

**IN THE TENTH JUDICIAL CIRCUIT COURT
FOR HARDEE, HIGHLANDS, AND
POLK COUNTY, FLORIDA**

County Case No.: GF05-(001122-001130, 001135)-BA
Appeal No.: 2006AP-000014

DENNIS GOOSBY, et al.

Appellants,

v.

STATE OF FLORIDA

Appellee.

OPINION OF THE COURT

This matter is on appeal from the county court of Polk County, Judge Anne Kaylor presiding. Appellants seek review of the trial court's April 5, 2006, Order finding Appellants guilty of violating §286.011(3)(a), Florida Statutes. This Court has jurisdiction. Fla. R. App. P. 9.030(c). The ruling of the trial court is affirmed.

The violation stems from a publicly noticed meeting held by the Polk County Opportunity Council (hereinafter "PCOC") on September 15, 2005, wherein Appellants took an unscheduled recess during the noticed meeting to discuss disciplinary issues related to then-Executive Director, Carolyn Speed. Appellants returned from the closed meeting and voted on disciplinary action to Ms. Speed without public discussion. A second public meeting was held on September 29, 2005, where Appellants again voted on the disciplinary issue.

Appellants were found guilty of a noncriminal violation of §286.011, Florida Statutes. Section 286.011(1), Florida Statutes, provides that

"[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings."

Section 286.011(3)(a), Florida Statutes, provides that "[a]ny public officer who violates any

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provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding \$500.00."

The trial court held: 1) that the PCOC was subject to the Public Records Act and the Sunshine Law; 2) that Appellant's were "public officers"; 3) that the meeting was a closed meeting not open to the public, and 4) that official acts' were taken, or could have been taken, at the closed meeting.

"Cases involving alleged violations of the Sunshine Law are determined on a case by case analysis basis. Review of these types of cases by courts of appeals are made pursuant to a de novo standard." Bruckner v. City of Dania Beach, 823 So.2d 167, 169 (Fla. 4th DCA 2002). "Statutes enacted for the public benefit should be interpreted most favorably to the public." Board of Public Instruction v. Doran, 224 So.2d 693, 699 (Fla. 1969). "The fact that the statute contains a penal provision does not make the entire statute penal so that it must be strictly construed." Id. "[T]he Sunshine Law was enacted in the public interest to protect the public from 'closed door' politics and, as such, the law must be broadly construed to effect its remedial and protective purpose." Wood v. Marston, 442 So.2d 934, 938 (Fla. 1983); *see also* City of Sunrise v. News and Sun-Sentinel Company, 542 So.2d 1354, 1355 (Fla. 4th DCA 1989).

Appellants raise the following issues on appeal: 1) that there was insufficient evidence that Appellants are public officers subject to §286.011, Florida Statutes, and that PCOC is subject to Florida's Public Records Act and Florida's Sunshine Law; 2) that there was insufficient evidence that an "official act" occurred at a "meeting"; 3) that the trial court erred in not applying Appellant's defense of entrapment by estoppel; 4) that the trial court erred in accepting jurisdiction and in applying the criminal procedural rules; and 5) that §286.011, Florida Statutes, is unconstitutionally vague and overbroad on its face and in its application.

I. Was there was insufficient evidence that Appellant's are public officers subject to §286.011, Florida Statutes, and that PCOC is subject to Florida's Public Records Act and Florida's Sunshine Law?

Chapter 286, Florida Statutes, does not define the term "public officer". "In the absence of a statutory definition, resort may be had (1) to case law or related statutory provisions which define the term, and (2) where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997). As such, Appellants turn to dictionary meanings of "public officer" and "public office", wherein a "public officer" is defined as "a person who has been elected or appointed to a public office" and "public office" is defined as "an office created by a constitution or legislative act, having a definite tenure, and involving the power to carry out some governmental function." Merriam-Webster's Dictionary of Law (1996).

Cape Coral Medical Center, Inc. v. News-Press Publishing Company, Inc., 390 So.2d 1216, 1218 n. 5 (Fla. DCA 1980), states that "[a]s the policy behind chapter 119 and the policy behind section 286.011 are similar, ... they should be read in pari materia." Thus, under §119.011, "agency" is defined to mean "any state, county, district, authority, or municipal officer, department, division,

whether Appellants were acting on behalf of government. Where a private company steps into the shoes of a government agency and assumes governmental functions, it is subject to the Sunshine Law. Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So.2d 373, 379-380 (Fla. 1999). Appellee argues that by disbursing public monies, PCOC assumed and exercised a delegated governmental function making the board members "public officers" subject to the Sunshine Law.

