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IN THE SUPREME COURT OF FLORIDA

Case No. 66,473

STATE OF FLORIDA, etc.,

Appellant,

v.

STATE BOARD OF EDUCATION OF FLORIDA, etc.,

Appellee.

IN RE $100,000,000 STATE OF FLORIDA, FULL FAITH AND CREDIT, STATE BOARD OF EDUCATION, PUBLIC EDUCATION CAPITAL OUTLAY BONDS, SERIES 1985.

On Appeal from the Circuit Court of the Second Judicial Circuit of Florida in and for Leon County, Florida

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an appeal by the State of Florida from a final judgment of the Circuit Court of the Second Judicial Circuit of Florida, in and for Leon County, Florida. The action, which was commenced on December 19, 1984, was a proceeding to validate $100,000,000 State of Florida, Full Faith and Credit, State Board of Education, Public Education Capital Outlay Bonds, Series 1985.

At the close of the hearing, on January 22, 1985, Judge Charles E. Miner, Jr. found for the State Board of Education of Florida and issued a final judgment validating the proposed Series 1985 Bonds.

On January 28, 1985, the State of Florida filed a Notice of Appeal from the Final Judgment directly to the Supreme Court of Florida. On January 29, 1985, the State of Florida and the State Board of Education of Florida filed a joint Motion to Expedite and waived oral argument.

During the Special Session of the Florida Legislature, held on December 6 and 7, 1984, the House and the Senate overrode the Governor's veto of HB 1302, the Public Education Capital Outlay bill, now Chapter 84-542, Laws of Florida. The bill provides for expenditures for purported educational capital outlay projects.

On December 18, 1984, the State Board of Education adopted a resolution authorizing the issuance of not exceeding $100,000,000 public education capital outlay bonds (the "Series 1985 bonds") pursuant to Subsection (a)(2) of Section 9 of Article XII of the Florida Constitution, as amended (the "Public Education Capital Outlay Amendment"), Sections 215.57-215.83, Florida Statutes, Chapter 84-542, Laws of Florida, and other applicable provisions of law [A-9].

The Public Education Capital Outlay Amendment provides that state bonds pledging the full faith and credit of the state may be issued, without a vote of the electors, by the state board (of Education) to finance or refinance capital projects theretofore authorized by the legislature, and any purposes appurtenant or incidental thereto, for the state system of public education. Since becoming effective on July 1, 1975, the Public Education Capital Outlay Amendment has required the public education capital outlay and debt service trust fund, the primary source of revenues for bonds issued pursuant to the Public Education Capital Outlay Amendment, to be funded from gross receipts taxes as the same were provided and levied pursuant to the provisions of Chapter 203, Florida Statutes, as of the time of that amendment.

During the 1984 Regular Session, the Florida Legislature revised Chapter 203, Florida Statutes, and thereby changed the definition of gross receipts taxes. In order to

continue to issue bonds pursuant to the Public Education Capital Outlay Amendment, it was therefore necessary to amend the Public Education Capital Outlay Amendment of the State Constitution to allow for changes to the definition of gross receipts taxes found in Chapter 203, Florida Statutes. To this end, the House, on May 31, 1984 [A-51], and the Senate, on June 1, 1984 [A-57], proposed an amendment to Subsection (a)(2), Section 9, Article XII of the Florida Constitution.

Article XI of the Florida Constitution, the "Amendments" article, provides, inter alia: "Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published."

Notice of the proposed amendment was published in newspapers of general circulation in each of sixty-five Florida counties during the tenth and sixth week prior to the November 6, 1984, general election [A-58]. Such notice was not printed in a newspaper of general circulation located in Hamilton County, Florida, and only one such notice was printed in a newspaper of general circulation located in Madison County, Florida, despite a request for publication by the Secretary of State's Office pursuant to Article XI of the Florida Constitution [A-58].

The proposed amendment, labeled Amendment 8 on the ballot, was approved by the electors of the State of Florida on November 6, 1984, by a vote of 2,553,312 to 778,114 [A-61]. The proposed amendment was approved by the voters of Hamilton County, Florida by a vote of 1,167 to 613 [A-66] and was approved by the voters of Madison County, Florida by a vote of 2,401 to 950 [A-66]. The total number of registered voters certified on October 11, 1984, in Hamilton County, Florida was 4,986 [A-66]; the total number of registered voters certified on October 16, 1984, in Madison County, Florida was 7,611 [A-66].

