IN THE SUPREME COURT OF FLORIDA

DUANE EDWIN SUTTON,

Petitioner, Case No. SC04-1954

vs. DCA No. 2D03-2780

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF THE DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as accurate for purposes of the issue presented, with the following corrections, additions and clarifications:

In the initial underlying cases of In Re: The Commitment of Keith Norwood Smith, 827 So.2d 1026 (Fla. 2d DCA 2002); In Re: The Commitment of John R. Beikirich, 828 So.2d 421 (Fla. 2d DCA 2002; and In Re: The Commitment of Edward Allen Singleton, 829 So.2d 402, the court found that a civil detainee under an involuntary civil commitment as a sexually violent predator could not assert a blanket protection from deposition. §§394.910, et seq., Florida Statutes (2000); Involuntary Civil Commitment of Sexually Violent Predators (Jimmy Ryce Act, hereinafter "Ryce Act"). On remand, the Petitioners were advised by the court that they were required to appear at the scheduled depositions and make good faith assertions of privilege where necessary. However, when the Second District Court of Appeal again considered these cases upon subsequent appeal from the circuit court, it was determined that the same blanket assertion of privilege had been made by the defendants. 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). It was this "aspect" of the Petitioner's argument that the court below found had "no merit."

In In Re: Commitment of Duane Edwin Sutton, 828 So.2d 1081 (Fla. 2d DCA 2002), the court specifically found that Ryce Act detainees in this type of civil commitment proceeding "do not have any absolute privilege to avoid the discovery process." Sutton, 828 So.2d at 1082. However, on remand to the circuit court, Petitioner objected to all but a few of the deposition questions posed. On subsequent appeal, reviewing the determinations of the trial judge the Second District Court of Appeal found that the "trial court properly limited the scope of inquiry where the questions on their face appeared to call for a potentially incriminating response." The court went on to state: "[t]o the extent that the trial court did not sustain the petitioners' objections, it was with respect to questions that on their face did not appear to call for an incriminating response." 29 Fla. L. Weekly D1722. The court maintained its position that proper privacy issues and the privilege against self-incrimination were protected. However, in the exercise of those privileges, it was incumbent upon the individual defendant to raise a proper objection to each specific question posed.

The court further found that the Petitioners failed to demonstrate that the majority of the challenged questions

touched on areas protected by the federal right to privacy or Florida's right to privacy because the inquires made did not extend into areas in which the Petitioners had a legitimate expectation of privacy. Regarding the one question that might have infringed upon a perceived right of privacy, the court found that "given the nature of the proceedings, that expectation is clearly outweighed by the State's compelling interest in the long-term control, care, and treatment of sexually violent predators." Citing Jackson v. State, 833 So.2d 243 (Fla. 4th DCA 2002); Article I, §23, Florida Constitution. It was this "aspect" of the Petitioner's appeal that the court determined had "no merit," as the Petitioner failed to properly raise, or subsequently support, justifiable refusal to answer deposition questions.

Having found that the Petitioners failed to meet their burden to demonstrate that the trial court departed from the essential requirements of law in ordering them to answer the questions, the court denied the Petitions.

SUMMARY OF THE ARGUMENT

The ruling of the Second District Court of Appeal, directing that Petitioner, a civil detainee under the Ryce Act, appear for deposition in accordance with 394.9155(1), Florida Statutes (2000), and the Florida Rules of Civil Procedure, does not create conflict jurisdiction pursuant to 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

ARGUMENT

ISSUE

> THERE IS NO CONFLICT BETWEEN THE ORDER OF THE SECOND DISTRICT COURT OF APPEAL IN IN RE: COMMITMENT OF DUANE EDWIN SUTTON, KEITH NORWOOD SMITH, JOHN R. BEIKIRICH, EDWARD ALLEN SINGLETON, JERRY WADE RHOADES, and GEORGE SAMUEL DEMARCO/DUANE EDWIN SUTTON, KEITH NORWOOD SMITH, JOHN R. BEIKIRICH, EDWARD ALLEN SINGLETON, JERRY WADE RHOADES, and GEORGE SAMUEL DEMARCO v. STATE OF FLORIDA, NOS. 2D03-2780, 2D03-2973, 2D03-2984, 2D03-2988, 2D03-2993 and 2D03-3327 [CONSOLIDATED BELOW] (FLA. 2ND DCA JULY 28, 2004)AND 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), OR ANY OTHER DISTRICT COURT OPINIONS. (RESTATED)

Petitioner improperly perceives the ruling of the court below. The court did not depart from the requirements of due process; rather, found that any claimed privileges be addressed on a question by question basis. At no time did the court hold that Petitioner was barred from raising a proper objection to deposition questions. It was, however, incumbent upon the Petitioner to raise a proper objection and not attempt to exert a blanket objection to the deposition process itself. Sutton; supra. As the court noted:

> [t]he petitioners have objected to every question posed to them, including questions as innocuous as those requesting their date of birth, on the ground that the information sought is protected by the Fifth Amendment.

> In essence, the petitioners have done nothing more than raise a blanket assertion of their Fifth Amendment privilege, something we have previously held is not available to these petitioners because of the civil nature of these proceedings. Smith, 827 So.2d at 1029.

In accordance with 394.9155, Florida Statutes, and the Florida Rules of Civil Procedure, the court properly determined that a civil detainee under the Ryce Act was subject to deposition. This does not conflict with the holdings of this Court in State ex rel. Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973) or Kozerowitz v. Florida Real Estate Commission, 289 So.2d 391 (Fla. 1974).

In Vining, a charged realtor was required to be a witness against himself by submitting a sworn answer in an administrative license revocation proceeding, the penalty for failure to respond by means of a sworn answer to charges made by the Real Estate Commission was the entry of a default judgment against the defendant realtor. This Court found that the "basic constitutional infirmity of the statute lies in requirement of a response under threat of license revocation or suspension, which amounts to compelling the defendant to be a witness against himself within the meaning of the Fifth Amendment to the U.S. Constitution and Article I, § 9 of the Florida Constitution, F.S.A." 281 So.2d at 491. Conversely, the court

in the instant case found that Petitioner had a right to exert his privilege against self-incrimination; however, was required to properly raise the privilege and failed to do so.

This court in Kozerowitz, simply iterated the holding in Vining, stating that the "proscription against self-incrimination also applies to any administrative proceeding of a 'penal' character." Kozerowitz, 289 So.2d at 392. Again, the court in the instant case found in accord with both Kozerowitz and Vining, determining that Fifth Amendment privileges could be asserted to improper questions propounded during the deposition process. In fact, the determination of the court below is in strict accord with these cases, holding that a civil detainee under the Ryce Act is afforded protection under the Fifth Amendment when such privilege is properly asserted. In the instant case, Petitioner failed to demonstrate that there was a realistic possibility that the answer to the questions propounded, in the context and manner these questions were posed, could be used to convict him of a crime. Consequently, Petitioner did not properly assert his privilege against self-incrimination under the Fifth Amendment.

Additionally, the court below did not deprive Petitioner of the right to claim a violation of privacy. After a thorough review of the deposition questions posed by the State, the court

properly found that "[t]he petitioners have not offered any explanation regarding how these questions intrude into an area in which they have a legitimate expectation of privacy." In Re: Commitment of Sutton, et al., 29 Fla. Law Weekly D1721. Further, the court determined, to the extent some of the questions could perceivable invade Petitioner's reasonable expectation of privacy, those expectations were clearly outweighed by the State's compelling interest in the long-term control, care, and treatment of sexually violent predators:

> To the extent that any of the questions pertaining to their physical health may seek information that is protected as private, we conclude that the trial court did not abuse its discretion when it found that **the State successfully demonstrated that its need for the information outweighed the petitioners' right to privacy, which, given the petitioners' status as Jimmy Ryce detainees, is minimal**. [Citation omitted] See also State v. Johnson, 814 So.2d 390 (Fla. 2002)(stating that although a patient's medical records enjoy a confidential status by virtue of the state constitutional right to privacy, the right to privacy will yield to compelling governmental interests). [Emphasis added]

In Re: Commitment of Sutton, et al., supra; Jackson, supra.

The Second District Court of Appeal correctly applied the law in determining that Petitioner had failed to demonstrate that the challenged questions touched on areas that has a realistic possibility of being used to convict him of a crime or

delved into areas protected by the federal or state right to privacy and created no conflict by so doing.

CONCLUSION

WHEREFORE this Court should decline to exercise its discretion to take jurisdiction over this matter, as no conflict has been demonstrated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction has been furnished by U.S. Mail and facsimile transmission to Christopher E. Cosden, Assistant Public Defender, 2071 Ringling Boulevard, Fifth Floor, Sarasota, Florida 34237, this _____ day of October 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type font used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(l).

Respectfully submitted,

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