IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO FLORIDA SUPREME COURT APPROVED FAMILY LAW FORMS – DOMESTIC VIOLENCE, REPEAT VIOLENCE AND DATING VIOLENCE
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CASE NO.SC02-2445

COMMENT IN OPPOSITION TO PROPOSALS

COMES NOW, Blaise Trettis, executive assistant public defender for the Eighteenth Judicial Circuit, and makes the following comment on the proposed forms.

I.

THE COURT SHOULD NOT ADOPT THE PROPOSED PETITION FOR AFFIDAVIT FOR RULE TO SHOW CAUSE AND SHOULD NOT ADOPT THE PROPOSED ORDER TO SHOW CAUSE.

The proposed affidavit for rule to show cause and the proposed order to show cause would lead to the inference that the Florida Supreme Court has implicitly decided that violations of an injunction can be prosecuted by indirect criminal contempt in the circuit court, at the discretion of the circuit court, instead of by prosecution in the county court as a first degree misdemeanor crime. Such a result would lead to the denial of a citizen's constitutional rights to a jury trial, a speedy trial, and equal protection of the laws.

The Florida Legislature has made almost every conceivable affirmative act in violation of the terms of

a domestic violence, repeat violence, and dating violence injunction a first degree misdemeanor crime. *See* § 741.31(4)(a); 784.047. By making these violations of the injunctions first degree misdemeanor crimes, the legislature has conferred on citizens accused of committing these crimes the constitutional right to a jury trial and a speedy trial in the county court. However, a prosecution of these same crimes by indirect criminal contempt in the circuit court would deny citizens of these constitutional rights conferred by the legislature and the Florida Constitution. The proposed order to show cause reads that, "All issues of law and fact shall be determined by the judge." Thus, the citizen prosecuted in the circuit court through indirect criminal contempt of court will be denied a jury trial even though the same citizen would be accorded a jury trial if the same law violation were prosecuted by state information in the county court. This arbitrary exercise of power of the state would violate the Florida Constitution's guarantee to equal protection of the laws.

The proposed affidavit for rule to show cause and the proposed order to show cause would also result in a denial of a citizen's constitutional right to a speedy trial through Florida Rule of Criminal Procedure 3.191. In Burk v. Washington, 713 So.2d 988 (Fla. 1998), the Court held that the speedy trial rule is not applicable

to indirect criminal contempt of court prosecutions initiated by the court. The proposed affidavit for rule to show cause and the proposed order to show create a codified procedure for court-initiated indirect criminal contempt prosecutions which would result in a denial of the right to a speedy trial under the Burk v. Washington decision even though a citizen would have a constitutional right to a speedy trial if the same violation of injunction were prosecuted by the state in the county court.

It is conceded that this court, in Walker v. Bentley, 678 So.2d 1265 (Fla. 1996), approved of the district court decision in Walker v. Bentley, 660 So.2d 313,321 (Fla. 2d DCA 1995) where the court said, "...the fact the alleged violation of the injunction may also constitute a criminal offense under 741.31, Florida Statutes (Supp. 1994), does not preclude the use of the power of indirect criminal contempt."[1] However, it is significant the Florida Attorney General did not take part in the Walker and Lopez decisions either in the District Court of Appeal or in the Supreme Court. It is likely that the Florida Attorney General would have taken the position of Judge Altenbernd's dissenting opinion in Walker v. Bentley because of the double jeopardy implications of the decision which would make the circuit court's contempt prosecution a double jeopardy bar to the state's prosecution in the county court and even in circuit court for felony stalking. Indeed, it is hard to imaging the Florida Attorney General not taking the position of Judges Altenbernd and Fulmer considering the possibility that the following hypothetical case could occur in the trial court:

prosecutor: Your honor, the state has filed this motion to intervene in this indirect criminal contempt case that the Court, *sua sponte*, initiated so that the Court would be apprised of the double jeopardy implications posed by the court's order to show cause. I'm sure that when the court signed the order to show cause the court was not aware that the five incidents alleged in the order to show cause are the same five incidents that the state relies on in its felony information that charges the defendant with aggravated stalking in violation of section 784.048(4). Since your honor's contempt prosecution would create a double jeopardy bar to the State's aggravated stalking prosecution under U.S. v. Dixon, 125 L.Ed.2d 556 (1993), the state respectfully requests that your honor dismiss the order to show cause because, as the Court said in Walker v. Bentley, 660 So.2d. 313, 321 (Fla. 2d DCA 1995), in exercising its contempt powers, the court must be mindful of the implications of the double jeopardy clause. The only thing else the state would add is that the defendant is being prosecuted as a habitual felony offender in the aggravated stalking case and the state is seeking the maximum ten year prison sentence.

