IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 9 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

H. LEE MOFFITT, as Speaker of the
Florida House of Representatives,
and CURTIS PETERSON, as President
of the Florida Senate,

Petitioners,

vs. Case No. 64,882

HONORABLE BEN C. WILLIS, a Judge
of the Circuit Court, Second Judicial
Circuit of Florida,

Respondent,

and

THE MIAMI HERALD PUBLISHING COMPANY,
a division of KNIGHT-RIDDER NEWSPAPERS,
INC., a Florida corporation, THE
TIMES PUBLISHING COMPANY, a Florida
corporation, and SENTINEL COMMUNICATIONS
COMPANY, a Delaware corporation,

Intervenors.

_______________________________________/

REPLY OF PETITIONERS TO RESPONSE OF RESPONDENT CIRCUIT COURT JUDGE AND RESPONSE OF INTERVENORS

The Florida House of Representatives, on behalf of its Speaker, H. Lee Moffitt, and the Florida Senate, on behalf of its President, Curtis Peterson, submit the following Reply to the Response of the Respondent Circuit Court Judge and the Response of the Intervenors.

On February 17, 1984 this Court issued its Order determining that the Petition demonstrated a preliminary basis for relief and directing the Respondent, the Honorable Ben C. Willis, to show cause on or before February 27, 1984, why the Petition For Writ of Prohibition filed herein should not be granted. Subsequently, various motions for intervention and extension of time were filed and considered, and on March 2, 1984, Respondent filed a Response agreeing to abide by the decision of this Court. Additionally, Intervenors, representing three newspaper publishing corporations, filed a Response to the Petition for Writ of Prohibition. Neither of these pleadings

directly responds to this Court's Order to Show Cause, nor do they adequately respond to the issues raised by the Petition, and Petitioners submit that under these circumstances, a final Writ of Prohibition should issue.

SEPARATION OF POWERS

The fundamental issue raised in the Petition for Writ of Prohibition is the authority of the Respondent Circuit Court Judge to determine and declare the meaning and application of rules and procedures of the Florida Senate and the Florida House of Representatives. At issue is not any policy commitment of the State of Florida, nor the balancing of compelling interests of the state, but the authority of each house of the Legislature, under the doctrine of separation of powers set forth in Article II, Section 3, of the Florida Constitution, to determine its own internal procedure.

It is particularly significant that Article III, Section 4(a), gives to each house the power to "determine" its own rules of procedure. As historically interpreted by this court, this provision commits to each house the power and prerogative not only to adopt, but also to interpret, enforce, waive, suspend, and (so long as no constitutional requirement for enacting laws is ignored) to disregard such rules of procedure. As is stated in 82 C.J.S., Statutes, s. 11, p. 31, when a legislative house has the constitutional right to make its own rules, "it is the judge of such rules." (emphasis added) This Court has held not only that each house is the judge of its own rules, but that each house may employ whatever procedures it deems necessary or desirable so long as constitutional requirements for the enacting of laws are not violated.

In State ex rel. X-Cel Stores, Inc. v. Lee, 122 Fla. 685, 166 So. 568, 571 (Fla. 1936), this Court upheld the Legislature's creation and adoption of the conference committee format, including the procedure of adopting a conference committee report in lieu of a specific House or Senate bill, stating that former

Article III, Section 6, 1885 Florida Constitution, the predecessor and equivalent of current Article II, Section 4(a):

> . . . gives the Legislature full power to adopt and enforce its own rules of legislative procedure. So long as the legislative rules are in harmony with the constitutional plan for making laws, proceedings had in conformity thereto are not invalid.

The Court also stated at 166 So. 571, regarding legislative compliance with constitutional title requirements, that:

> . . . it is no objection how, or by what method of parliamentary procedure, the title to such "law enacted by the Legislature" was finally agreed upon, or arrived at, in the course of its legislative history prior to the time the act left the hands of the Legislature . . . .

