IN THE SUPREME COURT OF FLORIDA

CARL LEROY THOMAS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

SUPREME COURT NO. 78,055

DISCRETIONARY REVIEW OF
A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, SECOND DISTRICT

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL), ON BEHALF OF PETITIONER

JAMES T. MILLER, ESQUIRE, ON
BEHALF OF FLORIDA ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
407 Duval County Courthouse
Jacksonville, Florida 32202
(904) **630-1548**

ATTORNEY FOR AMICUS CURIAE ON
BEHALF OF PETITIONER

FLORIDA BAR NO. 0293679

ROBERT A. HARPER, JR., CHAIRMAN
AMICUS COMMITTEE, FACDL

GEORGE TRAGOS, PRESIDENT
FACDL

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.): **PAGE NO.**

TABLE OF CITATIONS

CASES CITED (cont):

OTHER AUTHORITIES:

OTHER AUTHORITIES (cont.):

PRELIMINARY STATEMENT

On August 22, 1991, this Court granted the Florida Association of Criminal Defense Lawyers (FACDL) permission to file an Amicus Curiae Brief on behalf of Petitioner.

The FACDL is a not for profit Florida corporation formed to assist in the reasoned development of the criminal justice system. Its statewide membership of over 900 includes lawyers who are daily engaged in the defense of individuals accused of criminal activity. The founding purposes of FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. FACDL members serve in positions which bring them into daily contact with the criminal justice system.

The involvement of the FACDL in this case should enable this Court to have the input of an organization which collectively represents numerous criminal defense lawyers, and other practitioners and non-lawyer professionals throughout the United States. The studied view of the FACDL could help this Court reach a fair and equitable decision in this cause.

FACDL will present only legal arguments in this brief and will not make any references to the record in this cause. References to the facts below will come from the decision of the

STATEMENT OF THE CASE AND FACTS

The Fifth District Court of Appeal, en banc on rehearing, certified the following two questions to this Court:

> 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 THE 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?

The FACDL otherwise adopts the Statement of the Case and Facts in Petitioner's Initial Brief on the Merits.

SUMMARY OF ARGUMENT

The Orlando Bicycle Bell Ordinance is invalid because it is inconsistent with State law. Section 316.271(4), Florida Statutes, specifically prohibits a bell on a bicycle. The majority en bane decision below erroneously focused on the inherent police power of Orlando to enact a Bicycle Bell Ordinance. Although Orlando probably has the power to enact such an ordinance, Article VIII, Section 2(b), of the Florida Constitution limits such power when the State legislature has otherwise provided for in the field. Consequently, the ordinance is invalid, not because Orlando cannot enact such an ordinance, but because the State has already enacted a law which is directly contrary to the ordinance.

Orlando has required what the State strictly prohibits. Although some would argue that a State law which prohibits bicycle bells is absurd, it is no more absurd that an ordinance which carries up to a 60 day jail term for not having a bicycle bell or gong. As was noted by the court below, this Court should not question the wisdom of such legislation and invade the province of the legislature. Therefore, this Court can dispose of this case without answering the two certified questions.

If the Court decides to answer the certified questions, it should decide that even if Orlando enacted a valid ordinance, its penalty (up to 60 days) denies equal protection under the laws. The State Uniform Traffic Control Act, Chapter 316, Florida Statutes, decriminalized similar traffic offenses. Section 316.2065, Florida Statutes, regulates the operation of and equipment

on a bicycle. Section 316.2065(8) provides for a $32.00 fine for failing to have lights on a bicycle. There is no incarceration for a violation of the State regulations for a bicycle. Consequently, the penalty in the Orlando ordinance lacks a just and reasonable relationship to the statute in respect to which the classification is proposed.

