IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 70,647
	)	
ROBERT COGSWELL,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DIANE E. LEEDS
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Appellant

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PRELIMINARY STATEMENT

Appellant was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellant before the Fourth District Court of Appeal. Appellee was the defendant and appellee before the Fourth District Court of Appeal. In this brief the parties will be referred to as they appeared before the trial court.

The symbol "R" will denote record on appeal; "T" will denote trial transcript. All emphasis has been supplied by Appellant unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged with "Bookmaking" in violation of §849.25(1) and §849.25(2), Fla. Stat. (1985). Nine counts were charged -- five for receiving bets (football cards) on 3 football games; two for receving bets on 5 football games, and two for receiving bets on four and ten football games. (R. 18-21).

A motion to declare §849.25 unconstitutional was filed charging a violation of due process in that the criminal conduct prohibited fell within the purview of two statutes -- §849.25, Fla. Stat., making the proscribed conduct a felony; and, §849.14, Fla. Stat., making the proscribed conduct a misdemeanor. (R. 23). The complaint was that there was "no added element or standard which necessarily makes it [the prohibited behavior] the felony offense". (R. 23).

A hearing was held, pretrial, after which the lower court agreed that §849.25, Fla. Stat., was unconstitutional. The court stated that the misdemeanor and felony statutes are very similar having "distinctions without a difference" (T. 16), yet there are no "standards to discern what constitutes the felony or the misdemeanor" offense. (R. 33). As such the court found the felony statute "susceptible to arbitrary and discriminatory application" (R. 33) and granted Defendant's motion to dismiss. (T. 16). The Fourth District Court of Appeal affirmed on appeal similarly finding a violation of the due process as well as equal

protection clauses as the same prohibited conduct may be prosecuted as either a felony or misdemeanor depending on the discretion of the prosecutor, State v. Cogswell, 504 So.2d 464 (Fla. 4th DCA 1987).

This appeal follows.

POINT ON APPEAL

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE UNCONSTITUTIONALITY OF §849.25, FLA. STAT. (1985), AS VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FLORIDA AND U.S. CONSTITUTIONS?

SUMMARY OF THE ARGUMENT

The U.S. Supreme Court in Batchelder has previously addressed the issue raised herein -- the constitutionality of two statutes that overlap yet vary in their penalties where prosecutorial discretion alone determines which statute is charged. It was found that this seemingly 'unbridled' prosecutorial discretion was subject to constitutional constraints. Further, a decision to proceed under the statute with the harsher penalty did not empower the prosecutor to predetermine ultimate criminal sanctions but merely empowered the court to impose a longer prison sentence. Also found was that there was no difference between the instant discretion and the discretion exercised when deciding whether to charge under one of two statutes with different elements. As such constitutional provisions are not violated. Florida law has always been in accord -- no additional elements need be shown to assist the prosecutor in exercising his discretion as to charging either a felony or misdemeanor. Further, assuming arguendo, that an additional element need be proven to make the felony statute constitutional, the legislature has recently amended the statute which amendment clarifies the legislature's past and present intent to prohibit the business or profession of gambling under the felony bookmaking statute.

ARGUMENT

THE TRIAL COURT ERRED IN DECLARING §849.25, FLORIDA STATUTES, UNCONSTITUTIONAL AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The Fourth District Court of Appeal held the felony bookmaking statute, §849.25, Fla. Stat. (1985), "constitutionally invalid". The court found a "due process and equal protection" violation to the extent that the prosecution of the same conduct as either a felony, pursuant to §849.25, Fla. Stat., or a misdemeanor, pursuant to §849.14, Fla. Stat. (1985), is permitted. It was reasoned that as both statutes prohibited the same conduct -- the taking or receiving of a bet -- unbridled prosecutorial discretion may be exercised when deciding under which statute to prosecute.

The Fourth District's decision, however, is incorrect. The U.S. Supreme Court has previously rendered an opinion on this exact issue. In U.S. v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979),a constitutional challenge identical to the instant challenge was made. It was argued that as Defendant's behavior violated two similar statutes providing for two different penalties[1] a violation of the due

[1] The lesser statute provided for a maximum 2 year sentence of imprisonment; the greater statute, under which Defendant was convicted, provided for a maximum 5 year sentence of imprisonment.

process and equal protection clauses existed. The Circuit Court of Appeals agreed with Defendant and expressed "serious doubts about the constitutionality of the two statutes" as they "provide different penalties for identical conduct" Batchelder at 60 L.Ed.2d 764. In that court's view, identical to the Fourth District Court of Appeals' view, the "unfettered prosecutorial discretion as to which penalty to apply could produce 'unequal justice'.

The U.S. Supreme Court, however, found this analysis "factually and legally unsound", Batchelder, at 60 L.Ed.2d 765. It was reasoned that contrary to the assertions of the Circuit Court of Appeals, a prosecutor's discretion to choose between two applicable statutes was not unfettered, Batchelder, at 60 L.Ed.2d 765. Selectivity in the enforcement of criminal laws was subject to constitutional constraints, Id. at 765. Further, a decision to proceed under the statute with the harsher penalty did not empower the Government to predetermine ultimate criminal sanctions. Rather, it merely enabled the sentencing judge to impose a longer prison sentence than the alternate statute would permit, Id. at 765. The unanimous court continued:

> More importantly, there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one or two statutes with identical elements. In the former situation, once he determines that the proof will support

> conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. Cf. Rosenberg v. United States, supra, at 294, 97 L.Ed. 1607, 73 S.Ct. 1152 (Clark, J., concurring); Oyler v. Boles, supra, at 456, 7 L.Ed.2d 446, 82 S.Ct. 501. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced. See U.S. Const., Art. II, §§ 2, 3; 28 USC §§515, 516 [28 USCS §§ 515, 516]; United States v. Nixon, supra, at 694, 41 L.Ed.2d 1039, 94 S.Ct. 3090.
>
> Batchelder, at 60 L.Ed.2d 765-766

The Circuit Court of Appeal's opinion was reversed.

As Batchelder, Id., is on all fours with the case sub judice -- two statutes similarly overlapped to prohibit identical criminal conduct albeit had different penalties -- it is clear that the prosecutorial discretion involved in the case at bar similarly did not violate either the due process or equal protection clauses of the constitution.

Florida law is in accord. It has similarly been found that it is not unusual for a course of criminal conduct to violate laws that overlap yet vary in their penalties, Fayerweather v. State, 332 So.2d 21, 22 (Fla. 1976). For example, in Fayerweather, Id., the defendant was convicted of

receiving stolen property, a credit card, in violation of §811.16, Fla. Stat., (1973), and sentenced to 5 years imprisonment. Fayerweather argued that he could not be punished under §811.16, Fla. Stat., as his criminal behavior was also covered under the State Credit Card Crime Act. Said act provided a less severe punishment. This Court, however, held that Fayerweather was properly convicted and sentenced under the statute -- prosecution under the credit card act was non-exclusive. Similarly, in Davis v. State, 475 So.2d 223 (Fla. 1985), defendant stole a Mercedes Benz automobile valued at over $23,000. He was charged with first degree grand theft in violation of §812.014(2) (a), Fla. Stat. (1981). Said statute punished theft of property valued at $20,000 or more as grand theft in the first degree, making it a second degree felony. Davis moved to dismiss the information arguing that he could only be charged with second degree grand theft under §812.014(2) (b). Said statute specifically covered motor vehicles making their theft solely a felony of the third degree. This Court, however, held that the State properly prosecuted Davis. It was reasoned that as the legislature was concerned about the theft of motor vehicles it was mandated that their theft be prosecuted as at least second degree grand theft.

The same is true in State v. Weir, 488 So.2d 557 (Fla. 5th DCA 1986) where forgery of a gasoline credit card was held properly prosecuted under either the forgery statute (felony) or

the credit card statute (misdemeanor) depending on the prosecutor's discretion; State v. Copher, 395 So.2d 635 (Fla. 2d DCA 1981) where Defendant committed the offense of the sale of a motor vehicle with an altered or destroyed motor number which was held properly prosecuted as either a felony or misdemeanor depending on the prosecutor's discretion; Soverino v. State, 356 So.2d 269 (Fla. 1978) where a battery upon a police officer was held properly prosecuted under §748.03, Fla. Stat., as a misdemeanor and under §748.07 Fla. Stat. as a felony; and, State v. Cain, 381 So.2d 1361 (Fla. 1980) where pursuant to §39, Fla. Stat. a juvenile may be tried as either a child or an adult if he meets one of several exceptions to the statute.

