358 So.3d 18
District Court of Appeal of Florida, Fourth District.

Michael E. JACKSON, Appellant,
v.
CITY OF SOUTH BAY, Florida, South Bay Canvassing Board, Palm Beach County Canvassing Board, Wendy Sartory Link, in her Official Capacity as Supervisor of Elections, Palm Beach County, Florida, and Esther E. Berry, Appellees.

No. 4D21-3503
|
[February 15, 2023]

Synopsis

Background: Candidate who ran for city commissioner and lost by one vote issued a public records request, requesting copies of canvassing board meeting minutes pertaining to the election, then filed a complaint alleging violations of Florida's Sunshine Law and Florida's Public Records Act and seeking attorney's fees under both statutes. The Circuit Court, 15th Judicial Circuit, Palm Beach County, Scott Kerner, J., found no violation of either statute and therefore no entitlement to attorney's fees. Candidate appealed.

Holdings: The District Court of Appeal, Levine, J., held that:

[1] city, county canvassing board, and county supervisor of elections did not violate the Public Records Act, but

[2] there was a Sunshine Law violation when they took nearly five months to produce one day of meeting minutes.

Affirmed in part, reversed in part, and remanded with instructions.

Procedural Posture(s): On Appeal; Motion for Attorney's Fees.

West Headnotes (14)

[1] **Records** Scope, Standard, and Extent of Further Review

A trial court's factual findings involving an alleged Public Records Act violation are reviewed for competent substantial evidence, while its interpretation of the law is reviewed de novo. Fla. Stat. Ann. § 119.01 et seq.

[2] **Records** Questions of law or fact

Whether a governmental entity acted in good faith in manner in which it responded to a request for disclosure of public records is necessarily a question for court to decide based on circumstances of a case. Fla. Stat. Ann. § 119.07(1)(c).

[3] **Records** Time for Response

Where delay is at issue in an alleged Public Records Act violation, court must determine whether delay was justified under facts of particular case. Fla. Stat. Ann. § 119.01 et seq.

1 Case that cites this headnote

[4] **Records** Right of Access in General
Records Under constitutional provisions

The Public Records Act, like the Florida Constitution, guarantees a right of access to public records. Fla. Const. art. 1, § 24(a); Fla. Stat. Ann. § 119.01(1).

1 Case that cites this headnote

[5] **Records** Costs and Fees

Unlawful refusal under the Public Records Act, warranting an award of attorney fees, includes not only affirmative refusal to produce records, but also unjustified delay in producing them. Fla. Stat. Ann. § 119.12(1)(a).

1 Case that cites this headnote

[6] **Records** Particular cases

City, county canvassing board, and county supervisor of elections did not violate the Public Records Act in response to request

from candidate who lost election for city commissioner for copies of canvassing board meeting minutes pertaining to the election; city produced all meeting minutes at issue, except for minutes from one day, before an agreed-upon deadline with candidate's counsel, discovery of minutes missing from one day and their prompt production upon discovery was result of a good faith response, and delay in production of missing minutes did not amount to an unlawful refusal but rather was justified under the circumstances. Fla. Stat. Ann. §§ 119.07(1)(c), 119.12(1)(a).

[7] **Records** Preservation of error; waiver and estoppel; record

Candidate who lost election for city commissioner, requested copies of canvassing board meeting minutes pertaining to the election, then filed a complaint alleging violations of the Public Records Act, did not preserve claim of a Public Records Act violation by city due to destruction of handwritten meeting notes, where that issue was not addressed in final judgment and candidate did not move for rehearing challenging trial court's lack of findings concerning handwritten notes. Fla. R. Civ. P. 1.530(a).

[8] **Administrative Law and Procedure** Trial or review de novo

Administrative Law and Procedure Findings; evidence

A trial court's factual findings involving an alleged Sunshine Law violation are reviewed for competent substantial evidence, while its interpretation of the law is reviewed de novo. Fla. Stat. Ann. § 286.011.

[9] **Administrative Law and Procedure** Effect of violation of open meetings laws in general

Mere showing that government in the Sunshine Law has been violated constitutes an irreparable public injury. Fla. Stat. Ann. § 286.011.

[10] **Administrative Law and Procedure** Open Meetings Requirement; Sunshine Laws

The Sunshine Law should be construed so as to frustrate all evasive devices. Fla. Stat. Ann. § 286.011.

[11] **Election Law** Powers and proceedings of canvassers as to returns

There was a Sunshine Law violation when city, county canvassing board, and county supervisor of elections took nearly five months to produce one day of canvassing board meeting minutes pertaining to city commissioner election in response to request from candidate who lost the election; meeting minutes from that day clearly were not open to public inspection where city, canvassing board, and supervisor of elections were unaware of their existence, and busy election, pandemic, and good faith conduct did not justify the five-month delay in production or excuse compliance with the Sunshine Law. Fla. Stat. Ann. § 286.011.

[12] **Election Law** Preservation of grounds of review

Candidate who lost election for city commissioner, requested copies of canvassing board meeting minutes pertaining to the election, then filed a complaint alleging violations of the Sunshine Law, did not preserve claim of a Sunshine Law violation for failure to produce minutes from a meeting on one specific day, where that issue was not addressed in final judgment and candidate did not move for rehearing challenging lack of findings concerning that specific day. Fla. Stat. Ann. § 286.011; Fla. R. Civ. P. 1.530(a).

[13] **Administrative Law and Procedure** Open Meetings Requirement; Sunshine Laws

The use of the word "shall" in the Sunshine Law requires mandatory compliance. Fla. Stat. Ann. § 286.011.

[14] **Constitutional Law** Constitutional Rights in General

There is no pandemic-related exception to the Constitution.

***20** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Scott R. Kerner, Judge; L.T. Case No. 50-2020-CA-004756-XXXX-MB.

Attorneys and Law Firms

Jennifer A. Winegardner of Rayboun Winegardner PLLC, Tallahassee, and Leonard M. Collins of GrayRobinson, P.A., Tallahassee, for appellant.

David K. Markarian, Jessica R. Glickman, and Juanita Solis of The Markarian Group, Palm Beach Gardens, for appellees Wendy Sartory Link, in her official capacity as Supervisor of Elections, Palm Beach County, Florida, Palm Beach County Canvassing Board, and South Bay Canvassing Board.

Pamela C. Marsh and Virginia M. Hamrick for First Amendment Foundation, Tallahassee, Amicus Curiae on behalf of appellant.

Opinion

Levine, J.

Michael Jackson appeals a final judgment finding that the Palm Beach County Canvassing Board and the Palm Beach County Supervisor of Elections ("appellees") did not violate Florida's Sunshine Law or Public Records Act and therefore Jackson was not entitled to attorney's fees. As to the Public Records Act, we affirm on all issues. However, we find the delay in the production of the March 13 meeting ***21** minutes was a violation of the Sunshine Law. As to this issue, we reverse.

Jackson ran for South Bay City Commissioner in the March 17, 2020 municipal election and lost by one vote. On April 24, 2020, Jackson issued a public records request, requesting copies of the canvassing board meeting minutes pertaining to the March 17 election. Jackson then filed a complaint contesting the election results. Jackson later amended his complaint to allege violations of Florida's Sunshine Law and Florida's Public Records Act and sought attorney's fees under both statutes.

All of the meeting minutes, except for the March 13, 2020 minutes, were produced before a deadline suggested by Jackson's counsel. At the time of Jackson's records request, appellees did not realize a canvassing board meeting had occurred on March 13. Appellees' calendars did not contain an entry for that date. Upon receiving notes indicating a canvassing board meeting had occurred on March 13, appellees tried to access data from the laptop of the person responsible for taking the minutes, but the laptop was broken. The minutes were then retrieved from the minute-taker's email and immediately produced upon discovery to Jackson on September 18, 2020.

The trial court found Jackson's election contest untimely. That finding is not challenged on appeal. The trial court also found no violation of the Sunshine Law or Public Records Act and therefore no entitlement to attorney's fees.

Specifically, the trial court found that Jackson's public records request occurred during a "busy election" in the "throes of a pandemic" with stay-at home orders in effect and that appellees acted in good faith in assembling and producing the records. The trial court concluded no violation of the Sunshine Law occurred because there was "no evidence—particularly under the extraordinary circumstances of the day—from which the Court can conclude, using 'common sense or principles of logic' that the meeting minutes were neither 'promptly recorded' nor 'open to public inspection.' " The trial court also concluded no Public Records Act violation occurred because appellees did not "unlawfully refuse[ ]" a public records request. The trial court found that appellees produced all of the meeting minutes, except for the March 13 minutes, before "an agreed production date." Finally, the trial court found that appellees were "unaware" of the March 13 minutes and that those minutes were promptly produced upon discovery in September 2020.

A. Public Records Act

On appeal, Jackson argues that appellees' unreasonable delay in the production of meeting minutes violated the Public Records Act.

[1] **[2]** **[3]** A trial court's factual findings involving an alleged Public Records Act violation are reviewed for competent substantial evidence, while its interpretation of the law is reviewed de novo. *Nat'l Council on Comp. Ins. v. Fee*, 219 So. 3d 172, 177 (Fla. 1st DCA 2017); *see also* *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 761 (Fla. 2010). "Whether a governmental entity acted in 'good faith' in the manner in which it responded to a request for disclosure of public records is necessarily a question for the court to decide based on the circumstances of a case." *Consumer Rights, LLC v. Union Cnty., Fla.*, 159 So. 3d 882, 885 (Fla. 1st DCA 2015). "Where delay is at issue ... the court must determine whether the delay was justified under the facts of the particular case." ***22** *Citizens Awareness Found., Inc. v. Wantman Grp., Inc.*, 195 So. 3d 396, 399 (Fla. 4th DCA 2016) (citation omitted).

[4] **[5]** Florida's Constitution provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf ...." Art. I, § 24(a), Fla. Const. The Public Records Act also guarantees a right of access to public records. § 119.01(1), Fla. Stat. (2021). Pursuant to the act, a records custodian must respond to public records requests "in good faith." § 119.07(1)(c), Fla. Stat. (2021). The court shall award attorney's fees where an "agency unlawfully refused to permit a public record to be inspected ...." § 119.12(1)(a), Fla. Stat. (2021). "Unlawful refusal under section 119.12 includes not only affirmative refusal to produce records, but also unjustified delay in producing them." *Citizens Awareness Found.*, 195 So. 3d at 399 (citation omitted).

[6] **[7]** The trial court did not err in finding no violation of the Public Records Act. The trial court made a factual determination, after an evidentiary hearing, that appellees produced all of the meeting minutes at issue, except for the March 13 minutes, one day before "an agreed production date" of June 4. This factual finding is entitled to deference because it is supported by competent substantial evidence in the record. *Fee*, 219 So. 3d at 177. Because appellees produced those minutes before an agreed upon deadline, Jackson cannot now complain that he should have received those minutes earlier. Additionally, the discovery of the March 13 minutes, and their prompt production upon discovery, was the result of a "good faith response." "A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed." § 119.07(1)(c), Fla. Stat. The delay in production of the March 13 minutes did not amount to an "unlawful refusal"; rather the delay was justified under the circumstances of this particular case. *See* § 119.12(1)(a), Fla. Stat. (providing for attorney's fees where an "agency unlawfully refused to permit a public record to be inspected"); *Consumer Rights*, 159 So. 3d at 885 (finding that a four-month delay in providing records was not "the functional equivalent of an unlawful refusal" because the delay was caused by concerns regarding the authenticity of the requestor's email). [1]

B. Sunshine Law

Jackson also argues that appellees violated the Sunshine Law by failing to promptly record and make available for public inspection meeting minutes from March 13.

[8] A trial court's factual findings involving an alleged Sunshine Law violation are reviewed for competent substantial evidence, while its interpretation of the law is reviewed de novo. *Fee*, 219 So. 3d at 177; *see also* *Sarasota Citizens for Responsible Gov't*, 48 So. 3d at 761.

***23** Section 286.011(2), Florida Statutes (2021), states: "The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection." Additionally, "the court shall assess a reasonable attorney's fee" where an action is filed "to enforce the provisions of this section ... and the court determines that the defendant or defendants to such action acted in violation of this section ...." § 286.011(4), Fla. Stat. (2021).

In interpreting a statute, the starting point of analysis is the actual statutory language. *United Auto. Ins. Co. v. Chironex Enters., Inc.*, 352 So. 3d 341, 344 (Fla. 4th DCA 2022) (citation omitted). When a statute is unambiguous, a court need not resort to other rules of statutory construction. *Id.*

[9] **[10]** "Few, if any, governmental boards or agencies deliberately attempt to circumvent the government in the sunshine law." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 476 (Fla. 1974). "Mere showing that the government in the sunshine law has been violated constitutes an irreparable public injury ...." *Id.* at 477. "The statute should be construed so as to frustrate all evasive devices." *Id.*

[11] The trial court erred in finding no Sunshine Law violation as to the March 13 meeting minutes. Under section 286.011, meeting minutes "shall be promptly recorded" and "shall be open to public inspection." The March 13 meeting minutes clearly were not open to public inspection where appellees were "unaware" of their existence, as stated by the trial court. Jackson requested the minutes on April 24, but they were not produced until September 18, nearly five months later.

[12] **[13]** **[14]** The trial court cited the "busy election," the pandemic, and appellees' good faith conduct as justification for the delay in the production of the March 13 minutes. However, none of these factors excuse compliance with section 286.011. The use of the word "shall" in section 286.011 requires mandatory compliance. *See DeGregorio v. Balkwill*, 853 So. 2d 371, 374 (Fla. 2003). Additionally, section 286.011, unlike the Public Records Act, does not have a good faith exception. *See* § 119.07(1)(c), Fla. Stat. (stating that public records custodian must respond "in good faith" to requests to inspect or copy records). Further, there is no pandemic related exception to the constitution. *See E.A.C. v. State*, 324 So. 3d 499, 509 (Fla. 4th DCA 2021) (Levine, C.J., concurring). Indeed, Executive Order 20-69, which was issued on March 20, 2020 in response to the pandemic, expressly recognized that the Sunshine Law remained in effect: "This Executive Order does not waive any other requirement under the Florida Constitution and 'Florida's Government in the Sunshine Laws,' including Chapter 286, Florida Statutes." [2]

Because the trial court erred in finding no violation of the Sunshine Law with respect to the March 13 meeting minutes, we reverse as to this issue. We remand for the trial court to determine a reasonable amount of attorney's fees and costs for the Sunshine Law violation related only to the March 13 meeting minutes. *See Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1151 (Fla. 1985) (recognizing that ***24** attorney's fees are awardable only on successful claims). We affirm as to all of the other remaining issues.

Affirmed in part, reversed in part, and remanded with instructions.

May and Conner, JJ., concur.

