IN THE SUPREME COURT OF FLORIDA

FILED
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MAY 31 1994
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STATE OF FLORIDA
et al.,

Appellants,

vs. Case No. 83,103

THE CITY OF PORT ORANGE, FLORIDA, a political subdivision of the State of Florida,

Appellees.
_____/

On Appeal from a Final Order of the Seventh Judicial Circuit Court, In and For Volusia County, Florida

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APPELLANTS' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The City of Port Orange, and its supporting Amici, do not realistically challenge the State's assertion that there is an inherent right to the free use of the public roads. Nor have the cities offered any authority on how the City can alter this inherent right without express approval of the Legislature. While the home rule powers of the cities are broad, they are not that broad.

The City and Amici have not rebutted the State's position that the "fee" charged by the City is a "tax." The City and Amici incorrectly compare the City's "fee" with fees and charges that are statutorily approved. This is a false comparison. Nor do the City and Amici answer the charge that a "fee" is based upon some relationship of use and that the service provided, especially in mandatory fee cases, is a specific and identifiable benefit to the person paying the fee.

ARGUMENT

I. THE FLORIDA LEGISLATURE HAS NOT RECOGNIZED SUCH A THING AS A "TRANSPORTATION UTILITY"; THE CITY OF PORT ORANGE CANNOT TURN ITS ENTIRE STREET SYSTEM INTO A TOLL ROAD FACILITY

The Appellee and Amici, ignoring this Court's admonition in Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880 (1932) and City of Miami v. South Miami Coach Lines, Inc., 59 So. 2d 52, (Fla. 1952), that there is an inherent right of the citizens of Florida to free travel on the public highways, including city streets, *subject only* to the police powers and ***the power of taxation*** for the construction and upkeep of the roads, have not presented to the Court any stated direct authority that the cities have to create a "utility" out of the previously free and paid for road system. Rather, they all justify the creation of the transportation utility on the broad home rule powers of a city. The cities' claim was stated in the extreme by the Amicus Florida League of Cities argument that that is nothing that the cities presently do that cannot be funded through the use of a fee, including police and fire services. Amicus Florida League of Cities, Brief, pp. 18-19. They argue, that all that is necessary is a methodology to adequately distribute the total cost of a municipal function to each household. Id. Thus, under that assertion, a city can alter its entire revenue stream and charge monthly each household and business a "fee" for everything a city does irrespective of the existence of statutory authority. Under the League of Cities extreme position, there could be, besides the present water, sewer and stormwater fees (all

specifically authorized by statute), a sidewalk fee, a street light fee, a parks and recreation fee, a street sign fee, a police and fire fee. Of course, this position is contrary to this Court's earlier position on governmental functions. See Hamler v. City of Jacksonville, 97 Fla. 807, 122 So. 220, 221 (1929) (Governmental functions are those duties owed by the government to the general public at large as part of the compact between the government and the people, acting as the sovereign). See also City of Miami Beach v. Jacobs, 315 So. 2d 227 (Fla. 3rd DCA 1975) (Governmental powers include police and fire protection).

This argument first intentionally avoids the dichotomy of a "fee" versus a "tax." It likewise, makes a mockery of the Constitutional homestead exemption for such fees are not limited by that constitutional restrictions. The homestead exemption was to avoid the forced sale for the inability to pay taxes. Thus, a city could, under their argument, shift the costs of city government to those persons, the homestead exemption was intended to protect in the first place.

The State still takes the position that the Appellee cannot turn their road system into a utility or a toll system. This in spite of Amicus City of Orlando's quote to this Court's opinion in Masters v. Duval County, 114 Fla. 205, 154 So. 172, 175 (1934)(Orlando Brief, p.7) where this Court approved toll

payments where the amount paid was equal to all who so used. [1]/ In Masters, Duval County had constructed a bridge to which a toll was charged for its use. The toll was charged to everyone who used the bridge, not just county residents. This Court decided that the toll so charged was not a "tax." Id. 154 So. at 174.

The City of Port Orange's attempt to turn its street system into a "utility" fails the test in Masters for two reasons. First the toll Duval County charged was restricted to the users of the bridge, not the entire street system. Second, the per trip charge for city residents is not the same, some residents do not pay for the use of city streets at all and non-residents do not pay to use the City's roads, where they would on a dedicated toll road.

The City and the Amici attempt to justify the existence of the transportation utility on the basis of the fact that some private roads do exist and that private companies do build roads. While this is true in the limited sense, it begs the question. Historically roads have been public and built with public funds. The fact that a private contractor does the construction does not change the public character of the completed road or bridge. The number of privately owned toll roads must be very low or the City would have cited numerous examples. As to private roads, the public does not have the inherent right to travel on them.

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[1]/ The real issue in Masters had nothing to do with the issue in this case. There, the question was whether a toll could be continued on a bridge, with the proceeds going to other road expenses, after the costs of the bridge have been paid for by the toll charged.

