D/a 9-1-87 28

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,524

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Petitioner,

v.

MID-FLORIDA GROWERS, INC. and HIMROD & HIMROD CITRUS NURSERY, etc.,

Respondents.

_____/

INITIAL BRIEF OF PETITIONER

PETITION FOR DISCRETIONARY REVIEW OF A DECISION CERTIFIED BY THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA, AS A QUESTION OF GREAT PUBLIC IMPORTANCE

FRANK A. GRAHAM, JR.
Resident Attorney
Department of Agriculture and Consumer Services
Room 512, Mayo Building
Tallahassee, Florida 32399-0800
(904) 488-6851

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

MISCELLANEOUS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the district court of appeal. It will be referred to as the Department in this brief. The appendix to the petitioner's brief will be referred to as "A".

STATEMENT OF THE CASE AND OF THE FACTS

The respondents, plaintiffs in the trial court, filed an inverse condemnation action claiming that the destruction of their citrus plants by the State, in an effort to eradicate citrus canker, constituted a taking. (A-178)

The Department, defendant in the trial court, contended that the action of the State, in its efforts to eradicate citrus canker, was a valid exercise of its police power.

A pretrial hearing was conducted to determine whether a taking of respondents' property occurred. The trial judge ruled that, since there were no positive findings of canker in the plants destroyed, there was no justification for their destruction and, therefore, a taking had occurred requiring compensation. (A-188)

The Department appealed the trial court's order to the Second District Court of Appeal and the district court affirmed the finding of the trial court but certified, as a matter of great public importance, the following question:

> Whether the State, pursuant to its police power, has the constitutional authority to destroy healthy, but suspect citrus plants without compensation?

The Department filed its Notice to Invoke Discretionary Jurisdiction in this court.

During 1984, respondents operated citrus nurseries in Hardee County, Florida. In April, 1984, respondents obtained citrus budwood from Ward's Nursery, a citrus nursery in Polk

County. On August 27, 1984, a form of citrus canker was discovered at Ward's Nursery. On September 6, 1984, the Department obtained samples from respondents' nurseries. No positive canker findings were made. (A-191) After a recommendation by the Citrus Canker Technical Advisory Committee, an Immediate Final Order was directed to respondents for the destruction of citrus plants which had been received or propagated from Ward's Nursery and which had been exposed to canker. The Immediate Final Order provided in part:

> The Citrus Canker Technical Advisory Committee has recommended, and the department adopted by emergency rules, treatment and eradication procedures for nurseries which received citrus trees from nurseries or stock dealers declared infested or infected with citrus canker. The department will implement those procedures in Mid-Florida Growers, Inc.
>
> Mid-Florida Growers, Inc. is hereby designated a treatment or eradication area within the meaning of Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code.
>
> All plants in Mid-Florida Growers, Inc. received from a nursery or stock dealer declared infested or infected with citrus canker will be destroyed by burning or by other methods prescribed by the department or the United States Department of Agriculture (USDA).
>
> In addition, all citrus plants within one hundred twenty five (125) feet of such plants will also be destroyed in like manner.

(A-213.)

The Immediate Final Order directed to Mid-Florida Growers, Inc. is identical to the Immediate Final Order directed to Himrod & Himrod Citrus Nursery. (A-212) From October 7 to October 19, 1984, the Department burned the specified citrus plants of the respondents. (A-191)

A total of eight nurseries obtained citrus materials from Ward's Nursery. All eight received Immediate Final Orders and destruction was carried out in the identical manner as with the respondents. (A-123)

SUMMARY OF ARGUMENT

The trial court ignored the emergency rules, disagreed with the decision making authorities as to the need to destroy suspect citrus plants, and held since there was no justification for such destruction, a taking of respondents' property occurred requiring compensation. Contrary to the law, the trial court substituted its judgment for that of the decision making authorities.

The respondents did not challenge the propriety of the destruction of suspect plants prior to filing in circuit court. Case law holds that a party in an inverse condemnation proceeding may not challenge the propriety of the State's exercise of its police power.

When the State exercises its police power in conformance with applicable statutes and rules, the court may not substitute its judgment as to the wisdom of the police power action.

To hold that a taking of respondents' property had occurred requiring compensation because of the magnitude of the loss suffered and because the impact of the loss falls upon a few is unsound and not founded in the law.

Case law holds, that where there is a valid exercise of police power to prevent a public harm, and the government has no possessory or proprietary interest in the property neither the magnitude of the loss nor the fact the burden of the loss rests upon a few is a basis for finding that a taking has occurred requiring compensation.

ISSUES

I.

