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SUPREME COURT OF FLORIDA

Case No. 91,424

AVATAR DEVELOPMENT CORP.
and AMIKAM TANEL,

Petitioners.

v.

STATE OF FLORIDA.

Respondent,

INITIAL BRIEF ON THE MERITS

Appeal Of A Petition For Review From The Fourth District Court of Appeal

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Avatar Development Corp. and Amikam Tanel v. State of Florida
Case No. 91,424

CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellee, AVATAR DEVELOPMENT CORPORATION, certifies that the following persons and entities have or may have an interest in the outcome of this case.

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Defendant

Honorable Robert F. Diaz
trial judge

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Avatar Development Corp. and Amikam Tanel v. State of Florida
Case No. 91,424

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Amikam Tanel
Defendant

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Fourth District Court of Appeal,
State of Florida Department of Environmental Protection

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PREFACE

This is a petition to review a decision of the district court which reversed the trial court's Order dismissing this action and the information as refiled.

The Appellant, State of Florida, will be referred to herein as the "State."

The Appellee, Avatar Development Corporation, will be referred to herein as "Avatar."

The Florida Department of Environmental Protection, Amicus Curiae in the Fourth District Court of Appeal, will be referred to herein as "DEP."

The Appellee, Amikam Tanel, will be referred to herein as "Tanel."

The Appendix will be referred to as "App.___. "

STATEMENT OF THE FACTS AND CASE

On January 18, 1994, the DEP issued a permit authorizing Avatar to conduct dredge and fill operations in Broward County, Florida. App.1. The permit contains specific condition 3, which states:

> At least 48 hours prior to commencement of work authorized by this permit, the permittee shall notify the Department of Environmental Protection, Bureau of Wetland Resource Management in Tallahassee, and the Southeast District District [sic] office in West Palm Beach, in writing of this commencement.

App.1. The permit also contains specific condition 5, which states:

> Prior to the commencement of any construction authorized by this permit, floating turbidity curtains with weighted skirts extending to the bottom of the man-made canals shall be properly installed around the shoreline stabilization areas and all areas to be dredged and filled, to isolate adjacent waters from the work area . . . The floating turbidity curtains shall remain in place, be inspected daily and be maintained in good working order until all the authorized work is complete, and turbidity levels in the project area are within 29 NTU's of background levels.

App.1.

On November 28, 1995, the State charged Avatar and Tanel by information with two first degree misdemeanors for wilfully violating specific conditions 3 and 5 of the permit. App.2.

Count I charged that Avatar and Tanel violated specific condition 3 by wilfully failing to provide written notice to the DEP at least 48 hours before beginning the work authorized by the permit and by wilfully failing to employ turbidity curtains before beginning the work authorized by the permit in violation of § 403.161(1)(b) and § 403.161(5), Fla. Stat. App.2. Count II charged that Avatar and Tanel violated specific condition 5 by failing to employ turbidity curtains in violation of § 403.161(1)(b) and § 403.161(5), Fla. Stat. App.2. The information charged that Avatar and Tanel's violations of the permit were first degree misdemeanors pursuant to § 403.161(5), Fla. Stat. App.2.

Section 403.161(1)(b) provides in pertinent part:

> (1) It shall be a violation of this chapter, and it shall be prohibited for any person:
>
> * * *
>
> (b) to violate or fail to comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority.

Section 403.161(5), Fla. Stat., provides in pertinent part:

> Any person who wilfully commits a violation specified in paragraph 1(b) . . . is guilty of a misdemeanor of the first degree punishable as provided in ss. 775.082(4)(a) and 775.083(1)(g) by a fine of not more than $10,000 or by 6 months in jail, or by both for each offense.

The trial court dismissed the information against Avatar and Tanel on the grounds that §§ 403.161(1)(b) and 403.161(5) Fla. Stat., violate Art.I, § 18, and Art.II, § 3, Fla. Const., because they unconstitutionally delegate to an administrative agency the power to define a crime. App.3. The trial court also dismissed the information on the grounds that §§ 403.161(1)(b) and 403.161(5), Fla. Stat., violated Avatar and Tanel's due process rights because the acts prohibited by the statutes do not appear on the face of the statutes. App.3. The trial court then certified the following question to the Fourth District Court of Appeal:

> Are Florida Statutes § 403.161(1)(b) or § 403.161(5) unconstitutional as charged in the information?

App.3.

On July 16, 1997, the Fourth District Court of Appeal reversed the trial court's decision, expressly finding the challenged statutes to be constitutional. App.4. On August 19, 1997, the Fourth District Court of Appeal denied Avatar's motion for rehearing. App.5. On September 11, 1997, Avatar and Tanel filed a notice to invoke discretionary jurisdiction of this Court. On December 19, 1996, this Court accepted jurisdiction. App.6. This appeal follows.

SUMMARY OF ARGUMENT

Section 403.161, Fla. Stat., provides that wilfully violating or failing "to comply with any rule, regulation, order, permit or certification adopted or issued by the department pursuant to its lawful authority" is a crime. Thereby, by a process of delegation, the statute transforms each and every rule, regulation, order, permit or certification adopted or issued by the DEP into a criminal statute.

The Florida Legislature may not delegate to an agency the power to determine the elements of a crime. The power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. Delegation of such power is unconstitutional because it violates the principle of separation of powers, which is codified in Art. II, § 3 of the Florida Constitution.

The fact that the DEP is aided by broad legislative guidelines in the decision whether to grant individual permits does not permit it to define the elements of a criminal offense under Florida's Constitution. This is because the Florida Constitution mandates a strict separation of powers unlike the U.S. Constitution. Such a strict construction of Art. II, § 3 of the Florida Constitution applies with greatest force to criminal statutes, which carry with

them a sense of moral approbation, and implicate the prohibition of Art. I, § 18.

Because DEP performs its delegated function through the issuance of individualized permits, the process runs afoul of yet another constitutional prohibition. Art. III, § 11(a)(4) prohibits special laws defining criminal conduct. Because each permit relates to particular permitees and a particular project, it is in effect a special law, and may not define criminal conduct. Because the legislature cannot create a crime by a special law, it certainly cannot delegate the power to do so to an agency.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT § 403.161, FLA. STAT. (1993), IS FACIALLY UNCONSTITUTIONAL BECAUSE THE LEGISLATURE HAS IMPROPERLY DELEGATED TO AN ADMINISTRATIVE AGENCY THE POWER TO DETERMINE THE ELEMENTS OF A CRIME IN VIOLATION OF ART I, § 18 AND ART. II, § 3 OF THE FLORIDA CONSTITUTION.

The Florida Legislature may not delegate to the DEP the power to determine the elements of a crime. "The power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch." *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991) (citations omitted). Accordingly, § 403.161, Fla. Stat., which provides that any person who violates or fails to "comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority" is guilty of a misdemeanor of the first degree, is unconstitutional as violative of Florida's non-delegation doctrine.

Florida's non-delegation doctrine is based on the principle of separation of powers, which is codified in Art. II, § 3 of the Florida Constitution as follows:

> The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided herein.

This Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a strict separation of powers." *B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1994), *cert. denied*, 515 U.S. 1132, 115 S.Ct. 2559 (1995). Florida has rejected arguments of expediency or necessity or any penumbra theory in setting limits on the separation of powers doctrine. *Id.* at 992. Indeed, Florida has explicitly rejected the approach to the non-delegation doctrine adopted by the federal courts and some states, which focuses on procedural safeguards in the administrative process, in favor of a purely textual analysis of the Florida Constitution. *Id.*

The Fourth District Court of Appeal improperly relied on *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789 (Fla. 1919), as authority for the proposition that the DEP may define the elements of a criminal offense, because the *Bailey* decision relies solely on federal constitutional standards. *Bailey*, 82 So. at 794. These federal standards have been expressly rejected by later decisions of this Court. This Court's more recent decision in *B.H. v. State* seriously calls into question the continued vitality of the *Bailey* decision. In *B.H.*, this Court reiterated that Florida's Constitution absolutely requires a strict separation of powers. *B.H.*, 645 So. 2d at 991. This Court announced that "[a]ny

discussion must begin by noting several special features of the State Constitution, which we are required to honor under the doctrine of primacy notwithstanding less stringent federal law." *Id.*

Moreover, the *Bailey* court was not required to depart from Florida's constitutional non-delegation doctrine in order to uphold the statute in that case. The particular act with which the defendant in *Bailey* was charged was failing and refusing to dip his cattle for tick eradication. The directive to require cattle to be dipped to meet the legislative purpose of tick eradication was expressly stated by the legislature on the face of the legislation itself, quoted at 86 So. at 792. Thus, the legislature expressly stated the legislative purpose, tick eradication, and the method by which to accomplish this purpose, by the dipping of cattle. The legislation was complete in itself, and a person could determine that refusal to dip cattle for tick eradication would be a criminal offense merely by resorting to the language of the statute itself.

Strict construction of Art. II, § 3, Fla. Const., is especially warranted in criminal cases. This Court recently noted that the "authority to define a crime . . . is of such a different magnitude from noncriminal cases that more stringent rules and greater scrutiny certainly is required." *B.H.*, 645 So. 2d at 993.

The power to create the elements of a crime results in more serious consequences for the individual than the power to issue rules and regulations which are vested merely with civil or administrative liability. *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 Mich. L. Rev. 51, 52 (1943). As a New York court has stated:

> It is a power to take life and liberty, and all the rights of both, when the sacrifice is necessary to the peace, order, and safety to the community. This general authority is vested in the legislature, and as it is one of the most ample of their powers, its due exercise is among the highest of their duties.

Id. citing *Barker v. People*, 3 Cow. 686, 704 (N.Y. S.Ct. 1824).

Crimes differ from civil sanctions because they carry with them a sense of moral approbation.

> What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition. The determination of 'community condemnation' is not within the realm of administrative expertise, but rather is wholly within the province of the legislative branch.

Mark D. Alexander, *Increased Judicial Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 615 (1992) (citations omitted). Agencies have two major virtues which the legislature lacks: special expertise and increased flexibility.

> Both of these attributes lose significance when criminal regulations are implicated. An agency's expertise in determining how best to regulate an area does not apply as well in the criminal context, which traditionally reflects criminal approbation. Agencies do not have special insight into determining community values.
>
> * * *
>
> Declaring specific conduct so blameworthy as to deserve a criminal sanction should be possible only after running the gauntlet of political processes. . . . When criminal punishment is involved, flexibility is not a virtue.

Id. at 612, 643, 644. Accordingly, the State and DEP's reliance below on a number of cases in the civil context is misplaced. *E.g. Jones v. Department of Revenue*, 523 So. 2d 1211 (Fla. 1st DCA 1988); *State v. Bender*, 382 So. 2d 697, 698 (Fla. 1980) (noting that validity of the criminal statute allegedly violated was not an issue); *Brown v. Appalachee Regional Planning Council*, 560 So. 2d 782 (Fla. 1990); *Florida Gas Transmission Company v. Public Service Commission*, 635 So. 2d 941 (Fla. 1994); *Department of Insurance v. Southeast Volusia Hospital District*, 483 So. 2d 815 (Fla. 1983).

This Court most recently dealt with the issue of the non-delegation doctrine in a criminal context in *B.H. v. State*. In that case, B.H. was charged with escaping from a juvenile commitment facility in violation of § 39.061, Fla. Stat., which provided that escape from a facility of restrictiveness level VI or

above was a felony. *B.H.*, 645 So. 2d at 989. The issue on appeal was whether the statute was facially unconstitutional as violative of the separation of powers doctrine because it left the designation of a restrictiveness level VI facility to the Department of Health and Rehabilitative Services. *Id.* at 993. The First District Court of Appeal held the statute unconstitutional because it improperly delegated legislative authority to the Department of Health and Rehabilitative Services to define the crime of juvenile escape. *Id.* at 990. This Court affirmed and held that the legislature's attempts to delegate the power to determine the elements of a crime to an agency was unconstitutional under Florida law. This Court stated:

> [T]here is a violation of separation of powers in the attempt to give an administrative agency power to define a crime.

Id. at 993.

The statute in this case is an even more generous effort to give to an administrative agency the power to define a crime than was the statute in *B.H.* In *B.H.*, the statute created the crime of escape from a commitment facility and merely left it to the Department of Health and Rehabilitative Services to specify which facilities would fall under the prohibition. In this case, § 403.161(1)(b), Fla. Stat. (1993) makes it a crime to "violate or

fail to comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority." The DEP is not merely permitted to determine one element of a crime, as in *B.H.*, but is invited to legislate any and all crimes it might wish to create whether by rule, regulation, order, permit, or certification.

While the legislature may assign to administrative agencies certain duties involved in applying the law, the legislature may not allow agencies to create the law. On several occasions, this Court has upheld statutes wherein the legislature had set out all of the elements of the crime and merely left it to the agencies and executive officers to use their expertise to define certain terms. These distinguishable cases are the ones upon which the State and DEP relied below. *See, e.g., Clark v. State,* 395 So. 2d 525 (Fla. 1981) (upholding statute which prohibited the introduction of contraband into a correctional or penal institution except through regular channels and left to the prison administrator to define the meaning of "regular channels"); *State v. Cumming,* 365 So. 2d 153 (Fla. 1978) (allowing agency to specify animals which are "wildlife" which pose "a real or potential threat to human safety"); *Cesin v. State,* 288 So. 2d 473 (Fla. 1974) (upholding statute which prohibited operating a motorcycle without a helmet

approved by the Department of Highway Safety and Motor Vehicles.) Because the legislature was making all of the judgments as to the conduct to be regulated, why it was to be regulated, and how it was to be regulated, leaving to the agency only a narrow application of its technical expertise, these cases do not evoke Florida' strong constitutional prohibition against delegation of criminal law-making authority.