Private roads are on private property and subject to the wishes of the owner. Because a shopping mall, while it has replaced the town square, is private, it does not have to allow the same public access as a town square.

II. WHAT THE CITY OF PORT ORANGE HAS TERMED A "FEE" IS IN REALITY A "TAX"

For all the written words, the Appellee and Amici did not go into any analysis or discussion of the threshold issue in this case which is whether this "fee" is really a "tax." The Transportation Utility Fee ("TUF") ***is*** a "tax." The cities attempted to rationalize their position by relying on the "rational nexus test." While this test has validity in attempting to determine if a true "fee" is properly applied to the situation at hand, it is not the test to use when determining if an involuntary charge is a "fee" or "tax." The State has cited to this Court all the cases used by this Court to determine if a revenue source is a "fee" or "tax."

Just recently the First District Court of Appeal addressed that question in the case of Santa Rosa County v. Gulf Power Company, 19 Fla. L. Weekly D703 (Fla. 1st DCA March 30, 1994). In that case, the power companies challenged the charge Santa Rosa County imposed on them for the use of the County's roads. The companies asserted that the charge was not a "fee," as asserted by the County, but was in fact a tax. Id. The companies did so by asserting the charge "bore no relation to the cost of regulation." Id. at D706. Relying on, and quoting, this

Court's decision of City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976), the District Court rejected the companies "tax" theory. Santa Rosa County, 19 Fla. L. Weekly, at D706. The District Court obviously relied upon this Court's finding that the charge was levied "in exchange for specific property rights relinquished by the cities." Id. (quoting City of Plant City, 337 So. 2d at 973).

The District Court cited other cases in support of its decision that Santa Rosa County's charge was a fee. The common thread running through all these cases is that the utilities charged a franchise fee had no "right" to use the roads or the right of way for their commercial operations, that the city gave up some of its property for the use and the utility received something of concrete, tangible benefit. However, the ability to charge a fee for the use of public property is quite different from what this Court has recognized in Day v. City of St. Augustine, supra, and City of Miami v. South Miami Coach Lines, Inc., supra, as the public's inherent right to the use of the public streets. The streets are owned by the City, the City is composed of its residents, and as the owners of the streets they have the right to the free and unfettered access to the streets and the right to travel over them.

Some of the Amici rely upon the First District Court's opinion in Jacksonville Port Authority v. Alamo Rent-A-Car, Inc, 600 So. 2d 1159 (Fla. 1st DCA 1992) for their position that the City of Port Orange can charge for the use of the cities roads.

However, there are material differences between the facts of this case and those that existed in Jacksonville Port Authority. First and foremost, a port authority is NOT a city; its legal status and relation to the general public are not the same. A port authority is a public form of a private corporation organized to accomplish a specific public purpose. Second, there is no evidence in the case that the Port Authority was assessing and charging a fee whatsoever to the general public when they used the roads to the airport and the City and Amici cite to no airport authority that charges the public to just enter the airport to discharge of pickup passengers. Nor is there any evidence of a charge to businesses whose sole job was to deliver goods to the airport, the vendors or airlines. The "fee" charged by the airport was limited to those commercial enterprises that earned their income from the generation of business caused by the very existence of the airport. The fee created improvements for the airport which, in turn, created greater benefits to those whose economic livelihood depended upon the health of the public facility. As the District Court so accurately said, "[i]f Alamo wished to avoid the fee, it could obtain its customers from another source. The subject charge is tied exclusively to Alamo's use of the airport facilities to conduct its business. Id., 600 So. 2d at 1164.

The State admits that the form of fee imposed by the Port Authority, charging commercial enterprises for the right to use property for commercial gain, is quite permissible. But such a

charge is totally different than one charged the general public when no specific benefit is conferred by the charge. The commercial enterprise, as noted by the District Court, can go elsewhere to acquire its business. The residents of a city cannot realistically move about the city without using the roads; they are a captive audience. While a resident may choose to avoid a toll bridge and select another route to his destination, he cannot avoid the city street at the end of his driveway.

The cities further attempt to defend the TUF by comparing it with the "stormwater utility" fee. However, the cities cannot use this fee for comparison as the stormwater utility has a major factor the TUF does not have; the stormwater utility is statutorily authorized by the Legislature in Chapter 403, Florida Statutes. The cities and counties of Florida are legislatively authorized to create a utility and impose a "fee." Section 403.0893, Florida Statutes. It is this type of statute that the State asserts that must exist before the City can impose a "fee" for the use of its streets.

