

IN THE SUPREME COURT OF FLORIDA

TERESA R. GOWDEN,  
A/K/A CHERYL LYNN POWELL,

Petitioner,

v.

Appeal No.: 64,407

STATE OF FLORIDA,

Respondent.

**FILED**

SID J. WHITE

APR 19 1984

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH  
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

Counsel for Respondent

/ech

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	
<u>ISSUE</u>	2-8
THE SECOND DISTRICT COURT OF APPEAL ERRED IN REVERSING THE ORDER OF THE CIRCUIT COURT WHICH DISMISSED THE INFORMATION AGAINST PETITIONER TERESA R. GROWDEN AND HELD SECTION 817.563 OF THE FLORIDA STATUTES TO BE UNCONSTITUTIONAL. (As stated by Petitioner)	
CONCLUSION	9
CERTIFICATE OF SERVICE	9
APPENDIX (attached)	

TABLE OF CITATIONS

	<u>PAGE</u>
<u>FLORIDA CASES:</u>	
Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)	4
Hutchinson v. State, 315 So.2d 546 (Fla. 2d DCA 1975)	5
M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983)	3, 8
Pederson v. Green, 105 So.2d 1 (Fla. 1958)	5
State v. Beasley, 317 So.2d 750 (Fla. 1975)	5
State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984)	1
State v. Dunmann, 427 So.2d 166 (Fla. 1983)	2
State v. Growden, 437 So.2d 783 (Fla. 2d DCA 1983)	1
State v. King, 435 So.2d 370 (Fla. 2d DCA 1983)	8
State v. Reese, 222 So.2d 732 (Fla. 1969)	5
State v. Thomas, 428 So.2d 327 (Fla. 1st DCA 1983)	3
White v. State, 330 So.2d 3 (Fla. 1976)	5
<u>OTHER CASES:</u>	
Ahmed v. Rockefeller, 308 F.Supp. 935, 938 (D.C. N.Y. 1970)	4
Erby v. State, 184 S.W.2d 14, 16 (Tenn. S.Ct. 1944)	4
In the Matter of Andrew M., 398 N.Y.S. 2d 824, 825 (Family Court, Kings County, N.Y. 1977)	3
People v. Contreras, 38 Calif. Rptr. 338 (Calif. 2d DCA 1964)	7
People v. Ernst, 121 Calif. Rptr. 857 (Calif. 2d DCA 1975)	7
People v. House, 74 Calif. Rptr. 496 (Calif. 1st DCA 1969)	7
People v. Lechlinski, 131 Calif. Rptr. 701 (Calif. 2d DCA 1976)	7

People v. Medina, 103 Calif. Rptr. 721, 724 (Calif. 1st DCA 1972)	6
State v. Thomas, 595 S.W.2d 325, 328 (Mo. 1st Div. App. 1980)	4
United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978)	6

OTHER AUTHORITIES:

28 C.J.S. Drugs & Narcotics Supp. §105	2
§817.563, Fla. Stat. (1981)	2, 3, 6
21 USCA §802(7)	6
21 USCA §841(a)(2)	6
West's Calif. Ann. Health & Safety Code §§11355 and 11382	6
Title 16-13-21(6), Criminal Code of Georgia	7
New Hampshire RSA 318-B:2	7
New Hampshire RSA 318-B:2-b	7
5 Kan. Statutes Ann (Cum. Supp.) §65-4155	7
7A Ark Statutes Ann §82-2619(5)	7

PRELIMINARY STATEMENT

Respondent would alert this Court that a constitutional challenge to Section 817.563, Florida Statutes (1981) is presently pending. See, State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984) pending on the merits Florida Supreme Court Case Nos. 64,966; 64,967; 64,968. The case under review is reported below as State v. Growden, 437 So.2d 783 (Fla. 2d DCA 1983).

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by Petitioner in his brief on the merits except where noted in the body of this brief.

ARGUMENT

ISSUE

THE SECOND DISTRICT COURT OF APPEAL ERRED  
IN REVERSING THE ORDER OF THE CIRCUIT  
COURT WHICH DISMISSED THE INFORMATION  
AGAINST PETITIONER TERESA R. GROWDEN AND  
HELD SECTION 817.563 OF THE FLORIDA  
STATUTES TO BE UNCONSTITUTIONAL.

(As stated by Petitioner)

The purchaser of counterfeit drugs, even though the transaction is couched in *pari delicto*, assumes the delivered goods to be genuine. The people of the State of Florida are offended if such a fraudulent transaction is consummated; and, the People of Florida are not interested in defining the contractual rights between a pusher and his victim.

Statutes which either regulate or control dangerous drugs or narcotics (whether genuine or counterfeit) must be construed in such a manner as to carry out the intention of the legislature and to effect the purpose of such laws. Constructions should not be adopted which will result in a frustration of legislative purpose. See, 28 C.J.S. Drugs & Narcotics Supp. §105. The purpose of Section 817.563, Fla. Stat. (1981) is to prohibit drug transactions —whether counterfeit or bona fide. In State v. Dunmann, 427 So.2d

166 (Fla. 1983), this court recognized that the legislature has the power to dispense with intent as an element of a crime and to prescribe punishment without regard to the mental attitude of an accused.

The issue of mens rea, or scienter, has been addressed by two district courts in State v. Thomas, 428 So.2d 327 (Fla. 1st DCA 1983) and M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983). On alternate reasoning, both courts have found Section 817.563, Florida Statutes (1981) to be constitutional. As the Second District in this case followed its precedent in M.P. v. State, supra, it cannot be said constitutional infirmity exists when an individual intends from the beginning to sell an uncontrolled substance which he represents to the purchaser to be a controlled substance.

The question of scienter and/or mens rea is but an abstraction. Scienter is a reflection of knowledge and mens rea... guilty purpose. The Florida Legislature recognized an inherent wrongful purpose in fraudulent and/or counterfeit drug transactions. As pointed out by our sister state of New York, the crucial determinant of criminal behavior in classic common-law sense was "evil intent" or "mens rea", without which the act could not be deemed criminal in nature and which has been defined in terms of knowledge of anti-social consequences of one's acts. See, In the Matter of Andrew M., 398 N.Y.S.2d 824, 825 (Family Court, Kings County, N.Y. 1977). The Thomas court found the mens rea requirement to be supplied by the word "unlawfully" in the statute. The

Tennessee state courts in a liquor transportation case, have compared the word "knowingly" to "unlawfully" pointing out: "...the words 'unlawfully', 'wilfully', and 'knowingly' when applied to an act or thing done, import knowledge of the act or thing so done, as well as evil intent or bad purpose in doing such thing." Erby v. State, 184 S.W.2d 14, 16 (Tenn. S.Ct. 1944). The Missouri appellate court states the following interpretation: "As employed in criminal statutes, words 'unlawfully' and 'wilfully' mean knowingly and intentionally or a thing not done accidentally or unconsciously." State v. Thomas, 595 S.W.2d 325, 328 (Mo. 1st Div. App. 1980). See also, Ahmed v. Rockefeller, 308 F.Supp. 935, 938 (D.C.N.Y. 1970) which relied on Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) for interpretation of the word of act "unlawfully". This statute does not ensare an innocent as it is from without the realm of thematic apperception to project an individual "ignorantly" offering to sell a substance which they represent to be illicit and controlled. To interpret the statute as requiring the State to prove the seller was aware of the scientific contents of every substance sold in an illicit drug transaction would frustrate the public policy considerations (health, safety, and welfare) regarding narcotics trafficking. This was never a requisite of the statute. The statute under review reads:

817.563 Controlled substance named or described in s.893.03; sale of substance in lieu thereof.—It is unlawful for any person to agree, consent, or in any manner



offer to unlawfully sell to any person a controlled substance named or described in s.893.03 and then sell to such person any other substance in lieu of such controlled substance. Any person who violates this section with respect to:

(1) A controlled substance named or described in s.893.03(1), (2), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

(2) A controlled substance named or described in s.893.03(5) is guilty of a misdemeanor of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

There are certainly knowing anti-social consequences to such statutorily described transactions; and, such sales are not consummated accidentally or unconsciously.

