

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: 14-AP-48-A-O
LOWER COURT CASE NO: 14-MM-5841-B-O

STATE OF FLORIDA,

Appellant,

v.

CHRISTOPHER E. DORWORTH,

Appellee.

Appeal from the County Court,
for Orange County, Florida,
Tanya Davis Wilson, County Court Judge

Jeffrey Ashton, State Attorney,
Kenneth S. Nunnolley, Assistant State Attorney,
for Appellant

John N. Bogdanoff, Esquire,
for Appellee

Before LATIMORE, DOHERTY, and SCHREIBER

PER CURIAM.

AFFIRMED.

19 ^L DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this
day of August, 2015.


Alicia L. Latimore
Presiding Circuit Judge

DOHERTY and SCHREIBER, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order Affirming Trial Court has been provided to Kenneth Nunnolley, Assistant State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; John N. Bogdanoff, Esq., The Carlyle Appellate Law Firm, The Carlyle Building, 1950 Laurel Manor Drive, Suite 130, The Villages, Florida 32162; and Honorable Tanya Davis Wilson, 425 N. Orange Avenue, Orlando, Florida 32801, this 19 day of August, 2015.

Sheryl Sharp
Judicial Assistant
yes Alice Smith

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IN THE COUNTY COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. 2014-MM-5841-B-O
DIV. 64

STATE OF FLORIDA,

Plaintiff,

v.

CHRISTOPHER E. DORWORTH,

Defendant.

ORDER GRANTING MOTION TO DISMISS

THIS MATTER came before the Court for consideration of Defendant Christopher Dorworth's Motions to Dismiss filed on August 11, 2014, pursuant to Rule 3.190(b) Florida Rules of Criminal Procedure. After considering Defendant's Motions, States' Motion to Strike Defendant's Motion to Dismiss Count Two filed September 17, 2014, State's Memorandum filed October 7, 2014, the information, and arguments, the Court finds as follows:

On June 4, 2014, Defendant was indicted for a violation of section 286.011(3)(b) and 777.011 for aiding, abetting, counseling or procuring one or more members of the Orlando-Orange County Expressway Authority (OOCEA) to participate in meetings through conduits, intermediaries, or third parties in relaying information related to official acts to be taken by the OOCEA. On July 30, 2014, the State filed an information charging Defendant with the same offense alleged in the indictment, but with changes to the language used in the indictment. An indictment cannot be amended by an information. Fla. R. Crim. P. 3.140; *see Snipes v. State*, 733 So. 2d 1000, 1004 (Fla. 1999). However, the state attorney and the grand jury have concurrent charging authority on non-capital offenses. As such, the state attorney was well within his authority to charge the Defendant by way of an information. The state apparently is proceeding on the information, as

the assistant state attorney advised the Court in a hearing on the matter that the "superseding information" made the grand jury's indictment a nullity. While the superseding information could not amend the indictment, it is considered the charging document the state is proceeding on with this prosecution. As such, by filing of the information the State dismissed the indictment.

Defendant asks this Court to dismiss the information because, as applied, it violates the Constitutions of the United States and the State of Florida. In his motion, Defendant outlines three reasons in support of dismissal. He argues that the State's attempt to prosecute him for violation of section 286.011, Florida's Sunshine Law, by invoking section 777.011, Florida's principle statute, violates his First Amendment right to free speech as a private citizen. Additionally, Defendant argues that the statute is overbroad as applied because it attempts to prohibit his right to free speech. Last, Defendant claims that the statute is vague as applied to private citizens. The State, however, argues that the two statutes are clear and unambiguous and alleges that there are no exceptions to the application of the principal statute. Further, the state claims that nothing in the law excludes Defendant from liability as a principal for violation of the Sunshine Law.

DISCUSSION

This is a case of first impression. Neither the Court nor the parties have found any authority in Florida or the nation where a private citizen was prosecuted for a public records law violation.

Section 268.011 states:

1) All 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, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, 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.

.....

3)(a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding \$500.

(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

§ 286.011, Fla. Stat. (2013).

The principal statute reads:

Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

§ 777.011, Fla. Stat. (2013).