THE PROPRIETY OF AN EXERCISE OF POLICE POWER MAY NOT BE CHALLENGED IN AN INVERSE CONDEMNATION PROCEEDING.

II.

WHEN THE PURPOSE OF DESTROYING PRIVATE PROPERTY IN THE EXERCISE OF POLICE POWER IS TO PREVENT A PUBLIC HARM, AND THE STATE HAS NO PROPRIETARY INTEREST IN THE PROPERTY, THERE IS NO TAKING REQUIRING COMPENSATION.

ISSUE I

THE PROPRIETY OF AN EXERCISE OF POLICE POWER MAY NOT BE CHALLENGED IN AN INVERSE CONDEMNATION PROCEEDING.

The need to thwart the spread of citrus canker was of such urgency to the citrus industry and the welfare of the State as to require the exercise of police power measures to destroy suspect and exposed citrus plants.

> It has long been held that the citrus industry is of such vital import to the welfare and economy of this state that police power measures may be taken to safeguard the industry.

Flake v. State, Department of Agriculture, 383 So.2d 285, 288 (Fla. 5th DCA 1980), quoting State, Department of Citrus v. Griffin, 239 So.2d 577, 578 (Fla. 1970).

In Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968), the Court stated:

> The protection of a large industry constituting one of the great sources of the state's wealth and therefore directly or indirectly affecting the welfare of so great a portion of the population of the state is affected to such an extent by public interest as to be within the police power of the sovereign.

Id. at 213.

Section 581.031(17), Florida Statutes (1983), authorizes the Department:

> To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles capable of harboring plant pests or noxious

> weeds, if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were reasonably exposed to infestation, when necessary to prevent or control the dissemination of plant pests or noxious weeds or to eradicate same and to make rules therefor.

The Citrus Canker Technical Advisory Committee, composed of representatives of the citrus industry, nurserymen, the scientific community, the Florida Department of Agriculture and the United States Department of Agriculture, promulgated emergency rules directed to the eradication of citrus canker. These are Emergency Rules 5BER84-8 and 5BER84-9. (A-200-211)

Subsection (1)(t) of Emergency Rule 5BER84-9 defines a suspect citrus canker infested or infected plant as:

> A plant which has been subjected to infestation or infection by its presence in an infected area or having been removed from an infested area within a given period of time.

Subsection (4)(a) provides:

> All citrus trees from any nursery or stockdealer declared infested or infected since January 1, 1984, are considered as infested or infected plants.

The procedures for eradication are set forth in paragraphs (5) (a) and (b) and direct the Department to destroy by burning or other methods as may be prescribed by the USDA or the department, <u>suspect citrus canker infested or infected</u>

plants and all citrus plants within 125 feet of suspect citrus canker infested or infected plants. (A-209-210)

A citrus plant that has been in the presence of or exposed to nursery stock infected or infested with canker is not a healthy tree. Referring to the destroyed nursery stock as "healthy but suspect" is a contradiction in terms.

The sole basis for the trial court's finding that a taking occurred was:

> No competent evidence supports the State's concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. . . . The Plaintiffs' careful methods of operation and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the legal conclusion that no citrus canker was present.

(A-188.)

The trial court ignored the emergency rules in its order of taking.

The effect of the trial court's order is to allow a challenge to the propriety of the Department's action in destroying the nursery stock.

The propriety of the Department's action may not be challenged in an inverse condemnation proceeding.

Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982), involved a dredge and fill permit denial on the basis that the project would destroy all of the aquatic

life in the area. Key Haven did not challenge the DER order, but, instead, filed suit in circuit court alleging that the denial of the permit amounted to a taking by inverse condemnation because the denial deprived the property owners of any beneficial use. The Supreme Court held:

> We emphasize that, by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary or capricious or in failing to comply with the intent and purposes of the statute.

427 So.2d at 160 (emphasis added).

In Albrecht v. State, 444 So.2d 8, 12 (Fla. 1984), the Court was again dealing with a dredge and fill permit issue. The Court held:

> The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists.

In Atlantic International Investment Corp. v. State, 478 So.2d 805, 807 (Fla. 1985), the Supreme Court held:

> [O]nce a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper.

In the instant case respondents initially accepted the propriety of the Department's action and filed in circuit court claiming that the action of the Department amounted to a taking. Perhaps the decision to accept the propriety of the action was based on Nordmann v. Florida Department of

Agriculture and Consumer Services, 473 So.2d 278 (Fla. 5th DCA 1985), and Denney v. Conner, 462 So.2d 534 (Fla. 1st DCA 1985).

In Nordmann the order to destroy trees which were only suspect because of their origin was challenged on the basis that the State did not have authority to destroy apparently healthy trees without the payment of compensation.

