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Decision below 398

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

-v- Case No. 65,810

PERRY LAMAR JENKINS,

Appellee.

_____/

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	
QUESTION PRESENTED	
WHETHER THE LOWER COURT ERRED IN HOLDING § 839.25(1)(a), F.S., TO BE FACIALLY UNCONSTITUTIONAL.	3
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

Case	Page(s)
State v. DeLeo, 356 So.2d 306 (Fla. 1978)	6, 7, 8
State v. Riley, 381 So.2d 1359 (Fla. 1980)	7, 9
Schultz v. State, 361 So.2d 416 (Fla. 1978)	11
Statute	
§ 193.092, Florida Statutes	9
§ 839.25, Florida Statutes, (1977)	6, 9, 11
§ 839.25(1)(a), Florida Statutes (1983)	2, 3, 8, 9, 10, 11
§ 839.25(1)(b), Florida Statutes	7
§ 839.25(1)(c), Florida Statutes	6, 8, 9
Other	
Rule 3.190(c)(4), Florida Rules of Criminal Procedure	2
Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure	2
Laws 1979, Chapter 79-163, § 10	7
Section 12D-8.06, Florida Administrative Code	9

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

References to the record proper filed in the lower court (Vol.I) will be made by the symbol "R" followed by appropriate page number. References to the transcript of hearing filed in the lower court (Vol.II) will be made by the symbol "Tr." followed by appropriate page number.

STATEMENT OF THE CASE AND FACTS

On July 7, 1983, an amended indictment was returned against appellee charging him in thirty one counts with various and sundry violations of Florida law, i. e., nine counts of grand theft, eight counts of official misconduct, three counts of misuse of confidential information, one count of failure to pay taxes, three counts of perjury, and seven counts of fraudulent travel voucher violations (R 1). Appellee, by motion filed

September 22, 1983, moved to dismiss Counts I, II, III, IV, V, VI, VII, VIII, IX, X, XII, XIV, and XV, primarily on the grounds of alleged unconstitutionality of the Florida statute governing public officials, statute of limitations, and that the uncontroverted facts would show no violation of Florida law, i.e., Rule 3.190(c)(4), Florida Rules of Criminal Procedure (Tr. 16, line 22--17, line 4). The trial judge gave the prosecutor an extension of time within which to file a traverse to those counts of the motion to dismiss challenging certain counts of the amended indictment under Rule 3.190(c)(4). The trial judge found counts II, IX, X, and XV to be facially unconstitutional and granted the motion to dismiss as to those counts (Tr. 38, line 18-24)(R 25). The state appealed (R 26).

On direct review the lower court affirmed the order of the trial judge striking down Counts II, IX, X, and XV on the ground that § 839.25(1)(a), F.S. (1983), is facially unconstitutional under the due process guarantees of both the state and federal constitutions. This court has jurisdiction pursuant to Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure.

A copy of the lower courts opinion is submitted with this brief as an appendix.

ARGUMENT

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN HOLDING § 839.25(1)(a), F.S., TO BE FACIALLY UNCONSTITUTIONAL.

For the convenience of the court, the counts of the indictment dismissed by order of the trial judge because of the alleged facial unconstitutionality of the statute are as follows:

COUNT II - OFFICIAL MISCONDUCT

> The Grand jurors of the County of Suwannee, State of Florida, Charge that PERRY LAMAR JENKINS between MARCH 1, 1978, and JULY 1, 1978, in Suwannee County, Florida, PERRY LAMAR JENKINS, being Property Appraiser for Suwannee County, Florida, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another, did unlawfully and knowingly refrain from performing a duty imposed on him by law, in that PERRY LAMAR JENKINS failed to assess for back taxes approximately 10.12 acres of real estate in Section 26, Township 2 South, Range 13 East in Suwannee County, Florida, more particularly described in Official Record Book 166, Page 601, Official Records of Suwannee County, Florida, as required by Florida Statute 193.092 and/or Section 12D-8.06, Florida Administrative Code, contrary to Florida Statute 839.25, said offense being misconduct by a Public Officer, to-wit: PERRY LAMAR JENKINS, Property Appraiser for Suwannee County, Florida and the said PERRY LAMAR JENKINS not having left office prior to the filing of this Indictment.

