IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NUMBER 65,100
	*	
PERRY LAMAR JENKINS,	*	
	*	
Appellee.	*	
	*	

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the two-volume Record before the District Court will be by "Vol. I" and "Vol. II," respectively, followed by the appropriate page number. References to the Opinion of the District Court, at pages 1 through 3 of the Record before this Court, will be by "Op.," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

At issue in the instant appeal, is the District Court's unanimous affirmance of a Circuit Court Order (Vol. I, p. 25) granting the Appellee's Motion to Dismiss four counts of a 31-count Amended Indictment. (Vol. I, pp. 1-17). In that Order, Counts Two, Nine, Ten, and Fifteen of the Amended Indictment were dismissed on the ground that the statutory subsection charged in those counts, §839.25(1)(a), Fla.Stat. (1981), is unconstitutional. (Vol. I, p. 25).

Those particular counts of the Indictment are each set forth verbatim in the Initial Brief of Appellant at pages 3-5. Each of them charged that the Appellee, on different given dates (Counts Two and Eleven charged dates in 1978, Count Ten charged 1981, and Count Fifteen charged a date in 1976), did:

> refrain from performing a duty imposed upon him by law in that [the Appellee] failed to assess for back taxes [a certain piece of real estate, different in each count] as required by Florida Statute 193.092 and/or §12 D-8.06, Florida Administrative Code, contrary to Florida Statute 839.25 . . . .

(Vol. I, pp. 2, 6, 7, 9)(emphasis added). A subsection of the statute charged, §839.25, does indeed purport to render felonious "knowingly refraining, or causing another to refrain, from performing a duty imposed upon [a 'public servant'] by law." §839.25(1)(a), Fla.Stat. (1981).

After hearing a long and detailed argument,[1/] the trial court ruled that the particular subsection at issue was unconstitutional, and it therefore granted the Motion to Dismiss the appropriate counts of the Indictment. The trial court's written Order, dictated into the Record at the hearing (Vol. II, p. 38), read as follows:

> On October 3, 1983, in the Suwannee County Courtroom the Defendant brought on for hearing his Motion to Dismiss.
>
> After extensive arguments were heard and some preliminary dispositions made, the Court undertook further hearing and disposition of the defendants Motion to Dismiss the Indictment as to Counts 2, 9, 10, & 15 based on the asserted grounds of unconstitutionality of Florida Statute 839.25(1)(a). Upon arguments heard and cases cited including the case of State vs. DeLeo, Florida 1978 356 S2d 306, by the Defendant and the case of State of Florida vs Riley, Florida 1980, 381 S2d 1359 cited by the State. The Court upon consideration hereby
>
> ADJUDGES said Statute 839.25(1)(a) to be unconstitutional and grants the defendants Motion to Dismiss Counts 2, 9, 10, and 15.
>
> DONE AND ORDERED in open Court orally on October 3, 1983 and this written order confirming same entered this 3rd day of October, 1983.

(Vol. I, p. 25).

[1/] Hearing was held October 3, 1983 (Vol. II, p. 1), after the Appellant advised the trial court that it was ready to "take up . . . the constitutionality" of the questioned statute. Unfortunately, however, the Appellant has not seen fit to include in the Record that portion of the transcript containing the arguments it made in the trial court, in defense of the statutory subsection at issue here. (See Vol. II, p. 27, reflecting that "Whereupon [that] portion of the proceeding was transcribed as an exerpt and filed under separate cover"). Nevertheless, little was lost inasmuch as the argument there focused on the instruction of just two appellate decisions, State v. Riley, 356 So.2d 306 (Fla. 1978), and State v. DeLeo, 381 So.2d 1359 (Fla. 1980), both of which concerned the constitutionality of the other two subsections of the statute in question and both of which were cited by the trial court (Vol. I, p. 25) and the District Court (Op. 2-3) as enunciating the controlling law.

The State appealed to the District Court of Appeal, First District, and that court, in a 3-0 decision, affirmed, without reservation, the trial court's Order. (Op. 1-3). In so doing, the District Court found that subsection (a) of the statute "is as vague and open to arbitrary application" as that contained in the since-repealed subsection (c) of the statute, already stricken by this Court in State v. DeLeo, 356 So.2d 306 (Fla. 1978). (Op. 3).

ARGUMENT

THE DISTRICT COURT CORRECTLY AFFIRMED THE TRIAL COURT FINDING THAT SECTION 839.25(1)(a), FLORIDA STATUTES (1981), IS UNCONSTITUTIONAL.

Prior to the decision of the Supreme Court of Florida in State v. DeLeo, 356 So.2d 306 (Fla. 1978)(declaring §839.25(1)(c) unconstitutionally vague and subject to arbitrary application), the entire "official misconduct" statute read as follows:

> 839.25 Official Misconduct
>
> (1) "Official misconduct" means the commission of one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:
>
> (a) Knowingly refraining, or causing another to refrain, from performing a duty imposed upon him by law; or
>
> (b) Knowingly falsifying, or causing another to falsify, any official record or official document; or
>
> (c) Knowingly violating or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.
>
> (2) "Corrupt" means done with knowledge that act is wrongful and with improper motives.
>
> (3) Official misconduct under this section is a felony of the third degree, punishable as provided in §775.082; §775.083, or §775.084.