All Citations

358 So.3d 18, 48 Fla. L. Weekly D371

Footnotes

1 Jackson also claims a Public Records Act violation due to the destruction of handwritten meeting notes. This issue is not preserved because it was not addressed in the final judgment and Jackson did not move for rehearing challenging the trial court's lack of findings concerning the handwritten notes. *See* Fla. R. Civ. P. 1.530(a) ("To preserve for appeal a challenge to the sufficiency of a trial court's findings in the final judgment, a party must raise that issue in a motion for rehearing under this rule."); *In re Amends. to Fla. R. Civ. P. 1.530*, 346 So. 3d 1161, 1162 (Fla. 2022) (recognizing that the amendment to rule 1.530 clarified existing law).

2 Jackson also claims a Sunshine Law violation for the failure to produce minutes from an April 1, 2020 meeting. That issue is not preserved because it was not addressed in the final judgment and Jackson did not move for rehearing challenging the lack of findings concerning the April 1 audit. *See* Fla. R. Civ. P. 1.530(a); *In re Amends. to Fla. R. Civ. P. 1.530*, 346 So. 3d at 1162.

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362 So.3d 311
District Court of Appeal of Florida, Fifth District.

Cynthia BURTON, Appellant,
v.
Craig OATES, as Chair of the Recall Committee, Appellee.

Case No. 5D23-1573
|
Opinion Filed June 12, 2023

Synopsis

Background: After citizen committee filed petition to recall city commissioner, commissioner brought action for declaratory and injunctive relief against committee chair, alleging that recall petition was legally insufficient and that committee did not follow statutory procedures in filing petition, thus rendering it invalid. The Circuit Court, 7th Judicial Circuit, Putnam County, Kenneth J. Janesk, J., denied commissioner's request. Commissioner appealed.

Holdings: The District Court of Appeal, Lambert, C.J., held that:

[1] county supervisor of elections was not the "equivalent" of clerk of the municipality within meaning of municipal recall statute;

[2] committee did not substantially comply with municipal recall statute by filing recall petition of city commissioner with county supervisor of elections; and

[3] commissioner did not commit act of "malfeasance," within meaning of municipal recall statute.

Reversed.

Makar, J., concurs, with opinion.

Pratt, J., concurs, in part, and concurs in result, with opinion.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment; Motion for Permanent Injunction.

West Headnotes (6)

[1] **Municipal Corporations** Proceedings and Review

Public Employment Petition or other application

County supervisor of elections was not the "equivalent" of clerk of the municipality during recall election of city commissioner within meaning of municipal recall statute, and thus citizen committee's filing of recall petition with county supervisor of elections did not comply with municipal recall statute, although statute permitted recall petition to be filed with someone acting as equivalent of auditor or clerk of municipality if it did not have clerk or auditor; city had existing clerk of municipality, plain language of statute did not provide for multiple persons to act as auditor or clerk of municipality, and legislature set forth very distinct and separate duties for clerk of municipality and county supervisor of elections in recall election process. Fla. Stat. Ann. § 100.361(2)(f).

[2] **Municipal Corporations** Proceedings and Review

Public Employment Petition or other application

Citizen committee did not substantially comply with municipal recall statute by filing recall petition of city commissioner with county supervisor of elections; municipal recall statute required recall petition to be filed with municipality's auditor, clerk, or equivalent, no statutory language permitted mere substantial compliance, and statute did not provide that failure to comply could be excused if there was alleged lack of prejudice to elected official targeted for election recall. Fla. Stat. Ann. § 100.361.

[3] **Municipal Corporations** Rules of procedure and conduct of business

Municipal Corporations Grounds

Public Employment Grounds

Public city commissioner meeting in which city commissioner participated where city business was conducted but members of public were only permitted to attend virtually due to COVID-19 pandemic was "open to the public" within meaning of Sunshine Law, and thus commissioner did not commit act of "malfeasance," within meaning of municipal recall statute, by attending meeting, as ground for recall of elected municipal officer from office; city had placed public on notice that meeting would be conducted in "virtual environment" and that anyone wishing to participate and speak at meeting could do so, notice gave directions in bold lettering on how to attend, and citizen committee who filed petition did not argue that public was precluded from participating in meeting or was not properly noticed. Fla. Stat. Ann. §§ 100.361(2)(d)(1), 286.011(1).

[4] **Municipal Corporations** Grounds

Public Employment Grounds

"Malfeasance," within meaning of municipal recall statute, is the performance of a completely illegal or wrongful act by an elected official. Fla. Stat. Ann. § 100.361(2)(d)(1).

[5] **Municipal Corporations** Rules of procedure and conduct of business

Municipal Corporations Grounds

Public Employment Grounds

Commissioners of a municipality must comply with Sunshine Law, and the failure to do so can constitute an act of "malfeasance" that is properly presented in a recall petition pursuant to municipal recall statute. Fla. Stat. Ann. §§ 100.361(2)(d)(1), 286.011.

[6] **Constitutional Law** Judicial rewriting or revision

Statutes Departing from or varying language of statute

A court may not rewrite a statute or ignore the words chosen by the legislature so as to expand its terms.

1 Case that cites this headnote

***313** Appeal from the Circuit Court for Putnam County, Kenneth J. Janesk, Judge. LT Case No. 2023-CA-8

Attorneys and Law Firms

Meagan L. Logan, of Douglas & Douglas, Lake City, for Appellant.

Marc J. Randazza and Richard J. Mockler, of Randazza Legal Group, PLLC, Tampa, for Appellee.

Opinion

LAMBERT, C.J.

On January 14, 2021, Appellant, Cynthia Burton, an elected city commissioner for the city of Crescent City, attended a regularly scheduled meeting of the city commission. The agenda for the meeting stated that the "meeting will be conducted in a virtual environment due to the recent escalating COVID-19 outbreaks" but provided a specific description of the procedures to be followed for any member of the public who wished to attend or speak at the meeting.

Approximately twenty-three months after this meeting, Appellee, Craig Oates, filed a petition under section 100.361, Florida Statutes (2022), to recall Burton as city commissioner. The petition designated Oates as the chair of the recall committee and alleged that at the aforementioned January 14, 2021 commission meeting, Burton committed an act of malfeasance under section 100.361(2)(d)1, Florida Statutes, when she, the other city commissioners, the mayor, and the city manager met "in private, behind locked doors at ... City Hall, depriving members of the general public from attending the meeting in person as required under Florida['s Government-in-the-Sunshine L]aw." The petition stated that "[d]uring the meeting, a motion for an ordinance to abolish the Crescent City Police Department was made."

In response to the recall petition, Burton promptly filed suit in circuit court. She sought a declaratory judgment that

the grounds alleged in the recall petition did not constitute "malfeasance" under section 100.361(2)(d), Florida Statutes, and that the recall petition to remove her from office was thus legally insufficient. Burton also sought a judicial determination that Oates, as recall committee chair, did not follow the statutory procedures outlined in section 100.361 when he filed the recall petition directly with the Putnam County Supervisor of Elections instead of the Clerk for the City of Crescent City, thus rendering the petition invalid. Based on these alleged violations, Burton also asked the trial court to enjoin the recall proceedings.

Oates answered the complaint, admitting, among other things, that he filed the ***314** recall petition with the director of services for the Supervisor of Elections of Putnam County. The trial court advanced the case on its calendar and promptly held an evidentiary hearing on Burton's complaint. By the time of the hearing, the election on whether to recall Burton had been set for Tuesday, May 30, 2023.

The trial court denied Burton's request for declaratory and injunctive relief. In its written order, the court found that the recall petition was "legally sufficient." The court also found that while it was "clear" from the evidence that a Ms. Karen Hayes "did and still does perform the duties of the 'Crescent City Clerk,' " it was nevertheless permissible under section 100.361 for Oates to have filed the recall petition directly with the Putnam County Supervisor of Elections, instead of Ms. Hayes.

Burton has timely appealed. Due to the abbreviated time frame before the election, an emergency panel was assigned on May 26, 2023, that issued an order allowing the May 30th election to go forward; it also stayed the result of the election and prohibited Burton's removal from office pending disposition of this appeal. For the following reasons, we reverse the order denying Burton relief.

ANALYSIS

[1] Burton first argues that the trial court erred in denying her relief because, procedurally, Oates failed to comply with the requirement of section 100.361, Florida Statutes, by failing to file the recall petition with the Clerk of Crescent City. We agree.

Section 100.361 is succinctly titled "Municipal recall" and sets forth the procedure by which a city commissioner of a municipality may be recalled from office by the electors of the municipality. The statute carefully delineates: (1) the content requirements for the recall petition; (2) the requisite number of signatures for the petition based upon the number of registered electors in the municipality; (3) that there be a designated recall committee, with a specific person named as the chair who acts on behalf of the committee; (4) the limited, enumerated grounds for the removal of an elected official and the requirement that the grounds for recall be set forth in the petition; and (5) the process of obtaining electors' signatures on the recall petition. *See* § 100.361(2)(a)–(e), Fla. Stat. (2022).

Subsection 100.361(2)(f) addresses the process of filing the recall petition forms. Specifically, the chair of the recall committee "shall file the signed petition forms with the auditor or clerk of the municipality ..., or his or her equivalent." § 100.361(2)(f). The trial court found in its order that "[t]he testimony was clear that [an individual by the name of] Karen Hayes is absolutely the Clerk of Crescent City, now in name, but since 2021 in job duties." Equally clear was that Oates did not file the recall petition with Ms. Hayes. Instead, as previously mentioned, he filed it with the office of the Putnam County Supervisor of Elections.

Burton argued below, as she does here, that Oates's filing of the recall petition with the Supervisor of Elections violated the plain language of the statute. The trial court disagreed, explaining that filing the recall petition with the County Supervisor of Elections was permissible under section 100.361(2)(f) because the statute was silent as to whether only one person can serve as the municipality's "auditor, clerk, or equivalent" and that "common sense would say that there is no prohibition on multiple clerks."

Thus, the issue before our court is one of statutory interpretation—whether the trial court correctly interpreted ***315** section 100.361(2)(f) to permit a County Supervisor of Elections to separately be the "equivalent" of the clerk of a municipality in a recall election when there is an existing clerk of the municipality. We review statutory interpretation de novo. *Cohen v. Autumn Vill., Inc.*, 339 So. 3d 429, 430 (Fla. 1st DCA 2022) (citing *Ag. for Health Care Admin. v. Best Care Assurance, LLC*, 302 So. 3d 1012, 1015 (Fla. 1st DCA 2020)). The Florida Supreme Court has made very clear that, for purposes of statutory interpretation, courts are to apply the "supremacy-of-text principle"—namely, that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Ham v.*

Portfolio Recovery Assocs., LLC, 308 So. 3d 942, 946 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012)).

Here, the plain text of section 100.361(2)(f) does not provide for multiple persons to act as the auditor or clerk of the municipality. The text provides that the recall petition is to be filed with the auditor or clerk of the municipality and, if there is no clerk or auditor, with someone who is acting as their "equivalent." As found by the trial court, there was a clerk of the municipality—Karen Hayes. Moreover, the Legislature set forth in section 100.361 very distinct and separate duties for the clerk of a municipality and the County Supervisor of Elections in the recall election process. *See* § 100.361(2)(g), (3). Had the Legislature also intended the County Supervisor of Elections to act as the "equivalent" of the clerk of the municipality during a recall election, it could have easily, clearly done so. It did not.

[2] We further reject Oates's separate argument that the trial court's order should be affirmed because the recall committee substantially complied with section 100.361 by filing the recall petition with the Supervisor of Elections. First, section 100.361(2)(f) provides that the petition shall be filed with the municipality's auditor, clerk, or their equivalent. "Shall" is mandatory. *Sanders v. City of Orlando*, 997 So. 2d 1089, 1095 (Fla. 2008) (citing *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002)).

Second, section 100.361 contains no language that permits substantial compliance with the statute. Nor does it provide that the failure to comply with the filing requirements of the statute can be excused if there is an alleged lack of prejudice to the elected official targeted for election recall. *Accord Demase v. State Farm Fla. Ins.*, 351 So. 3d 136, 139–41 (Fla. 5th DCA 2022) (Sasso, J., concurring specially) (rejecting a substantial compliance argument as there was nothing in the text of the statute that permitted substantial compliance, "the statute employs the mandatory language 'shall,' " and the Florida Legislature did not include either a substantial compliance or a prejudice exception).

Accordingly, we hold that Oates failed to comply with the procedural requirement of section 100.361 when he filed the signed recall petition with the Putnam County Supervisor of Elections, instead of with Karen Hayes, the Clerk of Crescent City.

[3] We next address Burton's claim that the trial court erred when it determined that the recall petition was "legally sufficient." Section 100.361(2)(d) provides seven enumerated grounds for the recall of an elected municipal officer from office. The recall petition filed in this case alleged that Burton had committed an act of "malfeasance" under section 100.361(2)(d)11.

[4] Malfeasance is the "performance of a completely illegal or wrongful act" by an elected official. *Moultrie v. Davis*, 498 So. 2d 993, 995 (Fla. 4th DCA 1986). As previously ***316** stated, the alleged malfeasance in this case was that on January 14, 2021, Burton met with other Crescent City commissioners, together with the mayor and city manager, in private, behind locked doors at City Hall, thus depriving members of the general public from attending the commission meeting in person, "as required by Florida law," and that, during this meeting, a motion was made for "an ordinance to abolish the Crescent City Police Department."

The "law" Oates asserted that Burton violated is Florida's "Sunshine Law," codified at section 286.011, Florida Statutes (2020). Subsection (1) of this statute provides, in pertinent part, that "[a]ll meetings of any ... commission of any ... municipal corporation ... 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." *Accord* Art. I, § 24(b), Fla. Const.

[5] We begin our analysis with matters that are not in dispute. First, commissioners of a municipality must comply with Florida's Sunshine Law. The failure to do so can constitute an act of malfeasance that is properly presented in a recall petition. *Thompson v. Napotnik*, 923 So. 2d 537, 540 (Fla. 5th DCA 2006). Second, a public meeting was held at City Hall on January 14, 2021, attended by Commissioner Burton at which business of Crescent City was conducted. Third, the public was permitted to attend this meeting "virtually," but could not attend in person.

From these facts, the dispositive question is whether, under section 286.011(1), this January 14, 2021 meeting was "open to the public." If so, then Burton, by definition, did not commit an act of "malfeasance" by her attendance.

In *Herrin v. City of Deltona*, 121 So. 3d 1094, 1097 (Fla. 5th DCA 2013), our court addressed the phrase "open to the

public" contained in Florida's Sunshine Law. We concluded that the term reasonably meant that city commissioner meetings must be properly noticed and made reasonably accessible to the public. *Id.* We also held that the public had no right to speak or be heard at such a meeting. *Id.*

What Oates is essentially asking here is that we interpret section 286.011(1)'s language to mean that a meeting is "open to the public" only if the public can attend the meeting in person, despite the language "in person" being conspicuously absent from the statute. We respectfully decline to do so.

