ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

HONORABLE WARREN BURK,

Petitioner,

vs.

SHALONDA WASHINGTON,

Respondent.

_____/

CASE NO. 89,829

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Florida's speedy trial rule should apply to indirect criminal contempt of court prosecutions whether initiated by an arrest or by the service of an order to show cause charging document. A defendant receives the benefit of the speedy trial rule if charged by all other charging documents such as an indictment, an information, a notice to appear, or a uniform traffic citation. A defendant must be tried within the applicable speedy trial period if arrested or, in lieu of arrest, served with a notice to appear, a uniform traffic citation, or a summons. Denying speedy trial to a defendant merely because the charging document is an order to show cause is untenable and would lead to the disparate treatment of criminal defendants for no justifiable reason.

Florida Rule of Criminal Procedure 3.010 specifically provides that the rules of criminal procedure apply to proceedings involving indirect criminal contempt. In Gidden v. State, 613 So.2d 457 (Fla. 1993), the Court held that the indirect criminal contempt process requires that all of the procedural aspects of the criminal justice process be accorded a defendant.

The criticisms of the dissenting judges in the instant case do not withstand critical review. The Supreme Court has already rejected the dissenting judges' argument that speedy trial should only apply to cases in which an arrest has been made. Contrary to the assertions of the dissenting judges, there is no difficulty prosecuting an indirect criminal contempt case within the ninety day speedy trial period.

ARGUMENT

FLORIDA'S SPEEDY TRIAL RULE SHOULD APPLY TO ALL CRIMINAL PROSECUTIONS IRRESPECTIVE OF THE TYPE OF CHARGING DOCUMENT THE PROSECUTION IS BASED UPON.

The respondent was arrested and handcuffed in a public place (Wal-Mart), transported to jail where she was photographed, fingerprinted, her person was searched and she then was imprisoned behind bars just as any other person arrested for violating any of Florida's penal statutes. The state and the dissenting judges in the Fifth District Court of Appeal take the position that Florida's speedy trial rule should not apply to the prosecution of the respondent because the charging document in an indirect criminal contempt prosecution is an order to show cause rather than an indictment, information, a notice to appear, or a uniform traffic citation. This position, respondent submits, results in the disparate treatment of criminal defendants that is untenable.

Although Fla. R. Crim. P. 3.191(a) provides that the speedy trial rule applies to "every person charged with a crime by indictment or information", the speedy trial rule has always applied to all criminal prosecutions irrespective of the type of charging document the prosecution is based upon. Florida Rule of Traffic Procedure 6.160 provides that the speedy trial period under Fla. R.

Crim. P. 3.191 commences when a defendant is arrested, or when a traffic citation, notice to appear, summons, information or indictment is served on defendant in lieu of arrest. Florida Rule of Traffic Court 6.165 provides that uniform traffic citations are lawful charging documents in prosecutions for criminal traffic offenses. A notice to appear can serve as the charging document in the prosecution of a municipal or county ordinance. Fla. R. Crim. P. 3.140(a)(2). The caselaw holds that the speedy trial period commences with the service of a summons or the issuance of a uniform traffic citation. Singletary v. State, 322 So.2d 551 (Fla. 1975); Rodriquez v. State, 453 So.2d 175 (Fla. 2d DCA 1984). Although Fla. R. Crim. P. 3.191 refers to an indictment or information, it is clear from the caselaw and the rules of traffic court that the speedy trial rule should apply to a prosecution that is based on an order to show cause charging document whether the defendant is arrested or the defendant is served with the order to show cause.

Florida Rule of Criminal Procedure 3.010 specifically provides that the rules of criminal procedure govern the procedure in indirect criminal contempt proceedings. Florida Rule of Criminal Procedure 3.010 states, "These rules shall govern the procedure in all criminal proceedings involving direct and indirect criminal contempt,..." The dissenting judges in the instant case point to Mann v. State, 476 So.2d 1369, 1375 (Fla. 2d DCA 1985), for the proposition that the criminal rules are only a prefatory policy and therefore not binding