All that is necessary, the Court stated, is that the law as finally enacted by the Legislature be in conformity with constitutional requirements, and in State ex rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270, 281 (Fla. 1935), this Court stated that "with mere violations of parliamentary rules in legislative proceedings, the courts have nothing to do, since under section 6 of article 3 of the Constitution the Legislature determines upon and enforces the rules of its own proceedings . . . ." (emphasis added)

In Jinkins v. Entzminger, 102 Fla. 167, 135 So. 785 (Fla. 1931), and Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, (Fla. 1912), this Court held that it was bound by the Legislature's reconsideration of a proposed constitutional amendment. In Crawford, at 59 So. 968, this Court emphasized the broad power of each house to interpret and enforce (determine) its own procedures, which goes far beyond the power to merely adopt formal rules.

> The provision that each House "shall determine the rules of its proceedings" does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; when exercised by a majority of a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution. (emphasis added)

It should be clear, then, that the case below concerns the exercise of wholly legislative power and prerogative by each house of the Legislature and is accordingly a non-justiciable political matter beyond the jurisdiction of the courts, as are the defendants in their respective, official legislative capacities.

As set forth in the Petition for Writ of Prohibition, the power of the judiciary with respect to exercise of legislative prerogative should be to measure the constitutional validity of legislative enactments. General Motors Acceptance Corp. v. State, 11 So.2d 482, 485 (Fla. 1943); Carlton v. Mathews, 103 Fla. 301, 137 So. 875, 847-848 (Fla. 1931). This principle, unchanged since Marbury v. Madison, 5 U. S. (1 Cranch) 137 (1803), is fundamental to the issue of separation of powers, as set forth in this Court's ruling in Brewer v. Gray, 86. So.2d 799, 703 (Fla. 1956):

> The Legislature is a coordinate branch of the government and even though the performance of a duty is required by the Constitution, the courts, being another coordinate branch of the government, are not authorized to compel the Legislature to exercise a purely legislative prerogative. We are not here intending to hold that once the legislative discretion is exercised and crystallized into a statute, the courts do not have the power to examine the statute and measure the validity by the prescriptions of organic law. (emphasis added)

In accord is this Court's statement in Dade County Classroom Teachers Ass'n v. Legislature, 269 So.2d 684, 686 (Fla. 1972), that "it is too well settled to need any citation of authority that the judiciary cannot compel the Legislature to exercise a purely legislative prerogative." (emphasis added)

In McPherson v. Flynn, 397 So.2d 665 (Fla. 1981), this Court held that, under the doctrine of separation of powers, it lacked jurisdiction to inquire into the qualifications of a duly elected member of the House of Representatives pursuant to Article III, Section 2, Florida Constitution, which provides in part that "[e]ach house shall be the sole judge of the qualifications, elections, and returns of its members . . . ."

Citing as precedent two earlier cases which had reached the same result under the 1885 Constitution's equivalent section (which did not even use the term "sole") this Court held at 667:

> The courts in the state are without jurisdiction to determine the right of one who has been elected to legislative office. English v. Bryant, 152 So.2d 167 (Fla. 1963); State ex rel. Rigby v. Junkin, 146 Fla. 347, 1 So.2d 177 (1941). . . . As the United States Supreme Court has pointed out under the parallel articles of the federal constitution, the doctrine of separation of powers requires that the judiciary refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution.(emphasis added)

The Court further held, at 668 that "[t]he litigation in this case unavoidably involves a nonjusticiable political question and is properly left to the prerogative of the legislature." (emphasis added) In Baker v. Carr, 369 U. S. 186, 217, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962), the United States Supreme Court similarly stated that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." (emphasis added)

This Court's statements in McPherson v. Flynn, supra, conform to the earlier statement of the court in Brewer v. Gray, quoted above, that the Legislature is a "coordinate branch" of government and that the courts, as another "coordinate branch," are without authority to compel the Legislature's exercise of purely legislative prerogative. In the words of the Court in McPherson, it seems inconceivable that any matter could be more "committed to a coordinate branch of government by the demonstrable text of the constitution" than is the matter of internal legislative procedures (e.g., meetings of individual legislators) committed to the legislative branch by Article III, Section 4(a), Florida Constitution.

