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SUPREME COURT OF FLORIDA

Case No. 91,424

AVATAR DEVELOPMENT CORP.
and AMIKAM TANEL,

Petitioners.

v.

STATE OF FLORIDA.

Respondent,

REPLY BRIEF ON THE MERITS

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

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SUMMARY OF ARGUMENT

In an effort to defend the delegation of the power to define the elements of a crime, both the State and DEP rely upon statutory clauses which do not "*expressly* articulate reasonably definite standards of implementation . . . ." *B.H. v. State*, 645 So. 2d 987, 994 (Fla. 1994). Instead, these statutory provisions defer to DEP to "consider and balance" the listed non-specific considerations, § 403.918(a)(c) (1991), and as a result imposes no "actual limit - both maximum and minimum - on what the agency may do." *B.H.*, 645 So. 2d at 994. Therefore, the statute is unconstitutional.

The civil regulatory aspects of the dredge and fill program are irrelevant to the consideration of the constitutionality of the statutes at issue. Determining that these statutes are unconstitutional will not destroy the dredge and fill program. Conversely, the civil regulatory aspects of the dredge and fill program do not make the challenged statutes any the less criminal in nature.

Because it is the content of the individual permit which determines what specific conduct will constitute the crime of violating a permit, and each permit is applicable only to the individual permittee, each permit is a special law defining criminal conduct which is unconstitutional.

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 State and DEP overstate the issue before this Court, and the extent of the disagreement of the parties. Certainly Chapter 403 is, for the most part, an administrative program. This general thrust does not negate the criminal aspects of Chapter 403. In addition, whether the entire dredge and fill permitting program of the DEP is an appropriate administrative response to a proper legislative delegation of authority is not the issue in this case. The narrow issue before this Court is whether § 403.161(1)(b) and (5), which criminalize non-specific conduct to be defined later by DEP on an individual case by case basis, constitutes an improper delegation to an administrative agency of the power to define the elements of a crime. In this case, the Legislature, in crafting the statute, failed to define any elements of any crime, but deferred completely to the DEP, directed only by aspirational goals to be accomplished. This is an unlawful delegation in violation of the separation of powers. *B.H. v. State*, 645 So. 2d 987 (Fla. 984); *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991).

The State and DEP misapprehend Avatar's and Tanel's position when they state that Avatar and Tanel advocate a *per se* rule "prohibiting the legislature from depending on an administrative agency for the implementation of legislatively determined policy where a violation would constitute a crime." Answer Brief, p.15. The rule which Avatar and Tanel advocate, consistent with this Court's prior pronouncements, is a *per se* rule prohibiting the Legislature from depending on an administrative agency to define the elements of a crime in the absence of "reasonably definite standards of implementation." *B.H.*, 645 So. 2d at 994.

The State and DEP purport to find a legislative definition of the crime in the authorization for the DEP to create the dredge and fill permit program itself. Answer Brief, p.8. This argument might be helpful if Avatar and Tanel had been charged with performing dredge and fill work without a permit. However, since the mere authorization of DEP to create the dredge and fill permit program does not specify the acts to be permitted or prohibited by any given permit, the authorization of a permit program does not constitute a legislative creation of the crime of doing certain acts in violation of a permit.

The statutory provision upon which the State and DEP rely for dictating to DEP "reasonably definite standards of implementation,"

B.H., 645 So. 2d at 994, for determining what the content of a permit should be, and thus what the elements of the crime of violating the permit should be, is § 403.918, Fla. Stat. (1991) (now § 373.414, Fla. Stat.) However, rather than being statutes specifically providing definite standards for defining crimes or criminal conduct, the statutes are merely broad platitudes regarding the prevention of various adverse effects. These statutes provide:

> (1) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that water quality standards will not be violated. The department, by rule, shall establish water quality criteria for wetlands within its jurisdiction, which criteria give appropriate recognition to the water quality of such wetlands in their natural state.
>
> (2) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest. However, for a project which significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the project will be clearly in the public interest.
>
> (a) In determining whether a project is not contrary to the public interest, or is clearly in the public interest, the department shall consider and balance the following criteria:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the project will be of a temporary or permanent nature;

6. Whether the project will adversely affect or will enhance significant historical and archaeological resources under the provisions of Sec. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed project.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project.

The legislature defers completely to the DEP as to how to act after it has "consider[ed] and balance[d]" these criteria, and what

specific actions should be required or prohibited as a result of these considerations.

While this legislation may determine the legislature's fundamental policy, it does not "*expressly* articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit - both minimum and maximum - on what the agency may do." *B.H.*, 645 So. 2d at 994 (emphasis in original). There are no "standards" at all, merely broad topics for DEP to "consider and balance." There is no guidance or directive as to what provisions to place in a permit, mandating or prohibiting any specific conduct, in order to define the elements of the crime of violating a permit. Instead, DEP is merely given the goal of avoiding various adverse effects.

In light of the unlimited authority granted to DEP in these statutory provisions, it is curious that the State has chosen to attempt to distinguish *B.H.* as merely prohibiting "open-ended" delegation. Answer Brief, p.18. The delegation to the DEP in this case is far more open-ended than the delegation to the Department of Health and Rehabilitative Services in *B.H.* Indeed, the delegation in this case is so open-ended that it could be satisfied by an unconditional ban on all dredge and fill activity, thereby obviating the need for much of DEP's other dredge and fill

regulation. In *B.H.*, the Department of Health and Rehabilitative Services was permitted to designate restrictiveness level 6 facilities on the basis of "the risk and needs of the individual child." In this case, the DEP is permitted to mandate or prohibit activity in a permit after it considers and balances potential adverse effects. If anything, the delegation in this case is more "open-ended" than the delegation in *B.H.*

In order to rely on cases involving delegation of legislative authority in non-criminal contexts, e.g. *Florida Gas Transmission Co. v. Public Service Commission*, 635 So. 2d 941 (Fla. 1994); *Apalachee Regional Planning Council v. Brown*, 546 So. 2d 451 (Fla. 1st DCA 1989), *affirmed* 560 So. 2d 782 (Fla. 1990); *Jones v. Department of Revenue*, 523 So. 2d 1211 (Fla. 1st DCA 1988), the State misinterprets *B.H.* to render much of the language of *B.H. dicta*. Answer Brief, p.19. This Court in *B.H.* expressly stated that "[t]he delegation of authority to define a crime, for example, is of such a different magnitude from noncriminal cases that more stringent rules and greater scrutiny certainly is required." 645 So. 2d at 993. Thus, this Court has clearly distinguished criminal delegations from non-criminal delegations. The only issue not addressed in *B.H.* was "the precise question of how extensive a role administrative agencies may take in defining the elements of

crimes." *Id.* This Court was not required to address that issue in *B.H.*, because the delegation in question clearly exceeded the legislature's authority to delegate a role to the agency. In this case, the role which the legislature has delegated to DEP in the permit process is even more extensive than the role delegated to the Department of Health and Rehabilitative Services in *B.H.*, and therefore this Court is still not required to answer that precise question.

The plea that flexibility is required in the creating of permit conditions, the violation of which may be a crime, should also fall on deaf ears, at least as applied to Avatar and Tanel in this case. Answer Brief, p.21. The particular permit provisions which Avatar and Tanel are alleged to have violated are not the product of any authority which must be given to DEP for the sake of flexibility. Neither the State nor DEP even argue that the forty-eight (48) hour advance notice requirement is somehow beyond the ability of the legislature to understand. The more technical requirement which was allegedly violated, the failure to employ a turbidity curtain, has been expressly included by the legislature on the face of the statute in other contexts, § 403.813(2)(f), (g), thus demonstrating beyond peradventure that the legislature has the

ability to understand and apply this technology without deferring to the DEP.

This Court's opinion in *Rosslow v. State*, 401 So. 2d 1107 (Fla. 1981), relied upon by both the State and DEP, does not dictate a contrary result because the statute involved in that case is not analogous to the statute in this case. The statute in *Rosslow* criminalized the sale of citrus without an inspection certificate. The statute itself then delineated four (4) very precise, limited exceptions which could be granted by the agency. The legislature determined both what was unlawful, and what would be excepted, leaving it to the agency only to perform the inspections and grant the legislatively created exceptions. The limited role of the agency in *Rosslow* of administering exceptions to what the legislature has determined to be criminal does not implicate the same concerns discussed by this Court in *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991), that the democratic process must determine what conduct will be deemed criminal in the first instance.

State v. Cumming, 365 So. 2d 153 (Fla. 1978) and *Cesin v. State*, 288 So. 2d 473 (Fla. 1974) do not support the statute because the statutes in those cases completely defined the elements of the crime, leaving to the agency only the definition of certain

scientific terms within parameters established by the legislature. Similarly, *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789 (Fla. 1919), to the extent that the rationale in that case is still valid, does not support the position of the State or DEP because the statute in that case completely defines the criminal conduct – refusal to dip cattle for purposes of tick eradication.

The manatee speed limit cases relied upon by both DEP and the State also demonstrate a more limited exercise of discretion by the agency, within limits and according to standards set by the legislature. In *Marine Industries Association of South Florida, Inc. v. The Florida Department of Environmental Protection*, 672 So. 2d 878 (Fla. 4th DCA 1996) and *State v. Rawlins*, 623 So. 2d 598 (Fla. 5th DCA 1993), the authorization for the manatee speed limits in question limited and directed the agency both as to where to regulate and how to regulate. In so doing, the legislature imposed both standards and limits on the agency's exercise of its delegated power.

In its Amicus Brief, the DEP notes several statutes which it feels are analogous in delegating the authority to define crimes to an agency. Amicus Brief, p.26. However, DEP correctly notes that none of these statutes are before this Court, and that determination of whether any or all of these statutes are also

unconstitutional would require in depth analysis. DEP does not provide this in depth analysis, and to do so here would exceed the scope of this Reply Brief. By attempting to invoke a parade of horribles in the guise of a multitude of potentially unconstitutional statutes, the DEP is attempting to create the impression that upholding the statute in question notwithstanding its unconstitutionality will serve the convenience of the legislature and the State. However, "Florida has not relied on . . . arguments of expedience or necessity, or any penumbral theory in gauging the contours of the separation of powers." *B.H.*, 645 So. 2d at 992. Neither this statute, nor any other cited by DEP, can be rendered constitutional merely because it would be convenient or expedient to do so.

The State and DEP appear to be concerned that invalidating § 403.161(1)(b) and (5) will somehow disrupt the entire dredge and fill permit program and place Florida's environment at risk. This concern is overstated. The legislature has expressly created a crime of causing pollution in § 403.161(1)(a), (3) and (4). Section 403.161(1)(a) makes it a crime "to cause pollution . . . so as to harm or injure human health or welfare, animal, plant, or aquatic life or property." A wilful violation of this section is rendered a felony by § 403.161(3), and a reckless or grossly

careless violation of this section is rendered a misdemeanor by § 403.161(4). Further criminalizing causing pollution through violation of a permit would be superfluous to protection of Florida's environment, or the integrity of the dredge and fill program. Of course, neither Avatar nor Tanel were charged under § 403.161(1)(a), (3) or (4).

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.

While the general law makes violation of a permit a misdemeanor, this observation is only the beginning of the inquiry. What acts or omissions will constitute a violation of the permit, and therefore a misdemeanor, will vary from permit to permit, and therefore from permittee to permittee, at the discretion of the DEP. It is this individualized determination from permit to permit of what conduct is proscribed or required which renders each permit a special law defining criminal conduct.

The State incorrectly assumes that this argument is dependent upon Avatar and Tanel's other argument with respect to delegation. Answer Brief, p.26, 27. This is incorrect. If the delegation element were taken out of the dredge and fill permit process, with the legislature directly issuing permits, the argument remains the same. It is not the source of the permit, but rather the variation in requirements and proscriptions from permit to permit, which renders each permit a special law defining criminal conduct.

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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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true and correct copy of the foregoing Reply Brief on the Merits has been served by U.S. Mail, Postage Prepaid, this 9th day of March, 1998, to counsel of record as noted below.

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