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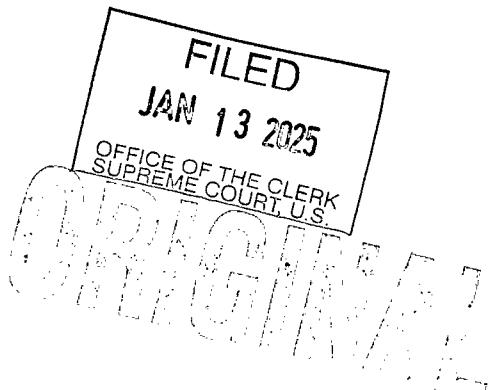
IN THE UNITED STATES SUPREME COURT

SAMUEL LEE SMITH, JR.
Petitioner,

Case Number:

v.

NATASHA KATHERINA SMITH,
Respondent,



PETITION FOR WRIT OF CERTIORARI

(From Fla. Third District Court of Appeal 3D2024-0535)

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QUESTIONS PRESENTED

Did the trial court violated the Petitioner's fundamental right to due process notice and opportunity to be heard, as guaranteed by the 5th and 14th Amendment when the trial court imposed a stay away order against the Petitioner without ever affording him notice and opportunity to be heard?

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PETITION FOR WRIT OF CERTIORARI

1. Decision Below

The decision of the Florida District Court of Appeal for the Third District, State of Florida which is published at *Smith v. Smith*, ____ So.3d ___, No. 3D2024-053 , (Fla. 3rd DCA 9/27/2024); *pet for review denied November 7, 2024 (Fla. 2024)*.

2. Jurisdiction

The Order being reviewed is the September 27, 2024 Opinion of the Florida District Court of Appeal, Third District. *Smith v. Smith*, ____ So.3d ___, No. 3D2024-053 , (Fla. 3rd DCA 9/27/2024); *pet for review denied November 7, 2024 (Fla. 2024)*.

The Supreme Court's appellate jurisdiction includes the authority to review decisions of state courts. 28 U.S.C. § 1257(a). The current statute authorizing Supreme Court review of state court decisions allows the Court to review the judgments of "the highest court of a State in which a decision could be had." *Koon v. Aiken*, 480 U.S. 943 (1987). Here, the judgment for which review is sought, is not to further any further review in the State of Florida and is an effective determination of the litigation. *Flynt v. Ohio*, 451

U.S. 619 (1981); *Florida v. Thomas*, 532 U.S. 774 (2001). *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 304 (1989).

Additionally, the issue before the Court concerns the 5th Amendment right to “due process” and applied to the States under the 14th Amendment of the United States Constitution.

Federal Rule/Question Involved

The Federal Rule or Federal Question involved concerns the 5th and 14th Amendments of the United States Constitution and the right to due process and to be free from arbitrary and capricious rulings by the lower court.

3. Statement of the Case

A. Procedural History

On March 9, 2022, the lower court sua sponte entered a Stay Away Order (“hereinafter “Order”)[A.050]. On February 21, 2024, Petitioner moved to set aside and vacate the stay away order on the basis that it was void as it was entered in violation of the Petitioner’s due process right to notice and opportunity to be heard.[A. 053-058]. The lower court denied the motion without a hearing on March 14, 2024.[A.059]. The order denying the motion to vacate merely states that the motion was legally insufficient. However, the Order does not state why the motion was legally sufficient. As

a result, on March 19, 2024, Petitioner filed a motion for clarification requesting the lower court to explain why the motion was legally insufficient. [A.061-062]. Subsequently, Petitioner filed a notice of appeal on March 25, 2024 that appeals the lower court's Order. [A.063-065].

Petitioner sought review of the trial court's order via a petition for certiorari in the State of Florida District Court of Appeal, Third District.¹. The petition was denied on September 27, 2024. [A. 079]. Petitioner sought review in the Florida Supreme Court, and the petition for review was denied on November 7, 2024.[A.080]

The petition now follows.

