OA 10-4-91

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
LAKELAND, FLORIDA

STATE OF FLORIDA, et al., Appellants, vs. E.D. "BUD" DIXON, Appellee.	CASE NO. 90-01618 Circuit Case No: GCG-88-2410

APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

AMICUS CURIAE BRIEF OF CHARLIE GREEN, CLERK OF THE CIRCUIT COURT IN AND FOR THE TWENTIETH JUDICIAL CIRCUIT, LEE COUNTY, FLORIDA

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PREFACE

The Appellants, STATE OF FLORIDA and the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, will be collectively referred to in this brief as the "State," unless the context dictates otherwise. Appellee, HONORABLE E.D. "BUD" DIXON, will be refereed to as the "Clerk".

This Amicus Brief is being filed by Charlie Green, Clerk of the Circuit Court in and for the Twentieth Judicial Circuit, Lee County, Florida, in support of the position of the Appellee. This brief shall address only the substantive issues of whether the subject statute §61.181(5), Fla. Stats., involves an unconstitutional extension of credit to private persons, and will not address the procedural issues raised by the State. This brief shall also proffer the additional argument that a reasonable, alternative construction of the statute upholds the constitutionality of the statute without requiring the Clerk to issue payments on uncollected funds remitted by check.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae, CHARLIE GREEN, hereby adopts the Statement of the Case and of the Facts contained in the Appellee's brief filed in this cause.

SUMMARY OF ARGUMENT

POINT I: It is argued that the two-part test applied to projects funded by revenue bonds is not wholly applicable to the case at bar. Yet, to the extent that test is applicable, the payment procedure established by Section 61.181(5), Fla. Stats., clearly constitutes an "extension of public credit" to a private person under the interpretations of that term by the Florida courts. However, that procedure does not serve a paramount public purpose. Any public purpose for the speedy delivery of support funds to obligees is merely incidental to the primary benefit to the obligee. Therefore, that statute is violative of Article VII, Section 10 of the Florida Constitution.

POINT II: In arguing the central issue of whether the statute is unconstitutional, the parties, both in the trial court and this Court, have presumed that the present version of the statute (the 1989 amendment) mandates disbursement of funds remitted by check within four days of receipt of the check. In truth, the statute contains no such express requirement. By tracing the legislative history of Section 61.181(5), it is shown that the legislature was aware of the difference between the remittance of a check and the payment of a check. The law deems that payment of a check occurs upon its honor by the drawee bank. Since the 1988 version of that section expressly mandated disbursement within a certain number of days after receipt of the remittance, and the 1989 version eliminated that express language, it must be presumed that the new language is to be accorded a different meaning than that of the

1988 version, to-wit, that disbursal is required within four days of payment of the check. That construction saves the statute from being unconstitutional under Article VII, Section 10 of the Florida Constitution, while at the same time providing for speedy disbursement of funds once they are actually paid the Clerk.

POINT I

WHETHER SECTION 61.181(5), FLORIDA STATUTES, REQUIRING THE CLERK TO DISBURSE FUNDS PAID INTO THE CSDA BY PERSONAL CHECK WITHIN FOUR (4) DAYS OF RECEIPT, IS VIOLATIVE OF ARTICLE VII SECTION 10 OF THE FLORIDA CONSTITUTION.

Assuming the 1989 version of Section 61.181(5) requires disbursement of funds remitted by personal check within four days of receipt of the check[1], that requirement renders that section unconstitutional, since it constitutes an extension of credit to private individuals in violation of Article VII, Section 10 of the Florida constitution.[2]

The State asserts the test for determining whether a violation of that constitutional provision has occurred is two-fold: (1) whether the extension of public credit is involved; and, if so, (2) whether the challenged activity serves a paramount public purpose. To the extent that test is applicable to the facts in the case at bar, the payment procedure mandated by the statute satisfies the first prong, and fails to satisfy the second, as will be shown below.

1. The disbursement requirements of Section 61.181(5) constitutes an extension of public credit to private individuals.

Certainly, any analysis of a legislative scheme challenged

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[1]See, argument under Point II of this brief to the contrary.

[2]That constitutional provision reads in pertinent part:

> Neither the state nor any county, school district, municipality, special district, or agency of any of them shall...give, lend or use its...credit to aid any...person...

under the subject constitutional provision would necessarily involve an inquiry as to whether an extension of public credit has been made to a private person. Thus, it is agreed that the first prong of the cited test is applicable to the case at bar.

As used in the subject constitutional provision, the term "public credit" has been broadly construed by the Florida Supreme Court. As stated in Nohrr v. Broward County Educational Facility Authority, 247 So.2d 304, 309 (Fla. 1971):

> In order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody.