The Florida Supreme Court, in Memorial Hospital, stated that "private actors should look to the factors announced in Schwab [, 596 So.2d at 1031]" to determine whether they are operating on behalf of a public agency. See id. at 379-380. News and Sun-Sentinel Company, et. al. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029, 1031-1032 (Fla. 1992), approved a "totality of factors" test to be used to determine whether a private entity under contract with a public agency is subject to the Public Records Act. The trial court utilized the "totality of factors" test outlined in Schwab. The factors include: 1) the level of public funding; 2) the commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function that the public agency would otherwise perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private agency was created by the public agency; 8) whether the public agency has a substantial financial interest in the private agency; and 9) for whose benefit the private agency is functioning. See id. at 1031.

Appellants assert that the proper test for determining whether a public entity is subject to Florida's Sunshine Law is whether the public entity is subject to the dominion and control of the Florida Legislature. Appellants cite to Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So.2d 373, 382-383 (Fla. 1999), and City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971), for this proposition. However, Memorial Hospital did not adopt the dominion and control test stated in Berns as a test to determine whether a private entity is subject to the Sunshine Law, but simply did not "abandon the Berns dominion and control test for factual situations similar to the one presented in Berns." Memorial Hospital at 383.

The Court finds that the trial court utilized the correct test in determining that Appellants were public officers subject to the Public Records Act and the Sunshine Law. PCOC receives the majority of its grant money from public funds. Approximately \$7,000,000.00 is direct federal monies and approximately \$2,100,000.00 is monies received by the State of Florida from the federal government and distributed to PCOC by DCA following legislative appropriation. These monies are for the limited purpose of assisting economically disadvantaged persons. Distribution of the funds is a government function for the benefit of the public. Only about \$13,000.00 to \$17,000.00 of PCOC's grant money is generated from non-public money (private donations from the community). The non-public money has no restriction on how it may be spent. PCOC's Board of Directors approve expenditures and develop a yearly expenditure plan. Appellants state that every act they are permitted to take is prescribed by the contract. By contract, PCOC must comply with all applicable state and federal laws, rules and regulations. Further, the contract specifically requires PCOC to publicly notice all board of directors meetings and make all such meetings open to the public. Testimony at trial established that PCOC holds regularly scheduled meetings once a month and special meetings as needed.

"The "totality of factors" test under *Schwab* presents a mixed question of fact and law." Memorial Hospital at 381. Accordingly, the Court finds that there was competent, substantial evidence to support the trial court's finding that Appellants are public officers subject to §286.011, Florida Statutes, and that PCOC is subject to Florida's Public Records Act and Florida's Sunshine Law and that the trial court did not err in applying the law to the facts.

II. Was there insufficient evidence that an "official act" occurred at a "meeting"?

Appellants argue that there was insufficient evidence that any "official act" occurred at a "meeting". Pursuant to §286.011(1), Florida Statutes, "public meetings" are "[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken..." There is no disagreement that a closed meeting occurred during the September 15, 2005, board meeting. Instead, Appellants contend that the closed meeting was a fact-finding meeting only, and that fact-finding meetings are not "meetings" under the Sunshine Law. See Cape Publications, Inc. v. City of Palm Bay, 473 So.2d (Fla. 5th DCA 1985). However, Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 698 (Fla. 1969), provides that "[t]he obvious intent [of §286.011, Florida Statutes,] was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board." In the case at hand, Appellants discussed disciplinary actions and then immediately voted on such action upon reconvening the September 15th meeting.

