IN THE SUPREME COURT OF FLORIDA

DUANE EDWIN SUTTON,
Petitioner, Case No.

v. DCA No. 2D03-2780

STATE OF FLORIDA, Circuit Court No. 14-2001-CA-221
Respondent.
________________________________/

On Petition for Discretionary Review of the Decision of the Second District Court of Appeal

BRIEF OF PETITIONER DUANE EDWIN SUTTON ON JURISDICTION

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PREFACE

The instant Petitioner, Duane Edwin Sutton, was the Respondent in an action the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida, to adjudicate him a sexually violent predator pursuant to §§ 394.910 et seq. Florida Statutes (2000). He now petitions this Court for discretionary conflict review pursuant to Fla. Const. Art. V, § 3(b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(iv). To avoid confusion herein, the instant Petitioner (the Respondent in the trial court and the Petitioner in the district court), will be referred to by name or as the Defendant; the State of Florida (the Petitioner in the trial court and the Respondent in the district court) will be referred to as the State of Florida or the State.

STATEMENT OF THE CASE AND FACTS

The State of Florida filed a Petition for commitment of Duane Edwin Sutton as a sexually violent predator on 29 March 2001 in DeSoto County, Florida. The State sought to take his deposition and the trial court entered an order requiring him to respond to certain deposition questions. The Defendant filed a petition for writ of certiorari in the Second District Court of Appeal, asserting the right not to be compelled to be a witness against himself, and arguing that the order of the trial court compelling his deposition failed to afford him due process of law.

In In re. Commitment of Smith, 827 So. 2d 1026 (Fla. 2d DCA 2002), the district court held that a respondent in a sexually violent predator commitment proceeding can not assert a blanket right of privacy or the right against self-incrimination to avoid being deposed. However in that case the district court remanded for a hearing on the proposed deposition questions. Following the hearing on remand, in a consolidated opinion in In re Commitment of Duane Edwin Sutton, Keith Norwood Smith, John R. Beikirich, Edward Allen Singleton, Jerry Wade Rhoades, and George Samuel Demarco, 29 Fla. L. Weekly D1721 (Fla. 2d DCA July 28, 2004)[1], the district court held that the assertion of the right to privacy and the right against self-incrimination has no merit. A copy is attached as Appendix A. The Defendant's motions for rehearing, rehearing en banc, certification of conflict, and certification of question were denied by order of the district court entered 21 September 2004. The instant petition follows.

SUMMARY OF ARGUMENT

Jurisdiction. Jurisdiction to hear this case exists because the decision of the district court compels the Defendant to be a witness against himself in violation of the rights guaranteed by Art. I, § 9, Florida Constitution and the U.S. Constitution,

[1] Case Nos. 2D03-2780, 2D03-2973, 2D03-2984, 2D03-2988, 2D03-2993, 2D03-3327.

amendment V. The order of the circuit court, affirmed in the district court, constitutes a departure from the requirements of due process of law in several particulars and conflicts directly with the decisions of this Court in State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973) and Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391 (Fla. 1974). There this Court ruled that the right not to be a witness against oneself applies in "penal" civil proceedings absent any criminal prosecution of any nature.

Discretion. Discretion to hear this case exists because the district court's opinion is in irreconcilable conflict with the view of this Court and the other district courts regarding application of the constitutional right not to be a witness against oneself in civil as well as criminal cases.

Exercise of Discretion. This Court should exercise its discretion to review this case because to allow courts in one district to force a person to testify against himself when such testimony is excluded by this Court and in other districts would result in gross inequities, departing from the essential requirements of due process of law and, creating a class of persons who are exempt from the constitutional protections afforded other civil and criminal litigants.

ARGUMENT

> The order of the Second District Court in this case is in direct conflict with the decisions of this Court in State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973) and Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391 (Fla. 1974), and is in direct conflict with several district court decisions.

At issue here is the constitutional right not to be a witness against oneself. See Art. I, § 9, Florida Constitution; U.S. Constitution, amendment V. The order of the circuit court, affirmed in the district court, requires the Defendant to be a witness against himself. The same constitutes a departure from the requirements of due process of law in several particulars and conflicts directly with the decisions of this Court in State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973) and Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391 (Fla. 1974). There this Court held that the right not to be a witness against oneself applies to civil proceedings involving professional licensure absent any criminal prosecution of any nature.

Provided that the civil commitment of a "mentally ill" and "dangerous" person takes place pursuant to proper procedures and evidentiary standards, such commitment would not automatically violate the provisions of the federal or Florida due process clause. See Foucha v. Louisiana, 504 U.S. 71, 80 (1992);

Addington v. Texas, 441 U.S. 418, 426-427 (1979); In re Beverly, 342 So. 2d 481 (Fla. 1977). Thus:

> "The legislature... has characterized the confinement under the Act as 'civil.' This is consistent with the Act having been amended in 1999, when it was renumbered and retitled as 'Involuntary Civil Commitment of Sexually Violent Predators.' Ch. 99-222, Laws of Fla. ***The fact that this is a civil proceeding, however, does not mean that the petitioners are not entitled to due process****....*"

Valdez v. Moore, 745 So. 2d 1009, 1011 (Fla. 4th DCA 1999) (emphasis added). Although the courts have many powers, one of them is not the ability to simply "decide" that a particular class of litigants is somehow "unworthy" of the right to due process of law available to all other litigants, criminal or "civil," whom the state may attempt to deprive of their liberty, professional standing, professional reputation, or livelihood.

In the instant case, to allow the State to depose the Defendant in the manner requested would violate due process by requiring him to be a witness against himself. That would cause material and irreparable injury to the Defendant throughout subsequent proceedings. For the Defendant to describe the actual matters which might be the subject of the disputed discovery would itself violate the Defendant's constitutional protection against compulsory self-incrimination. **At**

issue here is classic "cat out of the bag" discovery. Therefore no adequate remedy would be available after final judgment.

The federal constitutional protection against self incrimination is not as broad as the similar Florida constitutional protection. In Kastigar v. United States, 406 U.S. 441, 444-445 (1972), the U.S. Supreme Court held that the Fifth Amendment right not to be a witness against oneself can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. The self-incrimination clause protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.

In the context of the federal self-incrimination clause, "penalty" is not restricted to fine or imprisonment. It includes the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." The threat of loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion, as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him." Spevack v. Klein, 385 U.S. 511, 515-516 (1967). The federal right is inapplicable only "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." Brown v. Walker, 161 U.S. 591, 597 (1896).

In the instant case, the right to due process of law must be implemented in the context of the broader protection provided by Florida law. This Court has applied the right not to be a witness against oneself to a variety of civil proceedings absent any "criminal" status in the orthodox sense. See, e.g., State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 489 (Fla. 1973); Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391, 392 (Fla. 1974).

In both Vining and Kozerowitz this Court specifically held that the right to not to be a witness against oneself, as guaranteed by Art. I, § 9, Florida Constitution, applies not only to traditional criminal cases, but also to "administrative proceedings which may result in deprivation of livelihood". Vining at 491. "In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood." Id.; see also Kozerowitz at 392.

The penal nature of the regulatory statutes at issue in Vining and Kozerowitz is insignificant compared to the penal nature of § 394.910 et seq. Florida Statutes (2000). The filing of a petition for involuntary commitment results in incarceration in the Florida Civil Commitment Center. Once the State petitions to commit a person pursuant to § 394.914 Florida Statutes (2000), he can not be afforded any form of pre-trial release. § 394.915(5) Florida Statutes (2000). Once committed,

he may be incarcerated indefinitely, potentially for life. §§ 394.918, 394.919, 394.920 Florida Statutes (2000). Such incarceration is much more grave than a mere degradation of a person's professional standing, professional reputation, or livelihood.

The Fourth District Court of Appeal reached a similar conclusion in an action for damages in negligence and breach of contract against a swimming pool contractor. See Best Pool & Spa Service Co., Inc., v. Romanik, 622 So. 2d 65, 66 (Fla. 4th DCA 1993) ("requiring [Petitioner] to answer these questions does violate his right against self-incrimination, which applies not only to criminal matters but also administrative proceedings such as licensing.") The First District Court of Appeal reached a similar conclusion in a licensure action against a harbor pilot. See McDonald v. Department of Professional Regulation, Board of Pilot Commissioners, 582 So. 2d 660, 662 n.2 (Fla. 1st DCA 1991) ("Because license revocation or suspension proceedings are penal in nature, the fifth amendment right to remain silent applies.").

This Court has long held that when a statute imposes sanctions and penalties in the nature of denial of a professional license, suspension from professional practice, revocation of license to practice, probation, and private or public reprimand, the statute is penal in nature. State ex. rel. Jordan v. Pattishall, 126 So. 147 (1930). A statute is penal if "the injury sought to be redressed affects the

public. If the redress is remedial to an individual and the public is indirectly affected thereby, the statute is not regarded as solely and strictly penal in its nature." State v. Atlantic Coast Line Railroad Company, 47 So. 969, 980 (1908). In Vining this Court held that administrative proceedings that "tend to degrade the individual's professional standing, professional reputation, or livelihood" are penal in nature. 281 So. 2d at 491.

In Lester v. Department of Professional & Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977), the court held that a statute permitting denial of license or disciplining of a physician was penal in nature. The court noted that the Medical Practice Act "is, in effect, a penal statute since it imposes sanctions and penalties in the nature of denial of license, suspension from practice, revocation of license to practice, private or public reprimand, or probation, upon those found guilty of violating its proscriptions." The court reached that conclusion even though the legislature stated that the statute was enacted in the interest of the public welfare and was to be liberally construed so as to advance that purpose (thus suggesting that the subject matter of the statute should be construed as civil and not criminal). Idem. See also Department of Business and Professional Regulation v. Calder Race Course, 724 So. 2d 100, 104 (Fla. 1st DCA 1998) (a statute regulating pari-mutual wagering should be deemed penal in its effect because its application could lead to the institution of administrative, civil or

criminal actions); Galbut v. City of Miami Beach, 605 So. 2d 466, 467 (Fla. 3d DCA 1992), affirmed with opinion 626 So. 2d 192 (Fla. 1993) (§ 112.317 Florida Statutes (1991), which allows civil penalties of up to $5,000 and removal from public office or employment is penal in nature, even though the penalties are specifically civil rather than criminal).

The degradation of an individual's professional standing, professional reputation, or livelihood imposed by application of the regulatory statutes at issue in the above cases is almost inconsequential when compared to the complete depravation of liberty resulting from the mere commencement of proceedings pursuant to § 394.910 et seq. Florida Statutes (2000). The due process provisions of Florida law directed at protection of the rights of civil litigants in other civil actions should require strict interpretation of the rights guaranteed by our constitution where, as here, an individual's liberty is at issue.

CONCLUSION

WHEREFORE the Defendant (the instant Petitioner) requests that this Honorable Court exercise its discretion to review the decision of the Second District Court of Appeal wherein that court adopted a position which expressly and directly conflicts with decisions of this Court and other district courts of appeal on the same question of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been furnished by U.S. mail, postage prepaid, to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, on this 11th day of October, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is printed in Times New Roman 14 point type.

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