IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D08-4713

COUNCIL FOR SECULAR HUMANISM, INC., RICHARD HULL, and ELAINE HULL,

Appellants,

v.

WALTER A. MCNEIL, in his official capacity as Secretary of Corrections of Florida; PRISONERS OF CHRIST, INC., a Florida corporation; and LAMB OF GOD MINISTRIES, INC., Florida corporation,

Appellees.

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Opinion filed December 15, 2009.

An appeal from the Circuit Court for Leon County.
John C. Cooper, Judge.

Christine Davis Graves of Carlton Fields, P.A., Tallahassee, for Appellant.

Bill McCollum, Attorney General, Scott D. Makar, Solicitor General and Timothy D. Osterhaus, Deputy Solicitor General, Tallahassee, for Appellee Secretary Walter A. McNeil.

Major B. Harding, and E. Dylan Rivers of Ausley & McMullen, P.A., Tallahassee; Eric C. Rassbach, Admitted Pro Hac Vice, The Becket Fund for Religious Liberty, Washington, D.C., for Appellees Prisoners of Christ, Inc. and Lamb of God Ministries, Inc.

VAN NORTWICK, J.

The Council for Secular Humanism, Inc., (CSH), Richard Hull and Elaine Hull appeal a final judgment on the pleadings on their amended petition seeking to have the trial court prohibit, on state constitutional grounds, appellee Walter A. McNeil, as Secretary of the Department of Corrections, from using State funds pursuant to sections 944.473 and 944.4731, Florida Statutes (2007), to support the faith-based substance abuse transitional housing programs of appellees Prisoners of Christ, Inc. (Prisoners) and Lamb of God Ministries, Inc. (Lamb of God). Count I of the amended petition alleged that payments to these organizations constituted payments to churches, sects, religious sects, religious denominations or sectarian institutions contrary to the so-called "no-aid" provision in Article I, section 3 of the Florida Constitution.[1] Count II challenged the contracts which were entered into with these faith-based institutions under the same constitutional provision. Count III sought to bar the secretary from delegating government authority and powers to

[1] Article I, section 3 of the Florida Constitution provides:

> **Religious freedom.** - There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

chaplains pursuant to section 944.4731(6)(a), which requires that, prior to placement of an offender in a faith-based substance abuse transitional housing program, a transition assistant specialist must consult with a chaplain if an inmate requests and is approved for placement. The trial court entered a final judgment on the pleadings in favor of appellees on all counts.

Because we are reviewing a final judgment on the pleadings, we are required to accept as true all well-pleaded allegations and the inferences to be drawn therefrom. We find that in Count I the allegations state a cause of action that sections 944.473 and 944.4731 violate the no-aid provision of Article I, section 3. Thus, we reverse the trial court's final judgment as to Count I. As to Count II, we affirm the trial court's determination that appellants lack taxpayer standing to pursue the Count II claims because those claims did not constitute a challenge to the government's taxing and spending powers. Finally, with respect to Count III, we hold that the amended petition does not state a cause of action under Article I, section 3, based on the alleged unlawful delegation of authority to prison chaplains. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Count I

CHS is a nonprofit New York corporation registered to do business in Florida and is a Florida taxpayer. CHS alleges that it was formed to foster

religious liberty by promoting the enforcement of the principle of separation of church and state. The Hulls are Florida taxpayers residing in Leon County and members of CHS. Prisoners and Lamb of God are both Florida nonprofit corporations which describe themselves as "ministries."

McNeil, as Secretary of the Department of Corrections, entered into contracts with Prisoners and Lamb of God under which these entities were obligated to provide faith-based substance abuse post-release transitional housing program services in return for which the ministries would be paid $20 per day per prisoner assigned to the programs. In their amended petition, appellants allege that these appellees are sectarian religious institutions which use Christian doctrine to carry out their work with participants in the substance abuse transitional programs; "that the faith-based component of the state-funded programs they provide includes teaching of Christian doctrine and attempts to encourage program participants to change their character by faith in Jesus Christ and other Christian doctrines;" that Prisoners is a member of the Coalition of Prison Evangelists; and that Lamb of God works in partnership with the Church in the Woods at Freedom Ranch, a Christian church operated by John Glenn, founder of Alpha Ministries, which appellants allege is an explicitly Christian organization. Finally, appellants allege that sections 944.473 and 944.4731 authorize the "payment of funds from

the public coffers" to these "sectarian institutions" in violation of Article I, section 3.

Section 944.473(2)(a) requires inmates who meet certain criteria to "participate in substance abuse program services when such services are available." Section 944.473(2)(c) provides that "[w]hen selecting contract providers to administer substance abuse treatment programs, the department shall make every effort to consider qualified faith-based service groups on an equal basis with other private organizations." Section 944.4731(3)(a) adds that "contingent upon funding, the department shall enter into contracts with multiple providers who are private organizations, including faith-based service groups, to operate substance abuse transition housing programs . . ." Section 944.4731(3)(b) requires that the department "ensure that an offender's faith orientation, or lack thereof, will not be considered in determining admission to a faith-based program and that the program does not attempt to convert an offender toward a particular faith or religious preference."

In Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004) (Holmes I), this court addressed the constitutionality of the Florida Opportunity Scholarship Program (OSP) and held that the no-aid provision of Article I, section 3, which mandates that "[n]o revenue of the state . . . shall ever be taken from the public treasury directly or indirectly in aid . . . of any sectarian institution," prohibited

those sectarian schools from receiving funds from the State through the OSP voucher program provided for in section 229.0537, Florida Statutes (1999). In Holmes I, we explained:

> The constitutional prohibition in the no-aid provision involves three elements: (1) the prohibited state action must involve the use of state tax revenues; (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and (3) the prohibited beneficiaries of the use of state revenues are "any church, sect, or religious denomination" or "any sectarian institution."

886 So. 2d at 352.

Upon review in Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (Holmes II), the Florida Supreme Court did not reach the issue addressed by this court in Holmes I. Rather, the court held that the OSP was facially unconstitutional under the provisions of Article 9, section 1(a) of the Florida Constitution. The Court neither approved nor disapproved of this court's decision in Holmes I. Holmes II, 919 So. 2d at 413. Thus, this court's majority opinion in Holmes I, construing Article I, section 3, remains controlling law.

In the case under review, the trial court was erroneously persuaded by appellees that this court's decision in Holmes I was limited explicitly to the school context. The Holmes I decision did not limit its analysis to a "schools only" context. On this point, we stated:

> The Governor and the Attorney General argue that holding the OSP [Opportunity Scholarship Program] unconstitutional will put at risk a great multitude of other programs and activities in which the state provides funds for health and social service programs that are operated by institutions affiliated with a church or religious group. Those appellants assert that these programs range from the use of church buildings as polling places during elections; to the use of institutions affiliated with religion to provide social services, such as substance abuse, transitional housing or assistance to victims of crimes; to the use of healthcare facilities owned by religious groups by Medicaid recipients.
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> As we discuss above, nothing in the Florida no-aid provision would create a constitutional bar to state aid to a nonprofit institution that was not itself sectarian, even if the institution is affiliated with a religious order or religious organization. Unlike the sectarian schools receiving OSP vouchers, it has been observed that the health and social service programs and activities raised in the appellants' arguments, although affiliated with a church or religion, are generally operated through non-profit organizations that are not sectarian or, at least, not pervasively sectarian institutions . . . The analysis of the application of the no-aid provision to other programs is for another time and another case involving its own unique facts.

886 So. 2d at 362 (citations omitted).

In granting the judgment on the pleadings below, the trial court utilized an Establishment Clause[2] analysis to conclude that the subject program in this case

[2]The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an

and the contracts entered into pursuant to that program are not unconstitutional since the language in section 944.473(2)(c), which directed DOC to consider faith-based service groups on an equal basis with other private organizations, was merely an expression of a nondiscrimination policy that would prevent the state from excluding groups based on religion. Examining the contracts involved, the trial court rejected the contention of the appellants that the DOC contracts in this case mandated adherence to Christian doctrines. The trial court reasoned that these contracts require the contractors to ensure that state funds are used for the sole purpose of furthering the secular goals of criminal rehabilitation and the staff of the ministries are prevented from disparaging a client's religious beliefs or seeking to convert them to a particular religious faith. See, e.g., Freedom From Religion Foundation, Inc. v. McCallum, 324 F.3d 880 (CA 7, 2003) (holding that taxpayer group which sought to enjoin state correctional authorities from funding halfway house that incorporated Christianity into its treatment program were not entitled to that injunction because the funding did not violate the Establishment Clause).

