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IN THE SUPREME COURT OF THE STATE OF FLORIDA

WARREN BURK, etc.,

Petitioner,

v.

CASE NO.: 89,829

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT - NO. 96-1404

SHALONDA WASHINGTON,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Defendant was arrested on the 28th of November 1995, for violating an injunction against repeat violence which prohibited her from visiting the place of employment of Amy Litchfield.[1] The Defendant's arrest was effectuated pursuant to Section 901.15, Florida Statutes (1995), which allows a law enforcement officer to make a warrantless arrest if probable cause exists to believe a person has violated an injunction against protection.

On the 11th of March 1996, the circuit court issued an order to show cause based on the violation of the injunction, thereby, initiating indirect criminal contempt proceedings against the Defendant. The Defendant then filed a motion for discharge which stated that the speedy trial time period for indirect criminal contempt was triggered at the time of her initial arrest on the 28th of November 1995.[2] Thereafter, the trial court denied defendant's motion for discharge based on the authority of *Mauney v. State, 507 so.* 2d *746* (Fla. 5th DCA 1987), which held that Florida Rule of Criminal Procedure 3.191 does not apply to indirect

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[1]These facts are taken from the District Court's opinion since the case was initiated with a petition for writ of prohibition with no record on appeal.

[2]The State had filed a notice of no information in the county court case.

criminal contempt prosecutions under Florida Rule of Criminal Procedure 3.840.

On the 20th of May 1996, the Defendant sought a writ of prohibition from the Fifth District Court of Appeal declaring that her impending hearing for indirect criminal contempt of court for violating an injunction was barred by operation of the speedy trial rule. On the 3rd of January 1997, the Fifth District Court of Appeal issued an opinion in the instant case granting the petition for writ of prohibition and receding from its decision in *Mauney*. This Court has accepted jurisdiction based on conflict.

SUMMARY OF ARGUMENT

The Petitioner submits that the inherent power of contempt is different than a criminal offense charged by the State through an information or indictment; and unlike those cases where the State initiates the charges, a case initiated by an order to show cause by the court should not be limited by Florida's speedy trial rule.

ARGUMENT

POINT OF LAW

FLORIDA'S PROCEDURAL RULE OF SPEEDY TRIAL SHOULD NOT BE APPLIED TO CONTEMPT PROCEEDINGS.

In the instant case, the Defendant was arrested for being in violation of a repeat violence injunction which specifically enjoined her from visiting the victim's place of employment. Since her actions constituted a criminal offense, the Defendant could have been prosecuted by the State under section 784.047, Fla. Stat. (1995), which makes violation of a repeat violence injunction a first degree misdemeanor. However, in addition to the criminal matter, the Defendant was also in violation of the circuit court's injunction, and based upon this specific violation of one of the terms of the injunction, the circuit court issued an order to show cause to the Defendant for her to explain why she should not be held in contempt for wilfully disobeying the court's injunction. Measured from the time of her arrest, the speedy trial period of ninety (90) days set out in Fla. R. Crim. P. 3.191 had expired, and the Defendant moved to be discharged. Based on *Mauney* v. State, 507 so. 2d 746 (Fla. 5th DCA 1987), which held that speedy trial

does not apply to contempt proceedings,[3] the trial court denied the motion. Upon petition for writ of prohibition, the Fifth District Court of Appeal, then, heard the case ***en banc*** and granted the petition. The Fifth receded from its previous holding and found that speedy trial does apply to contempt proceedings. The State respectfully disagrees with this holding.

"[T]he power of a court to punish for contempt is an inherent one that exists independent of any statutory grant of authority and is essential to the execution, maintenance, and integrity of the judiciary." ***Walker v. Bentley, 678 So.*** 2d 1265 (Fla. 1996), see ***also, Lopez v. Bentley, 678*** So. 2d 333 (Fla. 1996).[4] In the *Walker* case, this Court addressed whether the legislature could eliminate a court's indirect contempt power.[5] In an unanimous decision, this Court held that it was an inherent power in the court to punish someone for contempt and that the legislature could not

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[3]A decision which was followed in the case ***Drost v. Drost, 519 so.*** 2d 698 (Fla. 4th DCA 1988).

[4]*Walker* involved the domestic violence injunction in section 741.30, Fla. Stat. (Supp. 1994); whereas, Lopez involved the repeat violence injunction of section 784.046, Fla. Stat. (Supp. 1994). Although the domestic violence statute and the repeat violence statutes are quite similar, it is actually the repeat violence statute of §784.046, Fla. Stat. (1995) which was involved in this case although the opinion of the Fifth indicates otherwise.

[5]section 741.2901(2), Fla. Stat. (Supp. 1994).

constitutionally eliminate that power.

The contempt power at issue in the instant case is that of indirect criminal contempt. Unlike direct contempt which must occur in front of the court, indirect criminal contempt is "an act done, not in the presence of a court or of **a** judge acting judicially, but at a distance under circumstances that reasonably tend to degrade the court or the judge as a judicial office or to obstruct, interrupt, prevent, or embarrass the administration of justice by the court or judge." ***Ex parte*** *Earman*, ***95 So. 755, 760*** (Fla. 1923). An indirect criminal contempt proceeding is initiated when the judge issues an order to show cause to a defendant.[6] This order shall be served upon the defendant, and it should specifically state the essential facts which constitute the criminal contempt charged. ***See Giles v. Renew, 639 So.*** 2d 701 (Fla. 2d DCA 1994). While definitely quasi-criminal in nature, the contempt proceeding is not **a** purely criminal matter, and a defendant is not entitled to a trial by jury.[7] Instead of having

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[6] *See* Florida Rule of Criminal Procedure 3.840 which sets out the entire process for such a contempt proceeding.

[7] *See* ***Aaron v. State,*** 284 So. 2d 673 (Fla. 1973), ***Wells v. State,*** 654 So. 2d 146 (Fla. 3d DCA 1995); see **also,** committee notes, Fla. R. Crim P. 3.840 and discussion of fact that contempt proceedings are exempt from jury trial requirements. In fact, the Rule specifically provides that "[A]ll issues of law and fact shall

the State seeking to prosecute someone for violating one of its statutory laws, contempt is the process where the court seeks either to enforce an order or to punish for a violation of an order.

Florida Rule of Criminal Procedure 3.191 specifically provides that it applies "to every person charged with a crime by indictment or information." The majority opinion in the Fifth District states that it should make no difference how a case is initiated and seems to take issue with the fact that in domestic situations it may be the State which submits the proposed order to show cause. While such may or may not be the case in some indirect contempt cases,[8] this observation by the majority misses the point since it is a completely different process than that of the State officially charging an offense. In a contempt proceeding, it is the neutral court seeking an explanation for a defendant's behavior regardless

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be heard and determined by the judge."

[8]A problem with the Fifth's opinion is that it seems to have concerns over the use of domestic injunctions, and it, therefore, decides to apply the speedy trial rule to all indirect contempt proceedings; however, these contempt proceedings while common in domestic situations exist in numerous court cases including those with no criminal connections whatsoever. The language used by the Defendant in its petition is cited favorably by the majority opinion when it claims that the State submits the order to show cause and uses injunctions to avoid jury trials.

of who may draft the order to show cause.

In the instant case, the Defendant's actions constituted a misdemeanor and could have been prosecuted by the State in county court. And speedy trial would have applied. However, that is a different matter from the fact that the Defendant's actions also violated the injunction issued by a circuit court in the family division. As pointed out by the dissent in this case in the Fifth, contempt proceedings are initiated by an order to show cause which may or may not also involve an arrest.[9] Then, there is the problem of when the speedy trial period should commence. Under the ruling of the Fifth in this case, a county court could review the matter and determine that the circuit court is barred from exercising its inherent power to punish someone who has violated an injunction of the circuit court, or perhaps, the family court would be required to calculate the running of speedy trial which could even involve

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[9]In fact, as discussed in a concurrence in the district court's case of ***Walker v. Bentley, 660 So.*** 2d 313, 322-323 (Fla. 2d DCA 1995), a defendant could commit a non-criminal act in violation of an injunction which could not be prosecuted criminally. While that case discussed the issue of the elimination of a court's contempt power, the situation where no criminal violation of the injunction occurred creates a perplexing calculation problem if we are to attempt to apply speedy trial.

situations where a criminal violation had not occurred.[10] Normally, the State prosecutes a defendant and is responsible for meeting the requirements of speedy trial. The result of the Fifth's opinion places the normally neutral court in the role of monitoring the time frame of its order to show cause and places the court in the position of prosecuting the case. Speedy trial should not be expanded in such a manner.

