

IN THE SUPREME COURT OF FLORIDA

JOHN EUMMELL BRIGHT, and)
 ARTHUR DAVIS,)
)
 Petitioners,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 65,689

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PETITIONERS' BRIEF ON THE MERITS

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 STATE OF FLORIDA,)
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PETITIONERS' BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The Petitioners, JOHN EUMMELL BRIGHT and ARTHUR DAVIS, will be referred to herein as the Petitioners. The State of Florida will be referred to as the State. The following symbols will be used:

"R" - Record on Appeal of Petitioner
JOHN EUMMELL BRIGHT

"X" - Record on Appeal of Petitioner
ARTHUR DAVIS

STATEMENT OF THE CASE AND FACTS

Petitioner, JOHN EUMMELL BRIGHT, was charged by information with one count of sale of a counterfeit substance, in violation of Section 817.563, Florida Statutes (1981). (R4) Following the entry of a not guilty plea, Bright filed a motion to dismiss alleging the above-mentioned statute to be unconstitutional on its face and as applied. (R13-15) Specifically, he asserted that the statute was unconstitutional because it did not require an element of specific intent or knowledge; conflicted with the decision in State v. Cohen, 409 So.2d 64 (Fla. 1st DCA 1982) and, among other things, was not a valid exercise of police power. The trial court granted the dismissal motion on October 11, 1982, in an order which incorporated by reference his reasoning in State v. Charles Williams, Orange County Circuit Court Case No. 82-102. (R16) Such order contains the finding that Section 817.563 is unconstitutional because it "makes the sale of a substance illegal regardless of whether it is dangerous to public health or safety, regardless of whether it is a controlled substance, regardless of whether the seller knew what it was, regardless of whether the seller intended to sell a controlled substance (the same or different from what was sold), and regardless of whether the buyer knew what he was buying". (R28,29) The trial court also found Section 817.563 to be overbroad.

The factual basis relied upon by the trial court was that on June 19, 1982, Petitioner BRIGHT approached a drug agent

of the Orange County Sheriff's Department and asked him if he wanted to "get high". (R21) Although the agent disclaimed any interest, BRIGHT exhorted "Look man, I got some great coke, let's get in your car and snort some". (R21) BRIGHT offered to make a sale for \$80.00 a gram and exhibited two packets of white powder. (R21) When the agent and BRIGHT entered a nearby bathroom, for the avowed purpose of completing a transaction, the agent immediately directed another agent to arrest BRIGHT. (R22) Although originally charged with delivery of a controlled substance, a Val-tox test of the packets found in BRIGHT's pockets did not reveal the presence of any controlled substance.

In response to Circuit Judge Baker's order, the State filed a timely notice of appeal on October 21, 1982. (R17) Appellate briefs were filed with the Fifth District Court of Appeal. On or about May 26, 1983, Petitioner BRIGHT's appeal was consolidated with the appeal of Petitioner ARTHUR DAVIS.

As for Petitioner DAVIS, he was also charged by information with one count of sale of a counterfeit controlled substance; in violation of Section 817.563, Florida Statutes (1981). (X12) On December 21, 1982, he filed a motion to dismiss in which he alleged that Section 817.563 was unconstitutional both on its face and as applied. Similar to Petitioner BRIGHT, he asserted the statute was rendered unconstitutional because it did not require specific intent; conflicted with the decision in State v. Cohen, 409 So.2d 64 (Fla. 1st DCA 1982), and, among other things, was not a valid exercise of police power. (X20)

On December 29, 1982, Circuit Judge Baker granted DAVIS' motion to dismiss. (X25-26) Specifically, Judge Baker found the statute unconstitutional for its failure to require an element of specific intent or knowledge. He further found Section 817.563 unconstitutional because it made sale of a substance illegal regardless of whether it was dangerous; regardless of whether it was a controlled substance; and regardless of whether or not the buyer or seller knew what was being sold. (X25-26) Finally, the judge noted the statute was overbroad in that its language would include mistakes and negligence of pharmacists as criminal acts. Applying the statute to the facts, Judge Baker noted that Petitioner DAVIS had clearly intended to sell a substance that he knew was not a controlled substance. (X25,26)

A prosecutive summary, attached to the order of dismissal, indicates that on October 15, 1982, Petitioner DAVIS negotiated with two undercover officers to sell them an ounce of cocaine for \$1,950.00. (X27) These negotiations led to the sale of two grams of a white substance, purported to be cocaine, for \$100.00. (X27) The officer named Oestreich gave Petitioner a marked hundred dollar bill and Petitioner stated that he would give the money to his "source" as a way of getting the entire ounce. Petitioner was followed and it was soon determined that Petitioner had used the marked bill to purchase incense. Laboratory results indicated that the two grams were not cocaine, as represented. (X28)

In response to the trial court's dismissal, the State

filed a timely notice of appeal on January 7, 1983. (X31)
Appellate briefs were filed with the Fifth District Court of
Appeal. On or about May 26, 1983, Petitioner DAVIS' appeal was
consolidated with the appeal of Petitioner JOHN BRIGHT.

Oral argument on these consolidated appeals took place
February 21, 1984. On May 10, 1984, the Fifth District rendered
a short opinion reversing the trial court's orders dismissing the
informations against Petitioners BRIGHT and DAVIS; and holding
that Section 817.563 is constitutional. ___ So.2d ___, 9 FLW
1078 (Fla. Case No. 83-57 Opinion filed May 10, 1984). On motion
for rehearing, the Fifth District certified its decision is in
direct conflict with State v. Bussey, 444 So.2d 63 (Fla. 4th DCA
1984). State v. Bright and Davis, ___ So.2d ___, 9 FLW 1415
(Fla. Case No. 83-57, Opinion filed June 28, 1984).

On July 30, 1984, Petitioners timely filed notice of
their intention to seek this Court's discretionary jurisdiction.
On August 6, 1984, this Court set August 26, 1984 as the date by
which Petitioners should serve a brief on the merits.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL
ERRED IN UPHOLDING THE CONSTITU-
TIONALITY OF SECTION 817.563,
FLORIDA STATUTES (1981).

In this appeal Petitioners challenge the constitutionality of Section 817.563 which makes it unlawful to sell a counterfeit controlled substance. Specifically, the Petitioners challenge this fraud statute on the grounds that it violates due process in that it purports to create a criminal act without a mental element; that it is overbroad to the point of vagueness; and that it lacks a valid police power basis. This Court is urged to adopt the reasoning of the Fourth District in State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984). Section 817.563, Florida Statutes (1981), provides:

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 ...

As the trial court accurately pointed out, the above statute makes illegal the sale of any substance without regard to whether that substance is dangerous to the public health or safety; regardless of whether the seller knew what it was; regardless of whether the seller intended to sell a controlled substance (the same or different from what was sold); and regardless of the buyer's knowledge. (R28-29;X25-28)

Despite its placement in Chapter 817 (Fraudulent Practices), Section 817.563 has no facial requirement of scienter. The first case to consider the question of scienter as applicable to Section 817.563 was Thomas v. State, 428 So.2d 327 (Fla. 1st DCA 1983), pet. for rev. denied, 436 So.2d 101 (Fla. 1983). The Thomas court upheld the constitutionality of Section 817.563 by construing the statute to require specific intent only as to its first half, i.e., the offer to sell an illegal drug. Stated differently, if the accused offers to sell a substance by calling it a name he or she knows to be the name of a controlled substance, then specific intent or scienter exists. In regard to the second element of Section 817.563, i.e., an actual sale, only a general intent is required. Consequently, proof of any offer accompanied by proof of the sale of any substance is all that is required to achieve a criminal conviction so long as the offeror knew the substance alluded to in the offer was a controlled substance. As construed by the Thomas court, an accused's knowledge of the nature of the substance actually sold is totally irrelevant. The Thomas court also found Section 817.563 to be a valid exercise of the police power because the statute advances important public policies of protecting the health of drug users, enhancing the credibility of high school drug education programs, and limiting the ability of organized crime to profit from the proliferation of fake drugs.

The Second District in M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983), likewise held Section 817.563 to be constitutional and clearly embraced the conclusion that the State need

not prove the accused intended to sell a controlled substance in order to obtain a conviction. Subsequent cases have continued to uphold the substantive portions of Section 817.563. See, State v. King, 435 So.2d 370 (Fla. 2d DCA 1983); State v. Growden, 437 So.2d 783 (Fla. 2d DCA 1983); Houser v. State, ___ So.2d ___, 9 FLW 1647 (2d DCA, Case No. 84-199, Opinion filed July 27, 1984).

In accordance with the Fourth District's reasoning in State v. Bussey, supra, the Petitioners respectfully contend that Section 817.563 violates due process (as a fraud statute) because it does not require proof of specific intent as to the sale of a counterfeit drug. Consequently, the effort of the First District in Thomas v. State, supra, to "save" the statute by construing it to require proof of specific intent as to the offer element alone ignores the common law concepts of fraud. The Thomas court's construction also ignores the very language of the statute since no conviction can be reached unless a sale is completed. See, Sipp v. State, 442 So.2d 392 (Fla. 5th DCA 1983). Because it is the sale of the substance which triggers criminal liability, and not the offer, scienter must relate to the crime's critical second element. The Petitioners maintain there is no possible way in which to construe Section 817.563 in a constitutional manner without an abandonment of judicial restraint, and a violation of the principle that the courts are not to perform lawmaking functions. See, Aztec Motel, Inc. v. State ex rel. Faircloth, 251 So.2d 849 (Fla. 1971); State v. Wershow, 343 So.2d 605 (Fla. 1977).

Second, the Petitioners contend Section 817.563 suffers from overbreadth and vagueness since it makes illegal the sale of any substance without regard to whether that substance is dangerous to the public health and safety, and without regard to any factor of knowledge of intent on the part of buyer or seller. In order for a penal statute to satisfy due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Florida Constitution (1968); it is necessary that the statutory language be sufficiently definite to apprise persons as to what conduct is being prohibited. When persons of common intelligence must speculate about its meaning at the risk of being subjected to arrest and punishment, the penal statute is violative of due process. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); State v. Winters, 346 So.2d 991 (Fla. 1977); Brock v. Hardy, 114 Fla. 670, 154 So. 690,694 (1934).

In the case-at-bar, the statute's vagueness stems from the fact that it is so overbroad that it cannot be read literally. Ostensibly, such a reading would make unlawful the mistake of a pharmacist who filled a prescription order calling for a controlled substance, with a different, non-controlled substance. A similar, unintended result could be reached if a pharmaceutical company shipped the wrong package of drugs to a research laboratory and received payment on a contract specifying delivery of a controlled drug. Consequently, Section 817.563 creates a unique opportunity for the selective and arbitrary enforcement of

the statute against persons who are playing harmless practical jokes on friends or strangers alike. As an illustration, the statute under attack is so overbroad that a crime would be committed if while walking along the ocean, one person scooped a fistfull of sand and sold it to his walking companion (an undercover agent) as a bale of marijuana. The above illustration is accurate, despite its absurdity. The point being that, as enacted, Section 817.563 does not even begin to provide fair warning to citizens or adequate standards to guide enforcement agencies.

The Fourth District in State v. Bussey, supra, even found the statute vagueness to extend to its penalty provisions.

Petitioners' third major point is that Section 817.563 lacks a valid police power basis. In Thomas v. State, supra, the First District concluded the statute was a proper exercise of the police power by finding that the statute protected the health of drug users since the taking of an uncontrolled substance would not produce a physical tolerance as do genuine drugs and thus might contribute to an overdose when real narcotics are later ingested. Additionally the court found that the statute would promote confidence in high school drug education programs. State v. Bussey, supra, rejected the First District's rationale after concluding that Section 817.563 was a fraud statute and that the public interests relied upon by the First District concerned drug abuse and not fraud. The Petitioners respectfully contend that Section 817.563 cannot stand, constitutionally, as a fraud

statute because the public interests relied upon i.e., protection of users from overdoses and protection of drug programs, do not deal with fraud.

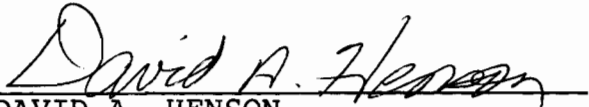
In conclusion, Petitioners contend that Section 817.563 violates due process in that it does not contain any requirement of intent as to the sale of a counterfeit drug, and because of its overbreadth and vagueness. It is further contended that, as a fraud statute, Section 817.563 is not a proper exercise of the police power. Petitioners urge this Court to adopt the reasoning of the Fourth District in State v. Bussey, supra.

CONCLUSION

BASED UPON the foregoing argument, policies, and authorities, the Petitioners requests this Honorable Court to reverse the decision of the Fifth District Court of Appeal, and remand with directions to discharge Petitioners.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

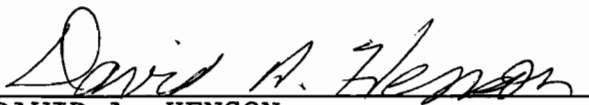


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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32015; and mailed to John Eummell Bright, 835 Douglas Avenue, Winter Park, Florida 32789, on this 27th day of August, 1984.



DAVID A. HENSON
ASSISTANT PUBLIC DEFENDER