

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

THOMAS PARKER,

Petitioner/Appellant,

v.

STATE OF FLORIDA,

Respondent/Appellee.

Case No. SC01-1013

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT/APPELLEE'S ANSWER BRIEF ON THE MERITS

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Section 903.0471, Florida Statutes (2000)

Section 907.041, Florida Statutes (2001)

PRELIMINARY STATEMENT

Respondent was the Appellee in the Florida Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

Petitioner was the appellant in the District Court and the defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

AB = Appellant's Initial Brief

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

Respondent accepts the facts as set out by the Fourth District Court of Appeal in *Parker v. State*, 780 So.2d 210 (Fla. 4th DCA 2001) for the purposes of this appeal, and submits those facts are the only facts necessary to the proper resolution of the issue presented.

SUMMARY OF THE ARGUMENT

The Florida Constitution, emanating from the people themselves, represents the supreme law of the State. Once the legislature passes a law, it is incumbent upon this Court to interpret the meaning of that law consistent with constitutional principles whenever possible.

In 1983 the people of the State amended the Constitution to further limit the right to pretrial release. Article I, section 14 was amended to include a new, broad category of those who were not entitled to such release. The Constitution sets out the categories, but does not require any particular findings. Section 903.0471, Florida Statutes (2000) breathes life into the constitutional provision.

The statute provides substantive due process in that it provides for a standard of proof necessary to revoke pretrial release. The mere fact that incarceration is a possible consequence does not automatically require proof beyond a reasonable doubt. Incarceration may result in many cases where a lesser standard is required.

The procedure provided for in the statute is the same as required for a probable cause finding to hold a defendant following an arrest. The constitution does not require an adversarial hearing or any particular form of notice. A finding by a magistrate is all that is required.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL
PROPERLY HELD THAT FLORIDA STATUTE
903.0471 (2000) DOES NOT VIOLATE THE FLORIDA
OR THE UNITED STATES CONSTITUTION (Restated).

Petitioner comes to this Court from a decision of the Florida Fourth District Court of Appeal upholding the constitutionality of section 903.0471, Florida Statutes (2000).

Petitioner, while on pretrial release for the crimes of aggravated fleeing and eluding, resisting arrest without violence and driving while license suspended, was once again arrested for the crimes of possession of cocaine with intent to sell and possession of marijuana. The trial court, finding there was probable cause for the second arrest, revoked Petitioner's bond in the previous case pursuant to the provisions of section 903.0471, Florida Statutes (2000). Petitioner argued both in the trial court and in the Fourth District Court of Appeal that section 903.0471 violates the Florida Constitution.

The statute reads:

903.0471 Violation of Condition of Pretrial Release –
Notwithstanding s. 907.041, a court may, on its own
motion, revoke pretrial release and order pretrial detention
if the court finds probable cause to believe that the
defendant committed a new crime while on pretrial release.

Article I, section 14 of the Florida Constitution provides:

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Facial Constitutionality of the Statute

This Court has consistently followed the established precept that, if reasonably possible and consistent with constitutional rights, it should interpret statutes in such a manner as to uphold their constitutionality. See *State v. Mitro*, 700 So.2d 643 (Fla. 1997); *State v. Wershow*, 343 So.2d 605, 607 (Fla. 1977). The constitution, emanating as it does from the people themselves, represents the supreme law of Florida. See *Lane v. Chiles*, 698 So.2d 260 (Fla. 1997) (It is illogical to conclude that the people of Florida have greater protection in the legislative process where they participate indirectly through their representatives, than they do in the constitutional initiative process where they can participate directly by their casting their own votes.) The people can amend any "portion or portions" of the Constitution in any way that they see fit; there is no limitation on matters which can be the subject of a constitutional

amendment in Florida. See *Lane*, *id*; *Smathers v. Smith*, 338 So.2d 825(Fla. 1976). Once the legislature passes a law, it is incumbent upon this Court to interpret the meaning of that law consistent with constitutional principles whenever possible. See, generally, *Mitro*, *id*.

In *State v. Paul*, 783 So.2d 1042 (Fla. 2001), this Court noted that prior to 1983 “there were only two types of cases for which Florida courts could deny bail: offenses punishable by death and offenses punishable by life in prison.” However, “Effective January 1, 1983, the Florida Constitution was amended to broaden the group of persons to whom the courts could deny bail.” It is now well settled that, contrary to the implications of Petitioner’s argument, the Florida Constitution does not provide for absolute, unrestricted pretrial release. Indeed, the people themselves have said that such release may be denied “[i]f no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process . . .” And, Respondent submits, section 903.0471 Florida Statutes (2000) does nothing more than breathe life into that constitutional provision.

In *Paul* this Court recognized the conflict between the Fourth District Court of Appeal in *Paul v. Jenne*, 728 So.2d 1167 (Fla. 4th DCA 1999), and the Third District Court of Appeal in *Houser v. Manning*, 719 So.2d 307 (Fla. 3rd DCA 1998). The

conflict essentially involved the difference between strict adherence to section 907.041 and inherent authority in cases involving revocation of pretrial release because of the commission of a second crime. This Court followed the *Paul* line of reasoning, holding that a trial court's discretion to deny a subsequent application for bail is circumscribed by statute. However, as pointed out by Judge Gross in *Barns v. State*, 768 So.2d 529 (Fla. 4th DCA 2000), “[t]he legislature sent a clear signal about revocation of existing bonds during the 2000 session” by passing section 903.0471, Florida Statutes (2000). Petitioner contends that by passing that section, the legislature extracted one form of violation of pretrial release – violation by the commission of another crime – and gave it a separate, special status.

Petitioner's argument that the Fourth District Court erred by “requiring findings compelled by the constitution which are not contained in the statute” does not stand up to scrutiny. It is the function of this Court, as well as the district courts of appeal, to interpret statutes and constitutional provisions. *Chiles v. Phelps*, 714 So.2d 453 (Fla. 1998). He argues that if the trial court had made a specific finding to the effect that his detention was necessary to protect the community from the risk of physical harm, the court would have applied an unconstitutional statute in a constitutional manner and his argument would have been negated. He supports this argument by reference to other statutes which quote the constitutional provisions of “risk of

physical harm” and “defendant’s appearance.” However he shies away from the third constitutional provision, that relating to the “integrity of the judicial process.”

In fact, Article I, section 14 does not require any particular form of findings. In *Paul*, this Court said the 1983 constitutional provision merely adds a broad additional category of cases in which pretrial release may be denied: where no conditions of release can reasonably protect the community from physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process. See *State v. Paul*, *id.* Given that language, the Fourth District’s conclusion that “[t]he legislative intent behind section 907.041 was not to narrow the breadth of the trial court’s discretion under the state constitution, but to be coextensive with it,” (*Parker v. State*, 780 So.2d at 212) was entirely reasonable and well within its power.

Substantive Due Process

Petitioner’s argument that section 903.0471 violates substantive due process in that it provides for a finding of only “probable cause” rather than proof beyond a reasonable doubt is equally unavailing.

Petitioner rightly states that due process operates not so much to establish the quantum of proof necessary in a particular proceeding, but rather to instruct the fact-

finder concerning the degree of confidence our society requires in the correctness of factual conclusions for a particular type of adjudication. *Addington v. Texas*, 444 U.S. 418 (1979). Obviously, proof beyond a reasonable doubt is the standard used in most criminal proceedings. *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000) (“The Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 [1970].)

But conviction in a criminal case carries with it many consequences beyond loss of liberty. There is no reason to conclude that “proof beyond a reasonable doubt” is required in those cases simply because loss of liberty may be one of the many unhappy results of conviction. Indeed, not all proceedings which end in incarceration require such a high standard. The evidence upon which to predicate a violation of probation must only be sufficient to satisfy the conscience of the court. *Bernhardt v. State*, 288 So.2d 490, 495 (Fla.1974) And the standard required for pretrial detention under section 907.041, Florida Statutes (1999) is “substantial probability” that the defendant falls into one of four enumerated categories.

Contrary to Petitioner’s argument, section 903.0471 does not involve pretrial release; rather it deals with revocation of pretrial release of defendants who have

already had a previous probable cause finding (i.e., probable cause that they committed the first crime). Thus it applies to that limited number individuals who are at liberty under restrictions of a greater or lesser degree. And, in spite of the presumption of innocence, it is well settled a court may place restrictions on the travel, association, or place of abode of the defendant during the period of release. *Carter v. Carson*, 370 So.2d 1241 (Fla. 1st DCA 1979). Certain courts have even required defendants on pretrial release to surrender passports and report daily to the probation office, and that they not possess firearms. *Polakoff v. United States*, 489 F.2d 727, 730 (5th Cir. 1974); *United States v. Perrone*, 413 F.Supp. 861 (S.D. Fla. 1979).