Florida's Sunshine Law

The Legislature's intent in enacting section 286.011 was to open to the public all meetings of any body when official acts are to be taken by that body and prevent decisions made behind closed doors. *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974). From the plain meaning of the statute's language, section 286.011 applies only to public officers, members or elected members of a board, commission, state agency, authority of a county, municipal corporation, or political subdivision. § 286.011(1), (3), Fla. Stat. Specifically, the criminal penalties apply only to members of a board, commission, state agency, authority of a county, municipal corporation, or political subdivision. § 286.011(3)(b), Fla. Stat. All subsections of section 286.011 identify public officers, members or elected members of a board, commission, state agency, authority of a county, municipal corporation, or political subdivision as the group of individuals subject to the statute's provisions. No language in the statute suggests the Legislature intended for the statute to apply to a private citizen. The State, though, uses the principal statute in this case to prosecute a private citizen under the Sunshine Law.

The Court agrees with the State that, when considered separately, the statutes are clear and unambiguous. On their own, both statutes pass constitutional muster. Nevertheless, a statute cannot be applied in a manner that would lead to an unconstitutional result and charging Defendant as a principal in violation of section 286.011 is an overbroad application that infringes on Defendant's freedom of speech.

Overbroad as applied

A statute may be overly broad if it infringes on conduct protected by the First Amendment. *Carrivarte v. State*, 384 So. 2d 1261, 1262 (Fla. 1980) (citing *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)). "Statutes which punish only the spoken word will withstand an overbreadth challenge if they may be narrowly construed to delete application to protected speech." *Id.* (citing *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972)).

Defendant is accused of relaying information between and among members of the OOCEA about employment matters related to the OOCEA's executive director, and thereby aiding the members to meet without complying with the requirements of section 286.011. As a private citizen, Defendant has a First Amendment right to communicate and petition public officials and members of public boards on matters that may come before that board. Communication with public officials and members of public bodies to influence the public body's decision is the primary function of Defendant's profession as a lobbyist and is permitted by law. §§ 11.045(e), 112.3215(f), Fla. Stat. (2013) ("Lobbying" means influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature. "Lobbies" means seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee.). Furthermore, "regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *McCutcheon v. Fed. Election Com'n*, 134 S. Ct. 1434, 1441 (2014).

Using the principal statute to prosecute private citizens and private citizens with political access to public officials, such as lobbyists, is an unconstitutionally overbroad application of the Sunshine Law. If this application of the law is permitted, private citizens will be hesitant to exercise their First Amendment right to communicate with public officials for fear that their communications will constitute a violation of the Sunshine Law.

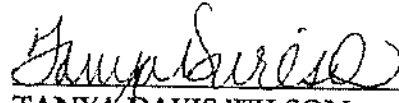
The State analogizes charging Defendant as a principal in this case to charging a defendant as a principal to possession of a firearm by a convicted felon, which often is prosecuted in federal courts. Yet, in this case, a private citizen has a protected constitutional right to communicate with public officials or members of a public body about matters that may come before that body. A principal to a possession of a firearm by a convicted felon case does not involve the same infringement of a private citizen's First Amendment right.

In conclusion, when the State charged Defendant with violating sections 286.011 and 777.011, it expanded the reach of the Sunshine Law to private citizens; and, the Legislature did not intend for the statute to apply to private citizens. Section 286.001(3)(b) was intended to hold members of boards and public bodies, not private citizens, criminally liable for violating requirements of the Sunshine Law. Therefore, charging Defendant, a private citizen, as a principal in violation of section 286.011 applies the statute in a way that is unconstitutionally overbroad and violates Defendant's right to free speech. If a violation of the Sunshine Law occurred from the communication between Defendant and OOCEA members, then the appropriate target for prosecution would be the OOCEA members, not Defendant, a private citizen. Accordingly, Count Two of the information must be dismissed.

In light of this ruling, the Court finds no need to address Defendant's other arguments. All pending motions in this matter are dismissed as moot. The jury trial scheduled to begin in this matter for Thursday, October 23, 2014, is hereby canceled.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss is **GRANTED** and Count Two of the information is **DISMISSED**.

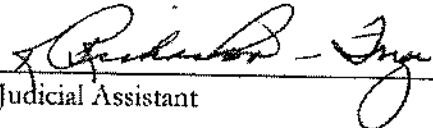
DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 21st day of October 2014.



TANYA DAVIS WILSON
County Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to **Richard E. Hornsby, Esq.**, Richard E. Hornsby, P.A., 1217 E. Robinson Street, Orlando, Florida 32801-2115; **Richard I. Walsh, Assistant State Attorney**, Office of the State Attorney, 415 N. Orange Avenue, P.O. Box 1673, Orlando, Florida 32802-1673, on this 21ST day of October 2014.



Judicial Assistant