

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Mogavero v. State

744 So. 2d 1048 (Fla. 4th DCA 1999) · No. Nos. 97-4276, 97-4280 · Decided August 25, 1999

SUMMARY

The Florida Fourth District Court of Appeal reversed two convictions for acting as a mortgage broker without a license because the jury instruction improperly permitted conviction based on constructive knowledge rather than the actual knowledge required by the statute. The court affirmed two convictions for collecting an advance fee by a loan broker and affirmed the revocation of probation. The case was remanded.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fourth District
WRITING FOR THE COURT	Gross, J.; Dell, J.; Shahood, J.
JURISDICTION	Florida
DECIDED	August 25, 1999
DOCKET	Nos. 97-4276, 97-4280
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Mogavero appealed convictions for acting as a mortgage broker without a license and collecting an advance fee by a loan broker, and separately appealed revocation of probation. He also challenged prosecutorial closing argument, jury instructions, and an alleged discovery violation.
STANDARD OF REVIEW	The court reviewed the legal correctness of the jury instructions de novo or as a question of law, reviewed unpreserved prosecutorial comments for fundamental error, and applied a cautious harmless-error analysis to an erroneous instruction on the elements of the charged crime.
PRECEDENTIAL VALUE	Published Florida Fourth District Court of Appeal opinion
PARTIES	Joseph G. Mogavero, Jr. v. State of Florida

TOPICS

- jury instructions
- statutory interpretation
- criminal procedure
- preservation of error
- appellate procedure

PRACTICE AREAS

criminal law

criminal procedure

jury instructions

statutory interpretation

appellate procedure

QUESTIONS PRESENTED

1. Whether the trial court improperly expanded the statutory mens rea for acting as a mortgage broker without a license by instructing the jury that knowledge could be constructive.
2. Whether the erroneous jury instruction constituted reversible error where the defendant's theory of defense disputed knowing commission of the offense.
3. Whether unobjected-to prosecutorial closing-argument comments constituted fundamental error.
4. Whether the trial court erred in giving a principals instruction or in finding no discovery violation.
5. Whether the convictions under section 687.141(1) supported revocation of probation.

HOLDINGS

1. The statutory term "knowingly" requires actual knowledge or awareness that the defendant is acting as a mortgage broker without a license; an instruction permitting conviction based on constructive knowledge improperly enlarges the offense.
2. The erroneous instruction was reversible because the jury might reasonably have been misled and the defendant's defense directly disputed the required knowledge.
3. The alleged prosecutorial errors were not fundamental error and were not preserved for review; however, the court noted that comments concerning Mogavero's reasons for consulting an attorney would be improper on retrial.
4. The two convictions under section 687.141(1) were sufficient to support revocation of probation.

KEY QUOTATIONS

"'Knowingly' means to act '[w]ith knowledge.'" (744 So. 2d at 1050)

"The use of the term 'knowingly' in section 494.0018(1) requires that a defendant have actual knowledge or awareness that he is acting as a mortgage broker without a license." (744 So. 2d at 1050)

"A trial court 'should not give instructions which are confusing, contradictory, or misleading.'" (744 So. 2d at 1050)

"Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading...." (744 So. 2d at 1050)

FACTUAL BACKGROUND

Mogavero was convicted of acting as a mortgage broker without a license and collecting advance fees by a loan broker. At trial, he argued that he did not knowingly act as a mortgage broker without a license and claimed that the fees were for preparing a package and making an introduction. The trial court instructed the jury that knowledge could be actual or constructive, allowing conviction if Mogavero could have known of the relevant fact through reasonable care.

PROCEDURAL HISTORY

The trial court convicted Mogavero of two counts of acting as a mortgage broker without a license and two counts of collecting an advance fee by a loan broker, and revoked his probation in a separate case. The Fourth District reversed the two mortgage-broker convictions because the jury instruction improperly permitted conviction based on constructive rather than actual knowledge, affirmed the two section 687.141(1) convictions and the probation revocation, and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The two convictions for acting as a mortgage broker without a license were reversed and the matter was remanded. The two convictions under section 687.141(1) and the revocation of probation were affirmed.

CASES CITED

- O'Neill v. State, 684 So. 2d 720, 722 n. 5 (Fla. 1996)
- Weber v. City of Fort Lauderdale, 675 So. 2d 696, 698 (Fla. 4th DCA 1996)
- State v. Jackson, 526 So. 2d 58, 59 (Fla. 1988)
- C.S. v. S.H., 671 So. 2d 260, 268 (Fla. 4th DCA 1996)
- Butler v. State, 493 So. 2d 451, 452 (Fla. 1986)
- Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953)
- Gross v. Lyons, 721 So. 2d 304, 306 (Fla. 4th DCA 1998)
- Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990)
- Lewis v. State, 693 So. 2d 1055, 1059 (Fla. 4th DCA 1997), review denied, 700 So. 2d 686 (Fla. Sept. 30, 1997)
- DeFreitas v. State, 701 So. 2d 593, 602 (Fla. 4th DCA 1997) (Gunther, J., concurring)
- Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993)
- Stark v. Regency Highland Condominium Ass'n, 418 So. 2d 1058 (Fla. 4th DCA 1982)