In construing a statute, Florida courts have consistently held that a statute should be interpreted and applied so as to give effect to the obvious intent of the legislature regardless of whether such construction varies from the statute's literal meaning. Hutchinson v. State, 315 So.2d 546 (Fla. 1975); and, State v. Beasley, 317 So.2d 750 (Fla. 1975). The words of the legislature are to be construed in their "plain and ordinary sense." Pedersen v. Green, 105 So.2d 1 (Fla. 1958). There is a judicial responsibility to avoid a determination of unconstitutionality whenever a fair construction can be gleaned within constitutional limits. White v. State, 330 So.2d 3 (Fla. 1976). Also, courts do not address the wisdom or motives of the state legislature in enacting a law. The concern of the courts must be with the validity of the enactment when measured by organic requirements. State v. Reese, 222 So.2d 732 (Fla. 1969).

Attached as appendix to this brief is the 1981 Florida Legislature staff analysis retained by the Florida Department of State, Division of Archives. These materials are evidence of the legislative basis and intent of the statute under review, except for the plain reading of the statute itself.

There does exist a federal counterpart to the statute Section 817.563, Florida Statutes (1981). In 21 USCA §802(7), the term "counterfeit substance" is defined. Such an act is made unlawful pursuant to 21 USCA §841(a)(2). Parenthetically, the federal courts have noted that deliberate ignorance of the contents of packages is the same as knowledge for purposes of a possession with intent to distribute conviction. See, United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978).

Our sister-state of California has a comparable statute. See, West's Calif. Ann. Health and Safety Code §§11355 and 11382 which both address the sale or furnishing of a substance falsely represented to be a controlled substance. In an interpretation of the former, its constitutionality was upheld. Justice Molinari in People v. Medina, 103 Calif. Rptr. 721, 724 (Calif. 1st DCA 1972) opined:

As the aim of the statute is not simply to proscribe fraudulent narcotics traffic, but rather to prohibit anyone from appearing to engage in narcotics traffic. The offense is complete at the time of delivery regardless of the intent with which it is done.

text of 103 Calif. Rptr. at 724

See also, People v. House, 74 Calif. Rptr. 496 (Calif. 1st DCA 1969) and People v. Ernst, 121 Calif. Rptr. 857 (Calif. 2d DCA 1975). California has also held that specific intent is not necessary to uphold a conviction as the sale of the counterfeit substance is a general intent crime. People v. Contreras, 38 Calif. Rptr. 338 (Calif. 2d DCA 1964); People v. Sweet, 65 Calif. Rpt. 31 (Calif. 2d DCA 1967); and, People v. Lechlinski, 131 Calif. Rptr. 701 (Calif. 2d DCA 1976). The whole purpose of the California statute is to discourage anyone from engaging or appearing to engage in narcotics traffic rather than to define the contractual rights of the pusher and his victim. People v. Ernst, supra.

The Florida Legislature relied also on Title 16-13-21(6), Criminal Code of Georgia as a basis for enactment. New Hampshire has a comparable statute which became effective June 20, 1983. See, New Hampshire RSA 318-B:2. Additionally, the New Hampshire Legislature set forth affirmative defenses to this statute so that medical practitioners would not be prosecuted for sale and distribution of placebos. See, New Hampshire RSA 318-B:2-b. In Kansas, the governing statute is 5 Kan. Statutes Ann (Cum. Supp.) §65-4155; in Arkansas, the governing statute is 7A Ark Statutes Ann §82-2619(5).<sup>1/</sup>

---

<sup>1/</sup>Regretfully, the South Dakota statute contained in the attached staff analysis of Florida Senate Bill 31 as Appendix to this brief is not available on a local level.


The Florida Legislature passed a statute prohibiting the sale of an uncontrolled substance when a pusher represents to his victim that it is controlled. The statute is defined with appropriate definiteness and passes Constitutional muster. See, M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983) and State v. King, 435 So.2d 370 (Fla. 2d DCA 1983).

CONCLUSION

Respondent respectfully prays that this Honorable Court will affirm the decision of the Second District Court of Appeal finding Section 817.563, Florida Statutes (1981) constitutional and grant whatever other relief is necessary and proper.

Respectfully submitted,


JIM SMITH  
ATTORNEY GENERAL

  
WILLIAM I. MUNSEY, JR.  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert F. Moeller, Assistant Public Defender, Courthouse Annex, Tampa, Florida 33602 on this 16th day April, 1984.

  
OF COUNSEL FOR RESPONDENT