See also, State v. Housing Finance Auth. of Polk Cty, 376 So.2d 1158, 1160 (Fla. 1979) ("lending of credit means the assumption by the public body of some degree of direct or indirect obligation to pay the debt of a third party.")

Under the disbursement scheme of Section 61.181(5), the Clerk is required to pay out public funds to cover personal checks received by the Clerk, but not yet honored by the drawee bank. The public is therefore clearly contingently liable for payment of the check if it is ultimately dishonored, and directly liable when it is dishonored.

The State attempts to discount that risk by pointing to the relatively small number of checks actually dishonored. However, the State's focus on that point is misplaced, since it is the risk of liability the public takes by disbursing funds before check clearance occurs that creates the impermissible extension of the public credit, and not the actual imposition of liability.

Thus, the first prong of the constitutional test is plainly met.

2. Section 61.181(5) does not serve a paramount public purpose, if, in fact, that requirement is applicable to the statutory procedure in question.

Citing only cases involving the funding of private projects with revenue bonds, the State argues that the legislative intent of Section 61.181(5) was to serve the paramount public purpose of insuring that support funds are received by those dependent on such funds in an expeditious manner. The State's argument on this point fails in two ways.

Firstly, the cases establishing the "paramount public purpose" requirement, as relied upon by the State, were not dealing with the constitutionality of a public agency making an outright extension of credit to a private person, as in the case at bar, but rather the constitutionality of funding of a specific construction project or enterprise with public revenue bonds. The paramount public purpose test was adopted in those cases to specifically focus on the character of the particular project being constructed with the bond funds. As stated by the Supreme Court in Orange County Indus. Develop. Auth. v. State, 427 So.2d 174, 178 (Fla. 1983):

> This Court has recognized that the listing of particular authorized projects in article VII, section 10(c) of the Florida Constitution was not intended to deny public revenue bond financing of other types of projects. In Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971), we said "the naming of these particular projects was not intended to be exclusive." 247 So.2d at 308. This Court then went on to establish a two-prong test for

> determining whether revenue bonds for other projects would be validly authorized pursuant to the constitution. The two criteria are (1) whether the revenue bonds contemplate a pledge of the credit of the state or political subdivision and (2) whether the funded project serves a paramount public purpose, although there might be an incidental private benefit. 247 So.2d at 309. This test was reaffirmed in subsequent decisions. (citations omitted).

In the case at bar, no construction project or private business enterprise is involved; and no case could be found applying the paramount public purpose test to a simple extension of credit to a private person or to a legislative enactment authorizing such an extension.[3] Thus, it would appear that the paramount public purpose test is not applicable to the case at bar. Due to the unequivocal language of the constitutional prohibition at issue, the sole test when public credit is extended unconnected with any project or enterprise, should simply be whether the statute authorizes the extension of public credit to a private person, regardless of the nature or degree of any underlying public purpose. If that be the test, then certainly the payment procedure in question is violative of the constitutional provision.

Notwithstanding the above analysis, even the application of the paramount public purpose standard does not save the challenged statute. While it is certainly recognized that Section 61.181 was enacted as a means to insure that support payments were properly

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[3]But see, AGO-076-115, wherein it was opined that proposed legislation that would defer ad valorem taxes for certain Florida citizens through the issuance of tax anticipation bonds would be an unconstitutional extension of public credit to private persons, since the legislation created a debt solely for the benefit of certain private individuals.

and promptly paid, credited and disbursed to those dependent on such payments, the primary benefactor of that enactment is the obligee of such payments. While one cannot argue that the public does not enjoy some benefit when dependent persons, such a spouses and children, receive timely support payments from those persons on whom such responsibility falls, that benefit is clearly secondary, if not only incidental, to the private benefit. As stated, the primary benefits under the statute flow to those private persons who receive support payments through the depository system.

Of course, it is not the depository system, per se, that is being challenged in this case, only the fairly recent amendment to subsection (5), which requires the Clerk to extend the public credit to private persons during the period a personal check is received by the Clerk and subsequently paid by the drawee bank. That particular requirement most definitely enjoys no paramount public purpose, since, contrary to the assertion of the State, speeding up the flow of depository funds remitted by check in the manner now provided only results in potential harm to the public, i.e., the risk of dishonored checks. The only benefit realized by the disbursement of funds prior to the checks being honored is a private one.[4]

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[4]The State argues that the statutory requirement to disburse funds four days after receipt of the check, rather than the approximate fourteen days in which the Clerk was disbursing funds in practice, benefits "thousands of children and ... spouses" by expeditiously placing the funds in their hands, rather than having the funds "lolling about" in the depository account. In truth, except for the first payment, the obligee would receive the funds at the same time increment each month under either scenario, resulting in no actual long-term benefit or detriment, as the case

Therefore, since the payment requirements of Section 61.181(5) fall squarely within the definition of "public credit," since that credit is being extended to private persons, and since that procedure does not serve a paramount public purpose, the trial court correctly held that portion of the statute to be in violation of Article VII, Section 10 of the Florida Constitution.

