

IN THE SUPREME COURT OF FLORIDA

GREGORY A. MASKE, )  
FRANCIS ALAN PLOEGERT, )  
and GARY ANDREW UECKER, )  
Defendants/Petitioners, )

v. )

STATE OF FLORIDA, )  
Plaintiff/Respondent. )

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DCA #: 82-2276

**FILED**

SID J. WHITE

APR 2 1984

CLERK, SUPREME COURT

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Chief Deputy Clerk

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PETITIONERS' BRIEF ON JURISDICTION

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JERRY HILL  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

BY: Amelia G. Brown  
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STATEMENT OF THE CASE AND FACTS

Petitioners were charged by information with the Sale of a Counterfeit Controlled Substance in violation of Section 817.563(1), Florida Statutes (1981) (R 3).

Motions to dismiss the information, based upon allegations that F.S. 817.563(1) was unconstitutional and in violation of Article 1, Section 17 of the Florida Constitution, were filed (R 8-11). These motions were heard before the Honorable Fred Woods and granted on September 2, 1982 (R 12-26).

The State appealed from the order of dismissal. On February 3, 1984 the trial court's order was reversed and remanded with instructions to reinstate the informations.

In its opinion, the appellate court found that the motions to dismiss were improperly granted on the basis of certain case authorities which have upheld the constitutionality of F.S. 817.563. The authorities

cited by the Court were State v. Thomas, 428 So.2d 327 (Fla. 1st DCA), petition for review denied, 436 So.2d 101 (Fla. 1983); M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983); State v. Growden, 437 So.2d 783 (Fla. 2d DCA 1983), and State v. King, 435 So.2d 370 (Fla. 2d DCA 1983).

In State v. Bussey, No. 82-2145 (Fla. 4th DCA January 11, 1984), motion for rehearing denied February 15, 1984, [9 FLW 153] the defendant was also charged by information with sale of a noncontrolled substance in violation of F.S. 817.563. The trial court found the statute to be unconstitutional, as an improper exercise of the police power, and the Fourth District Court of Appeal affirmed its order.

In the Bussey decision, the Fourth District specifically disagreed with the rationale of the First District Court of Appeal in Thomas v. State and with that of the Second District in M.P. v. State. The basis for this disagreement was that the Fourth District Court, in Bussey, viewed F.S. 817.563 as a fraud statute rather than as a drug abuse statute.

The Court decided that it was a violation of due process to prosecute one accused under a fraud statute which did not provide for specific intent as to the sale of the uncontrolled substance. Therefore, as a fraud statute 817.563 was held to be both an improper exercise of the police power and unconstitutionally vague.

A Motion for Rehearing filed by the Petitioners herein, based upon Bussey, was denied on March 19, 1984. Notice to invoke the dis-

cretionary jurisdiction of this Court was filed in the Second District Court of Appeal on March 29, 1984.

## ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN STATE OF FLORIDA v. GREGORY A. MASKE, FRANCIS ALAN PLOEGERT, AND GARY ANDREW UECKER, CASE NO 82-2276, WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE V. RICKY BUSSEY, CASE NO. 82-2145 (FLA. 4th DCA JANUARY 11, 1984) AS TO THE CONSTITUTIONALITY OF SECTION 817.563 FLORIDA STATUTES (1981).

In its orders granting the Motion to Dismiss (R 12-26), the trial court agreed that F.S. 817.563 was unconstitutional because the state was not required to prove specific intent as to the sale of an uncontrolled substance (R 12, 14, 17, 19, 22, 24). This rationale was adopted from the Circuit court decision which was reversed in Thomas v. State, 428 So.2d 327 (Fla. 1st DCA), petition for review denied, 436 So.2d 101 (Fla. 1983).

In reversing the trial court, the Second District Court of Appeal relied upon the Thomas decision as well as its own decision in M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983).

The Thomas court expressly held that specific intent was only necessary in application to the portion of F.S. 817.563 dealing with the offer to sell an illegal drug; therefore the intent to actually sell a noncontrolled substance was not required for conviction under the statute. By contrast, in M.P. v. State the Second District Court of Appeal found that there was no specific intent to actually sell a controlled substance (illegal drug) contemplated by the statute.

Finally, the Bussey holding disagreed with both Thomas and M.P. on the ground that F.S. 817.563 was a fraud statute rather

than a drug abuse statute. As such, it was reasoned, the section violated due process when it eliminated any part of the specific intent requirement.

The conflict between Thomas and M.P., as discussed in Bussey, was used to illustrate why the statute was both vague and constitutionally infirm:

...The First District held in Thomas that Section 817.563 only applies when the defendant actually knows that the substance sold is a legal substance and not when he has a mistaken belief that it is an illegal substance. A close reading of Thomas indicates the statute applies only when one knowingly offers an illegal drug and then knowingly sells a legal substance. The Thomas opinion is in disagreement with M.P. v. State, supra, which holds that there need be no intent to ever sell an illegal drug but only an offer to do so. After consideration of the statute and the cases construing it we conclude it is vague and thus constitutionally infirm. Bussey, 9 FLW 153.

Thus the decision of the Second District Court of Appeal in State v. Maske expressly and directly conflicts with the decision of the Fourth District Court of Appeal in State v. Bussey on the same question of law, to-wit: whether F.S. 817.563 is unconstitutional because it is impermissibly vague and has no specific intent requirement.



CONCLUSION

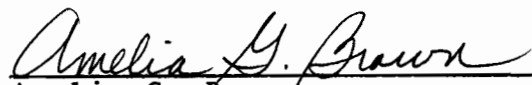
Based upon the foregoing argument, reasoning and citations of authority, this Court has jurisdiction to review the decision of the Second District Court of Appeal in State of Florida v. Gregory A. Maske, Francis Alan Ploegert and Gary Andrew Uecker, Case Number 82-2276, pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

Petitioners herein respectfully request that this Court accept jurisdiction and decide this case to maintain uniformity within appellate decisions in Florida concerning the constitutionality of section 817.563 Florida Statutes (1981).

Respectfully submitted,

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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 this 29th day of March, 1984.

  
Amelia G. Brown