OA 9-4-84

IN THE SUPREME COURT OF FLORIDA

NELSON WATTS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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Case No. 64,613

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON MERITS

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STATEMENT OF THE FACTS

Respondent, State of Florida, accepts Petitioner's statement of the facts with the following additions:

Officer Reaume testified that the following circumstances caused him to believe that the safety of persons or property was in jeopardy: Benny's Oyster Bar is a predominately white bar, Watts was looking into cars, looking around his shoulder to see if anybody was watching him and going from car to car. As the officer drove by, Watts began walking in an easterly direction (R-9) The officer drove around three or four blocks and, by the time he returned, Watts was back in the center of the lot, doing the same thing, bending over looking into cars. (R-9) No other people were observed in the parking lot (R-10)

About ten days later, Watts was asked by Officer Reaume way he ran (R-8) Watts told Reaume he ran because he did not want to talk to Reaume (R-8) Watts denied knowing anything about the incident at Benny's Oyster Bar. (R-14)

ISSUE

WHETHER SECTION 856.021, FLORIDA STATUTES, THE LOITERING AND PROWLING STATUTE, IS FACIALLY UNCONSTITUTIONAL IN LIGHT OF THE UNITED STATES SUPREME COURT OPINION IN KOLENDER V. LAWSON, ____ U.S. ____, 75 L.ED.2d 903, 103 S.Ct. 855 (1983).

The United States Supreme Court, in Kolender v. Lawson, ___ U.S. ___, 75 L.Ed.2d 903, 103 S.Ct. 855 (1983), struck down a California loitering and prowling statute which required persons who loiter or wander on the streets to provide "credible and reliable" identification and to account for their presence when requested by a peace officer. Under the California statute, failure of an individual to provide "credible and reliable" identification permitted an arrest. 75. L.Ed.2d at 909. Because the statute failed to clarify what was contemplated by the requirement that a suspect provide "credible and reliable" identification and thus encouraged arbitrary enforcement by failing to describe with sufficient particularity what a subject must do in order to satisfy the statute, the Supreme Court determined that the statute was unconstitutionally vague.

Petitioner argues that the Florida loitering and prowling statute suffers from the same defects as the California statute and, thus, is unconstitutionally vague on its face.

The two statutes which are to be compared are set forth below:

The California Penal Code §647(e) provides:

Every person who commits any of the following acts is gulity of disorderly conduct, a misdemeanor.... (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by an peace officer to do so, if the surrounding circumstances are such to indicate to a reasonable man that the public safety demands such identification.

Section 856.021, Florida Statutes (1981), in pertinent part provides:

(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances make it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and expalin his presence and conduct.

No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

There is no doubt that a statute broadly proscribing loitering, without more, would be unconstitutional. State v. Ecker, 311 So.2d 104 (1975), cert. denied sub nom Bell v. Florida, 96 S.Ct. 455, 423 U.S. 1019, 46 L.Ed.2d 391 (1975)

Section 865.021, Florida Statutes was found to be constitutional in Ecker because it set out standards and separate and distinct elements which must be established in order to convict a defendant under it.

In holding that Section 865.021, Florida Statute is not vague or overbroad in Ecker, this court construed the language: "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity" to mean those circumstances where peace and order are threatened or where safety of persons or property is jeopardized. This court adopted the principle set forth in Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 10 L.Ed.2d 1889, 906 (1968) that ". . . [T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants 'a finding that a breach of the peace is imminent, or the public safety is threatened.'" Ecker, 311 So.2d at 109.

Relying solely on the 'credible and reliable" identification aspect of the Kolender opinion, petitioner's claim appeared meritorious.[1] However, as this Court recognized in Ecker, the issue of identification and the issue of explanation are separate and distinct, 311 So.2d at 109. The Florida Statute mandates that a suspect be afforded an opportunity to explain his presence and conduct as an additional defense to the charge. As stated in

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1 As stated by the Circuit Court. . . "At first blush, appellant's attack seemed to have merit, especially when the phrase ". . . credible and reliable identification. . ." is extracted from the Opinion in Kolender without actually comparing the California Statute with the Florida Statute as construed in Ecker." (See Appendix filed by Petitioner at A-1)

Ecker, "while the statute might be unconstitutionally applied in certain situations, this is no ground for finding the statute itself unconstitutional."

The "void for vagueness" doctrine requires that a penal statute define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender, 75 L.Ed.2d at 909, citations omitted. The reliance in Kolender on the demand for "credible and reliable identification" does not compel a conclusion that Florida's Statute must fail.[2] Proof of both of the following elements is essential in order to establish a violation of the Florida Statute:

> (1) Loitering and prowling in a place at a time and in a manner not usual for law abiding individuals.
>
> (2) Conduct on the part of the accused which warrants a justifiable and reasonable concern for the safety of persons or property in the vicinity.

In order to satisfy the second element, the police must, prior to making any arrest, provide an opportunity for the accused to dispel any concern or alarm, unless the circumstances are such that it is impractical for the police to give the accused this opportunity. S.F. v. State, 354 So.2d 474 (Fla. 3d DCA 1978). An individual may not be convicted of violating Florida's loitering and prowling statutes if the law enforcement officer did not comply with the procedure or if it appears at trial that the explanation

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2 As the Second District determined... "while some of the authorities and reasoning relied upon in Ecker have now been disapproved in Kolender, we feel that Section 856.021 is so much more definitive than the California Statute as to render the result in Ecker still valid."

by the accused is true and, if believed by the officer at the time , would have dispelled any alarm or immediate concern. §856.021 (2), L.L.J. v. State, 334 So.2d 656 (Fla. 3d DCA 1976).

Florida's "loitering and prowling" statute is not a "catch-all" provision; rather, it is a specific prohibition against specific conduct and requires that all elements of the statute be satisfied. B.A.A. v. State, 356 So.2d 304 (Fla. 1978). A conviction under this statute cannot stand if there are no "specific and articulable facts" which reasonably warrant a finding that the public peace and order were threatened or that the safety of persons or property was jeopardized. Id. at 306. The statute only comes into play when the surrounding circumstances suggest to a reasonable man some threat or concern for the safety of persons or property. See Ecker, 311 So.2d at 110.

Enforcement of Florida's statute is limited to only that conduct which justifiably warrants police concern. Furthermore, the Florida statute as drafted and construed, does not penalize a person's status or past conduct, nor does it amount to a "catch-all" provision which would subject it to claim of vagueness and overbreadth, See Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839. 31 L.Ed.2d 110 (1972) Despite petitioner's assertions to the contrary, section 856.021, Florida Statutes, is not rendered invalid by the decision of the Supreme Court in Kolender v. Lawson, supra.

Petitioner, Nelson Watts, was validly convicted for "loitering and prowling" based upon circumstances which were more than sufficient to cause a reasonable person to be concerned for the safety of persons or property in the vicinity. At approximately 8:40 p.m. on November 6, 1982, Police Officer Reaume observed Watts peering into several of the cars which were parked in the lot of Benny's Oyster Bar. (R-6) Watts was observed looking into the cars, looking around his shoulder as if to see if anybody was watching him and going from car to car (R-9) When Watts saw the police officer, he began walking in an easterly direction (R-6) The officer, who was in uniform and in a marked patrol vehicle, circled the block and attempted to make contact with Watts. (R-7) At this point, Watts had returned to the center of the parking lot and was again looking into the cars (R-7) As Officer Reaume drove up, Watts ran down an alley (R-7) The canine units were brought to track Watts but were unable to locate him (R11-12).

Respondent, State of Florida, respectfully submits that the Florida "loitering and prowling" statute, as previously interpreted by this court, does not suffer from the same Constitutional infirmities as the California statute challenged in Kolender; and, thus, the opinion of this court in Ecker, supra, is still valid.

CONCLUSION

Based upon the foregoing reasons and authorities, Respondent respectfully requests this Honorable Court uphold the validity of Section 856.021 Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: L.S. Alperstein, Assistant Public Defender, Courthouse Annex, Tampa, Florida 33602-4197

OF COUNSEL FOR RESPONDENT