in indirect criminal **contempt prosecutions.** Respondent submits that the Mann decision should not be viewed as a convenient excuse to ignore the rules of criminal procedure when there is no impediment to applying the rules of criminal procedure to a particular type of criminal prosecution. It is readily apparent why the court in Mann, supra, concluded that Fla. R. Crim. P. 3.191 cannot apply to direct criminal contempt proceedings. In the direct criminal contempt setting, the Florida Rules of Criminal Procedure which require the filing of a charging document, an arraignment, time to prepare for trial after arraignment, discovery, et cetera, simply cannot apply because it would be impossible for the court to immediately enforce its authority if the criminal rules governed the proceedings. The same cannot be said for indirect criminal contempt of court prosecutions. There is no reason why the rules of criminal procedure cannot or should not apply to indirect criminal contempt prosecutions. Furthermore, the Supreme Court has previously held that all procedural aspects of the criminal justice process must be accorded a defendant facing prosecution for indirect criminal contempt. Gidden v. State, 613 So.2d 457, 460 (Fla. 1993). In deciding Gidden, the Court did not make an exception for the speedy trial rule. "Consequently, as reflected by the substantial requirements of rule 3.840, the indirect criminal contempt process requires that all procedural aspects of the criminal justice process be accorded a defendant, including an appropriate charging document, an answer, an order of arrest, the right to bail, an arraignment, and

a hearing," Gidden at 460, (emphasis supplied).

In its criticism of the decision in the instant case, the dissent argues that there are strong policy reasons not to apply the speedy trial rule to indirect criminal contempt prosecutions. Respondent submits that these policy reasons asserted by the dissent do not withstand critical review. For instance, the dissent takes the position that the safeguards provided to persons against whom indirect criminal contempt proceedings are brought do not dovetail with the speedy trial rule. In support of this assertion, the dissent states that the order to show cause must give the defendant a reasonable time to prepare a defense after service of the order and a reasonable time may exceed the ninety days prescribed by the speedy trial rule. This argument ignores the fact that the State of Florida prosecutes more than a hundred thousand misdemeanor crimes a year in the county courts every year and all of these prosecutions must be prosecuted within the ninety day speedy trial period. Within ninety days in misdemeanor cases the state must decide whether it will file an information or not, and discovery between the state and the defendant is exchanged in preparation for trial. Pretrial motions are also filed and heard before the expiration of the ninety day speedy trial period. Most county judges schedule their trials often enough to allow at least one continuance and still try a case within the ninety day speedy trial period. There is no reason why a prosecution based on an order to show cause charging document cannot be easily prosecuted within ninety days as well.

The dissenting judges also argue that speedy trial should not apply when a person is served with an order to show cause because no arrest occurs and a person's freedom is not so impacted as when arrested in a "purely criminal case." The Florida Supreme Court has already rejected this argument. As discussed above, the Florida Supreme Court's rules and decisions mandate that speedy trial commences in the absence of an arrest when a defendant is issued a uniform traffic citation, a notice to appear, or a summons. Florida Rule of Traffic Procedure 6.160; Singletary v. State, 322 So.2d 551 (Fla. 1975). In Singletary, the Court rejected the dissenting judges' view that speedy trial should not apply in cases where there has not been an arrest. The Court concluded that, "One served with a summons to answer a criminal charge is no less an accused charged with a crime than one formally placed under arrest by warrant. The anxiety and concern attendant on public accusation commence at that point." Singletary at 554. The state attorney could intentionally eliminate speedy trial in many of the prosecutions in Florida if only an arrest commenced the speedy trial period. Instead of an arrest by law enforcement, the state attorney could initiate the prosecution by serving a summons and thereby eliminate speedy trial. Under the dissenting judges' view of speedy trial, the state would be allowed to unilaterally determine whether or not a defendant is entitled to a speedy trial under Fla. R. Crim. P. 3.191 by orchestrating the prosecution in a manner that would eliminate the speedy trial rule's application.

The dissent argues that it is impractical to apply the speedy trial rule to indirect criminal contempt prosecutions because the civil courts which issue injunctions in family law cases will have 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. Respondent replies that recent statutory amendments and enactments to s. 741.31 Fla. Stat. (1995) and s. 784.047 Fla. stat. (1995) have placed the duty to prosecute violations of the injunctions squarely in the hands of the state attorneys. The civil courts, as a result of these statutory changes, are appropriately relieved of any affirmative duty to investigate alleged violations of their injunction orders and then act as prosecutor and judge if there is believed to be a violation of an injunction. The statutory amendments advance the appearance of fairness in indirect criminal contempt proceedings because they are initiated and prosecuted by the state attorney - not by the court. Young v. State, 22 Fla. L. Weekly S 384 (Fla. Sup. Ct., July 3, 1997) ("We must also be concerned about fairness and the appearance of fairness. How fair could a court that has initiated the prosecution on its own then be in deciding whether to impose habitual offender sanctions? At the very least, the appearance of fairness may be questioned in such a situation."). Because the state attorneys have the constitutional authority and statutory duty to prosecute violations of protective injunctions issued pursuant to s. 741.30 Fla. Stat. (1995) and s. 784.046 Fla. Stat. (1995), the civil court that issued the injunction does not

have to be concerned with arrest dates or the status of the state's criminal prosecutions for injunction violations in the county courts pursuant to s. 741.31(4) and s. 784.047. The state attorney, just as in every other criminal prosecution, is responsible for keeping abreast of an arrest date or the date of the service of the order to show cause in order to prosecute within the speedy trial period.

In 1994 and in 1995, the legislature amended s. 741.31(4) by expanding the types of conduct that are violations of domestic violence injunctions that can be prosecuted by the state as misdemeanor crimes in the county courts. Chapter 94-134, pgs. 731, 732, Laws of Florida; Chapter 95-195, pg. 1772, Laws of Florida. The 1994 legislation also increased the degree of the crime from a second degree misdemeanor to a first degree misdemeanor. The legislature also enacted legislation which made it a fist degree misdemeanor crime to violate an injunction for protection against repeat violence by engaging in specified conduct. Section 784.047 Fla. Stat. (1995); Chapter 95-195, pg. 1773, Laws of Florida.

Section 741.31(4) Fla. Stat. (1995) now reads as follows:

. . . .

> (4) A person who willfully violates an injunction for protection against domestic violence, issued pursuant to s. 741.30, by:
> (a) Refusing to vacate the dwelling that the parties share;
> (b) Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;

(c) Committing an act of domestic violence against the petitioner;
(d) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner; or
(e) Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;
is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

. . . .

Section 784.047 Fla. Stat. (1995) reads, in its entirety, as follows:

784.047 Penalties for violating protective injunction against repeat violators. - A person who willfully violates an injunction for protection against repeat violence, issued pursuant to s. 784.046, by:
(1) Refusing to vacate the dwelling that the parties share
(2) Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
(3) Committing an act of repeat violence against the petitioner;
(4) Committing any other violation of injunction through an intentional unlawful threat, word, or act to do violence to the petitioner; or
(5) Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;

is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

. . . .

At the same time that the legislature enacted the above legislation, the legislature also amended s. 901.15(6) by providing that a law enforcement officer can make a lawful arrest without a

warrant when, "There is probable cause to believe that the person has committed a criminal act according to s. 741.31 or s. 784.047 which violates an injunction for protection entered pursuant to 741.30 or 784.046, over the objection of petitioner, if necessary." Chapter 95-195, pg. 1781, Laws of Florida.

From this legislation, it is now clear that law enforcement can make warrantless arrests for specific types of violations of domestic and repeat violence injunctions that are then prosecuted by the state attorney as a misdemeanor crime in the county court. Certain types of violations of an injunction may not constitute a first degree misdemeanor crime under s. 741.31(4) or 784.047. For example, a petitioner may refuse to make a child available to the respondent for visitation in violation of the terms of the injunction. An arrest could not lawfully be made for this type of violation under s. 901.15(6). Legislation enacted in 1995, however, places an affirmative duty on the state attorney to investigate allegations of domestic violence injunction violations when there is not an arrest and prosecute violations either through an information or an order to show cause. This legislation allows the state attorney to file a motion for an order to show cause to prosecute violations of injunctions that do not fall within the types of violations proscribed by s. 741.31(4). Section 741.31(1)-(2) Fla. Stat. (1995); Chapter 95-195, pgs. 1771, 1772, Laws of Florida. In a non-arrest case, the state attorney could decide to file a motion for an order to show cause in the circuit court to prosecute a petitioner who

refuses to relinquish custody of a child for court ordered visitation. Whether there is an arrest or no arrest, the state attorney is responsible for the prosecution of violations of the protective injunctions and it is therefore the state attorney - not the court - that must keep track of an arrest date or the date of service of an order to show cause so that the case will be prosecuted within the ninety day speedy trial period.

The dissent criticizes the decision in the instant case because the decision allegedly will strip the civil courts of their inherent power to enforce their orders in family law cases involving domestic violence. Respondent argues to the contrary that the legislation enacted in 1994 and 1995 has greatly strengthened the enforcement of injunctions for protection against domestic violence and repeat violence. Before this legislation was enacted there was no uniform procedure in place for the enforcement of injunctions nor was there any particular office, person or resources committed to prosecuting violations of the injunctions. Most injunction violations are now misdemeanor crimes. The state attorney is responsible for prosecuting these misdemeanor law violations in the county court. See Section 741.2901(2); "The filing, nonfiling or diversion of criminal charges, and the prosecution of violations of injunctions for protection against domestic violence by the state attorney, shall be determined by these specialized prosecutors over the objection of the victim, if necessary." Unlike the family law divisions in the circuit court, the county courts are staffed with assistant public

defenders and assistant state attorneys who defend and prosecute hundreds of misdemeanor cases each year. This statutory scheme whereby the vast majority of injunction violations are prosecuted in the county court greatly strengthens the enforcement of the court's domestic violence and repeat violence injunctions by committing state resources to the enforcement of the injunctions. These same state resources are committed to the prosecution of injunction violations that are not enumerated in s. 741.31(4) or 784.047 through the state attorneys prosecution in the circuit court predicated on an order to show cause charging document. The application of the speedy trial rule to the enforcement of the injunctions does not diminish the ability to prosecute any more so than in any other type of criminal prosecution.

The decision to commit the resources of the state attorney offices and the county courts to the prosecution of injunction violations may have been the legislature's response to the dramatic increase in the number of filings of petitions for injunctions for protection against domestic violence and repeat violence. Domestic violence injunction and repeat violence injunction cases have increased thirty-five percent over the past four years. The Florida Bar News, March 1, 1997, comments of Chief Justice Kogan. The large increase in the number of injunctions for protections against domestic violence should not be surprising given the fact that an injunction can be obtained even though a petitioner has never actually been assaulted or battered. The statute allows the issuance

of the injunction if the "household member" has "reasonable cause to believe he or she may become the victim of any act of domestic violence." Section 741.30(1)(a)-(e); s. 741.28(2). Judge Chester B. Chance, administrative law judge of the family law division of the Eighteenth Judicial Circuit, has observed that the real motive behind the filing of the petition for the injunction often is not protection against domestic violence but, instead, is immediate access to the courts in order to decide child visitation and child support issues that would otherwise have to be decided through the more time - consuming family law process. The Florida Bar Journal, "Screening Family Mediation for Domestic Violence," April 1996 at pg. 55. A Florida lawyer has made the claim that the large number of parties seeking an injunction has resulted in an assembly-line process where petitioners do not hesitate to make false allegations and where judges almost always issue the injunction out of caution rather than address the thorny issue of perjury. The Florida Bar News, Nov. 1996, Barne J. Morain's letter to the editor entitled "Domestic Violence". Whether the opinions of the lawyer and judge above are accurate or inaccurate, with the increase in the number of domestic violence injunctions being issued, it follows that there has been a corresponding increase in the number of alleged violations of the injunctions. The legislature's decision to direct the resources of the state attorney and the county courts to address these alleged violations is logical because the state attorney routinely prosecutes more than a thousand misdemeanor crimes every year before each county

judge in Florida. The impact of these additional prosecutions on the county courts would be imperceptible. The family law judges in the circuit court, on the other hand, are ill-equipped to manage this ever-increasing problem.

Because the respondent prevailed with her speedy trial argument in the appellate court, there was no reason for the respondent to, at the trial court level, challenge the circuit court's jurisdiction to preside over the state's indirect criminal contempt prosecution. Although a jurisdiction question is not the issue on appeal before the Supreme Court, the dissenting opinion raises the issues of jurisdiction and double jeopardy. Respondent believes that the dissenting judges' conclusions regarding the circuit court's jurisdiction and double jeopardy deserve a response.

The dissent takes the position that the state attorney has the discretion to either prosecute the criminal statute violation in the county court or prosecute as an indirect criminal contempt in the circuit court. Respondent disagrees with this assessment. Respondent's position is that the county court has exclusive jurisdiction over prosecutions of violations of injunctions that constitute a criminal act proscribed by 741.31(4) or 784.047.

The respondent could have been prosecuted in the county court for violating s. 784.047(2) which makes it a first degree misdemeanor for a person to violate an injunction for protection against repeat violence by going to the petitioner's place of employment. In the county court, respondent would have been able to exercise her

constitutional right to trial by jury. However, because the state filed its motion for an order to show cause in the circuit court, the circuit court could (and did in fact in the instant case) deny respondent a jury trial by limiting the jail sentence if convicted to six months or less. Aaron v. State, 284 So.2d 673 (Fla. 1973). The state, under this scenario, can intentionally deprive a person of their constitutional right to a jury trial by hand-picking the court in which it brings the prosecution. Respondent contends that this type of forum-shopping violates a respondent's constitutional right to a jury trial.

In State v. Coqswell, 521 So.2d 1081 (Fla. 1988), the Court held that, when two statutes prohibit the same conduct but have different penalties, the prosecutor has the discretion which violations to prosecute and hence which range of penalties to visit upon the offender. Cf. Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959) ("It is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms... It has been said that this rule 'is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provision. '"). The holding in Coqswell has not been extended to allow the state to choose the court for its prosecution when that choice will deny the defendant a jury trial that defendant

would be entitled to had the state brought its prosecution in a different forum.

Double jeopardy implications also militate in favor of exclusive jurisdiction in the county court for violations of injunctions proscribed by s.741.31(4) and s. 784.047. Under Fla. R. Crim. P. 3.840(d), the circuit court that issued the injunction could exercise its inherent contempt authority by prosecuting a violation of an injunction that would constitute a crime under s.741.31(4) or 784.047 without the permission of the state attorney and without the assistance of the state attorney. However, this exercise of the court's inherent authority could create a double jeopardy bar to the state attorney's exercise of constitutional authority to prosecute crime.

In United States v. Dixon, ____ U.S., 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), the Court held that criminal contempt of court can constitute former jeopardy when followed by a criminal prosecution that does not survive the "same elements test" enunciated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932). The holding in Dixon could prevent the state attorney from prosecuting a battery as a felony crime and then seek a habitual offender sentence after conviction if the circuit court were to have formerly caused jeopardy to attach by its indirect criminal contempt prosecution based on the same battery. (Section 784.03(2) allows battery to be prosecuted as a felony crime and the holding in Gavman v. State, 616 So.2d 17 (Fla. 1993), would allow the court to sentence

as a habitual offender upon conviction), This double jeopardy bar has already occurred in Florida since the Dixon decision, Hernandez v. State, 624 So.2d 782 (Fla. DCA 1993); Fierro v. State, 653 So.2d 447 (Fla. 1st DCA 1995). Exclusive jurisdiction in the county court for violations of injunctions that constitute a crime under s. 784.047 or s.741.31(4) would eliminate the possibility of this double jeopardy bar from occurring. Respondent submits that this statutory scheme whereby violations of court orders are exclusively prosecuted as criminal offenses rather than through indirect criminal contempt does not unconstitutionally violate the separation of powers doctrine contained in article II, section 3, of the Florida Constitution. See Judge Judge Altenbernd's dissenting opinion in Walker v. Bentley, 660 So.2d 313 (Fla. 2d DCA 1995).

In the instant case the state failed to prosecute respondent in the county court for violating s. 784.047(2) which makes it a first degree misdemeanor to violate an injunction for protection against repeat violence by going to the petitioner's place of employment. Instead, in the face of a speedy trial discharge in the county court, the state forum-shopped to the circuit court where the caselaw at the time held that the speedy trial rule did not apply to indirect criminal contempt prosecutions. The dissenting judges in the instant case apparently see nothing wrong with this intentional forum-shopping done by the state to overcome its own lack of diligence. The respondent, however, was arrested, handcuffed, booked, fingerprinted, photographed, searched and jailed just as any

other person arrested for violating any of Florida's penal statutes. Indirect criminal contempt is a crime. Aaron v. State, 284 So.2d 673, 676 (Fla. 1973); Moorman v. Bently, 490 So.2d 186, 187 (Fla. 2d DCA 1986); Mann v. State, 476 So.2d 1369, 1374 (Fla. 2d DCA 1985). If speedy trial were not to apply to indirect criminal contempt prosecutions, then every person charged with a crime in Florida would be accorded the protections of the speedy trial rule except when the crime is charged by an order to show cause charging document rather than by information, indictment, notice to appear, or uniform traffic citation. There is no justifiable reason why indirect criminal contempt defendants should be singled-out for such disparate treatment. The respondent went through all of the public humiliation and personal anxiety caused by an arrest. Speedy trial rule 3.191 should apply to all criminal prosecutions irrespective of what type of charging document the prosecution is based upon.

CONCLUSION

Based on the arguments and authorities presented above, the respondent respectfully prays this honorable court affirm the decision of the appellate court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this the respondent's brief on the merits has been furnished by U.S. mail to Wesley Heidt, Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, this 15th day of July 1997.

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