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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CARL LEROY THOMAS,

Petitioner,

v. Case No. 78,055

STATE OF FLORIDA,

Respondent.

ON CERTIFIED QUESTIONS FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the petitioner's recitation of the case and facts with the following additions:

The district court's decision relates the relevant facts as follows:

> 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.

Thomas v. State, 583 So.2d 336, 337 (Fla. 5th DCA 1991).

Officer Bass testified that he had arrested several other persons for violation of this ordinance in addition to Mr. Thomas. (R 6)

At trial, petitioner filed a motion to suppress on various grounds, including that the ordinance was preempted by state statutes, that he could not be arrested for violation of a municipal ordinance, and that the ordinance was unconstitutional. (R 13-20, 38-39) The motion to suppress was denied. (R 20-21, 42, 46)

Thomas entered a plea of no contest to the charge of carrying a concealed firearm, reserving the right to appeal the

denial of his motion to suppress. (R 40) He was sentenced to two years' probation on December 1, 1989. (R 27, 49)

Notice of appeal was timely filed. (R 51) The public defender's office filed an initial brief on petitioner's behalf on or about March 28, 1990. The brief contended that the stop was pretextual, and that the defendant's right to be free from unreasonable seizures and searches was superior to the city's interest in insuring compliance with its bicycle equipment ordinances. The claim of a pretextual stop has been abandoned in this court, as has the selective enforcement claim.

In response, the state filed an answer brief on April 17, 1990. First, the state argued that even if the ordinance was unconstitutional, the evidence seized incident to the arrest for that ordinance was nevertheless admissible, and thus the motion to suppress was not dispositive. On the merits, the appellee contended that the home rule powers act gave the City of Orlando the power to enact legislation concerning any subject matter that was not "expressly preempted" by the state or county government. Section 316.008(1)(h), Florida Statutes (1989) expressly delegated to municipalities the right to regulate the operation of bicycles on streets and highways. Therefore, the Orlando ordinance was valid due to this express delegation of authority, Finally, there was no evidence presented to suggest that the stop was pretextual, and in fact the trial court expressly found that the stop was not pretextual.

Oral argument was set for September 10, 1990, by order dated July 17, 1990. On July 25, 1990, the district court sua sponte ordered the parties to file a supplemental brief within ten days, addressing the issue of:

> ...whether, in light of Section 775.08(2), Florida Statutes, a law enforcement officer has authority to make a custodial arrest for a violation of Chapter 10 of the Orlando City Code.

The supplemental brief of appellant argued that the officer did not have the authority to arrest for the municipal ordinance committed in his presence because "the code of criminal procedure" provided that a notice to appear was the appropriate procedural process. Municipal ordinance violations are mere civil wrongs, he argued, and although arrests were authorized, they were unreasonable. The state argued in response that section 901.15, Florida Statutes (1989), provided direct authority for a custodial arrest on a municipal ordinance committed in his presence, and nothing in section 775.08 abrogated a municipality's right to penalize conduct and affix criminal penalties for its commission.

The District Court of Appeal, Fifth District, issued its en banc decision on March 28, 1991, affirming the convictions. Upon appellant's motion, the decision was amended to add two certified questions, as follows:

> *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?

This court permitted amici to join both parties; the Florida Association of Criminal Defense Lawyers filed an amicus curiae brief on petitioner's behalf while respondent anticipates that the City of Fort Lauderdale and the Florida League of Cities will file amicus curiae briefs supporting respondent's position,

SUMMARY OF ARGUMENTS

Nothing in chapter 316 expressly preempts the Orlando City Ordinance at issue. The mere existence of a state regulation on the subject does not preclude a municipality from adding additional requirements, so long as no express conflict exists. The legislature has expressly delegated to municipalities the authority to regulate the operation of bicycles. §316.008(1)(h), Fla. Stat. (1989).

Section 901.15 specifically addresses under what circumstances a law enforcement officer can arrest for offenses committed within his presence, and specifically includes municipal ordinances. That an officer may issue a notice to appear does not mean that he must do so; moreover, even if a citation is issued, the person is still arrested and can be searched incident to that arrest. The first certified question should be answered in the affirmative.

