

magistrate be unable to determine the existence of probable cause from the affidavit presented to him, then he may require the complainant to come in and give sworn testimony for the purpose of determining if there is reasonable ground to believe the complaint to be true.

In the circumstances described in your question, the magistrate determined the existence of probable cause, not only from the contents of the affidavit executed by the complainant but also from talking with him on the telephone. The magistrate then expressly authorized the person before whom the affidavit was executed to complete a presigned warrant, which is a ministerial function. It is assumed that the magistrate conveyed to the officer sufficient information, *i.e.*, amount of bail and return date, to enable him to complete the presigned warrant. I find nothing unlawful in this procedure. Accordingly, your question is answered in the affirmative.

073-126—April 19, 1973

GAME AND FRESHWATER FISH

IMPORTATION FOR AQUATIC WEED CONTROL

To: *Bill Fulford, Chairman, House Committee on Natural Resources, Tallahassee*

Prepared by: *Halley B. Lewis, Assistant Attorney General*

QUESTION:

Does the amendment of §§372.26 and 372.265, F. S., subsequent to the rendering of AGO 071-12 affect your conclusions in that opinion relative to the importation of animals not indigenous to this state?

SUMMARY:

The term "any species of the animal kingdom" as used in §372.265, F. S., was defined in AGO 071-12 to embrace fish and reptiles as well as mammals, and it was concluded in that opinion that the unlawful importation, sale, use, or release of any species of the animal kingdom (including fish and reptiles) not indigenous to Florida without first having obtained a permit therefor from the Game and Fresh Water Fish Commission subjected a violator to the more severe criminal penalty prescribed by §372.265(3). Since that time the specified penalty provision has been amended so as to make a violation punishable as a misdemeanor of the first degree as prescribed in §§775.082 and 775.083, F. S.; and the penalty prescribed by §372.71, F. S., 1969, for a violation of Ch. 372, F. S., has been amended so as to provide punishment for a misdemeanor of the second degree for first offenders for a violation of Ch. 372, *supra*, as provided in §775.082 or §775.083. The aforesaid amendments in no way changed or modified AGO 071-12 in the definition of "any species of the animal kingdom" or the conclusion thereof relative to the more severe penalty prescribed by §372.265(3), *supra*.

Sections 372.26 and 372.265, F. S., have been amended, effective September 1, 1971, so as to provide that the restriction therein contained shall not apply to the Department of Natural Resources acting under authority of §372.925(4), F. S. Said amendments per se did not operate to effect any change in or modification of AGO 071-12

vel non, nor in the aforesaid definition and conclusion therein set forth. However said amendments do in terms except the Department of Natural Resources when acting under the authority of §372.925(4) from the inhibitions and restrictions presented by §§372.26 and 372.265, *supra*; and when said department is so acting, it is not required by §372.26 or §372.265 to obtain a permit from the Game and Fresh Water Fish Commission for the importation of freshwater fish of any species or any species of the animal kingdom not indigenous to Florida if and when any such fish or animal is imported or used or placed in fresh waters of the state in connection with and for the purpose of promotion, development, and support of research activities directed toward the more effective and efficient control of aquatic plants.

In essence, AGO 071-12 defines the term "any species of the animal kingdom" as used in §372.265, F. S., to embrace fish and reptiles as well as mammals and concludes that the unlawful importation, sale, use, or release of any species of the animal kingdom (including fish and reptiles) not indigenous to Florida without first having obtained a permit therefor from the Game and Fresh Water Fish Commission is subject to the more severe criminal penalty prescribed by §372.265(3). At the time AGO 071-12 was rendered, the penalty prescribed by §372.265, F. S. (1970 Supp.), for violations thereof was a fine of not less than one thousand dollars, imprisonment in the county jail for not less than three months nor more than six months, or both such fine and imprisonment. Since then, the penalty fixed in §372.265(3), F. S., has been amended so as to provide that persons in violation of said section shall be guilty of a misdemeanor of the first degree punishable as provided in §775.082 or §775.083, F. S. The penalty prescribed by §372.71, F. S. 1969, for violations of Ch. 372, F. S., has since been amended so as to provide that any person violating the provisions of Ch. 372, *supra*, shall, unless otherwise provided, for the first offense be guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083, and for a second or subsequent offense be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