Appellants rely on State of Florida v. Chiaro, No. 91-8AC10, 2 (Fla. 17 Cir. Ct. May 11, 1992), non-binding authority, where a former City Attorney was charged pursuant to §286.011 with a non-criminal violation for participating in an advisory committee meeting with the Mayor, the City Manager, an Assistant City Manager, and members of various city boards to discuss the viability of a proposed land purchase. The circuit court, acting in its appellate capacity, reversed the trial court's guilty verdict and found the group to be distinguishable from other groups found to fall under the Sunshine Law. See id. at 6. The Chiaro Court focused on the composition of the group and the authority of the group, specifically finding that "[t]he composition of the group, the findings that it 'had no name, no printed agenda, no designated chairman, no formal proceedings' and its discussion ended with 'no motion ... made nor vote taken' made the group far different from any of those found to be within the Sunshine Law's commendable broad reach. Id. Chiaro also found that "[t]he fact that no two members of any governing body attended the gathering, and that it had no authority to recommend, decide or even screen sites, underscores how far removed the group was from the statutory requirement of 'official acts.'" Id. Chiaro went on to state that the City Manager's recommendation based on a consensus did "not convert the gathering into a meeting at which any decision-making official acts were taken under the Sunshine Law." Id. at 6-7.

Appellee cites Dascott v. Palm Beach County, 877 So.2d 8, 11-12 (Fla. 4th DCA 2004) (hereinafter "Dascott I"), for the proposition that where decision-making is involved in a committee function, even one delegated from a person not ordinarily subject to open-government laws, then the meeting must be held in the Sunshine. Dascott I involved a case where "the Palm Beach County Board of County Commissioners established a panel to consider terminating an employee, and the County Administrator delegated his authority to that panel" Id. at 1-2. "In the closed-door meeting,

the staff members discussed the decision to terminate but did not vote on it.” *Id.* The Court stated that application of the Sunshine Law to the ad-hoc board depended “on the decision-making nature of the act performed.” *Id.* at 8-9. The County moved for a rehearing stating that the meeting was a fact-finding meeting and not a decision-making function. *Drascott v. Palm Beach County*, 2004 Fla. App. LEXIS 11228, 2 (Fla. 4th DCA 2004) (hereinafter “*Drascott II*”). *Drascott II* held that giving advice to the panel considering termination distinguished the case from mere fact-finding panels that held no discussions or decision-making powers. *See id.* at 2; *see also City of Sunrise v. News & Sun-Sentinel Corp.*, 542 So.2d 1354, 1354-55 (Fla. 4th DCA 1989). The Court further stated that panels meeting on employee terminations were subject to the Sunshine Law, and that if “no evaluation and advice on the decision to terminate was given to the ultimate decision-maker at the time of his decision, then there was no need for a closed-door deliberation.” *Id.* at 3.

The trial court found that “official acts” were taken, or could have been taken, at the closed door meeting”. (R. at 1870). Testimony supported that the purpose of the unscheduled closed meeting was to discuss disciplinary issues of then Executive-Director Carolyn Speed. No record was made of the closed meeting; however, immediately upon reconvening the open meeting, the board members voted on disciplinary action without public discussion. A second public meeting was held on September 29, 2005, where Appellants again voted on the disciplinary issue. “Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices.” *Town of Palm Beach v. Gradison*, 296 So.2d 473, 476, 477 (Fla. 1974).

Accordingly, the Court finds that there was sufficient evidence that an “official act” occurred at a “meeting” subject to the Sunshine Law.

III. Did the trial court err in not applying Appellant’s defense of entrapment by estoppel?

Appellants argue that the trial court erred in not applying the defense of entrapment by estoppel. “Entrapment-by-estoppel is an affirmative defense that provides a narrow exception to the general rule that ignorance of the law is no defense.” *United States v. Funches*, 135 F.3d 1405, 1407 (11th Cir. 1998). A defendant must have: (1) relied on a point of law misrepresented by an official of the state; and (2) such reliance must be reasonable given the identity of the official, the issue represented, and the substance of the misrepresentation. *See id.* Appellants argue that they relied on the contract language referring to them as “independent contractors” and that based on the language they never considered themselves as an agent of the state. Further, Appellants argue that they relied on there being no need to notice the September 15, 2005, meeting due to previous fact-finding meeting(s) that DCA required them to hold in private. Appellants allege that the September 15, 2005, meeting was exactly like the meeting(s) that DCA had previously told them not to notice.

