0/a 6-4-86

FILED
SID J. WHITE
MAY 20 1986
CLERK, SUPREME COURT
By ______ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO: 67,630

Maurice Ferre

Petitioner,

vs.

State of Florida, ex rel.
Janet Reno, as State Attorney of the
Eleventh Judicial Circuit of Florida

Respondent.

REPLY BRIEF OF PETITIONER

On Review from the Third District Court of Appeal

Arthur J. England, Jr., Esq.
Mitchell R. Bloomberg, Esq.
and
Charles M. Auslander, Esq.
of
Fine Jacobson Schwartz Nash
Block & England, P.A.
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

TABLE OF CONTENTS

				Page
Table of Authorities				ii
Introduction				1
Preliminary Considerations				1
I.	First Amendment Infringement			3
	A.	Governmental Interests		3
		1.	Appearance of corruption	3
		2.	Public information	4
		3.	Fiscal responsibility	4
	B.	Narrowly drawn restrictions		5
II.	Other Issues			6
	Conclusion			7
	Certificate of Service			8

TABLE OF AUTHORITIES

Cases	Page
Bang v. Chase, 442 F. Supp. 758 (D. Minn. 1977), aff'd, 436 U.S. 941 (1978)	2
Bankers Multiple Lines Ins. Co. v. Farish 464 So.2d 530 (Fla. 1985)	6
Buckley v. Valeo 424 U.S. 1 (1976)	3
Citizens Against Rent Control v. Berkley 454 U.S. 290 (1981)	3
Dania Jai-Alai Palace, Inc. v. Sykes 450 So.2d 1114 (Fla. 1984)	6
Winn-Dixie Stores, Inc. v. State 408 So.2d 211 (Fla. 1981)	3
Statutes	
Section 106.08(2), Florida Statutes (1981)	1
Section 106.08(5), Florida Statutes (1981)	6
Section 106.141(10), Florida Statutes (1981)	1

Introduction

The briefs previously filed by the parties -- Ferre's initial brief and the state's answer brief -- offer a good start for the Court's consideration of the issues presented in this case. There is full agreement between the parties as to the facts, and as to the procedural history of the case. There is general agreement as well concerning the standards and cases to be applied to statutes infringing the First Amendment.

There are, however, strong and fundamental differences between the parties as to the role of the First Amendment in election matters and, more specifically in this case, the central issue of whether statutes which ban post-election campaign contributions for mayoral run-off elections can be sustained in the face of the First Amendment to the United States Constitution.

Preliminary Considerations

In arguing to preserve the constitutionality of sections 106.08(2) and 106.141(10), Florida Statutes, the state offers three preliminary reasons why the Court should avoid an evaluation of First Amendment impact on those laws. (Answer Brief pages 7-14). Each of these arguments, however, was also offered to the district court of appeal, and there given short shrift by that tribunal. Each was also anticipated and treated

fully in Ferre's initial brief (Initial Brief pages 7-9), so that further discussion is unnecessary.[1]

---

[1]The state cites cases for the proposition that the legislature has acted merely to regulate the time, manner and place of electioneering. Only one of these cases involves campaign financing, Bang v. Chase, 442 F. Supp. 758 (D.Minn. 1977), aff'd, 436 U.S. 941 (1978), and that case is badly misquoted in the state's brief. The state has inserted the term "not" in a quoted excerpt, with the consequence that the case purports to stand for the opposite of what it really says. The correct statement from the opinion (442 F. Supp. at 763) is that: "simply because an individual is permitted some speech does not mean he may be constitutionally forbidden to engage in more." (emphasis added).

I. First Amendment Infringement

The issue at stake in this proceeding is the constitutionality of statutes which absolutely ban contributions five days before and at any time after a mayoral run-off election held one week after the mayoral primary. As these laws bear directly on free speech, the laws at issue:

> are subject to exacting scrutiny: they must be supported by a compelling governmental interest and must be narrowly drawn so as to involve no more infringement than is necessary.

Winn-Dixie Stores, Inc. v. State, 408 So.2d 211, 212 (Fla. 1981).

The two areas of major disagreement between Ferre and the state are whether the governmental interests asserted are, as the state urges, "compelling," and whether the means of effecting those ends are, as they must be, narrowly drawn. The parties' briefs diverge on these issues.

A. Governmental interests.

1. Appearance of corruption.

The state's discussion of this governmental interest relies wholly on language contained in Buckley v. Valeo, 424 U.S. 1 (1976), quoted in the state's answer brief at page 18. But, as Ferre explained in his initial brief, the appearance of corruption can only be a concern in respect of a candidate's receipt of large contributions. See Citizens Against Rent Control v. Berkley, 454 U.S. 290, 291-97 (1981).

Indeed, the very language from Buckley which the state has quoted for reliance, three times in two short paragraphs uses the word "large" to describe the only type of contributions which the Court deemed to be corrupting. The state offers no basis whatsoever, in decisional law or logic, to treat as sufficiently compelling (to withstand rigorous scrutiny) a governmental concern over contributions, within the low dollar limitations of Florida's election law, such as those involved here.

2. Public information.

Illustrating its concerns with an example of concealed contributions from the Ku Klux Klan, the state suggests that the disclosure of pre-election contributions is a compelling interest. But, as discussed in Ferre's initial brief, the state's statutory authorization of PACs as a practical matter makes possible the concealment of Klan membership, or other contribution sources, even before an election.

3. Fiscal responsibility.

This alleged governmental interest is not identified or discussed by the district court of appeal. It appears to be wholly without merit.

The argument here seems to be that the public needs the state's protection from possible losses which could result when campaign spending exceeds contributions and post-election contributions do not materialize for repayment.

The suggestion, apparently, is that a ban on post-election contributions acts as a deterrent to overspending by candidates, which in turn protects persons who finance or commit to election campaigns from incurring losses. The argument is strained. It provides no compelling reason for the ban. By substituting the word "chill" for deterrent, it is seen that the state's argument is in reality an argument to minimize -- i.e., chill -- expression by reducing campaign expenditures through candidate self-restraint.

B. Narrowly drawn restrictions.

For the reasons expressed in his initial brief (pages 19-22), Ferre suggests that whatever the validity of the state's concerns, the statutes at issue fail completely to meet this Court's Winn-Dixie requirement of being drawn as narrowly as possible to achieve their purpose. There is no refutation in the state's brief to the key fact that Florida is the only state in the nation with a total ban on post-election contributions. Yet all other states, and the federal government, are equally concerned about the alleged governmental interests of an appearance of corruption in elections and disclosure of financing information.

II. Other Issues

Ferre has raised two issues unrelated to First Amendment concerns -- that the statutory term "contributions" does not encompass post-election receipts, and that the mandatory double fine in section 106.08(5) is unconstitutionally excessive. These issues are adequately treated on the merits in Ferre's initial brief and in the state's answer brief.

The state argues as a new point, however, that these two issues, although treated by the district court expressly in its decision, are not properly before the Court because they were not argued in Ferre's jurisdictional brief. (Answer Brief pages 26-28). The state relies for this position wholly on a 1980 law review article. This Court, however, has rejected the position asserted in that article. It has specifically declared, contrary to the article, that a case accepted for review brings for Court consideration all issues addressed by the lower tribunal. Bankers Multiple Lines Ins. Co. v. Farish, 464 So.2d 530 (Fla. 1985); Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984). It follows that these issues are properly before the Court.

Conclusion

For the reasons expressed, Ferre requests that the Court hold invalid the post-election ban on contributions as applied to Ferre's mayoral election held one week after his election as a candidate in the run-off election. Alternatively, the Court should absolve Ferre of the fine imposed in this case for the alternate reasons raised in this appeal.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Mitchell R. Bloomberg, Esq.
and
Charles M. Auslander, Esq.
of
Fine Jacobson Schwartz Nash
Block & England, P.A.
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

Certificate of Service

I certify that copies of this brief were hand-delivered on May 29, 1986 to:

Jim Smith, Esq.
Attorney General
Department of Legal Affairs
701 N.W. 2nd Avenue
Miami, Florida 33128

and to

Anthony C. Musto, Esq.
Assistant State Attorney
Office of the State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

By: ______________________

4193D
052886/5/IDT