O/G 9-12-86 org

SUPREME COURT OF FLORIDA

SAM FALZONE,

Petitioner,

vs

STATE OF FLORIDA,

Respondent.
_____/

County Criminal No: 84-2298
Circuit Appeal No: 84-2319
SECOND DISTRICT COURT
OF APPEAL NO: 85-64
CASE NO: 68,178

PETITIONER'S BRIEF

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On October 24, 1984, an Indictment was filed charging the Petitioner, SAM FALZONE, along with other individuals, with violation of campaign finance law. (R-55) The final paragraph of that document refers to Florida Statutes 106.03 and 106.19.

On November 7, 1984, Petitioner filed Motions to dismiss. (R-81-86) On November 29, 1984, a hearing was held before the Honorable Dan C. Rasmussen, County Judge, Sixth Judicial Circuit in and for Pasco County. (R-1-54) At the conclusion of that hearing, the trial Court reserved ruling and subsequently entered its written Order of dismissal on November 30, 1984. (R-120)

The Order of dismissal was based on three grounds:

1. The Indictment was deficient in that it failed to charge that each Defendant knowingly and willfully acted as a political committee;

2. That Florida Statute 106.03 is unconstitutionally vague and overbroad;

3. That no crime was committed in that Florida Statute 106.19 does not include Florida Statute 106.03, Violations, within its provisions. (R-120)

On December 4, 1984, the State filed its Notice of Appeal and incorrectly took that Appeal to the Circuit Court for the Sixth Judicial Circuit of Florida. (R-121) Eventually, the Appeal was transferred to the Second District Court of Appeal for determination.

The Second District Court of Appeal reviewed the trial Court's dismissal and reversed same in a decision filed November 15, 1985 (Case No: 85-64).

On January 10, 1986, Petitioner filed a Notice of Appeal seeking discretionary review by the Court. On January 22, 1986, Petitioner filed his jurisdictional brief. While this Court's decision on jurisdiction was pending, Petitioner on March 4, 1986, pled no contest to the charge and, specifically, with the consent of the trial Court and the Stipulation of the State, reserved his right to pursue this appeal.

SUMMARY OF ARGUMENT

Section 106.03, Florida Statute, as applied with the definitional statute 106.011(1) and penalty statute of 106.19 is unconstitutionally vague and overbroad. The reasons are numerous and include the following:

1. An ordinary citizen is unable to determine when they are considered to be a part of a "political committee";

2. An ordinary citizen is unable to determine what constitutes a "political committee";

3. A citizens "incident purposes" during expression and association are needlessly and dangerously regulated without clear parameters;

4. Citizens are regulated in §106.03 as a political committee under circumstances that are said to not be regulated under§106.011(1);

5. Citizens are subject to criminal penalties predicated on anticipation of future acts or contingencies;

6. An ordinary citizen is unable to determine when compliance with regulation is required since there are alternative ten day time periods that are keyed into vague and unclearly defined events.

The State seeks to prosecute Petitioner for failing to file a statement of organization as a political committee.

The terms of the statutes in Chapter 106 do not state that such a failure to file is a crime. The Second District has improperly ignored the rules of construction for penal statutes and has improperly relied on rules of construction for civil statutes to interpret §106.19 to create a crime the legislature never stated, but one which the Second District thinks the legislature intended

ISSUE ONE

THE TRIAL COURT DID NOT ERR IN FINDING THAT §106.03 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND FAILS TO PLACE ORDINARY CITIZENS ON NOTICE AS TO WHAT CONDUCT IS PROSCRIBED AND WHEN COMPLIANCE IS REQUIRED.

Florida's Laws on campaign financing are found in Chapter 106, Florida Statute. By their very nature, these laws implicate and regulate two fundamental first amendment freedoms, to-wit: the freedom of expression and the freedom of association. While it is clear that neither the right to associate nor the right to participate in political activities is absolute, the Courts must remain cognizant that any potential infringement of the exercise of said rights by legislation must be scrutinized with great care. Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976). In analyzing such statutes, the Court must probe the legitimacy and the weight of the governmental objective, the appropriateness and the effectiveness of the means chosen in attaining it and the availability of less drastic alternatives to the same end. Buckley, supra. The language used by the legislature must be so definite as to make it possible to distinguish between permissible and impermissible speech and association. Buckley, supra. Chapter 106, Florida

Statute, abounds with confusion and unnecessary infringement of first amendment rights and gross misuse of the English language.