The Court notes that it was unable to find any case law dealing with the applicability of the defense of entrapment by estoppel in Florida. However, Appellee argues that even giving Appellants the benefit of the doubt that the defense is applicable in Florida, the defense still fails because the law was not misrepresented to Appellants because Appellants were advised that they were subject to the Sunshine Law and they were trained on the Sunshine Law. Further, that the PCOC contract

specified that meetings were to be held in the sunshine and that the September 15, 2005, meeting was publicly noticed. Accordingly, the trial court did not err in failing to apply the defense of entrapment by estoppel.

IV. Did the trial court err in accepting jurisdiction and in applying the Florida Rules of Criminal Procedure?

Appellants argue that the trial court erred by accepting jurisdiction and in applying the Florida Rules of Criminal Procedure. Appellants argue that this deprived them of their full civil and constitutional rights in that they had limited availability of pre-trial discovery and no opportunity for a jury trial. Appellants cite to the lower court's procedural order in State of Florida v. Chiaro, No. 91-8AC10, 2 (Fla. 17 Cir. Ct. May 11, 1992), which held that the Florida Rules of Civil Procedure applied since the statute expressly provided that the violation was not criminal. Appellants further argue that the Legislature specifically intended that some violations be criminal and that some be civil.

Appellee argues that the trial court did not err in accepting jurisdiction or in applying the Florida Rules of Criminal Procedure. Appellee states that Appellants in part requested that the Florida Rules of Criminal Procedure apply by 1) filing a motion to dismiss (as under criminal law) without citing a jurisdictional basis; 2) by not filing a motion for summary judgment (as under civil law); and 3) by indicating to the trial court that they were fine with proceeding on their motion under the Florida Criminal Rules of Procedure. Additionally, Appellee states that Appellants waived the right to a civil jury under the Florida Rules of Civil Procedure because they never demanded a jury trial in their initial pleadings as required by the rules. The trial court selected the procedure to be used on January 26, 2006, and Appellants trial counsel filed a Motion to Dismiss on January 13, 2006, never requesting jury trial prior to the trial court's decision. Nor does the record on appeal contain a written demand for a jury trial. "A party who fails to serve a demand as required by this rule waives trial by jury." Fla. R. Civ. P. 1.430.

Finally, Appellee argues that Appellants received more procedural protections under the Florida Rules of Criminal Procedure than they would have received under the Florida Civil Rules of Procedure, rendering any error harmless. Appellee contends that assuming the Civil Rules of Procedure should have been followed, the question becomes one of prejudice to Appellants. Appellee bears the burden of showing beyond a reasonable doubt that the error did not contribute to the verdict. See State v. DiGiulio, 491 So.2d 1129, 1135 (Fla. 1986). Appellee argues that there was no prejudice to Appellants because (1) Appellants would not have been entitled to a civil jury trial, (2) no discovery rights were lost, (3) the trial court allowed Appellants to take depositions of some witnesses upon motion, (4) the civil rules apply to criminal depositions, (5) by invoking the criminal rules, Appellant's were afforded the right of silence unavailable in civil proceedings, (6) Appellants were afforded the right to a speedy trial, (7) the state had the burden of continuing disclosure, (8) Appellants had the right to counsel, and (9) Appellee had to prove case beyond a reasonable doubt.

While the Court agrees with Appellants that the violation charged was civil in nature and that the Florida Rules of Civil Procedure should have applied, the Court finds the error to be harmless.

V. Is §286.011, Florida Statutes, unconstitutionally vague and overbroad on its face and in its application?

Appellants argue that §286.011 is unconstitutionally vague and overbroad on its face and in its application. To determine whether a statute is void for vagueness, a court must consider whether the statute: 1) provides fair notice to the ordinary person of what is and is not prohibited; 2) provides minimal guidelines for determining guilt or compliance so that arbitrary and discriminatory enforcement is discouraged; and 3) interferes with the exercise of constitutionally protected rights such as freedom of assembly. See Sultz v. State of Florida, 906 So.2d 1013, 1032 (Fla. 2005). Specifically, Appellants argue that the statutory references to “authority” and “public officer” of the state are unconstitutionally vague and overbroad and that no reasonable person in Appellants position could be on notice that: 1) PCOC’s contract with DCA would make them an authority of the State; 2) PCOC board members would be considered public officers; or 3) PCOC board members could be charged as a public officer for conduct ordinarily protected by the First Amendment of the United States and Florida Constitutions.