The amendment to the state constitution in 1968 gave municipalities the power to make ordinances and affix criminal penalties for their violation. No further statutory authorization is necessary. The repeal of section 165.19 is merely a recognition of these broad home rule powers granted by the constitution, and it was not the legislature's intent to in any way restrict the power of municipalities, The second certified question should be answered in the negative.

POINT ONE

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?

Respondent contends that this question should be answered in the affirmative. There are two parts to this question; first, whether the city can legally require the existence of safety equipment on a bicycle or whether a state statute has preempted the municipality's right to regulate this area, and second, can this ordinance be enforced by arresting the person who violates the ordinance.

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

> 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.

The penalty for violation of this ordinance is punishment by a fine not exceeding $500 and or sixty days in jail.

Thomas and his amicus contend that this ordinance is invalid because there are provisions in chapter 316 which preempt this ordinance. Section 316.271(4), Florida Statutes, (1989), states that no vehicle shall be equipped with any siren, whistle or bell. Section 316.2065 (11), Florida Statutes (1989), expressly applies to bicycles, and requires that "a person propelling a bicycle upon and along a sidewalk...shall give an audible signal

before overtaking and passing such pedestrian." The state contends that the former subsection is general, while the latter is specifically directed to bicycles. It is a general rule of statutory construction that a specific statute controls over a more general statute. Moreover, as the court below observed, "section 316.2065, Florida Statutes, requires certain equipment (lights, reflectors, brakes) on bicycles but does not prohibit bells, gongs or other audible warning devices." Thomas v. State, 583 So.2d at 340.

The state contends that there is no express and direct conflict between chapter 316 and the ordinance. The district court correctly observed that "The mere existence of state regulations does not preclude a local authority from adding additional requirements as long as no conflict exists." Id.

Section 166.021(3)(c), Florida Statutes, (1989), "Municipal Home Rule Powers Act", provides that a municipality may enact legislation concerning any subject matter upon which the state legislature may act with the exception that a municipality may not enact legislation concerning any subject matter expressly reserved to state or county government by the constitution or by general law, which cannot be achieved by implication or inference. Edwards v. State, 422 So.2d 84 (Fla. 2d DCA 1984). The state legislature has expressly delegated to municipalities the power to regulate the operation of bicycles on streets and highways under their jurisdiction.

Powers of local authorities.--

> **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 police power, from:**
> **(h) Regulating the operation of bicycles.**
> §316.008(1)(h), Fla. Stat. (1989).

Pursuant to this express delegation of the authority to regulate the operation of bicycles to municipalities, the Orlando City Council enacted Section 10.08, Orlando City Code. This constitutes a valid exercise of municipal power. Art. VIII, §2(b), Fla. Const.

Whether or not this ordinance is a poor public policy is a complaint which should be addressed to the Orlando City Council. It is a fundamental tenet of the doctrine of the separation of powers that courts will not substitute their judgment as to the reasonableness of a regulation whose reasonableness is fairly debatable. Courts should intervene only where there is an obvious abuse of police power and where the ordinance clearly does not have a foundation in reason or necessity. See Dennis v. City of Key West, 381 So.2d 312 (Fla. 3d DCA 1980).

Courts should be very cautions in declaring a municipal ordinance unreasonable as there is a peculiar propriety in permitting inhabitants of a city, through its officials, to determine what rules are necessary for their local community. State v. Sawyer, 346 So.2d 197 (Fla. 3d DCA 1977). This court has held that the "clear purpose" of Article VIII, Section 2(b)

of the Florida Constitution is to give the municipalities inherent power to meet their municipal needs. Lake Worth Utilities v. City of Lake Worth, 468 So.2d 215 (Fla. 1985).

The power of a city ta enforce its municipal ordinances by arresting violators cannot seriously be questioned. Section 901.15(1), Florida Statutes, (1989) expressly provides:

> 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.

As the district court held below, this statute is clear and unambiguous, and demonstrates a clear legislative intent to specifically authorize a law enforcement officer to arrest a person who violates a municipal ordinance in his or her presence. See, City of Tampa v. Thatcher Glass Corp. 445 So.2d 578 (Fla. 1984); Carson v. Miller, 370 So.2d 10 (Fla. 1979).

