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IN THE SUPREME COURT OF FLORIDA

ST. ELMO CASH, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,142

REPLY BRIEF OF PETITIONER ON THE MERITS

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PUBLIC DEFENDER
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ARGUMENT

I. A CONVICTION OF GRAND THEFT OF TAX PROCEEDS IS INVALID IN THE ABSENCE OF EVIDENCE THAT THE STATE HAD A POSSESSORY INTEREST IN THE MONEY COLLECTED.[1]

The extensive statutory analysis performed by respondent on this point omits pertinent rules of statutory construction. First, any ambiguity in a provision of a tax statute must be resolved in favor of the taxpayer and against the taxing entity. Harbor Ventures, Inc., v. Hutchens, 366 So. 2d 1173 (Fla. 1979); Florida Hi-Lift v. Department of Revenue, 571 So. 2d 1364 (Fla. 1st DCA 1990). Similarly, in criminal statutes, any ambiguity must be resolved in favor of the accused. Sec. 775.021(1), Fla. Stat. (1989). In criminal and civil statutes alike, the more specific statute covering a subject is controlling over one covering the same subject in general terms. State v. Billie, 497

[1]Herein, petitioner has followed respondent's argument format, and has reformulated the argument heading in light of the answer brief. The initial and answer briefs are cited as (IB[page number]) and (AB[page number]).

So. 2d 889 (Fla. 2d DCA 1986), rev. denied, 506 So. 2d 1040 (Fla. 1987); Kiesel v. Graham, 388 So. 2d 594 (Fla. 1st DCA 1980). Finally, unless a contrary indication appears, one may assume that the legislature intended the amended statute "to have a meaning different from that accorded to it before the amendment." U.S. Fire Insurance Co. v. Roberts, 541 So. 2d 1297, 1299 (Fla. 1st DCA 1989).

The state has attempted to show that petitioner became an agent for the state when he collected the local option gas taxes. If so, the reasoning goes, the taxes became the property of the state as principal at the moment of collection. However, respondent is wrong both in general on the law of agency in specifically on the provisions at issue here.

First, the general. Agency is a question of fact, and the burden of proving agency is on the one who asserts it. Bernstein v. Dwork, 320 So. 2d 472 (Fla. 3d DCA 1975). Respondent attempts to establish agency as a matter of law. The principal-agent relationship cannot be demonstrated under the law or facts here. The lack of control over the manner and performance of duties is the mark of agency. See Lee v. Family Life Assurance Co. of Columbus, 431 So. 2d 249 (Fla. 1st DCA 1983). As Judge Zehmer's dissent shows, gasoline retailers such as petitioner are given broad control over collected local option gasoline taxes from the point of collection until they come due. Respondent claims that the purchaser of gasoline, not the retailer, is the actual taxpayer. (AB7) However, in a 1930 case, this Court held that a gasoline tax apportionable to the counties is primarily a tax on

the privilege of selling gasoline, i.e., an excise tax. Amos v. Matthews, 126 So. 308, 99 Fla. 1, (Fla. 1930); United States v. Lee, 13 So. 2d 919, 153 Fla. 94 (Fla. 1943); Carlton v. Matthews, 137 So. 815, 103 Fla. 301 (Fla. 1931). In contrast, under statutes governing state sales taxes, the seller is merely an agent of the state. Davis v. Ponte Vedra Club, 78 So. 2d 858 (Fla. 1955); Spencer v. Mero, 52 So. 2d 679 (Fla. 1951). Thus, under Amos, in his capacity as a retailer collecting county gas taxes, petitioner was subject to an excise tax.

Next, the specific. At page 11 of the answer brief, respondent sets out an abbreviated version of its argument. In reply to each lettered paragraph:

> A. As a retail dealer, petitioner could not be punished for embezzlement committed by a motor fuel refiner, importer or wholesaler under section 206.56, Florida Statutes (1987).
>
> B. Petitioner was neither a distributor under section 206.56 nor a licensed dealer in special fuels to which section 206.97 would apply.
>
> C. Since the state did not prove that appellant was a licensed dealer in special fuels, he could not be punished for embezzlement by a special fuel dealer. Even by way of Part II of chapter 206, section 206.56 does not apply to him.
>
> D. Since chapter 212 governs state sales taxes on gasoline, its provisions making the dealer an agent of the state for tax collection purposes do not apply to section 336.021 and 336.025, which concern a wholly different tax previously held to be an excise tax.