ARGUMENT

I. WHETHER ALL OF THE PROJECTS SCHEDULED TO BE FINANCED BY THE SERIES 1985 BONDS ARE PUBLIC EDUCATION CAPITAL PROJECTS FOR THE STATE SYSTEM OF PUBLIC EDUCATION, AS REQUIRED BY ARTICLE XII, SECTION 9(a)(2) OF THE FLORIDA CONSTITUTION.

The Public Education Bond Amendment lists the following as being included in the state system of public education: institutions of higher learning, junior colleges, vocational technical schools and public schools. Art. XII, Sec. 9(a)(2), Fla. Const. The Florida Legislature has defined the state system of public education as consisting of "such publicly supported and controlled schools, institutions of higher education, other educational institutions, and other educational services as may be provided or authorized by the Constitution and laws of Florida". Sec. 228.041 (1), Fla. Stat. (1983).

Three items in particular that are included in the list of projects to be financed by the proposed Series 1985 Bonds do not seem to be "for the state system of public education" as the same has been defined in the Constitution or the statutes. These are items (N), $300,000 for planning the construction of a public broadcasting facility [A-17]; (W), $1,500,000 for the state contribution to a performing arts center [A-18]; and (Z), $1,700,000 for the construction of a public broadcasting facility [A-19].

In addition, with regard to the two items concerning public broadcasting facilities, the Florida Attorney General has specifically opined that fixed capital outlay needs of the state system of public broadcasting, including educational television, may not be financed with revenues accruing from the gross receipts tax since such system does not fall within the definition of an institution of higher learning, a junior college or a vocational technical school (the only three types of institutions authorized at the time of the opinion to receive gross receipts tax funds). 1975 Op. Att'y Gen. Fla. 075-150 (May 29, 1975). While it is true that shortly after this opinion was issued the Public Education Capital Outlay Amendment was amended to include public schools as permissible recipients of gross receipts tax funds, no provision has been added to either the Constitution or the statutes concerning the funding of public broadcasting facilities with these taxes. It would therefore seem that these three items, at least, may not be financed with bonds issued pursuant to the Public Education Capital Outlay Amendment.

II. WHETHER THE FAILURE TO PUBLISH NOTICE OF A PROPOSED AMENDMENT TO THE FLORIDA CONSTITUTION IN TWO COUNTIES IN WHICH NEWSPAPERS OF GENERAL CIRCULATION ARE PUBLISHED, IN CONTRADICTION OF ARTICLE XI, SECTION 5(b) OF THE FLORIDA CONSTITUTION, INVALIDATES SAID PROPOSED AMENDMENT AFTER IT HAS BEEN APPROVED BY THE VOTERS OF THE STATE.

This appears to be a question of first impression in Florida. There are decisions concerning other types of defects in Constitutional amendment cases and there are decisions concerning defects in cases involving elections generally. The question of defective publication of a proposed Constitutional amendment, however, has apparently not been decided in this State.

In order to avoid confusion, it should be noted that the years of the Florida decisions cited in this brief range from 1905 to 1944. At the beginning of this period, the publication requirements for Constitutional amendments, proposed by the Legislature in the usual manner, were found in Article XVII, Section 1 of the Constitution of 1885. The pertinent part of this section states "proposed amendments ... shall be ... published in one newspaper in each county where a newspaper is published, for three months immediately preceding the next general election of Representatives ..."

In 1948, the Constitution was amended, and the provision was changed to read "the proposed ... amendment ... shall be ... published in one newspaper in each

county where a newspaper is published for two times, one publication to be made not earlier than ten weeks and the other not later than six weeks, immediately preceding the election at which the same is to be voted upon ..."

Finally, after the 1968 Constitutional Revision, the language was changed to its present-day form: "[o]nce in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment ... shall be published in one newspaper of general circulation in each county in which a newspaper is published." Art. XI, Sec. 5(b), Fla. Const.

Because the State Constitution is the basic legal foundation upon which all State laws are based and from which basic rights and privileges of the citizens are derived, it should be construed very carefully. In this regard, it should not be supposed that there are sections of the Constitution that have no meaning, or that are superfluous. It has been held that "[e]very word of a state Constitution should be given its intended meaning and effect, and essential provisions of a Constitution are to be regarded as mandatory." Crawford v. Gilchrist, 64 Fla 41, 54, 59 So. 963, 968 (1912). Crawford is one of a line of cases involving irregularities in the proposal of Constitutional amendments in the Legislature; in this case, the Senate voted to recall the proposal it had originally approved and sent to the House, after the

proposal had been approved by the House. The Court denied supersedeas from an order granting a temporary injunction restraining the Secretary of State from publishing the proposed amendments and from having them placed on the ballots at the general election, having found that the agreement of three-fifths of all the members of each house of the Legislature to a proposed amendment was a vital element in the adoption of a Constitutional amendment. Id. at 55, 59 So. at 968.