While section 775 defines crimes for purposes of punishment, section 901.15 specifically addresses under what circumstances a law enforcement officer may make a warrantless arrest. A municipal ordinance may not be a "crime" for purposes of punishment [See, Pridgen v. City of Auburndale, 430 So.2d 967 (Fla. 2d DCA 1983)], but nonetheless be a crime for purposes of arrest.

It is well established that a law enforcement officer may arrest a persan without a warrant. Gerstein v. Pugh, 420 U.S. 103 (1975). It is also well established that the common law rule

prohibits warrantless arrests for misdemeanors committed outside of the officer's presence, Welsh v. Wisconsin, 466 U.S. 740 (1984). However, a state may lawfully enact a statute permitting warrantless arrests for misdemeanors or municipal ordinance violations committed within the officer's presence without offending the fourth amendment. Id. Florida has expressly provided for such warrantless arrests in section 901.15. Therefore, there is no fourth amendment violation when a person such as petitioner is arrested without a warrant for the commission of a municipal ordinance in the officer's presence.

Once a valid arrest is accomplished, it is well established that an officer may search the defendant incident to the arrest. See, New York v. Belton, 453 U.S. 454 (1981). In Florida, an officer may conduct a search incident to an arrest even if he does not effect a custodial arrest, but merely issues a notice to appear. State v. Boulia, 522 So.2d 528 (Fla. 2d DCA 1988).

There are several cases which hold that a custodial arrest for violation of a municipal ordinance is a valid arrest, so long as the violation occurred in the officer's presence. In Canney v. State, 298 So.2d 495 (Fla. 2d DCA), cert. denied, 423 U.S. 892 (1973), the defendant was arrested for violation of a St. Petersburg ordinance forbidding obscene language. The court held that the officer "certainly" had the authority to arrest Canney for violation of the ordinance after personally hearing the offending language. See also, Nixon v. State, 178 So.2d 629 (Fla. 3d DCA), cert. denied, 385 U.S. 853 (1965). In Snow v.

State, 179 So.2d 99 (Fla. 2d DCA 1965), the defendant was arrested for a Coral Gables ordinance prohibiting vagrancy, and the conviction was affirmed. See also, City of Miami v. Clarke, 222 So.2d 214 (Fla. 3d DCA 1969).

Several cases hold that municipalities may punish ordinance violators by imprisonment, or fine, or both, so long as the penalty does not exceed $500 and sixty days in jail. Edwards v. State, 422 So.2d 84 (Fla. 2d DCA 1982); Pridgen v. City of Auburndale, 430 So.2d 967 (Fla. 2d DCA 1983). A municipal ordinance may adopt all criminal misdemeanor laws and impose additional penalties which do not exceed the state statute. Jaramillo v. City of Homestead, 322 So.2d 496 (Fla. 1975).

Thomas argues further that an officer may not effect a custodial arrest without running afoul of Florida Rule of Criminal Procedure 3.125(b). This rule permits an officer to issue a notice to appear unless one of six circumstances exist, i.e., failure to identify; no ties to the community, etc. That rule is permissive, not mandatory. This rule does not mean that the officer must issue a notice to appear if none of these circumstances exist. Moreover, these are some rules of criminal procedure which do not apply to municipal ordinance violations, for instance, speedy trial. State ex rel. Stevens v. Kaplan, 297 So.2d 868 (Fla. 4th DCA 1974).

Most significantly, even if the officer issues a notice to appear, the person is still under arrest, and the officer may still search the defendant incident to that arrest. State v.

Boulia, 522 So.2d 528 (Fla. 2d DCA 1988). "It is well settled that the fact that an accused is not taken into actual custody at the time of an arrest does not diminish one whit the legal effect of the arrest at that time. See Giblin v. City of Coral Gables, 149 So.2d 561 (Fla. 1963)." State v. Parnell, 221 So.2d 129 (Fla. 1969).

As there is no direct conflict with any provision in chapter 316, the Orlando City Ordinance at issue is a valid exercise of municipal power. Section 901.15(1), Florida Statutes (1989), explicitly gives municipalities the power to arrest without a warrant persons who violate municipal ordinances in the officer's presence. The search of Thomas incident to that lawful arrest which revealed that he was carrying a concealed firearm was also lawful. Even if he had only been issued a notice to appear despite the clear authority to arrest pursuant to section 901.15, the search would still be valid. The first certified question should be answered in the affirmative.

POINT TWO

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?

In 1968, the Florida Constitution was amended to change the relationship between the state and its municipalities. Prior to the revision, municipalities were "creatures of legislative grace." Lake Worth Utilities v. City of Lake Worth, 468 So.2d 215, 217 (Fla. 1985). The 1885 Constitution gave the legislature the authority to establish municipalities and provide for their jurisdiction and powers. This court held in Lake Worth that the "clear purpose of the 1968 revision embodied in Article VIII, Section 2 was to give the municipalities inherent power to meet municipal needs," Id. The Florida Constitution now 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.

Article VIII, Section 2 (B), Constitution of Florida. See also, Chapter 166, Florida Statutes.

Generally, the only constitutional limitation on municipal power is that it must be exercised for a municipal purpose. State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978). Therefore,

as the caurt below observed, municipalities are not dependent upon the legislature for further authorization. What power is granted by the constitution cannot be altered by statute. The second certified question must be answered in the negative.

The repeal of section 165.19 in 1973 was a recognition by the legislature that the constitution had granted municipalites broad home rule powers. Although not cross-referencing this specific subsection, the legislature made its intent clear in section 166.042(1), by stating that by repealing the statutes which formerly governed municipalities, they did not intend to restrict or limit the power of municipalities, but rather were recognizing the constitutional power of home rule that municipalities were presently endowed with under the constitution. The history and legislative intent is fully addressed by amicus curiae Florida League of Cities, and respondent adopts that argument herein.

This court has held that municipalities have the power to enact criminal or penal statutes pursuant to its broad home rule power. Jaramillo v. City of Homestead, 322 So.2d 496 (Fla. 1975); See also, 1978 Op. Att'y Gen. Fla. 078-111, (August 28, 1978). There are no statutory or constitutional limitations upon the severity of a penalty imposed for violation of a municipal ordinance, and any limitation on the power or severity of a penalty is in the sole discretion of the legislative body of the municipality. 1981 Op. Att'y Gen. Fla. 081-76, (October 13, 1981); See also, 1989 Op. Att'y Gen. Fla. 089-24, (April 21,

1989). (No constitutional or statutory limitation on a municipality's power to impose penalties for violation of its municipal ordinances.)

In section 775.08(3), Florida Statutes, (1989), the legislature expressly excluded municipal ordinances from the definition of "noncriminal violations":

> The term "noncriminal" violation shall not mean any conviction for any violation of...any municipal...ordinance. **Nothing contained in this code shall repeal or change the penalty for violation of any municipal...ordinance.**

Not only is there no statutory limitation an a municipality's power to punish violators of its ordinances by imprisonment or fines, this provision expressly provides for such punishment. See also, §162.21(8), Fla. Stat. **(1989).**

In the amicus curiae brief of the Florida Association of Criminal Defense Lawyers, an additional argument is improperly raised for the first time. At page 13 of this brief, FACDL argues that equal protection is violated by permitting an arrest for this ordinance because section 316 "decriminalizes" traffic offenses. This argument is improper for several reasons. First, as he candidly acknowledges, it has never been raised before. As he argues that the ordinance is unconstitutional **as** applied, the issue is waived for failure to present it below. Trushin v. State, **425** So.2d 956 (Fla. **1982).** Second, amici are not permitted to inject new issues into **the** litigation or raise new

issues which were not raised below. Keating v. State, 157 So.2d 567 (Fla. 1st DCA 1963); Acton v. City of Fort Lauderdale, 418 So.2d 1099 (Fla. 1st DCA 1982); approved, 440 So.2d 1282 (Fla. 1983). Third, Thomas has failed to sustain his burden of demonstrating that this ordinance violates equal protection. See, King v. State, 557 So.2d 899 (Fla. 5th DCA 1990), rev. denied, 564 So.2d 1086 (Fla. 1991). There is no evidence to support this contention.

Finally, Thomas claims that a "full custodial arrest" for violation of a municipal ordinance is unreasonable. The state constitutional counterpart of the fourth amendment must be interpreted in harmony with United States Supreme Court decisions interpreting the fourth amendment. In Gustafson v. Florida, 414 U.S. 260 (1973), the Court held that there was no fourth amendment violation in conducting a full search of the person incident to his arrest on a traffic offense violation of driving without possessing a driver's license, even though the officer had the discretion to issue a notice to appear. If there is probable cause to arrest, even if the arrest is for a misdemeanor, traffic offense or ordinance violation, the officer has the authority to conduct a custodial arrest. See also, Welsh v. Wisconsin, supra. Thomas has failed to sustain his burden of establishing this or any other claim.

The second certified question should be anwered in the negative. The constitution, and not statutory enactments, is the source of a municipality's power to punish ordinance violators with fines or imprisonment.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to affirm the judgment and sentence in all respects. Respondent requests this court to answer the first certified question in the affirmative and the second question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished, by delivery to Assistant Public Defender Michael Becker, counsel for petitioner, at 112 A Orange Avenue, Daytona Beach, FL, and by U.S. Mail to James T. Miller, counsel for amicus curiae FACDL, at 407 Duval County Courthouse, Jacksonville, FL 32202, this 26 day of November, 1991.

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BELLE R. TURNER
ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CARL LEROY THOMAS,

Petitioner,

v. Case No. 78,055

STATE OF FLORIDA,

Respondent.

ON CERTIFIED QUESTIONS FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

Thomas v. State, 583 So.2d 336 (Fla. 5th DCA 1991)

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Georgia Lucax 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 **GODERICII, 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 supported 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.**

1. 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 be 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 Corporatio

Municipality may, home rule powers, pres violation of its ordinance 166.011 et **seq.**; We **Art.** 8, § 2(b).

6. Municipal Corporatio

There was no const tory limitation on munic prescribe incarceration as tion of city ordinance req be equipped with bell or device. West's **F.S.A.** § West's F.S.A. Const. Art

7. Constitutional Law ⇐ Criminal Law ⇐37.1(

Mere failure to prose was not grounds for cla enforcement of municipal ing that bicycles be equi **gong** as warning device w protection; there had to selective enforcement based on unjustifiable st race, religion, or other ar tion. U.S.C.A. Const.Am

8. Municipal Corporation

Municipality cannot f lature has expressly lice or required, nor **may** it **au** islature has expressly for

9. Municipal Corporation

Mere existence of st does not preclude local aut ing additional requirement conflict **exists.**

10. Municipal Corporatio

Municipal ordinance re cycles be equipped with warning device was not " state legislation which requ fied equipment on bicycle Prohibit bells, gongs, or warning devices. West's **2065.**

James B. Gibaon, Publi
Barbara L. Condon, Asst.
Daytona Beach, for appella

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 baaed 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 stop 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 a p plied to determine if under the facts and ircumstances a reasonable officer would ave 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** US. 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 hy the trial judge. The arresting officer personally o b served 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 VIOWTION OF A MUNICIPAL **ORDINANCE:**

[2] Section 901.15(1), Florida Statutes, provide: 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 offi**cer** 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 as** "crimes."[1]

Note should be taken of s sions of the Florida Rules of C cedure which recognize that tnunicipal ordinances are not crimes or misdemeanors; that arrested and held in confineme charges of violations of mu nances and that for such vi may **be** subject to imprisonmen ty. Rule 3.111(b)(1) provides does not have to **be** provided to person in a prosecution for **a** n ***or*** a violation of a municipal the judge files a pretrial state imprisonment will result from Rule 3.125(b) provides that if ***arrested*** for violation **of** a n county ordinance triable in the arresting officer may issue a n pear except in *six* specified ci Rule 3.131(a) provides that "e charged with a crime ***or*** vio municipal **or** county ordinance s tled to pretrial release [from finement resulting from arrest able conditions."

SEARCH INCIDENT TO **ARR**

[3] A lawful arrest establis thority for **a full** search **of** the rested being an exception **to** t requirement and reasonable Fourth Amendment. ***United Robinson,*** **414** U.S. **218, 94** S. L.Ed.2d **427** (1973); *State v.* **258** So.2d 1 (Fla.1972), *affirme* **260, 94** S.Ct. 488, **38** L.Ed.2d See *also D.L.C. v. State,* 29 (Fla. 1st **DCA 1974)** (juvenile violation of municipal ordinance sion that he had been drinkin beverages justified arrest, and found on his person in search arrest was admissible **as** evid Supreme court in ***Michigan v.*** **443 U.S. 31, 99 S.Ct. 2627, 61** (1979) held **that** evidence obtai search incident to **an** arrest in municipal ordinance should n

1. *See Koch v. State,* 126 Wisc. 4 531, 3 L.R.A. (N.S.) 1096, 5 Ann.Ca *In re Sanford,* 117 Kan. 750, 752,

"crimes."'

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 he subject to imprisonment as a penalty Rule 3.111(b)(I) 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:

[3] 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 sup pressed 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. 59–24, (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.* Soles, 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 baaed 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-

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and Tribe, *American Constitution*
(2d Ed.1988).

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

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

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 Wilton 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 be 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 bells 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 has not seen fit to so restrict 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 pretextual 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 hy 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*, I 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 of 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 ordi-

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 violator with incarceration. [4]

to arrest for such violation section 901.15 (which was su same prior to 1974) was then During this period of time, authority of section 165.19, granted many municipalities lando, charters which grantt to incarcerate. And, becat 165.19, it did not matter tha laws (charters) violated artic 11(a)(4) of the Florida Const

There shall be no special la ing to: ... (4) punishme

However, on July 1, 1974, t repealed section 165.19.'

All of a sudden the expr authorization permitting the to incarcerate relied on by court in *State v. Parker,* 87 So. 260 (1924) and *State v.* Q 348, 17 So.2d 697 (1944) in ju ordinances, no longer existec

The individual charters, acts, without the authorizat by general law, are now in co prohibition of punishing crin act. It is true that there re reference in the statutes re municipal criminal authority,[5] pressly" grants such power t pality.

The only other source of s to the municipality would he t authority conferred by the Fl tution. Article VIII, section 2

Municipalities shall have . enable them to conduc government, perform munici and render municipal servic exercise any power *for mu poses* except as otherwise law. [Emphasis added].

The supreme court in *City Beach v. Fleetwood Hotel, In* 801 (Fla.1972), held:

1973) authorized the arrest for municipal ordinance as a "felo meanor" committed in the offic

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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 sounding 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 *Roe 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

4. § 1, Chap. 74-192, Laws of F

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 ar misdemeanor" committed in rhc officer's presence.

4. 5 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 dispoeition for each.[8] It would also safeguard conduct that is without fault or legitimate state interest from being condemned as criminal? 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 bath 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 narcotica. 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 to 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?

In all other respects, the p remains unchanged.

DAUKSCH, COBB, W. S HARRIS and GRIFFIN, JJ

GOSHORN, C.J., and CO PETERSON and DIAMANT without opinion.

WEST KEY NUMBER SYSTEM

Louis A, CAGGIANO,

v.

Robert A. **BUTTERWORT General of the State o**
Appellee.

No. 90-02026

District Court of Appeal Second Distric

June 22, 1991

Rehearing Denied July

State sought forfeiture after conviction of owner f and bookmaking. The Circ borough County, James A. entered summary judgmen State. Owner appealed. Court of Appeal, Hall, J., h Constitution prohibits forfe stead property under Racke and Corrupt Organizations A

Reversed and remanded certified.

Homestead ⇐90

State Constitution proh of homestead property under fluenced and Corrupt Orga (RICO). West's F.S.A. §§ 8 895.05(2)(a); West's F.S.A. C §

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 know 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. **CACGIANO,** 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 **de**fense and finding, pursuant to *DeRuyter v. State,* **521** So.2d **135 (Fla.** 5th **DCA** 1988), that homestcad 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**