As often the accused may be charged under a number of statutes which overlap or duplicate one another,[2] Soverino, supra at 272, the State attorney has been granted "complete discretion in making the decision to charge and prosecute"[3]

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[2]It is clear, however, that two very different statutes are involved. A violation of the felony bookmaking statute, §849.14, Fla. Stat., does not invariably constitute a violation of the misdemeanor bookmaking statute, §849.25, Fla. Stat. The statutes merely overlap as to the receiving of bets placed upon contests involving man or beast yet each additionally proscribes conduct which the other does not: The misdemeanor statute additionally proscribes a) the placing of such bets, and b) the becoming of a custodian or depository of such bets, whereas, the felony statute additionally prohibits the receiving of a bet placed upon the result of "any chance, casualty, unknown, or contingent event whatsoever". Further, the misdemeanor statute is not a lesser included offense of the felony statute. As such the elements of both crimes are and were intended to be obviously different.

[3]Under the instant facts prosecutorial discretion may inure to a defendant's benefit. Where §849.25, the felony (Cont'd)

(emphasis supplied), Cleveland v. State, 417 So.2d 653, 654 (Fla. 1982). This discretion is conferred by the legislature and includes the related decision of which range of penalties to apply, Fayerweather v. State, supra at 22. The prosecutor's decision is final and "not subject to judicial review" Cleveland, supra at 654. Said discretion, however, must be exercised in conformance with the spirit of the law and the legislative intent behind its enactment as statutes are subject to judicial interpretation, Garner v. Ward, 251 So.2d 252 (Fla. 1971).[4]

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statute, covers only receiving a bet, §849.14, the misdemeanor, covers both placing a bet as well as receiving one. As a result the small time 'receiver'may be given the benefit of the doubt and charged with a misdemeanor for his crimes. Without prosecutorial discretion all 'receivers' would, of necessity, be charged with a felony.

[4]In the instant case the prosecutor exercised his discretion as to charging within the spirit of the legislative intent as Defendant was obviously engaged in the business or profession of gambling. The legislative intent behind §849.25, Florida Statutes is set forth in Ferguson v. State, 377 So.2d 709, 711 (Fla. 1979):

> The statutory scheme of chapter 849 (gambling) evinces a general intent to treat the business or profession of gambling as a felony while treating the casual or occasional act of gambling as a misdemeanor.

This intent was again reiterated in State v. Tate, 420 So.2d 116, 118 (Fla. 2d DCA 198) where it was held that the bookmaking statute is "not applicable to a single act of gambling" (emphasis supplied). It was reasoned that if a single act of gambling were to be punishable under the bookmaking statute, §849.11 (as well as other sections) would lose their force and effect because the State could always prosecute a single act of gambling as a felony

> We must construe all statutes relative to the same subject matter with reference to

(Cont'd)

Batchelder, Id., has been applied by U.S. Circuit Courts of Appeals to varying factual patterns with varying 'twists'.

In U.S. v. Edmonson, 792 F.2d 1492 (9th Cir. 1986) Defendant argued, as did Defendant in the instant case, that his behavior, prohibited under either a misdemeanor or a felony statute, fell outside the general proposition that where "conduct violates more than one criminal statute the government may generally elect which statute it wishes to charge" Id. at 1497. Defendant argued that the general rule applied solely when one statute required proof on an element that is not required by the other statute" Id. at 1497. The Court, however, found that the "cases simply do not sustain this argument" Id. at 1497. The sole requirements for application of this general principal were found to be 1) no showing that the government discriminates against any class of Defendants in electing which statute it will charge,[5] and, 2) Congress must not have intended that the more specific statute repeal the more general statute,[5] Id. at 1497.

It must be noted that this was the entire argument made by the instant Defendant to the Fourth District Court of Appeal

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each other in such a manner that effect may be given to all of the provisions of each. Ferguson v. State.

[5]No such showing or allegation is made in the instant case.

(See Appellee's Brief). As such said court has improperly held the felony bookmaking statute unconstitutional.[6]

Further, in Edmondson, Id., contrary to the instant case, Defendant additionally argued 'implied repeal' -- the "most recently enacted statute" impliedly repealed the earlier statute. However to find such there must be an "irreconcilable conflict" between the two statutes. The fact that there are two criminal statutes which apply to exactly the same criminal conduct with different penalties does not create irreconcilable conflict, Id. at 1498. It merely brings into play the rule that the government has the election of which statute to charge, Id. at 1498.[7] As applied to the case sub judice it is the instant felony statute which is last in time. As such, should repeal by implication be found within the legislative intent it is the earlier misdemeanor statute which is repealed by implication and not the later felony statute. Florida law is in accord, Albury v. City of Jacksonville Beach, 205 So.2d 295 (Fla. 1974); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978). However, the instant Defendant, not being charged under the misdemeanor bookmaking statute has no standing to challenge same.