[6] Simply stated, a court "may not 'rewrite the statute or ignore the words chosen by the Legislature so as to expand its terms.' " *State v. Gabriel*, 314 So. 3d 1243, 1248 (Fla. 2021) (quoting *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 7 (Fla. 2004)). Had the Legislature intended that a meeting is only "open to the public" under Florida's Sunshine Law when the public is permitted to attend in person, it could have easily stated so. That is the Legislature's prerogative, not ours.

Due to the global pandemic, Crescent City placed the public on notice that its January 14, 2021 commission meeting would be conducted in a "virtual environment." The notice specifically advised the public that anyone wishing to participate and speak at the meeting could do so; and, in bold letters, directions were given to the public on how to do so. Oates does not argue here that the public was precluded from participating in the January 14 meeting through the virtual platform described, nor does he contend that the public was not properly noticed concerning the date or time of the meeting.

***317** Lastly, we find the cases cited by Oates in his brief for the proposition that Burton committed malfeasance to be distinguishable. In *Parris v. State*, 359 So.3d 1178 (Fla. 4th DCA Apr. 12, 2023), despite the earlier cancellation of a properly noticed city council meeting, three city council members held the meeting and addressed matters related to the city. In *Rhea v. Alachua County School Board*, 636 So. 2d 1383, 1384 (Fla. 1st DCA 1994), the Alachua County School Board held a public meeting more than 100 miles away from its headquarters. In contrast, the citizens of Crescent City were given sufficient notice of the January 14, 2021 meeting, together with a specific procedure that allowed them, as members of the public, to attend and be heard at the meeting.

Accordingly, we hold that the recall petition alleging that Burton committed an act of malfeasance under section 100.361(2)(d) was legally insufficient. We therefore reverse the trial court's order and the results of the subject petition and election to recall Burton as city commissioner for Crescent City.

REVERSED and REMANDED for entry of judgment in favor of Burton.

MAKAR, J., concurs, with opinion.

PRATT, J., concurs, in part, and concurs in result, with opinion.

MAKAR, J., concurring.

Sandwiched between Crescent Lake on its east and Lake Stella on its west, Crescent City, Florida (pop. 1,654), is the birthplace of A. Philip Randolph, who became a prominent civil rights leader in the 1950s and 1960s, and the hometown of Raymond Ehrlich, a future Florida supreme court justice, whose family moved there in 1926. Idyllic lake sunrises and sunsets, along with boating, watersports, and fishing (it is dubbed the "Bass Capitol of the World"), make Crescent City a desirable venue for a laid-back and relaxing lifestyle. Indeed, it describes itself as a "humble community" that is "the oasis of Old Florida" with a "serenity and peacefulness ... that is like no other."

Despite its tranquil and picturesque veneer, the City has been beset by political acrimony in the form of attempted recalls of municipal officials in recent years. [1] In communities both large and small, the divisiveness of politics that arises during election cycles can spin off into off-cycle squabbles that deteriorate into efforts to recall elected officials. Florida has a history of local recall elections, which are inherently contentious and personal in smaller close-knit towns; a statewide recall election involving millions of voters is one thing; a recall election in a quaint neighborly community such as Crescent City, with sixteen hundred and fifty-four residents on 2.1 square miles, is quite another.

Recall systems serve a limited and important purpose: empowering the people to pull the plug on elected public officials who engage in bribery, corruption, and other forms

of bad behavior before the completion of their terms. They require a delicate balance of the people's sovereign power over elected officials and the guardrails necessary to ensure that recalls aren't misused to the detriment of local communities and the destabilizing of the democratic process.

> ***318** The nature of the recall process balances two opposing positions: the democratic ideal of allowing the people to rectify serious mistakes in choosing officials, on the one hand, and the goal of allowing officials to serve out their term of office unimpeded by having to defend against a series of recall attempts for trifling reasons, by disgruntled political opponents, and the like, on the other.

> As the statutory scheme for recall elections presently stands, it is apparent that *recall is treated as an extraordinary proceeding with the burden on those seeking to overturn the regular elective process to base the petition upon lawful grounds or face the invalidation of the proceedings*. In our view, the present legislative scheme protects public officials from being ousted when illegal grounds provide the basis for recall. Since we place enormous value on the regular elective process, this legislative scheme is certainly not unreasonable.

Jay M. Zitter, *Sufficiency of Technical and Procedural Aspects of Recall Petitions*, 116 A.L.R.5th 1 § 2(a) (2023); *see also* Jay M. Zitter, *Sufficiency of Particular Charges as Affecting Enforceability of Recall Petition*, 114 A.L.R.5th 1 § 2(a) (2023) (same).

Elections themselves are the fundamental check on elected representatives. The longer a representative's term in office, however, the greater the potential for a lack of responsiveness to constituents and a departure from legal norms between elections, and thereby the need for an intra-term means of removing a corrupt elected official; officials mindful of recalls are less likely to engage in corrupt acts because the specter of removal is omnipresent. A downside to recall systems is that they potentially short-circuit the regular election process if used for invalid political or personal purposes; they can create a poisonous atmosphere of charges, counter charges, and vitriol that damage the democratic system itself and reduce rather than increase the potential for effective local governance. Plus, off-cycle recall elections tend to have lower turnouts, potentially skewing the outcomes. [2]

The bottom line on Florida's recall system was best stated almost a quarter century ago by our supreme court in *Garvin v. Jerome*:

767 So. 2d 1190, 1193 (Fla. 2000) (emphasis added). The legal issue in *Garvin* was whether the inclusion of one valid ground in a recall petition that contained four invalid grounds for removal nullified the recall process. *Id.* at 1190–91. The court concluded that "[t]here can be little doubt that the presence of the invalid grounds would taint any recall election based thereon." *Id.* at 1193.

The reason is that "approval of a ballot containing invalid grounds would almost certainly lead to abuse." *Id.* As an example, an "astute draftsman could couple legally insufficient (but politically charged) allegations with legally sufficient (but less politically compelling) grounds" in a recall petition, hoping to gain support and signatures because, although "the valid grounds might not generate support for the recall petition, the invalid grounds might." *Id.* Due to the potential for misuse, the supreme court concluded that judicially invalidating a defective petition was necessary, else the "legitimate purposes served ***319** by the recall statute would be severely undermined." *Id.*

For similar reasons, petitions that make conclusory legal claims or are based on conduct that is lawful (or not unlawful) are facially invalid. For instance, a petition claiming that an official "violated the public meetings" laws—without a supporting statement of facts demonstrating how—is legally insufficient. *Richard v. Tomlinson*, 49 So. 2d 798, 799 (Fla. 1951) (finding a petition invalid where it constituted "nothing more than the statement of a conclusion or opinion without

any tangible basis in fact"); *see also Bent v. Ballantyne*, 368 So. 2d 351, 353 (Fla. 1979) ("[T]he mere recital of a statutory ground, without an allegation of conduct constituting that ground[ ] is insufficient."); *Moultrie v. Davis*, 498 So. 2d 993, 996–97 (Fla. 4th DCA 1986) (holding unspecified allegations in a petition insufficient, citing *Richard* and *Bent*). A reviewing court cannot make a judgment on the facial sufficiency of a bare legal claim without a sufficiently detailed statement of alleged facts. *See Bent*, 368 So. 2d at 352.

The same is true of a claim, supported by a statement of alleged facts, that is false or misleading without additional facts or context. For example, a recall petition that says a mayor failed to attend city commission meetings is invalid because the city charter, which allowed but did not require attendance, did not establish a legal duty to attend. *Sanchez v. Lopez*, 219 So. 3d 156, 159 (Fla. 3d DCA 2017) ("Since the City Charter does not require that the mayor attend commission meetings, then it stands to reason that there cannot be a violation of such duty because the duty does not exist."). Within this category of claims are half-truths, such as a claim that a public official attended a meeting that excluded the public; if the claim fails to mention that a reasonable means of public access was allowed, it amounts to a misleading claim that will lead to invalidation. This type of half-true claim is the "blackest of lies." *Ross v. Bank S., N.A.*, 885 F.2d 723, 757 (11th Cir. 1989) ("That a lie which is half a truth is ever the blackest of lies, That a lie which is all a lie may be met and fought with outright, But a lie which is part a truth is a harder matter to fight.") (Clark, J., dissenting) (quoting Tennyson, *The Grandmother*, stanza 8 (1864)). Citizens have the right to recall their municipal officials, but their petitions must fully and accurately state ultimate facts to be considered by the electorate.

In conclusion, recalls of elected officials based on lawful grounds meet the heavy burden our supreme court has set. At the same time, the supreme court has made clear "that the public policy underlying the legislative scheme does not mandate that officials who have been duly elected to their positions of responsibility should have to face an extraordinary recall election with every vote they cast or statement they make." *Garvin*, 767 So. 2d at 1193 ("[P]ublic officials should not face removal from the office they were lawfully and properly elected to on a ballot that contains illegal grounds for recall in express violation of the statute."). Based on these principles, I fully concur in Chief Judge Lambert's opinion, which holds that the most recent recall attempt in Crescent City's municipal governance is marred both procedurally and substantively. It's worth pointing out that efforts to recall public officials that fail due to procedural infirmities or substantive shortcomings are a drain on not only a community's psyche, but on its limited financial and governmental resources, including legal fees. *See Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 917–20 (Fla. 1990). Just as those in public office must safeguard democratic principles and protect the public coffers, those who seek to overturn the ***320** regular elective process must strictly comply with procedural and substantive requirements to avoid unnecessarily wasting the people's money.

PRATT, J., concurring in part and concurring in result.

The majority opinion correctly acknowledges that the text and structure of the relevant statutes—and no other considerations—control our resolution of this appeal. *See Forrester v. Sch. Bd. of Sumter Cty.*, 316 So. 3d 774, 776 (Fla. 5th DCA 2021) (Sasso, J.). As to the recall petition's substantive defect, I fully concur in the majority's conclusion that the Sunshine Law contains no requirement that public meetings permit in-person attendance. While section 286.011(1), Florida Statutes (2020), requires that local government meetings be "open to the public at all times," it does not "prescribe any particular *means* of holding" open public meetings. Op. Att'y Gen. Fla. 2020-03 (2020) (emphasis in original). The majority properly rejects Oates's invitation to add the phrase "in person" to the statute.

However, as to the recall effort's procedural defect, unlike the majority, I would not reach the issues of whether section 100.361, Florida Statutes (2022), allows only one person to act as the clerk's or auditor's equivalent and whether Karen Hayes is that person. Instead, I would hold only that the county supervisor of elections cannot, under any circumstances, qualify. That conclusion follows clearly from the statutory text and suffices to adjudicate Burton's procedural defect claim.

Section 100.361(2) provides that the recall committee chair "shall file the signed petition forms with the auditor or clerk ... or his or her equivalent," and then directs that "[i]mmediately after the filing of the petition forms, the clerk shall submit such forms to the county supervisor of elections" so the supervisor may "promptly verify the signatures[.]" § 100.361(2)(f)–(g). The statute goes on to allocate additional responsibilities between the clerk and the supervisor. *See generally* § 100.361(2)–(4). Whatever

under-determinacy might flow from the statute's use of the term "equivalent"—and regardless whether the statute contemplates that multiple officials might qualify—the supervisor cannot fit the bill. Why? Because the statute clearly assigns one set of responsibilities to the clerk, and another to the supervisor. Treating the supervisor as the clerk's equivalent would eviscerate the statute's allocation of petition processing responsibilities between two officials and flout the statutory text by consolidating those responsibilities into one official.

Thus, regardless whether Ms. Hayes may be the clerk's equivalent, and regardless whether additional persons might fit that description, the statute makes very clear that at least one official can't: the supervisor. For that reason, I concur in the majority's conclusion that the recall effort is procedurally defective. I likewise concur in its conclusion that the statute's mandatory language and lack of exceptions preclude Oates's substantial-compliance argument.

All Citations

362 So.3d 311, 48 Fla. L. Weekly D1178

Footnotes

1 *See* Order on Plaintiff's Complaint for Declaratory and Injunctive Relief, *West v. Tatum*, No. 2021-CA-87 (Fla. 7th Cir. Ct. May 5, 2021) (The Circuit Court, in and for Putnam County, granted declaratory and injunctive relief based on a legally insufficient recall petition.).

2 The City has 1,013 registered voters, of which only 306 (30.2%) voted in the May 30, 2023, recall election (held the day after the Memorial Day holiday): 180 to remove Burton and 126 to retain her. By contrast, Burton received 350 votes to her opponent's 331, a total voter turnout of 681 (69% of the 987 registered voters at the time) in the 2020 election cycle.

359 So.3d 784
District Court of Appeal of Florida, Fourth District.

Damien Herman GILLIAMS, Appellant,
v.
STATE of Florida, Appellee.

No. 4D21-2667
|
[April 12, 2023]

Synopsis

Background: Defendant, who was city council member, was convicted in the County Court, Indian River County, Michael Linn, J., of violating Sunshine Law and perjury. Defendant appealed.

Holdings: The District Court of Appeal held that:

[1] Sunshine Law was not unconstitutionally vague, and

[2] perjury conviction was not supported by sufficient evidence.

Affirmed in part, reversed in part, and remanded with instructions.

Ciklin, J., concurred specially with opinion.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

West Headnotes (14)

[1] **Constitutional Law** Particular offenses in general

Municipal Corporations Rules of procedure and conduct of business

Municipal Corporations Criminal responsibility

Public Employment State, local, and other non-federal personnel in general

Fact that Sunshine Law provision requiring reasonable notice of public meetings did not define "reasonable notice" did not render provision unconstitutionally vague, in prosecution of city council member; plain and ordinary meaning of words "reasonable" and "notice," as well as court opinions addressing meaning of "reasonable notice," provided sufficient guidance as to phrase's meaning in context of Sunshine Law. Fla. Stat. Ann. § 286.011.

[2] **Constitutional Law** Particular offenses in general

Municipal Corporations Rules of procedure and conduct of business

Municipal Corporations Criminal responsibility

Public Employment State, local, and other non-federal personnel in general

Public Employment Instructions

Fact that Sunshine Law provision requiring reasonable notice of public meetings did not define "meeting" did not render provision unconstitutionally vague, in prosecution of city council member and in light of definition provided to jury, which included language "through wire or electronic means," where such interpretation was consistent with plain language of statute, and interpretation of statute as applying only to in-person meetings would render absurd result. Fla. Stat. Ann. § 286.011.

[3] **Constitutional Law** Presumptions and Construction as to Constitutionality

Constitutional Law Proof beyond a reasonable doubt

There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute's validity must be resolved in favor of constitutionality.

[4] **Constitutional Law** Vagueness in general

In a vagueness challenge to a statute, any doubt as to a statute's validity should be resolved in favor of the citizen and against the state.

[5] **Constitutional Law** Burden of Proof

A plaintiff who challenges the constitutionality of a statute has the burden of demonstrating its invalidity.

[6] **Constitutional Law** Statutes

In order to withstand a vagueness challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct.