Court: I am mindful of the double jeopardy implications of this case. I'm mindful of the fact that the state's felony prosecution will deprive the court of its ability to exercise its inherent contempt powers. I will not sit here idly and allow the court's inherent authority to be usurped in this fashion. I therefore will not dismiss the order to show cause. Trial on the order to show cause will commence next week as scheduled.

The correctness of the decisions in Walker and Lopez is questionable when one considers that the legislature's decision to make violation of the injunctions misdemeanor and felony crimes eliminates the circuit court's inherent authority to enforce its orders through contempt proceedings because the state prosecution creates a double jeopardy bar to the court's contempt prosecution. But this elimination of the circuit court's contempt power is the reason that the Walker court held the 1994 legislation at issue in the case to be invalid. Everytime the state attorney prosecutes a violation of an injunction in the county court it eliminates the circuit court's inherent contempt powers.

Undersigned counsel submits that the Court should not adopt the proposed affidavit for rule to show cause and the proposed order to show cause because of the serious constitutional issues discussed above. For practical reasons as well the Court should not adopt the proposal. The legislature by making almost every conceivable affirmative act done in violation of the terms of a protective injunction a first degree misdemeanor crime, has made a public policy decision to enlist the enormous resources of the county courts, and the state

attorneys in the prosecution of violation of injunctions for protection against violence. This decision by the legislature makes perfect sense when considering the fact that more than 58,000 petitions for domestic violence injunctions were filed in Florida in 2001. The circuit court civil family divisions are not equipped to handle the thousands of violation of injunction cases that are prosecuted in the county courts every year considering the family division's non-jury trial schedules, absence of state attorneys and public defenders, huge civil family law caseloads and absence of court reporters and absence of an established way to transport inmates in some parts of the state to a courthouse where only civil cases are heard. In the county court, on the other had, the state's prosecutions for violations of injunctions amounts to just another batch of cases in a court that is designed to efficiently adjudicate huge numbers of criminal cases. For example, in the Eighteenth Circuit, the public defender in 2001 represented 171 defendants charged by the state's information with violation of a protective injunction in the county court in Brevard County. In 2000, the number was 186. Considering private counsel also represented at least dozens, the sole circuit judge in Brevard County presiding over injunction cases would have been overwhelmed by the number of indirect criminal contempt prosecutions. Distributed in the county court between eight county court judges, however, the prosecutions amounted to only a small fraction of the huge number of criminal cases adjudicated in the county court.

Undersigned counsel submits that the Second District Court of Appeal very well might decide the Walker v. Bentley decision in accordance with Judge Alterbernd's dissenting opinion if the case were before the court today instead of in 1995 when the court was reviewing the law as it existed in 1994. Since 1994 the legislature has expanded the number of acts which constitute a first degree misdemeanor crime of violation of domestic violence injunction. *See* Ch. 1995-195, § 6 at 1772, Laws of Fla.; Ch. 1998-284, § 3 at 2505, Laws of Fla.; Ch. 2002-55, § 14 at 799, Laws of Fla. As a result of this legislation over the years, almost every conceivable act committed by a respondent in violation of the terms of a domestic, repeat, or dating violence injunction would now constitute a first degree misdemeanor crime. This is

significant because Judge Fulmer's concurring opinion makes it clear that he would have concurred with Judge Altenbernd's dissent if all violations of domestic violence injunctions were criminal offenses: "If all violations of domestic violence injunctions were criminal offenses, I would be inclined to concur with Judge Altenbernd because I agree that the legislature is not barred by the separation of powers doctrine from substituting one sanction available to punish conduct falling within the definition of indirect criminal contempt for another. I would also be inclined to agree that the court should defer to the legislative scheme created by Chapter 94-134, Laws of Florida, for dealing with domestic violence." 660 So.2d at 321.

It is also questionable to what extent the Florida Supreme Court approved of the district court's decision in Walker v. Bentley because in In re Report of the Commission on Family Courts, 646 So.2d 178, 180 (Fla. 1994), the Court recognized that the legislative scheme placed the violations of some provisions of domestic violence injunctions in the jurisdiction of the county courts while the violations of other provisions in the injunction remain in the family law divisions of the circuit courts. It is noteworthy that the Court did not question this legislative scheme even though the Court did question the separation of powers issue that existed by the legislature's complete elimination of the circuit court's contempt powers. One could make a persuasive argument that the Supreme Court only approved of the district court's decision that the legislature cannot completely eliminate the court's contempt powers as the 1994 legislation did. This was clearly the only issue that the Supreme Court reached in its decision.

