IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

CAROLYN WALKER,

Appellee.

Case No. 64,916

ON APPEAL OF THE DISTRICT COURT
OF APPEAL OF FLORIDA IN AND FOR THE SECOND DISTRICT

BRIEF OF APPELLANT ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLANT

/km

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CON'T

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

The State of Florida was the Plaintiff in the trial court and the Appellant in the Second District Court of Appeal and will be referred to as "Appellant" or "State" in this brief. Carolyn Walker was the Defendant in the County Court and Appellee in the Second District; she will be referred to as "Appellee" in this brief. The record on appeal is contained in one volume and will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Carolyn Walker, the Appellee was charged in the County Court for the Sixth Judicial Circuit of Florida in and for Pinellas County with Possession of a Controlled Substance Outside its Proper Container contrary to Section 893.13(2)(a)(7), Florida Statutes (R. 3).

Appellee filed a motion to dismiss pursuant to Rule 3.190 (b), Florida Rules of Criminal Procedure. The motion alleged Section 893.13(2)(a)(7) was unconstitutional because of vagueness, overbreathness and the statute had no rational relationship to a proper legislative purpose (R. 9-10). An amended motion to dismiss was filed adding the additional ground that the statute was unconstitutional for denying equal protection of the law (R. 14). After memoranda were filed by the parties, the trial court entered an Order granting Appellee's motion to dismiss (R. 32-48).

The Order indicated the statute was not void for vagueness (R. 36). The trial judge also stated Appellee's argument for overbreathness was really a sustantive due process argument (R. 36). The statute cannot be said to be overbroad since it does not impringe on constitutionally protected conduct or expression (R. 37). The Court, however, concluded the statute violated substantive due process by proscribing essentially innocent, conduct, without a rational basis for prohibiting that conduct (R. 47). The State appealed to the Second District Court of Appeals. That court affirmed the trial court and held Section 893.13(2)(a)(7), Florida Statutes, does not bear a reasonable relationship to the legislative objective of expanding the states' control over the manufacture and distribution of dangerous drugs. See State v. Walker, ___ So.2d ___ (Fla. 2d DCA 1984). Attached hereto as Appendix I is a copy of the Second District Opinion.

The State now appeals to this Court pursuant to Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure.

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 tables 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 ERRED IN DECLARING SECTION 893.13(2)(a)(7) FLORIDA STATUTES, UNCONSTITUTIONAL

Appellant respectfully submits the Second District while applying the proper rational basis test to determine the constitutionality of Section 893.13(2)(a)(7), Florida Statutes, erred in ruling that statutory enactment did not bear a reasonable relationship to any objective of the drug chapter. In its opinion the district court points out that the legislative objectives of Chapter 893 are 1. eliminate the confusion resulting from the existence of two statutory chapters on drug abuse by combining both into one chapter; 2. create uniformity between federal and state drug law; and 3. expand the exercise of the state's authority over the manufacture and distribution of dangerous drugs. These objectives are premised on earlier congressional and legislative findings that certain drugs and/or chemical substances should be controlled in the interest of public health and welfare. See 21 U.S.C.A. §801.

The power to regulate and control the use of dangerous substances has been recognized as a joint responsibility of both the federal and state governments. The states, including Florida, in exercising their police powers in the interest of public health and welfare have the authority to regulate traffic in drugs via the administration, sale, prescription and use of dangerous and habit forming drugs. Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758 (1962) and Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed. 2d 64 (1977). The states have the right to prohibit or limit the possession of these controlled substances. Section 893.13, Florida Statutes.

There is no constitutional right to possess, manufacture, etc., any substance controlled under Chapter 893. One may only possess a controlled substance in a manner and under circumstances as provided by statute. As outlined under Florida law a person such as Appellee can only possess one of these substances by having a valid prescription for it and carrying it in its prescription containing. The predecessor statute read:

> 398.12 Containers - A person to whom or for whose use any narcotic drug has been prescribed, sold, or dispensed, by a physician, dentist, apothecary, or other person authorized under the provisions of §398.06 and the owner of any animal for which any such drug has been prescribed, sold, or dispensed by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same. (emphasis added)

Section 398.12, Florida Statutes (1971).