The Court should also find that a full custodial arrest and incarceration far a violation of a bicycle bell ordinance is unreasonable. Chapter 316 and 328, Florida Statutes, provide for non-criminal, civil penalties for traffic violations. In light of this fact, incarceration for a bicycle bell violation is unreasonable under Article I, Section 12, of the Constitution. The United States Supreme Court has decided, in a variety of contexts, whether a particular form of search or seizure is reasonable under the Fourth Amendment. *See* e.g. Terry v. Ohio, 352 U.S. 1, 88 S.Ct. 1868 (1968); I.N.S. v. Delgado, 466 U.S. 210, 104 S.Ct. 1758 (1984); Michigan Dept. of State Police v. Sitz, 100 S.Ct. 2481 (1990). In each of these cases, the United States Supreme Court balanced the government interest involved with the degree of intrusion to determine whether the search or seizure was reasonable. This Court should perform the same balancing process and find that an arrest (with possible attendant strip and body searches) for a bicycle bell ordinance is unreasonable.

Section 165.19, Florida Statutes (1973), previously gave municipalities the power to incarcerate for an ordinance violation. However, Section 165.19 was repealed in 1974. There is no other authority for a municipality to incarcerate. FACDL urges

this Court to adopt the cogent reasoning of Judge Harris in his dissenting opinion for the second certified question, if the Court decides it is necessary to answer it.

ARGUMENT

ISSUE I

A CITY CANNOT ENFORCE A MUNICIPAL ORDINANCE REQUIRING THE EXISTENCE OF SAFETY EQUIPMENT ON A BICYCLE RIDDEN IN THE CITY LIMITS BECAUSE SECTION 316.271(4), FLORIDA STATUTES, (STATE UNIFORM TRAFFIC CONTROL) ALREADY COVERS THE SUBJECT OF BICYCLE BELLS AND EXPRESSLY FORBIDS A BELL ON A BICYCLE.

A. Introduction: The issue in this cause.

FACDL respectfully submits that the en banc opinion below considered many issues, as contained in the certified questions, which were unnecessary to the disposition of this cause. Both the majority and dissenting opinions addressed several constitutional questions about the power of a municipality to arrest someone for violating an ordinance which requires a person to have a bell or gong on a bicycle. The opinions discussed constitutional and statutory construction questions under Article I, Section 12, of the Florida Constitution and the Fourth Amendment to the United States Constitution, Article VIII, Section 2, of the Florida Constitution and various statutes dealing with the powers of municipalities. See Chapters 162, 166 and 316, Florida Statutes, and Section 901.15, Florida Statutes. FACDL submits that this cause presents an example of the aphorism "that the best solution is usually the simplest solution."

This Court has had a long-standing policy of avoiding a constitutional issue if the case can be disposed of on other

grounds. See State v. Tsavaris, 394 So.2d 418 (Fla. 1981); State v. Dye, 346 So.2d 538 (Fla. 1977); State ex rel. Kennedy v. Knott, 166 So. 835, 123 Fla. 295 (Fla. 1936). Consequently, if the Court accepts the following argument concerning the power of Orlando to enact a bicycle bell ordinance in the first place, it will not be necessary to decide whether the city can arrest someone for violating the ordinance.

B. The power of a city to enact a bicycle bell or gong ordinance.

The majority opinion below argued that the City of Orlando could enact a bicycle bell ordinance based upon Article VIII, Section 2(b), of the Florida Constitution. Article VIII, Section 2(b) states:

> "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government perform municipal services, and may exercise any power for municipal purpose, except as otherwise provided by law" (Emphasis supplied).

The majority en banc opinion then constructs a complicated argument to justify the conclusion that the City of Orlando could enact a bicycle bell ordinance which provides for the arrest and incarceration for a person who violates the ordinance. However, the majority opinion overlooked the question of whether the city could enact a bicycle bell ordinance (as opposed to other criminal or non-criminal ordinances) in the first place. The en banc decision simply overlooked the phrase, "except

as otherwise provided by law," in its zeal to justify an arrest for an offense which the dissenting opinion labeled as civil or non-criminal. If the City of Orlando could not enact such an ordinance, it does not matter if the city could arrest and incarcerate for a violation of it.

Under Article VIII, Section 2(b), of the Florida Constitution, municipalities shall have certain governmental powers, unless otherwise provided by law. The majority and dissenting opinions below engaged in a semantical battle over the concepts of comity and preemption. This was an unnecessary skirmish because both sides agreed that if the legislature had otherwise provided on the issue of bicycle bells, then Orlando lacked the authority to enact such an ordinance. Whether one calls it preemption or not, if the State has passed a contrary law, then Article VIII, Section 2(b), would not give a city the power to enact a bicycle bell ordinance.

