IN THE SUPREME COURT OF FLORIDA

JACK A. GRIFFITH, :

Petitioner, :

v. : CASE NO.: 66,742

FLORIDA PAROLE AND PROBATION :

COMMISSION, :

Respondent. :

REPLY BRIEF OF PETITIONER

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A. BECAUSE GRIFFITH'S RIGHT TO A HEARING WAS VESTED AT THE TIME CHAPTER 83-78 WAS ENACTED, RETROSPECTIVE APPLICATION OF CHAPTER 83-78 TO GRIFFITH'S CASE IS IMPROPER.

In its answer brief, the Commission argues that GRIFFITH's right to appeal his PPRD determination is not a vested right because it stems from a statutory source rather than a constitutional clause (AB-6, 7). It is submitted that this argument misapprehends both the nature of, and the law applicable to, vested rights.

1. VESTED RIGHTS

It should be noted at the outset that a precise definition of the term "vested right" has always been judicially elusive. In one early case, Board of Commissioners of the Everglades v. Forbes Pioneer Boat Line, 86 So. 199 (Fla. 1920), reversed on other grounds, 42 S.Ct. 325 (1922), this court wrote:

> The difficulty often comes, however, in determining what is a vested right in the sense secured by the constitutional guaranty. No useful purpose would be accomplished by attempting a general definition, nor by quoting general definitions as given by the authorities ... in its application as a shield or protection the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice.

Forbes, supra, at 202.

Although the Forbes decision was rendered more than 65 years ago, the precise definition of "vested rights" remains unclear. In McCord v. Smith, 43 So.2d 704 (Fla. 1949), this court held that retrospective application of a statute was unconstitutional "only in those cases wherein vested rights are adversely affected or destroyed...."

Similarly, in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), this court held that a 1980 amendment to sovereign immunity laws prohibiting suits against state employees could not be applied retroactively because "of due process considerations expressed in Village of El Portal v. City of Miami Shores[1] and McCord v. Smith[2], which prohibit retroactive abolition of vested rights...." Rupp, supra, at 666. However, no further explanation of vested rights was given.

More helpful was this court's opinion in State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981). In Knowles, the court faced a factual situation similar to the one in Rupp, supra. Knowles, an accident victim, sued both the Department of Transportation and one of its employees. A jury returned a verdict for $70,000 in his favor, but the trial court refused to enter judgment in excess of $50,000 due to a recent change in sovereign immunity law. The change, which occurred in the interval between the accident and the judgment, forbade suits against state employees as individuals, and limited departmental liability to $50,000. Knowles appealed to force entry of judgment for the full $70,000.

In reversing the lower court, this court first phrased the issue directly:

> The question, then, boils down to whether the legislature can do what courts so often do -- that is, make a prospective determination of law applicable to persons who are 'in the pipeline' because they are already litigating in that very subject area. To determine whether that problem implicates the maxim that retroactive legislation may not impair vested rights, we need first investigate whether Knowles had

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[1] 362 So.2d 275 (Fla. 1978). El Portal merely quoted McCord.

[2] 43 So.2d 704 (Fla. 1949).

> a vested right of some sort.... That investigation can best be launched by considering the change in Knowles' position which a retroactive application of the 1980 statute would engender.

Knowles, supra, at 1157.

In evaluating the change to Knowles' position, the court noted that:

> Knowles' right to sue [the defendant] had been replaced by a jury's determination both that [the defendant] was liable to Knowles for injuries, and that the damages suffered by Knowles were $70,000. As a matter of principle, it is indisputable that a retroactive application of the 1980 law has taken from Knowles something of value, and that nothing of value has been substituted or otherwise provided.

Knowles, supra, at 1158.

After the court concluded that Knowles' position would be completely undermined by retrospective application of the 1980 law, it continued its analysis:

> Under due process considerations, a retroactive abrogation of value has generally been deemed impermissible .... The rule is not absolute, however, and courts have used a weighing process to balance the considerations permitting or prohibiting an abrogation of value. Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.

Knowles, supra, at 1158.

Applying the Knowles criteria to GRIFFITH's case, it is initially clear that the strength of the public interest served by Chapter 83-78 is dual. First, there is the administrative convenience of prohibiting appeals from final PPRD determinations. Second, there is a clear public interest in finality, and consequent conservation of scarce judicial resources, which would result from prohibiting PPRD appeals.

The second criterion, the extent to which GRIFFITH's right is abrogated, is similarly easy to identify. As in Knowles, retrospective application of Chapter 83-78 would deprive GRIFFITH of something of value (the opportunity to have his appeal heard on the merits, in order to legally secure his freedom earlier than otherwise) while substituting nothing in return.

The third criterion, "the nature of the right affected," is somewhat more difficult to identify. In Knowles, supra, the right was not the simple right to sue; rather, it was the jury determination that the defendant was liable to Knowles. Knowles, supra, at 1158. Numerous other cases have also placed great weight on judicial determination and articulation of a right. For example, in Division of Workers' Compensation, Etc., v. Brevda, 420 So.2d 887 (1st DCA 1982), the court interpreted a statute awarding fees to attorneys representing claimants to a crime compensation fund. In deciding that such awards were not vested, the court reasoned:

> The Florida view as to whether the right to fees under a statute should be considered a substantive, vested right, or an inchoate, procedural right or remedy generally follows that of other jurisdictions. As observed, the Second District Court of Appeal ... has implicitly held that any right to fees is inchoate and does not become vested until awarded by judgment. Additionally, the Third District has implicitly applied the same principle.... Consequently, we conclude that until judgment has been entered properly awarding fees, any right under a fee statute constitutes nothing more than an expectable interest -- not a vested right. Therefore, the appellee's rights to fees, being merely remedial or procedural, cannot be deemed to vest upon the occurrence of the injury or upon filing of the action but vests only upon a legally proper award pursuant to judgment.
>
> Brevda, supra, at 891.

The proposition expressed in Brevda, that a court's final judgment will vest a right, also finds support in the United States

Supreme Court. In Thorpe v. Housing Authority of the City of Durham, 89 S.Ct. 518 (1969), the court clearly endorsed the idea:

> ... we held that the petitioner's right to recover lost pay for a wrongful discharge was "vested" as a result of our earlier decision in ... which we construed to have made a "final" and "favorable" determination ... that petitioner had been wrongfully deprived of his employment.
>
> Thorpe, supra, at 526, fn. 43.

In GRIFFITH's case, this court's own judicially noticed opinion, Griffith v. Florida Parole and Probation Commission, 451 So.2d 457 (Fla. 1984), reveals that the First District Court of Appeal "vested" in GRIFFITH a right to have his appeal heard on the merits. In 1981, the district court's decision in Daniels v. Florida Parole and Probation Commission, 401 So.2d 1351 (Fla. 1st DCA 1981), guaranteed prisoners seeking review of their PPRD such review if they filed within 30 days after the Daniels opinion issued. See Daniels, supra, pp. 1356-1357. GRIFFITH did so, but through no fault of his own the district court mistakenly refused to dedide his claim. In Griffith, supra, this court pointed out the error:

> Documents filed with the petitions show that both appeals were filed with the district court on June 10, 1981, twenty-nine days after Daniels was filed and within the thirty-day grace period set forth in Daniels. In Jordan v. Florida Parole and Probation Commission, 403 So.2d 591 (Fla. 1st DCA 1981), the district court made clear that the Daniels grace period made judicial review available to prisoners with a pre-Daniels final order from the Commission.
>
> After the Jordan decision issued, petitioners and two other prisoners who had also sought action within the thirty-day grace period, sought to reinstate their appeals or, in the alternative, to file petitions for writ of mandamus. Though procedurally indistinguishable, petitioners' motions were denied, the other two prisoners' motions were granted.
>
> In light of the delineation of jurisdiction in Daniels and Jordan and in light of the district court's granting review to other petitioners similarly situated, the denial of jurisdiction appears to be error.

Griffith, supra, at 457-458.

In short, GRIFFITH's right to appeal was enunciated by a court, and GRIFFITH took all the steps available to him to preserve that right. It is submitted that GRIFFITH's right was vested at that point, and regardless of the subsequent effects of Chapter 83-78 on other appeals pending when the legislature changed the law, it would be unconstitutional to retrospectively apply Chapter 83-78 to deprive GRIFFITH of his vested right to appeal.

