

shall ascertain the existence of any sanitary nuisance as herein defined, it shall serve notice upon the proper party or parties to remove or abate the said nuisance or, if necessary, proceed to remove or abate the said nuisance in the manner provided in §823.01.

And §381.482:

The division and/or its inspectors may enter and inspect migrant labor camps at reasonable hours and investigate such facts, conditions, and practices or matters, as may be necessary or appropriate to determine whether any person has violated any provisions of this law or rules and regulations of the division pertaining hereto are being violated. The division may from time to time at its discretion publish the reports of such inspections in its monthly bulletin.

Based on these statutes, it would have to be said that written complaints, or complaints reduced to writing by the Division of Health officials, are received pursuant to law and in connection with the transaction of official business. It would necessarily follow that all such complaints are public records unless there is an exception therefor by law. Section 119.07(2) (b), F. S., expressly exempts from the provisions of §119.07, *supra*, certain records, none of which concern complaints to or received by the Division of Health. Section 119.07(2) (a) says that "[a]ll public records which are presently deemed by law to be confidential or which are prohibited from being inspected by the public . . . shall be exempt from the provisions of this section." A search of the Florida Statutes reveals no law providing an exception to the Public Records Law for complaints made to and received by the Division of Health under the aforecited statutes.

Therefore, I feel that such complaints made to the Division of Health are public records under §119.01, F. S.

073-337—September 12, 1973

PERJURY

PERJURY BY CONTRADICTORY STATEMENTS—ELEMENTS OF CRIME

To: Leo C. Jones, State Attorney, Panama City

Prepared by: Reeves Bowen, Assistant Attorney General

STATEMENT OF FACTS:

In May, 1973, a woman complained to a deputy sheriff that a named man had raped her on the date she made the complaint. The deputy sheriff was also a notary public and she knew that this was so. He informed her that it would be necessary for her to make an affidavit as to the facts before the case could be carried to court. He prepared and she executed an affidavit stating, among other things, that she had sexual intercourse with the named man as a result of his having struck and beaten her. She left the affidavit with the deputy sheriff-notary public and it was turned over to an assistant state attorney and used by the state attorney, along with other evidence, as the basis for the rape information that he filed against the named man later in May, 1973. At a subsequent trial of the named man on said rape information, she testified that he struck her and beat her but that they did not have sexual intercourse.

QUESTION:

Is the woman subject to prosecution under §837.021(1), F. S., for perjury by contradictory statements?

SUMMARY:

When a woman complains to a deputy sheriff that a named man has raped her, such deputy, who is known to her to be a notary public, advises her that it will be necessary for her to make an affidavit as to the facts before the case can be carried to court, she executes such an affidavit and leaves it with the deputy-notary public, who transmits it to an assistant state attorney after which the state attorney uses it and other evidence as the basis for filing a rape information against the accused man, and when at the later trial of such man she testifies that he did not have sexual intercourse with her despite her statement in the affidavit to the contrary, she is subject to prosecution for perjury by contradictory statements under §837.021(1), F. S.

Section 837.021(1), F. S., provides that:

837.021 Perjury by contradictory statements.—

(1) Whoever, in one or more trials, hearings, investigations, depositions, or affidavits, *in which the making of statements under oath or affirmation is required or authorized by law*, willfully makes two or more material statements under oath or affirmation, when in fact two or more of the statements contradict each other, is guilty of a felony of the third degree, punishable as provided in §775.082, §775.083 or §775.084. The prosecution may proceed in a single count by setting forth the willful making of inconsistent statements under oath or affirmation pursuant to requirement or authorization of law and alleging in the alternative that one or more of them are false. (Emphasis supplied.)

To support a prosecution under this statute, it is not only necessary that each of the contradicting statements relied on by the prosecution be made under oath or affirmation but it is also necessary that each of such statements be made in a trial, hearing, investigation, deposition, or affidavit "*in which the making of statements under oath or affirmation is required or authorized by law.*" (Emphasis supplied.) *Collins v. State*, 15 So. 220 (Fla. 1894), illustrates the effect to be given such words in a perjury statute. The perjury statute involved in that case read as follows:

"Whoever, *being authorized or required by law* to take an oath or affirmation, willfully swears or affirms falsely in regard to any material matter or thing respecting which such oath or affirmation is authorized or required, shall be deemed guilty of perjury, and shall be imprisoned in the state penitentiary not exceeding twenty years." (Emphasis supplied.)

In order to induce County Treasurer Ellis to deposit county moneys in the Lake City Bank, Collins and others executed their bond to secure repayment upon request. Also, to further induce Ellis to make such deposits, Collins made an affidavit before a notary public in which he falsely swore and affirmed that he was worth ten thousand dollars over and above his debts and exemptions. Collins was prosecuted for and convicted of perjury because of the making of said false affidavit. When the case came before the Supreme Court of Florida, it quoted the applicable perjury statute as we have quoted it above and went on to reverse Collins' conviction, saying:

The crime of perjury, under this section of the statute, can only be made out in those cases where the oath or affirmation taken falsely is one that "*is authorized or required by law to be taken.*" There are many oaths authorized or required by different provisions of law to be taken, that if sworn or affirmed to willfully, and falsely, will subject the affiant to indictment under and to the penalties of this provision of the law; such, for example, as the affidavits required by law for the issuance of the

various writs of attachment, garnishment, replevin, claims to property levied upon, for injunction, for the proof of deeds and other writings for record, and in divers other cases wherever the law either expressly authorizes or requires the particular oath to be taken.

