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SID J. WHITE

MAY 25 1984

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

NELSON WATTS, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Case No. 64,613

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PETITIONER'S BRIEF ON THE MERITS

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JERRY HILL  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

By: L.S. Alperstein  
Assistant Public Defender  
Courthouse Annex  
Tampa, Florida 33602-4197

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IN THE SUPREME COURT OF FLORIDA

NELSON WATTS, )  
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 Petitioner, )  
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 vs. ) Case No. 64,613  
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 STATE OF FLORIDA,, )  
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 Respondent. )  
 )  
 )  
 )  
 \_\_\_\_\_ )

STATEMENT OF THE CASE

Petitioner, Nelson Watts, was charged by complaint affidavit with the offense of loitering and prowling, a violation of Section 856.021, Florida Statutes (1981) (R 1). On February 3, 1983, Petitioner appeared in the County Court of Polk County, the Honorable J. Dale Durrance presiding (R 5-20). The court considered the evidence and found Appellant guilty as charged (R 16, 19). Petitioner was sentenced to sixty days in the county jail (R 16, 19).

Petitioner took an appeal from the adjudication of guilt and subsequent sentence (R 22). Notice of appeal was timely filed March 4, 1983 (R 22).

On October 27, 1983, the Circuit Court of the Tenth Judicial Circuit affirmed the judgment of the trial court with an opinion. Watts v. State, (Tenth Circuit, Case No. L-159, opinion filed October 27, 1983).

On November 9, 1983, Petitioner filed a Petition for Writ of Certiorari to the Second District Court of Appeal. In an opinion denying certiorari, the Second District Court of Appeal expressly declared Section 856.021, Florida Statutes (1981), constitutional. Watts v. State, 447 So.2d 271 (Fla. 2nd DCA 1983) (Case No. 83-2334, opinion filed November 23).

A notice to invoke discretionary jurisdiction was filed December 6, 1983. In an order dated May 8, 1984, this Court accepted jurisdiction.

STATEMENT OF THE FACTS

Officer Reaume testified that at about 8:43 p.m. on November 6, 1982, he observed Petitioner in the parking lot of a restaurant looking into cars (R 6). When Petitioner saw Reaume, he began to walk in an easterly direction (R 6). Reaume followed Petitioner and was able to identify him from an earlier arrest (R 6-7, 11).

Reaume notified the other patrol units in the area and circled the block in an attempt to stop Petitioner (R 7). Reaume next saw Petitioner back in the parking lot looking into cars (R 7). When Petitioner saw Reaume, he immediately ran in a southerly direction down the alley (R 7). The canine units were brought to track Petitioner but were unable to locate him (R 11-12).

Reaume saw Petitioner about ten days later and asked him why he ran (R 8). Petitioner told Reaume he ran because he did not want to talk to Reaume (R 8). Reaume ran a warrants check on Petitioner, then let him go (R 8).

Petitioner testified that Reaume knew him (R 15). Petitioner knew nothing about the incident.

## ARGUMENT

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, 103 S.Ct. 1855  
(1983).

In Kolender v. Lawson, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), the United States Supreme Court recently found the California loitering and prowling statute to be unconstitutionally vague on its face. The court in Kolender concluded that the California Penal Code §647(e) was vague on its face "... because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." The Florida loitering and prowling statute suffers from the same defects as the California statute and thus is unconstitutionally vague on its face.

The California Penal Code §647(e) provides:

Every person who commits any of the following acts is guilty 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 a peace officer to do so, if the surrounding circumstances are such to indicate to a reasonable man that the public safety demands such identification.

In People v. Solomon, 33 Cal.App.3d 429 (1973), §647(e) was construed to require that an individual provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a Terry stop.

"Credible and reliable" identification was defined by the court as "... identification carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Solomon, supra, at 438.

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 circumstance 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 explain 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.

Like the California courts, Florida courts have construed Section 856.021 to require "credible and reliable" identification



under circumstances where the public safety is threatened. State v. Ecker, 311 So.2d 104 (Fla. 1975). The court in Ecker, supra, at 110 stated that when the elements of loitering and prowling have been established and "... the individual either refuses or fails to properly identify himself or flees when confronted by a law enforcement officer, the offense has been established." Conversely, when the elements have been established but the individual produces "credible and reliable" identification and complies with the orders of the law enforcement officer necessary to remove the threat to public safety or gives a reasonable explanation, then the charge under Section 856.021 cannot properly be made.

In reaching their decision in Kolender, supra, at 3065, the Supreme Court noted that California Penal Code §647(e) as drafted and construed "... contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide 'credible and reliable' identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go his own way in the absence of probable cause to arrest...." Since Section 647(e) fails to describe with sufficient particularity what must be done to satisfy the statute, the Supreme Court held it was unconstitutionally vague on its face.

Like the California Statute, Section 856.021, Florida Statutes (1981), as construed fails to describe what is sufficient to establish "credible and reliable" identification. As with California, the

Florida statute vests almost complete discretion in the police to determine what a person must do to satisfy the statute. Thus, like the California statute, the Florida statute as drafted and construed fails to describe with sufficient particularity what must be done to satisfy the statute, and is unconstitutionally vague on its face and must be declared invalid.

CONCLUSION

For the foregoing reasons and authorities cited, Petitioner respectfully requests this Honorable Court declare Section 856.021, Florida Statutes facially unconstitutional.

Respectfully submitted,

JERRY HILL  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

By: L.S. Alperstein  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Petitioner, 737 West Crawford Street, Lakeland, FL, 33802, this 23rd day of May, 1984.

L.S. Alperstein  
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