§839.25, Fla.Stat. (1977)(emphasis added). As indicated above, any question as to the constitutionality of two of the three operative subsections of this statute [(b) and (c)] -- as against such a challenge as that brought here -- has been already determined. In DeLeo, subsection (c) of the statute was declared unconstitutional, 356 So.2d at 308, cited with approval in Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979); while in State v. Riley, 381 So.2d 1359 (Fla. 1980), this Court found no such infirmity with respect to subsection (b).[2/] In the meantime, the above-quoted subsection (c), having been stricken in DeLeo, has also been formally repealed by the Legislature. Ch. 79-163, §10, Laws of Fla.

The only appellate decision concerning the constitutional propriety of §839.25(1)(a) is that of the District Court below, now before this Court. The DeLeo case -- declaring unconstitutional §839.25(1)(c) -- is, however, dispositive: Under its teaching, the District Court must be affirmed.

In the DeLeo case, the defendants were charged with the now-repealled subsection, (c), which rendered it a felony for a "public servant" to violate "any statute or lawfully adopted regulation or rule relating to his office." State v. DeLeo, 356 So.2d 306, 307 (1978)(emphasis added). There, one defendant was a city commissioner charged with violating that subsection for having

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[2/]Both of these earlier cases were analyzed and cited by both the trial court (Vol. I, p. 25), and the District Court (Op. 1), and they were the only two Florida cases argued below. Riley, however, is of little assistance to the task at hand inasmuch as it concerned subsection (b) of §839.25, which is very, very different from the other two subsections of the statute (one of which was stricken in DeLeo and the other of which is at issue here). In Riley, the subparagraph at issue was "not couched in such open-ended language," 381 So.2d at 1360, as the provisions here and in DeLeo, but instead it "specifically defines the prohibited conduct." Id.

diverted city property and labor to the construction of a carport at his home (which would, of course, also constitute theft, a well-known statutory felony). Id. The DeLeo defendants moved to dismiss and the trial court granted the motion, declaring §839.25 (1)(c) to be so vague and susceptible of arbitrary application as to constitute a denial of due process, contrary to the Fourteenth Amendment of the United States Constitution and Article I, §9 of the Florida Constitution. The Supreme Court of Florida agreed and affirmed. 356 So.2d at 308.

The decision in DeLeo is so closely analogous to, and so clearly dispositive of, the instant case, that it deserves to be quoted at length (as it was by the District Court below). The Supreme Court:

> The pertinent part of the statute [declared unconstitutional in DeLeo] follows:
>
> "839.25 Official Misconduct. --
>
> "(1) 'Official Misconduct' means the commission of one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:
>
> ****
>
> "(c) Knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office."
>
> We declare that the statute is unconstitutional under the due process guarantees of the federal and Florida Constitutions because it is susceptible to arbitrary application.
>
> "Official Misconduct" under subsection (c) is keyed into the violation of any statute, rule or regulation, pertaining to the office of the accused, whether they contain criminal penalties themselves or not, and no matter how minor or trivial. And any public servant may commit such

> misconduct. Public servant is not defined in Chapter 839, but in Chapter 838, a related Chapter, it is defined for purposes of that Chapter as any public officer, agent or governmental employee, whether elected or appointed. Theoretically, then, using this definition an appointed employee could be charged with official misconduct, a felony in the third degree and punishable by up to five years in prison or a fine up to $5,000, for violating a minor agency rule applicable to him, which might carry no penalty of its own.

Id. at 307-08 (footnotes omitted).[3/]

Certainly the District Court was correct in its observation that "Comparison of the language of subsection (c), struck down in DeLeo, with (a) at issue here, reveals that (a) is as vague and open to arbitrary and capricious application as (c) . . . ." (Op. 3). Indeed, in this court the Appellant seems to complain only that the court below found subsection (a) more unacceptable than the unconstitutional former-subsection (c). The Appellant complains at length that the District Court's conclusions in this regard "simply won't wash" and are not consistent with what the Appellant says is the "only reasonable construction" of the statute, i.e., a construction advanced by the Appellant that is contrary to the language of the statute itself. (Initial Brief of Appellant at 9-11). The Appellant argues that the District Court erred in its

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[3/] The Appellee here, incidently, was charged with this purported felony on account of his having allegedly refrained from assessing "back-taxes" on property that had inadvertently previously been unassessed, contrary to agency rule codified at §12 D-8.06, Fla. Admin.Code "and/or" a statute [§193.092, Fla.Stat. (1981)](both of which do appear to require "back-taxing"). (Vol. I, pp. 2, 6, 7, 9). Whether or not these underlying back-taxing provisions are in fact frequently waived in practice, neither of them are even arguably penal: In stark contrast to the criminal statute at issue here, the back-taxing provisions themselves carry no penalties whatsoever for noncompliance. (This also stands in stark contrast to the malum in se conduct that underpinned the charge stricken in DeLeo: theft.)

suggestion that the subsection at issue was more susceptible to arbitrary application than that in DeLeo. Unfortunately, for the Appellant, these complaints are irrelevant, as such suggestions by the court below were, of course, dicta: There are no degrees of unconstitutionality. Yet even so, if there were "degrees of unconstitutionality," the subsection at issue would be clearly "more unconstitutional" than its companion in DeLeo.

