FILED
SID J. WHITE
SEP 14 1995
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

COMMISSION ON ETHICS,

Appellee/Appellant,

vs.

JAMES BARKER,

Appellant/Appellee.

CASE NO. 85,860

REPLY BRIEF OF APPELLEE/APPELLANT

An Appeal from a Final Order of
the District Court of
Appeal of Florida, Third District

C. CHRISTOPHER ANDERSON III
Staff Attorney
Fla. Bar No. 0352861
PHILIP C. CLAYPOOL
General Counsel
Fla. Bar No. 217832
State of Florida
Commission on Ethics
P. O. Drawer 15709
Tallahassee, FL 32317-5709
(904) 488-7864
ATTORNEYS FOR APPELLEE/APPELLANT

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A R G U M E N T

I. The District Court of Appeal erred in declaring that Section 112.313(4), Florida Statutes, is facially unconstitutionally vague and an unlawful delegation of legislative authority.

The First District Court of Appeal has concluded that Section 112.313(4), Florida Statutes, is not unconstitutionally vague, expressly disagreeing with the analysis of the Third District Court of Appeal in the present case. Goin v. commission on Ethica, 20 Fla. L. Weekly D1763, So. 2d (Fla. 1st DCA 1995). The First District's lengthy opinion provides a detailed analysis **of** the statute, of the reasoning of the Third District, and of the arguments raised by Appellee here, effectively rebutting the arguments made in the Answer Brief.

APPELLEE'S ARGUMENT I, REGARDING THE ALLEGED VAGUENESS OF SECTION 112.313(4), FLORIDA STATUTES.

Barker and the Third District fail to realize, as the First District saw in Goin, supra, that Section 112.313(4) substantively is not the same provision as that stricken by this Court in D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977). The statute[1] shifts the focus from the effect of a gift on a public official--whether a hypothetical public official would have been influenced

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[1]Section 112.313(4) was adopted by the Legislature in 1975, before this Court's decision in D'Alemberte, supra. Ch. 75-208, Laws of Florida.

by the provision of a thing of value--to the intent of the donor and whether the particular public official knew, or should have known, that it was given with the intent to influence official conduct. The statute's focus on the provision of a thing of value to a particular public official under the totality of reality accompanying the gift is a far different emphasis than the previous statute's focus on the actual effect of a gift upon a hypothetical public official.

In disagreeing with the Third District's analysis, set forth in Barker v. State Commission on Ethics, 654 So. 2d 646 (Fla. 3rd DCA 1995), that the "with the exercise of reasonable care, should know" language of Section 112.313(4) in effect equates to the "reasonably prudent person" language stricken in D'Alemberte, the Goin court stated:

> The D'Alemberte court nullified a statute that tested the public official's behavior against the standards of a 'reasonably prudent man.' We find that the present statute, including the language 'with the exercise of reasonable care, should know,' does not perpetrate the same evil. Instead, the present statute merely allows proof of an ethical violation by demonstrating the public employee's actual or constructive knowledge of the donor's illegal intent. Thus, the statute first requires proof that the donor did in fact have an intent to influence the public employee in a 'vote or other action in which the officer or employee was expected to participate in his official capacity.' Next, the 'reasonable care' language of the statute places a specific duty upon the public employee to exercise such care before accepting a gift or anything else of value. The statute does not gauge the public employee's action against some hypothetical third person. Nor does it require a public employee to guess at whether certain conduct

> violates the ethics code. The statute fairly creates a zone of danger into which a public official or employee may not safely venture. It is left to the finder of fact to apply the statute to the specific conduct of the public employee in a given case and determine whether such conduct violates the statute. The focus, however, is upon the actual conduct of the charged public employee, and not upon the conduct of a hypothetical reasonable person. [20 FLW at D1765.]

Further, the Third District and Barker err in holding the view that the intent of a "third party" (the donor of a thing of value) can never be known, and in thus concluding that a statute concerned with the intent of a third party is "susceptible to the inherent dangers of arbitrary and discriminatory enforcement." As pointed out by the Commission in its Initial Brief, the intention of another is not unknowable--if it were, juries would not regularly be asked to judge the intent of defendants before them, and all criminal laws requiring as an element of proof the intent of an individual would be inherently vague.

Much of Barker's supplement to his answer brief attacks the reasoning of the Goin court based upon evidential determinations by triers of fact and caselaw discussing the same. Just because proof may be more difficult under some statutes than others, or just because various cases under the same statute may be laden with different quantities or qualities of evidence, does not mean that a given statute is unconstitutional. Further, Barker's argument that the statute is infirm because it does not have elements that are susceptible to proof by direct (as opposed to circumstantial) evidence, such as narcotics physically existent near a defendant,

is not well taken. Violations of many valid statutes are commonly proven by circumstantial evidence of elements of an offense (i.e., criminal intent) that are rarely expressly admitted and that cannot be physically handled. Contrary to Barker's assertion, the constitution does not require that every element of every statute be something that can be "seen, felt, [or] touched." Section 112.313(4), like various criminal statutes, contains some elements commonly proven by direct evidence and some elements commonly proven by circumstantial evidence. Such does not make Section 112.313(4) nor the other statutes constitutionally infirm.

Appellee's Argument 11, regarding exercising reasonable care in determining the intent *of* another person.

The First District in Goin, supra, stated:

> We believe, however, that the statute merely places a duty upon the public official to avoid certain dealings and transactions. The lack of a bright line test does not compel a finding of unconstitutional vagueness. While, in the view of some, a bright line test is always desirable, the Legislature may well have decided that in the circumstance of a public official, the existence of a bright line test would tend to facilitate conduct that pushes the envelope of propriety and would serve to erode confidence in governmental officials and others in whom public trust is placed.

Goin, supra, D1766. The Court then quoted with approval the Commission's understanding of the statute, as follows:

> The statute here simply requires a responsible public servant to ask one question when offered anything of value: 'Why is this person offering this to me?' If the answer is

> that it is being given because the donor has an interest in matters expected to come before the public servant and the donor would like to affect the public servant's judgment in those matters, then the statute prohibits its acceptance. There is nothing particularly difficult or obscure about determining the motivation of another, especially when, as here, one knows that the others are involved in building a multi-million dollar facility for which one has the authority to initiate change orders and arrange for funding. Nor is there any unfairness in expecting our public officials to ask themselves this single question and to exercise some insight into the motivations of others.

Goin, supra, D1766.

Although there is not a body of law conveying a generally accepted or commonly understood meaning of "reasonable care" in the context in which that phrase is used in the current statute, there is a substantial body of law that conveys a sufficiently definite warning that conduct containing an element of constructive knowledge or proof of knowledge by circumstantial evidence can result in punitive consequences. This body of law includes not only the dealing in stolen property decisions described by the First District in Goin, supra, at D1765, and in the Commission's Initial Brief (pp. 16-18), but also the cases regarding proof of knowledge by circumstantial evidence that are reviewed in Goin, supra, at D1765.

Barker would have this Court accept the proposition that constructive knowledge regarding the stolen character of goods can be imputed to a person who receives those goods, but that a public official cannot be held to constructive knowledge that a gift to the public official is colored with its donor's intent to influence

the recipient public official. Whether a reasonable hypothesis **of** innocence exists in this or any other case and whether a donor **of** a thing of value intended to influence the recipient or intended to accomplish some other purpose via his generosity are all case-by-case items of an evidential nature. The fact that such evidential concerns and labor attach to cases under Section 112.313(4), as they do to cases under other statutes involving constructive knowledge, does not make the statute constitutionally infirm. Under the statute at issue, the intent of another is not as a matter of law a "ghost" that can never be known and thus a provision laden with constitutional infirmity. Rather, the intent of another is a statutory element, the determinations of which, when based upon competent substantial evidence, should be given due deference by reviewing courts as being within the province of the trier of fact, regardless of whether a party aggrieved by that factual determination is able to conjure a benign-intent specter from a portion of the evidence.

Appellee's Argument 111, regarding the standard of review.

Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. **1981),** states that " [al legislative enactment is presumed valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution." Id., **413,** 414. D'Alemberte, supra, describes the test to be applied in determining

whether a provision in the State's Code of Ethics for Public Officers and Employees is unconstitutionally vague, but Bridges, supra, expresses the heavy burden of proof on Appellee to demonstrate the invalidity of the statute.

Appellee's Argument IV, regarding analogous authority cited by the Commission.

Contrary to Barker's view, Sapp v. Warner, 105 Fla. 245, 141 So. 124 (Fla. 1932), and Symons v. State Department of Banking and Finance, 490 So. 2d 1332 (Fla. 1st DCA 1986), are highly pertinent and relevant to an analysis of Section 112.313(4). These cases stand for the proposition that the jurisprudence of this State has long recognized that a person will not be allowed to remain willfully ignorant of reality or to claim that he had no notice or knowledge of a thing readily ascertainable. Notwithstanding Barker's desires to the contrary, the law has not tolerated, and should not tolerate, one's burying one's head in the sand to avoid recognition of the surrounding reality. As the First District stated in Goin, supra:

> The statute allows a finding of violation upon demonstration of the public employee's constructive knowledge because, under such circumstances, the evil sought to be avoided by the statute would have occurred. Put otherwise, a public employee or official subject to the ethics code may not forge blindly ahead, oblivious to the legitimate public concerns raised by his or her actions.

Goin, supra, D1765.

Appellee's Argument V, regarding the non-delegation doctrine and prior Commission decisions.

The proof of different factual situations will lead to different results in applying the subject statute, as with any statute, but this does not mean that the underlying statute is unduly vague or constitutes an unlawful delegation of legislative authority; nor does it mean that the statute is being applied arbitrarily or capriciously. That Barker was found to have violated the statute andthat different persons in other situations scrutinized by the Commission were found not to be in violation is the result of the particular evidence or factual scenario underlying each matter, rather than being the result of any attempt by the Commission to usurp the lawmaking function.[2]

In Goin, supra, the First District recognized that similarities in circumstances legitimately do not necessitate identical results, when it observed:

> The statute here under review [Section 112.313(4)] allows the state to demonstrate circumstances tending to show that a public official knew why he or she had been singled out as the object of the gift donor's generosity. To the extent an inference of guilt arises by the proof of such circumstances, nothing in the statute prevents the public official from demonstrating that in fact he did not know, nor with the exercise of reasonable care could he have known, of the

[2]Barker's case was one of three involving Coral Gables officials that were tried together before the Hearing Officer. In each case, the Hearing Officer found that accepting the free club memberships violated the statute. In re James Barker, 16 FALR 4059; In re Robert Hildreth, 16 FALR 4085; and In re Robert Zahner, 16 FALR 4098 (Fla. Comm. on Ethics 1994).

> donor's intent. The ultimate sorting of the facts must be left to the hearing officer, just as it is left to a jury in criminal cases. While we acknowledge that proof of similar facts might give rise to a finding of violation in one case but not in another, such exactly replicates the everyday experience of our criminal courts.

Id., D1765, D1766.

Barker, by pointing out that several previous decisions of the Commission on Ethics found no violation of Section **112.313(4),** seeks to argue that the statute was applied by the Commission on Ethics in the instant matter in an arbitrary and capricious manner. Admittedly, each of these decisions turns on the particular facts and circumstances involved. However, the decisions turn on all of the circumstances, not just a select few.

In advisory opinion CEO **92-43,** the Commission noted that Section **112.313(4)** did not appear to be violated where a city councilman's spouse was employed as executive director of a nonprofit corporation contracting with the city to perform services. In order to argue the similarities of this situation to him, Barker overlooks the fact that, for the two years prior to her assuming the paid position of executive director, the councilman's spouse had served on the corporate board **of** directors and had served as its executive director.

Barker also seeks to argue that In re Charles W. Flanagan, **13** FALR **3247** (Comm. on Ethics **1989),** a decision where the Commission found no violation of Section **112.313(4),** is analogous to the instant matter. Although he characterizes the transaction in that case as a "free satellite dish with installation" [Answer Brief, p.

281, in fact the Hearing Officer found that Flanagan paid **$1,667.72.** Id., 13 FALR at p. 3252. In that case, the Hearing Officer also found that the existing friendship between the donor and the donee was a basis for the provision of the gift or thing of value, to the extent that any was received. In the instant matter, there is no independent "friendship" basis for the provision of the memberships, the memberships were given "out of the blue" to Barker without his negotiating for or initiating their provision, and Barker did not pay even a reduced rate for the memberships.

In opinion CEO 83-57, not only was the city's insurance carrier, which hired the city attorney's husband to represent it, selected by a competitive bid process, but also the husband had been representing the city for the carrier for years before the wife became city attorney. There is no analogy between those facts and club memberships made available to Barker only because of his public position. The other advisory opinions of the Commission cited by Barker only exemplify the fact that the application of the statute will turn on the particular circumstances of the public official's individual case.

Here, in the context of a Chapter **120** proceeding involving a hearing before an independent hearing officer of the Division of Administrative Hearings, the Commission acted on a recommended order which contained findings of fact peculiar to the matter. Based upon the Hearing Officer's determinations, it was not arbitrary or capricious for the Hearing Officer and the Commission to conclude that Barker violated Section **112.313(4).**

In the instant case, as shown through the Hearing Officer's findings of facts (detailed in the statement of facts in the Commission's Initial Brief and not repeated here), the circumstances included Barker's public service as a member of the governing body of the City, his private employment in marketing, the Country Club's continuing dependency on the City Commission's favorable actions for its existence and prosperity, Barker's participation in a vote regarding the Club, the fact that the memberships were given solely because of his public position, the past relationship between the City and the developer of the Executive Club, and the fact that the memberships did indeed have value.

The Hearing Officer found that both memberships were given with the intent to influence, that Barker "should have known that the free membership to the Country Club was given in an effort to influence him in his official duties", and that "[n]o reasonable person could believe that the free Executive Club membership was given to Barker for any reason except to influence him." (R. 134-35.)[3] The Hearing Officer reduced her recommended penalty because of the advice given to Barker by the City Attorney, who also was found to have violated the statute by accepting the club

[3]Barker offered alternative theories or "justifications" for the provision of the memberships. In the case of the Country Club, that they were merely a tradition. In the case of the Executive Club, that the memberships were given to promote the Club by associating it with noteworthy persons. The Hearing Officer did not accept either of these theories and instead, as is within her domain as judge of the facts, determined that the memberships were given to influence.

memberships,[4] that there was no conflict of interest. (R. 136.)

As the First District specifically held in Goin, supra, the Commission is not free to alter the determinations of the trier of fact, including the determinations of whether the official knew or should have known the gift was given to influence, unless there is no competent substantial evidence upon which to base the factual determinations. The First District stated:

> Although the Commission on Ethics is an 'independent commission' under the Florida Constitution, article II, sections 8(f) and 8(h)(3), it is subject to and must comply with the provisions of chapter 120, Florida Statutes. (citations omitted) Under chapter 120, an agency may reject or modify a hearing officer's conclusions of law and interpretation of administrative rules, but it may not reject or modify a finding of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the particular finding of fact was not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. (citation omitted)
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> * * * * * *
>
> By stating he was not persuaded, the hearing officer engaged in the act of ascribing weight to the evidence. Florida's Administrative Procedures Act relies upon a hearing officer 'to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." (citation omitted) An agency, however, may not 'weigh the evidence presented . . . or otherwise interpret the evidence to fit its desired ultimate conclusion.' (citation omitted)

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[4] In re Robert Zahner, 16 FALR 4098 (Fla. Comm. on Ethics 1994).

Goin, supra, D1766, D1767.

The Commission submits that there is competent, substantial evidence in the record, as outlined above, to support the Hearing Officer's findings that Barker should have known the memberships were being given to influence him. In addition, the Commission submits that Barker has not preserved for appellate review his arguments about the sufficiency of the evidence. Under the A.P.A.[5] a party must file exceptions to the hearing officer's recommended order, thereby raising the party's various challenges to the order before the agency that must adopt the final order, in order to preserve the right to argue those challenges on appeal. Florida Department of Corrections v. Rradley, 510 So. 2d 1122 (Fla. 1st DCA 1987); Environmental Coalition of Florida, Inc. v. Broward County, 586 So. 2d 1212 (Fla. 1st DCA 1991); and Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993). These cases require that a party object to (take exception to) findings of a hearing officer on particular grounds (i.e., that there was no competent substantial evidence to support those findings) rather than, via his exceptions, merely reargue the case, tender additional facts not found by the hearing officer, or attempt to engage the agency in a reweighing of the testimony and other evidence which is the province of the hearing officer alone. An agency cannot be deemed to have erred by failing to act as to matters that are not brought to its attention until the filing of an appellate brief.

Though Barker filed exceptions to the Hearing Officer's

[5]Specifically, Section 120.57(i)(b)9., Florida Statutes.

Recommended Order, some of which proposed evidential findings other than those contained in the Recommended Order, he did not except **to** the Recommended Order based upon the ground that the factual findings actually made by the Hearing Officer were not based upon competent substantial evidence. (R. 333-343.)[6]

CO''

The State's interest in preserving the public's trust in a public official's actions justifies a preventative statute which forbids the official from accepting a personal benefit given to him for the purpose of influencing his official actions, when the official has actual or constructive knowledge of that intent to influence. Barker has not met his burden of proving that Section **112.313(4),** Florida Statutes, suffers from any constitutional infirmity. Thus, this Court must find that Section **112.313**(4), Florida Statutes, passes constitutional muster.

Therefore, the Commission respectfully asks this Honorable Court to reverse the final order of the Third District Court of Appeal and to affirm the Final Order and Public Report of the Commission on Ethics.

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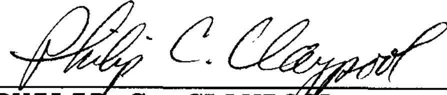
[6]Although the opinion **of** the Third District describes the evidence most favorable to Barker, that Court did not engage in any discussion concerning whether or not Barker had preserved his sufficiency of the evidence argument for appellate review and did not conclude that there was no competent substantial evidence to support the Hearing Officer's findings.

Respectfully submitted,

C. CHRISTOPHER ANDERSON III
Staff Attorney
Fla. Bar No. 0352861



PHILIP C. CLAYPOOL
General Counsel
Fla. Bar No. 217832
State of Florida
Commission on Ethics
P. O. Drawer 15709
Tallahassee, FL 32317-5709
(904) 488-7864

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 14th day of September, 1995, to: Stuart R. Michelson, Esquire, 1111 Kane Concourse, Suite 517, Bay Harbor Islands, Florida 33154.

C. CHRISTOPHER ANDERSON 111