B. Statement of Facts

In 2017, Respondent filed a petition for dissolution of marriage and for other relief in the circuit court for Miami Dade County, Florida. See Case Number 2017-007498-FC-04. In order to bolster her petition and deprive Petitioner of time sharing, Respondent filed a petition for a domestic

¹ The State of Florida District Court of Appeal, Third District, entered an Order directing the Petitioner to show cause why the appeal should be dismissed since an order concerning a stay away order is a non-appealable non-final order.[A.066]. On April 11, 2024 Petitioner responded to the show cause order.[A.068-077]. On April 12, 2024, the State of Florida District Court of Appeal, Third District, entered an Order appealing directing the Petitioner to proceed with this matter by filing a petition for a writ of certiorari.[A.078].

violence injunction on December 12, 208. See Case 2018-28970 FC 04. [A.004-013]. On December 12, 2018, without a hearing the lower court entered a temporary injunction against the Petitioner. [A.014-22]. A final hearing was scheduled for January 3, 2019, but the Court continued the hearing until February 21, 2019.

Petitioner was not aware of the temporary injunction or the continuance because Petitioner was never served with process. In fact, on January 11, 2019, there was a return of no-service filed with the Court. [A.023]. The Court continued the February 21, 2019 final hearing until April 11, 2019, and did so without notifying the Petitioner, and continued to extend the temporary injunction without any notice to the Petitioner.

Circuit Court Judge Angelica Zayas ordered Petitioner to appear for an in person meeting with a Family Court parenting coordinator. While the Petitioner was in a required meeting with Nancy St. Phard from Family Court Service, Stuart Perkins of Miami Dade Police Department dropped a copy of the motion and order to extend temporary injunction, together with a notice for final hearing. The MDPD officer did not explain what he dropped in front of Petitioner and did not even advise Petitioner of the contents that he dropped in front of him. [A.053-054].

Petitioner, had no idea of the April 11, 2019 hearing, and as such, the hearing failed to appear and Respondent obtained a final judgment of injunction.[A.054].

Subsequently, Petitioner, first filed a motion to dismiss the injunction on October 1, 2020. The motion alleged, amongst other things, that petitioner was not properly served with Respondent's motion or notice of hearing, and therefore, the injunction should be vacated. The Court denied the motion on November 16, 2020 stating that Respondent was still in fear, but it did not address the lack of service issue.

On October 27, 2021, the Petitioner filed a motion to terminate the domestic violence injunction based upon, it no longer being necessary since Respondent no longer had a well-founded fear of Petitioner.[A.040-043]. A hearing on the motion occurred March 9, 2022. The Order setting the hearing was specifically on the issue of the permanent injunction. [A.044].

On March 9, 2022, the Court entered an order dismissing/dissolving the injunction. [A.047-049]. The Order stated:

Based on the Petitioner's [Ms. Smith's] testimony that he/she has not been threatened, intimidated, or harassed in any way and the Respondent [Mr. Smith] has not violated the Permanent Injunction to

date, Petitioner [Ms. Smith] is in agreement that the injunction be dismissed and such has been done freely and voluntarily, the injunction is hereby DISMISSED. The Petitioner [Ms. Smith] understands that the dismissal of the injunction will result in him/her not having any protection which the injunction may have provided. The Court advised the Petitioner [Ms. Smith] that if at any moment she feels unsafe or threatened she can call the Police and file a new Domestic Violence Petition with no repercussions. The Court has issued a Stay Away order through the related Family Case No. 2017-007498-FC04, that the Respondent must comply with. The injunction is hereby vacated and the case is hereby dismissed without prejudice. [A.047].

As such, the same day that the lower court dismissed the permanent injunction based upon an agreement by Respondent, and finding that it was no longer necessary, entered a stay away order against the Petitioner. [A.50-52]. The Stay Away Order was entered in the family law case without any written motion requesting a stay away, without any notice of hearing notifying the Petitioner that the Court could enter a stay away order, and without any reason for the issuance of a stay away order (especially since the order dismissing the injunction found no reason for the issuance of a stay away order) and without an opportunity to be heard concerning the entry of a stay away order.