COUNT IX - OFFICIAL MISCONDUCT

The Grand jurors of the County of Suwannee, State of Florida, Charge that PERRY LAMAR JENKINS between FEBRUARY 1, 1978, and JULY 1, 1978, in Suwannee County, Florida, PERRY LAMAR JENKINS, being Property Appraiser for Suwannee County, Florida, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another, did unlawfully and knowingly refrain, or cause another to refrain from performing a duty imposed on him by law, in that PERRY LAMAR JENKINS failed to assess for back taxes approximately 14.23 acres of real estate in Section 26, Township 2 South, Range 13 East in Suwannee County, Florida, more particularly described in Official Record Book 165, Page 782, Official Records of Suwannee County, Florida, as required by Florida Statute 193.092 and/or Section 12D-8.06, Florida Administrative Code, contrary to Florida Statute 839.25, said offense being misconduct by a Public Officer, to-wit: PERRY LAMAR JENKINS, Property Appraiser for Suwannee County, Florida, and the said PERRY LAMAR JENKINS not having left office prior to the filing of this Indictment.

COUNT X - OFFICIAL MISCONDUCT

The Grand jurors of the County of Suwannee, State of Florida, Charge that PERRY LAMAR JENKINS between MAY 1, 1981, and JULY 1, 1981, in Suwannee County, Florida, PERRY LAMAR JENKINS, being Property Appraiser for Suwannee County, Florida, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another, did unlawfully and knowingly refrain, or cause another to refrain from performing a duty imposed on him by law, in that PERRY LAMAR JENKINS failed to assess for back taxes approximately 3.85 acres of real estate in Section

25, Township 2 South, Range 13 East in Suwannee County, Florida, more particularly described in Official Record Book 218, Page 135, Official Records of Suwannee County, Florida, as required by Florida Statute 193.092 and/or Section 12D-8.06, Florida Administrative Code, contrary to Florida Statute 839.25, said offense being misconduct by a Public Officer, to-wit: PERRY LAMAR JENKINS, Property Appraiser for Suwannee County, Florida, and the said PERRY LAMAR JENKINS not having left office prior to the filing of this Indictment.

COUNT XV - OFFICIAL MISCONDUCT

The Grand Jurors of the County of Suwannee, State of Florida, Charge that PERRY LAMAR JENKINS on or about JULY 1, 1976, a more precise date being unknown to the Grand Jury, in Suwannee County, Florida, PERRY LAMAR JENKINS, being Property Appraiser for Suwannee County, Florida, with corrupt intent to obtain a benefit for himself or another, did unlawfully and knowingly refrain, or cause another to refrain from performing a duty imposed on him by law, in that PERRY LAMAR JENKINS failed to assess for back taxes approximately 6.0 acres of real estate in Section 6, Township 1 South, Range 13 East in Suwannee County, Florida, more particularly described as parcel number 04572-000000 on the 1979 Certified Tax Roll for Suwannee County, Florida, which said property was assessed to the estate of Nora Jenkins, as required by Florida Statute 193.092 and/or Section 12D-8.06, Florida Administrative Code, contrary to Florida Statute 839.25, said offense being misconduct by a Public Officer, to-wit: PERRY LAMAR JENKINS, Property Appraiser for Suwannee County, Florida, and the said PERRY LAMAR JENKINS not having left office prior to the filing of this Indictment.

Section 839.25, F.S. (1977), reads 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 s. 775.082, s. 775.083, or s. 775.084.

In State v. DeLeo, 356 So.2d 306 (Fla. 1978), the court struck down as unconstitutional § (1)(c) of the above statute on the ground that is was susceptible to arbitrary application. The reasoning of the court in reaching this decision is as follows:

> "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. [Footnotes Omitted.]

Following the DeLeo decision, the legislature repealed § (1)(c), of the statute. Laws 1979, Chapter 79-163, § 10, effective August 5, 1979.