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[10]There are situations where the State is not even the party asked by the court to prosecute the case. The trial court can appoint a civil attorney to handle the matter. *See Routh v. Routh, 565 So.* 2d 709 (Fla. 5th DCA 1990).

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court reverse the decision of the appellate court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the above Merits Brief has been furnished by U.S. mail to BLAISE TRETTIS, executive assistant public defender, counsel for the Respondent, 2725 Judge Fran Jamieson Way, Building E, Second Floor, Melbourne, FL 32940, this 23rd day of June 1997.

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

WARREN BURR, etc.,

Petitioner,

v.

CASE NO.: 89,829

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT - NO. 96-1404

SHALONDA WASHINGTON,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1996

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

SHALONDA WASHINGTON,

Petitioner,

v

CASE NO.: 96-1404

HON. WARREN BURK, CIRCUIT COURT JUDGE, etc.,

Respondent

Opinion filed January 3, 1997

Petition for Writ of Prohibition,
A Case of Original Jurisdiction.

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Robert A. Butterworth, Attorney General,
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Attorney General, Daytona Beach, for
Respondent.

BNA N C

COBB, J.

The petitioner, Shalonda Washington, seeks a writ of prohibition declaring that her impending trial for indirect criminal contempt of court for violating a domestic violence injunction[1] is barred by the operation of the speedy trial rule.[2] The trial court denied her

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[1] See § 784,046, Fla. Stat. (1995)

[2] See Fla. R. Crim. P. 3.191.

motion for discharge.

The factual background of this case shows that Washington was arrested on November 28, 1995, at a Wal-Mart Super Center for violating an injunction against repeat violence which prohibited her from visiting the place of employment of one Amy Litchfield. The arrest was effectuated pursuant to section 901 .15, Florida Statutes (1995), which allows a law enforcement officer to make a warrantless arrest if probable cause exists to believe a person has violated an injunction for protection. Washington was handcuffed, transported to a detention center, booked, and then incarcerated.

The state obtained continuances at two docket soundings, and never filed an information charging Washington with the crime of violation of an injunction for protection under section 741.31(4)(b), Florida Statutes (1995), which makes such violation a first degree misdemeanor. On February 27, 1996, Washington's counsel filed a motion for discharge in the county court, utilizing the case number assigned at the time of arrest, and the state promptly filed a nol pros in that case the next day. That concluded the county court prosecution.

Subsequently, on March 11, 1996, the state filed in the family division of the circuit court a motion for order to show cause to be directed to Washington based on the incident at Wal-Mart on November 28, 1995. The circuit court issued the order, thereby initiating indirect criminal contempt proceedings against her. The court then denied Washington's motion for discharge, which asserted that the speedy trial time period for indirect criminal contempt had commenced to run at the time of her initial arrest on November 28, 1995, and expired 90 days thereafter pursuant to State v. Aaee, 622 So. 2d 473 (Fla.1993)(state

not entitled to 15-day recapture period where it has nol prossed its original information and then refiled after the expiration of the speedy trial period).

The trial court's denial of Washington's motion to discharge was predicated solely on the authority of Maunev v. State, 507 So. 2d 746 (Fia. 5th DCA 1987), wherein we held that Florida Rule of Criminal Procedure 3.191 does not apply to indirect criminal contempt prosecutions under Florida Rule of Criminal Procedure 3.840. Petitioner contends that we should recede from Mauney and argues in her brief:

> The court's decision in Mauney is based, in part, on the premise that judges, not prosecutors, typically file the order to show cause charging document. The Mauney decision also is based, in part, on the premise that show cause orders in indirect criminal contempt matters are not generally coupled with an arrest. Mauney at 748. While these premises may have had validity in 1987, these premises are outdated and are no longer valid in 1996. As in all prosecutions for indirect criminal contempt for violation of a protective injunction in Brevard County, the order to show cause in the petitioner's case was initiated, written, and submitted by the State of Florida - not by the court.
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> * * *
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> A number of factors have combined to make the State's indirect criminal contempt prosecutions routine and numerous in the family division of the circuit court. First and foremost is the "mandatory arrest" policies that all law enforcement agencies now adhere to when responding to a domestic disturbance call. The catalyst for this change in law enforcement policy was the enactment of legislation which provides an officer is immune from civil liability if the officer makes an arrest when enforcing a court order. See section 741.29(5), Fla. Stat. (1995); Ch.. 95-195, Laws of Florida. See. also, section 901 .15(7)(b), Fla. Stat. (1995).
>
> Second, pursuant to section 741.2091(1) which provides that each state attorney shall assign prosecutors to specialize in the prosecution of domestic violence cases, "domestic violence" prosecutors now prosecute indirect criminal contempt in the circuit court. The state favors indirect criminal contempt prosecution because a defendant does not have the right to a jury trial if the judge agrees to impose no more than six months

incarceration upon a conviction. Aaron v. State, 284 So. 2d 673, 676 (Fla. 1973). If the state were to prosecute in the county court, the petitioner would have to be afforded a trial by jury.