Petitioner does not suggest that the State is without a legitimate interest in insuring that the public knows who is involved in raising and spending money for political purposes. Any court may have sympathy for legislation which is intended to safeguard the public and insure honesty and integrity in government, but this sympathy cannot be allowed to impair a Court's judgment. State v. Dinsmore, 308 So.2d 32 (Fla. 1975).

The Second District clearly appears to have ignored the fact that "the law of Florida is well settled that statutes penal in nature must be strictly construed according to the letter thereof". Ex parte Bailey, 23 So. 552 (Fla. 1897); Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962), rehearing denied. Moreover such penal statutes are to be strictly construed in favor of the person against whom the penalty is sought to be imposed. Allure Shoe Corporation v. Lymberis, 173 So.2d 702 (Fla. 1965).

When "exercising its power to declare an offense punishable, the legislature must inform its citizen with reasonable precision what acts are prohibited". There must be provided

an ascertainable standard of guilt, a barometer of conduct must be established so that no person will be forced to act at his peril. Cramp v. Board of Public Instruction of Orange County of Florida, 368 U.S. 278 7 L.Ed.2d 285, 82 S.Ct. 275; Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947); State v. Buchanan, 191 So.2d 33 (Fla. 1966).

Sections 106.03, 106.011(1) and 106.19(c) are without sufficient statutory standards or guidelines. The legislature has effectively set a net large enough to catch all possible offenders and has left the Court's the power to say who should be detained and who should be set at large. This statute is dangerous and does not provide due process of law. United States v. Reese, 92 U.S. 214, 23 L.Ed.2d 563 1876; State v. Winters, 346 So.2d 991 (Fla. 1977).

The statute is vague and constitutionally infirm because its language is so unclear and/or ambiguous, that persons of reasonable intelligence must guess at what conduct is proscribed. State v. Ferrari, 398 So.2d 804 (Fla. 1981). A statute is vague if it fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement. Southeastern Fisheries Association v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984). The statute is overbroad

and therefore unconstitutional if it is so all-encompassing in its reach that it ensnares both protected and non-protected conduct. Ferrari, supra; Carricarte v. State, 384 So.2d 1261 (Fla. 1980). Chapter 106, and specifically §106.03, 106.011(1) and 106.19 are unconstitutional for all these reasons.

For the sake of analysis, let's approach Chapter 106 as one might expect an ordinary citizen to do so if he or she was interested in the laws pertaining to campaign financing, expression and association. A reasonable place to expect them to start would be at the beginning. The first statute is 106.011 and as a citizen might logically expect, it contains "definitions". The very first definition is particularly crucial to the issues on appeal. It states:

> unless the context clearly indicates otherwise; (1) "political committee" means a combination of two or more individuals, or a person other than an individual, the primary or incidental purpose of which is to support or oppose any candidate, issue, or political party, and which accepts contributions or makes expenditures during a calendar year in an aggregate amount in excess of $500.00..."

It seems reasonable to Petitioner, that a citizen would be immediately perplexed by the wording of several phrases in that paragraph. How many human beings does it

take to constitute a "political committee" in the State of Florida? According to Section 106.011(1), Florida Statute, it can be "a combination of two or more individuals". But also according to Section 106.011(1), Florida Statute, "a person other than an individual" can constitute a political committee. This is nonsensical. A person and an individual are the same things: human beings. The citizen would probably also be curious as to whether he or she and their spouse are a political committee. A husband and wife combination apparently is not excluded from being a political committee. Does this mean that each family unit that makes a contribution of over $500.00 in a calendar year constitutes a political committee?

If citizens are successful in figuring out "who" can make up a political committee, they are probably perplexed by the delineation between "primary" and "incidential" purpose. The wording chosen by the legislature regarding "purpose" is absolutely inappropriate for use in a statute with potential criminal penalties. The legislature does not simply try to deal with the primary purpose, but tries to legislate against citizens "incidental" purposes. What if two people combine to do something and their primary purpose is not political, but one of the two also has an

incidental purpose that is political? Do all the people who have combined have to share the incidental political purpose for it to be a political committee, or is it enough if 51% of the members have an incidental purpose, or is it enough if only one member has the incidental political purpose? Does it make any difference if the members whose primary purpose is not political don't have knowledge of the other members incidental political purpose? What does the term "incidental" really mean? Can a citizen really be expected to know what that means without guessing? Isn't the legislature just setting a large net and then leaving it to the Courts to later step inside and determine who should be set free? What if neither the primary purpose nor the incidental purpose was political when the individuals first combined and received $500.00, but later they get some new members who have as an incidental purpose one which is political? Do the old members now become "contaminated" by the new members and have to abide by all the regulations of Chapter 106, Florida Statute? Or can they wait until they collect another $500.00 after this incidental purpose has arisen?