[7] **Constitutional Law** Statutes

In order to withstand a vagueness challenge, a criminal statute must define the offense in a manner that does not encourage arbitrary and discriminatory enforcement.

[8] **Constitutional Law** Statutes in general

Legislature's failure to define statutory term does not, in and of itself, render penal provision unconstitutionally vague; in absence of statutory definition, resort may be had to case law or related statutory provisions which define term.

[9] **Perjury** Falsity of oath or assertion

Statement to investigator by defendant, who was city council member, that he "had only one phone conversation with another council member," was insufficient to support defendant's conviction for perjury; although video of defendant appeared to show defendant making several phone calls, record showed one longer call and several shorter calls, and there was no evidence that the shorter calls constituted instances of conversations. Fla. Stat. Ann. § 837.012(1).

[10] **Criminal Law** Review De Novo

An appellate court reviews a trial court's denial of a motion for judgment of acquittal de novo.

[11] **Perjury** Falsity of testimony or assertion, and knowledge thereof

The statement alleged to be perjury must be one of fact, and not of opinion or belief. Fla. Stat. Ann. § 837.012.

[12] **Perjury** Falsity of testimony or assertion, and knowledge thereof

The questions posed to elicit perjured testimony must be asked with the appropriate specificity necessary to result in an equally specific statement of fact. Fla. Stat. Ann. § 837.012.

[13] **Perjury** Falsity of testimony or assertion, and knowledge thereof

Precise questioning is imperative as a predicate for the offense of perjury. Fla. Stat. Ann. § 837.012.

[14] **Perjury** Falsity of testimony or assertion, and knowledge thereof

An initially false statement can be further explained so that the statement taken as a whole is not perjury. Fla. Stat. Ann. § 837.012.

***785** Appeal from the County Court for the Nineteenth Judicial Circuit, Indian River County; Michael Linn, Judge; L.T. Case No. 312020MM001119A.

Attorneys and Law Firms

Ama N. Appiah of the Law Office of Ama N. Appiah, P.A., St. Petersburg, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Lindsay A. Warner, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

Per Curiam.

After the City of Sebastian's city manager announced a cancellation of a properly noticed city council meeting, three councilmembers, including the appellant, Damien Gilliams, held a meeting anyway, during which they voted to terminate the employment of the city manager, the city attorney, and the city clerk, and voted to remove the mayor and replace him with Gilliams. Based on this meeting and telephone calls between Gilliams and Sebastian City Councilmembers Pamela Parris and Charles Mauti before and after the meeting, Gilliams was convicted of three counts of violating section 286.011, Florida Statutes (2019), commonly referred to as the Sunshine Law. He was also convicted of perjury based on a statement he made to state attorney investigators Ed Arens and Jeff Kittredge during an investigation of the Sunshine Law violation. Gilliams raises multiple issues on appeal. We agree with Gilliams that his perjury conviction should be reversed, as the state did not prove he made the false statement alleged. We affirm with respect to the remaining issues, because they lack merit or were not preserved.

Sunshine Law Convictions

[1] **[2]** **[3]** **[4]** **[5]** **[6]** **[7]** **[8]** Gilliams first challenges his Sunshine Law convictions, arguing that the statute is unconstitutionally vague due to undefined terms in the statute, namely ***786** "meeting" and "reasonable notice." [1] We disagree. "There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute's validity must be resolved in favor of constitutionality." *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012). However, "in a vagueness challenge, any doubt as to a statute's validity should be resolved in favor of the citizen and against the State." *Id.* (quoting *DuFresne v. State*, 826 So. 2d 272, 274 (Fla. 2002)). "One who challenges the constitutionality of a statute has the burden of demonstrating its invalidity." *Dep't of Child. & Fam. Servs. v. Nat. Parents of J.B.*, 736 So. 2d 111, 113 (Fla. 4th DCA 1999) (citation omitted). As we explained in our opinion in Gilliams's co-defendant's appeal, where we also addressed a vagueness challenge:

> "[I]n order to withstand a vagueness challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct. Additionally, the statute must define the offense in a manner that does not encourage arbitrary and discriminatory enforcement." *DuFresne v. State*, 826 So. 2d 272, 275 (Fla. 2002) (citations omitted). "However, '[t]he legislature's failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague. In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term ....' " *Id.* (alterations in original) (quoting *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980)). "[I]n cases where the exact meaning of a term was not defined in a statute itself, we have ascertained its meaning by reference to other statutory provisions, as well as case law or the plain and ordinary meaning of a word of common usage." *Id.*

Parris v. State, 4D21-2682 (Fla. 4th DCA Apr. 12, 2023).

In *Parris*, we explained that the plain and ordinary meaning of the words "reasonable" and "notice," as well as court opinions addressing the meaning of "reasonable notice," provide sufficient guidance as to the phrase's meaning in the context of the Sunshine Law. *Id.*; *see also Transparency for Fla. v. City of Port St. Lucie*, 240 So. 3d 780, 787 (Fla. 4th DCA 2018) (holding that what constitutes "reasonable notice" in any given case is a fact specific inquiry, and whether notice was reasonable depends on the purpose for the notice, the character of the event about which notice is given, and the nature of the rights to be affected); *Fla. Citizens All., Inc. v. Sch. Bd. of Collier Cnty.*, 328 So. 3d 22, 28 (Fla. 2d DCA 2021) (citing *Transparency for Fla.* and holding that "burying a notice inside a committee application and calendar on the instructional materials page of the District's website is an unreasonable way to give public notice of a meeting").

As for the word "meeting," Gilliams argues that the definition provided to the jury, which includes the language "through wire or electronic means," is inconsistent with the dictionary definition of "meeting" and is also contrary to the definition of the word at the time of the statute's enactment. Thus, he argues, a telephone conversation should not be considered a "meeting."

"Meeting" is defined as "an organized gathering of people for a discussion or other purpose ... a situation in which people meet by chance or arrangement." ***787** *Oxford Am. Dictionary & Thesaurus* (2d ed. 2009). Our courts have recognized that meetings which do not occur in person can potentially violate the Sunshine Law. *See Transparency for Fla.*, 240 So. 3d at 785 (recognizing that a series of phone meetings between councilmembers and city attorney could have violated the Sunshine Law); *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 766 (Fla. 2010) ("[A]ny possible violations that occurred when Board members circulated e-mails among each other were cured by subsequent public meetings ...."). These interpretations of the statute are consistent with its plain language. *See* Robert Michael Eschenfelder, *Modern Sunshine: Attending Public Meetings in the Digital Age*, 84 Fla. B.J. 28, 28 (Apr. 2010) ("Given the lack of any constitutional or statutory definition of the word 'meeting,' coupled with the ability of modern technology to allow meetings to be attended by persons physically located in different countries, a plain language reading of the word would seem to allow meetings subject to the Sunshine Law to be conducted and attended electronically."). [2] To interpret the statute as applying only to in-person meetings would render an absurd result.

Perjury Conviction

[9] Gilliams next argues that the trial court erred in denying his motion for judgment of acquittal as to the perjury count. We agree. The state alleged that Gilliams "falsely told a law enforcement officer that he had only one phone conversation with another council member on April 22, 2020 ...." However, the state failed to prove: (1) Gilliams actually stated that he had only one phone conversation with another councilmember on the date in question; and (2) Gilliams had more than one phone conversation with a councilmember during the period of time about which he was interrogated.

At trial, the state submitted a surveillance video and photographic stills showing Gilliams entering city hall at 5:30 p.m. on April 22, 2020, and speaking on a cell phone. The state also introduced into evidence an investigator's summary, which reflected that calls were made from Gilliams's cell phone to Parris's cell phone throughout the day starting in the morning and continuing into the afternoon and evening, and that calls were also made that day between Gilliams and Mauti.

The state also submitted as evidence Gilliams's recorded statement to investigators Arens and Kittredge. During questioning, Gilliams explained that one of his supporters, Russell Herrmann, called him on April 22 and asked if he was "coming down" to city hall. Gilliams responded that the meeting had been canceled. Herrmann encouraged him to go to city hall, as "your supporters are all down here and they want to have a rally." Gilliams dressed quickly and "brought my bullhorn." Upon his arrival, he met up with councilman Mauti. He believed Herrmann had called Parris to tell her about the rally.

Arens inquired whether Gilliams had asked Herrmann to contact Parris to tell her "we're having a meeting," and Gilliams responded, "No. I was there for a rally." Gilliams acknowledged that in the surveillance video, he can be seen talking on the phone. Arens stated that it "looked [like] ... you made some phone calls." Gilliams ***788** responded, "I made one phone call." When asked who he called, he declined to say. The following exchange occurred:

> Q: Did you call Councilman Parris?
>
> A: No.
>
> Q: Did you text or contact Councilman Parris ... in any way?
>
> A: I, I told you earlier, when I got there –
>
> Q: Right.
>
> A: — that was the only time that I had called her, about the rally. I told you that ... just a few minutes ago.
>
> Q: No, you didn't say that you called her. You said Mr. Herrmann called her.
>
> A: No, and I also called her as well.
>
> Q: Okay. I missed that.
>
> A: Yeah. I'm ... sorry ... I also asked her, I said, "Are you coming down to the rally, I'm down here." She says, she wasn't sure. I said, "So, okay, I'm going to be down here."
>
> ....
>
> Q: Anyway, so you did call Councilman Parris and asked her if she was –

A: About the rally.

Q: About coming to the rally.

A: Correct.

The investigative interview moved on to other topics. Investigator Kittredge then asked if, after Gilliams "decided to show up or go" to city hall, "[d]id you have any communication with Parris or Mauti via phone text?" Gilliams stated, "I think I called [Parris], not text." He denied any "texting." He called Parris to ask if she was going to come to the rally. After Kittredge questioned Gilliams about details regarding the meeting held on April 22, Arens returned to the topic of "who [Gilliams] called," as depicted on surveillance video. Gilliams said he "called [his] attorney."

Gilliams moved for a judgment of acquittal on the perjury charge, arguing that the investigators' questions were not sufficiently specific to support a finding that Gilliams made the perjurious statement alleged in the information. The trial court denied the motion.

[10] [11] [12] [13] [14] We review a trial court's denial of a motion for judgment of acquittal de novo. *McCray v. State*, 256 So. 3d 878, 881 (Fla. 4th DCA 2018). Gilliams was convicted of perjury under section 837.012, Florida Statutes (2019), which provides that "[w]hoever makes a false statement, which he or she does not believe to be true, under oath, not in an official proceeding, in regard to any material matter shall be guilty of a misdemeanor of the first degree." § 837.012(1), Fla. Stat. (2019). "The statement alleged to be perjury must be one of fact, and not of opinion or belief." *Vargas v. State*, 795 So. 2d 270, 272 (Fla. 3d DCA 2001). "The questions posed to elicit perjured testimony must be asked with the appropriate specificity necessary to result in an equally specific statement of fact." *Cohen v. State*, 985 So. 2d 1207, 1209 (Fla. 3d DCA 2008). "Precise questioning is imperative as a predicate for the offense of perjury." *Id.* (quoting *Bronston v. United States*, 409 U.S. 352, 362, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973)). "[A]n initially false statement ... can be further explained so that the statement taken as a whole is not perjury." *McAlpin v. Crim. Just. Stds. & Training Comm'n*, 155 So. 3d 416, 421 (Fla. 1st DCA 2014).

Here, the state alleged that Gilliams falsely stated that "he had only one phone conversation with another council member on April 22, 2020." Thus, the state's theory seemed to be that Gilliams either spoke to Parris more than once or he spoke to Parris and another councilmember. The ***789** investigators' questioning regarding the phone calls that resulted in the purported perjury was related to calls made after Gilliams arrived at city hall, at about 5:30 p.m. Arens stated during the interview that it appeared on the video Gilliams was making phone calls. Gilliams responded that he made "one phone call."

To the extent Gilliams lied about the number of phone calls which he made to Parris, that was not the state's allegation. The phone records summary shows that for the relevant time period, one call from Gilliams to Parris was made at 5:32 p.m. and lasted 1 minute and 34 seconds. A second phone call from Gilliams to Parris was made at 5:34 p.m. and lasted for 11 seconds. There was no evidence that the 11-second call constituted a "conversation." Arens acknowledged during cross-examination that many of the calls on the summary lasted only seconds, and he could not say whether anyone answered phone calls. He explained that the calls indicated "that person was trying to get ahold of the other person and they tried diligently to do so, multiple times before they answered." He assumed longer calls on the summary constituted conversations. Investigator Arens agreed that shorter calls "might simply represent a no answer or some kind of voice mail or I'm not available." Further, even on longer calls, Arens could only say that "one phone connected with another phone number at that particular time." The phone records summary also reflects a phone call from Mauti to Gilliams at 5:31 p.m. that lasted 35 seconds. Again, it's not apparent a "conversation" occurred. Consequently, it's not apparent that Gilliams falsely stated "he had only one phone conversation with another council member." The phone records summary shows other calls between Gilliams and the other councilmembers on April 22, but the investigators' questions were related to the period of time when Gilliams can be seen on his phone in the video – around 5:30 p.m.

Finally, Gilliams argues that the issue of materiality of the statements underlying the perjury charge should have been submitted to a jury. The Florida Supreme Court rejected this argument. *See* *State v. Ellis*, 723 So. 2d 187, 188 (Fla. 1998). Although *Ellis* involved a different perjury statute than the one at issue here, both statutes "limit[ ] the statute's sweep to those false statements that concern 'material matters.' " *See* *id.* at 189; §§ 837.02(1), Fla. Stat. (1993), 837.012(1), Fla. Stat. (2019). And, as in *Ellis*, the applicable statute here provides that the issue of materiality is a question of law. § 837.011(3), Fla. Stat. (2019) (defining

"[m]aterial matter" and providing that "[w]hether a matter is material in a given factual situation is a question of law").

Gilliams contends *Ellis* is no longer good law in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where the United States Supreme Court held that a factual determination that allows for an increase in the maximum prison sentence must be made by a jury. *Id.* at 490, 120 S.Ct. 2348. This argument lacks merit, as materiality is not a factual determination under chapter 837. Indeed, after *Apprendi* issued, the Third District cited *Ellis* for the proposition that materiality "is not an element of the crime of perjury in Florida but is a threshold issue that a court must determine as a matter of law prior to trial." *Vargas*, 795 So. 2d at 272.

Conclusion

Based on the foregoing, we affirm Gilliams's conviction of counts I-III, violations of the Sunshine Law, and we reverse his conviction of count IV, perjury, and remand for the trial court to vacate the conviction and sentence on that count.

***790** *Affirmed in part, reversed in part, and remanded with instructions.*

Klingensmith, C.J., and Warner, J., concur.

Ciklin, J., concurs specially with opinion.

Ciklin, J., concurring specially.

The majority opinion solidly stands for the "clinical" legal reasoning and academic analysis behind our decision to both affirm and reverse certain of the convictions that occurred before a jury below.