The case at hand does not present a constitutional challenge to a statute. Indeed, there is no allegation that any act passing the 1981 Legislature was not ultimately debated and

voted on by the membership of each respective house in open session. Instead, the action seeks to have the judiciary depart from its long-established role of statutory review, and to intervene in the internal procedures of the Florida Senate and Florida House of Representatives. In effect, the action seeks to have the courts assume the constitutional power to determine the rules of each house of the Legislature, which power has been committed by the demonstrable text of the Florida Constitution to the legislative branch.

None of the cases cited by Intervenors remotely suggests this Court's endorsement of such a departure. In Florida Senate v. Graham, 412 So.2d 360 (Fla. 1982), this Court in an original proceeding considered the validity of the Governor's call for a Special Session of the Legislature on state legislative apportionment, and found that it had jurisdiction because of this Court's unique role in the apportionment process pursuant to Article III, Section 16(b), (c), and (f) of the Florida Constitution. Four other cases cited by Intervenors dealt with the question of whether persons subpoenaed under the investigative power of the Legislature were required to comply with their subpoenas. Forbes v. Earle, 298 So.2d 1 (Fla. 1974); Johnson v. McDonald, 269 So.2d 682 (Fla. 1972); Johnston v. Gallen, 217 So.2d 319 (Fla. 1969); and Hagaman v. Andrews, 232 So.2d 1 (Fla. 1970). Finally Intervenors cite Girardeau v. State, 403 So.2d 513 (Fla. 1st DCA 1981) in which a member of the House of Representatives unsuccessfully claimed immunity from testifying before a grand jury in a criminal matter. Inasmuch as Petitioners in the case before Respondent do not claim an immunity from testifying with respect to a criminal matter, references to Girardeau are irrelevant to the issues before this Court. None of these cases is comparable to the circumstances here, and not one of these decisions suggests receding from the long line of decisions of this Court upholding the doctrine of separation of powers.

MOOTNESS

As noted in the record, the complaint below referred to one law that, allegedly, was adopted after secret meetings of "committees" of the Legislature, i.e., the 1981 General Appropriations Act, which has subsequently expired. The Petition alleged, and at page 19 of the response, Intervenors agree, that exceptions to the mootness doctrine should be made only in those cases that are capable of repetition, yet evading review. Clearly, the constitutionality of any enactment of the Legislature is subject to judicial review, and none of the cases cited by Intervenors holds otherwise.

JURISDICTION OVER THE PARTIES

As set forth in the petition filed herein, the United States Supreme Court has held that state legislators should be free from compulsory process and civil liability for legislative actions on the basis of common law immunity. Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951). It should be emphasized that in Tenney the court found that, regardless of the presence or absence of any constitutional immunity, state legislators enjoyed a common law immunity from compulsory process or civil liability for legislative acts. The Tenney Court discussed various state and federal constitutional provisions; however, the Court clearly held that the constitutional provisions are merely a reflection of the common law immunity, not the basis of the immunity or a codification of it. The Court explained its view of the common law immunity in language particularly applicable to the matters before this Court:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader . . . . 95 L.Ed. at 1027.

If there were any doubt that the immunity does not depend on any specific constitutional language, that doubt was erased in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 59 L.Ed 2d 401, 99 S.Ct. 1171 (1979). No constitution was involved in that case: the "legislators" to whom the immunity applied were appointed members of a two-state authority that exercised legislative powers.

Moreover, it has been established that the immunity applies equally to actions for declaratory and injunctive relief, as well as actions for damages. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 64 L.Ed 2d 641, 100 S.Ct. 1967 (1980). In extending the Tenney doctrine the court stated:

> ...we did not distinguish (in Tenney) between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces (legislators) to divert their time, energy, and attention from their legislative tasks to defend the litigation." 64 L.Ed. 2d at 654, citation omitted.

THE DECLARATORY JUDGMENT ACT

The Response of Intervenors merely restates certain provisions of Chapter 86, Florida Statutes. In this respect, Petitioners would supplement prior citation of authority and rely on this Court's decision in Askew v. City of Ocala, 348 So.2d 308 (Fla. 1977), where it was held that declaratory relief was not appropriate to adjudicate potential "sunshine" disputes concerning a city council's future meetings with its attorneys.

REMEDIES AVAILABLE TO PETITIONERS

Intervenors in their Response have further objected to this Court's exercise of jurisdiction in this matter. Initially, it should be observed that Article V, Section 3(b)(7) of the Florida Constitution provides this Court with the discretion to "issue writs of prohibition to all courts . . ." There is no limitation section in the Constitution or in Fla. R. App. P. 9.030(a)(3)

which inhibits this Court's exercise of jurisdiction, and indeed, the Constitution specifically provides that such writs may be issued to "all courts."

In a case with compelling parallels to the instant case, this Court in State ex rel. McKenzie v. Willis, 310 So.2d 1 (1974) acted upon a similar suggestion for Writ of Prohibition.

In that case the underlying circuit court actions under attack were brought by Chemical Tank Lines against McKenzie Tank Lines, the latter of which had been issued temporary operating authority by the Public Service Commission under emergency, short-circuited conditions. In the Leon County case, the trial court had declined to issue a temporary restraining order against the Public Service Commission, but retained jurisdiction to consider permanent injunctive relief. In the Hillsborough County case, the trial court issued a temporary restraining order.

This Court issued a Rule Nisi in Prohibition to command each circuit judge from exercising any further jurisdiction, or to show cause why the relators' suggestion should not be granted.

Each circuit court, through counsel, filed a detailed response, addressing the allegations in the petition. The trial court judges offered several affirmative defenses on the merits; basically that the temporary operating authority that the Public Service Commission had issued to McKenzie Tank Lines was, from the moment of its issuance, void, and stated the reasons why.

This Court held that the controversies involved in the two suits "do not lie within the jurisdiction of the Circuit Courts," and that "Both of these suits improperly trench upon the jurisdiction of the Public Service Commission."

In the McKenzie case, the Public Service Commission had jurisdiction "merely" by statute. In the instant case, it is the Constitution that grants the power to the Legislature to determine its own rules.

In precluding the Circuit Courts' jurisdiction, this Court stressed that the controversies resolvable by the Public Service Commission were subject to review by this Court. So is it here.

Any law enacted by the Legislature that any person with standing alleges is unconstitutional can, in a proper case, likewise be scrutinized in an appellate court of this state.

Petitioners submit that Respondent has acted in excess of jurisdiction and this is an appropriate case for the issuance of the Writ of Prohibition. Moreover, the ancient writ of prohibition has been said to be as old as the common law itself. One commentator notes that Glanville's Twelfth Century treatise on English law deals with the writ. J. HIGH, EXTRAORDINARY LEGAL REMEDIES 707 (3d Ed., 1896). In what was apparently the first reported Florida case concerning the writ, Sherlock v. Mayor and City of Jacksonville, 17 Fla. 93 (1879), this Court described the writ as follows:

> The writ of prohibition is a writ of the common law, originally issuing only out of the court of the King's Bench, a prerogative writ, but was sometimes issued out of the court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to some other. (3 Bl. Comm., 112.) This is the elementary definition of the office of the writ....The Constitution of this State expressly gives the Supreme Court jurisdiction to issue this writ. It does not, in terms, attempt to define or direct the purposes for which the writ may be used or applied. The definition and purpose of the writ must be sought for in the archives of the common law, to which it owes its origin....When, therefore, an inferior court assumes to exercise a power which is beyond its jurisdiction, or to proceed in a manner not warranted by law, the writ may be resorted to for redress to prohibit the threatened intrusion. 17 Fla. at 95-96.

There is no suggestion, either in Sherlock or in any subsequent Florida case found in the course of Petitioners' research, that the power of this Court to issue its writ does not extend to any inferior court. No such limitation existed at common law. As noted in J. SHORTT, INFORMATION MANDAMUS AND PROHIBITION 477 (1st Am. Ed., F. Heard, 1888):

> In the opinion of Lord Coke, there was no Court which might not be restrained by prohibition. "We here in this court," said he, in one case "may prohibit any court whatsoever, if they transgress and exceed their jurisdiction. And there is not any court in Westminster Hall but may be by us here prohibited, if they exceed their jurisdictions; and all this is clear without any question."

Thus, this Court's inherent and constitutional prohibition power extends to any lower court. Intervenors fail to recognize that Petitioners' have not invoked the jurisdiction of this Court on appeal or as a substitute for an appeal, but rather they are seeking to prohibit an excess of jurisdiction by the Circuit Court over matters specifically committed by the Florida Constitution to the Legislature. Under applicable law, therefore, the petition was not filed in the wrong court, nor was it filed as a substitute for other remedies.

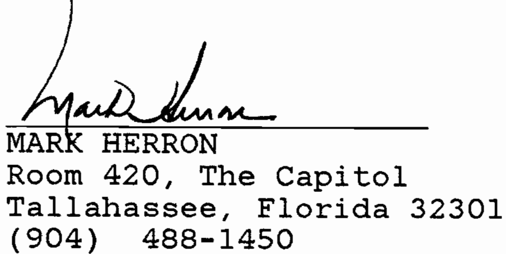
CONCLUSION

Petitioners are here asking this Court to issue its Writ of Prohibition to respondent to restrain an excess of jurisdiction over matters for which the Legislature by demonstrable text of the Constitution has exclusive responsibility. This Court has consistently held that the doctrine of separation of powers requires that the judiciary refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution.

Moreover, the Petitioners suggest that the Respondent has acted in excess of jurisdiction under the principles governing mootness, jurisdiction over the parties, and the declaratory judgment act as detailed in the Petition and as supplemented in this Reply. Therefore, it is respectfully requested that this Court issue a Writ of Prohibition to the Respondent, The Honorable Ben C. Willis, a Judge of the Circuit Court, Second

Judicial Circuit of Florida, to refrain from actions in excess of jurisdiction in and to dismiss the civil action entitled <u>The Miami Herald Publishing Company v. Moffitt</u>, Case No. 82-84 (Fla. 2nd Cir.).

Respectfully Submitted,



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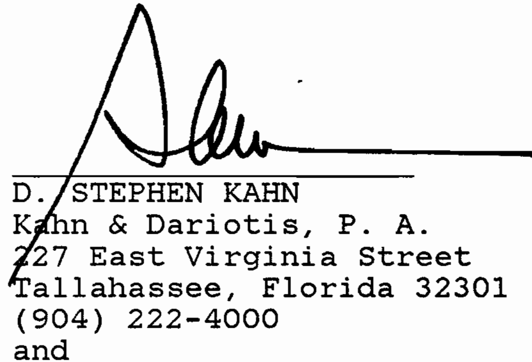

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply of Petitioners to the Response of Respondent Circuit Court Judge and Response of Intervenors was served by hand this 9th day of March 1984 upon the following:

The Honorable Ben C. Willis
Circuit Judge, Second Judicial Circuit
Leon County Courthouse
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Further, I HEREBY CERTIFY that a true copy of the foregoing Reply of Petitioners to the Response of the Respondent Circuit Court Judge and Response of Intervenors has been forwarded by Purolator Courier this 9th day of March to the following:

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