B. IT WOULD BE MANIFESTLY UNJUST TO APPLY CHAPTER 83-78 TO GRIFFITH'S APPEAL; CONSEQUENTLY, ANY SUCH RETROACTIVE APPLICATION IS PROHIBITED.

In his initial brief, GRIFFITH conceded that, generally, it is the law in effect at the time an appeal is decided which governs the decision. However, a notable exception exists where application of that law would result in "manifest injustice." GRIFFITH contends that application of Chapter 83-78 to his case would result in such injustice.

"Manifest injustice" is not a legal concept lending itself to ready identification. In the first case enunciating the doctrine, United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801), the Supreme Court limited its concern to "mere private cases between individuals," 1 Cranch at 110. However, this humble beginning subsequently gave way to a much wider range of examples. Subsequent cases have established that "manifest injustice" occurs through retroactive application of statutes which:

1. Abrogate vested or "matured" rights; see, National Wildlife Federation v. Marsh, 747 F.2d 616 (11th Cir. 1984) at 620; Bradley v. School Board of City of Richmond, 94 S.Ct. 2006 (1974) at 2019;

2. Abrogate reliance interests; see, Buccaneer Point Estates, Inc., v. United States, 729 F.2d 1297 (11th Cir. 1984) at 1299;

3. Impose new and unanticipated obligations on a person without notice or opportunity to be heard; see, Kaiser Steel Corp. v. Mullins, 102 S.Ct. 851 (1982) at 863.

Additionally, there is language in several cases indicating that the complete elimination of a forum, as opposed to merely changing it, could work a manifest injustice under the right set of facts. See, Hallowell v. Commons, 36 S.Ct. 202 (1916) at 203; Bruner v. United States, 72 S.Ct. 581 (1952) at 584; Gulf Offshore Co. v. Mobil Oil Corp, 101 S.Ct. 2870 (1981) at 2879, fn. 16; Bell v. New Jersey & Pennsylvania, 103 S.Ct. 2187 (1983) at 2199.

It is GRIFFITH's position that application of Chapter 83-78 to his case would result in abrogation of a vested right guaranteed him by the First District Court of Appeal, and withheld him only through that court's own error. Additionally, under the unique facts of this case, GRIFFITH argues that complete retroactive elimination of the only forum eligible to hear his appeal, is a manifest injustice when, but for an error recognized by this court, and through no fault of his own, the appropriate forum delayed deciding his appeal for so long that the law was changed in the interval.

Finally, GRIFFITH would call the court's attention to the three elements used by the Supreme Court in Bradley v. School Board, supra, to identify manifest injustice. Regarding the first factor, the nature and identity of the parties, GRIFFITH would point out that due to the unique factual situation surrounding his appeal, he should not be treated as if he were situated similarly to other inmates. Unlike

most prisoners with appeals pending at the time Chapter 83-78 was enacted, GRIFFITH's appeal was filed in conjunction with a court order specifically authorizing such filing; unlike other prisoners with pending appeals, GRIFFITH was clearly entitled to be heard and would have been heard but for the district court error. As for the second Bradley factor, GRIFFITH would only refer this court to his earlier argument that his right to appeal was vested at the time the law changed. Because GRIFFITH's right is vested, it is deserving of the solicitude normally accorded by courts to such rights. Lastly, the Bradley court thought relevant the impact of the change in the law upon the pre-existing right. Under this standard, GRIFFITH has the strongest possible appeal, as his right is being eradicated without any substitution.

CONCLUSION

Under the unique circumstances of this case, GRIFFITH's right to appeal is a vested right and cannot be retrospectively abrogated. Additionally, application of Chapter 83-78 to GRIFFITH's case would result in a manifest injustice of the type courts must strive to avoid.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to Doris E. Jenkins, Esq., Florida

Parole and Probation Commission, 1309 Winewood Boulevard, Building 6, Tallahassee, FL 32301, by hand/~~mail~~ this 20 day of May, 1985.

Respectfully submitted,

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