The district court held that citrus canker presents an imminent danger to the citrus industry. The court said:

> No real controversy exists on the critical fact that citrus canker may be transmitted by both natural (wind and rain) and artificial (man and machinery) means and that it may lay dormant in apparently healthy plants for some months . . . after exposure to infected plants before manifesting signs of the disease.
>
> Those circumstances underlie the department's conclusion that, even though the plants appear healthy and at this time evidence no sign of citrus canker, appellants' plants still present an imminent danger in the spread of the disease since they have been exposed to infested or infected plants.

473 So.2d at 280 (emphasis added).

In Denney it was contended that since the order did not recite that the trees in question manifested signs of canker infection, there was no immediate danger and, hence, destruction of "healthy" trees would violate the owner's constitutional right to due process.

The right to destroy citrus plants without positive findings of canker was judicially determined in Nordmann and

Denney as was the fact that citrus canker is an invidious nuisance.

The trial court's finding that there was no justification for the destruction of respondents' citrus plants and the affirmance of the order by the district court both constitute a challenge to the propriety of the Department's exercise of its police power in an inverse condemnation proceeding and such a challenge is contrary to the law. In substituting its judgment for the judgment of the decision making authorities, the trial court exceeded the permissible bounds of judicial review.

ISSUE II

WHEN THE PURPOSE OF DESTROYING PRIVATE PROPERTY IN THE EXERCISE OF POLICE POWER IS TO PREVENT A PUBLIC HARM, AND THE STATE HAS NO PROPRIETARY INTEREST IN THE PROPERTY, THERE IS NO TAKING REQUIRING COMPENSATION.

In Albrecht v. State, 444 So.2d 8 (Fla. 1984), the Court held that "a regulation or statute may meet the standards necessary for exercise of the police power, but still result in a taking."

One of the most frequently cited cases standing for the proposition that an exercise of police power may in some instances amount to a taking is Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922).

The factual distinctions between Pennsylvania Coal and the instant case render the principle of law enunicated inapplicable because (1) the case involved a traditional concept of real property law, i.e., the reservation of subsurface rights in a transfer of title, and (2) the statute prohibiting the mining of the subsurface was challenged and the statute was held to be unconstitutional.

Justice Holmes, writing for the majority, said:

> It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.

In the instant case, there is no challenge to the constitutionality of the statute and rules involved, and both the trial court and the district court determined that the actions of the Department constituted a valid exercise of the police powers.

The district court fortified its opinion by citing United States Supreme Court decisions. The district court misread these cases. The cases make it clear that neither the magnitude of the loss suffered nor the fact that the economic burden falls upon a few is a basis for finding a taking requiring compensation when there is a proper exercise of police power.

The magnitude of the loss theory is believed to have started with Justice Holmes in early United States Supreme Court decisions on this issue. However, as one commentator points out, the Holmes premise that the right to compensation depends on the magnitude of the loss suffered is historically unsound, has never, in fact, been acceptable to the Court, and wasn't even followed by Holmes himself. Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).

In Miller v. Schoene, 276 U.S. 272 (1928) the Virginia legislature enacted a statute requiring the destruction of red cedar trees in order to prevent the spread of a communicable plant disease to apple orchards nearby. The only method of controlling the disease and protecting apple

trees from the ravages of the cedar rust was the destruction of all red cedar trees subject to the infection located within two miles of apple orchards.

In reciting the economic importance of many millions of dollars invested in the orchards which furnished employment for a large portion of the population, the state had to choose between the preservation of the cedar trees or the apple orchards. The Court held:

> When forced to such a choice, the State does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another, which in the judgment of the legislature, is of greater value to the public.
>
> . . . .
>
> And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

276 U.S. at 279-280 (emphasis added). Despite the magnitude of the loss suffered and the fact that the economic burden fell on a few, the action in destroying the cedar trees was a valid exercise of the police power and did not constitute a taking requiring compensation.

In addition to the case of Pennsylvania Coal Co. v. Mahon, the most frequently cited cases on the issue of the exercise of police power versus a taking requiring

compensation are Miller v. Schoene, 276 U.S. 272 (1928), Armstrong v. United States, 364 U.S. 40 (1960), Goldblatt v. Hempstead, 369 U.S. 590 (1962), United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), and Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978).

In Goldblatt v. Hempstead the town enacted an ordinance regulating dredging and excavating. It was contended that the ordinance effected a taking of property without due process. The Supreme Court held that regulation of the use of property to protect health and safety of the public is not a taking. The Court said:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not--and, consistently with the existence and safety of organized society, cannot be--burdened with the condition that the State must compensate such individual owners for pecuniary losses. . . .

