IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,245

WILLIAM LEON HURST, MICHAEL IAN DUSAKT AND HUGH RAVEN WALKER,

Petitioner

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CITATIONS

OTHER AUTHORITIES

INTRODUCTION

Petitioners, William Leon Hurst, Michael Ian Dusakto, and Hugh Raven Walker, were the Appellees in the District Court of Appeal and the Defendants in the trial court. Respondent, the State of Florida, was the Appellant in the District Court of Appeal and the prosecution below. In this brief, the parties will be referred to as the State and Petitioners. The symbol "R" will be used to designate the record on appeal. The symbol "T" will be used to designate the transcript of the proceedings. The symbol "A" will be used to designate the Appendix to this brief. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioners' Statement of the Case and Facts as a substantially accurate account of the proceedings below.

POINTS INVOLVED ON APPEAL

I

WHETHER FLORIDA STATUTE 856.021 COMMONLY REFERRED TO AS THE LOITERING AND PROWLING STATUTE IS UNCONSTITUTIONAL PER SE IN LIGHT OF THE UNITED STATES SUPREME COURT OPINION OF KOLENSER V. LAWSON, 103 S.CT. 1855 (1983).

II

WHETHER FLORIDA STATUTE 856.021, COMMONLY REFERRED TO AS THE LOITERING AND PROWLING STATUTE IS UNCONSTITUTIONAL IN THAT IT PERMITS ARREST ON LESS THAN PROBABLE CAUSE.

A.

WHETHER FLORIDA STATUTE 856.021 IS UNCONSTITUTIONAL IN THAT IT IS IN DEROGATION TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY MAKING ARTICULABLE SUSPICION OF A CRIME ITSELF A SUBSTANTIVE CRIMINAL OFFENSE.

ARGUMENT

I

FLORIDA STATUTE 856.021 COMMONLY REFERRED TO AS THE LOITERING OR PROWLING STATUTE IS NOT UNCONSTITUTIONAL PER SE IN LIGHT OF THE UNITED STATES SUPREME COURT OPINION OF KOLENDER V. LAWSON, 103 S.Ct. 1855 (1983).

The trial court declared Florida's Loitering or Prowling Statute unconstitutional. Said ruling was based on the United States Supreme Court's decision in Kolender v. Lawson, 103 S.Ct. 1855 (1983). (R.43). The District Court reversed, holding that Section 856.021 Florida Statutes (1981), as upheld in State v. Ecker, 311 So.2d 104 (Fla. 1975) is not effected by Kolender. (A.1). The State submits that the reasoning and authorities relied upon in State v. Ecker, 311 So.2d 104 (Fla. 1975), is so much more definitive than the California Statute declared unconstitutionally vague in Kolender, as to render the result in Ecker still valid. See, Watts v. State, ___ So.2d ___, 8 FLW 2796, (Fla. 2d DCA 1983), review pending, Case No. 64613.

The United States Supreme Court, in Kolender, held that California's Loitering or Prowling Statute was unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient

particularity what a suspect must do in order to satisfy the requirement to produce credible and reliable identification when requested to during a justified detention.

The Statute in question was Cal. Penal Code Sec. 647(e), which provided:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: ... (e) Who loiters or wonders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any police officer to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.[1]

The Supreme Court found that the statute, as construed in People v. Solomon, 33 Cal. App. 3d 429, 100 Cal. Rptr. 867 (1973), the highest court in California that interpreted the statute, required that an individual provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity

[1]In Bauer v. Norris, 713 F.2d 408, (8th Cir. 1983), a civil rights action, the Court noted that although the constitutionality of South Dakota's Loitering or Prowling Statute was not at issue, South Dakota's Statute was substantially similar to the one held unconstitutional in Kolender. Id at 411 N.3. The State has no quarrel with the ocurt's implicit recognition of the unconstitutionality of South Dakota's Statute inasmuch as both California's and South Dakota's Statutes were based upon the intial draft of the Model Penal Code Sec. 250.12 (Tent. Draft No. 13, 1961). See Infra.

sufficient to justify a Terry detention. "Credible and reliable" identification is identification carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself. In addition, a suspect may be required to account for his presence to the extent that it assists in producing credible and reliable identification. Finally, failure of the individual to provide "credible and reliable" identification permits arrest.

Based upon the fact a detention under the statute may occur only where there is the level of suspicion to justify a Terry stop, the Supreme Court found that the initial detention section was constitutional. However, since the statute, as interpreted in People v. Solomon, failed to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement, the statute was unconstitutionally vague. The statute was unconstitutionally vague since it vested virtually complete discretion in the hands of the police to determine whether the suspected has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.

Florida's Loitering or Prowling Statute, Sec. 856.021 Fla.Stat., provides:

> (1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.
>
> (2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstance makes it impractical, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.
>
> (3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

This Court in State v. Ecker, 311 So.2d 104 (Fla. 1975), interpreted the statute as follows:

> We are not here dealing with the historical loitering and vagrancy statute that makes status a crime and gives uncontrolled discretion to the individual law enforcement officer to make the determination of what is a crime. As previously noted, the statute contains two elements: (1) loitering or prowling in a place at a time and in a manner not usual for law-abiding individuals, and (2) such loitering and prowling were under circumstances that threaten the public safety. Proof of both elements is essential in order to establish a violation of the statute. This statute comes into operation only when the surrounding circumstances suggest to a reasonable man some threat and concern for the public safety. These circumstances are not very different from those that the United States Supreme Court described as "specific and articulable facts" in Terry v. Ohio, supra.
>
> Clearly, when these elements are established and the individual either refuses or fails to properly identify himself or flees when confronted by a law enforcement officer, the offense has been established.
>
> On the other hand, under circumstances where the elements are established but the accused, upon being confronted by a law enforcement officer, properly produces credible and reliable identification and complies with the orders of the law enforcement officer neccessary to remove the threat to the public safety, or voluntarily offers a reasonable explanation for

> his presence that dispels the alarm and threat, then the charge under this statute can no longer properly be made.
>
> The whole purpose of the statute is to provide law enforcement with a suitable tool to prevent crime and allow a specific means to eliminate a situation which a reasonable man would believe could cause a breach of the peace or a criminal threat to persons or property.
>
> 311 So.2d at 110.

Since this Court found that the detention was to be made in accordance with Terry standards, the detention is, in accord with Kolender, constitutional. However, the trial court erred when it held, on the authority of Kolender, that requiring reliable and credible identification rendered Florida's Statute unconstitutional. The State submits, that an analysis of the two statutes clearly shows that Florida's Loitering or Prowling statute does not suffer the same constitutional infirmities as California's statute.

California's Loitering or Prowling Statute, Cal. Penal Code Sec. 647(e), was modeled after the initial draft of the Model Penal Code Sec. 205.12 (Tent Draft No. 13, 1961). Said initial draft provided:

> A person who loiters or wanders without apparent reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or

> about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfullness of his conduct and purposes.

The authors of the Code were concerned with the constitutionality of the section as drafted. Their concern was based on the fact that a statute which makes it a penal offense for a person to fail to identify himself and give an exculpatory account of his presence is in effect an extension of the law of arrest, thereby trenching on the privilege against self-incrimination. Said provision authorized arrest of persons, for failure to identify themselves, who have not given reasonable grounds for believing that they are engaged in or have committed offenses. In effect, the provision created a substantive offense of failure to respond to the police. See Model Penal Code Sec. 250.12, Comment (Tent. Draft. 13, 1961).

In accordance with these concerns, the section was revised in the final draft of the Code to include more objective elements of conduct. The revised draft of the Model Penal Code Sec. 250.6 (Proposed Official Draft 1962), which Florida's statute is patterned after, provides:

> A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law abiding individuals under

> circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

It is clear that in this draft the unlawful conduct is not a refusal to or to properly identify oneself, but prowling under circumstances that warrant alarm for the safety of others. See Keenan, California Penal Code Section 647(e); A Constitutional Analysis of the Law of Vagrancy, 32 Hastings L.J. 284 (1980); Comment. Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem, 12 Rutgers L.J. 585 (1981).

In Ecker, this Court, in accordance with the concerns of the authors of the Model Penal Code, interpreted Sec. 856.021 Fla.Stat. as follows:

> [2] Under the provisions of this statute, the elements of the offense are: (1) the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals; (2) such loitering and prowling were under circumstances that warranted a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. This alarm is presumed under the statute if, when a law officer appears, the defendant flees, conceals himself, or refuses to identify himself. Prior to any arrest, the defendant must be afforded an opportunity to dispel any alarm or immediate concern by identifying himself and explaining his presence and conduct. If it appears at trial that the explanation is true and would have dispelled the alarm or immediate concern, then the defendant may not be convicted under this statute.
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> 311 So.2d 106.

It is clear that Sec. 856.021 Fla.Stat. does not make the refusal to or to properly identify oneself a substantive offense, and therefore said statute is not a stop and identify one. Rather, the unlawful conduct is prowling under circumstances that warrant alarm for the safety of others. An individual who is legally detained under the statute and does not properly identify himself, is not arrested for his

failure to identify but for a substantive violation of Sec. 856.021 Fla.Stat., to wit: Prowling under circumstances that warrant alarm for the safety of others.[2] Under this interpretation, police officers do not have unbounded discretion to arrest whom ever they please, since the statute only authorized an arrest where the person loitering or prowling does so under circumstances which threaten a breach of the peace or the public safety. Regardless of whether the officer is satisfied with the person's identification an arrest can only be made where the officer has reasonable articulate facts, with the inferences emanating therefrom, that breach of the peace or public safety is threatened.[3]

When an officer has reasonable articulable facts that breach of the peace or public safety is threatened, the suspect must be allowed to dispel the alarm by identifying himself. Although whether the identification dispels the alarm in subject to an officer discretion, said discretion

[2]Justice Brennan, in his concurring opinion in Kolender, stated that regardless of the defect identified by the majority, the statute would still be violative of the Fourth Amendment inasmuch as said statute made it a crime to refuse to answer police questions. Id at 1863. Florida's statute does not suffer this constitutional infirmity. See Point II Infra.

[3]The United States Supreme Court, in Kolender, when interpreting California Loitering or Prowling Statute, found that the Solomon decision, did not require that the State must prove that a suspect detained under §647(e) was loitering or wandering for "evil purposes." Id at 1858, N.6. This Court; in Ecker, found that "evil" purposes is part of the offense and must be proved. Id at 806.

is not unbridled. The District Courts have interpreted this section to require an officer, who disbelieves a suspect's reasons for his presence in the area, has a duty to verify the suspects story prior to making an arrest. U.S. v. State, ___So.2d___, 9 FLW 562 (Fla. 3d DCA 1984, Case No. 83-668, case decided on March 8, 1984). Spears v. State, 302 So.2d 805 (Fla. 2d DCA 1974). Therefore, Section 856.021 Fla.Stat. (1981) does not permit arbitrary enforcement since it provides, through judicial interpretation, explicit standards for law enforcement officers in the arrest of suspects for loitering or prowling. See Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

Therefore, Sec. 826.021, is constitutional. Since it is much more definitive than the California Statute, and since it does not make the failure to provide credible and reliable identification a substantive offense, it does not suffer the constitution infirmities which rendered the California Statute unconstitutional for vagueness.

II

FLORIDA STATUTE 856.021, COMMONLY REFERRED TO AS THE LOITERING AND PROWLING STATUTE'S CONSTITUTIONAL IN THAT IT DOES NOT PERMIT ARRESTS ON LESS THAN PROBABLE COURT.

A.

FLORIDA STATUTE 856.021 IS NOT UNCONSTITUTIONAL IN THAT IT IS NOT A DEROGATION TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE IT DOES NOT MAKE ARTICULABLE SUSPICION OF A CRIME ITSELF A SUBSTANTIVE CRIMINAL OFFENSE.

Petitioners, on this point, adopt Justice Brennan's concurring opinion in Kolender v. Lawson, supra, and attempts to apply said rationale to Florida's Loitering and Prowling Statute. The State submits that the differences between California's and Florida's Statute, see point I, supra, precludes application of said concurring opinion.

The inapplicability of Justice Brennan's reasons to Florida Loitering and Prowling Statute was recognized by the Justice when he stated:

> 4. Of course, some reactions by individuals to a properly limited Terry encounter, e.g., violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that the officers already possess, to constitute probable cause.

> In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.
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> Kolender v. Lawson, supra 103 S.Ct. at 1863, N.4 (Brennan, J. concurring).

Therefore the State submits the Petitioners' reliance on Brennan's concurring opinion is tantamount to a concession that Florida Loitering or Prowling Statute is uneffected by Kolender and remains constitutional.

CONCLUSION

Based upon the foregoing points and citations of authority, the State respectfully urges that this Court find Florida's Loitering or Prowling Statute Constitutional and affirm the District Court's reversal of the trial court's dismissal of said count of the information.

Respectfully submitted,

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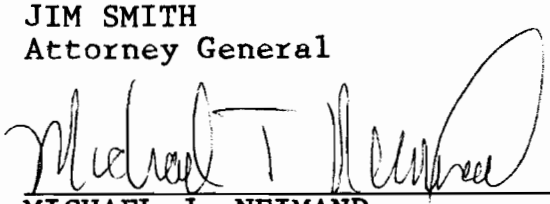

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to ALAN KARTEN, 3550 Biscayne Boulevard, #504, Miami, Florida 33137 on this 19th day of June, 1984.

MICHAEL J. NEIMAND
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