

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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BOBBY BROWN, )  
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 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 66,032

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON  
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ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Appellant in the District Court of Appeal and the Defendant in the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida. Respondent was the Appellee in the District Court of Appeal and the Prosecution in the Circuit Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by two informations filed in the Circuit Court of Orange County, Florida, with two counts of "sale of a counterfeit substance in lieu of controlled substance." He entered a plea of nolo contendere to each charge, reserving his right to appeal the trial court's denial of his motions to dismiss the informations made on the grounds that the statute under which he had been charged, Section 817.563, was unconstitutional. Orders placing Petitioner on concurrent five-year terms of probation were entered on March 8, 1984.

On October 11, 1984, the Fifth District Court of Appeal affirmed the trial court's ruling and held that Section 817.563, Florida Statutes (1981), was constitutional. (R 8) The District Court acknowledged that its decision conflicted with State v. Bussey, 444 So. 2d 63 (Fla. 4th DCA 1984). On January 31, 1985, this Honorable Court accepted jurisdiction. (R 11) Petitioner's Suggestion That Issue is Moot was denied on March 5, 1985.

SUMMARY OF ARGUMENT

Petitioner urges that the Fourth District Court of Appeal correctly held Section 817.563, Florida Statutes (1981), to be unconstitutional in State v. Bussey, 444 So. 2d 63 (Fla. 4th DCA 1984), and the reasoning therein should be adopted by this Honorable Court.

ISSUE PRESENTED

WHETHER THE FIFTH DISTRICT COURT OF  
APPEAL ERRED IN UPHOLDING THE CON-  
STITUTIONALITY OF SECTION 817.563,  
FLORIDA STATUTES (1981).

The Fifth District Court of Appeal affirmed Petitioner's orders of probation and found Section 817.563, Florida Statutes (1981), to be constitutional. The District Court stated that its decision directly conflicted with State v. Bussey, 444 So. 2d 63 (Fla. 4th DCA 1984). Brown v. State, 456 So. 2d 1335 (Fla. 5th DCA 1984).

Petitioner had relied upon the Fourth District Court of Appeal's ruling in State v. Bussey, supra, in arguing to the Fifth District Court that the statute was unconstitutional. Since the time of the District Court's decision in this case, this Honorable Court has reversed the Fourth District Court of Appeal's ruling, in State v. Bussey, 10 FLW 105 (Fla. February 7, 1985). In Bussey, this Honorable Court held that although the statute is contained in Chapter 817 governing "fraudulent practices," the statute is not a fraud but a drug abuse prevention statute; that the statute's making an act "unlawful" furnished its criminal intent requirement; and that no specific state purpose is required to render a law constitutional. Although the First and Second District Courts of Appeal found the statute to be valid for opposite reasons, this Honorable Court has held that it is not void for vagueness.<sup>1</sup>

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1. M. P. v. State, 430 So. 2d 523 (Fla. 2d DCA 1983), held there need be no intent to sell an illegal drug but only an offer to do so;

Because Petitioner's appeal was grounded solely upon the constitutionality or not of Section 817.563, the issue in this cause appears to have been disposed of by State v. Bussey, 10 FLW 105 (Fla. February 7, 1985). Petitioner, however, would respectfully urge that this Honorable Court reconsider its ruling in that case and thereupon adopt the well-reasoned conclusion of the Fourth District Court of Appeal in State v. Bussey, 444 So. 2d 63 (Fla. 4th DCA 1984).

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State v. Thomas, 428 So. 2d 327 (Fla. 1st DCA), review denied 436 So. 2d 101 (Fla. 1983), saw the statute as clearly requiring proof that the seller actually knows the substance sold is a legal substance and knowingly offers to sell an illegal substance.



CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the Fifth District Court of Appeal's decision herein, and order that this cause be remanded to the trial court with directions that Petitioner be discharged.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT



BRYNN NEWTON, ASSISTANT PUBLIC DEFENDER  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by hand delivery to the Honorable Jim Smith, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014; and by mail to Mr. Bobby Brown, 516 Sunset Drive, Apartment 4, Orlando, Florida 32805, this 25th day of March, 1985.



ATTORNEY