IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant, v. RICKY BUSSEY, Appellee.	CASE NO. 64,966
STATE OF FLORIDA, Appellant, v. HERBERT LEE GAINES, Appellee.	CASE NO. 64,967
STATE OF FLORIDA, Appellant, v. JAMES EARL DOTSON, Appellee.	CASE NO. 64,968

APPELLANT'S REPLY BRIEF ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, FL 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Appellant

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PRELIMINARY STATEMENT

The Appellant adopts the Preliminary Statement contained in its initial brief.

STATEMENT OF THE CASE AND FACTS

The Appellant adopts the Statement of the Case and Facts contained in its initial brief.

POINTS INVOLVED

I.

WHETHER FLA. STAT. 817.563 (1981) IS CONSTITUTIONAL?

II.

WHETHER APPELLEE DOTSON SHOULD HAVE BEEN GIVEN A SPECIAL JURY INSTRUCTION ON INTENT?

ARGUMENT

I.

FLA. STAT. 817.563 (1981) IS CONSTITUTIONAL.

The Appellee argues Fla. Stat. 817.563 (1981) is a fraud statute, not a drug or counterfeit statute, and it proscribes conduct completely different from that proscribed by Section 831.31 (1981). While the two statutes do appear in different sections, they were enacted by the legislature as a single Senate bill. See 1981 Laws of Florida, Chapter 81-53. The preamble reads:

> An act relating to counterfeit controlled substances; prohibiting the sale of substances falsely represented as controlled substances; prohibiting the sale, manufacture, delivery and possession of counterfeit or mislabeled controlled substances; providing penalties, providing an effective date.

Section 1 of Chapter 81-53 is now Section 817.563 and Section 2 is now Section 831.31, but it is clear the two statutes were enacted as part of a comprehensive bill intended to deal with the problems created by misrepresentations relating to and sales of counterfeit controlled substances.

The legislature, in enacting Section 817.563, had the power to dispense with the element of intent. State v. Dunmann, 427 So.2d 166 (Fla. 1983). The common law is not in force where it is inconsistent with acts of the legislature. Fla. Stat. 2.01. In fact, subsequent to the decision in the instant case, the Fourth District

has held Section 831.31 constitutional although it does not require proof of specific intent. State v. Hayes, ___ So.2d ___, 4DCA No. 82-2327 (Op. filed 3-21-84) [9 FLW 655]. The same result should obtain in the case sub judice, for as the Court of Appeal held in M.P. v. State, 430 So.2d 523, 524 (2DCA Fla. 1983):

> . . . persons charged can be guilty of violating Section 817.563 even if their intent is from the beginning to sell an uncontrolled substance, and the original 'fake' offer to sell a controlled substance is a complete subterfuge. While trying not to strain too much with the language, we conclude that the requirement of the statute that there be an 'offer to unlawfully sell to any person a controlled substance' has reference to an offer of an unlawful sale, i.e., a sale not authorized by law, regardless of the fact that there is never any intent to actually sell a controlled substance.

Accordingly, the fact that specific intent to sell a controlled substance is not an element of the statute does not render the statute violative of due process.

Appellees' challenge to the statute on the basis of overbreadth cannot be maintained for they have not shown their own conduct was wholly innocent and its proscription not supported by any rational relationship to a proper governmental objective. State v. Ashcraft, 378 So.2d 284 (Fla. 1979).

The Appellees argue Section 817.563 unconstitutionally shifts the burden to the defendant to prove he mistakenly sold an uncontrolled substance, in violation of due process

principles. This argument was briefed in State v. Bussey but not addressed by the District Court. In any event, Appellant maintains the statute does not shift the burden of proof. Once the prosecution has proven that a defendant knowingly sold a substance represented to be a controlled substance, the State has satisfied its burden of proof. Thereafter, if the defendant puts "mistake" or lack of knowledge at issue, the question is for the jury to determine. State v. Oxx, 417 So.2d 287, 289, n. 2 (5DCA Fla. 1982).[1]

