O/a 5-7-85

IN THE SUPREME COURT OF FLORIDA

E. N., a child,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 65,977

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

POINT I

THE APPLICABILITY OF SECTION 228.091(1), FLORIDA STATUTES, TO THE PETITIONER IS AMBIGUOUS AND, AS SUCH, MUST BE CONSTRUED IN ACCORDANCE WITH THE MEANING MOST FAVORABLE TO THE PETITIONER; MOREOVER, SAID STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

At the trial level, the prosecutor and defense counsel became embroiled in arguments over whether subsections (1)(a)1., (1)(a)2., and (1)(a)3. of Section 228.091, Florida Statutes were in the disjunctive or conjunctive. (R2-4,6) In its Brief on the Merits, the State makes this an issue before this Court. (Respondents Brief on the Merits at 4,5,6) The State's contention apparently is that it is required only to show that one of the three subsections applies to a defendant

in order to establish a violation of Section 228.091(1). Thus, the State argues that even if subsection (1)(a)1. ("not a student, officer, or employee of a public school") does not apply to E. N., he is still subject to prosecution if the State can establish that subsection (1)(a)2. ("does not have legitimate business", etc.) applies. In support of its position, the State relies on the statute prior to its 1979 revision, which contained the word "or" between what is now subsections (1)(a)1. and (1)(a) 2.

The connective "or" in several Florida statutes has been construed in the conjunctive sense, rather than the disjunctive sense. See Rudd v. State, 310 So.2d 295 (Fla. 1975); Pompano Horse Club v. State, 93 Fla. 415, 111 So.2d 801 (Fla. 1927); Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967); Infante v. State, 197 So.2d 542 (Fla. 3d DCA 1967); Pinellas Co. v. Wooley, 189 So.2d 217 (Fla. 2d DCA 1966). In Rudd, supra at 310, the Florida Supreme Court, quoting Dotty, supra, stated:

> "Although in its elementary sense the word 'or' is a disjunctive participle that marks an alternative generally corresponding to 'either' as 'either this or that'; a connective that marks an alternative. There are, of course, familiar instances in which the conjunctive 'or' is held equivalent to the copulative conjunction 'and', and such meaning is often given the meaning 'or' in order to effectuate ... the legislative intent in enacting a statute when it is clear that the word 'or' is used in the copulative

and not in a disjuctive sense. Pompano Horse Club, Inc. v. State, 1927, 93 Fla. 415, 111 So.2d 801, 52 A.L.R. 51; see also Pinellas County v. Woolley, Fla.App. 1966, 189 So.2d 217."

Interpretation of Section 228.091(1) to require the State to establish only that the defendant falls into either subsection (1)(a)1. or (1)(a)2. or (1)(a)3. leads to absurd results. For example, since public school students, with a few rare exceptions, would fall within subsection (1)(a)3. (not a parent, guardian, etc., of a student enrolled at such school), then public school students would be subject to prosecution under this statute upon entering the very school in which they were enrolled. A person with legitimate business on the campus, but who fits within (1)(a)1. (not a public school student, officer, or employee) or (1)(a)3. (not a parent, etc., of a student enrolled at such school) would also be subject to prosecution under the interpretation advocated by the State. The State's contention that it need only demonstrate that subsection (1)(a)2. applies to E. N. makes the exclusions created by (1)(a)1. and (1)(a)3. meaningless. In order to obtain a conviction under Section 228.091(1), the State must prove that (1)(a)1. and (1)(a)2. and (1)(a)3. apply. That is, the State must be able to show that the person is not a student, officer, or employee of a public school; and that the person does not have legitimate business on the campus; and that the person is not a parent, etc., of a student enrolled at said school. Stated otherwise, the prosecution must be able to

establish that the defendant does not fall within any of the three exclusions created by (1)(a)1., (1)(a)2., and (1)(a)3.

In short, whether the State is required to prove (1)(a)1. should not be at issue. It should be clear that it must. The question of statutory construction presented is how the language in (1)(a)1., "not a student, officer, or employee of a public school", is to be interpreted.