C. Chapter 316 (State Uniform Traffic Control) and Section 316.271(4), Florida Statutes (1989).

Section 316.271(4), Florida Statutes (1989), specifically prohibits a bell on a bicycle. Section 316.271(1) requires a horn on a motor vehicle. A bicycle, under Section 316.003(21), Florida Statutes (motor vehicle), is not a motor vehicle. Section 316.003 specifically excludes a bicycle from the definition of a motor vehicle. Section 316.271(4), Florida Statutes, states:

> "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." (The "as otherwise permitted" section refers to trolleys.)

A bicycle is unquestionably a vehicle. Section 316.003(75), Florida Statutes (1989), defines vehicle as:

> "Every 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 track."

In State v. Howard, 510 So.2d 612 (Fla. 3d DCA 1987), rev. denied, 520 So.2d 584, the Third District decided, in the context of a Driving Under the Influence charge, Section 316.193, Florida Statutes, that the definition in 316.003(75) included a bicycle. (The definition in 1985 was identical to the present definition.)

Section 316.271(4), Florida statutes, not only does not authorized the City of Orlando from passing a bicycle bell ordinance, it specifically prohibits a person from putting a bell on a bicycle. Although some would say that Section 316.271(4) is absurd or preposterous, it is no more absurd than the Orlando ordinance which authorizes up to 60 days incarceration for failure to have a bell on a bicycle. As the majority opinion below noted, "The wisdom OF reasonableness of statutes or ordinances are matters solely within the concern of the legislative branch." See Tatzel v. State, 356 So.2d 787 (Fla. 1978); Richman v. Shevin, 354 So.2d 1200 (Fla. 1977), cert. denied, 439 U.S. 953, 99 S.Ct. 348. Consequently, the City of Orlando has required what the State of Florida has prohibited. The exact purpose of Chapter 316, State Uniform Traffic Control, was to eliminate the inconsistencies

between State and local laws. Section 316.002, Florida Statutes, unequivocally states the legislative intent:

> "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."

A municipal ordinance is inferior in status to a state law and must not conflict with state laws. ~~See~~ City of Tampa v. Carolina Freight Carriers Corp., 529 So.2d 324 (Fla. 2d DCA 1988); City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985); City of Miami Beach v. Fleetwood Hotel, 261 So.2d 801 (Fla. 1972). The Orlando Bicycle Bell Ordinance directly conflicts with Section 316.271. Consequently, the Orlando Ordinance is invalid. ~~See also~~ City of Miami Beach v. Amoco Oil Co., 510 So.2d 609 (Fla. 3d DCA 1987); City of Coral Gables v. Seiferth, 87 So.2d 806 (Fla. 1956).

The logical flaw of the majority decision below was that it focused on the power of a municipality to arrest for any ordinance instead of whether the City of Orlando could presently enact a bicycle bell ordinance. The opinion below also illogically focused on the issue of the power to a city to regulate criminal or non-criminal matters instead of whether the Orlando ordinance was consistent with state law.

As demonstrated above, the Orlando Ordinance is invalid because it is inconsistent with state law and Article VIII, Section (2)(b), and not because Orlando lacks the inherent power to enact such an ordinance. Consequently, if the Court accepts this argument, it should rule that the Orlando Ordinance is

invalid for the reasons stated above and decline to answer the certified questions.

ISSUE II

A CITY CANNOT ARREST (HANDCUFF AND JAIL) A PERSON FOR VIOLATING A CITY ORDINANCE WHICH IS SIMILAR TO A STATE NON-CRIMINAL TRAFFIC INFRACTION UNDER CHAPTER 318, FLORIDA STATUTES, INCLUDING THE REGULATION OF BICYCLES UNDER SECTION 316.2065, FLORIDA STATUTES, BECAUSE SUCH PROCEDURE IS UNREASONABLE UNDER THE FOURTH AMENDMENT AND WOULD DENY PERSONS ARRESTED UNDER THE CITY ORDINANCE EQUAL PROTECTION UNDER THE LAWS OF THE STATE.

A. Introduction: The issue this Court must decide.

If the Court decides that it is necessary to answer the certified questions and rejects FACDL's argument that the Court can dispose of this case short of answering the broad certified questions, the Court must review the following question:

> "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?"

The Fifth District Court of Appeal addressed this question by focusing on the power of a municipality to arrest and incarcerate for an ordinance violation and whether such a procedure is unreasonable under the Fourth Amendment and Article I, Section 12, of the Florida Constitution. Although the question about whether an arrest under these circumstances is reasonable was appropriate, FACDL respectfully submits that the opinion below overlooks the following more significant question: Assuming a city can generally arrest for municipal ordinance violations, may

a city arrest and incarcerate for a violation of a traffic code violation (no bell on a bicycle) which is analogous to state traffic code violations under Chapter 318, Florida Statutes, which do not have criminal penalties (fines only)? Once this question is addressed, a second question arises: If a city incarcerates for a non-criminal traffic offense and the state does not, does the city procedure deny individuals equal protection under the law?

FACDL realizes that this equal protection question was not addressed in the opinion below. However, given the broad scope and impact of the opinion below on the power of municipalities and the rights of individuals, this Court should consider this question. If the Court decides that under the facts of this case, it would be inappropriate for Orlando to jail individuals for not having a bell on a bicycle, the Court could avoid answering the other complex and thorny constitutional problems raised by this case. Consequently, to assist this Court in reaching the correct and fair resolution in this cause, FACDL will address whether the Orlando ordinance denies equal protection under the law and is reasonable under Article I, Section 12, of the Florida Constitution.

B. The Orlando Bicycle Bell Ordinance denies individuals equal protection under the laws of Florida and is inconsistent with State law under Article VIII, Section (2)(b), of the Florida Constitution.

The Orlando Bicycle Bell Ordinance obviously regulates the equipment which must be on a bicycle on the streets of the city. The opinion below completely overlooked the fact that Chapter 316, Florida Statutes, regulates, in great detail, the type of equipment on motor vehicles, motorcycles, mopeds, golf cars, all-terrain vehicles and bicycles. Section 316.2065, Florida Statutes, specifically regulates the equipment on and the operation of a bicycle. Sections (1) through (7) of Section 316.2065 regulates, in minute detail, the physical operation and maneuvering of a bicycle.

Section (8) of Section 316.2065 requires a bicycle to have a lamp on the front exhibiting a white light visible from a distance of at least 500 feet and a rear reflector with a red light visible from a distance of 600 feet. If an individual violates Section (8) of Section 316.2065, the penalty is a fine as delineated in Section 318.18, Florida Statutes, or in Section 318.14(5) (if an individual chooses to contest the citation, the maximum penalty increases to $500.00 and attendance at a driver improvement school). Under Chapter 318, there is no incarceration for a violation of any of the State bicycle regulations. There is no incarceration for other offenses involving the operation of an equipment on motor vehicles and other vehicles. See Sections 318.18 and 318.17, Florida Statutes.

Under the State Uniform Traffic Control Code, the type of offense covered by the Orlando ordinance carries a maximum penalty of $500.00 (if the citation is contested). The usual fine would be $32.00. See Section 318.18(2), Florida Statutes. The

maximum penalty under the Orlando ordinance is a fine of $500.00 and imprisonment of **60** days.

Assuming Orlando can regulate the area of bells on **a** bicycle, is it fair and an equal application of the laws to imprison someone for 60 days for not having a bell on **a** bicycle while **a** person who does not have a light on the bike at night could receive a $32.00 fine? In terms of its penalty, the Orlando ordinance is irrational, denies equal protection under the laws and is inconsistent with state law under Article VIII, Section (2)(b) of the Florida Constitution.

Under Florida law, the test for determining whether a particular statutory provision or classification (in this case 60 days imprisonment as opposed to a fine) denies equal protection under the law is "whether the classification rests on some difference that bears a just and reasonable relationship to the statute in respect to which the classification is proposed." Rollins v. State, 354 So.2d 61 (Fla. 1978); Soverino v. State, **356** So.2d **269** (Fla. 1978). The United States Supreme Court has adopted similar tests. See In Re Griffiths, **413** U.S. 717, **93 S.Ct. 2851, 37** L.Ed.2d 910 (1973); Oyler v. Boles, 368 U.S. **448, 82** S.Ct. 501, 7 L.Ed.2d **446** (1962); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. **1064,** 30 L.Ed. **220** (1886).

Even if Orlando has the power to regulate bells on bicycles, there is no just relationship between imprisoning individuals for 60 days for not having a bell and imposing only a $32.00 fine for not having a light on a bike. Common sense tells us that not having **a** light on **a** bike at night is potentially more

dangerous than not having a bell or gong. Even if the ordinance has a reasonable relationship to Orlando's police power which enables the City to regulate in this area, the penalty is patently unjust.

The State of Florida has decided to decriminalize such picayune traffic violations through the Uniform State Traffic Control Act. Yet, in Orlando, an individual who does not have a bell on a bicycle could sit in jail for 60 days. Some major cities, like Jacksonville, do not even have a Bicycle Bell Ordinance. The United States Supreme Court in Yick Wo v. Hopkins, supra, invalidated a San Francisco ordinance covering Chinese laundries which like the Orlando Ordinance affected specific individuals in a specific area. The Yick Wo Court held:

> "Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." 6 S.Ct. at 1073.

When the Orlando Ordinance is considered with the State Uniform Traffic Control Code, it uses an evil eye and unequal hand against persons in similar circumstances. An individual in Jacksonville without a bell on a bicycle can receive no penalty; while one in Orlando can be incarcerated for 60 days. As discussed above, Section 316.271 prohibits a bell on a bicycle. Therefore, individuals in similar circumstances are not treated

similarly. There is no conceivable justification for persons with bicycles in Orlando to be treated differently than citizens in other cities. Consequently, the Orlando Ordinance violates Article I, Section 2, of the Florida Constitution.

c. A full custodial arrest and incarceration for a violation of a Bicycle Bell Ordinance is unreasonable.

Although FACDL submits that the City of Orlando lacks the power to enact a Bicycle Bell Ordinance, even assuming that it can, a full custodial arrest and incarceration is unreasonable for such a minor offense. This fact is especially true since the State of Florida has decriminalized all other similar infractions. FACDL does not contest the right of the police to stop an individual and issue a citation for a violation of a bell ordinance, assuming the ordinance is otherwise valid. However, a full custodial arrest (with a possible body cavity search) is unreasonable.

The Court has the authority to decide that a particular form of detention is unreasonable. Although Article I, Section 12, of the Florida Constitution binds this Court to United States Supreme Court decisions, the United States Supreme Court has not decided whether a full custodial arrest and incarceration is reasonable for such a minor traffic infraction. The Supreme Court has decided a search incident to arrest is permissible if there was an arrest for a traffic offense. See United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467 (1973), (arrest for driving

on revoked license); Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488 (1973), (arrest for driving without a license).

In a variety of contexts the United States Supreme Court has decided whether certain forms of seizure or search are reasonable: An investigatory stop and frisk - Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972); border stops/searches - United States v. Montoya De Hernandez, 473 U.S. 531, 105 S.Ct. 3304 (1985); United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074 (1976); work place detentions and inspections - I.N.S. v. Delgado, 466 U.S. 210, 104 S.Ct. 1758 (1984); DUI roadblocks - Michigan Dept. of State Police v. Sitz, 110 S.Ct. 2481 (1990). In each of these circumstances, the United States Supreme Court balanced the government interest involved with the degree of intrusion to determine if the search or seizure was reasonable under the Fourth Amendment. In this cause, this Court should engage in the same balancing process. It is simply unreasonable, in light of the decriminalization of all other minor offenses under Chapter 316 and 318, Florida Statutes, to arrest and incarcerate a person for not having a bell on a bicycle. See Tinetti v. Wittke, 620 F.2d 160 (7th Cir. 1980), (unreasonable to strip search persons arrested for non-misdemeanor offenses).

FACDL requests that the Court adopt the reasoning of Judge Harris' dissenting opinion below. It cogently demonstrates that it is simply unreasonable and draconian to arrest and incarcerate (with possible attendant strip and body cavity searches) for a violation of a Bicycle Bell Ordinance. Conse-

quently, if the Court rejects all the previous arguments presented by FACDL, it should find that a full arrest and search incident to it was unreasonable in this case. Therefore, the gun found on Petitioner should have been suppressed.

