IN THE SUPREME COURT OF FLORIDA

JOHN EUMMELL BRIGHT, and ARTHUR DAVIS,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,689

RESPONDENT'S BRIEF ON THE MERITS

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POINT ON CERTIORARI

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL, STATE V. BRIGHT, 451 So.2d 880 (Fla. 5th DCA 1984), WHICH DECLARED § 817.563 FLA. STAT. (1981) TO BE CONSTITUTIONAL, SHOULD BE APPROVED.

Since its enactment in 1981, § 817.563 Fla. Stat. (1981), which proscribes the sale of any substance in lieu of a controlled substance, has been challenged on constitutional grounds in four of the five district courts of appeal of this state. Three found it to be constitutional. See State v. Thomas, 428 So.2d 327 (Fla. 1st DCA), cert. denied 436 So.2d 101 (Fla. 1983); M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983); State v. Bright, 451 So.2d 880 (Fla. 5th DCA 1984). One did not. See State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984). This cause is before this Court on certified conflict of decisions, in reference to Bright and Bussey.

State v. Bussey, additionally, it must be noted, is currently on appeal to this Court as Case No. 64,966, State v. Bussey, and, at this juncture, has already been briefed and argued. It is Respondent's hope that, by the time this cause proceeds to judgment, Bussey will already have been disapproved. If such hope should prove to be unfounded for any reason, Respondent maintains with conviction that Bussey must be quashed and Bright, approved.

It is well-established that legislative enactments are presumed to be constitutional, and this Court has often recognized that its obligation is to resolve all doubts as to the validity of a statute in favor of its constitutionality.

See Cilento v. State, 377 So.2d 663 (Fla. 1979); State v. Lick, 390 So.2d 52 (Fla. 1980). Further, a statute will withstand constitutional scrutiny under a void-for-vagueness challenge, if it is specific enough to give persons of common intelligence and understanding adequate warning of the proscribed conduct. See Trushin v. State, 425 So.2d 1126 (Fla. 1982). Lastly, an attack upon a statute on the basis of overbreadth is only proper when the statute could be applied to innocent, protected conduct. See State v. Bales, 343 So.2d 9 (Fla. 1977); Street v. State, 383 So.2d 900 (Fla. 1980). Petitioners have failed to demonstrate through any of their various attacks that the district court's finding of constitutionality as to § 817.563 violates any of the above precepts.

One of Petitioners' attacks on the statute is that it allegedly lacks a mental element, most specifically an element of intent. This Court has repeatedly held that the legislature, if it wishes, may declare an act a crime regardless of the intent or knowledge of the violation thereof. See La Russa v. State, 142 Fla. 504, 196 So. 302 (1940); Ex Parte Stoddard, 34 So.2d 92 (Fla. 1948); State v. Medlin, 273 So.2d 394 (Fla. 1973); State v. Dunmann, 427 So.2d 166 (Fla. 1983). Thus, even if Petitioners' premise were correct, that there is no mental element as to the crime at issue, such fact would not betoken unconstitutionality.

Because of the decisions of State v. Thomas and M.P. v. State, however, Petitioners' premise cannot be regarded as correct. A defendant violates § 817.563 when, knowing that

a substance is a controlled one, he agrees, consents or in any manner offers to unlawfully sell such substance to another person and then sells such person any other substance in lieu of that controlled (and represented as the object of the putative sale). As M.P. holds, a defendant commits a criminal act even if he never intended to sell a controlled substance; the actus reus would be complete where a defendant follows up upon a representation to sell cocaine with a sale of table sugar. Bright expressly adopted M.P.'s reasoning and it, rather than Bussey, represents the correct view; the Fourth District in Bussey, contrary to such precedents as Lick or Cilento, showed no inclination to construe § 817.563 in such a manner as it could be upheld.

The criminal conduct proscribed by the statute is sufficiently clear so that a person of common intelligence would not be reduced to guesswork as to whether or not his actions were prohibited thereby. Compare State v. Ferrari, 398 So.2d 804 (Fla. 1981); Schultz v. State, 361 So.2d 416 (Fla. 1978). As was the case in Trushin, the legislature has sought to prohibit a particular act, i.e. the very act of "sale" of any substance previously represented to be contraband or controlled. Further, Petitioners are hardly the most convincing candidates to assert overbreadth; as this Court held in Street, supra, such attack is proper when the statute could be applied to innocent conduct. Petitioners' offers to sell cocaine hardly qualify as constitutionally protected behavior. The fact that some other defendant may assert mistake as a

defense neither validates the result in Bussey nor calls into question the constitutionality of the statute.

In Ferrari, supra, this Court approved the constitutionality of § 713.34(3), Fla. Stat. (1979) which proscribes the misappropriation of construction funds by contractors. This Court did so in spite of allegations of overbreadth based upon the likelihood that honest contractors would violate the statute without the intention to do so. In State v. Gray, this Court similarly noted that courts have no power to declare conduct innocent when the legislature has declared otherwise. Bussey's holding that § 817.563 is vague and overbroad, in conflict with Thomas, M.P. and Bright, is contrary to the above precedents and should be disapproved.

Petitioners' last attack upon the statute, that it lacks an adequate or valid police power basis, is not well taken. The legislature has broad discretion in determining necessary measures for the protection of the public health, safety and welfare; courts, of any level, should not substitute their judgment for that of the legislature as to the wisdom or policy of any legislative act. See State v. Yu, 400 So.2d 762 (Fla. 1981); Hamilton v. State, 366 So.2d. 8 (Fla. 1978). With any legislative enactment, there exists a strong presumption of constitutionality, as well as a rebuttable presumption of the existence of the necessary factual support in its provisions. State v. Bales, supra. In State v. Thomas, the First District discussed at length the purposes behind § 817.563; such purposes included protection of the health of individuals

who intend to take a controlled substance and discouragement of drug transactions, of any sort, which would enrich organized crime. It was for the legislature to determine what was harmful or injurious to the public, see Golden v. McCarty, 337 So.2d 388 (Fla. 1976), and the Fourth District in Bussey was precipitous in exalting its judgment over that of the people's elected representatives. Bussey should be disapproved.

In conclusion, the approach to § 817.563 taken by the First, Second and Fifth District Courts of Appeal was the correct one. The statute can be construed in such a manner as to be constitutional and it is neither vague nor overbroad; its serves valid public health and safety purposes. Bright should be approved, and Bussey quashed.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities, Respondent respectfully moves that this Honorable Court approve the decision of the Fifth District Court of Appeal in Bright v. State and quash that of the Fourth District Court of Appeal in State v. Bussey.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery to David A. Henson, Assistant Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014-6183, this 14 day of September, 1984.

Of Counsel
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