IN THE SUPREME COURT OF FLORIDA

CARL L. THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

CASE NO. 78,055

BRIEF AMICUS CURIAE OF FLORIDA LEAGUE OF CITIES, INC. IN SUPPORT OF RESPONDENT STATE OF FLORIDA

Original

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STATEMENT OF THE FACTS

Amicus, FLORIDA LEAGUE OF CITIES, INC., adopts the Statement of the Facts as it appears in the Answer Brief of Respondent, STATE OF FLORIDA.

SUMMARY OF ARGUMENT

Law enforcement officers have the explicit statutory authority to arrest a person who has violated a municipal ordinance in the officer's presence. Also, the Florida Legislature has not expressly preempted a municipality's authority to enact an ordinance requiring a bell or gong on a bicycle ridden in the city limits nor is such an ordinance in conflict with state law. Therefore, a city can enforce a municipal ordinance requiring a bell or gong on bicycles by arresting a person who violates the ordinance.

The Florida Statutes provide that persons may be punished for committing three distinct categories of offenses: crimes (felonies and misdemeanors); noncriminal violations; and violations of municipal and county ordinances. Criminal violations may be punished with imprisonment or fines or both while noncriminal violations may only be punished with fines. There are no statutorily imposed limitations on the punishment, imprisonment or fines or both, which municipalities may prescribe for ordinance violations.

Section 165.19, Fla. Stat. (1973), provided municipalities with general law authority to impose imprisonment up to 60 days and Up to $500 fines for municipal ordinance violations. This section of the Florida Statutes was repealed in 1974 at the recommendation of the Commission on Local Government. The repeal of Section 165.19 was a further recognition by the Florida Legislature of the

broad home rule powers granted by the 1968 Florida Constitution to municipalities and legislatively recognized by the 1973 Municipal Home Rule Powers Act, Chapter 166, Fla. Stat. Municipalities were recognized as having the broad home rule powers to enact penalty provisions, imprisonment or fines or both, for municipal ordinance violations through Chapter 166, Fla. Stat.: therefore, Section 165.19, Fla. Stat., was an unnecessary general law.

INTRODUCTION

For the convenience of this Court, the League presents the following tenants of local government ordinance construction which should guide this Court as it addresses the issues presented in this case.

The same rules applied in the construction of state statutes are employed in the construction of local ordinances. The primary rule for interpretation and construction is that the intention of the local legislative body is to be ascertained and given effect. 12 Fla. Jur. 2d, Counties and Municipal Corporations, Section 198. Ordinances will be construed, if possible, to give a result which renders them constitutionally valid, as opposed to a construction which renders them violative of the state and federal constitutions and consequently void. Id. at Section 199.

The power of a court to declare an ordinance void, because it is unreasonable, is one that must be carefully and cautiously exercised. The legislative body of a municipality is conceded a full measure of proper legislative discretion in the enactment of ordinances for the regulation, government, and the management of the municipal corporation and the well-being of its inhabitants. In such matters, municipal authorities are usually better judges than the courts, and their attempted exercise of discretion can be controlled only after abuse. The local authorities are presumed to have knowledge of local conditions; therefore, their exercise of discretion with reference to the needs of the local community

should be respected. The motives of the governing body of a municipal corporation, in adopting an ordinance legislative in character, are not the subject of judicial inquiry. Where the reasonableness of an ordinance is fairly debatable, a court should not substitute its judgement for that of the municipal council. 12 Fla. Jur. 2d, Counties and Municipal Corporations, Section 197.

The penalty or punishment imposed by an ordinance must be certain and definite. An ordinance will be declared invalid if it is not so. However, it is proper for penal ordinances to leave a margin for the discretion of the court, within certain specified limits, so that the fine and imprisonment imposed may be graded in proportion to the aggravation and the circumstances. Thus, an ordinance may specify only the maximum imprisonment or fine for its violation. 12 Fla. Jur. 2d, Counties and Municipal Corporations, Section 186.

As in other cases of attacks on the validity of legislation, where a municipal ordinance is attacked on the grounds of unreasonableness or unconstitutionality, the burden is on the person alleging its invalidity to establish that fact. In other words, if an ordinance is not inherently unreasonable, unfair, or oppressive, a person attacking it must assume the burden of affirmatively showing that as applied to him it is unreasonable, unfair, or oppressive. Hence, where an ordinance is not void on its face, but its invalidity is dependent on facts, it is incumbent on the party relying on the invalidity to allege and prove the facts that make it so. 12 Fla. Jur. 2d, Counties and Municipal

Corporations, Section 196.

ARGUMENT

QUESTION I: *CAN* A CITY ENFORCE A MUNICIPAL ORDINANCE REQUIRING THE EXISTENCE OF SAFETY EQUIPMENT ON A BICYCLE RIDDEN IN THE CITY LIMITS BY ARRESTING A PERSON WHO VIOLATES THE ORDINANCE?

POINT A. The plain meaning of Section 901.15(1), Fla. Stat., permits a city to enforce a municipal ordinance by arresting a person who violates the ordinance.

Section 901.15(1), Fla. Stat., provides in pertinent part:

> A law enforcement officer may arrest a person without a warrant when: (1) the person has ... violated a municipal ... ordinance in the presence of the officer.

A cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to its underlying legislative intent. City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984). If the intent of the legislature is clear and unmistakable from the language used, it is the court's duty to give effect to that intent. Englewood Water Dist. v. Tate, 334 So.2d 626 (Fla. 2nd DCA 1976). The best evidence of legislative intent is the plain meaning of the statute. In re: Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1980). Words of common usage should be construed in their plain and ordinary sense because it must be assumed the legislature knew the plain and ordinary meaning of the words used in the statute. Carson v. Miller, 370 So.2d 10

(Fla. 1979).

If the intent of the legislature is clear and unmistakable from the plain meaning of statutory language used, it is this Court's duty to give effect to that intent. Thus, the plain meaning of Section 901.15(1), Fla. Stat., explicitly authorizes the arrest of a person who violates a municipal ordinance in a law enforcement officer's presence.

The Amicus Criminal Defense Lawyers argue that the Legislature did not intend Section 901.15(1), Fla. Stat., to authorize a full custodial arrest and incarceration in view of the repeal of Section 165.19, Fla. Stat., in 1974. However, the League submits that had the Legislature also intended to repeal or modify Section 901.15(1), Fla. Stat., it could have done so at the time Section 165.19, Fla. Stat., was repealed. (An explanation of the effects of the repeal of Seciton 165.19, Fla. Stat., is provided at Question II of this Brief). The plain language of Section 901.15, Fla. Stat., places no restrictions on the extent to which a law enforcement officer may "arrest" an individual. The League also directs the Court's attention to the well-reasoned analysis of arrest found in the section of the district court's opinion entitled "Arrest for Violation of a Municipal Ordinance.'' Thomas v. State, 583 So.2d 336, 338-339 (Fla. 5th DCA, 1991) (Copy of opinion is attached as Appendix 1).

POINT B. The Florida Legislature has not expressly preempted a municipality's authority to enact an ordinance requiring the existence of safety equipment on a bicycle ridden in the city

limits nor is such an ordinance in conflict with state law.

Petitioner alleges that the City of Orlando ordinance at issue[1] is both preempted by and in conflict with Chapter 316, Fla. Stat. Admittedly, Chapter 316, Fla. Stat., establishes uniform traffic control laws for the state. However, the provisions within Chapter 316 do not expressly preempt municipal regulation of bicycles and the Petitioner's conflict argument leads to an absurd result when other provisions of Chapter 316 are reviewed.

1. Preemption

Municipalities have been granted broad powers of home rule by the State Constitution, and these broad powers have been recognized by the Florida Legislature in Chapter 166, Fla. Stat. Section 166.021, Fla. Stat., states that each municipal legislative body "has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except: (c) any subject expresslv preempted to state or county government by the

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[1] Orlando Municipal Ordinance, Chapter 10, Section 10.08, provides:

> No person shall ride a bicycle on the streets of the city without having a bell or gong with which to warn pedestrians and drivers of vehicles at street crossings.

Orlando Municipal Ordinance, Chapter 1, Section 1.08, provides that for a violation the above municipal ordinance the penalty is punishment "by a fine not exceeding five-hundred dollars ($500.00) and/or a definite term of imprisonment not exceeding sixty (60) days."

constitution or by general law." (Emphasis added).

Chapter 316, Fla. Stat., does not expressly preempt the subject of traffic regulations to the state government. In fact, the "Purpose" section of the Florida Uniform Traffic Control Law, Section 316.002, Fla. Stat., states, "[t]he Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities." Section 316.008(1), Fla. Stat., further provides, "[t]he provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from: (h) [r]egulating the operation of bicycles." Clearly, municipal regulation of bicycles has not been "**expressly preempted**" by the State Legislature.

2. Conflict

The concept of conflict may be distinguished from the concept of preemption in that the latter effectively precludes all municipal regulation in a given area while the former permits municipal regulation, but only to the extent that it supplements state law. Edwards v. State, **422** So.2d **84** (Fla. 2nd **DCA 1982)**; City **of** Miami Beach **v. Rocio Corp.,** **404** So.2d 1066 (Fla. 3rd DCA **1981).**

The League concedes an ordinance must fail if it conflicts with a statute. Rocio, supra. Under Florida law, a conflict

exists when the ordinance and the statute cannot "co-exist." Laborers International Union of North America, Local 478 v. Burroughs, 541 So.2d 1160 (Fla. 1989). The test of whether an ordinance and statute cannot "co-exist" is whether the person must violate the statute in order to comply with the ordinance. Id. The League submits that there is no conflict between the Orlando ordinance at issue and state statutes because a person does not have to violate state law in order to comply with the ordinance.

Petitioner argues that while Section 316.008, Fla. Stat., empowers municipalities to exercise reasonable regulatory police powers over traffic within its jurisdiction, the City of Orlando's bicycle bell ordinance expressly conflicts with other provisions of Chapter 316, Fla. Stat., and therefore must be voided. Petitioner's conflict argument, when reviewed with other provisions of Chapter 316 Fla. Stat., and taken to its logical conclusion, leads to an absurd result which the Florida Legislature could not have intended.

Petitioner relies on Section 316.271, Fla. Stat., as authority for the proposition that the Florida Legislature has passed a law which prohibits bells on bicycles. Upon a complete reading of Section 316.271, Fla. Stat., it is clear that the Legislature intended that no motor vehicles are to be equipped with any siren, whistle, or bell, except for a normal automobile horn.[2] Specific

[2] Section 316.271, Horns and warning devices. - (1) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet.

exceptions to this general prohibition are provided for emergency vehicles and trollies. Under the Petitioner's interpretation of and reasoning behind Section 316.271, Fla. Stat., it must be concluded that every bicyclist in the State of Florida with a bell on their bicycle is in violation of the Florida Statutes.

The judiciary's primary role in reviewing statutes is to determine the intent of the Legislature, Tyson V. Lanier, 156 So.2d 833 (Fla. 1963); and if the intent of the Legislature is clear and unmistakable from the language used, it is the court's duty to give

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(2) No horn or other warning device shall emit an unreasonably loud or harsh sound or a whistle.

(3) The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn, but shall not otherwise use such horn when upon a highway.

(4) No vehicle shall be equipped with, nor shall any person use upon a vehicle, any siren, whistle, or bell, except as otherwise permitted in this section.

(5) It is permissible but not required that any vehicle be equipped with a theft alarm signal device which is so arranged that it cannot be used by the driver as an ordinary warning signal.

(6) Every authorized emergency vehicle shall be equipped with a siren, whistle, or bell capable of emitting sound audible under normal conditions from a distance of not less than 500 feet and of a type approved by the Department, but such siren, whistle, or bell shall not be used except when the vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, in which event the driver of the vehicle shall sound the siren, whistle, or bell when reasonably necessary to warn pedestrians and other drivers of the approach thereof.

(7) Notwithstanding the other provisions of this section, a trolley may be equipped with a bell, and the bell is not required to be used only as a warning device. As used in this subsection, the term "trolley" includes any bus which resembles a streetcar, which is powered by overhead electric wires or is self-propelled, and which is used primarily as a public conveyance.

effect to that intent. Englewood Water District v. Tate, 334 So.2d 626 (Fla. 2nd DCA 1976). However, in construing legislative intent, courts will not interpret a statute in a manner such that the interpretation leads to an absurd result. City of St. Petersburs V. Siebold, 48 So.2d 291 (Fla. 1950).

It is absurd to conclude that the Legislature did not intend a person riding a bicycle upon a sidewalk to use a bell or similar device to warn and yield the right-of-way to pedestrians. Common sense dictates that having a bell on a bicycle is a reasonable safety precaution. Amicus Criminal Defense Lawyers even acknowledges the absurdity of a statute which prohibits bells on bicycles, yet it argues this point. Amicus Brief at 9.

Furthermore, Section 316.2065(11), Fla. Stat., specifically directs the use of an "audible signal" to prevent accidents. That sub-section provides:

> A person propelling a bicycle upon and along a sidewalk, or across a roadway upon and along a crosswalk, shall yield the right-of-way to any pedestrian and shall give an audible signal for overtaking and passing such pedestrian. (Emphasis added).

The use of a bell on a bicycle would accomplish the legislative mandate of providing "audible signals." Moreover, it would be difficult for a mute rider to emit an "audible signal" without the assistance of a device such as a bell or gong. If mute riders were required to clap their hands in order to comply with the statute, as Petitioner's interpretation of the statute could require, this interpretation would require mute persons to violate Section

316.2065(7), Fla. Stat., which requires any person operating a bicycle to keep one hand on the handlebars. A bell would certainly be required for a mute, one-armed bicyclist.

Petitioner submits that the statutory definition of **"vehicle"** in Section 316.003(75), Fla. Stat., includes bicycles. This definition of "vehicle" reads, **"(e)very** device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks." However, Petitioner fails to inform the Court that the "Definitions" section, Section 316.003, further states, **"[t]he** following words and phrases, when used in this chapter, shall have the meanings respectively ascribed to them in this section, except where the context otherwise requires." (Emphasis added). Clearly, the use of the word **"vehicle"** in Section 316.271 was not intended to include bicycles.

POINT C. Persons can be punished (imprisoned or fined) for committing three distinct categories of offenses: crimes (felonies and misdemeanors); noncriminal violations; and violations of municipal (and county) ordinances.

Petitioner attempts to obfuscate the authority of municipalities to enforce ordinance violations through the imposition of imprisonment or fines or both by arguing that such violations are not statutorily defined as **"crimes."** Petitioner's loose use of the words "crime or criminal violation", "noncriminal violation", and **"civil** offense" assists Petitioner in this

obfuscation. The League submits that the relevant statutes are quite clear and that Petitioner's loose language should be tightened to reflect the appropriate statutory language.

Petitioner begins his Brief by answering the first Question before this Court[3] negatively, "because the State of Florida has preempted the punishment of traffic infractions by declaring them to be civil in nature." (Emphasis added). Petitioner's Brief at 5. In this initial paragraph, Petitioner uses the word "civil" instead of the proper phrase "noncriminal violation."[4] The League submits that this distinction is more than a matter of semantics. Petitioner, by this initial paragraph, has set the tone of his Brief by implying and then arguing that individuals can be punished

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[3] "Can a city enforce a municipal ordinance requiring the existence of safety equipment on a bicycle ridden in the city limits by arresting a person who violates the ordinance?"

[4] Section 318.14, Fla. Stat., reads in pertinent part:

> (1) Except as otherwise provided in ss. 318.17 and 320.07(3)(b), any person cited for a violation of chapter 316, ... shall be deemed to be charged with a noncriminal infraction and shall be cited for such an infraction and cited to appear before an official. (Emphasis added).

Also, Chapter 316, Fla. Stat., by its own provisions, provides penalties for "traffic infractions" which are not "civil in nature." See generally, Section 316.027 (making it a felony for a driver of any vehicle involved in an accident resulting in injury or death to leave the scene of the accident), Section 316.061 (punishing a driver of a vehicle involved in an accident resulting only in property damage by a fine of not more than $500 or by imprisonment for not more than 60 days or both), Section 316.1301 (making it a misdemeanor for a non-blind person to carry a white cane on a street), Section 316.1305 (making it a misdemeanor for a person to fish from a bridge posted by the Department of Transportation).

with imprisonment or fines or both for criminal violations but only with fines for all other violations, including municipal ordinance violations. The League submits that this is an erroneous conclusion in that Florida Statutes clearly state that persons can be punished for committing crimes, noncriminal violations and violations of municipal ordinances and that there were no statutorially imposed limitations on the punishment, imprisonment, or fines or both which municipalities may proscribe for ordinance violations.

Petitioner then notes, and the League concurs, that a review of the pertinent statutory provisions by this court is necessary. Petitioner begins with Section ***775.08,*** Fla. Stat., and again inaccurately labels this section, "class(es) and definitions of criminal **offenses."** (Emphasis added). Petitioner's Brief at 5. Section ***775.08*** does not provide the classes and definitions of **"criminal"** offenses, rather, this section provides for the classes and definitions of offenses, as the statutory title to this section states. Specifically, Section ***775.08*** provides:

> 775.08 Classes and definitions of offenses. - When used in the laws of this state:
>
> (2) The term **"misdemeanor"** shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by a term of imprisonment in a county correctional facility, except an extended term, not in excess of one year. The term "misdemeanor" shall not mean a conviction of any noncriminal traffic violation of any provision of Chapter 316 or any municipal or county ordinance.
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> (3) The term "noncriminal violation" shall mean any offense that is punishable under the

> laws of this state, or that would be punishable if committed in this state, by no other penalty than a fine, forfeiture, or other civil penalty. A noncriminal violation does not constitute a crime, and conviction for a noncriminal violation shall not give rise to any legal disability based on a criminal offense. The term "noncriminal violation" shall not mean any conviction for any violation for any municipal or county ordinance. Nothing contained in this code shall repeal or change the penalty for violation of any municipal or county ordinance.
>
> (4) The term "crime" shall mean a felony or misdemeanor. (Emphasis added).

Section 775.08, Fla. Stat., clearly states offenses are to be divided into three categories: crimes (felonies and misdemeanors); noncriminal violations; and violations of municipal and county ordinances. This section does not state that violations of municipal ordinances are the same as noncriminal violations, punishable only by, "a fine, forfeiture, or other civil penalty." In fact, the definition of "noncriminal violation" goes to great length to state that it does not mean, @@convictionsfor any violation of any municipal or county ordinance," nor does it, "repeal or change the penalty for a violation of any municipal or county ordinance." This legislative statement clearly recognizes the authority of municipalities to specify penalties, imprisonment or fine or both, for persons violating their ordinances. Petitioner infers that only crimes, as defined by Section 775.08, can be punished by imprisonment or fines or both. The League submits that the Petitioner's inferred conclusion is erroneous and, as will be discussed in the next section of this Brief, that

municipalities have the home rule authority to establish penalties, imprisonment or fines or both, for violations of their ordinances.[5]

Thus, Petitioner's loose language in the following statement leads the Petitioner to an erroneous conclusion. Petitioner states:

> "[D]espite this clear intent of the legislature that violations of Chapter 316 and municipal ordinances are not to be considered criminal offenses, the City of Orlando has nevertheless enacted a provision which criminalizes the failure of a person to equip his bicycle with a bell or a gong." Petitioner's Brief at 6.

Section 775.08, Fla. Stat., does not prohibit municipalities from punishing violators of their ordinances by either imprisonment or fine or both. Chapter 316, Fla. Stat., does provide for uniform traffic control; however, municipalities are given the explicit authority to regulate the operation of bicycles (Section 316.008(1)(h), Fla. Stat.) as long as such provisions do not conflict with state law (Sections 316.002 and 316.2065, Fla.

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[5] Numerous Florida court decisions implicitly affirm a municipalities authority to punish ordinance violators by imprisonment or fine or both. See generally, Edwards v. State, 422 So.2d 84 (Fla. 2nd DCA 1982) (opinion by Justice Stephen H. Grimes while sitting on the 2nd DCA) (municipal ordinance penalties of imprisonment and fines are legal; however, they cannot exceed state established penalties for the same offense); Pridgen V. City of Auburndale, 430 So.2d 967 (Fla. 2nd DCA 1983) (sentence for violating a municipal ordinance of $547 fine and fifteen days imprisonment as a condition of six months probation was impermissibly excessive when the ordinance provided far a maximum of sixty days in jail and a $500 fine); and Jaramillo v. City of Homestead, 322 So.2d 496 (Fla. 1975) (municipal ordinance adopting all of the criminal misdemeanor laws of the state as municipal ordinances was proper and an individual was punished by thirty days jail for violating a municipal ordinance). Also, the Attorney General for the State of Florida has opined that municipalities, under their broad home rule of powers, may prescribe penalties, imprisonment or fines or both, for violations of their ordinances. 1989 Opinion Attorney General, Florida, No. 89-24 (April 21, 1989).

Stat.). Because Orlando's bicycle bell ordinance is not in conflict with state law,[6] the City had the home rule authority to both pass the ordinance in question as well as to determine the level of punishment to be imposed on violators.

Petitioner cites to this Court's decision in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985), as support for the proposition that, "[s]ince the Orlando municipal ordinance requiring bells on bicycles directly conflicts with the state statute it must be ruled invalid." Petitioner's Brief at 7. However, Petitioner has failed to show how the Orlando ordinance "directly conflicts" with Chapter 316, Fla. Stat., or any other state laws. In fact, the Del Percio decision illustrates how the judicial branch will construe two legislative actions in such a way as to give effect to both as long as the acts are not in direct conflict with one another. In Del Percio, this Court determined that state statutes which expressly preempted county and municipal authority to regulate obscene exhibitions, did not preempt local authority to regulate non-obscene exposure of the female breast below the top of the areola. Del Percio, 476 So.2d at 201.

It is interesting to note that the city ordinance in question

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[6] Numerous other provisions in the Florida Statutes referencing a municipality's authority to impose imprisonment or fines or both for ordinance violations further supports the conclusion that there is no conflict with or preemption by state law: Section 775.082(5) (persons convicted of noncriminal violations cannot be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in Chapter 316 or by ordinance of any city or county); and Section 951.23 (providing for "municipal detention facilities" for persons charged with or convicted of violation of municipal ordinances).

in Del Percio, Section 5-25 of the Daytona Beach City Code, enacted as Ordinance **81-334,** is punishable under Section 1-5 of the City Code, which provides for fines not to exceed $500 or imprisonment for a term not to exceed sixty days or both. In Del Percio, one defendant was fined ***$500*** for violating the ordinance. This Court reversed that fine imposition on Fifth Amendment (right to plead not guilty) and Sixth Amendment (right to a jury trial) grounds. Id. **at 205-206.** This Court never once questioned the authority of the City of Daytona Beach to impose the fine, or the city's ability to establish imprisonment, as a penalty for violating the ordinance.

QUESTION 11: DID THE REPEAL OF SECTION **165.19,** FLA. STAT. **(1973)** ELIMINATE A CITY'S PREVIOUSLY GRANTED POWER TO ENACT ORDINANCES WHICH PROHIBIT VARIOUS TYPES OF CONDUCT BY INDIVIDUALS WITHIN ITS JURISDICTION, AND WHICH PUNISHES VIOLATORS BY "CRIMINAL MEANS": ARREST; FINES; IMPRISONMENT?

POINT A. The repeal of Section **165.19,** Fla. Stat., in **1974** was a further recognition by the Florida Legislature of broad home rule powers granted by the **1968** Florida Constitution to municipalities.

In order to understand the significance of the repeal of Section 165.19, Fla. Stat., in 1974, the legislative activity from the years **1968** and **1973** must be reviewed.

The legislature, in special session convened on June **24, 1968,** adopted three Joint Resolutions which together proposed a general

revision of Florida's 1885 Constitution. The proposals were submitted to and ratified by the voters on November 5, 1968. See, Preface, Florida Statutes Annotated.

Article VIII, Section 2(b), Florida Constitution (1968), commonly referred to as Florida's Municipal Home Rule Amendment, in part provides:

> (b) Powers. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

The legislative analysis of this amendment stated that "municipalities would be given additional powers to perform services unless specifically prohibited by law," and that the Home Rule Amendment "gives municipalities residual powers except as provided by law." See, Louis C. Deal, "Post-Mortem - Home Rule", Florida Municipal Record, November, 1980.

In 1973, Florida's Legislature enacted the Municipal Home Rule Powers Act (the Act). Chapter 73-129, Laws of Florida. Section 166.021, Fla. Stat., states in pertinent part:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services and may exercise any power for municipal purposes, except when expressly prohibited by law.
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> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.
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> (3) The Legislature recognizes that pursuant

to the grant of powers set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact lesislation concerning any subject matter upon which the State Legislature may act, except:

(a) the subjects of annexation, merqer, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;

(b) any subject expressly prohibited by the constitution:

(c) any subject expressly preempted to state or county government by the constitution or by general law; and

(d) any subject preempted to a county sursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule Dowers qranted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.' ...

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[7] Exceptions to this general repeal, and thus limitations on the exercise of municipal home rule power, are special laws or charter provisions:

a. which affect the exercise of extraterritorial powers or which affect an area which includes land within and without a municipality;

b. which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election, or the distribution of powers among elected officers; or

c. which affect matters relating to appointive boards, any change

> (5) All existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality except as otherwise provided in subsection (4) shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances. (Emphasis added).

To insure it was understood the state Legislature was out of the business of municipal affairs, the Legislature repealed the majority of general laws that had authorized the exercise of municipal power prior to the Act. Section 166.042(1), Fla. Stat., provides:

> **(1)** It is the legislative intent that the repeal by Chapter **73-129**, Laws of Florida, of Chapters **167**, 168, 169, **172**, **174**, **176**, **178**, **181**, **183**, and **184** of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional **powers.** It is, further, the legislative intent to recognize residual constitutional home rule powers in municipal government, and the Legislature finds that this can best be accomplished by the removal of legislative direction from the statutes. It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe. (Emphasis added).

In adopting the Act, the Legislature, in sum, recognized Article VIII, Section 2(b), Florida Constitution, generally granted

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in the form of government, or any rights of municipal employees.

Changes to any of these special laws or charter provisions require approval by referendum of the electors. Section 166.021(4), Fla. Stat.

to the legislative body of each municipality the power to enact legislation concerning any subject matter upon which the state legislature may act. In State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978), this Court held the only constitutional limitation placed on the authority of municipalities to conduct municipal government, perform municipal functions, and render municipal services, is that such power be exercised for a valid "municipal purpose" and municipalities are not dependent upon further authorization; legislative statutes are relevant only to determine limitations on the exercise of such authority.

This Court might ask if the Legislature repealed so many laws restricting municipal powers by Section 166.042 (1), Fla. Stat., why did it not also repeal Chapter 165 at the same time. The answer to this question is quite simple. If the Legislature had repealed Chapter 165 in full, as it did with the Chapters listed in Section 166.042 (1), the Legislature would have repealed all general laws on organizing (incorporating) and dissolving municipalities. (Chapter 165, Fla. Stat. (1973), is attached as Appendix 2). Without these general law provisions, Florida citizens would have been unable to form (incorporate) or dissolve their municipal governments.

In 1974, the Legislature, acting on recommendations by the Commission on Local Government, reorganized Chapter 165, Fla. Stat., through Chapter 74-192, Laws of Florida. In reorganizing Chapter 165, the 1974 Legislature deleted provisions made unnecessary by the Municipal Home Rule Powers Act of 1973. Chapter 165, as reorganized, is now entitled the "Formation of

Municipalities Act" and provides the general law for incorporating, merging and dissolving municipalities.

A closer review of the activities of the Commission on Local Government and the 1974 Legislature, especially the House Community Affairs Committee, provides further clarification that the repeal of Section 165.19, Fla. Stat., was a legislative recognition of broad municipal home rule powers. In brief, Section 165.19 was an unnecessary general law in 1974 because any existing charter provisions (special laws) on punishment of municipal ordinance violations became municipal ordinances subject to municipal legislative body actions in 1973 (Section 166.021(5), Fla. Stat.), and municipalities were given the broad home rule powers to enact penalty provisions for municipal ordinance violations in that same year (Section 166.021(1)-(4), Fla. Stat.).

The Commission on Local Government issued its "Final Report on Legislative Action Recommendations for 1974" in March, 1974. (A certified copy of the relevant portions of the Final Report is attached as Appendix 3)[8]. The Final Report illustrates the Commission's desire to fully implement the concept of municipal home rule in Florida. The Report reads:

> The Commission believes the "home rule" concept continues to demand a shift, by both state and local governmental officials, in the traditional methods of responding to citizen demands. The use of this approach to state-local governmental concerns has developed

[8] A certified copy of the Commission on Local Government, Final Report on Legislative Action Recommendations for 1974, March 2, 1974 was obtained from the Florida State Archives, Tallahassee, Florida.

> gradually since adoption in the 1968 revised constitution. Since 1968, legislative action has further emphasized the changes necessary for full adoption of the home rule concept in Florida. Awareness of these changes in approach is gradually developing, with, perhaps, the greatest awareness occurring during and after passage of the Commission-sponsored "Municipal Home Rule Act of 1973."
>
> This report of the Commission's recommended legislative action for 1974, coupled with the final report of the Commission in June, will provide a comprehensive outline of the implications and impact of home rule in Florida. These two reports will also provide concrete examples and recommendations for state and local action.
>
> ... The Commission, however, views home rule as an integral part of the state governmental system which would allow decision-makers at all levels of government to consider various problems in governmental services and to implement decisions appropriate to both their interests and their respective relationships. The following recommendations for action demonstrate the changes necessary in the traditional approaches. The recommendations provide an opportunity to review and develop the new **processes** and approaches which are necessary for both state and local governmental action and further provide a framework for the systematic implementation of home rule in Florida.
>
> The Commission recommends consideration of the following elements which it deems necessary for the full adoption of the home rule philosophy in Florida:
>
> (I) removal of existing legal barriers to local governmental ability to resolve their local problems at the local level;
>
> ...

Final Report at 1-2.

The Final Report then went into an in-depth discussion on proposed legislation for 1974, including draft bills. The

Commission addressed the issue of municipal incorporation, merger, boundary adjustments and dissolution at pages 13-14 of the Report. These recommendations became the foundation for the reorganization of Chapter 165, Fla. Stat., by Chapter 74-192, Laws of Florida.

The Florida House of Representatives, Committee on Community Affairs Legislative Summary of General Bills of the 1974 Session is also informative on this matter. (A certified copy of relevant portions of the Legislative Summary is attached as Appendix 4)[9]. The Summary states on pages 2-3:

> Our work prior to and during the 1974 Session of the Legislature was a significant contribution to the overall success of the session. Foremost among the bills considered by this committee during the session was the "Local Government Legislation" package, which represented the fruition of the two year effort of the Local Government Commission. ... The four bills which were enacted deal with local governmental modernization and with the provision of the tools and management capacity our cities and counties need in order to handle the problems of growth and service delivery.
>
> ...
>
> With regard to cities, CS/HB 2730 and CS/HB 3266 offer the best examples of this year's tendency to legislatively modernize and update local governmental capacities. The annexation bill, CS/HB 2730 (Chapter 74-190), directed itself to the rationalization of annexation procedures in order to reduce present trends which include rampant incorporation, tending toward the strangulation of a core city, and the denial of a tax base for which a city

[9] A certified copy of the Florida House of Representatives, Committee on Community Affairs Legislative Summary of General Bills of the 1974 Session, July 8, 1974 was obtained from the Florida State Archives, Tallahassee, Florida.

> provides the value-added factor. Orderly and equitable urban growth is the avowed goal of this legislation as it is also for the "formation" bill, CS/HB 3266 (Chapter 74-192). It is based upon the premise that closer legislative scrutiny of the formation of local units will be beneficial to the state. ... (Emphasis added).

Finally, the League directs the Court's attention to the Florida House of Representatives, Committee on Community Affairs Chairman's Overview of the 1974 Session. (A certified copy of the relevant portions of the Overview is attached as and included in Appendix 4)[10]. The Chairman states, "I was pleased that most of the major bills originated by the Local Government Study Commission over the past two years were enacted into law. I believe the record of the Commission reflects favorably upon it and its two years of work."

In the Summary of General Bills included in the Chairman's Overview in Appendix 4, it states that CS/HB 3266 (Chapter 74-192), creates the "Formation of Local Government" law, repealing present laws relating to organization and dissolution of cities. The Summary goes on to state that the bill was "technical" in nature. This "technical" reference is a further indication that the 1974 Legislature desired to reorganize the formation and dissolution provisions of Chapter 165, and remove any provisions made unnecessary by the 1973 Municipal Home Rule Powers Act. These provisions included not only Section 165.19, Fla. Stat., but also

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[10] A certified copy of the Florida House of Representatives, Committee on Community Affairs Chairman's Overview of the 1974 Session, June 6, 1974, was obtained from the Florida State Archives, Tallahassee, Florida.

Section 165.191 - authority to adopt published code by reference, Section 165.192 - codification of ordinances, as well as numerous other sections of Chapter 165.

As is evident from the Final Report, the Legislative Summary, the Chairman's Overview, and the Summary of General Bills, the Commission on Local Government worked in both **1973** and **1974 to** legislatively implement the principal of municipal home rule found **in** the 1968 Florida Constitution. Not all of the necessary legislative changes were accomplished in 1973, necessitating further Commission work and recommendations in 1974. The reorganization of Chapter 165, Fla. Stat., and repeal of Section 165.19, and numerous other sections of **Chapter** 165, was simply a further legislative recognition of the principal of broad municipal home rule powers. These provisions of Chapter 165 were not included in the reorganized Chapter 165, Fla. Stat., because they were no longer necessary in order for municipalities to govern themselves.

Judge Harris, in his dissenting opinion below, respectfully fails to ascertain the interplay of the 1973 Municipal Home Rule Powers **Act** and the reorganization of Chapter 165 in 1974. The judge's reference to Article **111**, Section 11(a)(4), Fla. Const.,[7] ("The individual charters, being special acts, without the authorization conferred by general law, are not in conflict with the prohibition of punishing crime by special act.") and to

[7] Article **111**, Section **11(a)(4)**, Fla. Const., provides in pertinent part: "There shall be no special law **...** pertaining to: **... (4)** punishment for crime."

principles of Dillon's Rule[8] ("It is true that there remains vague reference to the statutes relating to the municipal criminal authority, but none "expressly" grants such power to the municipality."), are illustrative. 583 So.2d at 343.

As previously explained, municipal charter provision (special acts) dealing with punishment for municipal ordinance violations were made into municipal ordinances, subject to municipal legislative body activity, by Section 166.021(5) in 1973. Also, the Municipal Home Rule Power Act negated the principle of Dillon's Rule in Florida, and now municipalities have the power to enact legislation concerning any subject matter which the state legislature may act except on certain "express" subjects. Section 166.021 (1)-(4), Fla. Stat. The "express" subjects do not include the ability of a city to enact an ordinance requiring bicycles to have bells, and setting the punishment for violations of such ordinance.

POINT B. Imposing a penalty of imprisonment or fines or both for violations of municipal ordinances does not violate the Thirteenth Amendment to the United States Constitution.

Petitioner states, "[t]o permit a municipality to arrest and incarcerate for a noncriminal violation violates the Thirteenth Amendment to the United States Constitution which prohibits

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[8] Dillon's Rule embodies the principal that municipal legislative bodies only have the power expressly conferred and necessarily implied upon them by the state. Blacks Law Dictionary, 5th Edition.

imprisonment except as a punishment for a crime." (Emphasis supplied). Petitioner's Brief at 10.

Initially, Petitioner's loose language must be clarified. Municipalities do not "arrest and incarcerate for a noncriminal violation." By definition, "noncriminal violation" does not mean "any violation of any municipal ... ordinance." Section 775.08 (3), Fla. Stat. Individuals who violate municipal ordinances are charged with and punished for municipal ordinance violations.

The Thirteenth Amendment to the United States Constitution reads:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Thirteenth Amendment is intended to prohibit all shades and conditions of slavery or involuntary servitude. Slaughter - House Cases, 83 U.S. 36, 21 L.Ed. 394 (1873). See also, Memphis v. Greene, 451 U.S. 955, 67 L.Ed. 2d 769, 101 S.Ct. 1584, reh. den. 452 U.S. 955, 69 L.Ed. 2d 965, 101 S.Ct. 3100 (1981) (Thirteenth Amendment prohibits certain conduct amounting to or perpetuating "badge or incident of slavery").