I think it is important, however, to issue a clarion call to the hundreds of Florida public officials who are subject to the Florida Sunshine Law. Indeed, as more and more individuals become Floridians and engage in civic involvement, our new citizens need to be fully aware of Florida's Sunshine Law.[3] The appellate briefs filed in this case suggesting that the Sunshine Law is vague and unclear or that the law is weak and unprovable have given me pause and a commensurate urge to raise a warning flag. It has been many years since a comprehensive opinion has been issued by a Florida intermediate appellate court on the subject and, thus, perhaps this admonition is particularly timely.

It seems unlikely, in this unfortunate series of events, that former Sebastian City Councilmembers Pamela Parris and Damien Gilliams would have ever thought it imaginable that they would now be appealing criminal convictions for which they have been sentenced to serve jail time of two months and six months, respectively. My guess is, that in retrospect, they would have run away and resisted any temptation to get caught up in the excitement of the moment ... as, unfortunately, they ultimately did. These recent Indian River County Sunshine Law prosecutions and convictions illustrate actual examples of popularly elected local governing body officials being ordered to do real jail time in a real Florida county jail for the commission of a real Florida crime. Of course, whether elected or appointed is of no consequence. The Florida Sunshine Law applies equally to all.

After now engaging in significant research on the law itself, plus sitting for oral argument on the topic in January, I have developed a concern that some government officials subject to the Sunshine Law may not fully appreciate the Law's meaning and/or the possible criminal penalties that lie in wait for those who carelessly fail to fully comprehend the Sunshine Law and abide by it. And this baffling complacency is not for want of official publications—including the current 360-page Government-In-The-Sunshine manual prepared by the Florida Attorney General. 44 Government-in-the-Sunshine Manual (2022 ed.). To be sure, the briefings in these consolidated cases, and our majority opinion are considerably lengthy because the issues are complex and yet, paradoxically, not all that difficult to understand.

The scenario in this case is alarming. Three duly elected members of the Sebastian City Council who were not allowed to privately discuss foreseeable government issues did so anyway. They decided amongst themselves—as their personal protest to the mayor and city manager's decision to cancel a regularly scheduled city council meeting because of Covid—to enter the city council chambers and conduct the cancelled meeting anyway. Armed with a government-issued pass key, and in ***791** unlit city council chambers, these three city councilmembers took to the dais and purported to take official action at what in essence became a spontaneous, non-announced meeting of the three of them that lasted until the police showed up. That imprudent action was itself a flagrant

violation of the Sunshine Law and a reading of the statute makes this conclusion abundantly clear.

Whether two or more officials privately discuss, in any manner whatsoever, a foreseeable issue of any magnitude, inside the other's office or at a coffee shop or in the spectator audience of a child's soccer match or at a statewide education conference or by quick text or whether they do so through surrogates (such as aides, friends, relatives, other government officials) or whether, as in this case, they decide to spontaneously convene an unannounced rally or meeting, so long as two or more are involved, these are all distinctions without a difference. And every individual unauthorized private discussion between two or more officials along the way constitutes an individual statutory crime against each person with each separate charge carrying a possible penalty of 60 days in the county jail. Plus a $500 fine. Plus substantial court costs. Plus six months of probation. Per act. And notably, in the State of Florida, no statutory sentencing guidelines exist for these types of crimes, and consecutive jail sentences and consecutive probationary periods are permitted and within the unfettered discretion of the trial judge.

Even though ample publications, and just as many available seminars, meetings, discussions, and groups, are specifically charged with fully educating officials subject to the Sunshine Law (which, ironically all three charged city councilmembers attended), here are my very easy takeaways from the current state of the Florida Sunshine Law.

1. Meetings of two or more fellow government officials who are subject to the Sunshine Law are not allowed if any words of any type pertaining to any possible foreseeable issue will be communicated in any way unless they are open to the public to whom reasonable notice has been provided.

2. There is rarely any purpose for a private meeting or communication between two or more government officials who are both subject to the Sunshine Law. Those who engage in such activity widely open themselves to allegations that some aspect of the governmental decisional process has unlawfully occurred behind closed doors. Any aspect of the decisional process—ranging from whether to conduct a meeting in the first instance to the concept of terminating administrative staff to the seemingly inane decision as to which government officials will even make a motion to begin open public discussion—is part of the official decisional process and must be wide-open and advertised in advance to the public.

3. Under Florida law, there is no such thing as an "informal" conference or "unofficial" caucus or pass-you-in-the-hallway information gathering (or sharing) by two or more government officials subject to the Sunshine Law which would thereby remove such communication from the Sunshine Law's ambit. Indeed, such "innocuous" meetings have been held to be illegal and nothing short of the unlawful crystallization of secret decisions to a point just short of public discussion and ceremonial acceptance. And whether done personally or through surrogates (such as aide-to-aide), such meetings are illegal under Florida's Sunshine Law.

***792** 4. Any attempt to distinguish between a "formal," "informal," "ministerial," "informational gathering-only," or "just a listening" meeting between two or more government officials—for purposes of determining whether the Sunshine Law applies—is by itself alien to the law's design, exposing it to the very evasions which it was designed to prevent.

5. Because a violation of Florida's Sunshine Law can be investigated and charged as a crime, all of those law enforcement and prosecutorial techniques, such as the issuance of subpoenas for cell phone records is but a signature away. In these cases, prosecutors easily gathered data and produced it for the jury showing numerous texts, emails, telephone conversations, and voicemails over a wide-ranging period between all three city councilmembers. The flow chart prepared by the prosecution and shown to the jury highlighted the dates of the calls, to whom they were made, the duration of the calls, and the overall sequence of communications.

6. When in any doubt as to whether a meeting or communication, either directly or indirectly between two or more government officials may be illegal under the Sunshine Law, the easy answer is: "LEAVE." *See City of Miami v. Berns*, 245 So. 2d 38, 41 (Fla. 1971) ("The evil of closed door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit. If a public official is unable to know whether by any convening of two or more officials he is violating the law, he should leave the meeting forthwith.").

7. Lying, under oath, about any matter that is material to an alleged Sunshine Law violation is considered as an additional crime of perjury and every individual lie constitutes an individual statutory crime against each person with each separate charge carrying a possible

penalty of 1 year in the county jail. Plus a $1000 fine. Plus substantial court costs. Plus 12 months of probation. Per lie. And just as is the case with the underlying Sunshine Law crime, no statutory sentencing guidelines exist for this type of crime in Florida, and thus consecutive jail sentences and consecutive probationary periods are permitted and within the trial judge's unfettered discretion.

All Citations

359 So.3d 784, 48 Fla. L. Weekly D739

Footnotes

1 Gilliams points to other undefined words and phrases in the statute, but he either provides no argument or undeveloped argument as to those terms, or his argument was not preserved below.

2 Notably, the Government-in-the-Sunshine Manual, published by the Attorney General to help public officials navigate the Sunshine Law, provides an accurate explanation of the law in that "[p]rivate telephone conversations between board members to discuss matters which foreseeably will come before that board for action violate the Sunshine Law." 44 Government-in-the-Sunshine Manual § 1.C.16.a. (2022 ed.).

3 The Sunshine Law applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or political subdivision." § 286.011(1), Fla. Stat. (2019).

359 So.3d 1178
District Court of Appeal of Florida, Fourth District.

Pamela Rapp PARRIS, Appellant,
v.
STATE of Florida, Appellee.

No. 4D21-2682
|
[April 12, 2023]

Synopsis

Background: Defendant was convicted in the County Court, Indian River County, Michael Linn, J., of violating Sunshine Law and perjury. Defendant appealed.

Holdings: The District Court of Appeal held that:

[1] sufficient evidence supported findings that defendant knowingly participated in city council meeting that was not "open to the public" and for which "reasonable notice" was not given;

[2] Sufficient evidence showed that defendant made a false statement to investigator that she had received conflicting communications as to whether meeting had been cancelled;

[3] evidence was insufficient to show that defendant clearly indicated she had no phone conversations with any other councilmembers; and

[4] defendant's statements about conflicting communications were material.

Affirmed in part, reversed in part, and remanded with directions.

Ciklin, J., filed opinion concurring specially.

Procedural Posture(s): Appellate Review.

West Headnotes (20)

[1] **Municipal Corporations** Rules of procedure and conduct of business

Municipal Corporations Criminal responsibility

Public Employment Weight and sufficiency

Sufficient evidence supported findings that defendant, a city councilmember, knowingly participated in a city council meeting that was not "open to the public" and for which "reasonable notice" was not given, as required to support her conviction for violation of Sunshine Law, where, after scheduled meeting was cancelled, defendant, along with two other councilmembers, held meeting about an hour before cancelled meeting had been scheduled, with no notice, without broadcasting meeting, with only limited public attendance, and with none of other charter members present, and councilmembers voted on matters not on previously publicized agenda, such as removing city manager, attorney, clerk, and mayor, and replacing mayor with one of councilmembers.

Fla. Stat. Ann. § 286.011.

1 Case that cites this headnote

[2] **Criminal Law** Liberal or strict construction; rule of lenity

When a court must construe an equivocal criminal statute, or when the statute is open to more than one interpretation and the court is otherwise unable to determine which interpretation was intended by the Legislature, as opposed to arbitrarily choosing one of the competing interpretations, the rule of "lenity" provides that a court should apply the interpretation that treats the defendant more leniently.

[3] **Criminal Law** Liberal or strict construction; rule of lenity

Application of the rule of lenity, whereby equivocal criminal statutes are interpreted so as to treat a defendant more leniently, typically involves competing interpretations.

[4] **Constitutional Law** Vagueness

In order to withstand a due process vagueness challenge, a penal statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct, and the statute must define the offense in a manner that does not encourage arbitrary and discriminatory enforcement. U.S. Const. Amend. 14.

[5] **Constitutional Law** Vagueness

Legislature's failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague in violation of due process; in the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term. U.S. Const. Amend. 14.

[6] **Statutes** Undefined terms

In cases where the exact meaning of a term was not defined in a statute itself, the District Court of Appeal has ascertained its meaning by reference to other statutory provisions, as well as case law or the plain and ordinary meaning of a word of common usage.

[7] **Constitutional Law** Governments and Political Subdivisions in General

Municipal Corporations Rules of procedure and conduct of business

Lack of definitions for "reasonable notice" and "open to the public" in the Sunshine Law do not render the statute unconstitutionally vague in violation of due process; to the extent the language requires any interpretation, the well-established case law and the plain and ordinary meaning of the terms provide ample guidance. U.S. Const. Amend. 14; Fla. Stat. Ann. § 286.011.

[8] **Perjury** Falsity of oath or assertion

Sufficient evidence showed that defendant, a city councilmember, made a false statement to investigator for State Attorney's Office, who was investigating complaints regarding cancellation of city council meeting, as required to support her conviction for perjury, when she asserted that she had received numerous phone calls and emails from city manager giving her conflicting information as to whether meeting had been cancelled, giving her impression that scheduled meeting was still on when she held meeting found to violate Sunshine Law, where state's evidence at trial included phone records showing manager never called her on day in question. Fla. Stat. Ann. §§ 286.011, 837.012.

[9] **Perjury** Falsity of testimony or assertion, and knowledge thereof

Statement alleged to be perjury must be one of fact, and not of opinion or belief. Fla. Stat. Ann. § 837.012.

[10] **Perjury** Falsity of testimony or assertion, and knowledge thereof

Questions posed to elicit perjured testimony must be asked with the appropriate specificity necessary to result in an equally specific statement of fact; precise questioning is imperative as a predicate for the offense of perjury. Fla. Stat. Ann. § 837.012.

[11] **Perjury** Falsity of testimony or assertion, and knowledge thereof

Statement regarding a person's recollection is not an assertion of empirical fact that can support a perjury conviction. Fla. Stat. Ann. § 837.012.

[12] **Perjury** Falsity of testimony or assertion, and knowledge thereof

Initially false statement can be further explained so that the statement taken as a whole is not perjury. Fla. Stat. Ann. § 837.012.

1 Case that cites this headnote

[13] **Perjury** Falsity of testimony or assertion, and knowledge thereof

Typical manner of proving perjury is to have two conflicting sworn statements by the same person. Fla. Stat. Ann. § 837.012.

[14] **Perjury** Falsity of oath or assertion

Evidence was insufficient to show that defendant, a city councilmember, clearly indicated she had no phone calls with any other councilmembers on day of disputed city council meeting, during interview with investigator for State Attorney's Office, who was investigating complaints regarding cancellation of meeting, as would be required to support perjury conviction; defendant's statements were made in second half of interview, after significant lapse of time since specific meeting had been referenced, investigator's question broadly referred to conversations with public, with nothing indicating it was limited to communications with councilmembers, and defendant's answer seemed to deny, not communications with other councilmembers, but violation of Sunshine Law. Fla. Stat. Ann. §§ 286.011, 837.012.

[15] **Perjury** Materiality of testimony or assertion

Statements of defendant, a city councilmember, showed her intent to participate in a city council meeting that was not reasonably noticed and not open to the public at all times, in violation of Sunshine Law, and thus statements were material to prosecution for violation of Sunshine Law, as required to support her conviction for perjury, where defendant falsely told investigator for State Attorney's Office that she had received numerous phone calls and emails from city manager giving her conflicting information as to whether meeting had been cancelled, and went to city hall, where she and two other councilmembers held meeting found to be in violation of Sunshine Law, thinking cancelled meeting was still scheduled. Fla. Stat. Ann. §§ 286.011, 837.012.

1 Case that cites this headnote

[16] **Perjury** Materiality in general

Perjury Questions for jury

Materiality is not an element of the crime of perjury but is a threshold issue that a court must determine as a matter of law prior to trial. Fla. Stat. Ann. § 837.012.

[17] **Perjury** Materiality in general

"Material matter," for purposes of the materiality requirement for a perjury conviction, means any subject, regardless of its admissibility under the rules of evidence, which could affect the course or outcome of the proceeding. Fla. Stat. Ann. § 837.012.

[18] **Perjury** Questions for jury

Whether a matter is material, as required for perjury, in a given factual situation is a question of law. Fla. Stat. Ann. § 837.011(3).

[19] **Perjury** Materiality in general

To be material for purposes of perjury, statements must be germane to the inquiry, and have a bearing on a determination in the underlying case. Fla. Stat. Ann. § 837.012.

1 Case that cites this headnote

[20] **Perjury** Materiality in general

Perjury Degree of materiality and sufficiency to establish issues

To be material for purposes of perjury, it is not essential that the false testimony bear directly on the main issue; rather, it is sufficient if the false testimony is collaterally or corroboratively material to the ultimate material fact to be established. Fla. Stat. Ann. § 837.012.

1 Case that cites this headnote

***1180** Appeal from the County Court for the Nineteenth Judicial Circuit, Indian River County; Michael Linn, Judge; L.T. Case No. 312020MM001119B.

Attorneys and Law Firms

Philip L. Reizenstein and Bhakti Kadiwar of Reizenstein & Associates, PA, Miami, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Lindsay A. Warner, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

Per Curiam.

After the City of Sebastian's city manager announced a cancellation of a properly noticed city council meeting, three councilmembers, including the appellant, Pamela Parris, held a meeting anyway, during which they voted to terminate the employment of the city manager, the city attorney, and the city clerk, and voted to remove the mayor and replace him with ***1181** Parris's co-defendant, Damien Gilliams. Based on this meeting, Parris and Gilliams were charged with violating section 286.011, Florida Statutes (2019), commonly referred to as the Sunshine Law. They were also charged with perjury based on statements which they made during an investigation of the Sunshine Law violations. Parris and Gilliams were tried together and found guilty of most counts. Parris appeals her convictions for one count of violating the Sunshine Law and two counts of perjury. [1]

Parris raises multiple issues on appeal, most of which pertain to her conviction of a Sunshine Law violation. We address the following three arguments: (1) her conviction must be reversed where section 286.011 does not contain definitions for certain phrases; (2) her responses to the investigator's imprecise questions did not amount to perjury; and (3) her allegedly false statements were not material. We agree that the state failed to prove perjury as alleged in count V, and we reverse on this point, but we affirm with respect to the Sunshine Law arguments. Parris's remaining arguments lack merit, and on these arguments, we affirm without further discussion.

The Trial Evidence

The trial evidence revealed the following. The City of Sebastian operates under a charter form of government and its city manager, city attorney, and city clerk are charter officers. The charter requires the city council to meet once a month, but meetings are usually held twice monthly with charter officers being required to attend the meetings. Additionally, the city manager requires the attendance of IT personnel to facilitate the broadcast of meetings to the public. Meetings typically start at 6:00 p.m. and are broadcast live.

Parris, Gilliams, and Charles Mauti were elected to the council in November 2019. According to Mauti, they had a common interest: controlling growth. Councilmembers elected Ed Dodd as mayor. Mauti voted for Dodd, but in the ensuing months he had second thoughts. Gilliams confided in Mauti that he wanted to serve as mayor.

In the wake of the pandemic's arrival in the spring of 2020, changes were made to how meetings were held. Prior to that, the routine was the following. The meeting agenda was typically published to the public no later than the Friday before the meeting. City staff customarily set up 125 chairs in the meeting room, which can accommodate up to 420 people, and the doors to the meeting room were unlocked. When councilmembers were ready to begin the meeting, the mayor would "hit [a] button" and could see that the meeting was being broadcast. Doors to the meeting room were kept locked "all the time except for when we have meetings." When no meeting was being held, city officials with a passkey could enter the locked meeting room doors, but the doors automatically locked thereafter.

Beginning with a meeting held in March 2020, the city utilized the Zoom platform, and it "moved the public outside into the courtyard in order to maintain the social distancing." Speakers were placed outdoors "so that people could listen" to the meeting being held indoors. Additionally, members of the public who wished to be heard were escorted indoors and then back to the courtyard once they finished speaking. As one city employee explained, "We were trying to get creative, trying to make sure the public had every opportunity to be able to participate in these meetings."

Also in March 2020, Mayor Dodd signed an emergency declaration giving the city ***1182** manager the authority to

cancel meetings. According to another councilmember, Jim Hill, the council "made it very clear to the city manager that if ... he wasn't able to hold a safe meeting" or if there were no emergency issues to be addressed, he could cancel an upcoming meeting.

The charges which the state brought against Parris were based on the facts surrounding the city council meeting scheduled for April 22, 2020, and the events that followed. As the April 22 meeting approached, the city received "an extraordinary amount of emails" from residents who felt it would be prudent to cancel the meeting for public health reasons even though "hot button" topics were on the meeting agenda that had generated much interest from the public. Two of the five councilmembers, including the mayor, advised the city manager that he should cancel the meeting.

In the days leading up to the scheduled April 22 meeting, councilmembers and charter officers communicated regarding whether the April 22 meeting would go forward. On April 19, Gilliams emailed the city manager, requesting he not cancel the meeting, and he advised he would request an emergency meeting if the meeting was canceled. The next day, Gilliams emailed the IT manager, the city manager, and the city attorney, requesting an emergency/special meeting. Councilmember Mauti also emailed the city manager and councilmembers on April 20, stating that he did not agree to cancel the April 22 meeting and he planned to attend.

Meanwhile, the city's staff continued to prepare for the April 22 meeting. The meeting date and time and the agenda had been publicized to the city's residents. The agenda for the meeting contained the typical items: invocation, recitation of the Pledge of Allegiance, roll call, announcements, proclamations, and other routine matters. The agenda also included a resolution related to pandemic protocol, a quasi-judicial hearing to be conducted by the council in its capacity as the Board of Adjustment, a proclamation related to the retirement of the chief of police, and Mauti's request to replace the mayor.

At 2:36 p.m. on April 22, the city manager notified the councilmembers, city attorney, and city clerk by email that he was postponing the meeting:

> Based on the consensus of the City Council and the authority granted by the Declaration of Local State of Emergency, I am directing that the meeting of April 22, 2020 be postponed and all items carried forward to the next regularly scheduled meeting.

The meeting was canceled because it became apparent that contentious topics on the agenda were going to draw a large crowd, and the city was "expecting more public than we could accommodate and maintain Sunshine." Additionally, the city was still fine-tuning accommodations it would provide to comply with pandemic restrictions and the Sunshine Law.

Upon being told by the city manager of the meeting's cancellation, the city clerk notified city residents who were on her email list, department heads, the police chief, and the IT staff, as the latter were preparing the room and courtyard for the meeting. Staff "started putting equipment away," and a notice of the cancellation was posted on the city's website, its broadcast channel, and on the doors to city hall. The city clerk left city hall at 4:30 p.m.

Gilliams was aware the meeting had been canceled, but a city resident, Russell Herrmann, informed him that Gilliams's "supporters" were gathering at city hall and "they want to have a rally." Gilliams decided to go and went to city hall dressed in casual clothing and carrying his bullhorn. ***1183** Herrmann called Parris at about 5:10 p.m. to let her know about the rally. She responded that it was "late notice" but she would try to attend. Over at city hall, Gilliams informed residents who had turned out that the meeting had been canceled but they were going to proceed with the meeting once Parris arrived.

Mauti also went to city hall. He was dressed in a suit and ready for a meeting. He was surprised to see a number of people standing outside, as "usually people enter the town hall." He asked Gilliams "what was going on," and Gilliams told him there was a sign posted on the door announcing the meeting was "postponed or canceled." The city hall doors were locked, but Gilliams used a passkey to gain access. None of the charter officers were there, and the meeting room was dark and not set up for a meeting. When Parris showed up, dressed "[i]mpeccably," Gilliams advised them they had a quorum for a meeting and could proceed.

At about 6:00 p.m., Mayor Dodd went to city hall to see if any residents had not received word of the canceled meeting.

He saw supporters of Gilliams, Parris, and Mauti standing in the courtyard and signs were taped to the city hall doors announcing the cancellation of the meeting. Upon being told councilmembers were in the chambers, Mayor Dodd knocked on the doors, as they were locked. Gilliams let him in, and he saw that Mauti was also present. Mayor Dodd warned Gilliams and Mauti he would call law enforcement, but Gilliams told him to "go ahead." When Mayor Dodd went back into the courtyard, he saw Parris. Mayor Dodd left, as he was concerned he would violate the Sunshine Law if he remained.

Back in the city hall meeting room, Mauti and Gilliams worked on their agenda that was "limited to the reorganization of the city council and the firing of certain members." Some residents entered the meeting room, including supporters of Gilliams, Mauti, and Parris. But other residents were locked out. Mauti, Gilliams, and Parris proceeded to hold a meeting, and they voted on matters that were not on the previously publicized agenda. They voted to do the following: terminate the employment of the city manager, the city attorney, and the city clerk; modify the emergency declaration so that the city manager was not authorized to cancel meetings; "rescind the mayor" and seat Gilliams as mayor; and "retain a[n] outside attorney for the next meeting" and suspend the city attorney. One of the residents watching warned, "Here come the police," and the meeting was hastily adjourned.

An investigator with the State Attorney's Office, Ed Arens, was assigned to investigate written complaints filed by Parris and Gilliams regarding the city manager's cancellation of the meeting. Arens found it suspicious that their complaints matched and, on April 24, Arens met with and interviewed Parris. Arens broached the subject of the April 22 meeting being canceled, and Parris stated she "had mixed messages that entire day" and received "numerous ... conflicting phone calls and emails from the ... city manager ... that day." She also indicated she did not have any communications with Gilliams or Mauti that violated the Sunshine Law. She claimed that on April 22, she was studying the agenda between 4:00 and 5:30 p.m. to prepare for that day's meeting. Arens obtained telephone records and confirmed no calls were made from the city manager to Parris on April 22. Arens also looked at Parris's Facebook page. At 4:24 p.m. on April 22, about two hours after the city manager announced the cancellation of the meeting, Parris posted a photo of herself in a car with the caption, "cancel me." During a subsequent interview, Parris explained ***1184** that the noticed meeting was canceled "incorrectly," as she did not receive 24 hours' notice. She denied being aware of the city manager's email, as she was preparing for the meeting.

City residents testified at trial that they had planned to attend the meeting but did not go upon receiving the cancellation email or seeing the notice on the city's website. Other residents did not learn of the cancellation until they arrived at city hall.

Analysis

Sunshine Law Violation

[1] Parris was charged with a violation of the Sunshine Law, which provides as follows in pertinent part:

> (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 ... 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)(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 ....

§ 286.011, Fla. Stat. (2019). Specifically, Parris was alleged to have violated the Sunshine Law by holding a meeting that was not open to the public and without reasonable notice. She was also charged with perjury based on statements to Arens in her April 24 interview.

[2] **[3]** Turning to the issues raised on appeal, we must reject as meritless Parris's first argument that the Sunshine Law is unconstitutionally vague. Parris contends that because the phrases "reasonable notice" and "open to the public at all times" are not defined in section 286.011, Florida Statutes (2019), she did not know what conduct was prohibited, and, thus, her constitutional right to notice of prohibited conduct was violated. [2]

[4] **[5]** **[6]** "[I]n order to withstand a vagueness challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct. Additionally, the statute must define the offense in a manner that does not encourage arbitrary and discriminatory enforcement." *DuFresne v. State*, 826 So. 2d 272, 275 (Fla. 2002) (citations omitted). "However, '[t]he legislature's failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague. In the absence of a statutory definition, resort may be had to case ***1185** law or related statutory provisions which define the term ....' " *Id.* (alterations in original) (quoting *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980)). "[I]n cases where the exact meaning of a term was not defined in a statute itself, we have ascertained its meaning by reference to other statutory provisions, as well as case law or the plain and ordinary meaning of a word of common usage." *Id.*

With respect to "reasonable notice," "reasonable" is defined, in part, as "fair and sensible" and "as much as is appropriate or fair in a particular situation." *Oxford Am. Dictionary & Thesaurus*, 1079 (2d ed. 2009). "Notice" is defined, in part, as "information or warning that something is going to happen," "a sheet or placard put on display to give information," and "a small announcement or advertisement published in a newspaper." *Id.* at 880.

This court's interpretation of the phrase "reasonable notice" is consistent with these definitions. In *Transparency for Florida v. City of Port St. Lucie*, 240 So. 3d 780, 786 (Fla. 4th DCA 2018), we looked to Florida Attorney General opinions interpreting what constitutes sufficient notice under the statute. These opinions have provided that what satisfies "reasonable notice" "is variable and depends on the facts of the situation," but "special meetings should have at least 24 hours reasonable notice to the public." *Id.* (quoting Op. Att'y Gen. Fla. 2000-08 (2000)). Further, a Florida Attorney General opinion "finds that the type of notice given depends on the purpose for the notice, the character of the event about which the notice is given, and the nature of the rights to be affected." *Id.* at 787 (citing Op. Att'y Gen. Fla. 73-170 (1973)). We also noted that the Attorney General addressed the term "reasonable notice" in its Government-In-The-Sunshine Manual, which provides as follows:

> 3. Except in the case of emergency or special meetings, notice should be provided at least 7 days prior to the meeting. Emergency sessions should be afforded the most appropriate and effective notice under the circumstances.
>
> 4. Special meetings should have no less than 24 and preferably at least 72 hours reasonable notice to the public.

Id. (quoting 39 Government-in-the-Sunshine Manual, § (D)(4)(a)3., 4. (2017)). This court concluded that "[w]here there is no specific legislative directive as to what constitutes reasonable notice as a matter of law, we agree with the Attorney General that it is a fact specific inquiry." *Id.* (reversing and holding summary judgment was improper where there was a disputed issue of fact as to whether 21.5 hours' notice was reasonable under the circumstances).

Few appellate cases have addressed the issue of what constitutes reasonable notice, but the First District Court of Appeal has held that notice of a special meeting was reasonable where the special meeting was announced at the previous meeting and on a local radio station three days prior, the city posted the meeting agenda outside of city hall and delivered copies to the local media two days prior, and the media published an article regarding the meeting the day before. *Yarbrough v. Young*, 462 So. 2d 515, 516-17 (Fla. 1st DCA 1985). The First District has also held that a complaint made a prima facie showing of violation of the Sunshine Law by alleging that a public meeting regarding the appointment of a committee to study the operation of a regional utility authority was held without reasonable notice to the public where the meeting was held after approximately 1.5 hours' notice to the media. *Rhea v. City of Gainesville*, 574 So. 2d 221, 222 (Fla. 1st DCA 1991); *see also* ***1186** *Fla. Citizens All., Inc. v. Sch. Bd. of Collier Cnty.*, 328 So. 3d 22, 28 (Fla. 2d DCA 2021) (applying the analysis of *Transparency for Fla.* and holding that "burying a notice inside a committee application and calendar on the instructional materials page of the District's website is an unreasonable way to give public notice of a meeting").

Next, with respect to the phrase "open to the public," the word "open" is defined, in part, as "exposed to view or attack; not covered or protected," "admitting customers or visitors; available for business," "accessible or available," "frank and communicative," and "not disguised or hidden." *Oxford Am. Dictionary & Thesaurus* at 901. "Public" is defined, in part, as "relating to or available to the people as a whole." *Id.* at 1043.