Although a defendant is presumed innocent, a defendant on pretrial release is unlike other citizens in that he remains at liberty under a court order. As such his status is more akin to a probationer in that he is clearly on notice of those special restrictions. Simply stated, due process concerns do not prevent a legislature from establishing “probable cause” as a standard of proof in a revocation of pretrial release proceeding any more than they prevent the establishment of a “conscience of the court” standard in a probation revocation proceeding. Petitioner’s due process argument cannot stand.

Procedural Due Process

Petitioner further argues that section 903.0471 violates procedural due process because it does not provide the procedural safeguards found in section 907.041, Florida Statutes (2001), and relies on this Court’s language in *State v. Paul*, *id.*, to the effect that “Section 907.041(4)(b)(1) specifically applies to a defendant who has “previously violated conditions of release.”

Respondent submits the constitutionality of section 907.041 is not an issue; that has been decided by this Court in *State v. Paul*, *id.* At the same time, the fact that section 907.041 is constitutional does not mean that section 903.0471 is not.

A defendant on pretrial release is at liberty but is certainly not “free.” See *Reno v. Koray*, 515 U.S. 50 (1995). He can be subjected to travel and social restrictions including a requirement to report weekly to a probation officer. See *Polakoff*, *id.* He can be required to obey all laws and remain within the jurisdiction unless of the court permission was granted to travel, obey all court orders, and keep his attorney posted as to his address and employment. *United States v. Robles*, 563 F.2d 1308, 1309 (9th Cir. 1977). Thus a defendant may violate the terms of pretrial release in any one of a number of ways, and the Florida Legislature has said in section 907.041 that one who faces a revocation of pretrial release under those circumstances is entitled to a procedural hearing.

At the same time, in section 903.0471 the Legislature carved out an exception

for one category of alleged violators: those who are arrested for another crime while on pretrial release where a judge finds probable cause to believe the second crime was committed. Petitioner contends this amounts to a procedural short-cut which is constitutionally infirm. However the courts of this State regularly use and rely on probable cause affidavits in a variety of situations, such as the taking of pleas and at first appearances. See *Campuzano v. State*, 771 So.2d 1238 (Fla 4th DCA 2000); Fla.R.Crim.P. 3.133(a)(3) (indicating that a probable cause determination may be based on a sworn complaint or affidavit).

There is no single preferred pretrial procedure for determining probable cause for detaining an arrested person pending further proceedings; the nature of the determination usually will be shaped to accord with the state's pretrial procedure viewed as a whole. The United States Supreme Court has said that the full panoply of adversary safeguards – counsel, confrontation, cross-examination, and compulsory process for witnesses – are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. “This issue,” said the Court, “can be determined reliably without an adversary hearing. The standard is the same as that for arrest.” And, the Court added, “[t]he use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but

also by the nature of the determination itself.” *Gerstein v. Pugh*, 420 U.S. 103 (1975).

It is well settled Florida law that probable cause is the *sine qua non* of the validity of a magistrate’s commitment. *Sullivan ex rel. McCrory*, 49 So.2d 794 (Fla. 1951). However an adversarial preliminary hearing for the purpose of determining if probable cause exists to hold one accused of a crime for trial is not constitutionally mandated. *Gerstein*, *id.* In fact, although it may be called a hearing, the proceeding is in the nature of an inquiry and, outside of being conducted by a magistrate, bears little or no resemblance to a trial. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972).

The probable cause determination provided for in section 903.0471 is no more or less procedurally unfair than the determination which is made every day of the week by trial judges sitting at first appearances throughout the State of Florida. See *Thomas v. Jenne*, 766 So.2d 320 (Fla. 4th DCA 2000)(Gross, J., concurring), (Ultimately, this decision [finding probable cause to believe a defendant has committed further crimes while on pretrial release] rests with the sound discretion of the trial court, just like the setting of reasonable conditions of bond at a first appearance.) It is in the nature of an inquiry by a magistrate which has been approved by this Court and the United States Supreme Court. It is neither procedurally unfair nor unconstitutional. The holding of the Florida Fourth District Court of Appeal should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent/Appellee respectfully contends that the court below did not reversibly err; that section 907.0471, Florida Statutes (2000) is constitutional; and that the judgment of the Fourth District Court of Appeal should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “Answer Brief of Respondent/Appellee on the Merits” has been sent by United States mail to DIANE M. CUDDIHY, Esq., Chief Assistant Public Defender, 201 S.E. 6th Street, North Wing– Third Floor, Fort Lauderdale, FL 33301 on March 26, 2002.

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CERTIFICATE OF TYPE SIZE AND FONT

I HEREBY CERTIFY that the foregoing “Answer Brief of Respondent/Appellee on the Merits” has been printed in 14-point Times New Roman proportionally spaced font.

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