Finally, the City and Amici attempt to rely upon cases concerning mandatory garbage fees to support a mandatory fee for the use of the roads. This reliance is also flawed. The cases cited in support of the City's position reveal a major difference between a fee for water, sewer and garbage and a fee for the use of the roads; a difference sufficient enough that the cases so cited support the State, not the City. First, whether it is water, sewers or garbage that are being discussed, the

Legislature has authorized the public bodies to create public utilities and charge the public for their use. See, e.g. Section 180.06, Florida Statutes. There is **no** mention in Chapter 180 that authorizes the City to create a "transportational utility" and there is **no** comparable statute to Section 180.06 concerning a utility for streets. The only chapter in the Florida Statutes that speaks to like situation is Chapter 170, Florida Statutes, which allows special assessments to be used in the construction of a road. But a special assessment is a form of tax and is limited to those, like fees, that receive a special benefit from the assessment. Therefore, all the cases cited by the City and Amici that relate to water, sewer and garbage must be discounted by the fact that legislative authority existed for the utility and the legal questions involved concern the application and interpretation of those statutes. See, e.g. City of New Smyrna Beach v. Fish, 384 So. 2d 1272 (Fla. 1980); Stone v. Town of Mexico Beach, 348 So. 2d 40 (Fla. 1st DCA 1977).

Another major difference between a fee for the general right to use the roads and a water, sewer and garbage fee is that the latter is a payment for the receipt of a "special benefit" directly to the person paying the water, sewer or garbage fee and the former guarantees no special or direct benefit to the payer at all. The Third District Court of Appeal appears to have first identified the difference between a "tax" and a "fee" charged for water, sewer or garbage in the case of Turner v. State, 168 So. 2d 192 (Fla. 3rd DCA 1964). The District Court declined to rule

that Dade County's garbage fee was a "tax" because it was a charge "imposed for a special service performed to the owner . . ." Id, 168 So. 2d at 193. An examination of the cases cited by the City and Amici all have that same factor; the charge imposed on a person is for some legislatively authorized utility that provides a special, direct and accountable benefit to the person.

Contrary to these case, the City's transportation utility provides no direct, tangible or accountable benefit to any citizen of the City. The "fee" is for the "general" benefit of the person. While the fee will go to the repaving of the roads, it quite possible that a person can pay the fee for 10 years, then move from the City and not see the street in front of his home paved during this time. Where the "benefit" is general rather than direct and specific, the charge has been termed to be a "tax." There is no rational relation between the charge and a specific benefit. "Fees" are legal and legitimate because of this direct benefit; there is a relationship between the fee charged and the identifiable benefit received.

In sum, the City cannot truly discuss the sewer cases, the fee cases (such as Evansville-Vandorburgh Airport Authority v. Delta Airline, Inc., 405 U.S. 707 (1972)or tax cases because it quickly becomes apparent that the TUF is not a fee but a tax. It is a forced obligation on the residents and businesses of the City of Port Orange without regard to any special benefit to the payers.

CONCLUSION

For those reasons, the decision of the Circuit Court of the Seventh Judicial Circuit must be reversed, in that the City of Port Orange's Transportation Utility Fee is in excess of the City authority under the Florida Constitution and in direct conflict with Section 166.201, Florida Statutes. Because of the invalidity of the TUF, the bonds based on the collection of the TUF cannot stand.

Respectfully submitted,

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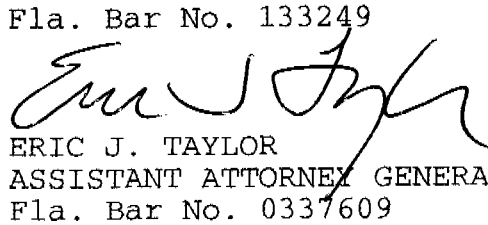

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: MAUREEN S. SIKORA, City Attorney, City of Port Orange, 1000 City Center Circle, Port Orange, Florida 32219-9619, and PETER L. DANE, Esquire, Squire, Sanders & Dempsey, 2100 Enterprise Center, 225 Water Street, Jacksonville, Florida 32202; STANLEY JAMES BRAINERD, Esquire, General Counsel, Florida Chamber of Commerce, 136 Bronough Street, Tallahassee, Florida 32301; GEORGE NICKERSON, J.R., Esquire, ROBERT L. NABORS, Esquire, and RANI T. PARTRIDGE, Esquire, Post Office Box 11008, Tallahassee, Florida 32302; STEPHEN E. DEMARSH, Assistant County Attorney, Sarasota County, 1549 Ringling Boulevard, 3rd Floor, Sarasota, Florida 34236; PAUL R. GOUGELMAN, Esquire, 1825 South Riverview Drive, Melbourne, Florida 32901; C. ALLEN WATTS, Esquire, Post Office Box 2491, Daytona Beach, Florida 32115-2491; KRAIG A. CONN, Assistant General Counsel, Florida League of Cities, Post Office Box 1757, Tallahassee, Florida 32302; and DAVID J. RUSS, Assistant General Counsel, Florida Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida 32399-2100, this 27th day of May, 1994.

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