O/A 5-7-85

IN THE SUPREME COURT OF FLORIDA

E.N., a child,

Petitioner,

v. CASE NO. 65,977

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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Section 228.091(1), Florida Statutes (Supp. 1982), is not ambiguous, but clear in its meaning: "A person who is not a student, officer or employee of a public school; who does not have legitimate business on the campus; or who is not a parent, etc., of a student enrolled at such school, commits a trespass when entering or remaining on the campus or other facility of such school." Therefore, a person who is a student at a public school other than the one he enters or remains in, is not within the classes of persons exempted from the application of the statute.

There was no effort to present to the trial court an assault on the constitutionality of section 228.091(1) on which the petition for delinquency was grounded, and this court should disregard a question not presented to either the trial or district court.

The state has a right to appeal from final judgments in juvenile cases pursuant to article V, § 4(b)(1), Florida Constitution (1972), which is a self-executing provision and alternatively, if such a right of appeal does not exist, the error could be reached by application for a writ of common law certiorari.

ARGUMENT

I. THE APPLICABILITY OF SECTION 228.091(1), FLORIDA STATUTES TO THE PETITIONER IS NOT AMBIGUOUS, NOR IS SAID STATUTE UNCONSTITUTIONALLY VAGUE ON ITS FACE

The delinquency complaint filed against the petitioner alleged that the petitioner was a delinquent child in that he violated section 228.091(1), Florida Statutes (Supp.1982), set out below:

> (1) Any person who:
>
> (a)1. Is not a student, officer, or employee of a public school;
>
> 2. Does not have legitimate business on the campus or any other authorization, license, or invitation to enter or remain upon school property; or
>
> 3. Is not a parent, guardian, or person who has legal custody of a student at such school; or
>
> (b)1. Is a student currently under suspension or expulsion; or
>
> 2. Is an employee who is not required by his employment by such school to be on the campus or any other facility owned, operated, or controlled by the governing board of such school and who has no lawful purpose to be on such premises; and who enters or remains upon the campus or any other facility owned by any such school commits a trespass upon the grounds of a public school facility and is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Based upon the language of the above statute, the trial court granted the motion to dismiss on the grounds that E.N. was a student of a public school and that it was possible that the legislature intended that public school students

should have access to all public school grounds (R. 6-8).

In the case sub judice, the juvenile did not attend the particular school he entered and remained upon (R. 1-3; R. 2-3). He was, however, enrolled in Memorial Junior High School (R. 1-13-14;R. 2-14-15). The effect of the trial court's holding was that a person who is a student at any public school in this state or any other state, yet does not have legitimate business at the particular school he was trespassing on would not be prosecuted under the above statute.

The respondent would strongly argue that such an interpretation of the above statute does not comport with logic and reason and ignores or misapprehends the clear meaning of the statute. The Fifth District Court of Appeal found logic in the state's position, finding the statute to be clear in its meaning and to proscribe the entering or remaining upon school grounds of a person who is not a student, officer or employer of that school, or who otherwise has no legitimate business on that campus or any other authorization, license or invitation to enter or remain on that school property. Therefore, the district court concluded that a person who is a student at a public school other than the one he enters or remains in, is not within the classes of persons exempted from the application of the statute. The district court reversed the trial court's order dismissing the delinquency charge and remanded for further proceedings. State v. E.N., 455 So.2d 636 (Fla. 5th DCA 1984) (A. 1).

Petitioner argues that the instant statute is ambiguous by apparently determining that the disjunctive is used in the above statute in subsections (1)(a)2 and 3, but is not used in (1)(a)1, concluding therefore, that subsection (1)(a) 1 which states that the person "is not a student, officer, or employee of a public school" must be proven, and that the person "does not have legitimate business on the campus or any other authorization, license, or invitation to enter or remain upon school property," or "is not a parent, guardian, or person who has legal custody of a student enrolled at such school." (R. 1-2;R. 2-4). It is apparently the petitioner's position that if a student goes to a public high school, then he's authorized to go upon elementary school grounds or junior high school grounds, or high school grounds anywhere in the state, for any purpose at all without having to account to anyone for his presence there, even if he is from another state or country himself.