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[6]There is no question that Defendant, at all times, was on notice that he had committed a crime. When Defendant received the instant bets the only question which needed to be resolved was as to the degree of punishment involved, not legality of his behavior.

[7]The legislative history must establish intent to repeal the earlier statute. This has not been argued in the instant case nor is said intent apparent.

Defendant in Edmonson also argued the concept of lenity which presupposes an ambiguity in the statute requiring judicial interpretation. However the court found no ambiguity within the statute itself or between the two statutes. As such there was no occasion for statutory interpretation. Such is the case at bar where the statutes themselves are perfectly clear.

In U.S. v. Fern, 696 F.2d 1269 (11th Cir. 1983), upon a conviction for making a materially false statement to an IRS tax auditor, Defendant argued on appeal that he should have been prosecuted under the specific statute covering the same behavior which provided for a lesser penalty as opposed to the general statute which provided a penalty twice as severe. Id. at 1273. The Court affirmed stating that "Many statutes in the Criminal Code overlap, and the Government may elect the provision under which it wishes to proceed. Erlich v. U.S., 238 F.2d 481 at 485 (5th Cir. 1976)". The Supreme Court has long recognized 'that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of Defendant. . .'" Id. at 1274.

Even though not argued in the instant case, as applied to the case at bar, it is the felony statute, §824.25, Fla. Stat., which is more specific. Said statute applies solely to the "receiving" of bets, whereas the misdemeanor statute, §849.14, Fla. Stat., applies to whoever "stakes" bets, "receives" bets or "knowingly becomes the custodian or depository" of

bets. As such should the more specific statute be held to apply it would be the instant felony statute.

U.S. v. Jackson, 805 F.2d 457 (2nd Cir. 1986) similarly discussed and rejected the implied repeal of an overlapping earlier statute by a similar later statute as there was no evidence of congressional intent to repeal. See also U.S. v. Uzzell, 780 F.2d 1143 (4th Cir. 1986) and U.S. v. Largo, 775 F.2d 1099 (10th Cir. 1985).

However, assuming arguendo that an additional element need be present within the felony statute to make said statute constitutional, the legislature has recently amended said statute to include an additional element -- that Defendant be engaged in the business or profession of gambling. This amendment does not alter the statute but merely codifies the legislative intent previously unwritten. This court in 1979 in Ferguson, supra, extracted this same legislative intent from the earlier felony statute. As such it is clear that it has always been and continues to be the legislative intent to prohibit the business or profession of gambling under §849.25, Fla. Stat. The lower court's opinion, therefore, is incorrect as the two statutes have always prohibited different acts -- the felony applied solely to the business of profession of gambling and the misdemeanor to the single act of gambling.

Finally, the trial court in its order declaring the instant statute unconstitutional, noted that this court in State

v. Glosson, 462 So.2d 1082 (Fla. 1985), had construed the Due Process clause of the Florida Constitution more broadly than its federal counterpart (R.32). However, what the trial court failed to consider is that this broader construction did not occur under similar facts to the case at bar. In the instant case the constitutionality of a statute was under attack. In Glosson, Id., this court was merely called upon to "construe a constitutional provision". As such all the presumptions relating to constitutionality and the courts duty to repulse attacks upon statutes did not come into play. The court was therefore free, under the common law, to interpret the Due Process clause as applied to the facts in Glosson more broadly. However, under the instant set of facts where the constitutionality of a statute is involved, there is no valid basis upon which this court may base a broader interpretation of the state Due Process clause. This court must apply the presumption that the statute, enacted by the Florida legislature, is presumed valid, Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983); State v. Lick, 390 So.2d 54 (Fla. 1980) and the courts are, therefore, duty bound to repulse an attack on the constitutionality of the statute by holding out a construction that sustains its validity over one that strikes it down, Gulfstream Park Racing Ass'n v. Dept. of Business Regulation, 441 So.2d 627 (Fla. 1983); Falco v. State, 407 So.2d 203 (Fla. 1981). Federal law as well as state law requires the lower courts decision to

be reversed and the constitutionality of the bookmaking statute, §849.25 Fla. Stat., upheld.

CONCLUSION

WHEREFORE, based upon the foregoing argument and citations of authority contained herein, Appellant respectfully requests that this Honorable Court reverse the decision of the court below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

Diane Leeds

DIANE E. LEEDS
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been sent by United States Mail to GEORGA PALLAS, ESQUIRE, Counsel for Appellant, 780 Northwest Lejeune Road, Suite 400, Miami, Florida 33126 this 17th day of July, 1987.

Diane Leeds

OF COUNSEL