ISSUE III

THE REPEAL OF SECTION 165.11, FLORIDA STATUTES (1973), ELIMINATED THE POWER OF ORLANDO TO PUNISH MUNICIPAL ORDINANCE VIOLATIONS BY IMPRISONMENT AND SECTION 162.21 SPECIFICALLY PROVIDES THAT A MUNICIPAL CODE VIOLATION IS A CIVIL INFRACTION.

A. The repeal of Section 165.19, Florida Statutes.

FACDL submits that this Court should adopt the dissenting opinion of Judge Harris, joined by Judges Dauksch and Griffin. Prior to 1974 the Florida Legislature expressly gave municipalities the power to incarcerate for municipal ordinance violations. At common law, incarceration for violation of ordinances was valid, if the sovereign (the state) expressly authorized such action by statute. City of Ft. Lauderdale v. King, 222 So.2d 6 (Fla. 1969). In 1974, the Legislature repealed Section 165.19 which authorized incarceration for municipal ordinance violations. Consequently, the question now is whether a municipality can arrest and incarcerate for a municipal ordinance violation.

The authority cited by the majority below, upon careful review, is not persuasive that municipal ordinances can presently, without express legislative authorization, arrest and take in custody municipal ordinance violators. The majority first cites Section 901.15(1) which authorizes an arrest for a municipal ordinance violation. However, Section 901.15(1) predates the repeal of Section 165.19; Section 901.15(1) must be construed to

mean that an officer may detain and issue a summons to, but take into custody a municipal ordinance violator. In light of the repeal of Section 165.19 and the common law principle, the language of Section 901.151 simply does not authorize a full custodial arrest and incarceration for a municipal ordinance violation.

B. Section 162.21(5) states a municipal code violation is a civil infraction.

The majority opinion also cites Chapter 162 as authority far a city to incarcerate. Chapter 162 establishes administrative code enforcement boards and limits punishments to a fine. Section 162.13, passed in 1982, states that nothing in Section 162 shall prohibit a local governing body from enforcing its codes by any other means. Part II of Chapter 162, passed in 1989, delineates the permissible penalties for code violations. Section 162.21 (5)(a) states that a code violation is a civil infraction and the maximum penalty is a $500.00 fine. The only criminal penalty is the refusal to sign or accept a citation. Therefore, the latest expression of the legislature is that Chapter 162 does not authorize incarceration for code violations. Section 162.21 expressly states that a code violation is a civil infraction.

The majority opinion next argues that under Article VIII, Section (2)(b), of the Florida Constitution, Orlando does have the power to incarcerate Petitioner, even if Section 165.19 was repealed. The majority opinion blithely states that there "is

no constitutional or statutory limitation "on a city's power to prescribe incarceration as a penalty.'' As was discussed above, this view ignores the language of Article VIII, Section (2)(b) itself - the municipality shall have certain powers, except as otherwise provided by law. The State has otherwise provided: in Section 316.271(4), Chapter 318 and Section 162.21(5), Florida Statutes. Therefore, there is no independent statutory authority for incarceration in this case. As there is no express authority for incarceration and there is contrary authority on the issue, the City of Orlando lacked the power to arrest and incarcerate Petitioner.

CONCLUSION

This Court should find that Petitioner was arrested and searched pursuant to an invalid ordinance. Therefore, the Motion to Suppress below should have been granted.

Respectfully submitted,

JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
407 Duval County Courthouse
Jacksonville, Florida 32202
(904) 630-1548

ATTORNEY FOR AMICUS CURIAE ON BEHALF OF PETITIONER

FLORIDA BAR NO. 0293679

ROBERT HARPER, JR., CHAIRMAN
AMICUS COMMITTEE, FACDL

GEORGE TRAGOS, PRESIDENT
FACDL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to the Assistant Attorney General Belle B. Turner, at the Office of the Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 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 FL 32114, Counsel for Petitioner, and this 12th day of September, A.D. 1991.

James T. Miller

JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS