SUPREME COURT OF FLORIDA

Case No.: SC04-990
L.T. CASE NO.: 4D02-3626

CITY OF HOLLYWOOD,

Petitioner,

v.

COLON BERNARD MULLIGAN,

Respondent.
_____/

INTITAL BRIEF OF PETITIONER, CITY OF HOLLYWOOD

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STATEMENT OF THE CASE AND THE FACTS

A. Statement of the Case and the Facts

Colon Bernard Mulligan ("Mulligan") initiated the underlying action by filing a Complaint (R. I:1-12) and a subsequent Amended Complaint (R. I:27-50) in the Circuit Court of the 17th Judicial Circuit against the City of Hollywood ("Hollywood") seeking a declaratory judgment that the City of Hollywood Vehicle Impoundment Ordinance (§101.46, Hollywood Code of Ordinances) (the "Ordinance") is invalid. Mulligan alleged the he was arrested by Hollywood police officers for offering to commit prostitution in violation of Fla. Stat. §796.07 and that, pursuant to the Ordinance, his 1989 Chevrolet automobile was impounded. Mulligan thereafter paid an administrative fine pursuant to the Ordinance, and the vehicle was returned to him. The trial court subsequently certified the action as a class action, and permitted Mulligan to proceed on behalf of all persons allegedly aggrieved by the enforcement of the Ordinance (R. I. I:58-60).

Both Mulligan (R. I:66-109) and Hollywood (R. I:135-163) filed motions for summary judgment. The trial court rejected all challenges to the Ordinance, and accordingly granted Hollywood's motion for summary judgment, and denied Mulligan's motion (R. II:209-210).

On Mulligan's appeal, the 4th District Court of Appeals reversed the trial court, and held that the Ordinance was preempted by, or, in the alternative, was in conflict with, the Florida Contraband Forfeiture Act, ("FCFA"), Fla. Stat. §932.701 et seq. Mulligan v. City of Hollywood, 871 So. 2d 249 (Fla. 4th DCA 2003). The District Court of Appeals thereafter denied Hollywood's Motion for a Rehearing, but certified to this Court the preemption issue as being of great public importance. This appeal followed.

B. The Hollywood Ordinance

The Ordinance at issue[1] authorizes the impoundment of motor vehicles whenever a police officer has probable cause to believe that the vehicle contains cannabis or a controlled substance, was used to purchase or attempt to purchase cannabis or a controlled substance, or was used to facilitate the commission of an act of prostitution. Ordinance §101.46(A). The Ordinance contains several exceptions to Hollywood's authority to impound, the most significant for our purposes being that the Ordinance is expressly inapplicable if the vehicle is subject to forfeiture under the FCFA. Ordinance §101.46(C).

Upon seizing the vehicle, the Ordinance requires that the police officer provide for the towing of the vehicle, and requires prompt written notice to the

[1] More than a dozen Florida municipalities have vehicle impoundment ordinances which are identical in all material respects to the Hollywood Ordinance. Appendix at 1.

owner of the vehicle that the vehicle has been impounded, and that the owner or person in control of the vehicle has a right to a preliminary hearing. Ordinance §101.46(B).

Upon receipt of a request for a preliminary hearing, a hearing is held within 96 hours (excluding weekends and holidays) before a Special Master. At the preliminary hearing, Hollywood bears the burden of showing that there is probable cause to believe that the motor vehicle is subject to impoundment pursuant to the Ordinance. If the Special Master determines that probable cause has not been shown, the vehicle is released forthwith. If probable cause is shown, the owner can regain the vehicle by paying an administrative fee of up to $500.00 plus towing and storage costs, or by posting a bond in the same amount. Ordinance §101.46(D).

If no preliminary hearing is requested, or if the Special Master concludes that there is probable cause at the preliminary hearing, Hollywood schedules a final hearing, notifying the owner by certified mail of the time, date and location of the hearing. The final hearing is held no later than 45 days after the date that the vehicle was impounded. At the final hearing, Hollywood bears the burden of showing by a preponderance of the evidence that the vehicle was properly impounded pursuant to the Ordinance, and that the owner of the vehicle either knew, or should have known that the vehicle was used or was likely to be used in

violation of the Ordinance. If the City fails in fulfilling its burden of proof, the vehicle is returned to the owner without penalty. If the City prevails, the owner may be ordered to reimburse the City for its administrative expenses in an amount not to exceed $500.00. Ordinance §101.46(E).

At no time is the actual vehicle subjected to forfeiture pursuant to the Ordinance. However, vehicles which remain unclaimed pursuant to the provisions of the Ordinance are subject to the state provisions for the disposition of lost or abandon property contained in Fla. Stat. Ch. 705. Ordinance §101.46(G).

SUMMARY OF ARGUMENT

The district court erred in concluding that the Ordinance is preempted by FCFA. Hollywood has home rule authority to enact the Ordinance unless the state, through a clear, express statement, manifests its intent to preclude local regulation. FCFA contains no such preemption language, and Hollywood is accordingly able to regulate the forfeiture of vehicles used in the commission of crime. Moreover, even if the FCFA were to include such express preemption language, Hollywood would not be precluded from enforcing an impoundment ordinance, which is substantially different than FCFA's forfeiture scheme.

The district court similarly erred in its alternative conclusion that the Ordinance conflicts with FCFA. Since the Ordinance, by its express terms, does not apply in those instances where FCFA forfeiture is available, compliance with

the Ordinance, by definition, cannot necessitate violation of FCFA standards. Moreover, the fact that FCFA actions entitle a defendant to a jury trial while the Ordinance does not is of no import; different procedural processes in the prosecution of statutory violations and municipal ordinance violations which pertain to different underlying conduct does not mean that the statute and ordinance conflict.

ARGUMENT

I. The District Court Erred in Concluding That the Ordinance is Preempted by the FCFA

The district court held that the Ordinance, which provides for the temporary impoundment[2] of motor vehicles which are used to commit certain

[2] According to the district court, since impoundment involves "a loss of property or a right . . . as a penalty for violating law . . .", Howard Cole & Co. v. Williams, 27 So. 2d 352, 356 (Fla. 1946), impoundment is a "forfeiture". Mulligan, 871 So. 2d at 252. Forfeitures, reminds the district court, are not favored by the legal system, and should be construed against the government. This broad definition of forfeiture (never repeated in any other published decision in the 58 year history of Howard Cole) virtually eliminates municipal home rule power. Since municipal ordinances impose either a fine (a loss of "property") or a jail sentence (A loss of the "right" to one liberty), Fla. Stat. §162.22, all municipal ordinances are, according to the district court, "forfeiture schemes" to be presumed invalid. No mention is made by the lower court (and apparently no heed has been taken) that the Municipal Home Rule Powers Act "shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution." Fla. Stat.§166.021(4). Similarly, the district court was unconcerned that legislative enactments are presumed to be constitutional, Gardner v. Johnson, 451 So. 2s 477.479 (Fla. 1984), and that courts are required to resolve doubts as to the interpretation of ordinances in a manner that will render them valid, if possible. Hamilton v. State, 366 So. 2d 8,10 (Fla. 1978).

misdemeanor offenses of drug possession or the solicitation of prostitution, is preempted by the FCFA, which provides for the permanent forfeiture of, inter alia, motor vehicles which are used to commit certain felonies, notwithstanding the fact that the Hollywood Ordinance is expressly inapplicable to vehicles which are subject to forfeiture pursuant to the FCFA.

A. Absent a clear statement of express preemption by the legislature, Florida municipalities are entitled to regulate in areas also regulated by the State.

Municipal home rule powers, generally conferred in Article VIII of the Florida Constitution, are expressly statutorily recognized:

> As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

Fla. Stat. §166.021(1) (emphasis added).

Only four exceptions to municipal home rule powers have been recognized by the legislature, the one relevant here being

> Any subject expressly preempted to state or county government by the constitution or by general law.

Fla. Stat. §166.021(3)(c) (emphasis added).

As the statute clearly indicates, the doctrine of preemption will prohibit a municipality from legislating on an issue only if the state expressly so provides. While, in other contexts, the law recognizes concepts such as "implied preemption" and "field preemption", these other forms of preemption are irrelevant when considering whether a Florida statute prohibits a Florida municipality from legislating. As this Court has stated

> Under the preemption doctrine a subject is preempted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme. Florida law, under §166.021, Florida Statutes (1981), which cites article VIII, section 2(b) of the Florida Constitution, includes a more restrictive application of the preemption doctrine, precluding preemption and leaving 'home rule' to municipalities unless the legislature has expressly said otherwise.

Tribune Company v. Cannella, 458 So.2d 1075, 1077 (Fla. 1984) (emphasis added). Moreover, courts strictly construe what is meant by "express preemption". To find a subject matter expressly preempted to the state, the express preemption language must be a specific statement; express preemption cannot be implied or inferred. See City of Daytona Beach v. Del Percio, 476 So. 2d 197, 201 (Fla. 1985) ("The Florida Constitution and the statutes thus imbue the City with the state's full police powers . . . except those powers expressly preempted") (emphasis in original). See also Hillsborough County v.

Florida Restaurant Association, Inc., 603 So.2d 587, 590 (Fla. 2d DCA 1992), Florida League of Cities, Inc. v. Department of Insurance and Treasurer, 540 So.2d 850, 856 (Fla. 1st DCA 1989), Board of Trustees of the City of Dunedin v. Dulje, 453 So.2d 177, 178 (Fla. 2d DCA 1984) ("Express preemption requires a specific statement; the preemption cannot be made by implication nor by inference"); Edwards v. State, 422 So.2d 84, 85 (Fla. 2d DCA 1982) ("An 'express' reference is one which is distinctly stated and not left to inference").

B. When the legislature desires to preempt local regulation, they do so clearly and directly.

The Florida legislature, of course, understands the need to expressly preempt local legislation when it so desires, and knows how to draft state legislation to accomplish this purpose. Metropolitan Dade County v. Santos, 430 So.2d 506, 508 (Fla. 3d DCA 1983) ("obviously the legislature knew how to forbid local intrusion into regulation of this subject matter if it wished. Particularly in view of the settled rules which require that any such language be strictly construed . . ."). Examples of express preemption in state legislative enactments abound. On the subject of minors and adult movies, the legislature provides that

> In order to make the application and enforcement of ss. 847.07-847.09 uniform throughout the state, it is the intent of the legislature to preempt the field, to the exclusion of counties and municipalities, insofar as it concerns exposing persons over 17 years of age to harmful motion pictures, exhibitions, shows, representations and presentations. To that end, it is hereby

> declared that every county ordinance and every municipal ordinance adopted prior to July 1, 1973, and relating to said subjects shall stand abrogated and unenforceable on and after such date and that no county, municipality, or consolidated county-municipal government shall have the power to adopt any ordinance relating to the subject on or after such effective date.

Fla. Stat. §847.09(1).

Similarly, on the subject of price controls, the legislature provides that

> Except as hereinafter provided, no county, municipality, or other entity of local government shall adopt or maintain in effect an ordinance or a rule which has the effect of imposing price controls upon a lawful business activity which is not franchised by, owned by, or under contract with, the governmental agency, unless specifically provided by general law.

Fla. Stat. §166.043(1)(a).

On the subject of smoking, Fla. Stat. §386.209, entitled "Regulation of Smoking Preempted to State", it is provided that "(t)his part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject".

C. The FCFA does not preempt municipal forfeiture schemes.

The FCFA does not contain preemption language similar to those statutes cited above. The district court decision relies exclusively upon Fla. Stat. §932.704(1), which provides that

> It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act

> to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of the innocent owners and lien holders . . .

This is not preemption language. Hollywood, of course, does utilize the provisions of the FCFA when the act applies. The referenced language certainly does not expressly indicate that a city may not legislate on the subject of vehicle forfeiture in addition to following the mandate that it "utilize the provisions" of the FCFA. Most significantly, the statute certainly does not provide that a municipality may not legislate a different remedy (brief impoundment versus forfeiture) for different underlying conduct (certain misdemeanors versus felonies).

Language comparable to that cited by the district court as contained in the FCFA has routinely been held to not preempt municipal ordinances. For instance, in Edwards, 422 So.2d 84, the City of Venice adopted an ordinance which prohibited the possession of cannabis and cocaine. An individual charged under the ordinance argued that the ordinance was preempted by the Florida Comprehensive Drug Abuse Prevention and Control Act, which also prohibited possession of these substances, and which expressly provided that "uniformity between the Laws of Florida and the Laws of the United States is necessary and desirable for effective drug abuse prevention and control, and . . . the inconsistencies in penalty provisions of current law demand amendment".

In rejecting the claim, the court found that "(t)here is no suggestion of a constitutional preemption, and neither the language of the legislative findings of fact nor the terminology of Chapter 893, Florida Statutes (1981), expressly preempts the field of drug abuse control. The City of Venice may, therefore, enact ordinances on that subject." Id at 85.

Similarly, in State v. Redner, 425 So.2d 174 (Fla. 2d DCA 1983), the City of Tampa enacted an ordinance making it unlawful for any employer of persons working where alcoholic beverages are sold to permit them to remain in such employment longer than 48 hours without having registered with the police department. An individual charged with a violation of the ordinance argued that the ordinance was preempted by the Florida Beverage Law, which seemed to limit local control of establishments selling alcoholic beverages to hours of operation, location of business and sanitary regulations:

> Nothing in the Beverage Law contained shall be construed to affect or impair the power or right of any incorporated municipality of the state hereafter to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefore, of any licensee under the Beverage Law within the corporate limits of such municipality.

Fla. Stat. §562.45(2). While expressly noting that the Tampa ordinance is not directed at any of the topics which the statute seems to reserve to

municipalities, the court nevertheless rejected the preemption argument because the referenced language did not sufficiently evidence express preemption by the legislature. See also City of Miami Beach v. Rocio, Corp., 404 So.2d 1066 (Fla. 3d DCA 1981) (Municipal ordinance regulating condominium conversion is not preempted by the Condominium Act, even though the Condominium Act provides that "every condominium created and existing in this state shall be subject to the provisions of this chapter"); Hillsborough County, 603 So. 2d at 590 (county not preempted from requiring a health warning sign in establishments that serve alcohol, notwithstanding a state statute that provides that "(t)he regulation and inspection of food service establishment . . . are preempted to the state", because "such generalized (preemption) language does not expressly refer to signage requirements as it must for us to find an express preemption.") (emphasis in original).

D. The FCFA does not preempt municipal vehicle impoundments.

Even assuming, argundo, that the FCFA contains an express preemption which precludes municipally authorized forfeitures for certain enumerated felonies, local government is clearly not preempted from providing a different regulatory scheme (impoundment versus forfeiture) for different underlying offenses (felonies versus misdemeanor drug possession and solicitation of prostitution).

The gravamen of the district court's decision is that the FCFA's "requirement of a felony implicitly excludes forfeitures based on misdemeanors and limits forfeiture to cases involving a felony". Mulligan, 871 So. 2d at 256 (emphasis added). In other words, according to the district court, not only does the phrase "law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act" express preempt a municipality from providing for forfeitures for FCFA's enumerated felonies, it "implicitly expressly preempts" brief impoundments for crimes unregulated by FCFA.

Merely because the FCFA provides a means under which a government can take (permanent) possession of a motor vehicle does not mean that a municipality is preempted from ever taking (even temporary) possession of a motor vehicle under a different regulatory scheme because the field of "taking possession of a motor vehicle" has been preempted[3]. The state oftentimes prohibits certain activities which it defines as criminal, leaving local government to impose (usually lesser) penalties[4] for (usually lesser)

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[3] Judge May, in her specially concurring opinion on Hollywood's motion for rehearing, of course, agrees, finding that the Ordinance is not preempted by the FCFA. Mulligan, 871 So. 2d Ct. 257 (May, J., specially concurring).

[4] According to the district court, "impoundments" are "forfeitures" because they (temporarily) deprive one of his property. Ignoring for the moment the substantial differences and purposes between in rem (forfeiture) and in personam (impoundment) actions, (impoundments, after all, seek only to temporarily remove an item from someone to prevent its continued use as an instrument of crime), surely it must be conceded that the FCFA and the Ordinance are radically different

misbehavior. This Court recognized the validity of such local regulation in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985). In Del Percio, the City of Daytona Beach enacted an ordinance prohibiting female persons from exposing their breasts in an establishment dealing in alcoholic beverages. An individual charged with violating the ordinance alleged that Chapter 847, Florida Statutes, which regulates obscene exhibitions, expressly preempted the ordinance. In rejecting the claim, this Court held that, while the state expressly preempted municipal regulation of the field of "obscene exhibitions", it did not preempt a local government from regulating "non obscene behavior which very easily can degenerate into obscene behavior". Id at 201. See also St. Johns County v. Northeast Florida Builders, Assoc., Inc., 583 So. 2d 635 (Fla. 1991) (Merely because the legislature has given school boards taxing authority does not mean that local government is preempted from funding school board facilities through the assessment of impact fees); Nelson v. State, 26 So. 2d 60 (Fla. 1946) (Merely because the State Beverage Act extensively regulates the sale, distribution and manufacture of liquor does not mean that a municipality is preempted from regulating who can serve liquor).

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in scale. The FCFA subjects individuals to potential multi-million dollar losses of cash or property (houses, boats, airplanes, etc.). The Ordinance places individuals in jeopardy to the maximum amount of $500.00.

District Courts have similarly recognized that, merely because the state legislature had criminalized certain conduct, it has not "legalized" other, related conduct so as to preclude municipal regulation. For instance, in Leigh v. State, 298 So.2d 215 (Fla. 1st DCA 1974), the City of Jacksonville prohibited the sale of obscene magazines. The Florida legislature however, in Fla. Stat. 847.09, regulated the subjects of obscene motion pictures, exhibitions, shows, representations and presentations, and expressly preempted local government from further regulating the subject. An individual charged with violating the Jacksonville ordinance accordingly alleged that the ordinance was preempted by the state statute. In rejecting the challenge, the appellate court held that while the state had preempted the regulation of obscene motion pictures, exhibitions, shows, etc., it did not preempt local government from regulating obscene magazines. The Jacksonville ordinance was thus not preempted. See also State v. Thompson, 536 So.2d 388 (Fla. 3d DCA 1989) (even though the state preemptively regulates disorderly intoxication and public intoxication, a municipal ordinance may prohibit the different, lesser misconduct of consuming alcoholic beverages in public); Hillsborough County, 603 So.2d 597 (even though the state pervasively regulates the preparation, service and sale of alcoholic beverages, a local government was not preempted from enacting an ordinance requiring that a health warning sign be posted in certain

establishments that serve alcohol). See generally State v. Redner, 425 So. 2d 174, 175 (Fla. 2d DCA 1983) (a municipality may "enact legislation on a topic already visited by state law except in those areas where the subject matter has been expressly preempted by the constitution or state law or when the ordinance directly conflicts with state laws.") (emphasis added).

II. The Hollywood Ordinance is not in conflict with the FCFA.

As an alternate holding, the district court held that the Hollywood ordinance conflicts with the FCFA because the FCFA provides for court proceedings and a jury trial, while the Hollywood ordinance provides for administrative proceedings without a jury trial. No explanation is made as to why these differences constitute a "conflict", and the conclusion that there is a conflict is in error.

A. Since the Ordinance can coexist with FCFA, there is no conflict.

As discussed, supra, the FCFA and the Hollywood ordinance provide for different remedies for different misconduct. For instance, the FCFA only applies where the underlying offense committed with a motor vehicle is a felony, while the Hollywood ordinance deals with misdemeanor level drug possession and solicitation of prostitution. Moreover, the Hollywood ordinance is expressly inapplicable in all instances where the FCFA is applicable. In

short, an individual may be subject to the FCFA, and may be subject to the Hollywood ordinance, but never both.

As this Court has held, "(a)n ordinance will be declared unconstitutional because in conflict with general law if the ordinance and the legislative provision cannot co-exist". Board of County Commissioner of Dade County v. Wilson, 386 So.2d 556 (Fla. 1980) (citation omitted). See also F.Y.I. Adventurers, Inc. v. City of Ocala, 698 So.2d 583, 584 (Fla. 5th DCA 1997) ("?Conflict' for this purpose is given a very strict and limited meaning . . . (The ordinance and the statute) must contradict each other in the sense that both legislative provisions (the ordinance and the statute) cannot co-exist. They are in ?conflict' if, in order to comply with one, a violation of the other is required").

There is no conflict between the FCFA and the Ordinance because they govern different conduct. Indeed, the same conduct can never implicate both the FCFA and the Ordinance. The statute and the Ordinance can obviously co-exist. If one uses a motor vehicle to commit one of the FCFA enumerated felonies, the vehicle may be forfeited (through judicial proceedings with a jury). If an individual uses a motor vehicle to commit an enumerated misdemeanor, the vehicle may be briefly impounded (by an administrative agency without a jury). Compliance with the FCFA does not necessitate a violation of the Ordinance

(indeed, since the Ordinance does not apply if the FCFA does, a violation of the FCFA does not even implicate the Ordinance and visa versa).

B. The fact that different procedures govern FCFA prosecutions and Ordinance prosecutions does not mean there is a conflict.

The fact that the prosecution for violation of a municipal ordinance is conducted in a manner different from prosecutions of state statutes which regulate similar (but more severe) misconduct does not mean that the ordinance and statute "conflict". For instance, if one is accused of performing an "obscene exhibition" in violation of Chapter 847, Florida Statutes, one is entitled to a jury trial because the exhibition constitutes a first degree misdemeanor, Fla. Stat. §847.011(1)(a), punishable by a year in jail. Fla. Stat. §775.082. Whipley v. State, 450 So. 2d 836 (Fla. 1984). In contrast, a female who exposes her breasts in Daytona Beach may be prosecuted for violating a municipal ordinance, and not be entitled to a jury trial. State v. Webb, 335 So. 2d 826 (Fla. 1976). Nonetheless, the statute and the ordinance do not conflict. Del Percio, 476 So. 2d 197. Similarly, a public official who allegedly violates the state code of ethics is subject to the administrative procedures of the Commission on Ethics. Fla. Stat. §112.391 et seq. A municipality which creates an ordinance imposing addition ethical requirements on public officials, however, will prosecute an alleged violation of the ordinance in a court of law.

Fla. Stat. §162.22. Nevertheless, the statute on ethics and the ordinance on ethics do not conflict. Op. Att'y. Gen. Fla. 91-89 (1989). Accordingly, there is no conflict between FCFA and the Ordinance.

CONCLUSION

Since the district court erred in concluding that the Ordinance is preempted by (or is in conflict with) FCFA, Hollywood respectfully requests that this Court reverse the district court's decision, and reinstate the judgment entered in Hollywood's favor by the circuit court.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U. S. Mail upon Ronald S. Guralnick, Esq., Law Offices of Ronald S. Guralnick, 550 Brickell Ave., Penthouse 1, Miami, FL 33131 on this ____ day of July, 2004.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

It is hereby certified that this Petitioner's Initial Brief has been submitted in Times New Roman 14 point font in compliance with Florida Rules of Appellate Procedure 9.210(a)(2).

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