369 U.S. at 133.

In Penn Central Transportation Co. v. New York City, the city, in an effort to preserve historic landmarks, enacted an ordinance restricting the development of landmarks. This ordinance was challenged as being a taking of property without compensation.

In holding that there was no taking requiring compensation, the Court said:

> [I]n instances in which a state tribunal reasonably concluded that "the health,

> safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.

438 U.S. at 125.

In United States v. Central Eureka Mining Co., the United States closed certain gold mines for the purpose of obtaining miners to go into essential war jobs. In denying there was a taking requiring compensation, the Court held:

> The government did not occupy, use, or in any manner take physical possession of the gold mines or equipment connected with them.

356 U.S. at 165-166.

In Armstrong v. United States, the United States contracted for the building of ships with the provision that if the shipbuilder defaulted, title to the ships would pass to the United States. Materialmen placed liens on the ships. The United States claimed soveriegn immunity making the liens unenforceable. The Court held that the extinguishing of the liens constituted a taking requiring compensation. It is important to note that, in this case, the government had a proprietary interest in the ships.

There is one thread that runs through all of the cases, and that is when a taking is denied, action of the government was to prevent a public harm and the government did not have a possessory or proprietary interest in the property involved.

So it is with the Florida cases as exemplified by Key Haven and Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981).

Estuary Properties specified some of the factors to be considered in determining whether there has been a valid exercise of the police power or a taking requiring compensation:

> 1. Whether there is a physical invasion of the property.
>
> 2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
>
> 3. Whether the regulation confers a public benefit or prevents a public harm.
>
> 4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
>
> 5. Whether the regulation is arbitrarily and capriciously applied.
>
> 6. The extent to which the regulation curtails investment-backed expectations.

Id. at 1380.

In the instant case the respondents' property was physically invaded and a portion of the citrus stock was destroyed. However, there can be no question that the goal of the canker eradication program is to prevent a public harm and that the action taken was to promote the economic welfare of an industry vital to the State of Florida, and that the action was taken to promote the public welfare.

The action was neither arbitrary nor capricious. This was not a unilateral action taken by the Department, but action taken after deliberation by an advisory committee consisting of individuals from industry, universities, and governmental entities. It was not arbitrary in that all nurseries which had received stock from the infected nurseries were treated similarly.

In Estuary Properties the Court held that the denial of the DRI permit was to prevent public harm and, therefore, there was no taking requiring compensation. 399 So.2d at 1382.

In the instant case, the Department was given the power and duty to declare canker infestation a public nuisance. Section 581.031(6), Florida Statutes (1983), authorizes the Department:

> To declare a plant pest or noxious weed to be a nuisance as well as any plant or other thing infested or infected therewith or that has been exposed to infestation or infection and therefore likely to communicate same.

The Department declared the canker problem a public nuisance and acted accordingly in directing the destruction of the suspect plants.

The decision to destroy suspect plants rests initially with the authorization granted by the legislature. Judicial review of the legislature's wisdom is limited.

> What makes for the general welfare is necessarily in the first instance a matter

> of legislative judgment, and a judicial review of such judgment is limited. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

German Alliance Insurance Co. v. Lewis, 233 U.S. 389, 414 (Fla. 1913).

This precise principle of constitutional law is set forth in 10 Fla.Jur.2d Constitutional Law § 171.

In the instant case, the certified question is whether the state, pursuant to its police power, has the constitutional authority to destroy healthy but suspect citrus plants without compensation.

This question must be answered in the affirmative. There has been no constitutional challenge to the authority. There is no requirement that positive findings of canker be made as a prerequisite to its destruction. In this instance a determination was made by the Citrus Canker Technical Advisory Committee that the suspect trees presented an

imminent danger to the spread of the disease and to the public welfare.

No one has a vested interest or a property right in a nuisance.

CONCLUSION

When the State exercises its police power in conformance with applicable statutes and rules, the propriety of such action may not be questioned in an inverse condemnation proceeding.

Destroying private property through the exercise of police power to prevent a public harm does not constitute a taking of property requiring compensation, especially when the State has no proprietary interest in the property.

The certified question should be answered in the affirmative.

Respectfully submitted,

Frank A. Graham, Jr.

FRANK A. GRAHAM, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner was furnished to M. Stephen Turner, Culpepper, Pelham, Turner & Mannheimer, 300 East Park Avenue, Tallahassee, Florida 32302, by hand delivery this 8th day of June, 1987.

Frank A. Graham, Jr.

FRANK A. GRAHAM, JR.