The Court should not adopt the proposed affidavit for rule to show cause because to do so would undermine the legislature's policy decision to treat essentially every affirmative act in violation of the terms of an injunction as a misdemeanor crime prosecuted in the county court with the maximum punishment as a year in the county jail. The proposed order to show cause denies the respondent a jury trial and thereby limits the maximum jail sentence to six months. *See* Aaron v. State, 284 So.2d 673 (Fla. 1973). Thus once again the policy of the legislature

has been refuted and contradicted if the Court were to approve of the proposals.

The Court should not even consider adopting the proposed affidavit for rule to show cause and the order to show cause in the absence of an explanation of why it is necessary or even advisable. Currently in Florida, the state attorneys have followed the legislative scheme whereby thousands of violation of injunction misdemeanors are prosecuted in the county court where the defendants possess the constitutional right to a jury trial and a speedy trial. The proposal before the Court is fraught with serious constitutional questions. In the absence of any explained need for the proposal the Court should reject it.

II.

THE PROPOSED ORDER TO SHOW CAUSE SHOULD BE REJECTED

In addition to the constitutional reasons why the proposed order to show cause should not be adopted that have been discussed above, the proposed order to show cause has "technical" inadequacies that should lead to its rejection. The proposed order to show cause would provide the defendant with his constitutional right to notice of the elements of the charge he is defending by way of attachment of the affidavit for rule to show cause. Such a procedure has been held to be unacceptable because it denies even minimum due process requirements. In Wisniewski v. Wisniewski, 657 So.2d 944 (Fla. 2d DCA 1995), the court held that such an attached affidavit failed to meet due process requirements and failed to meet the requirements of Fla. R. Crim. P. 3.840 which requires that an order to show cause state "the essential facts continuing the criminal contempt charged...". *See* also Bray v. Rimes, 574 So.2d 1114 (Fla. 2d DCA); Grant v. State, 464 So.2d 650 (Fla. 4th DCA 1985). In Bray v. Rimes, supra, the court held, "A motion for contempt or supporting affidavits may not take the place of the formal proceedings required by rule 3.840 to advise the accused of the charges so as to accord the accused reasonable opportunity to meet the charges by way of defense or explanation." The proposed order to show

cause violates the rule announced in Bray v. Rimes and violates the clear language of Fla. R. Crim. P. 3.840 which requires the order to show cause - not attached motions or affidavits - to state the essential facts of the alleged contempt.

The right of persons to know before trial the specific nature and details of crimes they are charged with committing is extended to those charged with criminal contempt and the standard of the criminal law applies to the notice requirements of the order to show cause. *See* Aaron v. State, 284 So.2d 673 (Fla. 1973); Deter v. Deter, 353 So.2d 614 (Fla. 4th DCA 1977). As in the Wisniewski, *supra*, case, affidavits written by laypersons that are attached to an order to show cause will often be illegible, unintelligible, use slang terminology, contain conclusions rather than factual allegations, and will almost never list all of the elements of the crime (or contempt) that must be proven beyond a reasonable doubt. It would be folly for the Court to adopt the proposed order to show cause for this reason alone.

The proposed order to show cause should be rejected because it implies that the defendant, or the alleged contemnor, will be tried the very first time he is before the court – unless he requests an arraignment before that. Although the proposed form tracks the language of

Fla. R. Crim. 3.840, it is submitted that the language in rule 3.840 has become archaic and should be changed in light of the fact that in an indirect criminal contempt prosecution all of the procedural aspects of the criminal justice process must be accorded to the defendant. *See* Gidden v. State, 613 So.2d 457, 460 (Fla. 1993). The first action that must be taken by the court is the appointment of counsel to an indigent person. Obviously a lawyer cannot be appointed the day the person is to be tried. Although the proposed order to show cause tracks the language of rule 3.840, the language of the rule has become archaic and is no longer followed because it would violate due process and the right to counsel to do so. The archaic language in Fla. R. Crim. P. 3.840 should not be perpetuated in the family law forms.

III.

THE COURT SHOULD NOT ADOPT THE PROPOSAL REGARDING FIREARMS PROHIBITION.