As to the Appellees' argument that Section 817.563 is not a valid exercise of police power, Appellant reiterates that the legislature has broad discretion to determine what measures are necessary for the public's protection. The fact that the First District Court of Appeal found the sale of an uncontrolled substance represented to be a controlled substance was not violative of the theft statute, State v. Mauncy, 417 So.2d 1021 (1DCA Fla. 1982), does not mean the Appellees' actions were non-criminal. It means merely that pursuant to judicial interpretation, their acts did not constitute a violation of the theft statute and the Mauncy decision cannot be taken as an indication that the acts are condoned by the Florida Legislature. It is for

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[1]A defense of "mistake" would actually be an admission that the defendant represented the substance offered for sale to be illicit and controlled and thought that it was; however, unbeknownst to him the substance proved to be uncontrolled. Thus, the defendant's mistake is actually an acknowledgment of intent to violate Section 893.13(1)(a), Fla. Stat.

this reason that Section 817.563 was enacted.

This statute is unlike the one found unconstitutional in State v. Walker, ___ So.2d ___, 2DCA No. 83-1047 (Op. filed 2-8-84) [9 FLW 368], for in Walker the court held a statute which prohibited the possession of legally obtained drugs in anything other than the original container did not serve the legislature's goal set forth in the preamble in the Laws of Florida of prohibiting the unlawful distribution of controlled substances. By contrast, the statute at issue here, as the court recognized in State v. Thomas, 428 So.2d 327, 331 (1DCA Fla. 1983) advances several important public policies: it helps to prevent unintended overdoses, increases the effectiveness of drug education programs, and prevents the enrichment of organized crime. Accordingly, Section 817.563 is a valid exercise of the police power.

The Appellees' claim that Section 817.563 is void for vagueness must also fail, for the statute is definite enough, when measured by common understanding and practice, to apprise ordinary persons of common intelligence what conduct is proscribed. State v. Ashcraft, 378 So.2d 284 (Fla. 1979). It does not punish innocent activities, for it is difficult to imagine anyone "innocently" selling a substance which he represents to be illicit and controlled. Likewise, the reference to the controlled substance statute, Section 893.03 is clear enough to put reasonable persons on notice as to the substances described.

See, State v. Ashcraft, supra [term "excitative drugs" sufficiently definite.]

In conclusion, the State urges this Court to apply the longstanding principle of statutory construction that legislative enactments are presumed to be constitutional, State v. Lick, 390 So.2d 52 (Fla. 1980); Cliento v. State, 377 So.2d 663 (Fla. 1979), and reverse the decision of the court below.

II.

APPELLEE DOTSON WAS NOT ENTITLED TO AN INSTRUCTION ON INTENT.

In the conclusion to his brief, counsel for Appellee Dotson asks this Court, should it reverse the Bussey decision holding Section 817.563 unconstitutional, to remand his case to the Fourth District for resolution of an issue he raised regarding the jury instructions. Appellant submits the issue should be decided by this Court in the present appeal. Since this Court has appellate jurisdiction of the instant case, it can decide all matters ancillary to the point upon which jurisdiction was obtained. Cf. Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976).

The Appellee Dotson's contention that the trial court erred in failing to instruct the jury on intent [Appellees' brief, page 3] has not been preserved for review since no specific request for an instruction was ever made (RD 96) nor was any objection stated. Fla. R. Crim. P. 3.390(d); Castor v. State, 365 So.2d 701 (Fla. 1978).

Even if the issue of whether the Appellee Dotson should have been granted a jury instruction that he intended to sell a controlled substance is deemed preserved for review, Appellant maintains he was not entitled to the instruction for this is not one of the elements of the statute. M.P. v. State, supra. (Also see Point I, supra, and Appellant's initial brief).

CONCLUSION

Wherefore, based on the foregoing reasons and authorities cited therein, the Appellant respectfully requests that the decisions of the Fourth District Court of Appeal holding Fla. Stat. 817.563 unconstitutional be reversed and remanded with appropriate directions.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Reply Brief on the Merits has been sent by courtier to Anthony Calvello, Esq., Assistant Public Defender, 224 Datura Street, 11th Floor, West Palm Beach, FL 33401, this 5th day of April, 1984.

Of Counsel