Case law also provides guidance as to the meaning of "open to the public." In *Rhea v. School Board of Alachua County*,

636 So. 2d 1383 (Fla. 1st DCA 1994), the court entertained whether a workshop held in Orlando by the Alachua County School Board while attending a convention violated the Sunshine Law's requirement that official action occur in a meeting open to the public. *Id.* at 1384. Although the board advertised the meeting in a Gainesville newspaper and stated that all persons were invited, it was more than 100 miles away from the board's headquarters. *Id.*

The First District recognized that the statute does not define "public," but that "[i]n construing a statute, words that are undefined by the statute should be given their plain and ordinary meaning." *Id.* at 1385. The court looked to the dictionary definition of "public" as "of, relating to, or affecting the people as an organized community; a place accessible or visible to all members of the community; an organized body of people: community, nation; a group of people distinguished by common interests or characteristics." *Id.* (citing *Webster's 3d New Int'l Dictionary* 1836 (1981)). Applying the plain and ordinary meaning of the word to the case before it, the court held that "the relevant 'public,' the community that would be affected by the Board's official actions, is Alachua County." *Id.* The court recited factors to be considered in determining whether the public was provided a reasonable opportunity to attend a meeting that is subject to the Sunshine Law: the interests of the public in having a reasonable opportunity to attend the meeting, the board's need to conduct a meeting at a site beyond the county boundaries, the extent of the distance from the usual meeting place, and any good faith action by the board to minimize the expense and inconvenience of the public in attending the out-of-county meeting. *Id.* Applying the test to the case before it, the court held the meeting held in an Orlando hotel room violated the Sunshine Law, as it did not afford the citizens of Alachua County a reasonable opportunity to attend. *Id.* at 1386; *see also Bigelow v. Howze*, 291 So. 2d 645, 646-48 (Fla. 2d DCA 1974) (holding that trial court properly declared public contract void where committee members who were members of the public body violated Sunshine Law by deliberating on a committee's recommendations while in Tennessee and then conducting a related meeting in a public room at a Florida hotel, since the "requisite advance notice and the reasonable opportunity [for the public] to attend did not exist").

More recently, in *Herrin v. City of Deltona*, 121 So. 3d 1094 (Fla. 5th DCA 2013), the court wrote that "[t]he phrase 'open to the public' most reasonably means that meetings must be properly noticed and reasonably accessible to the public, not that the public has the right to be heard at ***1187** such meetings." *Id.* at 1097. [3]

[7] Here, the lack of definitions for "reasonable notice" and "open to the public" in the statute do not render it unconstitutionally vague. To the extent the language requires any interpretation, the well-established case law and the plain and ordinary meaning of the terms provide ample guidance. Applying these definitions to the evidence here, sufficient evidence showed that Parris knowingly participated in a meeting that was not "open to the public" and for which "reasonable notice" was not given.

Perjury Charge

[8] We also reject Parris's second argument that the state did not prove the perjury charge against her in count VI where the investigator's questioning was imprecise.

[9] **[10]** **[11]** **[12]** **[13]** The crime of perjury is codified in section 837.012, Florida Statutes (2019), which provides that "[w]hoever makes a false statement, which he or she does not believe to be true, under oath, not in an official proceeding, in regard to any material matter shall be guilty of a misdemeanor of the first degree." "The statement alleged to be perjury must be one of fact, and not of opinion or belief." *Vargas v. State*, 795 So. 2d 270, 272 (Fla. 3d DCA 2001). "The questions posed to elicit perjured testimony must be asked with the appropriate specificity necessary to result in an equally specific statement of fact." *Cohen v. State*, 985 So. 2d 1207, 1209 (Fla. 3d DCA 2008). "Precise questioning is imperative as a predicate for the offense of perjury." *Id.* (quoting *Bronston v. United States*, 409 U.S. 352, 362, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973)). A statement regarding a person's recollection is not an assertion of empirical fact that can support a perjury conviction. *McAlpin v. Crim. Just. Stds. & Training Comm'n*, 155 So. 3d 416, 421 (Fla. 1st DCA 2014). "[A]n initially false statement ... can be further explained so that the statement taken as a whole is not perjury." *Id.* "The typical manner of proving perjury is to have two conflicting sworn statements by the same person." *Id.*

Here, the perjury charge against Parris alleged in count VI of the information was based on her statements in the first half of the April 24 interview by Arens, and it alleged that Parris

"falsely told a law enforcement officer that on April 22, 2020, she had several telephone conversations with City Manager Paul Carlisle concerning whether the April 22, 2020 Sebastian Council meeting was postponed or canceled." During this interview, Arens communicated his understanding that the April 22 meeting had been canceled, and Parris volunteered that she had "mixed messages that entire day" and "received numerous phone calls, conflicting phone calls and emails from the ... city manager ... that day." She "wish[ed]" he had sent her "all email," but "[h]e chose to call me on my phone a few times." She was "under the impression that there were two meetings scheduled by 5:00," so she "got dressed and went to city hall ... and I went into my meeting." Arens stated that ***1188** he thought the city manager sent an email "to all of you" at 2:30 p.m. canceling the meeting, and Parris responded, "There were several phone calls after that."

We hold sufficient evidence showed that Parris made a false statement when she asserted that she had received numerous phone calls and emails from the city manager on April 22. At trial, the state's evidence included phone records showing that the city manager never called Parris on April 22. Arens's statements and questions, and Parris's responses, read in context, indicate Parris was asserting that the city manager called her several times on April 22 and gave her conflicting information as to whether the meeting was canceled. Based on these "mixed messages," she thought the April 22 meeting was still on, and she went to city hall. As the prosecutor showed the jury, Parris's statements conflicted with what the phone records actually showed.

[14] Third, Parris argues that the state did not prove the perjury charge alleged against her in count V of the information. There, the state alleged that Parris "falsely told a law enforcement officer that she had no phone conversations with any other council members on April 22, 2020." We agree with Parris that the state's evidence fell short.

As evidenced at trial, during the interview, Arens and Parris took a break due to Arens's recorder's batteries running out of power. During the second half of the interview, the parties began discussing Arens's role at the State Attorney's Office. Parris then reminded Arens that he had been asking about the April 22 meeting being videotaped or held on the Zoom platform, and she volunteered that she had consulted with her doctor about whether she should attend public meetings, and she felt it was important to attend meetings in person. She also spoke about her conversations with the city manager and the city clerk regarding how to allow for public input during the pandemic.

After briefly changing topics, Arens asked the question that led to the statements related to count V: "[Y]ou've had a lot of phone calls you said from people that were trying to, or from people about the meeting happening. You said you received phone calls or texts or messages?" Parris responded, "No, it was the city manager." Arens sought to clarify: "Did you receive any phone calls or texts from Mr. Gilliam[s] or Mr. Mauti or anybody –". Parris interjected:

> I'm not ... going to do that, no. That's the Sunshine Law. ... That was pounded into my head from day one. ... Not to talk to them. And I think it's odd because it makes it really hard to come to good solutions when you can't communicate. But I've asked even a gentleman from Rick Scott's office. He sat down and he was kind enough, when I came to office to greet me and ... explain everything and it is what it is because (indiscernible) I go out of my way to make sure I don't violate that.

This evidence does not reflect that Parris clearly indicated she "had no phone conversations with any other council members on April 22, 2020." The statements forming the basis of count V were made during the second half of the interview, a significant amount of time after the April 22 meeting was referenced. Additionally, Arens asked Parris a broad question regarding whether she had conversations with members of the public pertaining to the April 22 meeting. Nothing in this broad question indicated that Arens was limiting Parris to phone calls and communications received on April 22 by other councilmembers. Parris's response to the unclear question was to state that she was referencing the city manager. Arens attempted ***1189** to clarify that he was talking about the other councilpersons, but again, he failed to make it clear he was referencing April 22. Further, even if it could be said that Parris's response related to April 22, she did not make it clear that she had not spoken to the other councilmembers at all. Read in context, Parris seemed to be denying that she had any communications with them that violated the Sunshine Law.

[15] [16] [17] [18] [19] [20] Finally, we reject Parris's contention that her statements were not material. " '[M]ateriality' is not an element of the crime of perjury in Florida but is a threshold issue that a court must determine as a matter of law prior to trial." *Vargas*, 795 So. 2d at 272. ' "Material matter' means any subject, regardless of its admissibility under the rules of evidence, which could affect the course or outcome of the proceeding. Whether a matter is material in a given factual situation is a question of law." § 837.011(3), Fla. Stat. (2019). "To be material, statements must be germane to the inquiry, and have a bearing on a determination in the underlying case." *Vargas*, 795 So. 2d at 272. However, "[i]t is not essential that the false testimony bear directly on the main issue. It is sufficient if the false testimony is collaterally or corroboratively material to the ultimate material fact to be established." *Gordon v. State*, 104 So. 2d 524, 531 (Fla. 1958). Here, Parris's statements are material because the statements showed her intent to participate in a meeting that was not reasonably noticed and not open to the public at all times.

Conclusion

Based on the foregoing, we reverse Parris's perjury conviction on count V and we remand for the county court to vacate the count V conviction and sentence. We affirm with respect to all other issues.

Affirmed in part, reversed in part, and remanded with directions.

Klingensmith, C.J., and Warner, J., concur.

Ciklin, J., concurs specially with opinion.

Ciklin, J., concurring specially.

The majority opinion solidly stands for the "clinical" legal reasoning and academic analysis behind our decision to both affirm and reverse certain of the convictions that occurred before a jury below.

I think it is important, however, to issue a clarion call to the hundreds of Florida public officials who are subject to the Florida Sunshine Law. Indeed, as more and more individuals become Floridians and engage in civic involvement, our new citizens need to be fully aware of Florida's Sunshine Law.[4] The appellate briefs filed in this case suggesting that the Sunshine Law is vague and unclear or that the law is weak and unprovable have given me pause and a commensurate urge to raise a warning flag. It has been many years since a comprehensive opinion has been issued by a Florida intermediate appellate court on the subject and, thus, perhaps this admonition is particularly timely.

It seems unlikely, in this unfortunate series of events, that former Sebastian City Councilmembers Pamela Parris and Damien Gilliams would have ever thought it imaginable that they would now be appealing criminal convictions for which they have been sentenced to serve jail time of two months and six months, respectively. My guess is, that in retrospect, they would have run away and resisted any temptation ***1190** to get caught up in the excitement of the moment ... as, unfortunately, they ultimately did. These recent Indian River County Sunshine Law prosecutions and convictions illustrate actual examples of popularly elected local governing body officials being ordered to do real jail time in a real Florida county jail for the commission of a real Florida crime. Of course, whether elected or appointed is of no consequence. The Florida Sunshine Law applies equally to all.

After now engaging in significant research on the law itself, plus sitting for oral argument on the topic in January, I have developed a concern that some government officials subject to the Sunshine Law may not fully appreciate the Law's meaning and/or the possible criminal penalties that lie in wait for those who carelessly fail to fully comprehend the Sunshine Law and abide by it. And this baffling complacency is not for want of official publications—including the current 360-page Government-In-The-Sunshine manual prepared by the Florida Attorney General. 44 Government-in-the-Sunshine Manual (2022 ed.). To be sure, the briefings in these consolidated cases, and our majority opinion are considerably lengthy because the issues are complex and yet, paradoxically, not all that difficult to understand.

The scenario in this case is alarming. Three duly elected members of the Sebastian City Council who were not allowed to privately discuss foreseeable government issues did so anyway. They decided amongst themselves—as their personal protest to the mayor and city manager's decision to cancel a regularly scheduled city council meeting because of Covid—to enter the city council chambers and conduct the cancelled meeting anyway. Armed with a government-issued pass key, and in unlit city council chambers, these three city councilmembers took to the dais and purported to take

official action at what in essence became a spontaneous, non-announced meeting of the three of them that lasted until the police showed up. That imprudent action was itself a flagrant violation of the Sunshine Law and a reading of the statute makes this conclusion abundantly clear.

Whether two or more officials privately discuss, in any manner whatsoever, a foreseeable issue of any magnitude, inside the other's office or at a coffee shop or in the spectator audience of a child's soccer match or at a statewide education conference or by quick text or whether they do so through surrogates (such as aides, friends, relatives, other government officials) or whether, as in this case, they decide to spontaneously convene an unannounced rally or meeting, so long as two or more are involved, these are all distinctions without a difference. And every individual unauthorized private discussion between two or more officials along the way constitutes an individual statutory crime against each person with each separate charge carrying a possible penalty of 60 days in the county jail. Plus a $500 fine. Plus substantial court costs. Plus six months of probation. Per act. And notably, in the State of Florida, no statutory sentencing guidelines exist for these types of crimes and consecutive jail sentences and consecutive probationary periods are permitted and within the unfettered discretion of the trial judge.

Even though ample publications, and just as many available seminars, meetings, discussions, and groups, are specifically charged with fully educating officials subject to the Sunshine Law (which, ironically all three charged city councilmembers attended), here are my very easy takeaways from the current state of the Florida Sunshine Law.

***1191** 1. Meetings of two or more fellow government officials who are subject to the Sunshine Law are not allowed if any words of any type pertaining to any possible foreseeable issue will be communicated in any way unless they are open to the public to whom reasonable notice has been provided.

2. There is rarely any purpose for a private meeting or communication between two or more government officials who are both are subject to the Sunshine Law. Those who engage in such activity widely open themselves to allegations that some aspect of the governmental decisional process has unlawfully occurred behind closed doors. Any aspect of the decisional process—ranging from whether to conduct a meeting in the first instance to the concept of terminating administrative staff to the seemingly inane decision as to which government officials will even make a motion to begin open public discussion—is part of the official decisional process and must be wide-open and advertised in advance to the public.

3. Under Florida law, there is no such thing as an "informal" conference or "unofficial" caucus or pass-you-in-the-hallway information gathering (or sharing) by two or more government officials subject to the Sunshine Law which would thereby remove such communication from the Sunshine Law's ambit. Indeed, such "innocuous" meetings have been held to be illegal and nothing short of the unlawful crystallization of secret decisions to a point just short of public discussion and ceremonial acceptance. And whether done personally or through surrogates (such as aide-to-aide), such meetings are illegal under Florida's Sunshine Law.

4. Any attempt to distinguish between a "formal," "informal," "ministerial," "informational gathering-only," or "just a listening" meeting between two or more government officials—for purposes of determining whether the Sunshine Law applies—is by itself alien to the law's design, exposing it to the very evasions which it was designed to prevent.

5. Because a violation of Florida's Sunshine Law can be investigated and charged as a crime, all of those law enforcement and prosecutorial techniques, such as the issuance of subpoenas for cell phone records is but a signature away. In these cases, prosecutors easily gathered data and produced it for the jury showing numerous texts, emails, telephone conversations and voicemails over a wide-ranging period between all three city councilmembers. The flow chart prepared by the prosecution and shown to the jury highlighted the dates of the calls, to whom they were made, the duration of the calls and the overall sequence of communications.

6. When in any doubt, as to whether a meeting or communication, either directly or indirectly between two or more government officials may be illegal under the Sunshine Law, the easy answer is: "LEAVE." *See City of Miami v. Berns*, 245 So. 2d 38, 41 (Fla. 1971) ("The evil of closed door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit. If a public official is unable to know whether by any convening of two or more officials he is violating the law, he should leave the meeting forthwith.").