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may be, to the obligee. For example, if a check is received by the Clerk on the first of the month and disbursed on the 15th of the month, an obligee would receive each payment, subsequent to the first, on the fifteenth of every month, or every 30 days. Under the four day disbursement requirement, the obligee would receive the payment on the 4th day of every month, or, again, every 30 days. Thus, only one payment is actually expedited as far as the obligee is concerned, which is hardly enough to elevate the scheme to one of a paramount public purpose.

POINT II

SECTION 61.181(5), FLA. STATUTES. (1989) MAY REASONABLY BE CONSTRUED TO MEAN THAT PAYMENT BY CHECK OCCURS WHEN THE CHECK IS HONORED BY THE DRAWEE BANK, THUS PRESERVING THE CONSTITUTIONALITY OF THAT STATUTE.

In the trial court, both the State and the Clerk presumed that the 1989 amendment to Section 61.181(5) continued the 1988 version's requirement that payments drawn by check must be disbursed by the Clerk within a certain number days of receipt of the check by the Clerk.[5]

However, based upon the legislative history of that section and the law defining payment by check, the language of the 1989 amendment is susceptible to another reasonable construction. As will be shown, that alternative construction serves to preserve the constitutionality of the statute, while, at the same time, sustains the underlying position of the Clerk that he should not be required to make disbursements of uncollected funds.

In that regard, prior to the 1986 legislative enactments, Section 61.181 contained no provision as to when the Clerk was required to pay out payments made to the depository (A-1). However, in 1986 the legislature amended the statute extensively (A-3), including in that amendment the following pertinent language:

(5) The depository shall accept a support

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[5]The Clerk originally attacked the 1988 version of the statute (A-4) as being unconstitutional. However, the statute was amended during the pendency of the trial court proceedings; and the trial court ultimately based its ruling on the 1989 amendment (A-5).

> payment tendered in the form of a check drawn on the account of a payor or obligor. The proceeds of the check need not be disbursed prior to payment of the check.

In 1988, the statute was again amended. The pertinent portions of the 1988 amendment (A-4) read as follows:

> (5) The depository shall accept a support payment tendered in the form of a check drawn on the account of a payor or obligor...Payment shall be made by the depository to the obligee within 2 working days after the depository receives the obligor's remittance. +++ The proceeds of a check remitted for the payment of delinquencies...or remitted by the obligor to avoid being jailed for contempt need not be disbursed prior to payment of the check; however, upon payment the depository shall disburse the proceeds to the obligee within 2 working days.

In 1989, the legislature amended the statute once more (A-5), which is the version upon which the trial court ultimately predicated its ruling. The pertinent portions of that section now read as follows:

> (5) The depository shall accept a support payment tendered in the form of a check drawn on the account of a payor or obligor ... +++ Upon payment by cash, cashier's check or money order, the depository shall disburse the proceeds within 2 working days. Payments drawn by check on the account of a payor or obligor shall be disbursed within 4 working days.

Thus, it is clear under the 1986 version of the statute that the Clerk was not required to disburse funds paid by personal check until the check had actually been paid by the drawee bank. It is equally as clear under the 1988 version of the statute that the Clerk was required to disburse funds received by way of personal

check within 2 days of their receipt by the Clerk, regardless of whether or not the check had yet been paid by the drawee bank.

The issue then before this Court is what was meant by the 1989 amendment, which deleted the express requirement to disburse within two working days after receipt of a "remittance" by check, and which substituted the less than clear requirement that "payments drawn by check" must be disbursed "within four working days" - period.

By utilizing the language it did in the earlier versions of the statute, the legislature necessarily understood the legal distinction between the payment of a check and the remittance of a check. A check is defined in Florida law as "...an unconditional...order to pay a sum certain in money...drawn on a bank and payable on demand." See, Section 673.104(1)(6) and (2)(b). See also, Tepper v. Citizens Federal Sav. & Loan Ass'n, 448 So.2d 1138, 1140 (Fla. 3rd DCA 1984).

In order words, a check is nothing more than an acknowledgment of indebtedness and an unconditional promise to pay. Mason v. Blayton, 166 S.E.2d 601, 603 (Ga. CA 2d 1969). Mere issuance and delivery of a check does not, therefore, constitute payment. State v. Hardin, 627 S.W.2d 908, 912 (Mo. W.D. 1982).