The appellants' claims in Count I are based on the no-aid provision in Florida's constitution, not the state or federal Establishment Clauses. Thus, we do not address the trial court's Establishment Clause analysis. As this court explained in Holmes I, Article I, section 3 of the Florida Constitution is not "substantively

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establishment of religion. . . ." The first sentence of Article I, section 3 of the Florida Constitution, *supra* n.1, is similar.

synonymous with the federal Establishment Clause." 886 So. 2d at 344. While the first sentence of Article I, section 3 is consistent with the federal Establishment Clause by "generally prohibiting laws respecting the establishment of religion," the no-aid provision of Article I, section 3 imposes "further restrictions on the state's involvement with religious institutions than [imposed by] the Establishment Clause." Id. Specifically, the state may not use tax revenues to "directly or indirectly" aid "any church, sect, or religious denomination or any sectarian institution." As we noted in Holmes I, 886 So. 2d at 359-360, the United States Supreme Court has recognized that state constitutional provisions such as Florida's no-aid provision are "far stricter" than the Establishment Clause, Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 489 (1986), and "draw[] a more stringent line than that drawn by the United States Constitution." Locke v. Davey, 540 U.S. 712, 722 (2004).

Examining Count I of appellants' amended petition, we conclude that appellants have sufficiently alleged the three elements required to state a cause of action under the no-aid provision. In passing on a motion for judgment on the pleadings, "all well pleaded material allegations of the complaint and all fair inferences to be drawn therefrom must be taken as true and the inquiry is whether the plaintiff has stated a cause of action by his complaint." Martinez v. Florida Power & Light, 863 So. 2d 1204, 1205 (Fla. 2003) (quoting Reinhard v. Bliss, 85

So. 2d 131, 133 (Fla. 1956)). "The allegations of the defendant's answer are of no avail to him at a hearing on a defendant's motion for decree on the pleadings." Id.

Appellees assert that, even if Prisoners and Lamb of God are considered sectarian institutions, paying them to provide social services to inmates under the programs does not violate the no-aid provision. We agree that Florida's no-aid provision does not create a per se bar to the state providing funds to religious or faith-based institutions to furnish social services. As we explained in dicta in Holmes I, 886 So. 2d at 362, "nothing in the Florida no-aid provision would create a constitutional bar to state aid to a non-profit institution that was not itself sectarian, even if the institution is affiliated with a religious order or religious organization." The inquiry here is whether the programs funded by sections 944.473 and 944.4731 and provided by Prisoners and Lamb of God are predominantly religious in nature and whether the programs promote the religious mission of the organizations receiving the funds.[3] The appellants allege that not only are Prisoners and Lamb of God sectarian institutions, but the programs themselves are fundamentally carried out in a sectarian manner in violation of

[3]We recognize that, as asserted by appellees, the services received by the state under the programs here serve legitimate penological goals. Further, "[t]he teaching of moral values, and creating a comprehensive rehabilitation program intentionally focused on moral values and character development, need not imply indoctrination into a religious faith." Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 875, n.12 (S.D. Iowa 2006), rev'd in part, 509 F.3d 406 (8th Cir. 2007).

Article I, section 3. As we stated above, at this stage of the proceedings, we must take as true the material allegations plead in the petition and all fair inferences to be drawn therefrom. Martinez, 863 So. 2d at 1205. It is only after the facts are developed with respect to the purpose and effect of the faith-based programs which are the subject of this action that these arguments can be addressed definitively. See, e.g., Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006), aff'd in part and rev'd in part, 509 F.3d 406 (8th Cir. 2007) (holding after trial on the merits, faith-based prisoner program violated the Establishment Clause).

Further, appellees urge us to find persuasive the Georgia Supreme Court's decision in Taetle v. Atlanta Independent School System, 625 S.E.2d 770 (Ga. 2006). Certainly, the no-aid provision in Georgia's constitution is virtually identical to the provision in Florida's constitution.[4] The Taetle court held that, when the Atlanta school system leased classroom space from a church to create a public school kindergarten annex, it did not violate the Georgia Constitution. The Georgia Court reasoned that the Georgia no-aid provision did not bar a political subdivision of the state from "enter[ing] into an arms-length, commercial

[4]Article I, § 11, Par. VII of the 1983 Georgia Constitution provides:

> No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

agreement with a sectarian institution to accomplish a nonsectarian purpose." Id. at 771. We find the holding in Taetle consistent with our discussion in Holmes I. 886 So. 2d at 362. Significantly, however, Taetle expressly distinguished Bennett v. City of LaGrange, 112 S.E. 482 (Ga. 1922), in which the Georgia Supreme Court had held that under the no-aid provision the City of LaGrange cannot pay a sectarian organization to "assume[] the care of the poor of that city . . ." Id. at 486-87. As the Taetle court explained: "That is because a political subdivision of the state cannot give money to a religious institution in such a way as to promote the sectarian handiwork of the institution." Taetle, 625 So. 2d at 771. These Georgia decisions underscore the complexity of any no-aid analysis and make evident that there is a continuum along which different cases will fall depending upon the facts and circumstances present in those cases. See, e.g., Cmty. Council v. Jordan, 432 P.2d 460 (Ariz. 1967) (analyzing the no-aid decisions on the subject).

Appellees also argue that, if the no-aid provision bars religious entities from participating in state contracting, it would violate the Federal Establishment and Free Exercise Clauses. This argument was rejected in Holmes I. As we explained in detail in Holmes I, 886 So. 2d at 362-66, the United States Supreme Court has recognized that a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause. Locke, 540 U.S. at 725. As the

Court explained, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause," id. at 719, and states are free to "draw[ ] a more stringent line than drawn by the United States Constitution. . . ." Id. at 722.

Because the allegations of the amended petition state a cause of action alleging a violation of Article I, section 3, we reverse the trial court's judgment on the pleadings as to Count I. We emphasize that our decision here is based solely on the pleadings. At this stage of the proceeding, we do not address the constitutionality of sections 944.473 and 944.4731 before the parties have been given the opportunity to develop a factual record. See Glendale Fed. Sav. & Loan v. State Dep't of Ins., 485 So. 2d 1321 (Fla. 1st DCA 1986). On remand, after the facts are developed, it can be determined whether appellants have established that the programs operated by Prisoners and Lamb of God under sections 944.473 and 944.4731 are primarily "sectarian" in nature and effect within the meaning of Article I, section 3, see Holmes I, 886 So. 2d at 353-54, and that "aid" within the meaning of Article I, section 3 is being given to these ministries. Id. at 352-53.

Count II

As the trial court recognized, in Rickman v. Whitehurst, 74 So. 205, 207 (Fla. 1917), the Florida Supreme Court construed the right of citizen-taxpayers to sue the state by requiring that, when challenging government policy or actions, a

taxpayer must allege a "special injury" which differs in kind and degree from that sustained by other members of the community at large. In Department of Administration v. Horne, 269 So. 2d 659 (Fla. 1972), the court created an exception to the Rickman standing rule. "[W]here there is an attack upon *constitutional* grounds based directly upon the Legislature's *taxing and spending* power, there is standing to sue without the Rickman requirement of special injury." Id. at 663. To withstand dismissal on standing grounds, however, the challenge must be to legislative appropriations. Id. at 663; see Philip J. Padovano, Florida Civil Practice § 4.3 (2009 ed.) ("[T]his is a narrow exception which applies only to constitutional challenges to appropriations; a plaintiff does not have standing to challenge other actions of the government simply by establishing his or her status as a taxpayer.").