The aforesaid statutory amendments did not in any way operate to effect any change in or modification of AGO 071-12, nor in the aforesaid definition of the term "any species of the animal kingdom" or the conclusion therein that the unlawful importation, sale, use, or release of any species of the animal kingdom as therein defined is subject to the more severe penalty as prescribed by §372.265, F. S. Neither §372.26 F. S., nor §372.265, has been amended in any manner so as to legislatively define the terms "freshwater fish" or "any species of the animal kingdom" as used in said statutes for the purposes of said §372.265 or so as to limit and restrict the operation of said §372.265.

Both §§372.26 and 372.265, F. S., have been amended, effective September 1, 1971, so as to provide that the restriction therein contained "shall not apply to the department of natural resources, acting under authority of §372.925(4)." (Sections 1 and 2, Ch. 71-294, Laws of Florida.) Said statutory amendments per se did not operate to effect any change in or modification of AGO 071-12 *vel non*, nor in the aforesaid definition and conclusion set forth therein. However, the said statutory amendments effected by Ch. 71-294, *supra*, do purport to except the Department of Natural Resources, when acting under the authority of §372.925(4), F. S., from the inhibitions and restrictions imposed or prescribed by §§372.26 and 372.265. That is to say, the Department of Natural Resources, when acting under and pursuant to its authority as set forth in §372.925(4), is not required by §372.26 or §372.265 to obtain a permit from the Game and Fresh Water Fish Commission for the importation of fresh water fish of any species or any species of the animal kingdom not indigenous to Florida if and whenever any such fish or animal is imported or used or placed in the fresh waters of the

state in connection with and for the purposes of the promotion, development, and support of research activities directed toward the more effective and efficient control of aquatic plants. It might also be noted that all or any part of any functions vested in the Department of Natural Resources under §372.925(3), *supra*, may be delegated by it to the Division of Game and Fresh Water Fish and that pursuant to §372.925(4), the department may contract with public or private agencies or corporations for research and development of aquatic plant control methods or for the performance of aquatic plant control activities.

The aforesaid amendments to §§372.26 and 372.265, *supra*, excepting the Department of Natural Resources from the restrictions therein prescribed when acting under the authority of §372.925(4), *supra*—to promote, develop, and support research activities directed toward the more effective and efficient control of aquatic plants—were presumably within the power of the legislature to enact and are presumptively valid. It is settled in this state that a statute found on the statute books must be presumed to be valid and must be given effect until it is judicially declared unconstitutional. *Evans v. Hillsborough County*, 186 So. 193 (Fla. 1938). It might be noted, however, that to the extent said amendments to §§372.26 and 372.265 may be deemed to abridge, impair, and infringe upon the regulatory powers vested in the Game and Fresh Water Fish Commission by Art. IV, §9, State Const., I have heretofore concluded in AGO 072-41, that the commission “‘is a law unto itself,’ in the areas of wild animal and fresh water aquatic life, and no statute of the legislature could prescribe otherwise,” except for the prescription by the legislature of license fees for the taking of wild animal life and fresh water aquatic life and penalties for violating regulations of the commission as authorized by Art. IV, §9, State Const. In recapitulation, that opinion holds:

The legislature is powerless, in view of Art. IV, §9, State Const. 1968, to transfer any of the powers, duties, or functions of the Game and Fresh Water Fish Commission to the supervision of any other department in the executive branch. Only by constitutional amendment can the legislature regain such authority.

073-127—April 19, 1973

SERVICE OF PROCESS

SHERIFF'S FEES

To: Doug Willis, Marion County Sheriff, Ocala

Prepared by: Andrew W. Lindsey, Assistant Attorney General

QUESTION:

Does the prohibition in §30.231, F. S., to the effect that no additional fees will be required for an alias or pluries document when service was not effected on the original document, prohibit a county in which such a document is served from charging a service fee to the county referring the document for service?

SUMMARY:

It is my opinion that your office can charge the office forwarding the alias and pluries document to you, if you complete service on the document. The office forwarding the alias or pluries document would remit to you the seven dollar and fifty cent prepaid fee and would not