9100 O.A. 1-7-80 En Banc

57,072

IN THE FLORIDA SUPREME COURT

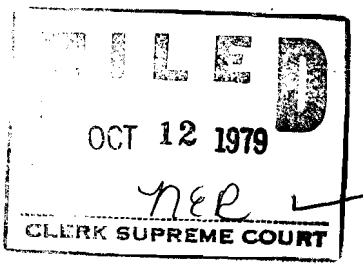
STATE OF FLORIDA,

Petitioner

vs. CASE NO. 57,072

PETE M. JAMES,

Respondent.



BRIEF OF RESPONDENT

ROBERT E. JAGGER, PUBLIC DEFENDER
SIXTH JUDICIAL CIRCUIT IN AND FOR
PINELLAS COUNTY, STATE OF FLORIDA
By: Stephanie L. Willis, Esquire
ASSISTANT PUBLIC DEFENDER
Rm. 150, 150 Fifth Street North
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CITATIONS

POINT

§§322.261 and 322.262, Fla. Stat.(1977), in delegating certain functions to the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles, violates Art. II, Sec.3 of the Constitution of the State of Florida by failing to set forth adequate standards of legislative policy to guide the agencies in the performance of those functions.

ARGUEMENT

There can be no question that the legislature of the State of Florida has both the right and the obligation to enact laws to protect the safety and welfare of citizens who use and enjoy the streets and highways of this state. Certainly, the prohibition of driving upon those streets and highways by persons who are unfit to do so is a valid exercise of that authority. This inherent authority is not the subject of the present inquiry. Having conceded the legitimacy of the power of the legislature to act in that area, however, does not forgive the violation by the legislature of limitations placed upon it by the Florida Constitution. Specifically, Art. II, §3, Fla.Const. provides:

> "Branches of Government. - The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

The violation of this provision is particularly grevious where, as in the instant case, the subject of the violation concerns the very evidence to be used against an accused in a criminal prosecution.

§316.193(1), Fla.Stat. (1977), makes it a crime for a person to drive or control any vehicle in this state while under the influence of an intoxicant to the extent his normal faculties are impaired. Subsection (3) of that same section makes it a crime for a person to drive or control a vehicle with a blood

alcohol level of 0.10 percent or above. The Respondents are charged with both offenses. As to a prosecution under §316.193(1), Fla. Stat. (1977), the legislature has provided that the admission of chemical test results into evidence gives rise to certain announced evidentiary presumptions regarding an accused's degree of influence or intoxication. §322.262(2), Fla.Stat. (1977), the chemical test result is an essential element of the offense itself and must be admitted into evidence against the accused to secure a conviction. The admission of such results into evidence depends largely upon the three following statutory provisions:

> "...An analysis of a person's breath, in order to be considered valid under the provisions of this section, must have been performed according to methods approved by the Department of Health and Rehabilitative Services. For this purpose, the department is authorized to approve satisfactory techniques or methods." §322.261(1)(b)1, Fla. Stat. (1977).
>
> "The test determining the weight of alcohol in the Defendant's blood shall be administered at the direction of the arresting officer in accordance with rules and regulations which shall have been adopted by the department. Such rules and regulations shall be adopted after public hearing, and shall specify precisely the test or tests which are approved by said department for reliability of result and facility of administration and shall provide an approved method of administration which shall be followed in all tests given under this section." §322.261(2)(a), Fla.Stat. (1977).
>
> "Chemical analyses of the person's blood or breath, in order to be considered valid under the provisions of this section, must have been performed according to methods approved by the Department of Health and Rehabilitative Services

> and by an individual possessing a valid permit issued by the department for this purpose. The Department of Health and Rehabilitative Services is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the Department of Health and Rehabilitative Services". §322.262(3), Fla. Stat. (1977)

By the first provision cited, the Legislature delegates to the Department of Health and Rehabilitative Services, hereinafter referred to as HRS, the task of approving "satisfactory techniques or methods" for chemical breath testing. There is no directive language whatsoever accompanying that delegation to guide HRS in its task. Rather, the policies which are to guide HRS in deciding which techniques and methods should be "approved" are left up to HRS. All the legislature has indicated is that they must be "satisfactory".

