IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 66,450

DANNY PAUL MOOSBRUGGER,

Appellee,

BRIEF OF APPELLANT

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLANT

GOW/cej

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Appellant is the State of Florida and the Appellee is a criminal defendant who was successful in having his judgment reversed by the Second District Court of Appeal on the ground that the penal statute under which his conviction was obtain is facially unconstitutional. Appellant is entitled to have this issue reviewed by this court as a matter of law. Article V, Section 3(b)(1), Constitution of the State of Florida.

The record on appeal will be referred to by the letter "R" followed by the appropriate page number.

SUMMARY OF ARGUMENT

This court should apply the limiting construction doctrine to §839.25(1)(a) and limit the term "duty imposed by law" to statutory duty. With the limiting construction there are substantial statutory definitions which provide men of common intelligence with notice of which acts violate the provisions of §839.25(1)(a).

STATEMENT OF THE CASE

Appellee was charged by information with Official Misconduct in violation of Florida Statute 839.25 on September 13, 1983 (R 4). After entering a written plea of not guilty, (R 6) Appellee filed a Motion to Dismiss the Information and Motion to Dismiss pursuant to 3.190(c)(4) (R 7, 9). A hearing was held on those motions on January 9, 1984, before the Honorable Oliver L. Green, Jr., who denied both motions (R 7, 14). The case proceeded to jury trial on January 23, 1984, and the Appellee was found guilty (R 253). Thereafter the Appellee filed a Motion for New Trial and Motion for Judgment Notwithstanding verdict (R 257-9). These were denied on February 1, 1984. (R 260) Appellee was adjudged guilty and sentenced on March 5, 1984. (R 261) Notice of Appeal was filed on April 5, 1984. Appellant moved to dismiss the Appellee appeal to the Second District since the notice of appeal was filed beyond the 30 day period allowed under Rule 9.140(b)(2), Florida Rules of Appellate Procedure. Appellee filed a response to the state's motion to dismiss alleging that he was entitled to appellate review pursuant to Baggett v. Wainwright, 229 So.2d 239 (Fla. 1970) and State v. Meyer, 430 So.2d 440 (Fla. 1983). Subsequently, the Second District denied the state's motion to dismiss, briefs were filed and oral argument was held on December 3, 1984. The Second District filed it's opinion (attached as appendix) on January 11, 1985, reversing the Appellee's judgment of conviction on the grounds that Section 839.25(1)(a) is unconstitutional. Appellant filed a notice of appeal on

January 15, 1985. In response to Appellant's motion, the Second District stayed the issuance of a mandate on its January 11, 1985, opinion pending appeal to this court.

STATEMENT OF THE FACTS

While on duty on June 9, 1983, Appellee, a Polk County Sheriff Deputy, was at Frederick Electronics in Winter Haven, Florida (R 46). This business provides electronic services to the Polk County Sheriff's Department. (R 56) While waiting for service, Appellee inquired if a car radio of a type on a shelf at Frederick Electronics had any value. (R 47) Appellant was told by Mr. Maynard that a similar radio, if legitimate, did have value. Mr. Maynard suggested that Appellee bring the unit in and that Mr. Maynard could advise him its value and whether it was stolen. (R 47) On June 12, 1983, Appellee brought the unit to Frederick Electronics. (R 45) During this time Appellee was on duty and in uniform and Auxillary Deputy Sheriff Terry Moore was with him. (R 84) Mr. Maynard examined the unit and told Appellee he though he recognized the unit as being one stolen in 1976 from the Winter Haven New-Chief. (R 49) Appellee told Mr. Maynard to return the unit to the News-Chief or to the insurance company that may have paid a claim on its theft. (R 53) Appellee also asked Mr. Maynard to "keep himself and his friend out of it" (R 51)

Appellee admitted to having had the radio in his possession and obtaining it from a friend (R 118) and that it had been mounted in his automobile while in highschool. (R 123) Appellant also admitted that he wrote no report concerning the recovery of stolen property (R 110), that he did not take it into his possession upon learing that it was stolen or have the radio placed into evidence with the Sheriff's Department. (R 117)

ARGUMENT

ISSUE

WHETHER §839.25(1)(a) IS UNCONSTITUTIONALLY VAGUE

The Second District Court of Appeal held that §839.25(1)(a), Florida Statutes (1983), was facially unconstitution because it was susceptible to arbitrary and capricious application. The Second District found that §839.25(1)(a) had the same flaw that this court found in §839.25(1)(c) in State v. DeLeo, 356 So.2d 306 (Fla. 1978) and cited the following from DeLeo as its finding.

> "The crime defined by the statute, ..., is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its 'catch-all' nature."
>
> DeLeo at 81.

The First District Court of Appeal also quoted the above in State v. Jenkins, 454 So.2d 79 (Fla. 1st DCA 1984), and stated that §839.25(a) is "as vague and open to arbitrary and capricous application (c)" because "subsection (a) goes beyond the limits of (c) to provide for imposition of criminal sanctions for failure to perform duties which need not be related to the office of the accused." The First District also found subsection (a) to be increasingly offensive to the constitution because the court interpreted subsection (a) as addressing duties imposed by any source of law, not merely the statutes and rules of

(c), found to be overly broad by DeLeo. Jenkins at 80.

The proper scope of review of a statute that is alleged by unconstitutionally vague is "whether the provisions forbids the doing of an act in terms so vague that individuals of common intelligence must guess at their meaning," Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979). See also Gardner v. Johnson, 451 So.2d 477 (Fla. 1984). The above standard of review exist in a setting where there is a strong presumption of constitutionality, State v. Bales, 343 So.2d 9 (Fla. 1977), and all doubts as to validity are resolved in favor of constitutionality. State v. Lick, 390 So.2d 52 (Fla. 1980). Furthermore, this court has stated that it is the judiciaries responsibility to apply the "restrictive construction doctrine" and "avoid a holding of unconstitutionality if a fair construction of the statute can be made within constitutional limits." State v. Beasley, 317 So.2d 750 at 752 (Fla. 1975). As such, Appellant submits that this court can apply the respective statutory provisions that cover the different public officials to derive the corresponding duties imposed by law for which the public servents could be prosecuted if he had the requisite corrupt intent. An example of this procedure is as follows. Sub judice, the Appellee was a deputy sheriff. Historically, a sheriff is the chief law enforcement officer of a county, 70 AM Jr. 2d, sheriffs, police, and constables, §22, and a deputy sheriff may do any act that a sheriff might do with the exception on being able to appoint a deputy himself, and a deputy sheriff may not be given less authority that the

sheriff. Guarantee Trust and Safty Deposit Company v. Buddington, 2 So. 885 (Fla. 1898). Chapter 112 of Florida Statutes is titled "Public Officers and Employee; General Provisions." §112.531, Florida Statutes (1983), is listed under the subtitle "Law Enforcement and Correctional Officers" and defines "law enforcement officer" as follows:

> "Law enforcement officer" means any person, other than a Chief of Police, who is employed full time at any municipality or the State, or any political sub division thereof, and who's primiary responsibility is prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highways of the State.

§943.10 defines law enforcement officer as follows:

> (1) "Law enforcement officer" means any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof, who is vested with authority to bear arms and make arrests, and whose primary responsibility is the prevention and detection crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.

The above definition is consistent with §30.15(5), Florida Statutes (1983) which recognizes that sheriffs of the state are conservators of the peace in their respective counties. Accordingly, when §112.531(1), 943.10 and 30.15(5) are read in pari materia and in the light of a sheriff's historical position

as the chief law enforcement officer there are sufficient statutory definitions from which this court can find definitive duties. Accordingly this court should apply the limiting construction doctrine to the term "duty imposed....by law" so as to mean statutory duty and find that the corresponding statutory provisions proved a sufficient description of duties via the definitions of the public offices to inform persons of common intelligence which acts are violative of the law. Appellant recognizes that the above construction could not be applied by this court if it was contrary to the legislatures intent. However, Appellant submits that the limitation of §839.25(1) to statutory duties is proper because the doctrine of expressio unius exclusio alterius requires that §839.25(1)(a) apply only to statutory duties[1].

---

[1] §839.25(1)(c) had expressedly allowed prosecution for failing to perform duties imposed by administrative regulations, whereas §839.25(1)(a) omits the reference to regulations.

CONCLUSION

Based on the above-stated facts, arguments and authorities, Appellee would pray that this Honorable Court affirm the decision of the lower court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel For Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jess J. Bennett, Jr., Bennett and Bennett, P.A., 116 West Central Avenue, Winter Haven, Florida, 33880, on this 5th day of February, 1985.

OF COUNSEL FOR APPELLEE.