7. Lying, under oath, about any matter that is material to an alleged Sunshine Law violation is considered as

an additional crime of perjury and every individual lie constitutes an individual statutory crime against each person with each separate charge carrying a possible penalty of 1 year in the county jail. Plus ***1192** a $1000 fine. Plus substantial court costs. Plus 12 months of probation. Per lie. And just as is the case with the underlying Sunshine Law crime, no statutory sentencing guidelines exist for this type of crime in Florida and thus consecutive jail sentences and consecutive probationary periods are permitted and within the trial judge's unfettered discretion.

All Citations

359 So.3d 1178, 48 Fla. L. Weekly D733

Footnotes

1 We take up Gilliams's appeal in a separate opinion in case 4D21-2667.

2 Parris asserts that the rule of lenity requires reversal. “When a court must construe an equivocal criminal statute, or when the statute is open to more than one interpretation and the court is otherwise unable to determine which interpretation was intended by the Legislature,” as opposed to “arbitrarily choosing one of the competing interpretations, the rule [of lenity] provides that a court should apply the interpretation that treats the defendant more leniently.” *Key v. State*, 296 So. 3d 469, 471 (Fla. 4th DCA 2020). However, application of the rule of lenity to a criminal statute typically involves competing interpretations. *See, e.g.*, *Wooden v. United States*, —— U.S. ——, 142 S. Ct. 1063, 1069, 212 L.Ed.2d 187 (2022). Parris offers no possible competing interpretations nor any construction analysis, and, thus, her argument is more akin to an argument that a statute is unconstitutionally vague.

3 Parris argues these cases are inapplicable as they do not involve a criminal violation of the Sunshine Law. Although our courts’ discussion of the meaning of “reasonable notice” and “open to the public” is contained in civil cases, the discussion extends to the meaning of the phrase in the criminal law context. *See Wolfson v. State*, 344 So. 2d 611, 614 (Fla. 2d DCA 1977) (acknowledging that the definition of “official act” it relied on was “employed in a civil context,” but observing that “we can think of no reasoning process which would compel the conclusion that it necessarily assumes a fatal vagueness when considered in a criminal context”).

4 The Sunshine Law applies to “any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or political subdivision.” § 286.011(1), Fla. Stat. (2019).

373 So.3d 945
District Court of Appeal of Florida, Fifth District.

Oren MILLER, Appellant,
v.
STATE of Florida, Appellee.

Case No. 5D23-0846
|
November 9, 2023

Synopsis

Background: Defendant, who was a county commissioner, was convicted in the Circuit Court, Marion County, Anthony M. Tatti, J., of perjury in an official proceeding, regarding sworn statement submitted as part of State Attorney's investigation into possible Sunshine Law violations. Defendant appealed.

Holdings: The District Court of Appeal, Soud, J., held that:

[1] defendant's sworn statement was not so demonstrably false as to support conviction for perjury, and

[2] even if statement was false, defendant subsequently corrected it.

Reversed and remanded.

Procedural Posture(s): Appellate Review.

West Headnotes (10)

[1] **Criminal Law** Construction in favor of government, state, or prosecution

Criminal Law Reasonable doubt

In determining whether there is competent, substantial evidence to support a jury's verdict, an appellate court views the evidence in the light most favorable to the State and, maintaining this perspective, asks whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.

[2] **Perjury** Nature and elements of offenses in general

In order to prove that a defendant is guilty of perjury in an official proceeding, the State must to prove beyond a reasonable doubt that the defendant (1) made a false statement, (2) that he did not believe was true, (3) under oath in an official proceeding, and (4) regarding any material matter. Fla. Stat. Ann. § 837.011(3).

[3] **Perjury** Materiality in general

Perjury Questions for jury

The materiality of an allegedly perjurious statement in an official proceeding is a threshold issue that must be determined by the court as a matter of law prior to trial on a charge of perjury. Fla. Stat. Ann. § 837.011(3).

[4] **Perjury** Materiality in general

In order for statements to be material, as an element of perjury in an official proceeding, the statements must be germane to the inquiry, and have a bearing on a determination in the underlying case. Fla. Stat. Ann. § 837.011(3).

[5] **Perjury** Degree of materiality and sufficiency to establish issues

In order for false testimony in an official proceeding to be material, as an element of perjury, it is not essential that false testimony in an official proceeding bear directly on the main issue; it is sufficient if the false testimony is collaterally or corroboratively material to the ultimate material fact to be established. Fla. Stat. Ann. § 837.011(3).

[6] **Perjury** Weight and Sufficiency in General

Sworn statement by defendant, which he made as part of State Attorney's investigation into Sunshine Law violations, that he had no telephone conversations with other county commissioner which defendant knew to be false

or untrue was not so demonstrably false as to support conviction for perjury in an official proceeding; defendant did not definitely claim that there were no such phone calls, but, rather, explained that calls stopped between January and March of that year, or "somewhere in there," and then acknowledged that phone calls occurred in March, stating, "yes, I promise you we had phone calls." Fla. Stat. Ann. § 837.011(3).

[7] **Perjury** Falsity of testimony or assertion, and knowledge thereof

A charge of perjury in an official proceeding may not be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows. Fla. Stat. Ann. § 837.011(3).

[8] **Perjury** Falsity of testimony or assertion, and knowledge thereof

An initially false statement can be further explained so that the statement taken as a whole is not perjury. Fla. Stat. Ann. § 837.011(3).

[9] **Perjury** Defenses

The law encourages the correction of erroneous and even intentionally false statements on the part of a witness, and perjury will not be predicated upon such statements when the witness, before the submission of the case, fully corrects his testimony. Fla. Stat. Ann. § 837.011(3).

[10] **Perjury** Defenses

Even if defendant's sworn statement that he did not have telephone conversations with other county commissioner after January was false, for purposes of State Attorney's investigation into possible Sunshine Law violations, the statement was insufficient to support conviction for perjury in an official proceeding, where defendant subsequently corrected statement by clarifying the uncertain timing of calls, including those received in February and March of that year. Fla. Stat. Ann. § 837.011(3).

***947** On appeal from the Circuit Court for Marion County. Anthony M. Tatti, Judge. LT Case No. 2021-CF-4602-A

Attorneys and Law Firms

Dock A. Blanchard, of Blanchard, Merriam, Adel, Kirkland & Green, P.A., Ocala, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Daniel P. Caldwell, Assistant Attorney General, Daytona Beach, for Appellee.

Opinion

Soud, J.

Oren Miller appeals his perjury conviction stemming from a sworn statement he gave to the State Attorney's Office investigating allegations that Miller violated Florida's Sunshine Laws during his service on the Sumter County Commission. We have jurisdiction. *See* Art. V, § 4(b)(1), Fla. Const.; Fla. R. App. P. 9.030(b)(1)(A). We reverse, concluding that Miller's statements—viewed as a whole—are insufficient as a matter of law to support a conviction for perjury.

I.

Miller was elected to the Sumter County Commission shortly after the August 2020 primary and took office the following November. For Miller—a then-seventy-year-old retiree from Joliet, Illinois with no prior criminal record—this election represented his first foray into politics.

Thereafter, the State Attorney's Office for the Fifth Judicial Circuit received three complaints of Sunshine Law violations centered on allegations that Miller's wife served as a conduit for communications between Miller and other commissioners, as well as Miller's alleged failure to maintain public records relating to his use of Facebook. As part of the State Attorney's investigation, Miller was subpoenaed to give a sworn statement, which he provided on October 6, 2021.

During the sworn statement, Miller was asked numerous questions about phone calls he had with another county commissioner, Gary Search. Based on cell phone records it had obtained, the State Attorney and his representatives inquired about both the substance and the timing of phone calls as it related to relevant meetings of the Sumter County Commission. Questioning focused on calls that took place after Miller had taken office in November and in his "official capacity."

In response to leading questions, Miller twice acknowledged that no calls occurred after January. However, prior to those questions, Miller made clear his uncertainty as to precisely when calls with Search ceased. Specifically, Miller stated the phone calls ended "about the first two or three months" after he and Search took office in November 2020, or "maybe three or four months." Thus, by Miller's reckoning, the calls stopped between January and March 2021 or "somewhere in there."

Later in the sworn statement, Miller did not dispute that he received a phone call from Search in February, though he could not remember what they discussed. Further still, when asked about a phone call with Search in March 2021, Miller stated, that while he could not remember what they discussed, "*[y]es*, *I promise you we had phone calls.*" [1]

***948** Ultimately, Miller was charged via information with one count of Perjury in an Official Proceeding. [2] Following trial, he was found guilty as charged. Miller was adjudged guilty and sentenced to the time served of seventy-five days in jail followed by three years of probation. This appeal followed.

II.

[1] We review this case to determine if there is competent, substantial evidence to support the jury's verdict finding Miller guilty of perjury. *See* *Bush v. State*, 295 So. 3d 179 (Fla. 2020). In doing so, we " 'view[ ] the evidence in the light most favorable to the State' and, maintaining this perspective, ask whether 'a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.' " *Id.* at 200 (citations omitted); *see also* *Peoples v. State*, 251 So. 3d 291, 300 (Fla. 1st DCA 2018) ("In our review of the sufficiency of the evidence, all evidence is viewed in the light most favorable to the verdict, and all inferences are interpreted in favor of the verdict." (citation omitted)).

A.

Section 837.02, Florida Statutes, provides, "whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree ...." § 837.02(1), Fla. Stat. (2021). Thus, Florida law is clear that to commit the felony offense of perjury in an official proceeding, not only must the statement made under oath be false, but the one making the statement must "not believe [the statement] to be true." *Id.*

[2] In accordance with the perjury statute, to prove Miller guilty of perjury, the State was required to prove beyond a reasonable doubt that he (1) made a false statement, (2) that he did not believe was true, (3) under oath in an official proceeding, and (4) regarding any material matter. *See id*.; *see also* *Hirsch v. State,* 279 So. 2d 866, 869 (Fla. 1973); *Cohen v. State*, 985 So. 2d 1207, 1209 (Fla. 3d DCA 2008); *Vargas v. State*, 795 So. 2d 270, 272 (Fla. 3d DCA 2001).

[3] **[4]** **[5]** The materiality of the statement is not an element of the crime to be proven to the jury. As used in the perjury statute, " '[m]aterial matter' means any subject, regardless of its admissibility under the rules of evidence, which could affect the course or outcome of the proceeding. *Whether a matter is material in a given factual situation is a question of law.*" § 837.011(3), Fla. Stat. (emphasis added). Accordingly, materiality is a threshold issue that must be determined by the court as a matter of law prior to trial. *See* *Vargas*, 795 So. 2d at 272; *see also* *Soller v. State*, 666 So. 2d 992, 993 (Fla. 5th DCA 1996). [3]

B.

Miller's sworn statement, when viewed as a whole, is not so demonstrably false as to support a conviction for perjury.

***949** 1.

The information alleges Miller committed perjury when "he stated there were no telephone conversations between him

and Sumter County Commissioner Gary Search *after January 2021*, that OREN MILLER knew to be false and untrue, in violation of Florida Statute 837.02(1)." Of course, "the State must prove the allegations set up in the information or the indictment." *Lewis v. State,* 53 So. 2d 707, 708 (Fla. 1951); *see also* *Banasik v. State*, 889 So. 2d 916, 918 (Fla. 2d DCA 2004) (quoting *Lewis*).

[6] Reviewing the entirety of the sworn statement made by Miller to investigating authorities, it cannot be said he in fact definitively claimed that there were no phone calls with Commissioner Search after January 2021. Indeed, quite the contrary.

While questions from representatives of the State Attorney's Office at times summarize Miller's prior answers as definitively stating there were no calls after January, Miller's statement viewed as a whole makes clear he was not so precise. Rather, Miller's entire statement indicates the calls stopped between January and March 2021 or "somewhere in there." Miller even goes as far to acknowledge phone calls in March 2021 by saying, "*Yes, I promise you we had phone calls.*"[4]

[7] Given this context of Miller's entire statement, "[i]t cannot be said with any degree of certainty by a fair reading of all of [Miller's statement], that the two challenged answers can be considered perjurious in the full context of his testimony." *Wolfe v. State*, 271 So. 2d 132, 135 (Fla. 1972). To hold otherwise would permit the trial court and the jury to divorce two answers from the remainder of Miller's statement. This Florida law does not allow. "A charge of perjury may not be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows." *Id.* (quoting *Van Liew v. United States*, 321 F.2d 674 (5th Cir. 1963)).

2.

[8] Even assuming *arguendo* Miller definitively and falsely stated that there were no calls after January as alleged, Miller may correct or clarify his answer(s) during later questioning. "[A]n initially false statement ... can be further explained so that the statement taken as a whole is not perjury." *Parris*, 359 So. 3d at 1187 (quoting *McAlpin v. Crim. Just. Stds. & Training Comm'n*, 155 So. 3d 416, 421 (Fla. 1st DCA 2014)).

[9] Such correction or clarification is not only permitted —it is encouraged. Permitting an individual to clarify or correct prior false or erroneous statements advances the core of judicial functions—a just determination of cases based on applicable law and the truth born from evidence. Florida law has long recognized this enduring principle.

> A judicial investigation or trial has for its sole object the ascertainment of the truth, that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury. The law encourages the correction of erroneous and even intentionally false statements on the part of a witness, and perjury will not be predicated upon such statements ***950** when the witness, before the submission of the case, fully corrects his testimony.

Brannen v. State, 94 Fla. 656, 114 So. 429, 431 (1927) (internal quotations and citations omitted).

[10] Here, even if Miller was considered to have definitively and falsely stated that no calls occurred after January, his later answers corrected or clarified the uncertain timing of calls, including those made or received in February and March 2021. As a result, as a matter of law, Miller cannot be found guilty of perjury as charged in the information.

III.

Accordingly, since Miller's sworn statement viewed as a whole is insufficient to support the perjury conviction, we REVERSE the judgment and sentence, VACATE Miller's conviction, and REMAND with instructions that the trial court enter a judgment of not guilty in favor of Miller.

It is so ordered.

Jay and Kilbane, JJ., concur.

All Citations

373 So.3d 945, 48 Fla. L. Weekly D2166

Footnotes

1 Miller remained insistent throughout his statement that he never discussed commission business during any phone call.

2 Miller was not charged in this case with violating Florida's Sunshine Laws.

3 We reject Miller's claim that his statements were not material. “To be material, statements must be germane to the inquiry, and have a bearing on a determination in the underlying case.” *Parris v. State*, 359 So. 3d 1178, 1189 (Fla. 4th DCA 2023), *rev. denied*, No. SC2023-0818, 2023 WL 6620379 (Fla. Oct. 11, 2023) (quoting *Vargas*, 795 So. 2d at 272). However, “[i]t is not essential that the false testimony bear directly on the main issue. It is sufficient if the false testimony is collaterally or corroboratively material to the ultimate material fact to be established.” *Parris*, 359 So. 3d at 1189 (quoting *Gordon v. State*, 104 So. 2d 524, 531 (Fla. 1958)).

4 Miller never denied the occurrence of any phone call about which he was asked.