By the second provision cited, the Legislature delegates to the Department of Highway Safety and Motor Vehicles, hereinafter referred to as DHSMV, the task of setting forth the rules and regulations which are to govern the administration of chemical blood testing. See §322.01(11), Fla.Stat. (1977) for definition of "department". By its directive, the Legislature does indicate to the DHWMV that such rules and regulations can be adopted only after public hearing that the tests approved must be precisely specified, and that there is to be an approved method of administration of the tests selected which will be followed in all cases. These indications, however, do not inform the agency of the legis-

lative policies which are to guide the performance of the assigned task of "approving" tests and methods of administration. Regarding approval of tests, the agency can look to "reliability of result and facility of administration" under this section, but the quoted language falls far short of providing adequate standards. The agency, under the delegation as worded, clearly has the discretion to approve tests which are less reliable than others available if the test can more easily and cheaply be administered. The agency is given the discretion to decide which interest should prevail where there is a conflict. The vesting of such unrestricted discretion in the agency cannot be tolerated where, as here, there is involved the right of one accused to have only competent and reliable scientific evidence offered against him in a criminal prosecution.

In the third provision cited, the availabilty of the evidentiary presumptions is made dependant upon the performance of chemical blood or breath analyses according to "methods approved" by HRS and by an individual with a valid permit. The Legislature delegates to HRS the task of approving "satisfactory" techniques of methods for such analyses, of setting forth the qualifications of persons who are to be permitted to perform such analyses, and to issue permits for the same. Once again, the grant of authority to the agency gives no indication as to what policies are to guide it in deciding what method is a "satisfac-

tory" one such that it could be "approved".

Article II, Section 3, Fla. Const. is an express limitation preventing each branch of the government of the State from shifting the performance of their constitutionally assigned functions to any other branch. This provision is the source of the so-called doctrine of non-delegation. The doctrine as it relates to the Legislature is classically formulated in Florida in the words of Justice Whitfield in Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789 (1919):

> "The legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself designed to accomplish a general purpose, and may expressly authorize designated officials within valid limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose, and may expressly authorize designated officials within definite valid limitatitions to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. This principle of the law is peculiarly applicable to regulations under the police power, since the complex and ever-changing conditions that attend and affect such matters make it impracticable for the legislature to prescribe all necessary rules and regulations."

Essentially, the doctrine guarantees that the fundamental and primary policy decisions underlying a law will be made by the Legislature i.e. by those persons to whom that responsibility was entrusted by the electorate. That doctrine is violated where the Legislature in enacting a law permits those charged

with the responsibility of enforcing it to exercise primary and independent discretion in delineating policy and such action of the legislature is unconstitutional. In the instant case, it is just such a delegation by the Legislature of this primary and independent discretion to HRS and to the DHSMV that renders §322.251 and §322.262, Fla. Stat. (1977) unconstitutional. These agencies are told to perform certain functions i.e. to approve "techniques and methods", to approve "tests", and to approve "methods of administration". However, rather than outline for the agencies the polices which are to guide them in performing these functions, these agencies are told only that the methods and tests they approve must be "satisfactory" or that they may consider "reliablility of result and facility of administration."

Past decisions of this Court have held invalid as violative of the doctrine of non-delegation both ordinances and statutes containing language which similarly failed to provide any meaningful guidance to the administrative body involved. Drexel v. City of Miami Beach, 64 So.2d 317 (Fla. 1953), held invalid a city ordinance which gave the city counsel the power to grant or deny permits for construction of parking garages "after a public hearing at which due consideration shall be given to the effect upon traffic of the proposed use..." the court noted the language could be construed to allow all manner of latitude in the granting or denying of permits. The ordinance