Imposing a penalty of imprisonment or fines or both for violations of municipal ordinances does not amount to a "badge or incident of slavery," and thus does not violate the Thirteenth Amendment. See generally, Milwaukee v. Horvath, 31 Wis. 2d 490, 143 N.W. 2nd 446, cert. den., 385 U.S. 970, 17 L.Ed. 2d 434, 87 S.Ct. 505 (1966) (imprisonment for failure to pay traffic fines

imposed by municipal government did not constitute involuntary servitude, as there was no labor involved); Dunn v. Wilmington, 59 Del. 287, 219 A. 2d 153 (1966, Supp.) (ordinance enacted by city mayor and council, creating offense of disorderly conduct and providing penalty of fine or imprisonment or both, does not violate Thirteenth Amendment); and Chicago v. Kunowski, 308 Ill. 206, 139 N.E. 28 (1923) (Thirteenth Amendment was not violated by imprisonment at labor to work out fine and costs imposed, for violation of city ordinance, under prosecution civil in form, but quasi-criminal in character).

POINT C. Chapter 162, Fla. Stat.,, is not the exclusive manner by which a municipality may enforce its ordinances.

Amicus Criminal Defense Lawyers inaccurately states on page 21 of their Brief, "[t]he majority opinion also cites Chapter 162 as authority for a city to incarcerate." The majority opinions reference to Chapter 162, Fla. Stat., reads:

> Chapter 162, which permits enforcement of municipal and county ordinances either through code enforcement boards or officers, limits punishment to a fine. However, the statute provides "[n]othing contained in this section shall prohibit a .., municipality from enforcing its code or ordinances by any other means." 583 So. 2d at 340.

This reference to Chapter 162, Fla. Stat., indicates the majority view that municipalities may choose to enforce their ordinances through the code board process (which provides for "administrative fines and other noncriminal penalties," Section 162.02, Fla. Stat.) or may opt to enforce their codes through an

alternative process (for example, in county court) and provide for either imprisonment or fines or both as punishment. The Legislature makes clear in both Sections 162.13 and 162.21(8), Fla. Stat., that "[n]othing contained in [Chapter 162] shall prohibit a local governing body from enforcing its codes by any other means." Thus, nothing in Chapter 162, Fla. Stat., prevents a municipality from establishing penalties (imprisonment or fines or both) for violations of its ordinances. However, if a municipality opts to enforce its ordinances through the Chapter 162 process, it is limited in the manner of punishment it may impose ("administrative fines and other noncriminal penalties").

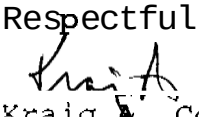
CONCLUSION

The Orlando City Commission made a reasonable decision when it decided to enact the City's bicycle bell ordinance to assist in the safety and well-being of city inhabitants. Because the City Commission's authority to enact such an ordinance has not been preempted by state law, nor is the ordinance in conflict with state law, this Court should defer to the legislative discretion properly **accorded** the Commission.

The Orlando City Commission **also** determined that violations of the City's bicycle bell ordinance would be subject to a maximum penalty of 60 days imprisonment or $500 in fines or both. A specific penalty for a specific violation would be left to the discretion of the court, taking into account all necessary circumstances. The Orlando City Commission had the broad home rule powers to enact such a penalty provision under Chapter 166, Fla. **Stat.**

Therefore, the City of Orlando **could** enforce its bicycle bell ordinance by arresting persons who violate the ordinance. Also, the City had the authority to prescribe punishments, imprisonment or fines or both, for ordinance violations.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the original and seven copies of the foregoing has been furnished to the Florida Supreme Court of Florida, Tallahassee, Florida, and a true copy of the same has been furnished by U.S. mail this 26th day of November, 1991, to Belle B. Turner, at the Office of the Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida, 32114, Counsel for Respondent, and Assistant Public Defender Michael S. Becker, at the Office of the Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, Counsel for Petitioner.

Kraig A. Conn

KRAIG A. CONN, Esquire
Assistant General Counsel
Florida League of Cities

APPENDIX 1

Georgia Lucas TAYLOR, Appellant,

v.

The STATE **of Florida,** Appellee.

No, 90-1939.

District Court of Appeal of Florida, Third District.

March 26, 1991.

Rehearing Denied Aug. **28,** 1991.

An Appeal from the Circuit Court of Dade County; David Tobin, Judge.

Harold Long, Jr., Miami, for appellant.

Robert **A,** Butterworth, Atty. Gen., and Marc **E.** Brandes, Asst. Atty. Gen., for appellee.

Before NESBITT, **LEVY** and **GODERICH,** JJ.

PER CURIAM.

Affirmed. See *Jimenez v. State,* 480 So.2d 705 (Fla. **3d DCA** 1985).

Carl Leroy THOMAS, Appellant,

v.

STATE of Florida, Appellee.

No. 89-2549.

District Court of Appeal of Florida, Fifth District.

March 28, 1991.

On Motion for Rehearing/Certification Aug. 8, 1991.

Defendant was convicted in the Circuit Court, Orange County, Michael F. Cycmanick, J., pursuant to his plea of nolo contendere, of carrying concealed firearm, and he appealed, challenging denial of motion to suppress. The District Court of Appeal, **en** banc, Cowart, J., held that: (1) defendant could be arrested for violating municipal ordinance requiring that bicycle be equipped with bell or gong as warning device: **(2)** defendant could **be** searched pursuant to lawful arrest for violation of ordinance; **(3)** there was no constitutional or statutory limitation on municipality's **power** to prescribe incarceration as penalty for violation of ordinance; and **(4)** ordinance was not "preempted" by state legislation.

Affirmed; question certified.

Harris, **J.,** filed dissenting opinion in which Dauksch and Griffin, JJ., concurred.

1. Arrest ⇐63.4(18)

Competent substantial evidence **sup**ported trial court's factual finding that officer's stop of bicyclist, for violating municipal ordinance requiring that bicyclist be equipped with bell or **gong** as warning device, was not pretextual. U.S.C.A. Const. Amend. 4.

2, Arrest **⇐63.4(5)**

Police officer was authorized to arrest bicyclist for violating municipal ordinance requiring that bicycle **be** equipped with bell **or** gong as warning device, though ordinance **was** noncriminal. West's F.S.A. § 901.15(1).

3. Arrest ⇐71.1(1)

Lawful arrest of bicyclist for violating municipal ordinance requiring that bicycle **be** equipped with bell or gong as warning device justified warrantless search of bicyclist incident to arrest, under exception to warrant requirement of Fourth Amendment. **U.S.C.A.** Const.Amend. 4.

4. Municipal Corporations ⇐57

Generally, only constitutional limitation on municipal power **is** that such power must **be** exercised for municipal **purpose:** therefore, municipalities are not dependent on legislature for further authorization, but legislative statutes may he relevant to determine limitations of authority. West's **F.S.A.** § 166.011 et seq; West's F.S.A. Const. **Art.** 8, § 2(b).

5. Municipal Corporations ⇐624

Municipality may, under its broad home rule powers, prescribe penalties for violation of its ordinances. West's F.S.A. § 166.011 et seq.; West's F.S.A. Const. Art. 8, § 2(b).

6. Municipal Corporations ⇐624

There was no constitutional or statutory limitation on municipality's power to prescribe incarceration as penalty for violation of city ordinance requiring that bicycle be equipped with bell or gong as warning device. West's F.S.A. § 166.011 et seq.; West's F.S.A. Const. Art. 8, § 2(b).

7. Constitutional Law ⇐250.1(3)
Criminal Law ⇐37.10(2)

Mere failure to prosecute all offenders was not grounds for claim that selective enforcement of municipal ordinance requiring that bicycles be equipped with bell or gong as warning device was denial of equal protection; there had to be showing that selective enforcement was deliberately based on unjustifiable standards such as race, religion, or other arbitrary classification. U.S.C.A. Const.Amend. 14.

8. Municipal Corporations ⇐592(1, 4)

Municipality cannot forbid what legislature has expressly licensed, authorized, or required, nor may it authorize what legislature has expressly forbidden.

9. Municipal Corporations ⇐592(1)

Mere existence of state regulations does not preclude local authority from adding additional requirements as long as no conflict exists.

10. Municipal Corporations ⇐592(1)

Municipal ordinance requiring that bicycles be equipped with bell or gong as warning device was not "preempted" by state legislation which required some specified equipment on bicycles, but did not prohibit bells, gongs, or other audible warning devices. West's F.S.A. § 316.2065.

James B. Gibson, Public Defender and Barbara L. Condon, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellee.

EN BANC

COWART, Judge.

Orlando Municipal Ordinance, Chapter 10, Section 10.08, provides:

> No person shall ride a bicycle on the streets of the city without having a bell or gong with which to warn pedestrians and drivers of vehicles at street crossings.

Orlando Municipal Ordinance, Chapter 10, Section 1.08 provides that for a violation of the above municipal ordinance the penalty is punishment "by a fine not exceeding five-hundred dollars ($500.00) and/or a definite term of imprisonment not exceeding sixty (60) days."

A law enforcement officer observed the defendant riding a bicycle on a street in the City of Orlando without having a bell or a gong as required by the municipal ordinance. The officer stopped the defendant and arrested him for violation of the municipal ordinance. Incidental to that arrest, the officer searched the defendant and found him to be carrying a concealed firearm on his person. The defendant was charged with carrying a concealed firearm in violation of section 790.01(2), Florida Statutes.

The defendant moved to suppress the seized firearm and argued (1)that the atop was pretextual, (2) that because a violation of the municipal ordinance was not a "crime" he could not be arrested for a violation of the ordinance, (3) that the search was not incidental to an arrest because the defendant was not arrested or cited for violation of the ordinance, (4) that the municipal ordinance, in providing for imprisonment for its violation, was unconstitutional, (5)that the ordinance was being selectively enforced, (6) that the ordinance was unreasonable in light of the fact that state statutes regulating similar matters have been decriminalized, and (7) that the municipal ordinance was invalid in that the

regulation of bicycles was preempted by state statutes.

The trial court found the stop was not pretextual, that state statutes have not preempted the regulation of bicycles by a municipality, that the ordinance and its penalty were constitutional, reasonable and valid, that the defendant was validly arrested pursuant to section 901.15(1), Florida Statutes, because of a violation of the municipal ordinance, that the search was incidental to a valid arrest, and denied the motion to suppress. The defendant pleaded nolo contendere to the concealed firearm charge, was sentenced to probation, and appeals.

PRETEXTUAL STOP:

[1] In determining whether a stop is a mere pretext an objective standard is applied to determine if under the facts and circumstances a reasonable officer would have stopped the vehicle absent an additional invalid purpose. *Kehoe v. State*, 521 So.2d 1094 (Fla.1988); *Monroe v. State*, 543 So.2d 298 (Fla. 5th DCA 1989); see *also*, *United States v. Smith*, 799 F.2d 704 (11th Cir.1986), *Cf.*, *Scott v. United States*, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). The trial court found that under the facts and circumstances the stop was not pretextual. The record on appeal reflects competent substantial evidence to support this factual finding by the trial judge. The arresting officer personally observed the defendant riding, on a street of the city, a bicycle not equipped with the required sounding device. Therefore, the finding of the trial court will not be disturbed on appeal. *See Reynolds v. State*, 222 So.2d 246 (Fla. 3d DCA 1969).

ARREST FOR VIOLATION OF A MUNICIPAL ORDINANCE:

[2] Section 901.15(1), Florida Statutes, provides in relevant part:

> A law enforcement officer may arrest a person without a warrant when:
>
> (1) The person has ... violated a municipal ... ordinance in the presence of the officer.

The unambiguous language of this statute shows a clear legislative intent to specifically authorize a law enforcement officer to arrest a person who violates a municipal ordinance in the officer's presence.

Some dissention to long established law results from an erroneous assumption and a deduction based on that assumption. The assumption is that one can be arrested only for the commission of a "crime." The deduction is that if the violation of a municipal ordinance is not denoted or described as a "crime" one cannot be arrested for that violation. The assumption is based on a misunderstanding of the purpose of an arrest. An arrest is the act of legal authority taking actual physical custody of a citizen and is a restraint on that citizen's liberty but it is an error to assume that is the purpose of the arrest. It is not. The purpose of an arrest or apprehension and resulting detention is to cause the detained person to be identified and to be forthcoming to answer some demand, charge or accusation against him. Custody and detention is a consequence, or by-product, of that purpose. An arrest, or any other word describing the same act, is a necessary part of any system which, to be effective, requires a person to be identified and placed under some constraint to appear and participate in a proceeding the result of which may be undesired, without regard to whether that proceeding is denoted to be criminal, or whether one possible undesired result of the proceeding may, or may not, be confinement as a penalty. There is no constitutional prohibition against a statute providing for the arrest of a person violating a municipal ordinance. Whether the term "crime" includes violations of municipal ordinances depends in any state upon the local definition of "crime" and "misdemeanor." Nevertheless, historically, crimes have been generally considered offenses against the state and a state has been construed to mean, literally, the commonwealth in its sovereign capacity. Cities have not been considered sovereignties and, accordingly, violations of municipal ordinances have not been legally classified BY

"crimes."[1]

Note should he taken of several provisions of the Florida Rules of Criminal Procedure which recognize that violations of municipal ordinances are not considered crimes or misdemeanors: that persons are arrested and held in confinement to answer charges of violations of municipal ordinances and that for such violation they may be subject to imprisonment as a penalty. Rule 3.111(b)(1) provides that counsel does not have to be provided to an indigent person in a prosecution for a misdemeanor *or* a violation of a municipal ordinance if the judge files a pretrial statement that no imprisonment will result from conviction, Rule 3.125(b) provides that if a person is *arrested* for violation of a municipal or county ordinance triable in the county, the arresting officer may issue a notice to appear except in six specified circumstances. Rule 3.131(a) provides that "every person charged with a crime *or* violation of a municipal or county ordinance shall be entitled to pretrial release [from pretrial confinement resulting from arrest] on reasonable conditions."

SEARCH INCIDENT TO ARREST:

131 A lawful **arrest** establishes the authority for a full search of the person arrested being an exception to the warrant requirement and reasonable under the Fourth Amendment. ***United States v. Robinson,*** 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *State v. Gustafson,* 258 So.2d 1 (Fla.1972), *affirmed,* 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973). *See also D.L.C. v. State,* 298 So.2d 480 (Fla. 1st DCA 1974) (juvenile defendant's violation of municipal ordinance and admission that he had been drinking alcoholic beverages justified arrest, and marijuana found on his person in search pursuant *to* arrest was admissible as evidence). The Supreme Court in ***Michigan*** *v. DeFillippo,* 443 U.S.31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) held that evidence obtained after a search incident to an arrest in reliance on a municipal ordinance should not be suppressed even when the ordinance is subsequently declared unconstitutional and notwithstanding that the defendant was not charged or tried for violation of that ordinance. The arrest of the defendant in the instant case for a violation of Orlando Municipal Ordinance 10.08 was lawful. Therefore the search of the defendant incident to the arrest was lawful.

CONSTITUTIONALITY OF ORDINANCE:

[4–6] Article VIII, § 2(b) of the Florida Constitution provides:

> Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Chapter 166, Florida Statutes, the home rule legislation, implements Article VIII § 2. As a general rule the only constitutional limitation on municipal power is that such power must be exercised for a municipal purpose. Therefore, municipalities are not dependent on the legislature for further authorization. Legislative statutes may be relevant to determine limitations of authority. *State v.* **City** *of Sunrise,* 354 So.2d 1206 (Fla.1978). *See also, City of Ormond Beach v. County of Volusia,* 535 So.2d *302* (Fla. 5th DCA 1988). A municipality may, under its broad home rule powers, prescribe penalties for violation of its ordinances. *See,* 1989 Opinion Attorney General, Florida, No. 89–24, (April 21, 1989).

Nor has the defendant demonstrated that the adoption by the City of Orlando of its bicycle bell ordinance (section 10.08) or its penalty (section 1.08) were beyond the grant of powers contained in the charter granted the city by the state legislature.

There is no constitutional or statutory limitation on the city's power to prescribe incarceration as a penalty for violation of the city ordinance involved in this case.

1. *See Koch v. State,* 126 Wisc. 470. 106 N.W. 531, 3 L.R.A. (N.S.) 1096, 5 Ann.Cas. 389 (1906); *In re Sanford,* 117 Kan. 750, 752, 232 P. 1053 (1925); *City of Burlington v. Stockwell,* 1 Kan. App. 414, 41 P. 221, 56 Kan. 208, 42 P. 826 (1895).

The wisdom or "reasonableness" of statutes and ordinances are matters solely within the discretion and legitimate concern of the legislative branch of government in enacting or adopting them. If a statute, or its enactment, does not violate a constitutional limitation and if a city ordinance, or its adoption, is not prohibited by constitutional provision and is within the powers granted the city by the legislature, by general statutes or special statutes granting city charter powers, such statutes or ordinances are valid and it is beyond the judicial function and power for courts to declare them invalid on the ground or belief that they are, for any reason, "unreasonable" or "undesirable."

Chapter 162, which permits enforcement of municipal and county ordinances either through code enforcement boards or officers, limits punishment to a fine. However, the statute provides "[n]othing contained in this section shall prohibit a ... municipality from enforcing its code or ordinances by any other means." Further, in determining that those convicted of noncriminal violations could not be jailed, the legislature added "except as provided ... by ordinance of any city or county." § 775.082(5), Fla.Stat. (1989).

SELECTIVE ENFORCEMENT:

[7] In order to constitute a denial of equal protection the selective enforcement must be deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification. *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); Bell *v. State*, 369 So.2d 932 (Fla. 1979); see *also, King v. State*, 557 So.2d 899 (Fla. 5th DCA 1990), rev. *denied*, 564 So.2d 1086 (Fla.1990). The mere failure to prosecute all offenders is not grounds for a claim of denial of equal protection. Bell; *Moss v.* Hornig, 314 F.2d 89 (2d Cir.1963). There has been no showing that enforcement of the Orlando Municipal Ordinance in this instance was deliberately based on an arbitrary classification.

PREEMPTION:

[8-10] A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden. *Rinzler v.* Carson, 262 So.2d 661 (Fla.1972); *Donisi v. Trout*, 415 So.2d 730 (Fla. 4th DCA 1981), *rev. denied*, 426 So.2d 29 (1983). The question is whether the legislature has denied municipalities the right to legislate on the subject. The mere existence of state regulations does not preclude a local authority from adding additional requirements as long as no conflict exists. 5 McQuillin, *Municipal Corporations* § 15.20 (3d Ed.) Section 316.2065, Florida Statutes, requires certain equipment (lights, reflectors, brakes) on bicycles but does not prohibit bells, gongs or other audible warning devices.

The legal concept of preemption does not apply to the relationship between a state statute and a municipal ordinance for basically the same reason the violation of a municipal ordinance is not considered a "crime," The reason again is that a municipality is not a sovereignty. The concept of preemption, as well as that of comity, is best understood and explained in terms of sovereignty and accommodations between sovereign powers. In concept neither the states nor the federal government created the other—the people created each and except as they were conceived and created unequal, both entities are equal and sovereign. Comity is that respect and courtesy that governmental equals accord the acts of each other as a privilege, not as a matter of right, but out of deference and good will. On the other hand, not even sovereign equals can always amiably occupy or act within the same space at the same time and some rule must apply. This is where the concept of preemption applies. Preemption has connotations of mild belligerency, hostility or disagreement, also implications of superiority and subservience, and really means that while both of two sovereignties are theoretically equal, the less powerful "equal" (a state) cannot legislate where its more powerful "equal" (the federal government) legislates.[2] The doc-

2. For a discussion of federal preemption of state legislation as mandated by the supremacy

trines of comity and preemption have nothing to do with the relationship between a municipality and a sovereign state whose legislature has created the municipality. That relationship is one of a creature and its creator. See *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970); see *also*, City *of Uilton Manors v. Starling*, 121 So.2d 172 (Fla. 2d DCA 1960). The city has no sovereign power and exists and exercises all governmental power at the will of the state legislature. If a municipality has any power that displeases the state legislature the State does not have to he polite and tolerant (comity) nor push or shove by asserting a superior inconsistent power (preemption)—the State can merely withdraw that municipal power or it may melt its creature down and repour it into a smaller mold, thereby recreating the city without the offending power. The State can do this by enacting a general law or a special law amending or repealing the city's charter. The City of Orlando now has the power to adopt ordinances, such as safety ordinances requiring bells on bicycles, and the power to provide for enforcement of ordinances by penalties, including imprisonment for 60 days. If the State desires to limit or eliminate ("preempt") this power of the city, the state legislature need only enact a statute providing simply that the City of Orlando may not require hells on bicycles or that the City of Orlando may not provide for imprisonment as a penalty for the violation of any ordinance, The state legislature ha5 not seen fit to so rrstrict the city's municipal power and state judicial officers should not attempt to do it by judicial decree.

While there is a judicial remedy for law enforcement abuses, such as prekxtual stops and selective enforcement practices, that remedy is not for the courts to hold invalid the statute or ordinance being abused. Otherwise law enforcement officers, members of the executive branch of government, could, by abusive enforcement practices, cause the judicial branch to invalidate statutes or ordinances, validly enacted by the legislative branch. This would violate constitutional provisions embodying separation of powers doctrine.[3]

Orlando Municipal Ordinance, Chapter 10, Section 10.08 is a proper exercise of the City of Orlando's police power.[4] It does not conflict with constitutional or statutory limitations, nor is it "preempted" by existing state statutes. The arrest and subsequent search of the defendant was valid. The denial of the defendant's motion to suppress was proper.

AFFIRMED.

COBB, W. SHARP, GOSHORN, PETERSON and DIAMANTIS, JJ., concur.

HARRIS, J., dissents with opinion with which DAUKSCH and GRIFFIN, JJ., concur.

HARRIS, Judge, dissenting.

I respectfully dissent.

Carl Leroy Thomas pled *nolo contendere* to carrying a concealed weapon but appeals the trial court's refusal to suppress evidence found as a result of an arrest for the violation of a municipal ordinance.

At about 9:00 a.m. on June 16, 1989, Officer Kevin Bass was patrolling a predominantly black, high drug crime area in Orlando when he observed Thomas riding a bicycle not equipped with a bell or gong as required by a city ordinance. Thomas was immediately stopped, placed under arrest, handcuffed and searched because of this violation under the authority of section 901.15, Florida Statutes (1989):

A law enforcement officer may arrest a person when:

(1) The person has committed a felony or misdemeanor or violated a municipal or

clause (Art. IV, cl. 2 U.S. Const.) *see*, 1 Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure*, § 12.1–4, (1986) and Tribe, *American Constitutional Law*, § 6–25 (2d Ed.1988).

3. Article II, section 3, Fla. Const.

4. We are aware that the Orange County Circuit Court, sitting in a three member appellate panel, may have reached an opposite conclusion in *Powers v. Stare*, Case No. CJAP89–95 (September 25, 1990).

county ordinance in the presence of the officer ...

During the search a handgun was found concealed in Thomas' pocket.

Thomas claims that the stop was pretextual and, since he was charged with carrying a concealed weapon rather than a violation of the city ordinance, the search was not incident to a lawful arrest. He further claims that the ordinance is unreasonable and is being selectively enforced. He also urges that bicycle regulation is preempted by the state traffic regulations.

A policy authorizing an arrest (as opposed to the issuance of a summons) for the violation of such an ordinance seems extreme, particularly when one considers that an aggressive, evenhanded application of the policy could net untold numbers of 10-year-olds. But the problem seems more profound than selective enforcement or the doctrine of preemption or pretextual stop.' The problem is that Thomas was *arrested* and subjected to jail for the violation of a *noncriminal* municipal ordinance.'

I confess to being one of those confused and concerned by the concept of incarceration—not necessarily arrest—for non-criminal conduct. If, in fact, the purpose of the "arrest" (as stated in the majority) is merely "to cause the detained person to be identified and to be forthcoming to answer some demand, charge or accusation against him" and this is done by the issuance of a summons then I have no concern. But the "by-product" of this benign arrest procedure sanctioned by the majority—the actual physical custody, handcuffs, search, booking and placing in a jail cell for violating a noncriminal act is indeed disturbing. And I am not as interested in the fact that incarceration for violation of municipal ordinances has been historically approved as I am in why it has been so approved and whether it continues, under the present state of the law, to be appropriate.

Prior to 1974 the legislature specifically authorized a municipality to enact "laws ..., for the preservation of the public peace and morals ..., and to impose such ... penalties ... as may be needed to carry the same into effect.,.. Provided, ... that for no one offense ... shall a fine of more than five hundred dollars be assessed, nor imprisonment for a period of time greater than sixty days." § 165.19, Fla.Stat. (1973).

Thus prior to 1974 the state expressly granted to the municipalities the power to enact "city crimes" [3] and to punish any

1. I concur with the majority that the record does not establish a pretextual stop in this case. The defense did not attempt to show that the juvenile court was devoid of young bike riders or that housewives, out exercising on their bicycles. were not arrested, handcuffed and dragged off to jail.

2. The following testimony is relevant:

Q. What drew your attention to Carl Thomas?
A. I observed the defendant riding a silver colored bicycle northbound and the defendant's bicycle was not equipped with a sound. ing device, horn, bell, as required by city code.
Q. And upon noticing Mr. Thomas was upon a bicycle that did not have the required bell or sounding device, what did you do?
A. I stopped him, obtained his name. After I obtained his name, I arrested him for the city ordinance.
Q. When you arrested the defendant, what did you do?
A. As soon as I placed the handcuffs on him, I conducted a search of his person.
Q. So when you handcuffed him, you intended to take him to jail for not having a bell on his bicycle, is that right?
A. Yes. ma'am.
Q. You were going to lock him up for that?
A. Yes, ma'am.

3. Since municipal "criminal" ordinances prior to 1974 were authorized by statute, it might well be argued that they were misdemeanors under the definition contained in section 775.08, Florida Statutes (1973) (any crime under Florida law shall be either a felony or misdemeanor). Courts were split on whether the violation of an ordinance was a crime or something else. In *Roc v. State*, 96 Fla. 723, 119 So. 118 (Fla.1928) the court held that it was not a crime sufficient to affect the credibility of the violator in a subsequent judicial proceeding. In *State v. Quigg*, 154 Fla. 348, 17 So.2d 697 (Fla.1944) it was described as an "offense against municipal law" but not an offense against the state in order to avoid double jeopardy problems. However, the court in *Snow v. State*, 179 So.2d 99 (Fla. 3d DCA 1965) refers to a violation of an ordinance as a misdemeanor and the court in *Canney v. State*, 298 So.2d 495 (Fla. 2d DCA

violator with incarceration. The authority to arrest for such violation as set out in section 901.15 (which was substantially the same prior to 1974) was then fully justified. During this period of time, and under the authority of section 165.19, the legislature granted many municipalities, including Orlando, charters which granted them power to incarcerate. And, because of section 165.19, it did not matter that these special laws (charters) violated article III, section 11(a)(4) of the Florida Constitution:

> There shall be no special law ... pertaining to: ... (4) punishment for crime.

However, on July 1, 1974, the legislature repealed section 165.19.[4]

All of a sudden the express statutory authorization permitting the municipality to incarcerate relied on by the supreme court in *State v. Parker*, 87 Fla. 181, 100 So. 260 (1924) and *State v. Quigg*, 154 Fla. 348, 17 So.2d 697 (1944) in justifying such ordinances, no longer existed.

The individual charters, being special acts, without the authorization conferred by general law, are now in conflict with the prohibition of punishing crime by special act. It is true that there remains vague reference in the statutes relating to the municipal criminal authority,[5] but none "expressly" grants such power to the municipality.

The only other source of such authority to the municipality would be the home rule authority conferred by the Florida Constitution. Article VIII, section 2(b) provides:

> Municipalities shall have ... powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power *for municipal purposes* except as otherwise provided by law. [Emphasis added].

The supreme court in *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801 (Fla.1972), held:

> Matters that because of their nature are inherently reserved for the state alone ... matters of general and statewide significance, are not proper subjects for local treatment.

The same constitution that permits through limited home rule power municipalities to enact local legislation expressly removes "punishment for crime" from its operation by prohibiting punishment of crime by local law. As the court stated in *City of Miami Beach v. Forte Towers*, 305 So.2d 764 (Fla.1974), the purpose of the home rule power is to eliminate the necessity of going to the legislature to obtain a local bill. But the state could never, consistent with the constitution, authorize city incarceration by local bill in any event. Defining crime and providing for its punishment, an issue of state wide significance, should be left exclusively to the state.

Not only did the state repeal the express authority to incarcerate violators of municipal ordinances, it also decriminalized any such violation. As indicated earlier the courts have considered violations of municipal ordinances, if not criminal, at least quasi-criminal or, as stated in *City of Fort Lauderdale v. King*, 222 So.2d 6 (Fla.1969), a "generic" crime. But by enacting section 775.08, Florida Statutes (1974 Supp.), the legislature defined "crime" as either a felony or misdemeanor[6] and then specifically excluded violations of municipal ordinances as misdemeanors.

Therefore, it is no longer a crime to violate a municipal ordinance. The majority says it makes no difference if the violation of a municipal ordinance is considered noncriminal, but the distinction is more than mere semantics. Amendment XIII, section 1, of the United States Constitution provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly

1973) authorized the arrest for violation of a municipal ordinance as a "felony or misdemeanor" committed in the officer's presence.

4. § 1, Chap. 74-192, Laws of Florida (1974).

5. *See, e.g.*, §§ 775.08, 775.082(5), 901.(15)(1) and 951.23(1)(d), Fla.Stat.

6. § 775.08(4), Fla.Stat. (1974 Supp.) and § 775.08(2), Fla.Stat. (1974 Supp.).

convicted, shall exist within the United States or any place subject to their jurisdiction.

The issue of incarcerating for a noncrime was before the supreme court in *City of Fort Lauderdale v. King*, 222 So.2d 6 (Fla. 1969). In *King* the court upheld municipal incarceration for violation of ordinances because:

> [I]n England and in this country, *where expressly authorized by statute*, imprisonment may be imposed in the first instance for violations of municipal ordinances ... [Emphasis added].

King at 8.

And because the court considered the violation of a municipal ordinance a "generic crime," it rejected the reasoning of a Wisconsin decision that denied incarceration based on the civil nature of the offense.[7] But now both reasons given by the court are no longer valid. The express authority to incarcerate has been withdrawn and our legislature (and not Wisconsin's) has chosen to decriminalize violations of municipal ordinances.

STATE PREEMPTION

Even ignoring the problem of municipal power to incarcerate for violation of municipal ordinances in general, it appears that the state has preempted the punishment of traffic infractions by declaring them to be civil.

In chapter 775 the legislature defined and classified crime after determining that *it* would differentiate on reasonable grounds between serious and minor offenses and *it* would establish appropriate disposition for each.[8] *It* would also safeguard conduct that is without fault or legitimate state interest from being condemned as criminal.[9] It then defined crime, felony and misdemeanor,[10] and these definitions expressly excluded violation of ordinances.

In chapter 318 the legislature took up traffic matters and, with specific exceptions not here relevant, converted what had previously been misdemeanor traffic offenses into "noncriminal infractions" subject only to "civil penalties."[11] In that regard, the legislature made violations of the state uniform traffic control code (chapter 316) merely civil infractions.

Section 316.002 provides:

> It is the legislative intent in the adoption of this chapter to make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities. The legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. Section 316.008 enumerates the area within which municipalities may control certain traffic movement or parking in their respective jurisdictions ...

Section 316.008 provides that:

> The provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:
>
> * * * * * *
>
> (h) Regulating the operation of bicycles.

These statutory enactments suggest a limited delegation of authority. It authorizes the city to supplement the uniform traffic control code by adding certain additional traffic regulations which are necessary to control particular municipal concerns and which are not inconsistent with the state scheme. It does not authorize converting the violation of the traffic code, as supplemented, into quasi-criminal con-

7. *City of Milwaukee v. Horvath*, 143 N.W.2d 446, 31 Wis.2d 490 (1966) is one such case.

8. § 775.012(4) Fla.Stat.

9. § 775.012(5) Fla.Stat. (1972).

10. The legislature also defined "noncriminal violation" and somehow made an ordinance violation both not a crime and, at the same time, not a noncriminal violation. *See* § 775.08(3), Fla. Stat.

11. § 318.14, Fla.Stat.

duct or changing the penalty from fine only to incarceration.

There are three important features of chapter 316 as it relates to this issue.

1. It only delegates to the municipality the authority to supplement the state uniform traffic code "within the reasonable exercise of the police power." It is not a reasonable exercise of police power to incarcerate for not having a bell on a bicycle or, for that matter, to punish by incarceration that which the state has determined to be punishable only by fine.

2. While chapter 316 permits limited municipal authority to regulate traffic, it does not authorize the municipality to convert the civil nature of such traffic offenses into city crimes.

3. Chapter 316 specifically prohibits vehicles (and I would suggest that the statutory definition of "vehicle" in section 316.003(75) includes bicycles) from being equipped with any "siren, whistle or bell, except as otherwise *permitted in this section*".[12] While emergency vehicles and trolleys are excepted in said section, municipal bicycles are not excused from this prohibition.

I urge that the Orange County Circuit Court, sitting as an appellate court in *Powers v. State*, Orange County Circuit Court, Appellate Division, Case # CJAP 89–95 (September 25, 1990) was correct in holding that the bicycle ordinance in question is unconstitutional because it makes criminal an act that the state determined to be a civil infraction. It is further invalid because it requires to be done that which the state had forbidden. The state has preempted the punishment field and, in so far as it relates to bicycles, whether a bell or other warning device may be attached.

FOURTH AMENDMENT ANALYSIS

Finally, even if the municipality has the power to regulate bells on bicycles, still the Fourth Amendment right of the people to be secure in their persons against unreasonable searches and seizures must be considered.

In this regard we must assume that the bell ordinance is uniformly enforced—not only in the black, drug areas but also on junior high school playgrounds and on bike paths throughout the city. Can one reread the dialog contained in footnote 2 and believe that such arrest procedure for this offense is reasonable?

In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) the Supreme Court held that while a person might be arrested in their home without a warrant on a "serious" charge if exigent circumstances existed, such arrest would not be permitted for a minor offense because "to allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction."

In the *Welsh* case a person suspected of drunk driving retreated into his home before the police arrived. They followed him in and arrested him in order to determine his blood alcohol level before it dissipated. The court held that since the state considered drunk driving a minor offense (a first offense of drunk driving in Wisconsin was noncriminal), it would be unreasonable at least not to obtain a warrant as required by the Fourth Amendment. There was no discussion, and none was required by the issues in the *Welsh* case, on the question of whether it would ever be reasonable under the strictures of the Fourth Amendment to "arrest" and take to jail a person accused of an offense which would not permit jail as part of the penalty upon conviction.

That issue did come up in *Barnett v. United States*, 525 A.2d 197 (D.C.App. 1987). In that case Barnett was observed in a high drug area "walking as to create a hazard," a noncriminal traffic offense. Barnett was arrested and, incident thereto, was searched. Narcotics were found and Barnett was cited for the traffic infraction and arraigned on the drug charge. The issue was the legality of Barnett's arrest for a noncriminal traffic offense and the subsequent search and seizure of the narcotics. Barnett conceded that the officer

12. § 316.271(4), Fla.Stat., (1989).

had probable cause to believe that he committed the offense of "walking as to create a hazard" in the officer's presence.

The court held:

> It appeared reasonable, therefore, for Willis to stop appellant, discover his name, and issue a ticket for the civil infraction. However, appellant contends, and we agree, that it was not reasonable, within the strictures of the Fourth Amendment, for Willis to effect a full custody arrest accompanied by a body search.
>
> * * * * * *
>
> When, as here, the authority for the search depends solely upon the legality of the arrest, if the arrest was unlawful, then, as a matter of law, the search is constitutionally prohibited.
>
> * * * * * *
>
> The undisputed testimony of Officer Willis leaves no doubt that appellant was arrested for violating a pedestrian traffic regulation which is a civil infraction for which only a monetary sanction may be imposed. Consequently, the arrest was invalid.

Barnett at 199.

I urge that while officers may detain persons suspected of violating noncriminal ordinances for the purpose of issuing summons, full-scale-custodial arrests with accompanying body searches are unreasonable under the Fourth Amendment. In order to preserve the constitutionality of section 901.15(1), I would construe "arrest" as it relates to violation of municipal ordinances to mean "to detain for the purpose of issuing a ticket, a summons or a notice to appear."[13]

This appears to be the general practice around the state in any event. In *Heller v. City of Ocala*, 564 So.2d 630 (Fla. 5th DCA 1990), appellant was "arrested" and given a notice tc appear on an alleged violation of a city ordinance relating to "indecent acts." Also, in *City of Coconut Creek v. Fowler*, 474 So.2d 820 (Fla. 4th DCA 1985), *Rev. denied*, 486 So.2d 596 (Fla.1986) Fowler was "arrested" for violating an ordinance relating to failing to admit a building official for an inspection and was issued a notice to appear. In neither case does it appear that the defendant was "taken into custody" or that a search was conducted. *See also Brooks v. State*, 524 So.2d 1102 (Fla. 3d DCA 1988) (search was pretextual where officer had motive not based on founded suspicion of criminal activity and detention was for traffic infraction for which an arrest would not otherwise have been made).

The evidence in this case should have been suppressed.

DAUKSCH and GRIFFIN, JJ., concur.

ON MOTION FOR REHEARING/CERTIFICATION

PER CURIAM.

We grant appellant's motion for rehearing solely for the purpose of amending the previous opinion to include the following certified questions of great public importance:

> CAN A CITY ENFORCE A MUNICIPAL ORDINANCE REQUIRING THE EXISTENCE OF SAFETY EQUIPMENT ON A BICYCLE RIDDEN IN THE CITY LIMITS BY ARRESTING A PERSON WHO VIOLATES THE ORDINANCE?
>
> DID THE REPEAL OF SECTION 165.19, FLORIDA STATUTES (1973) ELIMINATE A CITY'S PREVIOUSLY GRANTED POWER TO ENACT ORDINANCES WHICH PROHIBIT VARIOUS TYPES OF CONDUCT BY INDIVIDUALS WITHIN ITS JURISDICTION, AND WHICH PUNISHES VIOLATORS BY "CRIMINAL MEANS": ARREST; FINES; IMPRISONMENT?

13. It is significant that the supreme court referred to the authority to detain and cite for traffic infractions as an "arrest" in *State v. Parsons*, 569 So.2d 437 (Fla.1990). We kn[illegible] that the "arresting officer's" authority in this regard does not permit a search but only justifies detention long enough to issue a citation. Any further detention must be based upon a reasonable suspicion supported by articulable facts. *Cresswell v. State*, 564 So.2d 480 (Fla.1990).

In all other respects, the previous opinion remains unchanged.

DAUKSCH, COBB, W. SHARP, HARRIS and GRIFFIN, JJ., concur.

GOSHORN, C.J., and COWART, PETERSON and DIAMANTIS, JJ., dissent without opinion.

Louis A. CAGGIANO, Appellant,

v.

Robert A. BUTTERWORTH, Attorney General of the State of Florida, Appellee.

No. 90-02026.

District Court of Appeal of Florida, Second District.

June 21, 1991.

Rehearing Denied July 18, 1991.

State sought forfeiture of homestead after conviction of owner for racketeering and bookmaking. The Circuit Court, Hillsborough County, James A. Lenfestey, J., entered summary judgment in favor of State. Owner appealed. The District Court of Appeal, Hall, J., held that State Constitution prohibits forfeiture of homestead property under Racketeer Influenced and Corrupt Organizations Act (RICO).

Reversed and remanded, and question certified.

Homestead ⇐90

State Constitution prohibits forfeiture of homestead property under Racketeer Influenced and Corrupt Organizations Act (RICO). West's F.S.A. §§ 895.01 et seq., 895.05(2)(a); West's F.S.A. Const. Art. 10, § 4.

Joseph A. Eustace, Jr. and Anthony J. LaSpada, P.A., Tampa, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Ann P. Corcoran, Asst. Atty. Gen., Tampa, for appellee.

HALL, Judge.

The appellant presents six issues for review; however, since we find merit in his argument regarding the constitutional protection afforded homestead and that issue is dispositive of the case, we do not reach the other issues.

The appellant was convicted of one count of racketeering and sixteen counts of bookmaking. Three of the bookmaking incidents for which the appellant was convicted took place at his personal residence. Consequently, the state sought forfeiture of the appellant's homestead pursuant to section 895.05(2)(a), Florida Statutes (1989), on grounds the property was "used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of" chapter 895, Florida Statutes, the Florida RICO Act. After striking the appellant's homestead defense, among others, the trial court entered a final summary judgment of forfeiture in favor of the state. The appellant contends the trial court erred in striking his homestead defense and finding, pursuant to *DeRuyter v. State*, 521 So.2d 135 (Fla. 5th DCA 1988), that homestead property is subject to forfeiture under the RICO Act. We agree.

Article X, section 4 of the Florida Constitution provides homestead property will not be subject to forced sale or any court judgment that acts as a lien on such property. In the instant case, a forfeiture is certainly a judgment that acts as a lien on homestead property and, as the court impliedly held in *DeRuyter v. State*, a forced sale.

The state does not dispute that the property at issue is homestead property; however, it asserts *DeRuyter* as authority for the proposition that there is an exception to homestead protection in instances where the homestead is used in a criminal enterprise. The state therefore asks us to agree with the *DeRuyter* court and hold that the

APPENDIX 2

TITLE XII

CITIES AND TOWNS

CHAPTER 165

ORGANIZATION AND DISSOLUTION OF MUNICIPALITIES

165.01 Incorporation; requirement as to number of incorporators.—It is lawful for the male and female inhabitants, who are freeholders and registered voters of any hamlet, village or town in this state, not less than one thousand in number, who shall have the qualifications hereinafter prescribed, to establish for themselves a municipal government with corporate powers and privileges as hereinafter provided.

History.—§1, ch. 2047, 1875; RS 658; GS 999; RGS 1825; CGL 2935; §1, ch. 23656, 1947; §1, ch. 26913, 1951; §1, ch. 67-159.
Note.—Ch. 25758, Sp. laws of 1949, is specifically not repealed.

165.02 Distinction between cities and towns.—Whenever any municipal government is established, and it shall appear that there are three hundred registered voters within the limits to be designated, it is incorporated and designated as a city, entitled to the privileges of a city. All municipal governments having a less number of voters than those named above are designated and declared incorporated towns, entitled to the privileges and rights of incorporated towns.

History.—§3, ch. 1688, 1869; RS 659; GS 1000; RGS 1826; CGL 2936.

165.03 Publication of notice to assemble and organize.—Whenever any community of persons, both male and female, who are freeholders and registered voters, shall desire to form a municipal corporation under the provisions of this chapter, they shall, for a period of not less than thirty days, cause to be published in some newspaper of the county, or by posting in three places of public resort in the immediate vicinage, a notice requiring all persons, male and female, who are freeholders and who are registered voters, residing in the proposed corporate limits, which shall be stated in this notice, to assemble at a certain time and place to select officers and organize a municipal government.

History.—§2, ch. 1688, 1869; RS 660; GS 1001; RGS 1827; CGL 2937; §2, ch. 23656, 1947.

165.04 Proceedings of meeting.—At the time and place designated in the notice aforesaid, the male and female inhabitants who are freeholders and registered voters present, being not less than two thirds of those whom it is proposed to incorporate, shall select a corporate name and seal for the municipality which they propose to form and designate by definite metes and bounds the territorial limits thereof. They shall then proceed to choose by a vote of a majority of the said male and female inhabitants who are freeholders and registered voters a mayor and not more than nine and not less than five aldermen, who shall be known

as the city council and in whom shall vest the government of the city. The mayor shall continue in office for the period of one year from the date of his election or until his successor is elected and qualified; provided that the metes and bounds in this section shall not in any case apply to the fixing or establishing the boundary lines of towns and cities now or heretofore incorporated by the now existing laws of this state.

History.—§4, ch. 1688, 1869; RS 661; GS 1002; RGS 1828; CGL 2938; §3, ch. 23656, 1947; §2, ch. 67-159.

165.05 Terms of aldermen.—All aldermen elected for any incorporated city or town shall be elected for and hold their office for the term of two years; provided, that at the first meeting of aldermen so elected they shall by lot divide their body into two classes, as nearly equal in number as possible, one of which class shall hold office for two years, and the other class shall hold their offices for the term of one year, and an election shall be held to elect the successor of each class, so as to have their successors elected at the expiration of the term of the said classes, respectively.

History.—§1, ch. 3314, 1881; RS 662; GS 1003; RGS 1829; CGL 2939.

165.06 Oath of officers.—As soon as convenient, within three days from the date of the said election, the mayor-elect, shall take before some judicial officer of this state the following oath of office, viz.: "I, A. B., do solemnly swear (or affirm) that I will support, protect and defend the constitution and government of the United States and of the State of Florida against all enemies, domestic or foreign, and that I will bear true faith, loyalty and allegiance to the same, and that I am entitled to hold office under the constitution; that I will faithfully perform all the duties of the office of mayor of ..... on which I am about to enter. So help me God." And the mayor, upon being so qualified, shall administer to the aldermen and the other officers-elect the like oath, and thereupon they shall be considered fully qualified to assume the functions and powers and enter upon their several duties as officers of the city aforesaid.

History.—§5, ch. 1688, 1869; RS 663; GS 1004; RGS 1830; CGL 2940.

165.07 Transcript of proceedings of meeting.—A fair and complete transcript of the proceedings of the said meeting shall be prepared by the city clerk, in which shall be embodied the notice by which the meeting was convened, the number of qualified electors present, the style or name, seal and territorial limits of the corporation and the names of the officers-elect to which the mayor and aldermen shall attach their signatures, attested by the clerk and the corporate seal. A copy of the transcript shall be forthwith filed with the department of state and the clerk of the circuit court in and for the county within which the corporate limits are located and shall be by him duly entered upon the public records of the said county.

History.—§6, ch. 1688, 1869; RS 664; GS 1005; RGS 1831; CGL 2941; §3, ch. 67-159; §§10, 35, ch. 69-106.

165.08 Powers of corporation.—The provisions of §§165.01-165.07 having been complied with, the persons therein named, and their successors, shall thereupon constitute and become a body corporate with full power and authority to take and to hold property, real, personal and mixed, and to control and dispose of the same for the benefit and best interest of the corporation aforesaid, to sue and be sued, plead and be impleaded, and to do all such other acts and things as are incident to corporate bodies.

History.—§7, ch. 1688, 1869; RS 665; GS 1006; RGS 1832; CGL 2942.

165.09 Jurisdiction to extend over waters in limits.—The jurisdiction of said cities and towns, and the authority of the officers thereof, shall be held to have full force and effect over the waters of all rivers, creeks, harbors or bays contained within the corporate limits.

History.—§4, ch. 1855, 1871; RS 666; GS 1007; RGS 1833; CGL 2943.

165.10 President of council.—The city council shall, immediately after organization, proceed to elect one of its members president, who shall preside over the council. The president so elected shall, in case of the absence, sickness or other disability of the mayor, act as mayor for the time being and while so acting shall be disqualified from presiding over the council who shall elect a president pro tem, to preside so long as the disability of the mayor exists. No mayor of any municipal government shall be president of the city council.

History.—§§1, 3, ch. 1855, 1871; RS 667, 668; GS 1008; RGS 1834; CGL 2944.

165.11 Ordinances to be submitted to mayor.—All ordinances passed by the city council shall be submitted before going into effect, to the mayor or person acting as such, for his approval. If approved he shall sign the same, when it shall become a law. If disapproved, he shall return the same with his objections in writing to the city council, at their next regular meeting, who shall cause the same to be entered in full upon the record of their proceedings, and proceed to consider the mayor's objections, and to act upon the same. If, upon consideration, the city council shall pass the same by a two-thirds vote of the members present, which vote shall be entered upon the records, the ordinance or ordinances shall then become a law, the mayor's objections to the contrary notwithstanding. Any ordinance which shall not be returned to the city council at the next regular meeting of the council after its passage, shall become a law in like manner as if signed by the mayor or person acting as such.

History.—§2, ch. 1855, 1871; RS 669; GS 1009; RGS 1835; CGL 2945.

165.12 Qualifications of electors.—Any person who shall possess the qualifications requisite to an elector at general state elections, and shall have resided in the city or town for six months next preceding the election and shall have been registered in the municipal registration as shall be prescribed by ordinance, shall

be a qualified elector of the municipality at such election, except in cases in this chapter otherwise provided; and, provided that state or county registration shall not be required to qualify an elector of a city or town.