Reduced to its essence, respondent's argument has two main prongs: (1) because section 206.97 makes distributor embezzlement

applicable to dealers in special fuels, a dealer in motor fuels generally who fails to remit collected gas taxes must be liable for "theft of funds"; and (2) since chapter 212 makes retail dealers agents of the state in the collection of sales taxes on gasoline, the same dealers must also be agents of the state in the collection of local option gasoline taxes. On the first prong, the state presented no evidence he was a dealer in special fuels to which section 206.97 would apply. Section 206.86(1) defines special fuel generally as diesel fuel or kerosene, and specifically excludes fuels subject to the tax imposed by part I of the chapter. The state has made no showing that the fuel sold by petitioner at his service station was not subject to the tax imposed by part I of chapter 206. Moreover, petitioner was charged with grand theft, not distributor embezzlement. Even if the state could prove his conduct violated section 206.56, the validity of his conviction under section 812.014 remains in question. On the second prong, the taxes authorized by chapters 212 and 336 are distinct from one another, and nothing in the provisions governing the local option tax incorporates the agency relationship created for the sales tax.

To reiterate, any ambiguity on these questions of statutory interpretation must be resolved in petitioner's favor. If any criminal penalty were authorized for petitioner's failure to remit the taxes, it would come under the more specific statute, section 206.56, not the general grand theft statute, section 812.014. Since section 206.56 did not apply to retail dealers in 1987, the only reasonable conclusion is that at that time, the

legislature did not intend to authorize a criminal penalty for the failure to remit local option gasoline taxes.

Significantly, had appellant's failure to remit these taxes occurred after July 1, 1991, he could have been prosecuted under an amended section 206.56(a), Florida Statutes (1991). That provision, rewritten in chapter 91-112, section 15, Laws of Florida, now reads:

> Any person who knowingly obtains or uses, or endeavors to obtain or use, taxes collected pursuant to this chapter, part II of chapter 212, s. 336.021, s. 336.025, or s. 332.026 with the intent, either temporarily or permanently, to deprive the state of a right to the funds or a benefit therefrom, or appropriate the funds to his own use or to the use of any person not entitled thereto, commits theft of state funds.

The new statute applies to "any person," the old to "any refiner, importer, or wholesaler." The new statute dispenses with its predecessor's element of taxes collected "upon an invoice rendered." It makes the new crime of theft of state funds applicable to chapter 336, governing local option gasoline taxes. Significantly, incorporating a change first made in 1987, it also employs much of the language of the grand theft statute. Chapter 87-99, Section 78, Laws of Florida (effective Jan. 1, 1988). Petitioner submits that the amendment shows a recognition by the legislature that, preceding the 1987 and 1991 amendments, retail dealers could be prosecuted neither for distributor embezzlement under the predecessor to section 206.56 nor for grand theft under section 812.014. The 1991 amendment was no mere clarification of the existing law. See U.S. Fire Insurance Co. v. Roberts, supra, 541 So. 2d at 1299. The staff analyses of the House Committee on

Finance and Taxation pertaining to this portion of Chapter 91-112 (CS/HB 2523) show that in enacting the provision, the legislative intended a substantive change.

The decrepit out-of-state precedent cited by respondent does not support its position that Florida law created a principal-agent relationship between the state and petitioner in the collection of the local option taxes. In the excerpts provided by respondent, the courts clearly placed great emphasis on the fact that the statute showed the legislature's intent to make the dealer an agent of the state in collecting the tax. (AB16-17) Petitioner disputes respondent's claim that in Anderson v. State, 265 N.W. 210 (Wisc. 1936), and People v. Kopman, 193 N.E. 516 (Ill. 1934), the courts found this relationship only implicitly created by the pertinent statutes. As demonstrated above, the legislature showed no intent as to the local option gasoline tax collected by petitioner. To infer this relationship would be to violate the principles of statutory construction set out above.

