IN THE SUPREME COURT

STATE OF FLORIDA, :

Appellant, :

Appeal no. 64,916.

v. :

CAROLYN WALKER, :

Appellee. :

BRIEF OF APPELLEE

ROBERT E. JAGGER, PUBLIC DEFENDER
SIXTH JUDICIAL CIRCUIT IN AND FOR
PINELLAS COUNTY, STATE OF FLORIDA

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PRELIMINARY STATEMENT

Throughout the Brief the parties will be referred to as they were in the trial court. The Appellant is referred to as the "State" and the Appellee is referred to as the "Defendant."

References to the Record on Appeal will be designated by the letter "R" followed by the appropriate page numbers. References to the Opinion filed by the Second District Court of Appeals on February 8, 1984 will be designated by the letter "P" followed by the appropriate page numbers.

STATEMENT OF THE CASE

The State filed an information in Pinellas County Court on August 12, 1982, charging the Defendant with the offense of Possession of a Controlled Substance Outside Its Proper Container. (R3) The Defendant responded by entering her plea of not guilty on October 1, 1982. (R7)

The Defendant filed a Motion to Dismiss pursuant to Rule 3.190(b), Fla.R.Crim.P. The motion alleged Section 893.13(2)(a)(7) was unconstitutional because of vagueness, overbreadthness and the statute bore no rational relationship to a proper legislative purpose. (R9,10) The Defendant amended her Motion to Dismiss by adding the ground that the statute denied equal protection of the law. (R14) After memorandums were filed by the parties, the trial court entered an Order granting Defendant's Motion to Dismiss. (R32-48)

The trial court thoroughly examined the statute in its sixteen page Order. It concluded that the statute was not vague, that the Defendant's overbreadth argument was really the same as her substantive due process argument but that the statute did violate her right to substantive due process and equal protection. It held that the statute proscribed essentially innocent conduct without a rational basis for prohibiting that conduct. (R47-48)

The State appealed to the Second District Court of Appeals. That Court affirmed the trial court and held Section 893.13(2)(1)(7), Florida Statutes, does not bear a reasonable relationship to the legislative objective of expounding the state's control over the manufacture and distribution of dangerous drugs. See State v. Walker, ____So.2d____ (Fla. 2d DCA 1984), opinion filed February 8, 1984.

The State now appeals to this Court.

STATEMENT OF THE FACTS

The facts, as taken from the District Court opinion are:

On the morning of June 30, 1982, Appellee Carolyn A. Walker was preparing to leave for work. She took two (2) tablets of Centrax, a controlled substance, from an original container which she had lawfully obtained from an authorized person. She wrapped the tablets in a paper napkin and placed the napkin in her purse, intending to consume the tablets during the day as specified by her prescription. On her way to work she was involved in a traffic accident. Subsequently she was detained for a driver's license violation and her purse was searched. The Centrax tablets were then discovered. She was charged with a violation of Section 893.13(2)(a)(7), a first degree misdemeanor, which provides as follows:

> (2)(a) It is unlawful for any person:
> . . . .
>
> 7. To possess a controlled substance lawfully dispensed to him by a pharmacist or practitioner, in a container other than that in which the controlled substance was originally delivered.

ARGUMENT

THE COURTS BELOW WERE CORRECT IN DECLARING SECTION 903.13(2)(a)(7) FLORIDA STATUTES UNCONSTITUTIONAL.

As the State did in its brief to the Second District Court of Appeals, it has again spent the majority of its argument to this Court outlining two (2) general propositions. The first proposition is that Congress and the State's laws controlling and regulating drugs have been upheld as a proper exercise of governmental authority. Second, when those laws are challenged as being unconstitutional, the courts are not to violate the separation of powers doctrine and look into the legislative motives and purposes in enacting that legislation.

The Defendant agrees with the State that those propositions are correct. But as the Second District Court of Appeals noted in its Opinion (P6) filed on February 8, 1984, the real issue before the Court "is first to examine the legislative goals of Chapter 893, Florida's Drug Abuse Prevention and Control Act, and then to determine whether the means chosen, that is Section 893.13(2)(a)(7), bears a reasonable relationship to any of those objections." In other words, if Section 893.13(2)(a)(7) passes the substantive due process test, it is constitutional. However, the Defendant is in agreement with the trial court and the Second District Court

of Appeals opinion (P3) that this legislation "unreasonably and unjustifiably transgresses the fundamental restrictions on the power of government to intrude upon individual rights and liberties."

According to the preamble of Chapter 73-331, Laws of Florida, the legislative objective of Chapter 893 are: (1) eliminate the confusion resulting from the existence of two (2) statutory chapters on drug abuse by combining both into one chapter; (2) create uniformity between federal and state drug laws; and (3) expand the exercise of the state's authority over the manufacture and distribution of dangerous drugs. As the Second District Court of Appeals noted, these are "reasonable and worthwhile objectives," but only the third objective, that of expanded state control over the manufacture and distribution of dangerous drugs, is a legitimate legislative objective to which Section 893.13(2)(a)(7) could be rationally related.

The ultimate issue for this Court to decide is clearly defined. Does Section 893.13(2)(a)(7) further the legitimate legislative objective of expanded state control over the manufacture and distribution of dangerous drugs? The Second District Court of Appeals quoted the thorough trial court opinion in answering that question:

> (T)he statute under attack in the case at bar is inconsistent with the objective of the statutory

> scheme and "cannot be said to bear a fair and substantial relationship to the objective sought." Indeed, S.893.13(2)(1)(7) Fla. Stat. (1981) hampers the accomplishment of the legislative objectives. It lends itself to intentional drug abuse in two significant ways. First, one who must consume significant quantities of drugs (i.e. a heart patient) must carry all of them with him during his daily activities, thereby making them easily accessible to many people during the course of the day. Second, compliance requires that those persons who have prescription tranquilizers carry many pills with them in order to take their daily dosage. If the stresses of daily life become to (sic) great it is easy to reduce the stress by consuming excess dosages of the tranquilizers, because they are readily available in the original container which must be carried by the patient.
>
> The law also enhances the opportunity for accidental abuse of prescribed drugs in that it prohibits utilization of pill boxes or any other device to keep track of the proper daily and weekly dosages. It is consistent with common sense and reason to conclude that many elderly citizens and others lose track of the amount of drugs they have consumed in the absence of such a technique.

Case law further illustrates the failure of the law to bear a just and reasonable relation to a proper governmental objective. In Simmons v. Division of Pari-Mutual Wagering, 407 So.2d 269 (Fla. 3d DCA), aff'd 412 So.2d 357 (Fla. 1982), a part of the

pari-mutual law prohibited racing any animals that had been given "any substance foreign to the natural horse or dog". This was intended to prevent harm to the animals; a valid objective. But the Court noted that by preventing any substance, the law prohibited the use of helpful as well as harmful substances. Thus in part the statute did not "bear a fair and substantial relationship to the objective sought". 407 So.2d at 272.

Similarly, section 893.13(2)(a)(7) Florida Statute (1981) bears no "just and reasonable relation" to controlling the manufacture, distribution or possession of dangerous drugs. By forbidding the possession of a controlled substance that was purchased in a lawful manner, it does nothing to prevent the unlawful manufacture, distribution or possession of controlled drugs. The Statute says that only those citizens who possess controlled substances that have been "lawfully dispensed" are breading the law. Therefore, this arbitrary and narrow distinction doesn't even include those people engaged in illegal drug production and abuse. This is clearly not rationally related to drug control and prevention.

Another case that reflects the Florida court's reluctance to uphold a statute that impinges upon a citizen's innocent activity regardless of the validity of the goal sought in Pollins v. State, 354 So.2d 61 (Fla 1978). Section 849.06, Florida Statutes (1975) forbid the presence of minors in billiard parlors without proper parental permission, but allowed minors to

be in bowling alleys equipped with pool tables. The purpose of the law was to protect minors from exposure to gambling and undesirable characters. The Court noted that it was just as likely for gambling and undesirable characters to appear in bowling alleys as well as pool halls.

Similarly, as the trial court pointed out at (R46):

> So too it is just as likely that one who has prescribed drugs in the original container may abuse those drugs or illicitly distribute them as it is that one who does not have them in the original container will engage in such conduct. See also, Moore v. Thompson, 126 So.2d 543 (Fla. 1960); Mikel v. Henderson, 63 So.2d 508 (Fla. 1953).

