

IN THE SUPREME COURT OF FLORIDA

GREGORY A. MASKE, ET AL.,

Petitioner,

v.

CASE NO. 65,113

STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

AUG 22 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

BRIEF OF RESPONDENT

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR RESPONDENT

/tms

TABLE OF CONTENTS

	<u>PAGE NO.</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	2
ISSUE I	2
WHETHER §817.563(1) IS IN VIOLATION OF THE FLORIDA CONSTITUTION BECAUSE IT IS IMPER- MISSIBLY VAGUE.	
A.	2
THE STATUTE IS VIOLATIVE OF DUE PROCESS SINCE IT DOES NOT REQUIRE ANY REQUIREMENT OF INTENT AS TO THE SALE OF A COUNTERFEIT DRUG.	
B.	3
SECTION 817.563,. FLORIDA STATUTES IS UNCON- STITUTIONALLY VAGUE.	
CONCLUSION	6
CERTIFICATE OF SERVICE	7
APPEND IX	

TABLE OF CITATIONS

	<u>PAGE NO.</u>
M.P. v. State, 430 So.2d 523 at 524 (Fla. 2 DCA 1983)	5
Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959)	3
State v. Beasley, 317 So.2d 750 (Fla. 1975)	4
State v. Bussey, 444 So.2d 63 (Fla. 4 DCA 1984)	2
State v. Dunmann, 427 So.2d 166 (Fla. 1983)	3
State v. Thomas, 428 So.2d 327 at 330 (1 DCA 1983)	4
United States v. Balint, 258 U.S. 250, 66 L.Ed.2d 604, 42 S.Ct. 301 (1922)	2, 3
United States v. Greenbaum, 138 F.2d 437 (3rd Cir. 1943)	2

OTHER AUTHORITIES CITED

§817.563(1), Florida Statutes (1983)	2, 3, 4
--------------------------------------	---------

PRELIMINARY STATEMENT

This is an appeal by the Defendant, Gregory Maske, from the trial court's judgment and sentence. The record in the instant appeal will be referred to by the symbol "R". The Petitioner's brief will be referred to by the symbol "AB".

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Appellant's Statement of the Case and Facts for the issue raised on appeal.

ARGUMENT

ISSUE I

WHETHER §817.563(1) IS IN VIOLATION OF THE
FLORIDA CONSTITUTION BECAUSE IT IS IMPERMISSIBLY
VAGUE.

Petitioner relies wholly on State v. Bussey, 444 So.2d 63 (Fla. 4 DCA 1984) and argues that "the most serious failing" of §817.563, Florida Statutes (1983), is its vagueness. (AB 4) In Bussey, the Fourth District concluded that §817.561 is violative of the due process clause of the Fourteenth Amendment to the United States Constitution for the following two reasons: (A) that the statute does not contain any requirement of intent as to the sale of a counterfeit drug; and (B) that the statute is "vague in that it does not say whether the person selling the counterfeit drug must know it to be counterfeit or must know it not to be counterfeit." Bussey, 444 So.2d at 64. Respondent will discuss the two holdings in Bussey below.

A.

THE STATUTE IS VIOLATIVE OF DUE PROCESS SINCE IT
DOES NOT REQUIRE ANY REQUIREMENT OF INTENT AS TO
THE SALE OF A COUNTERFEIT DRUG.

Due process is not violated by the fact that mens rea is not a required element of a crime. United States v. Greenbaum, 138 F.2d 437 (3rd Cir. 1943). In United States v. Balint, 258 U.S. 250, 66 L.Ed. 604, 42 S.Ct. 301 (1922), the Supreme Court stated that "while the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes, even where the statutory

definition did not in terms include it, there has been a modification of this view in respect to prosecutions under the statutes the purpose of which would be obstructed by such requirement." The Supreme Court then upheld the statute against the claim that it violated due process because it punished a person for violation of a law when a person was ignorant of the facts. The Court in Balint went on to state that the state had the right to exercise police power and that an incidental purpose of the Narcotic Act was to "minimize the spread of addiction to the use of poisonous and demoralizing drugs." In Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959), the Supreme Court expressly recognized that state could "create strict criminal liabilities without any element of scienter," but also recognized that the power was not without limitation. Undoubtedly the State has a legitimate interest in protecting the health, safety and welfare of the public by prohibiting drug transactions - whether counterfeit or bona fide. It is a legitimate exercise of policy power to prohibit the sale of counterfeit controlled drugs absent specific intent by the seller to defraud the purchaser. As such, the strict liability portion of §817.563, does not offend principles of fundamental fairness as incorporated in the due process clause. See also State v. Dunmann, 427 So.2d 166 (Fla. 1983).