However, in 1980, this Court had occasion to consider a challenge to the constitutionality of § (1)(b) of the statute. State v. Riley, 381 So.2d 1359 (Fla. 1980). The Riley court reasoned as follows in turning back the constitutional challenge:

> The decision in **De Leo** was based upon the open-ended nature of subsection (c) which proscribed conduct "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." 356 So.2d at 308. The subsection violated by defendant in this case is not couched in such open-ended language but specifically defines the prohibited conduct:
>
> (b) Knowingly falsifying, or causing another to falsify, any official record or official document; §839.25(1)(b), Fla.Stat. (1977).
>
> * * *
>
> The conduct proscribed by section 839.25(1)(b), Florida Statutes (1977), is defined so that those with common intelligence and understanding have sufficient warning of what actions

> would constitute a violation. **Brunelle v. State,** 360 So.2d 70 (Fla. 1978); **Leeman v. State,** 357 So.2d 702 (Fla. 1978); **State v. Wershow,** 343 So.2d 605 (Fla. 1977). The elements imposed by subsection (b) also limit the danger of arbitrary application to a constitutionally acceptable degree. **State v. De Leo.**
>
> The order of the trial court dismissing the indictment is reversed and the cause is remanded for further proceedings.

The basis for the DeLeo holding was based upon the open-ended nature of § (c) which proscribed conduct "keyed into the violation of any statute, rule or regulation" relating to the office of the accused. Appellant agrees that this language is too broad, too vague, too susceptible of arbitrary application to pass constitutional muster. Indeed, under this language, an agency employee could be prosecuted because he failed to comply with a regulation requiring that memorandums be submitted to the agency head in a prescribed manner.

However, § (a) of the present statute does not contain the offensive language. The subsection reads: "(a) Knowingly refraining, or causing to refrain, from performing a duty imposed upon him by law; . . .." Please note that the present subsection now challenged makes no reference to a duty imposed upon the public servant by any agency rule or some remote regulation. The duty must be imposed by law; the public servant must knowingly refrain or cause another to refrain from performing such duty;

and such must be done with the corrupt intent to obtain a benefit for [the public servant] or another or to cause unlawful harm to another.

Now, note the basis for the duty imposed on appellee in count two of the amended indictment. The indictment charges in pertinent part that appellee "failed to assess for back taxes . . . as required by Florida Statute 193.092 and/or Section 12D-8.06, Florida Administrative Code, contrary to Florida Statute 839.25, ..." It is apparent that the language of the count clearly advised appellee of the statutory basis for the duty that he refrained from performing. Similarly, legal basis for the duty which appellee allegedly refrained from performing is set forth in counts IX, X, and XV.

It is submitted that the open-ended nature of § (c) of the 1977 statute struck down by this court in DeLeo is absent from § (a) of the statute now under attack. Therefore, it is respectfully submitted that absent the vice found constitutionally unacceptble in § (c) of the 1977 statute, the present statute limits "the danger of arbitrary application to a constitutionally acceptable degree." Riley, at 1361.

The lower court states on p. 3 of its slip opinion that "[s]ubsection (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." This

presents an extremely strained reading of § (1)(a). First, the statute deals only with official misconduct by public servants. Secondly, since the statute is so limited, a fair reading of the term "official misconduct" must be misconduct related to a duty imposed upon the public servant by law. Thirdly, appellant cannot fathom how the lower court reached the conclusion that criminal sanctions be imposed upon a public servant for failure to perform duties not related to the office of the public servant. The statute clearly states that the duty must be one imposed upon the public servant by law. Query: If the duty is imposed upon the public servant by law, then how can it not be related to the duties of his office?

It is submitted that the construction placed upon the language "duties imposed upon him by law" by the lower court is unrealistic. The only reasonable construction of the duties imposed upon the public servants by law are those statutory duties of his office. The lower court seeks to equate the duties addressed in § (a) with those that may by imposed by any source of law. This simply won't wash. While it is true that the law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread--the rich as well as the poor*, this does not mean that one who steals bread may be

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* The writer's apologies to Anatole France.

prosecuted for official misconduct under § 839.25. Such a broad construction would result, at least it could result, in a public servant being prosecuted under § 839.25 for the violation of any law. Such a reading cannot represent the legislative intent. By now it is well settled that when reasonably possible, a statute should be construed in such a manner as to avoid conflict with the constitution. Schultz v. State, 361 So.2d 416, 418 (Fla. 1978). It is submitted that the "duty" imposed upon the public servant by law are those duties imposed by law upon the office held by the public servant. When so read, § (1)(a) does not violate the due process clause of the state or federal constitutions.

CONCLUSION

The decision of the lower court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Appellant to Mr. Murray Wadsworth, P. O. Box 10529, Tallahassee, Florida 32302, by U.S. Mail, this 17th day of September, 1984.

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of Counsel