

IN THE SUPREME COURT OF FLORIDA

FILED

S'D J. WHITE

JUL 30 1984

CLERK, SUPREME COURT

By: _____
Chief, Deputy, Clerk

GREGORY A. MASKE, ET AL.,)
)
 Petitioners,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
)
 _____)

Case No. 65,113

PETITIONER'S BRIEF ON THE MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Amelia G. Brown
Assistant Public Defender
Courthouse Annex
Tampa, Florida 33602-4197

TOPICAL INDEX AND STATEMENT OF ISSUES

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS	1-2
ARGUMENT:	
SECTION 817.563 (1) IS IN VIOLATION OF THE FLORIDA CONSTITUTION BECAUSE IT IS IMPERMISSIBLY VAGUE.	3-8
CONCLUSION	9
CERTIFICATE OF SERVICE	9

CITATION OF AUTHORITIES

	<u>PAGE</u>
<u>Ex Parte Amos,</u> 93 Fla. 5, 112 So. 289 (1927)	5
<u>Ferguson v. State,</u> 377 So.2d 709 (Fla. 1979)	7
<u>M.P. v. State,</u> 430 So.2d 523 (Fla. 2nd DCA 1983)	3, 4, 5
<u>Palmer v. State,</u> 438 So.2d 1 (Fla. 1983)	5
<u>State v. Bright,</u> No. 82-1452 (Fla. 5th DCA May 10, 1984) [9 FLW 1078]	4
<u>State v. Bussey,</u> 444 So.2d 63 (Fla. 4th DCA 1984)	1, 2, 4, 5, 6, 9
<u>State v. Cohen,</u> 409 So.2d 64 (Fla. 1st DCA 1982)	3
<u>State v. Maske,</u> 446 So.2d 1091 (Fla. 2nd DCA 1984)	1
<u>State v. Shirah,</u> 427 So.2d 371 (Fla. 2d DCA 1983)	6
<u>State v. Tate,</u> 420 So.2d 116 (Fla. 2d DCA 1982)	6, 7
<u>State v. Thomas,</u> 428 So.2d 327 (Fla. 1st DCA), <u>petition for review denied</u> , 436 So.2d 101 (Fla. 1983)	3, 4, 5
<u>State v. Wershow,</u> 343 So.2d 605, 608 (Fla. 1977)	5, 7, 8

OTHER RESOURCES:

F.S. Chapter 817, <u>Fraudulent Practices</u>	6, 7
Section 817.02, Florida Statutes (1981)	6
Section 817.563 (1), Florida Statutes (1981)	1, 3, 4, 7, 8

Appellants herein asked the Second District to reconsider its decision in light of Bussey. The rehearing motion was denied on March 19, 1984.

Notice to invoke the discretionary jurisdiction of this Court was filed on March 29, 1984. Jurisdiction was accepted on July 9, 1984.

ARGUMENT

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

In the Second District Court opinion appealed herein, the trial court was reversed on the authority of State v. Thomas, 428 So.2d 327 (Fla. 1st DCA), petition for review denied, 436 So.2d 101 (Fla. 1983) and M.P. v. State, 430 So.2d 523 (Fla. 2nd DCA 1983), cases which upheld the constitutionality of Section 817.563, Florida Statutes (1981).

When it granted the Motion to Dismiss filed by Appellee, the trial court expressly adopted the rationale and holding of the circuit court which was reversed in Thomas. That order specifically rejected the argument that Section 817.563 is an unconstitutional exercise of police power (R 12-16).

In its Thomas decision, the First District Court of Appeal held that this statute did require the state to prove mens rea, in that an accused must offer to sell a controlled substance; that there was no conflict with State v. Cohen, 409 So.2d 64 (Fla. 1st DCA 1982); and that the statute was a valid exercise of the state's police power.

The Second District decided in M.P. v. State, 430 So.2d 523 (Fla. 2nd DCA 1983) to agree with and adopt the reasoning of Thomas, with the qualification that an accused would violate §817.563 even if the offer to sell a controlled substance was a "scam" type operation

(in which there was never any intent to actually sell a controlled substance). M.P., at 524. The Fifth District Court of Appeal agreed with and adopted the reasoning of M.P. in State v. Bright, No. 82-1452 (Fla. 5th DCA May 10, 1984) [9 FLW 1078].

In State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984) the Fourth District Court of Appeal affirmed the order of its trial court which found F.S. 817.563 to be unconstitutional, as an improper exercise of the police power. The Bussey court specifically disagreed with the rationales of both the First District in Thomas and the Second District in M.P., because it viewed Section 817.563 as a fraud statute rather than a drug abuse statute.

The Fourth District Court of Appeal decided that due process is violated when an accused is prosecuted under a fraud statute which fails to provide for specific intent as to the sale of an uncontrolled substance. Therefore, as a fraud statute, §817.563 would be unconstitutionally vague as well as being an improper exercise of the police power. Bussey, at 64-65.

Appellants submit that it would be redundant and unnecessary to reiterate the excellent reasoning set forth in the Bussey opinion. Of course, it is contended herein that this well-stated assessment of the applicable law should be approved and adopted by this Honorable Court.

However, we would emphasize that the most serious failing of §817.563 is its vagueness. This weakness is indubitably demonstrated by the diverse interpretations of our district courts of appeal.

For example, the Thomas decision is manifestly unclear to both the Second and Fourth District Courts of Appeal, which are decidedly equivocal in attempting to discuss it. The qualifying phrases-- "while we may be misintepreting what the Court said..."; "if that interpretation is correct...."; and "while trying not to strain too much with the language...." -- all indicate uncertainty and indefiniteness. M.P., at 524.

Then the Bussey court, in discussing Thomas, also expresses doubt as to what the precise holding of the First District might be: "However, some doubt is cast upon this holding [that scienter is only necessary to the offer to sell an illegal drug] in the closing paragraphs of the opinion." Bussey, at 64. Finally, the dissenting opinion by Judge Anstead urges that the constitutionality of §817.563 be upheld by adoption of the state's oral argument, which construed the statute as requiring an intent to deceive. Bussey, at 65 (Anstead, J., dissenting).

These differing interpretations and constructions contravene this Court's own clear prohibition against such strained analysis of a penal statute. In Palmer v. State, 438 So.2d 1 (Fla. 1983) the rule of State v. Wershow, 343 So.2d 605, 608 (Fla. 1977), quoting Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927) was restated:

nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.

Palmer, at 3.

The varying interpretations of §817.563 clearly indicate that the Florida district courts have found it necessary to guess at the meaning and application of the statute. The fact that "men of common intelligence" must necessarily resort to such guesswork, standing alone, is sufficient to render the statute unconstitutional. State v. Shirah, 427 So.2d 371 (Fla. 2d DCA 1983); State v. Tate, 420 So.2d 116, 118 (Fla. 2d DCA 1982).

Appellants would also explicitly agree with the Fourth District ruling that it is a violation of due process to prosecute an individual under a statute which makes no provision for specific intent as to the sale of the uncontrolled substance. Bussey, at 65. Section 817.563 does not even contain the requirement, clearly stated in many other divisions of F.S. Chapter 817, Fraudulent Practices, that there be any intent to defraud.

As stated earlier, Judge Anstead's dissent suggests that the statute be construed as requiring an intent to deceive. Bussey, at 65 (Anstead, J., dissenting). However, if the Legislature had intended for such an intent to be required, such language would surely have been included.

It must be noted that virtually all of the other sections of Chapter 817 contain words of intent. These include: "with intent"; "with a fraudulent intent"; "wilfully"; "by any knowingly false representation"; "with intent to injure, deceive or defraud"; "with intent to cheat"; with intent to lead the recipient or sendee to believe"; and "intentionally to misrepresent". F.S. 817.02, et seq. Surely one of these could, and should, have been included by the

Legislature in order to eliminate the possibility of strict liability being written into §817.563 through the process of judicial interpretation.

It is important to consider the various designations of intent found within Chapter 817 for another reason. Those statutes which relate to the same or to closely related subject matter are regarded as in pari materia; therefore, they must be construed together and compared with each other. Thus, in order to determine the legislative intent it is necessary to review the entire statutory scheme. Tate; Ferguson v. State, 377 So.2d 709 (Fla. 1979).

In sum, §817.563 is impermissibly vague as written and in its application. This Court's opinion in Wershow, supra, provides a thorough discussion of vagueness as it is related to construction of a penal statute. It unequivocally explains that the test of statutory vagueness is "whether the language conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice." Further, this case clarifies that although the Legislature need not include the element of criminal intent in a penal statute, it is still necessary for such a statute to be definite and precise as to what acts are prohibited. Wershow, at 608, 610.

It is unfortunate when poor drafting by a legislative body makes it necessary for courts to guess at the meaning and purpose of a statute. Such a situation leads to incomprehensible opinions which go to untenable lengths in order to uphold a statute already enacted.

When our learned appellate courts cannot succinctly describe the conduct proscribed by a statute at issue, surely that statute does not provide "the sufficiently definite warning of the proscribed conduct when measured by common understanding and practice "which is required under Wershow (emphasis added).

Therefore, Appellants would urge that this Honorable Court resolve the conflict and confusion surrounding F.S. 817.563 by agreeing with the Fourth District ruling that this statute is unconstitutional.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Appellants herein respectfully request that this Honorable Court quash the decision of the Second District Court and remand this cause with instructions to affirm the trial court's order of dismissal, in accord with State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984).

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Amelia G. Brown
Amelia G. Brown
Assistant Public Defender
Courthouse Annex
Tampa, Florida 33602

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 27th day of July, 1984.

Amelia G. Brown
Amelia G. Brown