B.

SECTION 817.563, FLORIDA STATUTES IS UNCONSTITUTIONALLY VAGUE.

In Bussey, the Fourth District Court of Appeal found that §817.563 was unconstitutionally vague since it does not say whether the person selling the counterfeit drug must know it not to be

counterfeit. Petitioner further argues that the statute's vagueness is "indubitably demonstrated by the diverse interpretations of the district court of appeal. (AB 4)

As to the facial validity of Florida Statute 817.563, it is a judicial responsibility to avoid a holding of unconstitutionality if a fair construction of a statute can be made within constitutional limits. State v. Beasley, 317 So.2d 750 (Fla. 1975). There is a substantial amount of information provided in the State Archives to substantiate that it was the Legislature's intent to outlaw all sales of counterfeit controlled substances, regardless of whether the person selling the counterfeit drug knew that it was counterfeit. Attached as an Appendix is (1) the Senate Staff Analysis and (2) a letter of the Staff Director of the Senate Criminal Judiciary Committee to Senator Beard discussing the purpose of the statute. The staff analysis of Senate Bill 31 reveals that it "makes it unlawful for any person to agree, consent, or offer to unlawfully sell to a person a controlled substance and then sell to such person any other substances in lieu of the controlled substance." (Appendix P. 1 - 2) The Staff Director's letter states that the statute was designed to penalize the sale of a non-controlled substance where a prior agreement to sell a controlled substance existed(ed)." (Appendix P. 3) As such, it is apparent that the legislature was to require specific intent as to the offer to sell a controlled substance. However, the second part of the statute requires the selling of a noncontrolled substance, regardless of the intent of the seller. This is exactly the position the First District Court of Appeal took in State v. Thomas, 428 So.2d 327 at 330 (1 DCA 1983)

when it stated:

There is nothing in the language of §817.563 which evidences any intent on the part of the legislature to require a knowledge of the substance sold as an element of this crime. The scienter, or guilty knowledge, required by this statute relates to the offer to sell and not to the actual sale of the substance. We hold, therefore that only general intent, the intent to do the act prohibited, is required as to the second element of this crime. In other words, a defendant's knowledge of the nature of the substance sold is irrelevant if the defendant knowingly offers to sell a controlled substance and then sells an uncontrolled substance in lieu thereof.

The Second District in M.P. v. State, 430 So.2d 523 at 524 (Fla. 2 DCA 1983) mistakenly thought Thomas required that §817.563 required that it be proven that the defendant originally intended to sell a controlled substance. The Second District went on to hold that statute required intent to "offer" to sell a substance "not authorized by law, regardless of the fact that there is never any intent to actually sell a controlled substance." According, both Thomas and M.P. both agree that it is irrelevant whether the person selling the counterfeit drug knows whether it was counterfeit or not. M.P. and Thomas have a superficial dispute as to the requirement that the seller originally intended to sell a controlled substance and not that the seller know the nature of the substance that he eventually sells. The legislative history and the opinions of the First, Second and Fifth District Courts are all in harmony as to the irrelevancy of the sellers knowledge of the substance sold. Furthermore, Respondent submits that both M.P. and Thomas interpret the first part of §817.563 as requiring an intentional agreement or offer to sell a controlled substance and not intent to sell a controlled

substance. As such, there is only the Fourth District's mutation that provide any deviation from the overwhelming understanding that the statute provides that it is a criminal offense to arrange to sell controlled substances and sell uncontrolled substances. The mistaken opinion of one appellate court cannot possibly make a statute unconstitutionally vague in light of the fact that men of common intelligence know that it is unlawful to transact a sale of a substance represented to be a controlled substance, regardless of the actual nature of the substance. Furthermore, it is apparent that the instant statute has been judicially construed to conform with the legislative intent and the perceptions of men of common intelligence as to its meaning. Therefore, the statute is a proper exercise of police power and is sufficiently specific so as not to offend concepts of due process.

CONCLUSION

Based on the above-stated facts, arguments and authorities, Respondent would pray that this Honorable Court affirm the decision of the lower court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Amelia G. Brown, Assistant Public Defender, Courthouse Annex, Tampa, Florida 33602, this 17th day of August, 1984.


OF COUNSEL FOR RESPONDENT.