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January 10, 2017

Thomas J. Perona
Chair, Fort Pierce Retirement Board
City of Fort Pierce
100 North U.S. Highway One
Fort Pierce, FL 34950

RE: "Case Memo: ***City of Hollywood v. Bien***"

Dear Mr. Perona:

This memo is addressed to you and, thru you, the Board, for the purpose of briefly commenting upon a new decision recently reported, ***City of Hollywood v. Bien***, __So.3rd__, Case No. 4D15-2632 (Fla 4th DCA 12/14/16), 41 FLWD 2761, attached. Such decision is based upon ordinance provisions unique to the City of Hollywood and therefore does not immediately impact our own system. It is raised here simply for the value of identifying principles that would be applied by the court in resolving any legal disputes that might ever arise hereafter with any party.

There, like Fort Pierce, the City of Hollywood's retirement plan included a DROP feature (see our Code sec. 13-40.1). Under Hollywood's plan, police officers were eligible to enter DROP either upon reaching the age of 50 or completing twenty-two years of creditable service. Upon application for DROP officers were required to retire and enter the program within eight years or no later than reaching 32 years of employment, whichever was less. That is, officers did not have to go into DROP immediately upon qualifying. They could continue to work for a time after reaching initial eligibility. In response to financial issues Hollywood then adopted an ordinance purporting to freeze accrual of benefits, and providing that officers

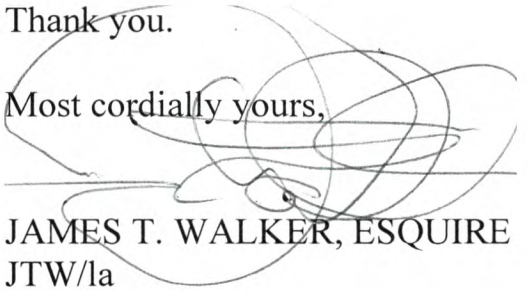
otherwise eligible for DROP and wishing to do so were required to enter the program by a certain designated date, the effect of which was to substantially shorten the time officers could continue on in normal employment before finally entering the program. By reducing the period of time available for normal service, there was adverse impact on the amount of their average final salary for purposes of calculating their retirement benefit.

Four officers sued for declaratory relief. They argued that they possessed a vested right to enter DROP after a delayed period . It was thus contended that the ordinance constituted a substantial impairment of contract rights and was a taking of private property without compensation. The Trial Court sided with the Plaintiff officers, ruling against the City of Hollywood. But its decision was reversed on appeal. The District Court noted that the rule of vesting is set out in ***Fla. Sheriff's Ass'n v. Dept. of Admin., Div. of Ret.***, 408 So.2d 1033, 1036 (Fla 1981): "Whether in a voluntary or mandatory plan, once a participating member reaches retirement status, the benefits under the terms of the act in effect at the time of the employee's retirement vest. The contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments." But this didn't apply to Plaintiffs. Instead, the District Court found that the City's ordinance was only a **prospective** change in benefits. It neither impaired contract rights nor operated as an unconstitutional taking of private property. The officers still enjoyed the same eligibility to enter DROP as before, and were able to obtain its full benefit, subject only to an imposed deadline for entry. That was deemed a permissible restriction. The Court relied in reaching its conclusion on an earlier Florida Supreme Court decision, ***Scott v. Williams***, 107 So.3rd 379, 381 (Fla 2013). There, in Scott, the FSC upheld legislation which converted the state retirement system from noncontributory to contributory, requiring members to begin contributing 3% of their salary toward retirement, and eliminating cost of living adjustments after the effective date of the act. The Scott Court observed that earlier precedent "recognized the authority of the Legislature to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired."

The foregoing briefly summarizes ***City of Hollywood v. Bien***. Should there be any questions please let me know and it will be a pleasure to respond in whatever fashion is satisfactory.

Thank you.

Most cordially yours,



JAMES T. WALKER, ESQUIRE
JTW/la
Enclosure
cc: Robert V. Schwerer, Esquire
James Messer, Esquire

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counsel from asking that question to the remaining prospective jurors, defense counsel still was able to ask the remaining prospective jurors if they "presumed" the defendant was innocent. The defendant has not argued that the court's error altered his jury selection strategy or tainted the jury which was selected. And during the court's final instructions, the court read Instruction 3.7, including its admonition: "The defendant has entered a plea of not guilty. This means you must *presume or believe* the defendant is innocent."

As for the court having intervened without the state having objected to defense counsel's "believe" question, we conclude the court's action was not so prejudicial as to require a mistrial. The defendant relies on *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968), for the proposition that reversible error occurs when a trial court *habitually* intervenes at trial.

However, *Bursten* is distinguishable. In *Bursten*, "[t]he thrust of [the defendant's] contention [was] that [the trial court] intervened to such an extent (on an average of at least once in each three pages of the Transcript) that [the defendant] was denied the right to a fair trial guaranteed to him by the Constitution." *Id.* at 982. Among the trial court's more prejudicial comments in the jury's presence were:

- "If [defense counsel] doesn't prove it, I hope the jury will hold it against him, because he shouldn't make that statement unless he has some proof."
- "[Defense counsel], now get back to your own case, if you have a case."
- "[Defense counsel], sit down and let the other attorney take over if you don't know how to cross examine this man."

Id. at 983-84.

In reversing for a new trial, the appellate court stated:

> If a trial court *continually* intervenes so as to unnerve defense counsel and throw [counsel] off balance, in a supposedly fair trial, and causes [counsel] not to devote [counsel's] best talents to the defense of [the] client, then this is ground for reversal, no matter what counsel's experience and equipoise may be. Even if there is a basis for some criticism of overpartisanship[ ] of defense counsel, this does not justify unwonted and unnecessary *continuous* interruption.

Id. at 983 (emphasis added).

Here, unlike in *Bursten*, the court did not *continuously* intervene or interrupt during defense counsel's voir dire. The court made one ruling regarding how the defendant's counsel was allowed to phrase a question to potential jurors regarding the defendant's presumption of innocence. The fact that the trial court errantly overlooked Instruction 3.7 in making this ruling ultimately did not unreasonably restrict defense counsel's voir dire on the defendant's presumption of innocence or prejudice defense counsel in the jury's eyes.

These circumstances distinguish this case from other cases before this court in which a trial court's more egregious actions amounted to error. *See Campbell v. State*, 812 So. 2d 540, 542-43 (Fla. 4th DCA 2002) (trial court abused its discretion in allowing the state forty-five minutes and the defense only twenty minutes for voir dire, instructing defense counsel to "stay away from anything I've gone over," and ultimately prohibiting defense counsel from questioning the jurors about the state's burden of proof, the defendant's presumption of innocence, and the defendant's right to remain silent); *Brown v. State*, 678 So. 2d 910, 911-13 (Fla. 4th DCA 1996) (trial court prejudiced defense counsel by repeatedly criticizing defense counsel's voir dire and criticizing defense counsel's closing argument; court's interjection conveyed that defense counsel had done something improper, and forcing defense counsel to apologize in jurors' presence created stigma intensified by judge's statement that he had never heard so much improper closing argument).

Conclusion

Based on the foregoing, the trial court did not abuse its discretion in denying the motion for mistrial. We affirm the defendant's burglary conviction, reverse his grand theft conviction, and remand for the trial court to enter judgment and sentence for petit theft.

Affirmed in part, reversed in part, and remanded. (LEVINE and KLINGENSMITH, JJ., concur.)

* * *

Municipal corporations—Employees—Retirement—Impairment of contracts—Action by city police officers seeking declaration that ordinance which imposed a deadline on entry into Deferred Retirement Option Plan constituted an unconstitutional impairment of their contract rights and an unlawful taking of private property without compensation—Because ordinance was a permissible prospective amendment which did not impair vested contract rights, trial court erred in entering judgment for plaintiff police officers

CITY OF HOLLYWOOD, FLORIDA, Appellant, v. LYLE BIEN, NORRIS REDDING, DERRICK AUSTIN, and MARK RUGGLES, Appellees. 4th District. Case No. 4D15-2632. December 14, 2016. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Marina Garcia-Wood, Judge; L.T. Case No. 12-032880 CACE (18). Counsel: David C. Miller and Michael L. Elkins of Bryant Miller Olive P.A., Miami, for appellant. William R. Scherer, III, of the Scherer Law Firm, Fort Lauderdale, and Albert L. Frevola, Jr. and Russell R. O'Brien of Conrad & Scherer, LLP, Fort Lauderdale, for appellees.