Petitioner argues not so much the proper construction of this statute, but that the traditional use of public school grounds as after school playgrounds or parks must necessarily create an ambiguity, as the legislature would not have contemplated the cessation of such activities in drafting the statute. Petitioner ignores the more modern sinister playground activities, such as older children bullying younger children out of their lunch money, or young adults encouraging their younger siblings to use and buy drugs. Few among us have not heard of graffiti. It would be a rare instance where a high school

student would have any legitimate purpose in entering or remaining upon elementary school grounds. The petitoner's finding of ambiguity is supported only by a strained and unreasonable interpretation of the above statute based on a view of the traditional, rather than modern uses of school grounds.

A plain interpretation of the statute indicates that subsection (1)(a)1 is in disjunctive as it concerns subsequent subsections (R. 1-3;R. 2-3). This position is well taken in view of the fact that subsection (1)(a)1 does not end in the word "and," but with a semicolon.

Subsection (1)(a)2, not being able to stand alone as a complete sentence as it begins with the verb "does", must necessarily relate back to subsection (1), "Any person who:," which makes persons without legitimate business on the campus a category separate from persons who are not students, officers, or employees. This interpretation is also supported by subsection (1)(a)3, which refers to "such" school and subsection (1)(b)2, which refers to "the" campus and again to "such" school; this indicates that only students enrolled at a particular school have a right to be on that school's campus or facilities. It is well settled in construing penal statutes, that the favored construction is that which gives effect to every part of the statute. Goode v. State, 50 Fla. 45, 39 So. 461 (1905). Clearly, the legislature did not intend that any student of any public school anywhere could enter and remain on the premises of a school in which he or she was not en-

rolled and otherwise had no legitimate business or authorization. A person who is not a student, officer or employee of a public school; who does not have legitimate business on the campus; or who is not a parent, etc. of a student enrolled at such school, commits a trespass when entering or remaining on the campus or other facility of such school.

It should be noted that the statute read as follows prior to 1979, when a reviser's bill corrected statutes by the deletion of expired, obsolete, invalid, inconsistent or redundant provisions, modified cross references and grammar, and otherwise improved the clarity to facilitate interpretation of the statutes. 1979 Fla. Laws, c. 79-164, § 48, eff. Aug. 5, 1979.

> 228.091 Trespass upon grounds or facilities of public schools; penalties; arrest--
>
> (1) Any person who is not a student, officer or employee of a public school, or who does not have legitimate business on the campus or who is not a parent, guardian, or person who has legal custody of a student enrolled at such school. . .

1977 Fla. Laws, c. 77-425, § 1, eff. October 1, 1977. See appendix.

The state would point out that prior to 1979, the statute did contain the disjunctive word "or"--"any person who is not a student, officer or employee of a public school or who does not have legitimate business on the campus..."

After the 1979 revision the statute read as follows:

> 228.091 Trespass upon grounds or facilities of public schools; penalties; arrest--
>
> (1) Any person who:

(a)1. Is not a student, officer, or employee of a public school;

2. Does not have legitimate business on the campus; or

3. Is not a parent, guardian or person who has legal custody of a student enrolled at such school; or. . .

The 1979 revision of the above statute did take out the disjunctive words "or who" from subsection (1)(a)1 and replaced them with a semicolon; however, it should be noted that a colon was added to (1)"any person who," changing it to read (1), "Any person who:". Therefore, the former intent of the statute was carried forward in the amended version, making the single noun "who" applicable to students and those with no legitimate business on the campus, and such revision cannot be interpreted, under the clear wording of the statute, to assume that a student enrolled in any school, by virtue of such enrollment, automatically has legitimate business on the campus of any school in the state.

Surely, it was never the intent of the legislature that high school students from any state in the union could roam at will upon the grounds of a Florida elementary school. Statutory history does not support this position, nor does the plain meaning of the statute. An ambiguity is found in this statute only by dissecting it and assigning undue importance to chosen provisions, while totally ignoring other provisions and not giving effect to every part of the statute. Moreover, it is well settled that if a term can be made definite by a reasonable

construction, the courts will usually narrowly construe it and uphold the statute. United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). What is involved here is merely the construction of a term or phrase in a statute, not a wholesale revision or redrafting of a statute in order to uphold it. In fact, a wholesale revision of the statute is necessary in order to strike it.

The petitioner next contends that if the legislature intended by subparagraph(1)(a)1 to exclude only students enrolled at the particular public schools which is entered, then it should have unequivocally said so in terms persons of ordinary intelligence could understand. The respondent would submit that what is at issue here is not "exclusion" but "inclusion." Proper statutory construction is not achieved by inverting phrases or converting negative meanings into positive ones in order to find an exclusionary ambiguity in a statute which is clear in its meaning as to who it affects.

The petitioner next submits the construction accorded the statute, by the Fifth District Court of Appeal renders it void for vagueness, by failing to clearly delineate the group of persons who are immune from prosecution by subparagraph(1)(a)1. This is an issue that the petitioner failed to raise before either the trial court or the Fifth District Court of Appeal. Although the facial validity of the statute, including an assertion that the statute is infirm because of overbreadth, can

be raised for the first time on appeal, the constitutional application of a statute to a particular set of facts is a matter which must be raised at the trial level before it can be considered on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1982). This circuitous method of bringing to this court a constitutional inquiry should not be approved. There was no effort to present to the trial court an assault on the constitutionality of the section on which the petition for delinquency was grounded. As such, this court should disregard a question not presented to either the trial, or district court. Silver v. State, 188 So.2d 330 (Fla. 1966). See also, Davis v. State, 383 So.2d 620 (Fla. 1980). In the event, however, that this court desires to entertain such issue, the state would submit that the statute clearly delineates the group of persons who are immune from prosecution by subparagraph(1)(a)1 . The petitioner relies on the past use of school grounds as playgrounds for the propisition that an exception for school students is not without a reasonable basis. Such reliance is misplaced as those schools desiring to, can still make open their grounds to students of other schools by granting an authorization or license to so utilize such school grounds, thereby, conferring upon such students the status of having legitimate business on the campus, or the requisite authorization. The historic use of school grounds alone does not serve to create an exception whereby students enrolled in any school can come upon the grounds of any other school without having any legitimate business on the campus, or any authorization, license or invitation to enter upon

the school property. There simply is no schoolchild's right to trespass. The fact that the state would be free to prosecute a public school student, under the general trespass statute, does not make the above statute void for vagueness. All persons of common intelligence should be able to discern from the above statute that they must have either authorization, a license or invitation to enter upon school property, or be conducting legitimate business on the campus, unless they belong to a class of persons who, by virtue of their status, belong on school grounds, such as a student of such school, an officer or employee of such school.

The petitioner next contends that the term "legitimate business," is unconstitutionally vague. Since only the construction of the phrase in subsection (a)(1)1 "is not a student, officer, or employee of a public school," was raised before the trial court and the district court, this court should limit its consideration only to that phrase and not undertake an analysis on appeal of the term "legitimate business." See, Trushin v. 425 So.2d 1126 (Fla. 1983); Simmons v. State, 305 So.2d 178 (Fla. 1974). In any event, the average person is on fair notice as to what constitutes "legitimate business." In everyday language, the term "business" may mean, aside from one's occupation, a purpose for being at a certain place, at a certain time, that is not illegal. Moreover, the cases cited by the petitioner deal with loitering, an activity far removed from that of simply trespassing.

II. THE STATE HAS A CLEAR RIGHT TO APPEAL FROM A FINAL JUDGMENT IN A JUVENILE PROCEEDING.

Article V, section 4(b)(1), Florida Constitution (1972), provides in part:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court. (emphasis supplied).

The emphasized language would appear at first to be a mere paranthetical phrase describing the appeals which district courts have jurisdiction to hear, implying that the grant of rights to take appeals would be found in statutory law. However, the constitutional provision formerly relating to the jurisdiction of district courts of appeal, article V, section 5(3), Florida Constitution (1956), provided in part as follows:

> Appeals from trial courts in each appellate district. ... may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court. (emphasis supplied).

This earlier provision clearly described the jurisdiction of the district courts of appeal as a corollary of a grant of the right to appeal final judgments. The Supreme Court of Florida held in Crownover v. Shannon, 170 So.2d 299 (Fla. 1964) that this provision of the constitution describing the jurisdiction of the district court granted a right of appeal as a matter of course.

In Crownover it was said that:

> The right to appeal from the final decisions of trial courts to the Supreme Court and to the District Courts of Appeal has become a part of the Constitution and is no longer dependent on statutory authority or subject to be impaired or abridged by statutory law....

The Fifth District Court of Appeal upon analyzing the above provisions in State v. W.A.M., 412 So.2d 49, 50 (Fla. 5th DCA 1982) held:

> Notwithstanding the substantial difference in language between the former consitutional provision considered in Crownover and the present provision relating to the jurisdiction of district courts of appeal, we do not believe such changes were intended to eliminate the right of appeal from final judgments. Therefore, we hold that the state does have a constitutional right of appeal from final judgments in juvenile cases.

The Fourth District Court of Appeal in State v. J.P.W., 433 So.2d 616, 619 (Fla. 4th DCA 1983) had further occasion to interpret article V, section 4(b)(1), Florida Constitution (1972), and held:

> If this section does not create a right of appeal, the language "that may be taken as a matter of right" would appear to be surplusage. There either is a right to appeal or there is not. To treat the quoted language as limiting the appeal jurisdiction of the district courts to those situations in which there is a "right" to appeal would be meaningless. This is somewhat equivalent to saying the court shall have jurisdiction to hear an appeal where there is a right to appeal but shall not have jurisdiction where there is no right to appeal. The possibility that such an unreasonable construction was intended in so wording the constitution cannot be presumed.

* * *

> Alternately the emphasized phrase could be interpreted to mean "where a right of appeal exists under the general law." It seems rather obvious, however, that if this was meant, it would have been said. Additionally, the presence of a comma between the words "appeals" and "that" belies such a construction. While the absence of a comma would lend itself to the interpretation that the clause was merely descriptive of the word "appeals," the use of the comma sets off the clause and emphasizes that "such appeals may be taken as a matter of right." Lastly, we have difficulty with the contention that while case law interprets the predecessor to this section of the constitution as conferring a right of appeal in civil cases, Crownover v. Shannon, 170 So.2d 299 (Fla. 1964), the identical language means something else in criminal cases. (We do not mean to imply, however, that juvenile proceedings are criminal in nature).

The respondent would also strongly argue that if the appeal is deemed to be civil in nature then either party is entitled to appeal. Conversely if the nature of juvenile delinquency proceedings is such as to require appeals therefrom to be considered as criminal appeals, then the state would be permitted to appeal pursuant to Rule 9.140(c)(1)(e), Florida Rules of Appellate Procedure. Where an appeal is permissible in either the civil or criminal context, it would be an anomaly to permit this proceeding to slip through the cracks as neither of a wholly civil nor wholly criminal nature.

Alternatively, if such a right of appeal does not exist, the error could be reached by application for a writ of common law certiorari. Florida Rule of Appellate Procedure 9.030 (b)(2)(B) provides:

> (2) Certiorari Jurisdiction. The certiorari jurisdiction of district courts of appeal may be sought to review:
>
> (A) non-final orders of lower tribunals other than as prescribed by Rule 9.130;
>
> (B) final orders of circuit courts acting in their review capacity.

However, this provision is followed in Rule by 9.030(b)(3):

> (3) Original Jurisdiction. District courts of appeal may issue writs of mandamus, prohibition, quo warranto, common law certiorari and all writs necessary to the complete exercise of the court's jurisdiction; or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof, or before any circuit judge within the territorial jurisdiction of the court. (emphasis added).

The latter provision affords redress on a broader basis, limited, however, within the confines with which the writ of certiorari has been circumscribed by the common law. Thus, the state would be afforded review from an adverse final judgment in juvenile proceedings by certiorari under appropriate circumstances if an appeal were not available. This is the position taken by the Fourth District Court of Appeal in State v. J.P.W., 433 So.2d 616 (Fla. 4th DCA 1983) and the respondent would submit that this is the correct analysis to be employed.

The petitioner further raises a question as to whether the constitutional provision relied on in State v. W.A.M., supra, is self-executing. The basic guide or test in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision

lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing. Gray v. Bryant, 125 So.2d 846,851 (Fla. 1960).

Unquestionably, section 4(b)(1), article V lays down a sufficient rule by which the state may take appeals without enabling action of the legislature. It seems clear that the subject provision meets the test and should be construed to be self-executing and as not requiring legislative action to activate the effect of its provisions. The will of the people is paramount in determing whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption, the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people. Gray, supra at 851.

A comparison of the present section 4(b)(1), Florida Constitution, with the pertinent provisions of article V as they existed prior to the adoption of section (4)(b)(1), indicates without doubt that the people intended that the state would have

a constitutional right to appeal from a final judgment in a criminal proceeding.

CONCLUSION

Based on the foregoing arguments and authorities presented herein, respondent respectfully requests this honorable court approve the decision of the Fifth District Court of Appeal in all respects,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Merits has been furnished by mail to Lucinda H. Young, Assistant Public Defender, 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014-6183, this 4th day of March, 1985.

Margene A. Roper

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