In DeLeo, the operative subsection required a finding that the accused was guilty of "violating" a "statute or lawfully adopted regulation" as long as this underlying, codified standard was one "relating" to his or her public office. §839.25(1)(c). The Appellant specifically agrees that this subsection "is too broad, too vague, too susceptible of arbitrary application to pass constitutional muster." (Initial Brief of Appellant at 8). Yet the statutory subsection at issue here renders criminal mere "refraining" from the performance of "a duty" that is defined no more specifically than that it must be one imposed "by law." §839.25(1)(a). Since the subsection of the statute condemned by the court in DeLeo looked to the violation of a "statute or lawfully adopted regulation or rule," it must be assumed that the Legislature meant something different and more broad in the subsection at issue, centering on duty imposed "by law." To violate subsection (a), the legal "duty" refrained from may apparently emanate from any source of law: constitutional law, common law, statutory law, administrative law, or civil law, criminal law (felonies and misdemeanors), quasi-criminal law (e.g., traffic

infractions), etc.[4/]

Moreover, and unlike the additional requirement attached to the subsection dealt with in DeLeo, the underlying "duty-refrained-from," as per subsection (a) at issue here, need not be one "relating to his office." Id. at (c). The relevancy requirement was expressly incorporated in the void and now-repealed subsection (c), but no such language is contained in subsection (a) at issue here.

Thus, in its most critical aspects, the statutory subsection at issue in the instant case is even more vague and susceptible to arbitrary application than that condemned in DeLeo. Accordingly, the District Court was eminently correct, not only in affirming the trial court's finding that subsection (a), like subsection (c), was unconstitutional, but also in recognizing that:

[4/]The Appellant argues that term "duty imposed by law," as used in subsection (a), really means "duty imposed by statute" (though this Appellee was charged because he allegedly refrained from a duty imposed by statute "and/or" rule). (Vol. I, pp. 2, 6, 7, 9). This argument not only misses the context of the words involved, but, more importantly, it misses the point. Certainly the use of different words by the Legislature, in the same provision, must mean that the Legislature meant different things by those words. Surely, when it used the broader term "by law" in (a), it referred to a broader concept than "statute" or "rule" referred to in (c). Presumably, the Legislature intended the common-sense, legal import of the words "by law," and any definition of the phrase "by law" is broad, no matter what the source (with the possible exception of the Appellant's Brief). Perhaps as accurate a definition as any is that contained in Black's Law Dictionary: "That which must be obeyed and followed by citizens, subject to sanctions or legal consequences, is a 'law.'" Black's Law Dictionary 1028 (4th ed. 1968). More importantly, as originally enacted, §839.25(1) contained a subsection that specifically purported to render it a felony for a public employee to violate a statute or codified administrative regulation, id. at (c), and that subsection was condemned, in its entirety, in DeLeo.

> Subsection (a) goes beyond the limits of (c) to provide for imposition of criminal sanctions for failure to perform duties which need not be related to the office of the accused. Furthermore, the duties addressed in (a) may be those imposed by any source of law, not merely the statutes and rules of (c), found to be overly broad in DeLeo.

(Op. at 3).

The trial court and the District Court below did not err, and the Appellee is optomistic that the DeLeo case (with which the Appellant has expressed its agreement) virtually decided the issue at bar: Section 839.25(1)(a) of the Florida Statutes is clearly unconstitutional on its face, just as was §839.25(1)(c), and for the very same reason. Subsection (a) is undoubtedly susceptible to the same abuses as concerned the court in DeLeo. As observed in the Opinion of the District Court below:

> The vulnerability of such a statute to arbitrary application was noted as follows by the DeLeo court in reference to subsection (c):
>
> > The crime defined by the statute, . . ., is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its "catch-all" nature.
>
> Id. at 308 (footnotes omitted).

(Op. at 3).

CONCLUSION

The Order of the District Court of Appeal, affirming the trial court Order finding Section 839.25(1)(a), Fla.Stat. (1981), to be unconstitutional under the due process guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Section A of the Florida Constitution, and granting the Defendant's Motion to Dismiss Counts Two, Nine, Ten, and Fifteen of the Amended Indictment, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HRERBY CERTIFY that a copy of the foregoing Answer Brief of Appellee has been furnished to William E. Allbritton, Assistant Attorney General, The Capitol, Suite 1502, Tallahassee, Florida 32301, by mail, on this 10th day of October, 1984.