Because there is no constitutional right to possess a controlled substance, we need only determine the conditions of

possession provided for by the legislature bear a rational relationship to the purposes of the statute. Belk-James Inc. v. Nuzmum, 358 So.2d 174 (Fla. 1978). In order to support the conclusion that legislation is unconstitutional, it must be shown that the constitution, not reason or justice as been violated. Howey Co. v. Williams, 142 Fla. 415, 195 So. 181 (1940), State ex rel Hogan v. Spencer, 139 Fla. 237, 90 So. 506 (1939); State ex rel McMullen v. Johnson, 102 Fla. 19, 135 So. 816 (1931); Peninsular Casualty Co. v. State, 68 Fla. 411, 67 So. 165 (1914). If a statute does not violate the Federal or State Constitution, the legislature's will is supreme and its policy is not subject to judicial review. Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So.2d 234 (1955); State ex rel McMullen v. Johnson, 102 Fla. 19, 135 So. 816 (1931); State ex rel Johnson v. Johns, 92 Fla. 187, 109 So. 228 (1926). The constitutionality of a statute is not to be tested by influence brought to bear to secure its enactment, or by the motices or purposes which may have actuated the legislature. Mercer v. Hemmings, 170 So.2d 33 (Fla. 1964); Volusia County Kennel Club, Inc v. Haggard, 73 So.2d 884, 897 (1954), cert. denied, 348 U.S. 865, 75 S.Ct. 87, 99 L.Ed. 681 (1954); West v. Lake Placid, 97 Fla. 127, 120 So. 361 (1929). These questions are matters of legislative rather than judicial concern, at least in the absence of fraud or the most palpable abuse of power. West v. Lake Placid, supra. In the determination of the constitutional validity of legislation, the Courts are to consider only the power of the legislature to enact the particular provision involved and

not the policy, wisdom or necessity for the enactment. United States Railroad Retirement Board v. Fritz, 499 U.S. 166, 101 S. Ct. 453, 66 L.Ed. 2d 368 (1980); Stoutamire v. Pratt, 148 Fla. 690, 5 So.2d 248 (1941); Florida Fruit Co. v. Shakeford, 145 Fla. 216, 198 So. 841 (1940); State ex rel Hosack v. Yocum, 136 Fla. 246, 186 So. 448 (1939); Platt v. Lanier, 127 So.2d 912 (Fla. 2d DCA 1961).

The avowed general purpose of Federal and State statutes on the control of drugs is to protect and maintain the health and general welfare of the public, which encompases a number of other purposes, i.e., prevention of illegal trafficking in controlled substances, etc. Accord Raines v. State, 225 So.2d 331 (Fla. 1969); 21 U.S.C.A. §801 and Section 893.01, Florida Statutes. Therefore, the ultimate question to answer is whether the statute requiring one to keep a lawfully dispensed drug in the prescription container has any rational relationship to the protection and maintenance of the public health. Florida Canners Association v. State, Department of Citrus, 371 So.2d 503 (Fla. 2d DCA 1979).

In its opinion the Second District seems to accept the trial court's belief the statute outlaws possession of drugs obtained in a sanction fashion. However, Appellant submits that sanctioned fashion includes the proviso that the drugs be kept in their proper container. Moreover, the district court also seems to accept the spectre of citizens walking around with enormous prescription bottles which may be lost or stolen. While one can agree there are some prescriptions given in large quantities nec-

essitating large containers, most prescriptions come in a size which readily fits into a pocket or purse.

Containers of any size can be lost or stolen; one intent on thievery can as easily steal a napkin or pill box containing drugs. If a prescription does come in a large quantity, there is nothing to preclude a patient from obtaining a small container also.

The real issue confronting this Court is whether or not the requirement of keeping prescription drugs in their prescription containers constitutes a reasonable means and is reasonably related to public welfare and the administration, sale, prescription and use of dangerous drugs. See Division of Pari-Mutual Wagering, Dept. of Business Regulation v. Caple, 362 So.2d 1350 (Fla. 1978) and Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981). This container law affords law enforcement personnel a ready method to determine if one's possession of a controlled substance is lawful. The heart patients, who Appellee has suggested would be harmed, can receive prompt and accurate emergency treatment (heart patients often gasping for breath cannot tell one assisting him the dosage needed). Additionally, the child-proof caps on prescription containers prevents the accidentially ingestion of these dangerous substances by the young. Even adults are spared the consequences of taking what they believe may be a simple headache remedy which is controlled substance not in its proper container.

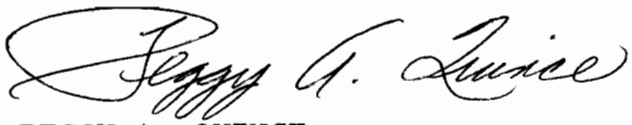
It is clear from these examples that Section 893.13(2)(a)(7), Florida Statutes, is rationally related to the overall purposes of our laws concerning the possession, use and abuse of controlled substances. The relationship having been established, the constitutionally validity of the statute must be upheld. Carroll v. State, 361 So.2d 144 (Fla. 1978).

CONCLUSION

Based on the foregoing argument and citations of authorities, the opinion of the district court affirming the trial court should be reversed and Section 893.13(2)(a)(7), Florida Statutes should be held constitutional.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert J. Lancaster, Assistant Public Defender, Criminal Courts Complex, 5100 - 144th Avenue North, Clearwater, Florida 33520, this 12th day of March, 1984.

Peggy A. Quince

Of Counsel for Appellant