To the contrary, a check does not legally constitute a payment until presented for collection and honored. Matter of Kimball, 16 B.R. 201 (Bkrtcy. M.D. Fla. 1981); Nicholson v. First Inv. Co., 705 F.2d 410, 413 (11th Cir. 1983); and In Re Midwest Boiler & Erectors, Inc., 54 B.R. 793, 795 (Bkrtcy. E.D. Mo. 1985). ("It is

not delivery of the check, but rather its payment by the drawee bank which constitutes payment of the debt.")

That legal distinction having been recognized by the legislature in the 1986 and 1988 versions of the statute, the issue before this Court is further refined to be whether the Clerk must make disbursements within four days of receipt of the check or within four days of payment of the check. Largely decisive of that issue is the legislature's deletion of the word "remittance", and the application of the word "payment" in the 1989 amendment to both payments by cash, or its equivalent, and to payments drawn by check.

Unlike a personal check, remittance of cash or its equivalent (cashier's check or money order), constitutes immediate payment. Matter of Kimball, supra. Therefore, disbursement of that form of payment under the 1989 version can lawfully be made two days after receipt by the Clerk, since the funds are in fact paid and received.

However, as shown above, payment by check does not occur until the check is actually paid by the drawee bank. Therefore, the 1989 version must necessarily mean that disbursement is not required until after payment is actually made, i.e., after the check is paid by the drawee bank. Had the legislature intended that the Clerk disburse the check proceeds within four days of receipt of the check, the legislature could have (and would have) merely repeated the language of the 1988 version to that effect in the 1989 version.

Instead, the legislature in the 1989 amendment deleted the "receipt of remittance" language from the disbursement requirement, and substituted a distinction between cash payments and payments drawn by check.

The only reasonable conclusion one can therefore reach is that, by so amending the statute, the legislature intended the disbursement requirement to be different from the 1988 version[6], that difference being that disbursal would be required four working days after payment legally occurs. That conclusion is especially compelling when viewed in the light of the legislative history of the statute, as discussed supra, which establishes that the legislature was fully cognitive of the distinction between the remittance of a check and the payment of a check. See, Vildibill v. Johnson, 492 So.2d 1047, 1049 (Fla. 1986), stating that "[I]n order to correctly discuss the intent of the legislature, it is necessary to trace the history of (a statute)."

While it is certainly recognized that the 1989 version is susceptible to the construction advanced by the State that disbursements should be made within four days of receipt of personal checks by the Clerk, that construction is not supported by such legislative history. Moreover, in light of the serious constitutional objections raised by that State's construction of

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[6]When the legislature amends a statute by deleting words, it is presumed that it intended the statute to have a different meaning from that accorded it prior to the amendment. Capella v. City of Gainesville, 377 So.2d 658 (Fla. 1979); Drigotas v. State, 531 So.2d 421, 422 (Fla. 4th DCA 1988).

the statute[7], the construction being proffered in this argument is mandated by controlling case law. In that regard, it is axiomatic that, whenever possible, a statute should be construed so as not to be in conflict with the constitution. Firestone v. News-Press Pub. Co., Inc., 538 So.2d 457, 459 (Fla. 1989). If a statute is susceptible of being reasonably construed in more than one manner, a court is obligated to adopt the construction which is in keeping with the Constitution. Vildibill v. Johnson, supra, at 1050.

Since the subject statute is susceptible to two constructions, both the legislative history of the statute and the Florida Constitution dictate the adoption of the construction proffered in this argument. Therefore, the Court is respectfully requested to construe the statute to mean that disbursement of funds remitted by personal check is required within four days of being paid by the drawee bank.

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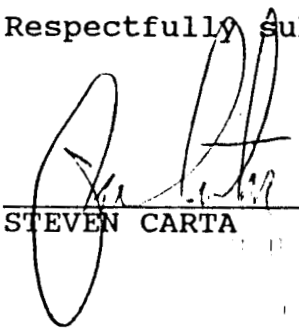
[7]See argument under Point I of this brief.

CONCLUSION

Based upon the foregoing, this Court is respectfully requested to affirm the judgment of the trial court as to the unconstitutionality of the statute, or, alternatively, reverse such ruling on the basis that the proper construction of the statute mandates that the Clerk need only disburse funds remitted by check within four days of payment of the check by the drawee bank.

Respectfully submitted,



STEVEN CARTA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief of Charlie Green, Clerk of the Circuit Court in and for the Twentieth Judicial Circuit in and for Lee County, Florida, was mailed by United States Mail to Victor J. Troiano, Esq., P. O. Drawer 829, Lakeland, FL 33802; Joseph Lewis, Jr., Esq., Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, FL 32399-1050; Fred W. Baggett, Esq., P. O. Drawer 1838, Tallahassee, FL 32302; Charles L. Carlton, Esq., 2120 Lakeland Hills Blvd., Lakeland, FL 33805, this 1 day of March, 1991.

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