left up to each member of the council to decide when the traffic problem was "duly considered". North Bay Village v. Blackwell, 88 So. 2d 524 (Fla. 1956) invalidated an ordinance which designated certain business districts and in one such district permitted gas stations "subject to approval of location and site by action of Council". The Court found the act vested completely arbitrary and unfettered authority in the Council. Delta Truck Brokers, Inc. v. King, 142 So.2d 273 (Fla. 1962) involved a provision in the statute regulating the licensing of auto transportation brokers which permitted the commission involved to "reasonably alter, restrict, or modify the terms and provisions of any such license or impose restrictions on such transfer where the public interest may be best served thereby." The Court struck down the delegation as one which allowed the Commission "unlimited discretion in forming its opinion as to when and how 'the public interest may best be served'" noting the legislature had failed in any degree to lay down" a rule which defines, even generally, what consitutes the public interest." The power to decide that was impermissibly given to the Commissison. Dickinson v. State, 227 So.2d 36 (Fla. 1969) dealt with a statute detailing the requirements involved in securing a license to operate a cemetary. The statute was held invalid insofar as it directed the agency involved to investigate "the need for a cemetary in the community to be located, giving consideration to the adequacy of existing facilities and the need for further facilities in the area to be served. It was concluded that without definition of the "need for a cemetary" or "need for further facilities" the

statute conferred discretion to grant or deny licenses without guides of accountability.

Harrington and Company, Inc. v. Tampa Port Authority, 358 So. 2d 168 (Fla. 1978) gave the Court occasion to review a statute allowing the port authority to "grant such number of licenses to competent and trustworthy persons to act as stevedores in the port and harbor as it may deem necessary, having due regard to the business of the port and harbor." The statutory language quoted was invalidated such a delegaiton of undefined power being described as "tantamount to an abdication of [the Legislature's] lawmaking responsibility".

Similarly, allowing HRS and the DHSMV to approve tests, methods, or techniques that they deem "satisfactory" essentially leaves the decision as to what will be satisfactory solely to the decision of the agencies involved. The agencies need only be satisfied. The question is of what it is that they must satisfy themselves before approval may be given? The legislature in two provisions, §322.261(1)(b)1 and §322.262(3), Fla.Stat. (1977) fails to provide any indication at all. In the third, §322.261(2)(a), Fla. Stat. (1977), the Legislature mentions "reliability of result and facility of administration" without defining the relationship these considerations will bear to one another, which should control in the event of conflict, or whether these are exclusive considerations. Furthermore, while it is true that guidelines can sometimes be found to save otherwise fatally defective legislation by looking to other related enactments, to clearly announced references to similar laws, or

by reference to trade usage, none of these alternative sources of standards and guides exists with respect to the provisions now being examined. Florida Welding and Erection Service, Inc. v. American Mutual Insurance Co. of Boston, 285 So.2d. 386 (Fla. 1973); Department of Legal Affairs v. Rogers, 329 So.2d. 257 (Fla. 1976); Harrington and Co. Inc. v. Tampa Port Authority, Supra page nine .

It is not contended by the Respondants that the functions the Legislature has sought to delegate to HRS and the DHSMV are not such functions as could properly be the subject of delegations to an administrative agency. The performance of the function of designating techniques and methods of administration for chemical tests of breath and blood would involve fact finding and as such are particularly suited for performance by agencies. However, it is the contention of the Respondants that such delegation must take a proper form. To suggest, as does the Petitioner in this cause that, because the area involved in the delegation is one within the expertise of an agency, the Legislature could not be expected to draft any more specific guides, is contrary to the very position of the Legislature in drafting §316.193(3) and §322.262 (2), Fla. Stat. (1977). The fact the Legislature passed such laws indicates that the Legislature investigated and understood the significance of the blood alcohol level and the relationship of such levels to degrees of physical impairment. Certainly, then, the Legislature is capable of directing HRS and the DHSMV with more specificity regarding the policies which are to guide them in their rulemaking. There are important interests of the public at stake in the delegation under inquiry

and the people of this State have every right to expect the Legislature, and not the agency involved, to set the priorities in this area. It is true, to borrow the words of Justice England in his concurring opinion in Department of Legal Affairs v. Rogers, supra page ten , that legislative policy can be "'fleshed out' by administrative action to meet changing circumstances within our borders". However, it is equally well recognized that there is a grave difference between such a "fleshing out" and a setting of policy:

> "...for an administrative agency to 'flesh out' an articulated legislative policy is far different from that agency making the initial determination of what policy should be. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), reh. den. Feb. 15, 1979.

Askew v. Crosskey Waterways, infra, considered the constitutionality of §380.05(2)(a) and (b). These sections set forth the criteria for designation of areas of critical state concern but the task of applying those criteria and designating such areas was given to the Administration Commission. The Court, finding that task to constitute the making of a fundamental policy decision, deemed the statutory provision to be unconstitutional. Central to that decision was a renewed recognition of the constitutionally imposed line between according to an agency flexibility in administration of a complex and changing area and the abdication of legislative responsibility to establish fundamental policies in the interest of expediency. This same recognition can be seen to be operating in the decision of the Court in Department of Business Regulation v. National Manufactured Housing Federation, Inc., 370 So.2d 1132, (Fla. 1979) where under con-

sideration was a statute which delegated to an appropriate agency the task of determining the validity of rental or service charge increases in mobile home parks. The statute set forth certain criteria for making such a determination but the Court found the statute to be violative of the doctrine of non-delegation for the reason that it was left to the agency involved to strike a balance between the interests of mobile home park owners and tenants without meaningful guidance.

Neither Art. II, Section 3, Fla. Const., nor its corrollary doctrine of non-delegation are hollow. As Justice Sundberg clearly reminded us in writing for the court in Askew v. Crosskey Waterways, Supra page eleven the doctrine has life and substance and guarantees important rights to the people of this State. By enforcing the mandate for legislative guidance in the delegation of administrative functions, the duty to make fundamental policy decisions regarding the rights of the people in this State stays where it was placed by the State Constitution in its division of governmental power. The people are guaranteed that those who they elected and chose to make those decisions will, in fact, make them. Further, the people are guaranteed the availability of meaningful judicial review of agency action for the judiciary then has a standard, or yardstick as it were, against which to measure that action to see if the agency has performed its delegated task in accordance with the legislative directive. The people of this State are also protected against irresponsible or arbitrary action by the agency. In this regard, it should be noted the Petitioner argues this protection can be found in the instant case because HRS and the DHSMV have promul-

gated standards for themselves which are uniformly applied. (Brief of Petitioner at page 17).

However, that the agency has performed well in shouldering the impermissible duty of setting standards and policies for the performance of its delegated functions does not save the legislation:

> "The validity of the power sought to be vested...must be measured by the scope of the grant of power, not the extent to which it has been exercised." Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1976)

The agency is not permitted to in the first instance to set the policies and standards and then proceed to "'flesh-out' what it has in the first instance conceived ". Askew v. Crosskey Waterways, supra page eleven.

A citizen of this State who is required by the Legislature to submit to a chemical test of his breath or blood for the purpose of measuring the alcohol content thereof, which test result may be used against him in a criminal prosecution, has a right to expect that the Legislature in so requiring him has taken all steps necessary to insure that the test is based on recognized scientific principles, is highly reliable and accurate by its nature, and carries only the smallest chance for error in administration. Neither those nor any other appropriate safeguards are delineated by the Legislature in §322.261 and §322.262, Fla. Stat. (1977). The cited provisions are unconstitutional as an abdication of the responsibility to the citizens of this State which is placed squarely upon the shoulders of the Legislature by the State Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of Jim Smith, Attorney General, Charles Corces, Jr. Assistant Attorney General, 1313 Tampa Street, Suite 804 Park Trammell Building, Tampa, Florida 33602, by U.S. Mail, this 9th day of October, A.D., 1979.

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PINELLAS COUNTY, STATE OF FLORIDA

Stephanie J. Willis