OA 6-20-88

IN THE SUPREME COURT OF FLORIDA

EUGENE RAFFIELD and
RAFFIELD FISHERIES, INC.,

Petitioner,

vs. CASE NO. 71,677

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE DISTRICT COURT,
FIRST DISTRICT, STATE OF FLORIDA

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF BY SOUTHEASTERN FISHERIES ASSOCIATION

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COUNSELS FOR RESPONDENT

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PRELIMINARY STATEMENT

The State adopts the preliminary statement in its answer brief. Additionally, the State notes that the amicus brief by Southeastern Fisheries Association (SFA) does not comply with the letter or intent of the rules of appellate procedure. Rule 9.210 requires that briefs refer to appropriate pages of the record, cite to legal authority relied upon, etc. Neither Rule 9.210 nor Rule 9.370 makes an exception for amicus briefs. SFA's brief includes no cites to the record, contains an insufficient table of citations, and cites only one marginal section of Federal law (i.e., 16 USC s. 1801) as authority. It asserts unsupported facts. The brief does not comply with Rule 9.210; this Court would be completely warranted in striking it. Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 471 So.2d 1380 (Fla. 1st DCA 1985)(assertion of unsupported facts and legal

arguments justified striking of brief at court's initiative). See also, Axtell v. Lyons, 105 So.2d 610 (Fla. 1st DCA 1958).

STATEMENT OF THE CASE AND FACTS

The State adopts the statement of the case and facts set forth in its answer brief.

SUMMARY OF ARGUMENT

Southeastern Fisheries Association (SFA) has strewn its amicus brief with unsupported facts. Even if true, these facts are not relevant, and raise issues not raised by Raffield. SFA does not have standing to raise them. The issues are not legal questions, but attacks on the policy or wisdom of s. 370.08(3), Florida Statutes. The Court cannot pass upon the wisdom or policy of a statute.

Read most deferentially, SFA's second point implicitly argues "arbitrary" enforcement against Raffield. Raffield was the only observed violator of s. 370.0813)'s possession ban. Enforcement against him was not arbitrary, but based on the reasonable classification that he was a diligently observed lawbreaker. The fact that other violators of s. 370.08(3) may go undetected and thus unpunished is irrelevant.

SFA seeks an advisory opinion from this Court. It concludes by asking only that this Court "consider the issues raised" in

the amicus brief. This Court should not do so, and should affirm the decision by the First District Court of Appeal.

ARGUMENT

I. SFA HAS NO STANDING TO RAISE THE ALLEGEDLY ADVERSE ECONOMIC EFFECTS OF SECTION 370.08(3); WHICH, EVEN IF TRUE, INVOLVE THE WISDOM, NOT LEGALITY, OF THE STATUTE

Relying on unsupported facts, SFA alleges s. 370.08(3) adversely affects the "livelihood of [its] members and the economic viability of their operations." (amicus brief p. 6). Raffield attacked s. 370.0813) in a similar manner, by claiming that Florida could enforce the statute "anywhere in the world." (initial brief, p.17). Raffield, in essence, attempts to challenge s. 370.08(3) by raising absurd and hypothetical instances of its application to others. He does not have standing to do so. State v. Hill, 372 So.2d 84 (Fla. 1979). Raffield does not have standing because "a person to whom a statute may constitutionally by applied may not challenge that statute or the ground that it may conceivably be applied to other in situations not before the Court." New York v. Ferber, 458 U.S. 747, 767 (1982). SFA, as an amicus curiae, has no standing to raise issues not

available to the parties, nor may it inject issues not raised by the parties. Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982), approved 440 So.2d 1282 (Fla. 1983). Therefore, SFA does not have standing to speculate as to the economic effects of s. 370.08(3).

Possibly all regulation of lawful commercial activity has economic consequences. These,consequences may prevent affected persons from making the maximum profit in the manner they desire. This is not fatal to an otherwise proper exercise of the police power. Correctly depicted, SFA is actually challenging the wisdom or legislative policy behind s. 370.0863). A court does not have authority to pass on the wisdom of a statute. State v. Wu, 400 so.2d 762 (Fla. 1981), appeal dismissed Wall v. Florida, 454 U.S. 1134, 71 L.Ed. 2nd 286, 102 S.Ct. 988 (1982)(Supreme Court may not substitute its judgment for that of the Legislature as to the wisdom or policy of an act). Fraternal Order of Police, etc. v. Department of State, 392 So.2d 1296 (Fla. 1980)(fact that legislature may not have chosen the best possible alternative is of no consequence if statute otherwise proper; more rigorous inquiry would amount to determination of statute's wisdom and usurp legislature).

Without supporting citations, SFA claims (amicus brief, p.7) that Mississippi allows purse seining, while Alabama and.Louisiana allow processing of purse-seined fish caught outside state waters. If true, these facts are irrelevant. Curiously, SFA fails to note that all Gulf states prohibit the harvest, or at

least the sale, of redfish. Florida prohibits any commercial or recreational harvest. See rule 46-22.008, Florida Administrative Code. The United States has prohibited commercial harvest of redfish (other than minor incidental catch up to a quota) with any gear since latter July, 1986. (See the State's answer brief at p.3, and App. 11, III and IV thereto.)

Throughout its brief, SFA refuses to recognize that enforcement of criminal sanctions attending s, 370.08(3) requires knowledge by the possessor that the saltwater foodfish have been taken with a purse seine. It was lack of such knowledge that led the State to dropping charges against a several of the original defendants. (R 181-182)

Further indicating that it is raising new issues inappropriately, SFA states that this case places its members "in a position of not knowing whether they are in violation of s. 370.08(3), F.S., or whether they are subject to criminal charges if they buy fish that were caught legally in other places with a purse seine." (amicus brief, p. 8). SFA is asking this Court for an advisory opinion on the applicability of s. 370.08(3) to others, regardless of whether these unnamed members have knowledge of how the purchased fish were caught; and regardless of whether the fish are a species in which Florida has any legitimate interest. Here, Raffield has admitted his agents caught redfish with a purse seine, and shipped them from their landing point in Louisiana to Raffield's facilities in Port St. Joe; where the fish were processed for resale and shipment. It is not

contested that redfish are native to Florida, and that adult redfish seasonally migrate from state waters into other parts of the Gulf of Mexico. In contrast, SFA is seeking advice on new issues based upon unspecified facts.

SFA concludes is first argument with the scenario that total enforcement of s. 370.08(3) could "destroy" Florida's seafood processors and restaurants. Section 370.0863) has, in substance, been law since 1969. Its similar predecessor was first enacted in 1933. The parade of harribles depicted by SFA has not materialized; SFA cites no instance of any individual being destroyed by the law. This Court should ignore SFA's innuendo. No restauranteur or processor has the right to depend on fish supplied through use of unlawful gear.

II. SECTION 370.08(3) IS NOT ARBITRARY, AND DOES NOT DENY THE SEAFOOD INDUSTRY OF LAWFUL MEANS TO CATCH AND PROCESS SALTWATER FOODFISH

The State reasserts the arguments made under part I of this brief. It again notes that the federal government has prohibited commercial redfish harvest throughout the Gulf.

Viewed most deferentially, SFA may be arguing, that s. 370.08(3) has been arbitrarily enforced against Raffield. The First District denied this challenge,,disagreeing with the trial

court's "belief" that the statute was selectively enforced. State v. Raffield, 515 So.2d 283, 286 (Fla. 1st DCA 1987). Raffield was the only violator of s. 370.08(3)'s possession ban, as applied to purse-seined redfish, the State was able to observe and apprehend. (See State's answer brief at p. 5, and citations to the record therein.) The fact that other violators may have gone unobserved and thus unpunished has nothing to do with the validity of the statute. The fact that the Florida Marine Patrol may have insufficient manpower to enforce the law as vigorously as it would otherwise do so, is similarly irrelevant. If the validity of statutes turned on whether every violatian were discovered and pursued, then few of the state's laws would be enforceable.

CONCLUSION

This Court should not consider the issues raised by Southeastern Fisheries Association in its amicus brief. The decision by the First District Court of Appeal should be affirmed.

Respectfully submitted,

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ICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer to Amicus Curiae Brief by Southeastern Fisheries Associatian has been sent by U.S. Mail to Ken Oertel, Esquire, Oertel & Hoffman, P.A., Post Office Box 6507, Tallahassee, Florida 32314, and Karen Hope Yore, Attorney for Southeastern Fisheries Association, 312 East Georgia Street, Tallahassee, Florida 32301 on this 27th day of May, 1988.

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