History.—§8, ch. 1688, 1869; §3, ch. 3850, 1889; RS 670; GS 1010; RGS 1836; CGL 2946.

165.13 Council may regulate registration and election.—The city or town council may establish rules, regulations and fees, for the registration of voters, for the annual election of municipal officers, and for filling of all vacancies which may occur in the city or town government, and for such other municipal elections as may be authorized by law.

History.—§1, ch. 2034, 1874; RS 671; GS 1011; RGS 1837; CGL 2947.

165.14 Election boards.—In all cities and towns in the state, in which it is provided that the general, primary and special elections of said cities and towns shall be conducted and held under the supervision and control of election boards, and where, under the provisions of law creating such election boards, any other method whatsoever for the selection of members of said boards is provided, other than the method of being elected by the people at a general or primary election, said method of selection is declared changed to conform to the provisions of §165.15.

History.—§1, ch. 16983, 1935; CGL 1936 Supp. 2947(1).

165.15 Election of members of boards of election.—All members of boards of elections in the cities and towns in the state shall be elected by the qualified electors thereof and the terms of office of the members of said election boards shall be for the period as hereafter fixed. The governing body of each city and town in the state, where under any law whatsoever elections are now controlled and held under the supervision of an election board, shall make provision for the nomination and election at each regular municipal primary and general election to be held in said cities and towns for the election of the members of such board as now constituted, the majority of whom shall be elected for a period of four years and the remainder of whom shall be elected for a period of two years. When the term of office of those elected for a period of two years shall have expired, their successors shall be chosen and their term of office shall be for a period of four years so that a majority of the members of said election board shall be elected at one election and the remainder shall be elected at the next election so that the term of office of each member shall be four years.

History.—§2, ch. 16983, 1935; CGL 1936 Supp. 2947(2).

165.16 Members of election boards shall not be candidates voted for in election.—No member of election boards shall be a candidate for any office to be voted for in said election for a period of one year after service upon said board.

History.—§3, ch. 16983, 1935; CGL 1936 Supp. 2947(3).

165.17 Applies to all elections; certain municipalities excepted.—Section 165.15 shall apply to all elections held within said cities and towns, whether primary elections, general elections or special elections; provided, however, that nothing therein contained shall apply to any municipality created under and pursuant to §9, Art. VIII, of the constitution of 1885.

History.—§14, 5, ch. 16983, 1935; CGL 1936 Supp. 2947(4); §11, ch. 69-216.

165.18 Powers of council concerning election returns, expulsion, etc.—The city or town council may judge of the election returns and qualifications of its own members, make such by-laws and regulations for their own guidance and government as they may deem expedient and enforce the same by fine or penalty, and compel attendance of its members; and two-thirds of the council may expel a member of the same or other officer of the city or town for disorderly behavior or malconduct in office.

History.—§10, ch. 1688, 1869; RS 672; GS 1012; RGS 1838; CGL 2948.

165.19 Ordinances and penalties.—The city or town council may pass all such ordinances and laws as may be expedient and necessary for the preservation of the public peace and morals, for the suppression of riots and disorderly assemblies and for the order and government of the city or town, and to impose such pains, penalties and forfeitures as may be needed to carry the same into effect. Provided, that such ordinances shall not be inconsistent with the constitution and laws of the United States or of this state; and provided, further, that for no one offense made punishable by the ordinances and laws of said city or town shall a fine of more than five hundred dollars be assessed, nor imprisonment for a period of time greater than sixty days.

History.—§1, ch. 3024, 1877; RS 673; GS 1013; RGS 1839; CGL 2949.

165.191 Authority to adopt published code by reference.—

(1) As used in this section, the following terms shall have the meanings indicated as follows, unless the context otherwise requires:

(a) "Code" shall mean and include any published compilation of rules and regulations which have been prepared by various technical trade associations and shall include specifically, but shall not be limited to, building codes; plumbing codes; electrical wiring codes; health or sanitation codes; fire prevention codes; inflammable liquids codes; codes for the slaughtering, processing, and selling of meats and meat products for human consumption; codes for the production, pasteurizing and sale of milk and milk products, together with any other code which embraces rules and regulations pertinent to a subject which is a proper municipal legislative matter;

(b) "Public record" shall mean and include city, state or federal statute, ordinance, rule or regulation adopted prior to the exercise by the municipality of the authority to adopt or incorporate by reference as herein granted;

(c) "Published" shall mean printed, lithographed, multigraphed, mimeographed, or otherwise reproduced.

(2) Any municipality is hereby authorized and empowered to adopt or incorporate by reference the provisions of any code or public record, or any portion thereof, without setting forth the provisions of such code or public record in full, provided that at least three copies of such code or public record (except Florida or federal statutes) which is adopted or incorporated by reference are filed in the office of the city clerk, and there kept available for public use, inspection and examination. The filing requirement herein required shall not be deemed to be complied with unless the required copies of such code or public record are filed with the city clerk for a period of ten days prior to the passage of the ordinance adopting or incorporating such code or public record by reference.

(3) Nothing contained in this section shall be deemed to relieve the municipality from any requirement of publishing any ordinance which adopts or incorporates any such code or public record by reference, but all provisions applicable to such publication shall be fully and completely carried out as if no code or public record was adopted or incorporated therein.

(4) Nothing contained in this section shall be deemed to permit the adoption of the penalty clauses by reference which may be established in the code or public record which is adopted or incorporated by reference, but all penalty clauses shall be set forth in full in the adopting ordinance and be published along with and in the same manner as the adopting ordinance is required to be published.

(5) Any subsequent amendments or revisions of any such code or public record may be adopted or incorporated by reference in the same manner as the original, as above authorized.

(6) Municipalities adopting any code or codes as provided for in this section are hereby authorized and empowered to provide for the appointment of officers boards, and/or commissions to administer or enforce such code or codes, except as otherwise provided by law.

(7) Municipalities shall not be required to re-adopt any such code or public record heretofore adopted or incorporated by reference; but all previous adoptions or incorporations by reference, which would have been valid if this section had been in effect, are hereby ratified and declared effective, provided, however, that the requisite number of copies are forthwith filed with the city clerk, if they have not already been so filed.

History.—§§1-7, ch. 28000, 1953; §1, ch. 29870, 1955.

165.192 Codification of ordinances.—

(1) Any municipality is hereby authorized and empowered to revise and codify its ordinances, or any part of them, into one or more volumes, either bound or in loose-leaf form, without the publication or posting of any part thereof, except that the ordinance adopting such revision or codification shall be enacted in accordance with the requirements for the passage of ordinances pertaining to such municipality. The ordinance adopting said revision or codification may provide for the repeal of certain ordinances and parts of ordinances by the deletion or omission of same from the revision or codification.

(2) Any revision or codification of ordinances heretofore adopted by any municipality at any time prior to May 14, 1953, which would have been valid if this section had been in effect, is hereby ratified and validated in all respects whatsoever.

History.—§§1, 2, ch. 28001, 1953.

165.20 Council to keep record and publish ordinances.—The city or town council shall keep or cause to be kept a regular record of their proceedings and ordinances, and they shall promulgate, without unnecessary delay, all laws and ordinances which they may enact by posting at the door of the city or town hall, and at one other public place within municipality, or by publishing the same in any newspaper in said city or town, in either case for a period of not less than four weeks.

History.—§27, ch. 1688, 1869; RS 674; GS 1014; RGS 1840; CGL 2950; §1, ch. 28166, 1953.

165.21 Appointment of deputies by city or town clerk.—The clerk of any city or town in the state may appoint a deputy clerk, who shall exercise the powers and perform the duties of such clerk during his absence or inability to act, and whose compensation shall be paid by the city or town clerk appointing him.

History.—§1, ch. 5462, 1905; RGS 1841; CGL 2951.

165.22 Meetings of council to be public; penalty.—

(1) All meetings of any city or town council or board of aldermen of any city or town in the state, shall be held open to the public of any such city or town, and all records and books of any such city or town shall be at all times open to the inspection of any of the citizens thereof.

(2) Any city or town councilman, or member of any board of aldermen, or other city or town official, who shall violate the provisions of this section, shall be guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.

(3) Such conviction shall immediately vacate the office held by such city or town councilman, or member of the board of aldermen, or other officer of such city or town.

History.—§§1, 2, 3, ch. 5463, 1905; RGS 1842, 5379, 5380; CGL 2952, 7514, 7515; §7, ch. 22858, 1945; §86, ch. 71-136.

165.23 Other municipalities declared legally incorporated.—All cities and towns which now are and for ten years last past have been exercising municipal governments are declared legally incorporated.

History.—§§1, 2, ch. 3748, 1887; RS 726; GS 1100; RGS 1947; CGL 3080.

165.24 Acts made valid.—All acts and doings of cities and towns included in §165.23, and of the government and officers of the same, done under any law of the state, are declared valid; and said municipal corporations and governments, and all the officers of the same, shall have the powers and privileges granted by law, approved February 4, A. D. 1869, and all subsequent laws relating to municipal corporations and the governments of the same.

History.—§2, ch. 1885, 1872; RS 727; GS 1101; RGS 1948; CGL 3081.

165.26 Proceedings to surrender franchise.—Any city or town incorporated under the laws of this state may surrender its franchise in the following manner: Upon petition of one-third of the registered voters of such city or town, the mayor shall issue a proclamation ordering an election to be held in such city or town on a day not less than thirty nor more than sixty days from the issuance of the proclamation. Those wishing to vote in favor of a surrender shall have written or printed on their tickets the words, "For Surrender of the Franchise," and those wishing to vote against a surrender shall have written or printed on their tickets the words, "Against Surrender of Franchise." The election shall be conducted, and the returns canvassed, under such rules and regulations as the town or city council may prescribe. If two-thirds of the votes cast at such election shall be in favor of the surrender of such franchises they shall stand and be deemed surrendered from the thirtieth day after the election.

History.—§1, ch. 3317, 1881; RS 728; GS 1102; RGS 1949; CGL 3082.

165.27 Certificates of result of election.—The city or town council shall cause to be entered upon the minutes of its proceedings, immediately after the result of said election is declared, a certificate or declaration of the result thereof, and they shall also transmit a certified copy thereof to the department of state, and if the result is in favor of a surrender it shall give notice in two gazettes of such surrender and record such certificate in a book to be kept for that purpose.

History.—§1, ch. 3317, 1881; RS 729; GS 1103; RGS 1950; CGL 3083; §§10, 35, ch. 69-106.

165.28 Payment of debts.—If such city or town, at the time of dissolution, shall owe any debt, any property or assets of such municipality which belonged thereto at the time of such dissolution shall be subject to legal process for the payment of such debt. After the payment of all the debts of said dissolved municipal corporation, any money or other assets, the title to which is vested in said corporation, shall escheat to the general fund of the county wherein located. If, however, it shall be necessary in order to pay any such debt, to levy any tax or taxes on the property in the territory or limits of the dissolved municipality, the same may be assessed and levied by order of the county commissioners of the county wherein the same is situated and shall be assessed by the county assessor of taxes and be collected by the county tax collector. The proceedings in the assessment, collection, receipt and disbursements of such taxes shall be like the proceedings concerning county taxes as far as applicable.

History.—§1, ch. 3317, 1881; RS 730; GS 1104; RGS 1951; CGL 3084; §4, ch. 67-159.

165.29 Sections not applicable in certain counties.—Sections 165.01-165.08 shall not apply to or be effective in any county having a population of not less than three hundred ninety thousand nor more than four hundred fifty thousand according to the latest official decennial census.

History.—§1, ch. 23615, 1947; §1, ch. 57-833; §1, ch. 61-3.

165.30 Municipal corporation, validity of existence; quo warranto.—Any person, or persons, association of persons, or corporation, who shall be the owner or owners of lands located and situate within the territorial boundary of a city, town or hamlet within the state shall have the right, upon refusal of the attorney general to institute proceedings in the name of the state upon the relation of such person or persons, to institute proceedings upon writs of quo warranto, or upon information in the nature of such writs, in the name of the state, to attack or challenge the validity of the municipal corporation wherein such lands are located, and the legal existence of its corporate franchises. In all such proceedings, the said municipal corporation and the members of its governing body shall be made parties defendant. The information filed in such proceedings shall set forth under oath a prima facie case of right in the relator or relators to challenge the validity of the municipal corporation of the exercise by it of its municipal franchises.

History.—§1, ch. 25275, 1949.