Other cases from outside the state support petitioner's position. In People v. Valenza, 457 N.E. 2d 748 (N.Y. 1983), the court held that the absence of a criminal penalty for failure to pay over sales taxes, in an integrated statutory regulation that includes a comprehensive scheme of civil and criminal penalties, must be construed to provide the civil penalty as the exclusive means of prosecuting the conduct. Here, the applicable gasoline tax laws are similarly comprehensive; they provide civil penalties for failure to pay local option taxes collected, and

criminal penalties for nonpayment in certain circumstances. The exclusion of a criminal penalty for petitioner's conduct must therefore be construed as legislative intention to provide solely for a civil penalty. In State v. Marcotte, 418 A.2d 1118 (Me. 1980), the court held that a retailer assumed no criminal liability for failure to remit sales taxes he was not required to reserve for payment to the state. Similarly, the applicable law here required no segregation or reservation of funds for payment. See generally, Annot., 8 ALR 4th 1068 (1981).

To summarize, the state has shown no principal/agent relationship which would make the taxes collected by petitioner the property of the state upon collection. Provisions creating such a relationship as to other gasoline taxes cannot be applied to this tax. If any criminal penalty were authorized for petitioner's conduct, it would come under the terms of section 206.56, which in 1987 did not apply to him as a retail dealer. The subsequent amendment to that provision demonstrates retail dealers had been excluded from its operation. Therefore, for the reasons presented herein and in Judge Zehmer's dissent below (adopted in the initial brief), the first certified question must be answered in the negative.

II. FUNDAMENTAL ERROR RESULTS FROM CONVICTION OF A NONEXISTENT OFFENSE UNDER A STATUTE PROVIDING CONSTITUTIONALLY INSUFFICIENT NOTICE.

Petitioner declines to reply to respondent's treatise on this point. (AB22-35) As to whether petitioner's conviction of a crime that never occurred constitutes fundamental error, this principle is not limited to statutory offenses that do not exist or to defective charging instruments. It applies also to conviction in the absence of a prima facie showing of the crime charged. See K.A.N. v. State, 582 So. 2d 57 (Fla. 1st DCA 1991), and cases cited therein.

In his dissent, Judge Zehmer observed that the statutory scheme at issue here left the taxpayer uninformed that the taxes collected must be collected and accounted for separately. Slip Op. at 28. Thus, the retailer is given no notice that the proceeds are the property of the state upon collection, and that failure to remit this "state property" constitutes theft. Due process requires notice of the conduct prohibited. See United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L. Ed. 2d 488 (1971), cited in this context in the concurring opinion in State v. Marcotte, 418 A.2d 1118, 1123 (Me. 1980). No less than conviction of a nonexistent crime, the lack of adequate notice in this case resulted in fundamental error. The second certified question should be answered in the affirmative.

III. THE STATE FAILED TO PROVIDE PRIMA FACIE EVIDENCE OF A TAKING ACCOMPANIED BY THE REQUISITE INTENT.

Much of respondent's argument on this point rests on its view that petitioner was an agent of the state when he collected the taxes. Petitioner responded to this claim in Point I, infra. As with the out-of-state precedent cited by both parties on Point I, State v. Teutsch, 126 N.W.2d 112 (S.D. 1964), excerpted at length by respondent (AB39-40), turns on interpretation of a specific statute. In Teutsch, the court pointed to a statute governing the defendant's appropriation of or failure to remit money collected on behalf of the state, and noted that the statute creating the tax had been interpreted as making the dealer an agent of the state. Id. at 114. Similarly, in State v. Gates, 394 N.E.2d 247 (Ind. 2d DCA 1979), the applicable statute provided that the taxes collected "shall constitute a trust fund in the hands of the retail merchant and shall be owned by the state." No similar statute governs the taxes collected by petitioner. Therefore, the state cannot prove that at any specific point in time, he converted or appropriated the funds to his own use with the requisite felonious intent.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court and remand with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Carolyn J. Mosley, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 21st day of April, 1993.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER