

IN THE SUPREME COURT OF FLORIDA

STEPHEN LOUIS HOUSER,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO: 65,793

DCA-2 No. 84-199

FILED

S/D J. WHITE

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DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

ORIGINAL BRIEF OF PETITIONER

THOMAS A. McDONALD, ESQ.
McDONALD & McDONALD
2000 E. Edgewood Dr., #106B
Lakeland, Florida 33803

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On July 16, 1983, the Petitioner was arrested on charges of selling a controlled substance. After the laboratory results were obtained, the Office of the State Attorney filed an Information on September 9, 1983, charging Petitioner with agreeing to sell a false controlled substance in violation of Florida Statutes 817.563. The Petitioner, by and through the undersigned counsel, moved to dismiss the Information herein based on the unconstitutionality of the penalty provisions of Section 817.563, Florida Statutes (R4-6). The Office of the State Attorney subsequently filed a written answer to Defendant's Motion to Dismiss (R7-9). A hearing was then conducted on November 21, 1983 before the Honorable Thomas L. Clarke, Jr. (R11-29).

In essence, the Petitioner argued that the issues regarding the penalty provisions of the statute were, at this time, a case of first impression and not the issues resolved in State vs. Thomas, 428 So. 2d 327, (Fla. 1 DCA 1983) and M. P. vs State, 430 So 2d, 23, (Fla 2 DCA 1983) which held the substantive portion of the statute constitutional (R-21). The Court indicated at the conclusion of the hearing that although the Second District Court of Appeal did not address the "direction" that was discussed by Petitioner in the Motion to Dismiss, that the Court was nevertheless going to deny the Motion and leave it to the Second District Court of Appeal to decide the matter. A Notice of Appeal was timely filed and the Second District Court rendered its opinion in Houser vs. State and indicated that their decision was in direct conflict with State of Florida vs. Bussey, 444 So. 2d 63 (Fla. 4th DCA, 1984).

The Petitioner then petitioned the Supreme Court of the State of Florida to invoke its discretionary jurisdiction to review the decision of the Second District Court of Appeal in Houser vs. State. The Supreme Court accepted jurisdiction in this case on or about January 25, 1985. This appeal follows.

SUMMARY OF ARGUMENT

The Petitioner was charged and convicted of agreeing to sell a false controlled substance after the entry of a nolo contendere plea. The Petitioner was never involved in the actual sale or possession of any controlled substance. However, the Petitioner was sentenced pursuant to penalty provisions regarding a schedule of controlled substances in the Florida Comprehensive Drug Abuse Prevention and Control Act. See 893.01 et seq., Florida Statutes, (1982). The Petitioner believes that to have a Statute which contains a penalty provision predicated upon a schedule of controlled substances when no controlled substances are involved violates logic, common sense and the due process clause of our Constitution. The Statute as written does not punish a more severe fraud nor does it punish a person based on the inherent danger of the substance which the person sells. Rather, he is punished because he calls a particular substance a controlled substance. Petitioner argues that this is violative of the due process clause of the Constitution, bears no rational relationship to the gravity of the offense or any legitimate State purpose.

ISSUE

WHETHER THE PENALTY PROVISIONS OF SECTION 817.563 OF THE FLORIDA STATUTES ARE UNCONSTITUTIONAL IN THAT SAID PROVISIONS LACK A RATIONAL BASIS BECAUSE THEY ARE PREDICATED UPON A SCHEDULE OF CONTROLLED SUBSTANCES WHEN NO CONTROLLED SUBSTANCES ARE INVOLVED IN THE CRIME.

In the case at bar, Stephen Louis Houser was charged and convicted of agreeing to sell a false controlled substance after entry of a plea of nolo contendere (R37-38). At no time was the Petitioner involved in the sale or possession of any drugs or controlled substances. Nevertheless, the Appellant was sentenced pursuant to a schedule of controlled substances which is found in the Florida Comprehensive Drug Abuse Prevention and Control Act. See 893.01 et seq., Florida Statutes, (1982). It is this sentencing portion of the statute which Petitioner believes is unconstitutional.

It is axiomatic that a statute is to be construed in such a manner as to ascertain and give effect to the evident interpretation of the legislature as set forth in the statute. Smith v. City of St. Petersburg, 302 So 2d 756 (Fla. 1974). In the case at bar, the "evident interpretation" of the legislature is unclear. The Fourth and Fifth District Courts of Appeal felt that the Statute in question was designed to regulate fraudulent practices. In addition, the joint Legislative Management Committee of the Florida Legislature codified the Statute in the Fraudulent Practices Section of the Florida Statute. Recently, however, the Supreme Court held that the Statute is not designed to regulate fraudulent practices but is a part of the law of this State per-

taining to Drug Abuse Prevention and Control. See State v. Bussey, ___ So 2d ___, (Fla. 1985), opinion rendered February 7, 1985.

It is now "evident" that the Statute is a Drug Abuse Law. Petitioner asserts that it is incongruous and violative of due process that the penalty provisions of the instant statute are predicated upon a schedule of controlled substances when no controlled substances are involved. The instant Statute as written does not punish a more severe act with a more severe penalty. Rather, it punishes a person for placing a different name on a lawful substance regardless of the potential harm that the substance could cause or the severity of the fraudulent act. An individual could sell 1,000 gallons of flavored water and call it codeine (Schedule V), fraudulently sell it for Fifty Thousand Dollars (\$50,000.00) and the individual would only be guilty of a second degree misdemeanor under this statute. If another individual took one drop of the same water and sold it for One Dollar (\$1.00) and called it morphine, he would be guilty of a felony under this Statute even though the first individual received Forty-nine Thousand Nine-Hundred Ninety-Nine Dollars (\$49,999.00) more than the second individual. Furthermore, an individual could sell liquid bleach or acid and call it codeine (Schedule V) and the individual would only be guilty of a second degree misdemeanor under the Statute. If another individual took one drop of flavored water but called it morphine, he is guilty of a felony yet the individual who sold the bleach or acid clearly created a greater danger to society.

Unlike the schedule in Section 893, Florida Statutes, which punishes more severely those individuals who actually

possess or sell those certain drugs which have a greater possibility of abuse and impose a greater danger to society, the schedule in Section 817, Florida Statutes, punishes criminal conduct as if different controlled substances were actually involved yet disregards what is actually sold as well as the amount of the fraud involved. Appellant would state that if the penalty provisions were based upon the amount of fraud, (i.e., in excess of \$100.00), like every other statute dealing with thefts and fraudulent practices, it would be constitutional. On the other hand, this, of course, would be consistent with the "fraudulent practice" interpretation of the statute. If the penalty provisions were based upon the actual criminal conduct of the individual, i.e., the actual substance which was sold and not what was falsely represented, then the Petitioner also feels that the statute would be constitutional.

To permit an individual who perpetrates a greater fraud or who perpetrates a severe and menacing danger to society by selling bleaches, cleansers, acids, etc., to be convicted only of a misdemeanor simply because they read the statute and call it codeine, is illogical and violative of the due process provisions of our Constitution.

This statute must be one of the most confusing statutes ever drafted by the legislature. The Fourth District Court does not know what it means, the Fifth District Court does not know what it means, and apparently many other attorneys and judges throughout the State as well as those individuals who indexed the Florida Statutes apparently do not know what it means. The Petitioner recognizes the holding in Bussey, supra, as the law of the State of Florida, and further recognizes that it is the apparent

intent of the Court to sustain the constitutionality of a Statute purportedly designed to regulate fraudulent practices but actually designed to regulate drug abuse. However, the penalty provisions of this law simply makes no sense. The Petitioner would respectfully request that this Honorable Court consider that the substantive portions of the Statute may be declared constitutional, but that the penalty provisions should be stricken down as not having a rational basis in that they permit the more dangerous criminals to "get off" while the less dangerous menace to society is punished as a felon.

ISSUE II

WHETHER SECTION 817563, FLORIDA STATUTES IS AN
IMPROPER EXERCISE OF POLICE POWER AND UNCONSTITUTIONALLY VAGUE.

The Petitioner recognizes that this Court has recently decided that the Statute in question is not unconstitutionally vague and is rationally related to a legitimate State purpose. See State v. Bussey, ___So 2d___, (Fla. 1985) opinion rendered February 7, 1985. The Petitioner would simply ask that this Court reconsider its prior ruling and adopt the rationale of Judge Beranek regarding this matter.

While the Petitioner recognizes that this Court has considered Judge Beranek's views and rejected them, the Petitioner hopes that this Court would reconsider and recognize that the total confusion regarding this Statute will continue until it is rewritten. This law makes no sense! Almost no one seems to understand what the law means including prosecutors, defense attorneys and, more significantly, some of the most eminent jurists in the State of Florida. The law does not regulate fraud, but is in the fraudulent practice section of our statutes. The law has a schedule of controlled substances upon which it penalizes an offender, yet no controlled substances are involved. A person could agree to sell marijuana to another party but when he goes to get the marijuana discovers that it has been stolen. The person then sells the purchaser a bottle of Jack Daniels whiskey in lieu of the marijuana. Under these circumstances, the person who sells a bottle of Jack Daniels whiskey is guilty of a felony.

The Petitioner admits that these arguments are "common sense" arguments and are not as "sophisticated" as this Court customarily receives, however, the Petitioner believes that the appropriate legal arguments have already been presented and rejected as a result of the Bussey decision and simply asks this Court to review this matter in light of the "common sense" problems that are created by this Statute. Put simply, this Statute permits more dangerous individuals to be given less severe penalties for their conduct. It also prohibits a lawful transfer of alcoholic beverage or any other substance in lieu of a controlled substance.

The Petitioner would ask this Court to reconsider its ruling in Bussey and to envision the actual problems associated with this Statute. The Petitioner respectfully submits that some of the brightest "expert" minds in the State of Florida have been unable to discern the true meaning of this Statute. This Court upheld the constitutionality of the Statute by ruling that a "fraudulent practice" is not a fraudulent practice but a drug abuse, and those same minds of the "experts" that deal with the realities of this Statute remain confused. The Petitioner would assert that this Statute should be struck down as being unconstitutional.

CONCLUSION

Based upon the cases, authorities and policies cited herein, the Petitioner respectfully requests that this Honorable Court declare Section 817.563 unconstitutional or in the alternative find that the penalty provisions are violative of the due process clause of the Constitution.

Respectfully submitted,

MCDONALD & MCDONALD
Attorneys for the Petitioner
2000 E. Edgewood Dr., #106B
Lakeland, Florida 33803
Telephone: 813/ 665-6895

BY: 

THOMAS A. MCDONALD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Original Brief of Petitioner was furnished by U.S. Mail this 21 day of February, 1985 to: Peggy A. Quince, Esq., Attorney General's Office, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.



THOMAS A. McDONALD