S/a 5-3-83

IN THE SUPREME COURT OF FLORIDA

GEORGE R. ALBRECHT and C. G. SCHINDLER, JR.,

Petitioners,

v.

THE STATE OF FLORIDA, et al.,

Respondents.

Case No. 61,600

RESPONDENTS' ANSWER BRIEF

Mary F. Smallwood
General Counsel

State of Florida Department
of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301
Telephone: (904) 488-9730

Attorney for Respondents

INDEX

TABLE OF CITATIONS

Cases — Pages

STATUTES

SECONDARY AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

Respondents do not differ substantially with the Statement of the Case and Facts as articulated by Petitioners in their brief on the merits. Respondents note, however, that the facts pertinent to this appeal are adequately set out in the Second District Court of Appeal opinion below, found in the record at R-Vol. II, p. 215 and in the First District Court of Appeal opinion in Petitioners' direct review of their permit denial, found in the appendix at A-11 and reported at 353 So.2d 883. Respondents would also add that the hearing officer in the instant case found as fact that Petitioners' proposed dredge and fill project would, as articulated by the First District Court of Appeal, "destroy a productive mangrove system which provides food for a variety of animal life." Appendix at A-12. The hearing officer concluded that the proposed project would be "contrary to the public interest" and recommended denial of the permit "in consonance with the legislative intent." Appendix at A-9.

RESPONSE TO POINT I ON APPEAL

ISSUE

WHETHER, FOLLOWING A FULL ADMINISTRATIVE HEARING ON A PERMIT DENIAL AND FOLLOWING A SUBSEQUENT CONSTITUTIONAL CHALLENGE ON DIRECT JUDICIAL REVIEW OF THE PERMIT DENIAL TO THE DISTRICT COURT OF APPEAL PURSUANT TO SECTION 120.68, FLORIDA STATUTES, A PARTY MAY SUBSEQUENTLY BRING AN ACTION IN CIRCUIT COURT ASSERTING THAT THE PERMIT DENIAL CONSTITUTED AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT A PARTY IS BARRED FROM BRINGING A SUBSEQUENT ACTION IN CIRCUIT COURT CHALLENGING A PERMIT DENIAL AS AN UNCONSTITUTIONAL TAKING AFTER THE LITIGANT HAS PURSUED DIRECT REVIEW TO THE DISTRICT COURT OF APPEAL ON THE PERMIT DENIAL.

A. PETITIONERS ARE BARRED FROM NOW FILING A CIRCUIT COURT ACTION ASSERTING THAT THE DENIAL OF A PERMIT HAS RESULTED IN A TAKING BY DIRECT AND EXPRESS AUTHORITY OF THIS COURT.

In Point I of Petitioner's brief on the merits, Petitioners cite the recent decision of this Court in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 7 FLW 537 (Dec. 16, 1982) (petition for rehearing pending), as sole authority for the proposition that the Second District Court of Appeal erred in holding that, following judicial review of their permit denial pursuant to Section 120.68, Florida Statutes, petitioners were barred from filing a subsequent circuit court action alleging an unconstitutional taking of private property without just compensation. Their reliance on Key Haven is misplaced for several reasons. First, the decision in Key

Haven is based on the judicial policy requiring exhaustion of administrative remedies. That doctrine is not applicable in this case. In fact, the circuit court and district court of appeal below dismissed the Petitioners' case on the basis of res judicata. The two doctrines are distinct and based on different policy considerations. Secondly, Key Haven clearly states that having pursued a 120.68 appeal of the permit denial, petitioners are now foreclosed from filing an action in circuit court challenging the permit denial as a taking. Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund, supra at 538. In resolving the exhaustion issue presented in Key Haven, this court found it necessary to identify the proper forum for raising constitutional questions arising from administrative actions or the implementation of statutory provisions. Three types of constitutional challenges were identified: (1) The facial constitutionality of a statute authorizing agency action (exhaustion not required), (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or statute (exhaustion required), and (3) the unconstitutionality of the agency action in implementing a constitutional statute or rule (exhaustion required). Id. at 538. A different situation arises, however, where the litigant accepts the agency action as "proper" but alleges that an unconstitutional taking results nonetheless. In this situation the litigant may forego his 120.68 appeal and proceed in circuit court:

> We hold that, once an applicant has appealed the denial of a permit through all review procedures available in the executive branch, the applicant may choose either to contest the validity of the agency action by petitioning for review in a district court, or, by accepting the agency as completely correct, to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation. We disagree, however, with Key Haven's contention that a party aggrieved by agency action is not in any way restricted in choosing a judicial forum in which to raise constitutional claims.

Id. (Emphasis supplied)

The Court concluded that Key Haven could, after exhausting its executive branch administrative remedies, accept the agency action as "proper" and pursue the claim that the permit denial "was proper but resulted in an unconstitutional taking" in circuit court. Id. at 540. The consequences of such an election, however, were clearly stated:

> We emphasize that, by electing the circuit court as a judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary and capricious or as failing to comply with the intent and purposes of the statute.

Id. (Emphasis supplied)

In addressing the proper forum for raising the facial constitutionality of statutory provisions, the only other situation addressed in Key Haven where circuit court intervention in the administrative process may be sought, this court stated:

> We agree with the district court's position in the instant case that the aggrieved party could complete the administrative process and

> then challenge the statute's facial constitutionality in the District Court on the direct review to which the party is entitled under Section 120.68. . . . We note, however, that once a party chooses one or the other alternative, he is foreclosed from proceeding with the alternative remedy.

Id. at 538. (Emphasis supplied).

Thus Petitioners were afforded an alternative--either seek judicial review of the permit denial pursuant to Section 120.68, Florida Statutes, or accept the propriety of the agency action and seek a determination in circuit court of whether the agency action constituted a taking.

Petitioners are wrong in asserting that it "makes no difference" that they did not forego direct review and that they did challenge the propriety of the agency action. This court stated very clearly that the offered alternative remedies were mutually exclusive - when one is utilized, the other is foregone. It is immediately apparent that Petitioners do not sit in Key Haven's position. Having appealed the permit denial to the Second District Court of Appeal pursuant to Section 120.68, they are now foreclosed from proceeding in circuit court.

B. PETITIONERS ARE BARRED BY THE DOCTRINE OF RES JUDICATA FROM NOW ASSERTING THAT THE PERMIT DENIAL WAS "PROPER" BUT RESULTED IN AN UNCONSTITUTIONAL TAKING.

In Prall v. Prall, 50 So. 867 (Fla. 1905), this court stated:

> [w]here a second suit is upon the same cause of action and between the same parties as the first, the final judgment in the first suit upon the merits is conclusive in the second suit as to every question that was presented or might have been presented and determined in the first suit.

Id. at 870 (Emphasis supplied)

"This rule applies to every question falling within the purview of the original action, both in respect to matters of claim and defense, which could have been presented by the exercise of due diligence." Hay v. Salisbury, 109 So. 617 (Fla. 1926). This doctrine of res judicata is founded upon the need to ensure that finite judicial resources are efficiently used and that there be some end to litigation. Avant v. Jones, 79 So.2d 423, 424 (Fla. 1955). If a party has had an opportunity to litigate an issue in a court of competent jurisdiction, he should not be permitted another opportunity to do so to the "harassment and vexation of his opponent." Caldwell v. Massachusetts Bonding & Insurance Company, 29 So.2d 694, 695 (Fla. 1947). This bar had been held to extend even to defenses not raised in a different cause of action. Wise v. Tucker, 399 So.2d 500, 502 (Fla. 4th DCA 1981); 32 Fla. Jur. 2d Judgments and Decrees §122.

The Second District Court of Appeal held in Coulter v. Davin, 373 So.2d 423 (Fla. 2d DCA 1979) that where a disgruntled permit applicant fails to take his direct review pursuant to Section 120.68, Florida Statutes, the result may be phrased in terms of res judicata: "Those constitutional issues which could have been raised by the party in a petition for review of the agency action are foreclosed and may not be subsequently asserted in a suit for relief brought in circuit court." Id. at 425; Accord, Fraternal Order of Police and AFSCME v. City of Miami, 384 So.2d 726 (Fla. 3d DCA 1980). In Coulter, the court pointed out that Sections 120.57(1)(a)(4) and 120.58(1)(b), Florida Statutes, provide ample opportunity to obtain and present evidence on constitutional

issues, including the taking issue, and that Section 120.68(12)(c), Florida Statutes, specifically provides for remand to the agency if the agency's exercise of discretion is in violation of a constitutional provision. 373 So.2d at 428 and n.6. Relying on Coulter, and decisions of this court, the district court below held that since Petitioners could have argued the taking issue in the proceedings before the First District Court of Appeal, but did not, they were precluded from entertaining a circuit court action on that issue. Albrecht v. State, 407 So.2d 210, 211-12 (Fla. 2d DCA 1981). That Petitioners could have argued the taking issue before the district court of appeal has been established by past decision of this Court. Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1380 (Fla. 1981) cert. denied. 454 U.S. 1083 (1981). In fact, the First District Court of Appeal in Estuary Properties found a taking to have occurred on the administrative record. Estuary Properties, Inc. v. Askew, 381 So.2d 1126, 1139-40 (Fla. 1st DCA 1979) rev'd in part sub nom Graham v. Estuary Properties, Inc., supra; Accord, Farrugia v. Frederick, 344 So.2d 921 (Fla. 1st DCA 1977). This court in Key Haven, supra, did not disagree:

> We agree with the district court, and wish to emphasize, that if a party in Key Haven's position has appealed to the trustees and received an adverse ruling, the only way it can challenge the propriety of the permit denial, based on asserted error in the administrative decision-making process or on asserted constitutional infirmities in the administrative action, is on direct review of the agency action in the district court.

> The claim of the taking of property can be raised in this direct review proceeding and, if an adequate record is available, the district court could require the state to institute condemnation proceedings.

7 FLW at 539. (citing Estuary Properties) (Emphasis added).

Petitioners have challenged the propriety of the permit denial on constitutional and other grounds before the First District Court of Appeal on direct review of the agency action in denying the permit. They could have raised the issue that the agencies exercise of discretion, albeit a proper exercise of that discretion, resulted in a taking in that direct review proceeding. Because they did not, the Second District Court of Appeal was correct in holding that they are now barred from filing circuit court litigation on this issue by the doctrine of res judicata.

This court in Key Haven expressed disagreement with the court below and Coulter "insofar as they conflict with" the court's conclusions in that case. 7 FLW at 539. Coulter is inconsistent with Key Haven, an exhaustion case, only to the extent that Coulter held that direct appeal to the district court of appeal was the only remedy in the particular circumstances of that case; Albrecht is inconsistent only to the extent it may have approved that view. The res judicata analysis of those cases was not addressed by this Court in Key Haven and remains valid. In fact, the traditional rule, that an issue would become res judicata if it could be asserted before the district court of appeal on direct review, whether or not such review is sought, is strengthened by the Key Haven decision. By allowing direct review to be eliminated and a circuit court action commenced only if the litigant is

willing to accept all agency action as correct, this court immunized the administrative process from collateral attack -- those issues which could have been asserted to the district court, but were not, become res judicata.

It is very clear from Key Haven that circuit court litigation is appropriate only "in the particular circumstances" of that case. 7 FLW at 539. Where, as here, the parties have been before a district court which could have entertained and decided the taking issue, every policy behind res judicata is offended by allowing a litigant to raise the issue in subsequent circuit court litigation.[1] The circuit court and the district court below have correctly found Petitioner's claim to be barred by res judicata. The district court decision should be affirmed.

RESPONSE TO POINT TWO

ISSUE

WHETHER, UNDER THE CIRCUMSTANCES OF THIS CASE, INVOKING THE DOCTRINE OF RES JUDICATA WOULD WORK AN INJUSTICE.

ARGUMENT

APPLICATION OF THE DOCTRINE OF RES JUDICATA UNDER THE CIRCUMSTANCES OF THIS CASE, WOULD NOT WORK AN INJUSTICE.

---

[1]It may be that, where a party foregoes his 120.68 appeal, the policies behind the doctrine of res judicata are not undermined by allowing collateral circuit court litigation on the issue of whether a taking of property occurred as the result of a proper permit denial. See Rice v. Department of Health and Rehabilitative Services, 386 So.2d 844 at note 6 (Fla. 1st DCA 1980); Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of the Internal Trust Fund, 400 So.2d 66, 71 (Fla. 1st DCA 1981) rev'd in part and aff'd in part, 7 FLW 537 (Fla. Dec. 16, 1982); Key Haven, 400 So.2d at 74 (J. Booth dissenting).

Petitioners seek to convince this court that it would somehow be "unjust" to apply the doctrine of res judicata. First, nothing in the record suggests any unfairness to Petitioners. Petitioners were well aware of the statutory provisions for making constitutional arguments before the administrative hearing officer and on appeal to the district court. In fact, Petitioners raised constitutional issues in both the administrative proceedings and before the First District Court of Appeal. Albrecht v. Dept. of Environmental Regulation, 353 So.2d 883 (Fla. 1st DCA 1977) cert. denied, 359 So.2d 1210 (Fla. 1978).

Secondly, it would be clearly unjust to require the state to expend its limited resources on interminable litigation by allowing Petitioners to split their defenses and present them in successive actions growing out of the same transaction. 32 Fla. Jur. 2d Judgments and Decrees §122. "There must be an end to litigation, and where a party has an opportunity to present his defense and neglects to do so, he must take the consequences." Id. There is nothing to prevent Petitioners from filing a new permit application; only one environmentally damaging use of the property has been rejected. Respondent suggests that it was not unjust to require Key Haven to submit a new application for its 185 acre project, 7 FLW at 740, and that it is also not unjust to require Petitioners to do the same on their 2.3 acre project. The proceedings on this present application should, however, be concluded. See Id.

Lastly, Petitioners assert that the state is somehow "unjustly enriched" by the denial of this permit. There is absolutely no foundation in the record for such a claim. in fact, the hearing officer found that Petitioners' project would destroy a productive mangrove system and that it would be contrary to the public interest. The record thus reflects the prevention of a serious public harm rather than the conferring of a benefit which may require compensation. Estuary Properties, 399 So.2d at 1382.

CONCLUSION

The facts of this case provide ample justification for application of the doctrine of res judicata. Petitioners have had a full 120.57 hearing on their permit application and have had review of the permit denial before the Board of Trustees of the Internal Improvement Trust Fund and the Department of Environmental Regulation. Petitioners have had direct review pursuant to Section 120.68. This court denied Certiorari. Not satisfied, Petitioners then filed an action in circuit court alleging an unconstitutional taking as a result of the permit denial. The circuit court entered judgment on the pleadings and the district court affirmed.

Petitioners have had their day in court on all issues arising from the denial of their dredge and fill permit. They could have asserted that the denial of the permit, whether "proper" or "improper" amounted to a taking without just compensation when they were before the First District Court of Appeal on direct review. The decision of the District Court below must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the persons listed below on this 4th day of March 1983:

LEE S. DAMSKER, ESQUIRE
Gordon and Maney, P.A.
2919 First Florida Tower
Tampa, Florida 33602

HENRY DEAN, ESQUIRE
Department of Natural
Resources, Suite 1003
Commonwealth Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32303

PETER J. WINDERS, ESQUIRE
Post Office Box 3239
Tampa, Florida 33601

Mary F. Smallwood
MARY F. SMALLWOOD
General Counsel