The State also contends that the Petitioner's void for vagueness argument was not raised before the trial court or the Fifth District Court of Appeal and that, therefore, this Court should refrain from considering this issue. In Trushin v. State, 425 So.2d 1126 (Fla. 1982) this Court recognized that there is confusion as to whether an appellate court should consider the constitutionality of a criminal statute absent a constitutional attack in the courts below. The Court in that case held that the facial unconstitutionality of a statute can be raised for the first time on appeal, but that the unconstitutional application of a statute to the facts of a particular case must be raised at the trial level. In Alexander v. State, 450 So.2d 1211, 1216 (Fla. 4th DCA 1984) the Fourth District Court of Appeal explained the reason for this distinction:

> The logic is that a facially unconstitutional statute creates no subject matter jurisdiction pursuant to which a court may convict the accused, whereas, one infers, a statute alleged to be applied unconstitutionally in the case has no such infirmity. Thus application of an unconstitutional statute

> constitutes fundamental error, whereas unconstitutional application of an otherwise constitutional statute does not.

(footnote omitted) In Trushin, supra, this Court explained that its previous decisions in Davis v. State, 383 So.2d 620 (Fla. 1980), Whitted v. State, 362 So.2d 668 (Fla. 1978), and Silver v. State, 188 So.2d 300 (Fla. 1966) more properly stood for the proposition that questions of constitutional infirmity can be waived.

Before this Honorable Court, the Petitioner contends that Section 228.091(1) is unconstitutional on its face based on the vague, confusing language delineating the persons to whom the statute applies and the term "legitimate business." At the trial level, E.N. argued that Section 228.091(1) was vague and abmiguous with respect to whether it excluded from prosecution public school students in general, or whether it exempted only students enrolled at the particular school entered. Because the trial court construed the statute in E. N.'s favor and granted his motion to dismiss, it was unnecessary for him to argue that the statute was so vague as to be constitutionally defective. Under these circumstances, his failure to precisely couch his argument in constitutional terms does not constitute a waiver. The rule that penal statutes, where ambiguous, must be construed in the accused's favor, which was E. N.'s argument at the trial level, is predicated on due process requirements of notice and fairness.

Petitioner concedes that before the Fifth District Court of Appeal he did not challenge the term "legitimate business," but focused on the vagueness and ambiguity with respect to what school students were immune from prosecution under this statute. Judge Cowart, in his dissenting opinion in this case, did, however, recognize and discuss the constitutional infirmities now presented to this Court. Therefore, the Fifth District was not unaware of these problems. Even if this Court should determine that E.N.'s constitutional challenge to the term "legitimate business" was not sufficiently presented at the trial and district court levels, Petitioner urges that this Court should consider this issue because it constitutes fundamental error. Moreover, in Trushin, supra at 1130, the court stated that once it has jurisdiction, it may consider any question that may affect the case.

The State contends that the decisions cited in the Petitioner's Initial Brief on the Merits, wherein other state courts struck down statutes as unconstitutionally vague, are inapposite because they deal with loitering, while the statute at issue in the instant case deals with trespassing. It is true that the statutes under scrutiny in People in Interest of M., 630 P.2d 593 (Colo. 1981); State v. Martinez, 85 Wash.2d 671, 538 P.2d 521 (Wash. 1975); and State v. Debnam, 542 P.2d 940 (Or.App. 1975) prohibited

loitering on public school grounds. The relevant point, however, is that those statutes contained qualifiers to criminal conduct similar to "legitimate business" in Section 228.091(1) (namely, "legitimate reasons" and "lawful purpose or object"), which the courts found unconstitutionally vague. Many of the problems discussed by the courts in those cases concerning vague, uncertain statutory language are also present in Section 228.091.

CONCLUSION

BASED ON the arguments and authorities presented herein and in the initial brief, the Petitioner respectfully requests, as to Point I, that this Honorable Court reverse the decision of the Fifth District Court of Appeal of the State of Florida. As to Point II, the Petitioner requests that this Honorable Court quash the State appeal in this cause and decline to treat the Notice of Appeal as a Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, 125 N. Ridgewood Ave., Daytona Beach, FL 32014 and E. N., 602 Twentieth Street, Orlando, FL 32805 on this 25th day of March, 1985.

Lucinda H. Young
LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER