FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-71

STATE OF FLORIDA,

Appellant,

v.

CODY WAYNE BERENS,

Appellee.

On appeal from the Circuit Court for Bay County.
E. William Dyer, Judge.

October 4, 2023

ROBERTS, J.

When a party contracts to have services performed on his property and fails to pay for those services, the person who performed the services may be entitled to a lien on that property. § 713.58, Fla. Stat. (2019–2020). Usually, a person who has a lien on personal property can sell that personal property to recuperate his loss. § 85.031, Fla. Stat. (2019–2020). The question before this Court is whether a meat processor can sell native venison meat when the hunter does not pay for the contracted processing services. We determine he cannot.

In December of 2019, law enforcement began investigating Appellee for selling native venison meat, which is prohibited by law. § 379.401, Fla. Stat.; Fla. Admin. Code R. 68A-12.004(7).

Appellee sold an undercover law enforcement officer processed native venison meat on two occasions. At the time of the sale, Appellee told the officer that he was not selling the native venison meat. He claimed he was recuperating his costs for the processing and storage of the native venison meat that a hunter abandoned.

As a result of those sales, Appellee was charged with violating section 379.401(2)(a) and rule 68A-12.004(7). Appellee filed a motion to dismiss the charges asserting the same arguments he made to law enforcement. The trial court ultimately agreed with Appellee. It found that because Appellee had a lien against the processed native venison meat, which was foodstuff or a meat product, section 713.58(1) superseded rule 68A-12.004(7). Consequently, the trial court granted Appellee's motion and dismissed the charges against him.

Because the issue on appeal involves a legal question, the standard of review is *de novo*. *Moore v. State*, 882 So. 2d 977, 980 (Fla. 2004). We begin our analysis with rule 68A-12.004. Subsection (7)(c) states that rule 68A-12.004(7) does not displace any laws pertaining to the sale or regulation of foodstuff and meat products. Next, we turn to the law applied by the trial court. Section 713.58 gives a person the right to place a lien on personal property that he performed services on if he has not been paid for those services. Appellee argues that because native venison meat is foodstuff, and this particular foodstuff is also personal property, section 713.58 displaces rule 68A-12.004(7).

Appellee's logic is flawed for two reasons. First, section 713.58 does not relate to the sale or regulation of anything. It simply authorizes a lien on personal property, which may include native venison meat. However, without relating to the sale or regulation of foodstuff or meat products, section 713.58 cannot supersede rule 68A-12.004(7). Second, Appellee's logic leads to an absurd result. It allows Appellee to sell native venison meat even though rule 68A-12.004(7) has banned such a sale.

Section 713.58 was in effect for more than forty years when the Fish and Wildlife Conservation Commission (FWCC) wrote rule 68A-12.004(7). If the FWCC wanted to allow an exemption for meat processors who were trying to recover their costs when a

hunter abandoned his native venison meat, it could have written the rule in such a way as to make that intention clear, but it did not. Based on our review of rule 68-A12.004(7) and section 713.58, section 713.58 does not supersede rule 68-A12.004(7). Accordingly, the trial court erred by dismissing the charges against Appellee.

REVERSED and REMANDED.

WINOKUR, J., concurs; TANENBAUM, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

TANENBAUM, J., concurring in result.

The trial court erred when it dismissed the charges against Cody Wayne Berens, and the order should be reversed. My reasoning behind this position, however, differs from that of the majority.

My consideration of this appeal begins with the premise that the Florida Fish and Wildlife Conservation Commission ("FWC") has quite limited authority. Friends and colleagues have heard (or read) me state repeatedly that there is only one lawgiver in this state, and that is the Legislature. This is generally true. *See* Art. III, § 1, Fla. Const. ("The legislative power of the state shall be vested in a legislature of the State of Florida. . . ."). However, when Floridians approved a revision to their constitution some years back to create FWC, they gave that unelected, executive-branch, collegial body a small quantum of the State's sovereign legislative authority. *See* Art. IV, § 9, Fla. Const. ("The commission shall exercise the *regulatory* and executive powers of the state *with respect to* wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state *with respect to* marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties

for violating regulations of the commission shall be prescribed by general law." (emphasis supplied)).

There are several facets to the legislative power. The exercise of the State's police power (*i.e.*, the authority to regulate health, safety, and welfare) is perhaps the most well-known. The legislative power, however, also includes the authority to set the contours of government (*i.e.*, the creation, modification, and elimination of state agencies) and to fund that government through appropriations out of the treasury. As I highlighted in the parenthetical above, the people gave FWC *just* the "regulatory" power, and they allowed FWC to regulate *just* "wild animal life and fresh water aquatic life" and "marine life."* FWC has no authority, on its own, to adopt rules that touch on subject matter outside these areas. If FWC adopts a rule within its authority that, in application, touches on subject matter outside the commission's reach (so still within the Legislature's purview to regulate), the FWC-adopted rule in essence encroaches on the Legislature's exclusive authority to regulate matters outside FWC's scope, and application of that FWC rule must give way to the Legislature's policy when there is a conflict.

With this in mind, we can say easily that FWC does not have the authority to regulate liens; that authority remains exclusively with the Legislature. The Legislature exercised that authority when it enacted the general law reflected in chapter 713, governing liens. Among others, the Legislature established a lien on personal property "[i]n favor of persons performing labor or services for any other person, upon the personal property of the latter upon which the labor or services is performed, or which is used in the business, occupation, or employment in which the labor or services is performed." §§ 713.50, 713.58(1), Fla. Stat. The Legislature also exercised its exclusive authority when it enacted the policy set out

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* Notably, the people stopped short of giving FWC the legislative power to set license fee amounts, to appropriate the funds it collects, and to establish criminal penalties. *See* Art. IV, § 9, Fla. Const. (requiring that "all license fees" and "penalties for violating regulations of the commission" be set "by general law" enacted by the Legislature).

in section 85.031, Florida Statutes, which provides to lienors "[r]emedies against personal property." One of those remedies is "by sale without judicial proceedings." *Id.* (2).

The Legislature set out the policy regarding personal-property-lien sales as follows:

> When any person entrusts to any mechanic or laborer, materials with which to construct, alter, or repair any article of value, or any article of value to be altered or repaired, and if the article is completed and not taken away, and the reasonable charges not paid, *such mechanic or laborer may sell it after 3 months from the time such charges become due at public auction for cash* . . . .

§ 85.031(2), Fla. Stat. (emphasis supplied). By general law, then, the Legislature gives a laborer who has been stiffed by a customer the right to recover the amount due him by selling at auction the personal property on which he acquired the lien. Before the lienor can auction off the property, though, he must "give public notice of the time and place thereof, by notices posted for 10 days in 3 public places in the county, one of which shall be at the courthouse, and *another in some conspicuous part of his or her shop or place of business*." *Id.* (emphasis supplied). Monies from the sale may be applied to cover the charges for the work performed and "the costs of the sale," but any excess proceeds must "be deposited with the clerk of the circuit court for the county, if the owner is absent, where they shall remain subject to the order of the person legally entitled thereto." *Id.*

The FWC regulation that Berens was charged with violating prohibits "[t]he sale of deer (venison)," except in very limited circumstances. Rule 68A-12.004(7), Fla. Admin. Code. When applied to impede poaching of native deer (by eliminating a market for taken deer), this regulation would fall squarely within FWC's limited-yet-exclusive scope of authority. At the same time, FWC does not prohibit the taking of native deer, and it does not prohibit the processing and packaging of that taken deer for the hunter's own consumption. Given this FWC policy, neither a hunter's failure to pay for and pick up the meat that he asked to be serviced, nor the processor's subsequent effort to recover the money he is

owed, could impact any effort to keep poaching in check. Indeed, the deer here already would have been taken and could not get any deader, and the meat already would have been processed and packaged. There is not a whole lot of financial incentive for a deadbeat hunter to over-hunt and then repeatedly engage in the stiffing of processors.

As a remedy for when this stiffing does happen, there are statutorily established commercial protections in place for the processor through the aforementioned lien law. To the extent that rule 68A-12.004(7) might be applied to impede a laborer's duly enacted statutory right to enforce his mechanic's lien on an "article of value" that he worked to alter—say, freshly taken deer that he legally processed for a hunter in exchange for a promise by the hunter to pay for services rendered—the application would exceed the scope of FWC's authority. In the abstract, then, Berens is correct that he could not be prosecuted for selling deer meat to enforce a lien he has on it.

Even though I agree with Berens in theory, there are fatal flaws in Berens's motion to dismiss that nevertheless impel me to vote for reversal. He filed his motion under Florida Rule of Criminal Procedure 3.190(c)(4). That rule allows a defendant to seek dismissal based on the lack of "material disputed facts" and the "undisputed facts" failing to "establish a prima facie case of guilt." *Id.* The rule requires that the defendant allege the facts on which his motion is based with specificity, and the motion must be "sworn to." *Id.* To support dismissal, Berens had to describe, under oath, "what the undisputed material facts are, and demonstrate that the undisputed facts . . . establish[ed] a valid defense (either an affirmative defense or negation of an essential element of the charge)." *Ellis v. State*, 346 So. 2d 1044, 1045 (Fla. 1st DCA 1977). Berens did not do this.

On the one hand, Berens's motion was not sworn. He signed it, to be sure, but the jurat executed by the notary indicates only that Berens "acknowledged" the motion, not that he swore to it. *Cf.* § 117.05(4)(b), Fla. Stat. (setting out the required elements of a notary's jurat, including the "type of notarial act performed, an oath or an acknowledgment, evidenced by the words 'sworn' or 'acknowledged'"); *compare id.* (13)(a) (setting out the form notarial

certificate for "oath or affirmation" as including the statement "sworn to (or affirmed) and subscribed before me"), *with id.* (13)(b) (setting out the form notarial certificate for "an acknowledgment" as including the statement, "[t]he foregoing instrument was acknowledged before me"). "Failure to swear to a '(c)(4)' motion to dismiss is fatal." *Styron v. State*, 662 So. 2d 965, 967 (Fla. 1st DCA 1995).

On the other hand, Berens does not aver facts sufficient to establish that he was charged for conduct that constitutes a bona fide lien sale that conformed with the procedures mandated by section 85.031(2). His sole averment regarding the supposed lien sale stated as follows: "FWC Officer Goss admitted that the Defendant, Cody Wayne Berens, had advised FWC Officer Jones on the very first audio/video recording that he was not selling deer but simply recouping his processing and storage charges when customers failed to pay for and pick-up their processed deer." This single factual assertion suggests that Berens had a mechanic's lien on the left-behind deer meat that he labored to process, but it falls far short of what would be sufficient to establish a prima facie case for his defense of negation based on the exercise of his right to enforce his ostensible mechanic's lien. Missing is any statement that he was selling the meat at a public auction after waiting the required three months and posting the required notices (including a notice at his place of business, which would have been readily available had it existed).

Because his motion did not set out undisputed facts demonstrating that he was selling the deer meat in compliance with the lien law, it was insufficient to support a dismissal of the charges based on that law superseding rule 68A-12.004(7). The motion instead effectively constitutes an admission that Berens indisputably was selling deer meat in violation of that rule. The trial court, in turn, erred by dismissing the information, so I concur in the disposition.

Ashley Moody, Attorney General, Trisha Meggs Pate, Tallahassee Bureau Chief, and Adam B. Wilson, Assistant Attorney General,

Tallahassee; Beverly McAllister-Brown, Assistant State Attorney, Panama City, for Appellant.

Russell R. Stewart, Panama City, for Appellee.