We note that Florida Rule of Criminal Procedure 3.010 provides that the rules "shall govern the procedure in all criminal proceedings involving direct and indirect criminal contempt."[3] It is clear from established 'case law that indirect criminal contempt is a criminal proceeding. See Gidden v. State, 613 So. 2d 457, 460 (Fla. 1993); Moorman v. Bentley, 490 So. 2d 186, 187 (Fla. 2d DCA 1986).

It should make no difference whether such a proceeding is initiated by indictment, information, citation, notice to appear, or order to show cause. As pointed out by Justice '"Powell in Barker v. Winao, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "[E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility."

The state has afforded us no substantive reasons for adherence to Mauney, and we elect to recede from it. We now hold that all indirect contempts are subject to the Speedy Trial Rule, whether initiated by arrest or service of an order to show cause.

The question we then must confront is: did the speedy trial period for the circuit court action commence with Washington's arrest on November 28, 1995, or with service of the show cause order in March, 1996? Section 775.021, Florida Statutes (1995) indicates that it is not the intent of the legislature to provide for separate convictions and sentences for

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[3]We do not concern ourselves in this opinion with the applicability of Rule 3.191 to direct criminal contempt proceedings. We note, however, there are persuasive reasons why the procedural requirements of this rule cannot apply to such summary proceedings. See, e.g., Mann v. State, 476 So. 2d 1369 (Fla. 2d DCA 1985).

two offenses which require identical elements of proof. In the instant case the charges against Shalonda Washington, whether pursued as a statutory misdemeanor in county court or as indirect contempt in circuit court, would require identical elements of proof for conviction. Cf. State v. Johnson, 668 So. 2d 194 (Fla. 1996). It necessarily follows that the initial arrest of Shalonda Washington incepted the running of the speedy trial time in the instant case irrespective of the prosecutorial device utilized by the state.

Accordingly, we grant the instant petition for writ of prohibition.

WRIT GRANTED.

HARRIS, GRIFFIN, THOMPSON and ANTOON, JJ., concur.

SHARP, W., J., dissents, with opinion, with which PETERSON, CJ., DAUKSCH and GOSHORN, JJ., concur.

SHARP, W., J., dissenting.

I disagree that this court should recede from *Mauney v. State, 507 So.* 2d 746 (Fla. 5th DCA 1987). The majority writes that the state has not afforded any substantive reason to adhere to *Mauney.* This misstates the burden for overturning precedent. The rule of *stare decisis* requires adherence to established precedent unless the party seeking to overturn it *(i.e.,* here the defendant below, Washington) presents an argument for change that is overwhelming, not just persuasive. *Old Plantation Corp. v. Maule Industries, Inc., 68 So.* 2d *180* (Fla. 1953). *See also Perez v. State, 620* So. 2d 1256, 1258 (Fla. 1993), (Overton, J., concurring).

In the first place, *Mauney* does not conflict with the majority opinion. It involved simply an indirect criminal contempt proceeding brought by the trial court for a possible violation of a court order. No prior arrest for a crime was involved. Indirect criminal contempt proceedings can be initiated by another party to the proceeding, by filing a motion, followed by an order to show cause. In such cases, we said the speedy trial rule[1] has no impact, and we pointed out that there were no relevant time periods for commencing the running of the speedy trial rule.

In this case, a criminal proceeding was commenced by an arrest for violating an injunction against repeat violence, pursuant to a new criminal statute, section 74 1.3 1(4)(b). In such a case, the speedy trial rule is triggered by the arrest. Once the prosecution by the state became barred by the speedy trial rule, the question in this case is whether the speedy trial rule should bar the circuit court from enforcing its own injunction. I do not think it should.

Rule 3.010 has long stated that the criminal rules shall govern all criminal proceedings, including direct and indirect criminal contempt matters. In *Mann* v. *State,* 476 So. 2d 1369 (Fla. 2d

[1] Fla. R. Crim. P. 3.191.