There is no clear indication, however, of which words in the Florida Constitution are essential, or mandatory, and which ones are merely directive. Although the Crawford Court said that there are two essential elements in the Constitutional amendment process, i.e., the assent of the Legislature and a majority of the popular vote, there had been no defective publication in that case; in fact, there had been no publication at all since the decision had been handed down before that step became necessary.

There are numerous cases, however, which place great emphasis on proper publication of proposed Constitutional amendments. While such publication was not at question in these cases, they list proper publication as a pre-requisite to a validly passed amendment.

West v. State, 50 Fla. 154, 39 So. 412 (1905) concerned a challenge to a Constitutional amendment on

the grounds that it had not been entered on the journals of the respective houses, a requirement of the amendment process. The Court, in allowing the amendment to stand, said

> [W]here a proposed amendment to the Constitution receives the affirmative votes of three-fifths of all the members elected to each house, and such proposed amendment is published and submitted to the vote of the people as required, and at the election is approved by a majority of the votes of the people cast thereon, then it becomes a valid part of the organic law ... (emphasis added).

Id. at 163, 39 So. at 414-15.

In upholding an amendment that had been entered correctly in the House Journal the first time it appeared, but incorrectly in subsequent appearances, the Florida Supreme Court said

> Even in case some required form of procedure has been omitted by the Legislature in submitting a proposal to amend the Constitution but the same has been advertised or the notices published and the people have approved it at an election, the amendment becomes a valid part of the Constitution (emphasis added).

Collier v. Gray, 116 Fla. 845, 858, 157 So. 40, 45 (1934).

In State ex rel. Landis v. Thompson, 120 Fla. 860, 163 So.270 (1935), the Court upheld an amendment even though it had not appeared verbatim on the ballot. As in the previous cases, the Court's holding was that

> Mere formal or procedural irregularities in the framing, manner, or form of submission or

> balloting, will not be held fatal to the validity of [the] amendment after it has been actually agreed to by three-fifths vote of all the members elected to each House, and such amendment thereafter [is] duly published submitted to and affirmatively approved by a majority vote of the electors cast thereon (emphasis added).

Id. at 874-75, 163 So. at 276.

Finally, in a similar vein, the Supreme Court, in Sylvester v. Tindall, 154 Fla. 663, 18 So.2d 892 (1944), a case involving the format of the ballot on a Constitutional amendment, said

> [O]nce an amendment is duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of submission (emphasis added).

Id. at 669, 18 So.2d at 895.

It can be inferred from the preceding cases that publication is an important element of the amendment process. But is it an essential element; an element that, if not complied with, will invalidate an amendment after the election? Before answering this question, it is necessary to know what the word "published" means.

It is contended that the word "published" in Section 5(b), Article XI of the State Constitution is synonymous with the word "distributed", and an Attorney General's Opinion to that effect has been cited by the State Board of Education in the Memorandum of Law it presented to the

Circuit Court at the bond validation hearing [1974 Op. Att'y Gen. Fla. 074-124 (April 18, 1974)].

While it is true that the word "published" has many meanings, there is only one reasonable way to interpret the word as it appears in Section 5(b). Actually, the word appears twice, adding even more confusion.

The first time the word is used, it appears as the object of the word "amendment": " ... the proposed amendment ... shall be published in one newspaper ..." The use of the word here is obviously synonymous with the word "printed", and is not in question. It is the second use of the word which is confusing: " ... in one newspaper of general circulation in each county in which a newspaper is published."

Since some newspapers, especially smaller ones, do not own their own printing presses, it is inappropriate to assert that "published" means "printed" in this case. But it seems to be that the intent of the section is for the word to mean more than just "distributed", else what effect was intended for the final phrase "in each county in which a newspaper is published"? If the intent was to provide for statewide distribution of newspapers containing the notice, then the words "shall be published in a newspaper of general circulation in each county" would have been sufficient; in fact, this is the language used in Section 100.21, Florida Statutes, which provides for

notice of general elections. However, for whatever reason, the final phrase does exist, and it can only indicate that the notice is to be published [printed] in a newspaper located in each county. In addressing the identical question, vis-a-vis a notice of annexation proceedings, the Kentucky Court of Appeals (the highest court in the state at the time) stated " ... a newspaper is "published" in the place from which it emanates for 'circulation'." Phillips v. City of Florence, 314 S.W.2d 938, 940 (Ky. 1958).

In support of this interpretation of the word, it should be noted that Chapter 50 of Florida Statutes, "Legal and Official Advertisements", in prescribing which newspapers may publish legal notices, contains a requirement that such newspaper shall have been in existence for one year and shall have been entered as second-class mail matter at a post office in the county where published, thus implying that a newspaper is only published in one county. Sec. 50.031, Fla. Stat. (1983). While this statute does not, and does not purport to, control or interpret the Constitution, its language is certainly instructive.

Returning to Crawford, it seems obvious that the assent of the Legislature and the electors are essential elements which must be satisfied. In the cases just cited, the defects were merely procedural, or, in one

case (Thompson), cured by publication. But consider the reason underlying the publication requirement - informing the electorate of its opportunity to alter the most important legal document affecting their lives. If even some of the people are deprived of the opportunity to be made aware of their choices, is that not a substantial defect? It may be argued that, in the present instance, even had all of the registered voters in the counties in which publication did not occur voted against the amendment, it would nevertheless have been approved statewide. Indeed, the State Board of Education's memorandum of Law cites Carn v. Moore, 74 Fla. 77, 76 So. 377 (1917) as authority for the proposition that defects which could not have affected the outcome of an election may not be challenged afterwards. The case involved an election concerning the sale of liquor. Two sets of ballots were printed, one with the words "For Selling" on top, and the other with the words "Against Selling" on top. The Court upheld the election, noting that

> The record fails to show that any person entitled to vote was prevented from expressing his choice, or that the election was not a full, fair, and free expression of the will of the people, or that if the ballots had been identical ... the result would have been different. We are therefore constrained to hold that the election was valid ...

Id. at 90, 76 So. at 341.

In the present case, however, can it truly be said that there was a full expression of the will of the

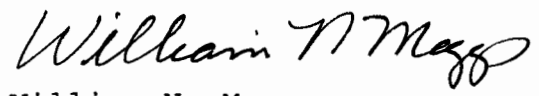
people, when thousands of registered voters in Hamilton and Madison Counties may have been unaware of their choices, due to lack of notice? It may be that their votes would not have made a difference. But suppose publication had not been made in areas containing roughly half of the State's voting population, and suppose the vote on the amendment had been a close one? Where is the line to be drawn? How many people must be uninformed before an election is invalid? Who can tell for certain how many people are uninformed because of lack of publication in any one area? For any other type of election or referendum the answer may well be "let the courts determine the outcome"; but when the issue involves an amendment to the Constitution, the organic law of the people of this State, it is urged that a higher standard be applied; that is, strict compliance with the requirements of Article XI. As the Supreme Court said in Gray v. Childs, 115 Fla. 816, 829, 156 So. 274, 279 (1934),

> The amendment of the organic law of the State or Nation is not a thing to be lightly undertaken, nor to be accomplished in a haphazard manner. It is a serious thing. When an amendment is adopted it becomes a part of the fundamental law. ... We cannot say that the strict requirements pertaining to amendments may be waived in favor of a good amendment and invoked as against a bad amendment. ... [I]t is the duty of the courts, when called upon to do so, to determine whether or not the procedure attempted to be adopted is that which is required by the terms of the organic law.

CONCLUSION

The court below erred in entering its final judgment validating the proposed Series 1985 bonds because 1) certain of the projects to be financed by the bond proceeds are not public education capital projects, in violation of Section 9(a)(2), Article XII of the Florida Constitution, and 2) Amendment 8 to the Florida Constitution, voted on during the November 6, 1984 general election, was improperly adopted, and therefor no valid source of revenue exists for the issuance of public education capital outlay bonds pursuant to Section 9(a)(2), Article XII of the Florida Constitution. Wherefore Appellant prays that the final judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, be reversed.

Respectfully submitted,



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CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been hand-delivered to Glenn R. Hosken, Esq., Counsel for Appellee, 453 Larson Building, 200 East Gaines Street, Tallahassee, Florida, on this 13th day of February, 1985.

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