(CIKLIN, C.J.) The plaintiffs in the lawsuit below are four police officers who were employed by the City of Hollywood ("the City"). By virtue of their age, each officer became eligible to enter the Deferred Retirement Option Plan ("DROP"), a feature of the City's retirement system, but they wished to defer their entry in order to increase their monthly retirement payment. Before they were ready to enter DROP, the City passed an ordinance which imposed a deadline on entry into this aspect of the City's retirement program. The officers brought suit, seeking a declaration that the ordinance constituted an unconstitutional impairment of their right to contract and an unlawful taking of private property without compensation. Because the change to the retirement plan was a prospective one, we reverse the trial court's judgment which found in favor of the officers, and remand for further proceedings.

The City's retirement plan for its police officers included the option of DROP, which allowed eligible officers to commence their monthly retirement payments and have them placed into an interest-bearing account while the officers continued to work and receive wages. Under the City's retirement scheme, an officer became eligible to enter DROP either by reaching the age of fifty or completing twenty-two years of creditable service. However, upon applying for entry into DROP, an officer was required to retire within the lesser of eight years or when the officer had accrued a total of thirty years of employment with the City. Before the enactment of the ordinance at issue, officers who became eligible to enter DROP were not required to do so immediately upon qualifying—and could defer their entry.

In an attempt to resolve its financial problems, the City adopted an ordinance in September 2011 which "froze" the accrual of benefits under the retirement system that had been in place, but provided an exception for officers who were eligible to retire with normal retirement benefits on September 30, 2011:

> [F]or any member who is eligible to retire with normal retirement benefits on September 30, 2011, the benefit structure in effect on September 30, 2011 shall remain in effect beyond September 30, 2011 and shall not be frozen, except that any such member who does not enter the DROP on or before September 30, 2011 shall not be eligible to enter the [DROP] after September 30, 2011 . . . .

On September 30, 2011, the four officers involved in this appeal met the age requirement to enter DROP, but based on the calculation method for monthly retirement payments, entry on that date would have resulted in a smaller monthly retirement payment than if they had

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been able to defer entry, as permitted prior to the passage of the ordinance.

In response to the ordinance, three of the officers submitted their DROP applications, but they provided that their entry into DROP was not effective until dates occurring after September 30, 2011. The City did not recognize their purported prospective entries into DROP.[1]

The four officers brought suit for declaratory relief, and requested the trial court find that the ordinance constituted a substantial impairment of their contract rights and a taking of private property without full compensation. After a bench trial, the trial court ruled in favor of the officers.

On appeal, the parties dispute whether the officers had a vested interest in delayed entry into DROP and, if so, whether the City proved it had a compelling interest in amending the retirement plan. Because we find that the ordinance was a permissible prospective amendment which did not impair vested contract rights, we need not consider the second issue. Additionally, on the facts of this case, we find no merit in the jurisdictional issue the City raises.

Article I, section 10 of the Florida Constitution provides that no "law impairing the obligation of contracts shall be passed." Article X, section 6(a) of the Florida Constitution provides in pertinent part that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

"[W]hether in a voluntary or mandatory plan, once a participating member reaches retirement status, the benefits under the terms of the act in effect at the time of the employee's retirement vest. The contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments." *Fla. Sheriffs Ass'n v. Dep't of Admin., Div. of Ret.*, 408 So. 2d 1033, 1036 (Fla. 1981).

A recent Florida Supreme Court opinion illustrates why we must find that a prospective change to retirement benefits does not operate as an impairment of a contract or an unconstitutional taking. In *Scott v. Williams*, 107 So. 3d 379, 381 (Fla. 2013), state employees challenged provisions of a statute which converted the state retirement system from noncontributory to contributory, required current members to contribute three percent of their salaries to the system, and eliminated the retirement cost-of-living adjustment for creditable service after the effective date of the act. In determining that the statute did not impair a contractual right, the court looked to its decision in *Florida Sheriffs*, and observed that it had "recognized the authority of the Legislature to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired." *Id.* at 388-89. The court found that the changes to the retirement system were prospective in nature and thus "within the authority of the Legislature to make." *Id.* at 389. Further, the court found that the statute did not impair any statutorily created contract rights, and thus did not result in an unconstitutional taking. *Id.*

Likewise, the ordinance at issue here did not impair any contract rights or operate as an unconstitutional taking of private property. Instead, it permitted officers already eligible to enter DROP to do so and to enjoy the full benefits of DROP, albeit with an imposed deadline for entry. We find that this was a permissible prospective change to the retirement plan. Accordingly, we reverse the order on appeal and remand for the trial court to determine whether, under the terms of the DROP plan, the appellees' DROP application permits them to enter DROP as of the deadline date, withdraw their DROP application, or whether their attempt to enter DROP beyond the deadline date renders their application a nullity.

Reversed and remanded for further proceedings. (MAY and DAMOORGIAN, JJ., concur.)

[1]A fourth officer did not apply for or enter DROP.

* * *

A.L., a child, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 4D16-188. December 14, 2016. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carlos S. Rebollo, Judge; L.T. Case No. 15003020 DLA. Counsel: Carey Haughwout, Public Defender, and Virginia Murphy, Assistant Public Defender, West Palm Beach, for appellant. No appearance for appellee.

(PER CURIAM.) In this *Anders*[1] appeal, we affirm the finding of guilt, the withholding of adjudication of delinquency, and the placement of the child on probation, but remand for the trial court to correct the delinquency disposition order to reflect all of the required information. *See* Fla. R. Juv. P. 8.115(d); *T.H.C. v. State,* 186 So. 3d 597 (Fla. 4th DCA 2016); *T.J. v. State,* 174 So. 3d 1070 (Fla. 4th DCA 2015); *A.M.R. v. State*, 134 So. 3d 502, 503 (Fla. 4th DCA 2014); *D.B. v. State*, 114 So. 3d 1121 (Fla. 2d DCA 2013).

Affirmed, but remanded. (CIKLIN, C.J., GROSS and KLINGENSMITH, JJ., concur.)

[1]*Anders v. California*, 386 U.S. 738 (1967).

* * *

SHAINA ALSTON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 4D15-3902. December 14, 2016. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael Robinson, Judge; L.T. Case No. 10-6518 CF10A. Counsel: Carey Haughwout, Public Defender, and Stacey Kime, Assistant Public Defender, West Palm Beach, for appellant. Pamela Jo Bondi, Attorney General, Tallahassee, and Rachael Kaiman, Assistant Attorney General, West Palm Beach, for appellee.

ON CONFESSION OF ERROR

(PER CURIAM.) The defendant argues her convictions and sentences on Counts V, VI, and VII for armed false imprisonment should be reversed because the record establishes she was unarmed. She argues the proper remedy is for the trial court to vacate the armed false imprisonment convictions, enter convictions for simple false imprisonment as third-degree felonies, and resentence her on those counts. She recognizes this remedy will not affect her ultimate prison term as she is still serving concurrent, ten-year prison sentences on Counts I through IV. The state confesses error. We agree.

Reversed and remanded for resentencing on Counts V, VI, VII. (CIKLIN, C.J., WARNER and GERBER, JJ., concur.)

* * *

THOMAS MORE SLOAN, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 4D16-2051. December 14, 2016. Appeal of order denying rule 3.850 motion from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Lawrence M. Mirman, Judge; L.T. Case No. 09CF001021A. Counsel: Thomas More Sloan, Wewahitchka, pro se. No appearance required for appellee.

(PER CURIAM.) *Affirmed. Howell v. State*, 109 So. 3d 763, 774 (Fla. 2013) ("[C]laims of ineffective assistance of postconviction counsel are not cognizable."). (GROSS, TAYLOR and MAY, JJ., concur.)

* * *

Criminal law—Discovery—Attorney-client privilege—Defendant's handwritten notes prepared for his personal use were not subject to attorney-client privilege as a "communication" under section 90.502(1)(c)—Trial court did not depart from essential requirements of law when it compelled production of these notes to codefendants' counsel after rejecting credibility of defendant's claim that notes were to be used for communication with counsel

BJON LEE, Petitioner, vs. SEAN CONDELL and JOSE ESTACHE, Respondents. 3rd District. Case No. 3D15-2316. L.T. Case No. 06-37622 B. Opinion filed December 14, 2016. On Petition for Writ of Certiorari to the Circuit Court for Miami-Dade County, Ellen Sue Venzer, Judge. Counsel: Eugene F. Zenobi, Criminal Conflict and Civil Regional Counsel, Third Region of Florida and Philip Louis Reizenstein, Assistant Regional Counsel, for petitioner. Richard K. Houlihan; Richard C. Klugh, for respondent Sean Condell; Jeffrey H. Fink, for respondent Jose Estache.

(Before SHEPHERD, LAGOA, and LOGUE, JJ.)