Other cases relied upon by the State and the DEP below are equally distinguishable. For example, in *Rosslow v. State*, 401 So. 2d 1107 (Fla. 1981), the statute involved completely defined the crime. Any transportation of citrus fruit without the appropriate certificate was unlawful. The only authority granted to the agency was in the negative, to grant exemptions. Even then, the exemptions authorized were narrow and specific, fulling expressing the legislature's policy decision in each discrete authorized exemption, with no discretion left to the agency. *Id.* at 1107, 1108.

Two cases interpreting the Florida Manatee Sanctuary Act are instructive. *Marine Industries Association of South Florida, Inc. v. The Florida Department of Environmental Protection*, 672 So. 2d 878 (Fla. 4th DCA 1996); *State v. Rawlins*, 623 So. 2d 598 (Fla. 5th DCA 1993). That statute directed the DEP to promulgate speed

limitations for boats in areas in which manatees are frequently sighted. The Legislature made all of the fundamental policy decisions, and merely left their application to the DEP. The agency was told where to regulate - where manatees are frequently sighted. The agency was also told how to regulate - by imposing speed limits. The agency was not vested with the discretion of where to regulate, or how to regulate. For example, the agency could not determine that it would prevent "adverse effects" on manatees by regulating in areas where manatees are sometimes sighted, or manatees might be present. Moreover, the agency was not permitted to determine the best method of avoiding adverse effects on manatees, such as by requiring propeller guards, requiring manatee warning devices, manatee repulsion devices, manatee lookouts, less harmful propellers, or banning propellers altogether. By contrast, the statute in this case not only allows the agency to determine what activities are deserving of regulation, but also the best methods to accomplish that regulation. Such broad authority may not be delegated to an agency.

Unlike the statutes in those cases, § 403.161, Fla. Stat. (1993) is unconstitutional because here the legislature leaves it to the administrative agency to determine the elements of the

crime. Other than the broad, non-controversial policy of protecting surface water quality, all legislative judgments are left to the DEP. Their judgments include the acceptable levels of effects on surface water, the most desirable means and methodologies to obtain or maintain those levels, the cost and benefit analysis of each requirement or prohibition, what activities are *de minimis* and undeserving of regulation, and what activities are so disruptive that no level of regulation or mitigation will suffice. Unlike the cases cited by the State and DEP in which narrow and specific tasks were left to the agencies after the legislature made the legislative judgments, § 403.161, Fla. Stat., gives DEP carte blanche to create crimes by "rule, regulation, order, permit or certification."

Both the State and Amicus rely on the "seven prong test" of § 403.918 (now § 373.414) as the legislative criteria guiding DEP in its promulgation of criminal statutes in the form of permits. In essence, these criteria require the DEP to determine whether a project will "adversely affect" various listed considerations. This is no greater guidance to the DEP than the requirement of the statute in *B.H.* that the agency consider the "needs of the individual child" in assigning a child to a particular detention facility. No fundamental legislative policy decision as to what

activities to regulate and how to regulate them is contained within this broad, aspirational listing of considerations. The DEP is left with virtually unfettered legislative discretion as to the quantity or character of effects which may be acceptable, and the nature or extent of the procedures, practices or equipment necessary to avoid unacceptable effects. This delegation differs both in kind and degree from the narrow definition of scientific terms selected by the legislature, or definition of specialized things mandated or forbidden by statute.

Reliance on these guidelines to legitimize the delegation of legislative authority further misses the point, because these guidelines relate to the administrative decision of whether or not to issue a permit, not the promulgation of regulations. The only way a person could violate a rule or regulation promulgated under these guidelines would be by proceeding without a permit. This would be a direct violation of the statute, and not a mere violation of a rule, regulation, order, permit, or certification. Avatar and Tanel have not been, and could not be, charged with failure to obtain required permits. App.2.

The degree of deference which the legislature has given DEP is unnecessary as demonstrated by the facts of this case and the permit provisions which Avatar and Tanel have been charged with

violating. Certainly the State cannot claim that the legislature lacked the technical expertise to specify in the statute that advance notice of dredging would be beneficial in DEP's enforcement and monitoring efforts. The other condition which Avatar and Tanel allegedly violated required turbidity curtains around the project. The legislature demonstrated its understanding of turbidity curtains and their attributes when it included a requirement of turbidity curtains on the face of Fla. Stat. § 403.813(2)(f) relating to maintenance dredging. There is no indication in this record that any "degree of flexibility" relied upon by the district court, Slip Opinion, App.4, p.4., (quoting *B.H.*, 645 So. 2d at 993) was required for this permit which was allegedly violated.

II. SECTION 403.161, FLA. STAT. (1993) IS UNCONSTITUTIONAL BECAUSE IT EMPOWERS AN AGENCY TO CREATE SPECIAL LAWS DEFINING CRIMINAL CONDUCT IN VIOLATION OF ART. III, § 11(a)(4) OF THE FLORIDA CONSTITUTION.

The definition of a crime by an agency is further unconstitutional if the agency is permitted to define a crime through a permit or certification. Permits or certifications apply only to the entities named therein, and are not instruments of general application. In effect, if treated as criminal statutes, they would be special laws defining criminal conduct. *State v. Stoutamire*, 129 So. 730, 733 (Fla. 1938).

While general laws may apply to a defined class, reasonably related to the purpose of the statute, the classification must be open and have the potential of applying to others. *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983) citing *Biscayne Kennel Club, Inc. v. Florida State Racing Commission*, 165 So. 2d 762, 763 (Fla. 1964); *see also Dep't of Business Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155 (Fla. 1989) (statute relating to thoroughbred horse races which applied only to one county with no possibility that it would ever apply to any other county was a special law.) Unlike a rule or regulation, a permit is not open and does not have the potential of applying to anyone other than the permittee. Therefore, making the violation

of a permit a crime violates Art. III, § 11(a)(4) of the Florida Constitution, which prohibits special laws for the punishment of crime. The legislature could not create crimes by issuing individual permits, and cannot delegate such a power to an agency. Art. III, § 11(a)(4) was violated in this case because the information only charges Avatar and Tanel with violation of a specific permit, and does not charge a violation of any pronouncement of general applicability. App.2.

This Court should consider the violation of Art. III, § 11(a)(4) as an alternative ground for affirmance of the trial court, notwithstanding that the issue was not raised below. If Avatar and Tanel had been convicted and failed to preserve this issue, the unconstitutionality would nevertheless be considered as fundamental error, "which goes to the foundation of the case or goes to the merits of the cause of action." *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994); *Jefferson v. City of West Palm Beach*, 233 So. 2d 206, 207 (Fla. 4th DCA 1970). *A fortiori*, such a constitutional issue may be considered in support of an order of dismissal. Importantly, neither the State nor DEP as amicus curiae asserted lack of preservation of this point in the Fourth District, and accordingly lack of preservation has been waived.

The savings clause in § 403.811, Fla. Stat. (1993), which provides for the saving of existing permits, also does not ratify the specific permit Avatar was alleged to have violated as the DEP suggested below. Avatar was issued its permit on January 18, 1994. App.1. Section 403.811 became effective on May 12, 1993. Therefore, § 403.811 could not possibly ratify the specific permit Avatar was alleged to have violated. More fundamentally and as the DEP correctly noted below, the real purpose of this savings clause was to preserve the status quo that existed while DEP reacted to changes in its legislation. There is no suggestion that the legislature intended to validate any act which was invalid under the status quo. There is certainly no indication that the legislature reviewed and adopted the legislative judgments contained in permits which were in existence. Indeed, if it had, the ratification would be invalid as creating a series of special laws defining criminal conduct.

Admittedly, the legislature's objective in enacting § 403.161, Fla. Stat. (1993), was to serve the public good. However, no matter how laudable a piece of legislation may be, it is unconstitutional if it leaves to an administrative agency the power to define a crime. The liberty interests of the accused trump the motivation for the delegation of legislative authority. *See Smith v. Portante*, 212 So. 2d 298, 299 (Fla. 1968) (holding that

legislation authorizing jury commissioners and county commissioners to gather essential information from prospective jurors violated the delegation doctrine when the prospective juror's privacy interests were implicated.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court reverse the decision of the District Court below, reinstate the dismissal by the County Court below, and hold that § 403.161, Fla. Stat., is unconstitutional as violative of Florida's non-delegation doctrine.

Respectfully submitted,

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