Let's assume this unexplainable confusion is ignored. The general tenor of the words contained in this definition

would probably seem to say to a citizen that if they combined with someone else with some type of purpose to support a candidate or issue, and they actually accept or spend over $500.00 in a single year, Florida would consider them to be a "political committee". This citizen would then rightfully assume, by definition, that if he's only involved in political association and expression on a small scale, i.e. accepting or spending less than $500.00 per year, he does not come within the definition of a political committee unless the later context of a statute in the chapter clearly states otherwise.

If our typical citizen continues to read Section 106, they might note that these things called "political committees" have to file a statement of organization if it anticipates collecting or spending over $500.00 per year. Our small scale citizen would reasonably assume that Section 106.03 is not making reference to him since he is below the threshold of $500.00 and is therefore by definition not a political committee. It is important to note that Section 106.03 does not say that the term "political committee" as used therein, has a different definition than initially set out at the beginning of the statute in Section 106.011. Section 106.03 does not contain any broadening terminology such

as saying each political committee or other persons or associations. Section 106.03 therefore does not clearly indicate there is a different definition to be applied by citizens reading said statute.

Let's assume for the sake of argument that we have a combination of two or more individuals whose primary or incidental purposes is to support or oppose any candidate, issue, or political party. When would the citizens think they have actually become a "political committee" under Florida Law and thereby subject to filing a "statement of organization" as required in Section 106.03? The terms of Section 106.011(1) (the definitions) say the political committee comes into existence when the combination of individuals "accepts contributions or makes expenditures during a calendar year in an aggregate amount in excess of $500.00...". Obviously, a common understanding of the terms contained therein clearly means the combination of individuals must actually accept or spend $500.00 before they are considered a political committee and thereby subject to laws for political committees. Section 106.011(1) does not say that "a combination" becomes a political committee if they "anticipate" receiving or spending $500.00. §106.03 does not harmonize with §106.011(1). §106.03 tries to require compliance of a political committee

before a political committee, by definition, exists. §106.03 tries to regulate conduct and disclosures based on a threshold of anticipating contributions or expenditures exceeding $500.00. It strikes Petitioner as shocking and ludicrous to have a statute in this country create potential criminal conduct based upon a citizens "anticipation" of events, particularly fund raising. Anyone who has done any type of fund raising, be it political or for a church, knows that the use of the word "anticipation" in this setting is a joke that is without humor.

Fortunately, case precedence is clear that anticipation cannot be a threshold of criminal responsibility. The legislature cannot predicate a crime on future acts or contingencies or on the take place of some future act. Kelly v. State, Rosowsky, 55 So.2d 561 (Fla. 1951); Dinsmore v. State, supra; State v. Llopis, 257 So.2d 17 (Fla. 1971).

The Second District, in its opinion on the instant case, had to concede a problem existed with the conflicts between 106.011(1) and 106.03. Said Court chose to refer to it as an anomaly. According to Black's Law Dictionary and Websters, an anomaly is something that deviates in excess of normal variation; an irregularity.

Petitioner submits that in this context, saying the

conflict between Section 106.011(1) and Section 106.03 is an anomaly, is also an understatement. Despite holding this to be in the context of a penal statute, the Second District Court of Appeal ignored this blatant irregularity and held that Section 106.03 applies to citizens who by definition it does not apply to under Section 106.011(1). The Courts only rationale for ignoring the anomaly was the phrase contained in Section 106.011 which said "unless the context clearly indicated otherwise". The District Court stated:

> "where the wording of a statute taken literally conflicts with the plain legislative intent, the wording must yield to the legislative purpose. Beebe v. Richardson, 156 Fla. 559, 23 So.2d 718 (1945). Unquestionably, the legislature intended that there be a public disclosure of persons who have organized to seek substantial contributions or make substantial expenditures for a political purpose. Thus, we hold that section 106.03 applies to those who anticipate obtaining contributions or making expenditures in excess of $500.00 in a calendar year and who are otherwise defined in Section 106.011(1), even though such contributions have not yet been obtained or such expenditures have not yet been made".

Petitioner respectfully disagrees and contests the finding that the context clearly indicates otherwise. If the plain legislative intent was to regulate persons who

anticipated collecting or spending money, why did the legislature define their regulations to apply to combinations of people who actually accepted and spent over $500.00?

The District Court appears to disregard the fact that legislative intent is not the primary rule of construction for interpreting penal statutes. Instead, the primary concern is that the citizens are clearly and specifically put on notice as to the prohibited conduct. In §775.021, the legislature has clearly directed how a criminal statute is to be construed where their wording allows confusion to exist:

> Rules of Construction:
>
> "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

This Court also has consistently so stated for nearly a century. Ex parte Bailey, supra; Ex parte Amos, 112 So.2d 289(1927); State v. Wershow, 343 So. 605 (Fla. 1977); Earnest v. State, 351 So.2d 957 (Fla. 1977).

When the Second District ignored the anomaly and gave precedence to Section 106.03, the Court was in violation of statutory construction since it was improper to give Section 106.03, Florida Statute, precedence over Section

106.011, Florida Statute. A more specific statute must always be given precedence over a more general one regardless of their temporal sequence. Busic v. United States, 446 U.S. 398, 64 L.Ed.2d. 381, 100 S.Ct. 1747 (1980).

Petitioner is prosecuted for not filing a statement of organization in a timely matter. The trial Court ruled that 106.03 did not place an ordinary citizen on notice as to when compliance is required. What are the time limits under Section 106.03, Florida Statute, and when do they begin to run? Are these time limits set out in a specific enough manner to clearly notice the public and therefore be a reasonable basis for a criminal statute? Petitioner submits that the time limits are too unclear and must be guessed at.

Initially, it seems that Section 106.03, Florida Statute, requires that a political committee file a statement of organization within ten days after its organization. It is left quite unclear as to what "organization" is suppose to mean. Petitioner believes that a normal citizen would be led to believe that we are talking about the filing requirements kicking in after some people have had a formal organizational meeting; like where they elect officers. Is this statute intended to pertain to our small scale citizen who is mad

about something and discusses it over the hedge with his neighbor? Is it an "organizational" meeting when two neighbors decide they are going to spend some money to express themselves over the next year about an issue or candidate?

Certainly it cannot be a crime to fail to file within this first ten day period, since 106.03 says that if you don't do it then, you can do it later within ten days after the political committee has information which causes it to anticipate that it will receive or spend over $500.00. So what it really comes down to is, if there is a crime, the crime occurs by not filing within ten days after the committee has anticipated receiving or spending over $500.00.

So now the citizen is back to some of the same questions. What does "anticipate" mean? Petitioner submits that it is nothing more than guessing or forecasting or prophesying. We are confronted by a statute that is trying to base and hinge criminality on forecasting or guessing or prophesying. What if one of the members anticipates that the committee will receive over $500.00, but doesn't tell the rest of the committee? What if a person says they are going to contribute $501.00, but the committee knows that that person always promises that and has never paid it before? Is it enough that the committee is "hoping" to receive the money?

Do people involved in fund raising ever really know that they are ever going to get money until it is actually in their coffers? The statute does not address what constitutes the quality of information that should cause a committee to anticipate the receipt or expenditure of funds over $500.00. A citizen can't help but wonder whether this statute is referring to some type of formal anticipation on the record of a formal meeting. When does a committee's hope for receiving or spending money blossom into anticipation? Petitioner submits that a citizen must be able to tell when his hopes for the ability to conduct political expression and association will cause him to come under scrutiny for criminal responsibility. This statute doesn't do that.

§106.03 is unconstitutional and vague because it fails to provide when Defendant is required to file a document. The statute does not provide any specific date or time within which Defendant would be obligated to file the required document, and therefore, Defendant would have no way of knowing from a reading of the statute when criminal responsibility would attach by reason of his failure to so file. There is no way of ascertaining when a crime has been committed. This Court cannot allow to stand a statute which requires the Defendant to perform an act under unclearly enumerated

circumstances and which also fails to advise him within what period of time he must perform it. These sections of the campaign financing law are clearly vague beyond redemption.

ISSUE II

THE TRIAL COURT DID NOT ERR WHEN IT DISMISSED THIS CAUSE BECAUSE §106.19, FLORIDA STATUTE DOES NOT INCLUDE §106.03, FLORIDA STATUTE "VIOLATIONS" WITHIN ITS PROVISIONS

Petitioner Falzone was charged with not complying with the requirements of Section 106.03; that is the failure to file a statement of organization. It is clear that Section 106.03 does not state any criminal penalties for failing to comply with said statute and does not suggest in its terms that a criminal penalty is provided in some other portion of the chapter. It is also apparent that Chapter 106 does not contain a "catch all" statute providing penalties for failure to comply with any of the various sections of the chapter. The only section of Chapter 106 that makes any reference to criminal penalties or implication is Section 106.19. However, Section 106.19 does not make any direct reference or specific mention of Section 106.03. The question then becomes is there anything in Section 106.19 that specifically puts a citizen or a group of citizens on notice that it is a crime to fail to "file a statement of organization" as requested in Section 106.03. Petitioner contended that

it does not do so, and the trial court agreed. As can be observed from the indictment, it was not alleged that Petitioner "accepted a contribution" as referred to in Section 106.19(a). It also was not alleged that Petitioner "failed to report any contribution" as referred to in Section 106.19(b). It also was not alleged that Petitioner "falsely reported .... any information" as referred to in Section 106.19(c).

So what it comes down to is simply a question of whether an individual or a group of individuals is put fairly on notice by the rest of the wording on Section 106.19(c) that it will be a crime to fail to file a statement of organization as requested in Section 106.03.

A simple reading on Section 106.19(c) reveals to any person of common understanding that the terms of the statute do not say that it is a crime to fail to file a report. The only thing that Section 106.19(c) states to be a crime is where a political committee (1) falsely reports information or (2) deliberately fails to include any information. As everybody knows, failing to include something means that you have provided information and in doing so, failed to give it all. There is nothing confusing or ambiguous about the terms of this statute. In analyzing this problem, the

Second District did not say that this is not what the words say, but the Second District did not think it would make sense for a statute to make it a crime for failing to include all information but there would be no penalty for providing no information whatsoever. The Second District stated that "the construction of a statute leading to an absurd result should be avoided", citing McKibben v. Mallory, 293 So.2d 48 (Fla. 1974). The fact that the Second District does not like the result of the words that the legislature chose does not mean that the Court can ignore the words that the legislature chose. There is nothing ambiguous about the terms in 106.19(c), but even if the Court were to believe that there was ambiguity, the Court must apply the rules of construction for a criminal statute as set forth in 775.021,

> "the provision of this code and offenses defined by other statutes shall be strictly construed; when the language is acceptable of different constructions, it shall be construed most favorably to the accused"

There is not doubt that this is the law of statutory construction in criminal cases, and it has been vigorously supported judicially in both Florida and Federal Courts.

Ex parte Bailey, supra; Sandford v. State, 78 So. 340 (Fla. 1918); Busic v. United States, supra.

Our position is clear, we are are not conceding that there is anything ambiguous about Section 106.19(c). A citizen governed by Florida law is entitled to rely on the clear meaning and the terms used in the wording of the statute. Such a person reading the statutes is not required to research the intent of the legislature. A person reading the statute simply has to be governed by the wording of the law. Any reasonable person reading the phrase in question would think it means what it says, and what it says contains the word "include". Maybe the legislature wanted to make a failure to file a statement of organization, pursuant to Section 106.03, Florida Statute, a crime, but it certainly is not what it stated in the terms of the law it passed. There is nothing ambiguous about the terms, the only thing that failing to include something can mean is that someone goes and gives information but doesn't give it all. Penal statutes must be strictly construed according to the letter thereof, and if there is any reasonable doubt as to the meaning of said statute, it should be construed in favor of the accused.

Ex parte Bailey, supra; Fiske v. State, 366 So.2d 423 (Fla. 1978). Statutes proscribing punishments and penalties should not be extended further than their terms reasonably justify. Atlantic Coastline Railroad Company v. State, 74 So. 595 (Fla. 1917). When construing criminal statutes, the state cannot defend a statute by simply claiming that something is the intent of the legislature. Nothing can be regarded as included within a criminal statute unless it is within the letter as well as the spirit of the statute. It must be clearly and intelligently described in the very words of the statute. Ex parte Bailey, supra; Washington v. Dowling, 109 So. 588 (Fla. 1926); Earnest, supra. Statutes creating and defining crimes cannot be extended by construction or intent, and no act, however, wrongful, can be punished under a statute unless clearly within its intent and terms. Bradley v. State, 84 So. 677 (Fla. 1920); Hutchinson v. State, 315 So.2d 546 (2d DCA 1975). Therefore, before any person can be punished for a statutory offense, his act must be plainly and unmistakably within the statute. Bradley, supra; Whitehurst v. State, 141 So. 878 (Fla. 1932).

CONCLUSION

Petitioner respectfully requests this Court to reverse the decision of the Second District Court of Appeal and reinstate the decision of the trial Court finding the statute(s) unconstitutional and/or finding the offense alleged not to be a crime. Petitioner requests this Court to remand the case to the trial Court to vacate the judgment and sentence and to dismiss the charge.

Respectfully submitted,

GREENFELDER, MANDER, HANSON,
MURPHY & TOWNSEND

By: A.R. Mander III
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief has been furnished to the Attorney General's Office, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida, by U.S. Mail, this 13th day of May, 1986.

By: A. R. Mendez III
Attorney for Petitioner