On February 21, 2024, Petitioner, as a pro se litigant, filed a motion to set aside and vacate the stay away order. [A.053-058]. The lower court

denied the motion without a hearing on March 14, 2024.[A.059]. The order denying the motion to vacate merely states that the motion was legally insufficient. The Order does not state why the motion was legally sufficient. As a result, on March 19, 2024, Petitioner filed a motion for clarification requesting the lower court to explain why the motion was legally insufficient.[A.061].

Subsequently, Petitioner filed a notice of appeal on March 25, 2024 that appeals the lower court's Order. [A.063]. The procedural history that followed in mentioned above.

4. Reasons for Granting the Writ

The trial court violated the Petitioner's fundamental right to due process notice and opportunity to be heard, as guaranteed by the 5th and 14th Amendment when the trial court imposed a stay away order against the Petitioner without ever affording him notice and opportunity to be heard.

Florida Rule of Civil Procedure 1.540(b) provides relief from an Order only under limited circumstances." *Dawson v. Wachovia Bank, N.A.*, 61 So.3d 1218, 1221 (Fla. 3rd DCA 2011); *Tikhomirov v. Bank of N.Y. Mellon*, 223 So.3d 1112, 1116 (Fla. 3rd DCA 2017). Amongst those circumstances are when a judgment is void as a matter of law. *Fla.R.Civ.P. 1.540(b)(4)*. A void judgment is so defective that it is deemed

never to have had legal force and effect. Generally, a judgment is void if in the proceedings leading up to the judgment or order, there is a violation of the due process guarantee of notice and an opportunity to be heard. *Nationstar Mortg., LLC v. Diaz*, 227 So. 3d 726, 727 (Fla. 3rd DCA 2017). In this case the judgment is void because the trial court denied the Petitioner's due process right to notice and an opportunity to be heard.

There is nothing more fundamental than the right to notice and a meaningful opportunity to be heard. "Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue and requires fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Crosby v. Fla. Parole Comm'n*, 975 So.2d 1222, 1223 (Fla. 1st DCA 2008); see also *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (holding that the notice required to satisfy due process must reasonably convey the required information, apprise interested parties of the pendency of the action, and afford them a meaningful opportunity to present their objections); *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard.").

This is why when an order is entered without notice, it is void *ab initio* as a matter of law. *Taylor v. Bowles*, 570 So.2d 1093, 1094 (Fla. 4th DCA 1990). The same holding occurred in *Shields v. Flinn*, 528 So.2d 967, 968 (Fla. 3rd DCA 1988) in which the court stated "A judgment entered without notice to a party is void."

In this case, the notice of hearing was for solely on for the dismissal of the 2018 case and was solely to address the motion to dismiss the permanent injunction. The notice did not mention anything about the family law case, no less that the Court would entertain entering a stay away order, which was done on the spot without any notice, opportunity to be heard, and without hearing or any evidence to support the rendition of a stay away order.

A trial court violates a party's due process rights when it expands the scope of a hearing to address and determine matters not noticed for hearing. *Illanes v. Gutierrez*, 972 So.2d 222 (Fla. 3d DCA 2007), *Rodriguez v. Santana*, 76 So. 3d 1035, 1037 (Fla. 4th DCA 2011); *Williams v. Primerano*, 973 So.2d 645, 647 (Fla. 4th DCA 2008) ("A trial court cannot determine matters not noticed for hearing or award relief not sought by the pleadings.").

In *Illanes v. Gutierrez*, 972 So.2d 222 (Fla. 3d DCA 2007), the trial

court modified visitation after a noticed case management conference. The appellate court granted a petition for writ of certiorari and quashed the order modifying visitation because "there was no notice in the case management order that visitation would be discussed or a modification considered at the case management hearing." *Id.* at 223. The Court stated that "Florida courts have repeatedly held that it is a violation of a parent's due process rights for a court to modify visitation in a final judgment unless the issue of modification is properly presented to it by written pleadings, noticed to the parties, or litigated below." *Id.* See also: *Off the Wall & Gameroom LLC v. Gabbai*, 301 So. 3d 281, 286 (Fla. 4th DCA 2020)(Court reversed lower court ruling when issue was not raised in the motion and was beyond the scope of the hearing); *Wanda I. Rufin, P.A. v. Borga*, 294 So. 3d 916, 918 (Fla. 4th DCA 2020). (A trial court violates a party's due process rights when it expands the scope of a hearing to address and determine matters not noticed for hearing.).

Similarly, in the present case, the parties, or at least the Petitioner, was not noticed that the Court would entertain a motion for a stay away order. In fact, there was not motion for a stay away order or any other pleading that requested a stay away order in this case. More importantly, the Petitioner was not provided with an opportunity to refute the entry of a

stay away order.

As mentioned above, the constitutional guarantee of due process requires that judicial decisions be reached by a means that preserves both the appearance and reality of fairness. Basic due process requires a party be provided notice and a meaningful opportunity to be heard, the denial of which constitutes fundamental error. *Pena v. Rodriguez*, 273 So.3d 237, 239 (Fla. 3rd DCA 2019). One of the basic elements of due process is the right of each party to be apprised of all the evidence upon which an issue is to be decided, with the right to examine, explain or rebut such evidence." *Id.* at 240. Surely the Petitioner was never provided such a meaningful opportunity to be heard.

The case of *Afanasiev v. Alvarez*, 299 So. 3d 474 (Fla. 3rd DCA 2020) is exactly this case. In that case, after multiple evidentiary hearings on a petition for domestic violence injunction, the trial court found there was insufficient evidence to issue a permanent injunction and dismissed the petition. In an abundance of caution, however, the court *sua sponte* issued a stay away order in the parties' pending dissolution of marriage action and granted the petitioner temporary exclusive use and possession of the marital home. The respondent in that case argued the trial court denied him due process by issuing orders in the dissolution of

marriage action as the hearing was limited to the permanent injunction.

There was no pending motion or hearing noticed in the dissolution of marriage action. Remarkably, the identical facts exist in this case.

With the facts in both cases being the same, the Court stated in *Alvarez*:

We have previously held that "the granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process." *Lapciuc v. Lapciuc*, 275 So.3d 242, 245 (Fla. 3d DCA 2019) (quoting *Miami-Dade Cty. Bd. of Cty. Comm'r's v. An Accountable Miami-Dade*, 208 So. 3d 724, 734 (Fla. 3d DCA 2016)); see also *Mizrahi v. Mizrahi*, 867 So.2d 1211, 1213 (Fla. 3d DCA 2004) ("Due process protections prevent a trial court from deciding matters not noticed for hearing and not the subject of appropriate pleadings."). Accordingly, we lift the stay away order and reverse and remand for proceedings with proper notice to the parties.

If the facts in *Alvarez* were legally sufficient and enough, then the lower Court should have ruled in this case exactly as it did in *Alvarez*, since the facts and legal issues in both cases are identical. Nevertheless, the lower court apparently ignored its prior decision and precent when per curiam affirmed the trial court ruling, and refused to opine why it ignored its prior decision which was on all fours the same as this case.

As such, the Petitioner's due process rights were violated, and he

stay away order entered in violation of the Petitioner's due process rights renders it void.

5. Conclusion

Wherefore, the Petitioner respectfully requests that the petition be granted and that a writ be issued remanding the case back to the trial court with the mandate that it vacated and set aside the March 9, 2022 stay away order and for such other further relief as this Honorable Court deems just and proper.

Respectfully submitted,

/s/ Samuel L. Smith

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