The new temporary and final dating violence injunctions should either have a mandatory firearms possession prohibition similar to that in the domestic violence injunction forms or not mention firearms at all. It is unclear why the proposal mentions firearms at all because, unlike § 741.30(6)(g), section 784.046 (the repeat and dating violence injunction statute) does not contain a legislative direction that the injunction, on its face, must warn the respondent about the unlawfulness of possessing firearms. In the domestic violence injunction context, the injunction forms approved by the Court advise the respondent that it is a federal felony offense to possess a firearm while subject to the injunction. It would also be a federal offense under 18 U.S.C.
§ 922(g)(8)(B) for a respondent to possess a firearm while subject to a dating violence injunction because the federal law applies to court orders of protection of "intimate partners" and § 784.046(1)(c) defines dating violence as violence between persons who have had a relationship of an "intimate" nature. To be consistent with the domestic violence injunctions already approved by the Court, and to fairly apprise respondents of the federal felony firearm possession law as the Court has

done in the domestic violence injunctions, the Court should include in the dating violence injunctions a similar but not identical prohibition and warning. The dating violence firearm provisions should not be identical to domestic violence injunction provision because, unlike § 741.31(4)(b)(2), the Florida Legislature has not exempted law enforcement officers from any firearm disabilities in repeat or dating violence injunctions. Therefore, if the Court is going to mention firearms at all in the dating violence injunction, it should be an across the board prohibition of firearm possession in every case. Section 741.31(4)(b)(2) implies that there is a federal law which might exempt law enforcement officers from the firearms disabilities that occur with the issuance of a dating violence injunction. If there is such a law[2], the dating violence injunctions could advise the trial judge of this in determining whether or not the injunction should make an exception to the firearms possession prohibition if the respondent is an active law enforcement officer.

The argument above for a mandatory prohibition against firearm possession is based on the assumption that 18 U.S.C. § 922(g)(8)(b) applies to the Florida dating violence injunction. The Court might opt to not include any mention of firearms in the dating violence injunction if the Court is of the opinion that the dating violence injunction statute fails to satisfy due process requirements that would make 18 U.S.C. § 922(g)(8)(B) apply to possessing a firearm while subject to the Florida dating violence injunction. The necessary due process requirements of injunction statutes was discussed in U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001). While

§ 784.046(6)(a) seems to satisfy procedural due process in the case of the temporary dating violence injunction, the dating violence injunction does not require any finding of fact regarding the issuance of the final dating violence injunction and the law provides no standard of proof or findings of the fact regarding likelihood of imminent violence when deciding whether or not to order a final dating violence injunction. In referring to the final injunction hearing the statute says only that, "Upon notice and hearing, the court may grant such relief as the court deems proper…". § 784.046(7) Fla. Stat. (2002).

Undersigned counsel submits that the Court should either include a mandatory firearms prohibition because possessing a firearm while subject to the dating violence injunction violates 18 U.S.C. § 922(g)(8)(B), or not mention firearms at all because the dating violence injunction statute fails to satisfy the due process requirements that would make possessing a firearm while subject to the injunction a violation of 18 U.S.C. §922(g)(8)(B).

IV.

THE COURT SHOULD NOT ADOPT PARAGRAPH 5 OF SECTION V OF THE FINAL JUDGMENT OF INJUNCTION FOR PROTECTION AGAINST DATING VIOLENCE

Paragraph 5 of section V of the proposed final injunction reads: "5. The temporary injunction, if any, entered in this case is extended until such time a service of this injunction is effected upon Respondent." This sentence is new and differs from paragraph 5 of Family Form 12.980(m), which is the blueprint for the

committee's proposal. Paragraph 5 of section V of form 12.980(m) reads: "5. The temporary injunction, if any, entered in this case is dissolved." It appears that paragraph 5 in the committee's proposal would run afoul of the statutory provision in § 784.046(6)(c) Fla. Stat. (2002) which authorizes the court to continue the ex parte injunction. That section requires that a party must show good cause for the court to grant a continuance of the ex parte injunction. The proposed sentence in paragraph 5 of section V rejects the statutory requirement that a party must show good cause for the continuance by including the continuance in every injunction. The proposal contradicts the clear language of the statute and should therefore be rejected.

Respectfully submitted by,

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[1] The Court, in Lopez v. Bentley, 678 So.2d 333 (Fla. 1996), reached the same decision in the context of indirect criminal contempt prosecutions for violations of repeat violence injunctions.

[2] If there is such a federal law, it must be relatively new because there apparently was not any federal exception for law enforcement officers in 1998 when Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir.

1999) was litigated.