DCA 1985), the court concluded that this rule was merely a policy declaration regarding use of the rules, in the conduct of criminal proceedings. It was not a mandate that the speedy trial rule is applicable to every criminal proceeding. Our sister court in *Drost* v. *Drost*, 5 19 So. 2d 698 (Fla. 4th DCA 1988) held that the speedy trial rule does not apply to direct or indirect contempt proceedings. The majority opinion in this case creates a conflict with that decision, which can only be resolved by the Florida Supreme Court.

Further, I suggest there are strong policy reasons not to hold that the speedy trial rule times commence to run in the circuit court, when the state arrests a defendant for violating the same injunctive order, even assuming the factual basis for both are the same, which we cannot properly ascertain in this case. The civil courts which issue injunctions and protective orders in family law cases have little or no practical way of knowing the status of a criminal prosecution involving one of their orders, or even whether an arrest by the state has been made. Thus, the circuit court has no way of knowing when the ninety day time period (for misdemeanors) has run or commenced to run in a criminal prosecution. Nor is it clear which court -- the circuit or the criminal -- should hold the hearing required by Rule 3.191(p) to determine whether (j) should or should not apply, and if not, to order the defendant brought to trial in ten days, In this case, it is not clear any such window period was allotted before barring prosecution by the state in the criminal case, much less this case.

Further, the safeguards provided to persons against whom indirect criminal contempt proceedings are brought, do not dovetail with the speedy trial rule. The judge on his or her own motion or on affidavit of a person having knowledge of the facts, issues and signs a show cause order directed to the defendant, stating the essential facts and requiring the defendant to appear to show cause why he or she should not be held in contempt of court. Fla. R. Crim. P. 3.840(a). The order

must give the defendant a reasonable time to prepare a defense after service of the order. A reasonable time may exceed the ninety days stated in the speedy trial rule, if as the majority suggests, speedy trial time starts to run when the show cause order is served.

When the speedy trial rule should commence to run in an indirect criminal contempt proceeding is likewise unclear. There is no strong argument to conclude it starts to run from the service of the show cause order. That is not truly analogous to an arrest in a criminal case. A person's freedom is not so impacted as in a purely criminal case. Further, the indirect criminal contempt rule contains a separate provision for arrest -- (c), applicable only in exceptional circumstances. The normal commencement of such proceedings does not involve an arrest. Thus the invocation of procedural protections embodied in the speedy trial rule are not necessary or required, unless a person is in fact arrested.

Finally, in my view, the application of the speedy trial rule to civil courts seeking to enforce their injunctions or orders, whether triggered by an arrest in a criminal prosecution or even a show cause order, will prove unworkable, and as a practical matter will strip the civil courts once more of their inherent powers to enforce their orders in family law cases involving domestic violence. The Legislature sought to do this once,' but it was held to be unconstitutional.[3] Subsequently, the Legislature restored contempt powers to the courts in that context.

I conclude from these events that violation of injunctions in cases involving domestic violence are intended to be enforced and punished by alternative methods. In one, the state may prosecute

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[2] § 741.30(8)(a), Fla. Stat. (Supp. 1994).

[3] *See Steiner v. Bentley, 679 So.* 2d *770* (Fla. *1996); Walker v. Bentley, 678 So.* 2d 1265 (Fla. 1996).

violations as a crime and the speedy trial rule should apply to that prosecution commencing with an arrest. But if sought to be enforced by a show cause order issued by the court which promulgated the injunction, I see no reason why the speedy trial rule should have any impact. Double jeopardy may possibly be applicable but that defense is not at issue in this case nor is this case ripe for that kind of analysis.

To hold otherwise strips away the circuit court's powers to enforce and punish for violation of its injunctions and orders. The civil courts which issue injunctions and protective orders have no way of knowing whether an arrest had been made involving one of their orders, no way of requiring compliance with the time frames of the speedy trial rule, and no way of applying the "window" period embodied in the speedy trial rule to save cases from dismissal in the appropriate circumstances. Further, the courts may also have difficulty in applying the speedy trial rule to their own proceedings, since it is not clear when the speedy trial rule starts to run, nor is it clear how the "window" period would apply to those proceedings. In sum, subjecting the civil courts to the speedy trial rule triggered either by the state's prosecution or by their own show cause orders, will have the practical effect of curtailing their ability to exercise their inherent criminal contempt powers, for no compelling reason.