IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

PAUL LOWELL,

Respondent.

CASE NO. 65,140

FILED
SID J. WHITE
MAR 28 1984
CLERK, SUPREME COURT
By _____
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PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the district court of appeal and the Prosecution in the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida. In the district court of appeal, Respondent was the Appellant and was the Defendant in the Circuit Court.

In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal.

All emphasis in this brief is supplied by Petitioner, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with agreeing, or offering, to sell cocaine and then selling another substance (powdered aspirin) in lieu thereof, contrary to Section 893.13 and 817.563 Florida Statutes (R. 21).

Respondent filed a pre-trial motion to dismiss the information on grounds that Section 817.563 is unconstitutional and is based on an improper exercise of the police power (R. 22-32). The motion to dismiss was denied and Respondent subsequently entered a plea of nolo contendere to the charge, reserving his right to appeal the denial of his motion to dismiss (R. 14-19). Pursuant to plea negotiations, Respondent was sentenced to one year probation and withheld adjudication (R. 14-19, 33).

On appeal before the Fourth District Court of Appeal, that court reversed Appellant's conviction under 817.563 Florida Statutes on the authority of State v. Bussey, ___ So. 2d ___ (Fla. 4th DCA, Case No. 82-2145, Opinion filed January 11, 1984) [9 FLW 153].

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the decision of the district court of appeal below which expressly and directly conflicts with other decisions of other district courts of appeal. This Court should grant discretionary review so that this case might travel along with the Bussey case also on review before this Court so that the law as established by this Court may be applied to this case.

REASONS FOR GRANTING THE WRIT

For purposes of consistency, Respondent will adopt the argument made in the brief on the merits in State v. Bussey, Case No. 64,966, presently on review before this Court. For the convenience of this Court, that argument is set forth below.

POINT ON APPEAL

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

ARGUMENT

POINT ON APPEAL

FLA. STAT. 817.563 (1981) IS CONSTITUTIONAL.

Fla. Stat. 817.563 (1981) provides:

> 817.563 Controlled substance named or described in s. 893.03; sale of substance in lieu thereof.--It is unlawful for any person to agree, consent, or in any manner offer to unlawfully sell to any person a controlled substance named or described in s. 893.03 and then sell to such person any other substance in lieu of such controlled substance. Any person who violates this section with respect to.
>
> (1) A controlled substance named or described in s. 893.03(1), (2), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) A controlled substance named or described in s. 893.03(5) is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The Court of Appeal found the statute unconstitutional because it lacks a specific intent requirement, is void for vagueness, and an invalid exercise of the police power. The State maintains the statute is constitutional, and urges this Court to follow the holdings of the First District in State v. Thomas, 428 So. 2d 327 (Fla. 1st DCA 1983) and the Second in M.P. v. State, 430 So. 2d 523 (Fla. 2nd DCA 1983), which so found.

A. Fla. Stat. 817.563 (1981) is not rendered unconstitutional by the absence of an express requirement of proof of intent to sell a counterfeit drug.

The Court of Appeal found the statute unconstitutional because the legislature was not empowered to do away with the element of intent. The court cited this Court's decision in State v. Allen, 362 So. 2d 10 (Fla. 1978) and Bell v. State, 394 So. 2d 979 (Fla. 1981). In so doing, the court failed to recognize, as this Court has in State v. Dunmann, 427 So. 2d 166 (Fla. 1983), that the legislature has the power to dispense with intent as an element of a crime and to prescribe punishment without regard to the mental attitude of an accused. What distinguishes Bell and Allen from the instant case is that in those cases, it was unclear whether the legislature had intended to eliminate specific criminal intent as an element of the offense proscribed. By contrast, in the instant case, the legislature had the power to, and did, dispense with the element of intent in defining the crime of offering to sell a controlled substance and then selling a counterfeit one.

In M.P. v. State, supra, the court construed the statute as focusing on the offer of an unlawful sale, regardless of whether there is any intent to actually sell a controlled substance. In State v. Thomas, supra, the court found only general intent, the intent to do the act prohibited, is required as to the second element of the crime, the sale itself. Thus, the State must still prove general intent in that the defendant intended to do the act prohibited, i.e., offer to sell and then sell a substance. See, State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982); LaRussa v. State, 142 Fla. 504, 196 So. 302 (1940). If the defendant then

puts mistake or lack of knowledge at issue, the question is for the jury to determine. State v. Oxx, supra, note 2. It is difficult to imagine anyone "innocently" offering to sell a substance which they represent to be illicit and controlled. To interpret the statute as requiring the State to prove the seller was aware of the scientific contents of every substance sold in an illicit drug transaction would frustrate the public policy considerations regarding narcotics trafficking. Such a requirement is both unrealistic and impracticable. Section 817.563 requires only that an individual knowingly and intentionally engage in the sale of a substance represented to be controlled under Fla. Stat. 893.03.

In construing a statute, Florida courts have consistently held that a statute should be interpreted and applied so as to give effect to the obvious intent of the legislature regardless of whether such construction varies from the statute's literal meaning. Hutchinson v. State, 315 So. 2d 546 (Fla. 1975); State v. Beasley, 317 So. 2d 750 (Fla. 1975); Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation District, 274 So. 2d 522 (Fla. 1973); Deltona Corp. v. Florida Public Service Commission, 200 So. 2d 905 (Fla. 1969); Beebe v. Richardson, 23 So. 2d 718 (Fla. 1945). The words of the legislature are to be construed in their "plain and ordinary sense." Pederson v. Green, 105 So. 2d 1 (Fla. 1958).

Further, the courts in construing statutes have a responsibility to avoid a determination of unconstitutionality whenever a fair construction can be gleaned within constitutional limits.

White v. State, 330 So. 2d 3 (Fla. 1976). It is well settled that courts are not concerned with the wisdom or motives of the state legislature in enacting a law. The concern of the courts must be with the validity of the enactment when measured by organic requirements. State v. Reese, 222 So. 2d 732 (Fla. 1969). The court below departed from these principles by finding Section 817.563 unconstitutional.

B. Fla. Stat. 817.563 (1981) is not unconstitutionally vague.

Contrary to the conclusion of the Court of Appeal, Section 817.563 is definite for it gives a person of ordinary intelligence fair notice of what conduct is forbidden, to-wit: the agreement, consent or offer to unlawfully sell a substance represented to be a controlled substance followed by a sale of any other substance in lieu of the controlled substance is forbidden.

When the language in a statute conveys a warning that is sufficiently definite as to the proscribed conduct as measured by common understanding, no constitutional violation has occurred. Morales v. State, 407 So. 2d 230 (Fla. 3DCA 1981). As this Court has stated:

> To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the act or conduct prohibited. Impossible standards are not required.

Orlando Sports Stadium, Inc. v. State, 262 So. 2d 881, 884 (Fla. 1972). Hence, the statute sub judice comports with due process of law.

Regarding the penalty provisions of the statute, from its plain language, if a person offers to sell an illegal drug, it is the type of drug offered for sale that determines the penalty applied, for the actual sale of a controlled substance would be charged under Fla. Stat. 893.13(1)(a). Therefore, neither the statute itself nor its penalty provisions are unconstitutionally vague.

C. Fla. Stat. 817.563 (1981) is a valid exercise of the police power.

The legislature in enacting Fla. Stat. 817.563, did so to implement several important public policies which are enumerated in State v. Thomas, 428 So. 2d 327, 331 (Fla. 1st DCA 1983). These include avoiding unintended overdoses, ensuring the effectiveness of drug education programs, and preventing the enrichment of organized crime. Id.

As the Thomas court recognized, when the legislature acts in the area of determining necessary measures for the protection of the public health, safety and welfare, the courts should not substitute their judgment. State v. Yu, 400 So. 2d 762 (Fla. 1981); State v. Reese, 222 So. 2d 732, 736 (Fla. 1969); Hamilton v. State, 366 So. 2d 8 (Fla. 1978). The Court of Appeal erred in so doing.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, the Petitioner 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief On Jurisdiction has been furnished to CRAIG S. BARNARD, ESQUIRE, Assistant Public Defender, Attorney For Respondent, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 26TH day of March, 1984.

Marlyn J. Altman
OF COUNSEL