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FILED

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DISTRICT COURT APPEAL NO. 81-2081

APR 4 1983

SID J. WHITE
CLERK SUPREME COURT
By _____ Chief Deputy Clerk

AZOR J. EVERTON, JR.,

Appellant,

vs.

MARION WILLARD, Individually and d/b/a WILLARD'S PAINTING COMPANY, PINELLAS COUNTY SHERIFF'S DEPARTMENT and PINELLAS COUNTY,

Appellees,

and

ANTON TRINKO, etc., et al.,

Appellants,

vs.

MARION R. WILLARD, Individually and d/b/a WILLARD PAINTING, STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, DEPUTY C.W. PARKER, PINELLAS COUNTY SHERIFF'S DEPARTMENT and PINELLAS COUNTY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, SECOND DISTRICT

PETITIONERS, AZOR J. EVERTON, JR.
and
ANTON TRINKO, etc., et al.

AMENDED BRIEF ON JURISDICTION

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CITATION OF AUTHORITIES

QUESTIONS PRESENTED

I. WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH COMMERCIAL CARRIER CORP. V. INDIAN RIVER COUNTY, 371 So.2d 1010 (Fla. 1979), AND ITS PROGENY, HOLDING THAT ONLY THOSE DISCRETIONARY DECISIONS WHICH ARE "PLANNING" AS OPPOSED TO "OPERATIONAL" IN NATURE ARE PROTECTED BY THE SHIELD OF SOVEREIGN IMMUNITY.

II. WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

PETITIONER'S BRIEF ON JURISDICTION

A. STATEMENT OF THE CASE AND FACTS.

The Plaintiffs/Petitioners, AZOR J. EVERTON, JR. and ANTON TRINKO, etc., et al., seek to have reviewed a decision of the District Court of Appeal, Second District, dated and filed on January 5, 1983. A Petition for rehearing was denied on February 21, 1983. The Petitioners were the original Plaintiffs below and the Appellants before the District Court of Appeal. The Respondents, DEPUTY C.W. PARKER, the PINELLAS COUNTY SHERIFF'S DEPARTMENT, and PINELLAS COUNTY, were the original Defendants in the trial forum and were the Appellees before the District Court of Appeal. This was an appeal by the Petitioners from a Final Judgment entered by the Circuit Court in and for Pinellas County on a Final Order granting with prejudice the Motion to Dismiss filed by Deputy C.W. Parker and Pinellas County Sheriff's Department. The District Court of Appeal, Second District, affirmed the dismissal with prejudice in a 19 page opinion and subsequently denied a rehearing.

In this brief, the parties will be referred to by their names and by the positions they occupied before this Honorable Court. The symbol "R" will be used for reference to the record of proceedings sought to be reviewed.

The facts accepted for purposes of the Motion to Dismiss are that Azor Everton was seriously injured and Anton Trinko's daughter, Renee, was killed in a two car collision in Pinellas County when Defendant, Marion Willard ran a red light. Approxi-

mately 10 to 20 minutes prior to the accident, Pinellas County Sheriff's Deputy C.W. Parker stopped Willard and issued him a citation for an improper u-turn at another intersection. During the stop, Deputy Parker knew, by his own observations and by Willard's own admissions, that Willard had been drinking. However, Deputy Parker did not require Willard to perform a field sobriety test in order to determine the extent of his intoxication, but instead allowed Willard to drive away even though a friend who had been following Willard stopped and offered to drive Willard home. The Petitioners alleged that Deputy Parker was negligent in his failure to administer field sobriety tests or to otherwise determine whether Willard was intoxicated to the extent that his normal faculties were impaired after having seen Willard drive erratically, stagger, smell of alcohol and admit to having consumed alcoholic beverages. The Petitioners further alleged that Deputy Parker's negligent failure to properly investigate under the particular facts of the instant situation resulted in the subsequent collision causing the death of Renee Trinko and the injuries to Azor Everton.

The Respondents brought a Motion to Dismiss asserting that Deputy Parker was engaged in a "discretionary" function and therefore, his alleged negligence was protected by the doctrine of sovereign immunity. The trial court agreed, granted the Motion to Dismiss with prejudice, and the Second District Court of Appeal affirmed and denied rehearing.

It is important to note that the Petitioners' allegations were misconstrued by the Second District Court of Appeals, which addressed its entire opinion to the deputy's negligent failure to arrest. The Petitioners do not challenge the deputy's authority to decide whether an arrest should be made, but do challenge the deputy's failure to gather facts which would put him in a position to make that decision. Petitioners therefore do not complain of the deputy's failure to arrest, but rather they challenge his failure to conduct an investigation which would have been conducted by a reasonably prudent police officer under the same set of circumstances. Petitioners believe that a proper investigation would have made further action necessary, thereby avoiding the fatal accident which subsequently occurred.

DISCUSSION

I. THE DECISION HEREIN EXPRESSLY AND DIRECTLY CONFLICTS WITH COMMERICAL CARRIER AND ITS PROGENY BY HOLDING THAT ALTHOUGH DEPUTY PARKER'S DECISIONS WERE CLEARLY OPERATIONAL IN NATURE, THEY ALSO INVOLVED A BASIC GOVERNMENTAL POLICY AND THE IMPLEMENTATION THEREOF, AND HENCE WERE STILL PROTECTED BY THE SHIELD OF SOVEREIGN IMMUNITY.

A. REQUIREMENTS FOR EXPRESS AND DIRECT CONFLICT.

Although Article V, Section 3(b)(3) of the Florida Constitution requires express and direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law for a decision to be within the realm of decisions over which the Supreme Court may exercise its discre-

tionary jurisdiction, it is not necessary that the decision with which the conflict exists be explicitly identified. In Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981), the Supreme Court was faced with an opinion which discussed the legal principles applied by the District Court, but did not mention any specific decision with which it disagreed. The Supreme Court held that it is not necessary that a District Court explicitly identify conflicting District Court or Supreme Court decisions in order to create an express conflict. Rather, the discussion of legal principles which the Court applies is a sufficient basis for conflict review. Id. at 1342.

The Florida Supreme Court further defined the basis for conflict jurisdiction in Mancini v. State, 312 So.2d 732 (Fla. 1975). There the court held that its jurisdiction cannot be invoked merely because it disagrees with the decision of the District Court, nor because it might have made a different factual determination. Rather, the court's jurisdiction to review decisions based upon conflict is invoked by (1) the announcement of the rule of law which conflicts with the rule previously announced by the Supreme Court or another district court or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as the prior case. Id. at 733.

Therefore, the instant decision is reviewable on the basis of conflict even though the Second District Court of Appeals did not point out a particular decision with which its opinion

disagreed. Rather, the case at bar is within the Supreme Court's disretionary jurisdiction because the District Court announced the rule of law which conflicts with Commercial Carrier and its progeny. Further, the decision of the Second District Court of Appeals is in conflict with Weissberg v. City of Miami Beach, 383 So.2d 1158 (Fla. 3rd DCA 1980), in that while both cases involved neglect of duty by police officers, the Third DCA found that sovereign immunity did not apply in Weissberg, while the Second DCA found to the contrary herein. The constitutional requirement for an express and direct conflict has therefore been met in the case at bar.

B. THE CONFLICT WITH COMMERCIAL CARRIER and its progeny.

The question of when sovereign immunity should apply is one which has spawned a multitude of litigation over the years. In Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979), the Florida Supreme Court attempted to define those activities which are protected by sovereign immunity as planning functions as opposed to operational functions, which are reviewable. In so doing the court abolished the special duty-general duty doctrine of Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). The court then adopted the analysis set forth in Evangelical United Brethren Church v. State, 67 Wash. 2nd 246, 407 P.2nd 440 (1965), as a preliminary test to be followed in order to determine whether a particular function involves planning as opposed to operational activities. Further, the court cited with approval Johnson v. State, 69 Cal. 2nd 782, 73

Cal. Rptr. 240, 447 P.2nd 352 (1968), in stating that planning functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy. The Court also noted that other factors should be considered, including the importance to the public of the function involved, the extent to which government liability might impair exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.

In its extensive analysis of the facts herein, the Second District Court of Appeals correctly determined that Deputy Parker's activities were clearly operational in nature. But instead of finding that sovereign immunity did not apply because the Deputy's actions were operational, the court carved out an exception to the rule that operational activities are not protected by sovereign immunity. This exception is one that has never before been suggested or recognized by any court of this state.

It was the opinion of the Second District Court of Appeals that merely because an activity is "operational", it should not necessarily be removed from the "category of governmental activity which involves broad policy or planning decisions." The court therefore held that although Deputy Parker's activities were clearly operational, they involved basic governmental policy and the implementation thereof and therefore were protected by sovereign immunity even though they were operational functions.

If such reasoning is to be relied upon in every case involving neglect of duty by a police officer, it follows that everything that a police officer does would be protected by the blanket of sovereign immunity. This is clearly not what the legislature intended when it waived sovereign immunity on a broad basis.

The Petitioners' argument that the reasoning found in Weissberg v. City of Miami, supra, should be followed in deciding the instant matter was never addressed by the opinion filed herein. In Weissberg, a police officer was dispatched to direct traffic around a work site. An accident occurred while the officer was resting in the shade on the side of the road. Judge Nesbitt's opinion rejected the city's contention that the police officer was engaged in a planning function by stating that there is "no difference between malfunctioning traffic devices and an inattentive police officer whose failure to regulate and direct the flow of traffic may have led to this accident...both are simply operational level activities." 383 So.2d at 1159. Under the reasoning of the Second District Court of Appeals as announced herein, the City of Miami Beach's argument for the application of sovereign immunity would have been upheld because although the police officer's activities were clearly operational, they also involved basic governmental policy and the implementation thereof. In fact, every decision that a police officer makes while on duty involves basic governmental policy the implementation thereof. Therefore, under the reasoning of the

Second District Court of Appeals, every decision that a police officer makes would be protected by the shield of sovereign immunity.

All of the decisions on sovereign immunity following Commercial Carrier have been based upon the distinction between planning and operational type decisions. Even the recent decisions handed down by the Florida Supreme Court are based upon that distinction. For the Second District Court of Appeals to announce its own rule that an activity may be immune even though it is operational in nature, is contrary to the existing law of sovereign immunity in Florida. Justice Sundberg, who wrote the Commercial Carrier decision stated in his dissent in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1981), that "only planning level functions, requiring basic policy decisions, were intended to be exempt from the legislature's waiver of governmental immunity, not all discretionary acts carried out by government." Judicial restraint should therefore be exercised only when the questioned decision rises to the level of "basic policy decisions."

In deciding not to require Mr. Willard to perform a field sobriety test, Deputy Parker was clearly not making a basic policy decision. Rather, the basic policies had already been made by the legislature and implemented by the Sheriff's Department. Therefore, Deputy Parker's actions in carrying out his orders were operational functions, and should not be deemed within the protection afforded by sovereign immunity.

C. THE CONFUSION WHICH WILL BE CREATED BY THE CONFLICT INVOLVED HEREIN JUSTIFIES THE EXERCISE OF DISCRETIONARY JURISDICTION.

Where irreconcilable statements of law will inevitably cause uncertainty and confusion to the bar, the obligation to clarify that law rests upon the Supreme Court through its exercise of discretionary jurisdiction. It is just such areas of uncertainty in the law as developed by inconsistent opinions that makes necessary the Court's conflict jurisdiction. When the conflict is of such degree and in an area of such importance as is here presented, the Supreme Court should take jurisdiction and attempt to express the law in such clear language as to discourage further litigation. Sroczyk v. Fritz, 220 So.2d 908 (Fla. 1969).

Prior to the Second District Court's opinion herein, the law of Florida was to the effect that planning level decisions are protected by sovereign immunity and operational level decisions are not. Now that the court below has carved out an exception to the planning versus operational dichotomy, the law of sovereign immunity in Florida is as unclear as ever. To discourage further litigation and to provide clarity and consistency to the law of sovereign immunity, this Honorable Court should exercise its discretionary jurisdiction and reverse the decision of the Second District Court of Appeals.

II. THE DECISION IN THE INSTANT CASE EXPRESSLY AFFECTS CONSTITUTIONAL OR STATE OFFICERS WHO MAY BE ENGAGED IN INVESTIGATORY ACTIVITIES RELATED TO PROTECTING THE PUBLIC FROM KNOWN DANGERS.

The instant case affects constitutional or state officers in that it involved a deputy sheriff who was acting in furtherance of the business of his employer, the County Sheriff's Department as well as the county itself. The county is obviously a political subdivision of the state, and the Sheriff is a county officer pursuant to Article VIII, Section 1(d), and can appoint deputies pursuant to Florida Statute Section 30.07. It cannot be disputed that the decision herein will affect every law enforcement officer in his line of duty. The important effect of this decision upon the conduct of law enforcement officers cannot be understated. It is therefore a decision which is so vitally important to the law enforcement function that it is truly ripe for review by this Honorable Court.

CONCLUSION

The decision in the instant case is erroneous and Commercial Carrier and Weissberg should be approved as the controlling law of Florida.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing instrument has been furnished by U.S. Mail to Robert K. Hayden, 800 Court Street, Clearwater, Florida 33516; Andrew J. Rodnite, 315 Court Street, Clearwater, Florida 33516; James B. Thompson, P.O. Box 210, St. Petersburg, Florida 33731 and Rick A. Mattson, P.O. Box 14373, St. Petersburg, Florida 33733, this 1st day of April, 1983.

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