* * * * *

. . . but nowhere does this or any other law authorize or require a county treasurer to exact a bond or other security for his deposit of the county funds in his hands, and nowhere does the law authorize or require the principals or sureties upon any such bond that may be so voluntarily given to justify or take an oath as to their property worth. *The bond, therefore, and the oath thereto, alleged to have been falsely taken in this case, were entirely voluntary, extra judicial, and neither authorized nor required by any law to be taken by the parties charged with having taken the same willfully and falsely. One of the vital essentials of the crime to be alleged and made out under this section of the statute is that the oath charged to have been falsely taken must be such an oath as is authorized or required by law to be taken under the circumstances by which it is surrounded when taken.*(Emphasis supplied.)

I see no reason to doubt that the law authorized the woman here involved to testify concerning the alleged rape at the trial of the man for raping her. Therefore, the question to be determined in the light of our Supreme Court's said pronouncements in the *Collins* case is as to whether the making of said extrajudicial affidavit was "required or authorized by law."

At the time said rape information was filed, §923.03(2), F. S. 1971, provided that:

(2) An information shall be in the same form and signed by the prosecuting attorney who shall also append thereto the oath of the prosecuting attorney to the effect following:

Personally appeared before me _____ (official title of prosecuting attorney who being first duly sworn, says that the *allegations as set forth in the foregoing information are based upon facts that have been sworn to as true* and which, if true, would constitute the offense therein charged. (Emphasis supplied.)

The affidavit shall be made by the prosecuting attorney before some person qualified to administer an oath.

This statutory provision does not require that the "facts that have been sworn to as true," upon which an information is based, be sworn to before the state attorney or a judicial officer. All that is required is that such facts be "sworn to as true," and this requirement is met when the witness or witnesses make affidavit to the facts before a notary public.

Therefore, the law authorized the woman to make the affidavit under consideration for the purpose of supplying the basis or part of the basis, upon which an information could be filed by the state attorney against the accused man, that is to say, for the purpose of supplying all or a part of the "facts that have been sworn to as true" for consideration by the state attorney in determining whether to file an information. (The rape of a woman, as distinguished from a girl under the age of eleven, is made a noncapital felony by §794.01, F. S., and §15(a) of Art. I of the State Constitution authorized it to be prosecuted upon information filed by the prosecuting attorney.)

I think that such a purpose can properly be attributed to her. She knew that the deputy sheriff was a notary public. He advised her that it would be necessary for her to make the affidavit before the case could be carried to court. He prepared the affidavit and she executed it and left it with him, with the result that the state

attorney used it as a part of the basis for filing a rape information against the accused man. Under these circumstances, her purpose in executing the affidavit was to help to get the case into court in any available lawful manner, including its use by the state attorney as the basis or part of the basis for filing an information. Consequently, I consider that the making of the affidavit was authorized by law within the meaning of §837.021(1), F. S.

It is true that Rule 3.140(g), CrPR, requires that "[a]n information charging the commission of a felony shall be signed by the state attorney *under oath stating his good faith in instituting the prosecution.*" (Emphasis supplied.) However, the Supreme Court's order of December 6, 1972, adopting said rule and the other Criminal Procedure Rules which became effective on February 1, 1973, did not supersede the provisions of the above-quoted §923.03(2), F. S. 1971. This is so because the Supreme Court's said order (272 So.2d 65) provides in pertinent part that "[a]ll conflicting rules and statutes are hereby superseded; statutes not superseded shall remain in effect as rules promulgated by the Supreme Court." (Emphasis supplied.)

There was no conflict between §923.03(2), F. S. 1971, and Rule 3.140(g), CrPR; hence, said order left §923.03(2) in full force and effect.

073-338—September 12, 1973

SALTWATER FISHING

EFFECT OF UNIFORM REGULATION OF SPEARFISHING ON EXISTING REGULATIONS AS TO SNOOK

To: Thomas F. Lewis, Representative, 83rd District, North Palm Beach

Prepared by: Victor Walsh, Assistant Attorney General

QUESTION:

What effect does Ch. 73-141, Laws of Florida, have on Ch. 370, F. S., relating to saltwater fisheries, and particularly, what is the effect on §370.111 relating to snook?

SUMMARY:

Chapter 73-141, Laws of Florida [§370.172, F. S.], regulates uniformly throughout the state the areas in which spearfishing may or may not be conducted in the salt waters of this state and does not affect the existing provisions of general law as to what species or how, or how many of, a particular species of fish may be taken by spearfishermen.

It appears that the primary objective of Ch. 73-141, *supra* [§370.172(2) F. S.], was to provide uniform regulation of the places in which underwater spearfishing may be safely conducted in the salt waters of this state. To this end, the legislature followed the procedure of Art. III, §11 (a) (21), State Const., in adopting Ch. 73-141 by a three-fifths vote, and thereby foreclosed any special law, general law of local application, or local ordinance dealing with spearfishing in salt waters.

Section 370.172 (2), F. S., reads as follows:

(2) After October 1, 1973, it shall be lawful to spearfish in all salt waters and all saltwater tributaries located in this state except as herein provided.

Subsection (3) of §370.172, *supra*, then expressly prohibits spearfishing in the immediate area of public bathing beaches, fishing piers and catwalks beneath them, and jetties. Subsection (6), *id.*, authorizes the Department of Natural Resources to establish other restricted areas and requires the posting of notices in