“What the Constitution requires is a definiteness defined by the Legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, cannot avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite.” State of Florida v. Wershow, 343 So.2d 605, 608 (Fla. 1977). “It is constitutionally impermissible for the [Legislature] to use such broad language that a person of common intelligence must speculate about its meaning and be subjected to arrest and punishment if the guess is wrong.” Id. at 608.

Appellee concedes that “[i]n order to satisfy the constitutional requirement of due process, a statute must be sufficiently explicit in its description of the acts, conduct or conditions required or forbidden, to prescribe the elements of the offense with reasonable certainty and make known to those to whom it applies what conduct on their part will render them liable for its penalties.” Board of Public Instruction v. Doran, 224 So.2d 693, 698 (Fla. 1969). “Statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding or practices satisfies due process.” Id.; see also Powell v. State, 508 So.2d 1307, 1310 (Fla. 1st DCA 1987). Doran specifically addressed the constitutionality of §286.011, Florida Statutes, and held that it was not unconstitutionally vague and ambiguous, that it complied with the organic due process requirements, and that it only embraced one subject. See id. at 697-699. “Statutes enacted for the public benefit should be interpreted most favorably to the public.” Id. at 699. “The fact that the statute contains a penal provision does not make the entire statute penal so that it must be strictly construed.” Id. In divining what statutory language is vague, one gives that language its plain and ordinary meaning. See Powell at 1310.

Appellants argue that the statutes vagueness is illustrated by the Legislature’s failure to define “authority” in §286.011, Florida Statutes, and the judiciary’s efforts to provide such a definition. However, Appellants cite no cases where the courts have attempted to define “authority” with respect to §286.011, Florida Statutes.

Appellants further argue that the strict liability offense applicable to public officers is overbroad. Specifically, Appellants state that the statute is open to being enforced arbitrarily and capriciously and is thus prone to punish entirely innocent conduct. Appellants cite to Sultz v. State of Florida, 906 So.2d 1013, 1032 (Fla. 2005), for the proposition that arbitrary enforcement is the most important prong of the vagueness analysis. Appellants argue that because their previous closed meeting(s) failed to raise any issue and were at the express direction of DCA, then the statute's enforcement is arbitrary and capricious.

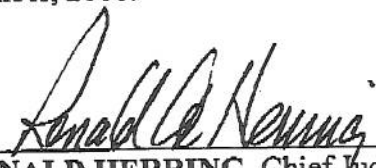
Finally, Appellants argue that §286.011, Florida Statutes, unlawfully interferes with their constitutionally protected freedom to assemble, and is, therefore, unconstitutionally overbroad and chilling. Appellants aver that when such rights are restricted or burdened, the laws must be narrowly tailored to promote a compelling governmental interest. See Wyche v. State of Florida, 619 So.2d 231, 234 (Fla. 1993). Appellants concede that the statute was passed to promote a compelling governmental interest; however, Appellants argue that because "authority of any agency" and "public officer" are not defined by the statute and because the statute failed to outline the jurisdictional basis or the rules of procedure applicable to a non-criminal infraction, the statute is unconstitutional.

Appellee argues that the statute is not overbroad because the First Amendment does not protect spending public money on behalf of a public agency. "Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested persons." Town of Palm Beach v. Gradison, 296 So.2d 473, 476 (Fla. 1974) (case dealt with a board of private citizen evaluating a zoning request behind closed doors... Florida Supreme Court held the citizen board violated the Sunshine Law and that taxpayers have a right to be heard...). In other words, PCOC is charged with administering sub-grant funds to the public and therefore must rely upon suggestions and ideas of the public. Further, when one is speaking as part of a public and official duty, the First Amendment does not automatically apply. See Garcetti v. Ceballos, 126 S.Ct. 1951, 1960 (2006).

Accordingly, §286.011, Florida Statutes, is not unconstitutionally vague and overbroad on its face and in its application.

Therefore, it is ORDERED and ADJUDGED that the ruling of the county court is AFFIRMED.

DONE and ORDERED 22 December, 2006.


RONALD HERRING, Chief Judge

Copies furnished to:

William E. Grob, Esquire, 101 E. Kennedy Boulevard, Ste 900, Tampa, Florida 33602-5133
Victoria J. Avalon, ASA, P.O. Box 9000 - Drawer SA, Bartow, Florida 33831