It should be noted that the Rollins case was decided on equal protection grounds. But the Second District Court of Appeals in its own opinion (p.3) stated that the equal protection and substantive due process tests are "essentially the same where no fundamental rights are at stake, United Yacht Brokers v. Gillespie, 377 So.2d 668 (Fla. 1979)."

The basic principle of substantive due process is to protect the individual from an abusive exercise of governmental powers. The Second District court of Appeals, recognizing this, has held that legislation must not arbitrarily state that actions which are inherently and generally innocent shall constitute criminal offenses. City of St. Petersburg v. Calbeck, 114 So.2d 316 (Fla.2d DCA 1959). In its opinion (p.9), it noted:

> Section 893.13(2)(a)7 criminalizes activity that is otherwise inherently innocent. We do not believe that taking a lawfully prescribed medication from its original container and placing it in a different container, whether for convenience, dosage, or for some other personal reason, is criminal behavior. In Robinson v. State, 393 So.2d 1076 (Fla. 1980), our Supreme Court considered the constitutionality of a statute prohibiting the wearing of any covering over the face so as to conceal identity. Obviously, a general prohibition against wearing a mask would assist law enforcement officers in determining the identity of persons involved in criminal activity. Yet, because the statute was susceptible of application to entirely innocent activities, the court struck it down as creating prohibitions which completely lacked any rational basis. In the same manner, even if section 893.13(2)(a)(7) helps law officers in deciding whom to arrest, the blanket prohibition against carrying prescription drugs which are controlled substances except in original containers causes activities which are otherwise entirely innocent to become criminal violations. Without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose of controlling drug distribution. See Schultz v. State, 361 So.2d. 416 (Fla. 1978); Foster v. State, 286 So.2d 549 (Fla. 1973).

The State, in its argument in support of the statute, suggests that the "container law affords law enforcement personnel a ready method to determine if one's possession of a controlled substance is lawful. The Second District Court of Appeals (p.8) pointed out that the State has mistaken the legislative purpose of Chapter 893:

> "The legislative concern of Chapter 893, however, is to convict persons who illegally possess controlled substances

> not those who remove prescription drugs from their original containers.... Simply because one does not carry drugs in a proper container does not mean that he unlawfully possesses a controlled substance. The police can properly arrest an individual in possession charge, the individual ultimately will have to show that he obtained such substance in a legal manner. He can do that even without ever producing the so-called original container.

Regarding the observation that a person could avoid conviction without producing the original container, one suggestion has been to reword Section 893.13(2)(a)(7) to allow a person charged with a violation of this section to produce a valid prescription within forty-eight to seventy-two hours after being cited. This would avoid many of the statute's unreasonable consequences.

Regarding the State's contention that the public welfare is benefited by enabling a person administering emergency medical treatment to easily determine proper drug dosages, this example again does not relate to the objective of controlling the manufacture and distribution of dangerous drugs. Also, as pointed out by the Second DCA (p.8), "This argument arbitrarily assumes that persons will always carry their prescription drugs with them.". It is reasonable to believe that a great majority of the male heart patients in Florida are taking more than two or three medications. Certainly very few of them carry a bag or purse to hold their medications.Common sense would dictate that patients with multiple medications would make use of "pill boxes" to avoid being walking pharmacies with bulky drug containers.

Furthermore, the use of the "pill boxes" would not be to engage in any criminal activity.

Finally, the State points out that the prescription containers have child proof caps that prevent accidental ingestion of dangerous drugs by the young. Again, the objective of Chapter 893 was not to require manufacturers of drug containers to produce child-proof caps.

It is clear that a statute must bear a reasonable relation to a permissible legislative objective and not be discriminatory arbitrary or oppressive. Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla 1974). By making actions which are inherently and generally innocent conduct constitute criminal offenses, Section 893.13(2)(a)(7) violates this rule and is unconstitutional.

CONCLUSION

Based on the foregoing arguments and citations of authorities the lower court's opinion finding Section 893.13(2)(a)(7), Florida Statute (1981), unconstitutional should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of the Appellee has been furnished to the Office of the Attorney General, Park Trammel Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602 and to the Appellant, this 4th day of April, 1984.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of the Appellee has been furnished to the Office of the State Attorney Clearwater, FL., this 4th day of April, 1984.

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