In Count II, appellants have challenged the contracts entered into between DOC and Prisoners and Lamb of God, alleging that they require these ministries to "provide a transitional program that includes a faith-based component resulting in spiritual renewal" and that "the spiritual renewal is created by inculcating faith in Jesus Christ." In Count II, appellants assert that "[t]o the extent Florida Statutes sections 944.473 and 944.4731 authorize the Illegal Contracts and payment of the Illegal Contracts, those statutes should be declared unconstitutional." They ask that McNeil be enjoined from entering into the contracts.

We agree with appellees that, to the extent that Count II challenges McNeil's authority to enter into contracts and the performance of those contracts by the ministries, the trial court correctly concluded taxpayer standing is not present. For, as appellees argued below, allowing third parties to gain access to courts based upon taxpayer standing to challenge the performance of contracts and the decision of an executive agency to enter into a contract would be extraordinarily burdensome and would impermissibly allow a taxpayer to interfere with State procurement contracts. In Department of Revenue v. Markham, 396 So. 2d 1120, 1122 (Fla. 1981) (quoting Paul v. Blake, 376 So. 2d 256, 259 (Fla. 3d DCA 1979)), the Florida Supreme Court recognized that opening the courthouse door to any taxpayer suit would allow the filing of lawsuits "by disgruntled taxpayers, who, along with much of the taxpaying public these days, are not entirely pleased with certain of the taxing and spending decisions of their elective representatives." Thus, ordinarily, "the taxpayer's remedy should be at the polls and not in the courts."

We agree with the trial court that petitioners have adequately alleged grounds for taxpayer standing in Count I to attack the constitutionality of sections 944.473 and 944.4731, since the state was using legislative appropriations allegedly to aid sectarian institutions. Such is not the case with Count II. The trial court correctly ruled that standing to raise Count II is foreclosed by Markham

because Count II challenges the downstream performance of these contracts by the ministries and the Department's oversight of the contracts. We realize that the distinctions being drawn in this case will be a minor consequence, however, because on remand the trial court will necessarily be required to examine the contracts as part of its inquiry into whether sections 944.473 and 944.4731 violate Article I, section 3. To that extent, the allegations of Count II are essentially subsumed under Count I.

Count III

In Count III, CSH and the Hulls have alleged that section 944.4731(6)(a)[5] provides a "chaplain" with important government powers with respect to the

[5]Section 944.4731(6)(a) provides:

> (a) The transition assistance specialist and the chaplain shall provide a list of contracted private providers, including faith-based providers, to the offender and facilitate the application process. The transition assistance specialist shall inform the offender of program availability and assess the offender's need and suitability for substance abuse transition housing assistance. If an offender is approved for placement, the specialist shall assist the offender and coordinate the release of the offender with the selected program. If an offender requests and is approved for placement in a contracted faith-based substance abuse transition housing program, the specialist must consult with the chaplain prior to such placement. A right to substance abuse program services is not stated, intended, or otherwise implied by this section.

placement of offenders in substance abuse transitional programs. They allege:

> This delegation of government authority to a religious official violates Article I, Section 3 of the Florida Constitution, as it unconstitutionally substitutes the judgment of a religious authority for the decision-making of secular public officials. Moreover, any use of public funds to pay the chaplain designated in Florida Statutes § 944.4731(6) similarly violates Article I, section 3 of the Florida Constitution.

They sought "a temporary and permanent injunction preventing [McNeil] from delegating government authority and powers to the chaplain, including, but not limited to, the authority to be consulted prior to the placement of any offender in faith-based substance abuse transitional housing programs."

These allegations do not state a cause of action under either the Federal Establishment Clause or Article I, section 3 of the Florida Constitution. Appellants have not alleged that the acts of these chaplains establish a religion. In addition, the state's employment of a chaplain does not violate the Establishment Clause. March v. Chambers, 463 U.S. 783 (1983). Moreover, the mere fact that public funds are used to pay a chaplain does not establish a cause of action under Florida's no-aid provision. The individual chaplains are not a church, sect, religious denomination or sectarian institution. Further, appellants do not allege that that employment of a chaplain is "in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

AFFIRMED in part, REVERSED in part, and REMANDED for further

proceedings consistent with this opinion.

PADOVANO, J., AND BROWNING, JR., EDWIN J., SENIOR JUDGE, CONCUR.