

IN THE SUPREME COURT OF FLORIDA
CASE NO. 67,249

FILED
SEP 8 1985
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

THE STATE OF FLORIDA,
Petitioner,

vs.

SALVADOR SAIEZ,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner, The State of Florida, was the prosecution at the trial court level and the Appellant in the Third District Court of Appeal. Respondent, Salvador Saiez, was the Defendant at the trial level and the Appellee in the Third District Court of Appeal.¹

¹ The State of Florida at different times invoked both the "discretionary jurisdiction" and the "appeal jurisdiction" of this court, subsequently abandoning "conflict jurisdiction" of the court. The parties are referred to as Petitioner and Respondent above in an effort to remain consistent with the "Brief of Petitioner on the Merits" filed in this Court by the State of Florida.

In this brief, the parties will be referred to as Defendant and Prosecution/State. The documents in the Record on Appeal to the Third District Court of Appeal will be referred to by the symbol "R.", and the documents in the Supplemental Record to the Third District Court of Appeal will be referred to as "S.R."

As of the date of this brief, it does not appear that the District Court of Appeal has yet transmitted the Original Record on Appeal to this Court. As a result, the page numbers cited in this brief refer to the Record on Appeal of the District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

The Defendant accepts the Statement of the Case and Facts contained in the Brief of Petitioner on the Merits, with the following corrections and additions:

As alleged in the information filed in the trial court by the state, the Defendant was in possession of one Farrington brand embossing machine (Count 1) (R.1) and one Elliot brand embossing machine (Count 3) (R.3). These machines are used to embosse numbers and letters on to plastic cards. They can be purchased at any one of a number of local business machine dealers without any restrictions or license.

With the exception of some minor damage to the Elliot brand machine, neither machine had been altered or modified in any way, and was in the same condition as when it left the dealer.

In the trial court, the Defendant filed a Motion to Dismiss On Grounds That Section 817.63 Florida Statutes is Unconstitutional. In its order granting the motion, the trial court concluded:

1. That Section 817.63 of the Florida Statutes prohibits the mere possession of a machine which can be readily purchased without restriction and without meeting any licensing requirements. The machine is used daily by countless legitimate businessmen to emboss plastic cards for a variety of uses.

(S.R.1).

The state appealed the trial court's order granting this

Motion to Dismiss to the Third District Court of Appeal.

The Third District Court of Appeal affirmed the trial court's order and held the statute to be unconstitutionally vague and overbroad.

This appeal follows.

POINT ON APPEAL

WHETHER A STATUTE WHICH PROHIBITS MERE POSSESSION OF AN EMBOSsing MACHINE, REGARDLESS OF THE USE TO WHICH IT IS PUT, PUNISHES INNOCENT AS WELL AS CRIMINAL CONDUCT, IS VAGUE IN IT'S MEANING, OVERBROAD IN IT'S SCOPE, AND IS THEREFORE UNCONSITUTIONAL.

ARGUMENT

SECTION 817.63 FLORIDA STATUTES (1984) WHICH PROHIBITS MERE POSSESSION OF AN EMBOSSING MACHINE REGARDLESS OF THE USE TO WHICH IT IS PUT, PUNISHES INNOCENT AS WELL AS CRIMINAL CONDUCT, IS VAGUE IN IT'S MEANING, OVERBROAD IN IT'S SCOPE, AND IS THEREFORE UNCONSTITUTIONAL.

Florida Statutes 817.63 prohibits the possession of any and all credit card embossing machines. The only qualification contained in the statute is that the machine must be capable of embossing a credit card (ex: Visa card) that was not authorized by the issuer (i.e. Visa). Any machine capable of embossing numbers and letters onto an authorized card, is obviously also capable of doing the same to an unauthorized card. Thus, the statute applies equally to all embossing machines.

Section 817.63 provides in relevant part:

"... a person possessing with knowledge of its character any machinery, plates or any other contrivance designed to reproduce instruments purporting to be the credit card of an issuer who has not consented to the preparation of such credit cards, violates this subsection..."

The words "... a person possessing with knowledge of its character..." simply mean that the person must know what it is he is possessing.

The words "... any machinery, plates or any other contrivance ..." can be summarized in this case by the words "embossing

machine."

The words "... designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards ..." describe the design or physical attributes of those machines covered by the statute. The machine must be able to emboss credit cards. Further, the credit cards must be "...credit cards of an issuer who has not consented to the preparation of such credit cards ..." that is to say, the machine must be capable of embossing a credit card which the issuer did not authorize the production of.

Thus, if the issuer is, for example, Visa, and there are Visa cards that Visa did not authorized the production of, such cards are "... credit cards of an issuer who has not consented to the preparation of such credit cards..."

Any machine that is "designed" or capable of embossing numbers and letters onto such credit cards is a machine described by the statute and the possession of any such machine is prohibited by the statute.

All machines that have the design and capability of embossing authorized cards, obviously also have the design and capability to do likewise to unauthorized cards. Thus, the statute applies to all embossing machines.

When the Third District Court of Appeal affirmed the Trial Court's holding in State v. Saiez, 469 So.2nd 927 (Fla. 3rd DCA

1985), it held this portion of Section 817.63 Florida Statutes (1984) to be both vague and overbroad.

A statute is considered unconstitutionally vague when it fails to give a person of common understanding and intelligence a sufficiently definite warning concerning the conduct it seeks to proscribe. State v. Wershow, 343 So.2nd 605 (Fla. 1977); Zachary v. State, 269 So.2nd 699 (Fla. 1972); Aztec Motel, Inc. v. Faircloth, 251 So. 2nd 849 (Fla. 1971).

A statute will be construed as overbroad when

... legal, constitutionally protected activities are criminalized as well as illegal, unprotected activities or when the Legislature sets a net large enough to catch all possible offenders and leaves it to the courts to step inside and determine who is being lawfully detained and who should be set free.

Coates v. Cincinnati, 402 US 61, 91 S. Ct. 1686, 29 L. Ed. 2nd 214 (1971); Schultz v. State, 361 So.2nd 416, at 418 (Fla. 1978); Wershow, Supra.

The Third District Court of Appeal, in noting that Section 816.63 prohibits the mere possession of embossing machinery observed that the "...statute does not denote a particular type of embossing machine, and thus includes in its prohibition machinery that is possessed and used for lawful purposes." Saiez, Supra at 929. The District Court held the statute to be unconstitutionally vague in that it "... fails to set forth a standard by which the possessor of the machinery may know what acts are

proscribed ..." Saiez, Supra at 929. It further held the statute to be unconstitutionally overbroad in that "... it's prohibition against simple possession of an embossing machine criminalizes legally protected activities as well as illegal unprotected activities." Saiez Supra at 929.

In its Brief of Petitioner on the Merits, the State suggests that the only machines covered by Florida Statute 817.63 are those that have had a "counterfeit plate" placed in them and would therefore produce a "counterfeit impression." However, by definition, an embosser does not contain any "plate" at all, counterfeit or otherwise. An embossing machine operates in a manner similar to a typewriter, with the only exception being that the numbers it "types" onto the plastic cards are raised numbers. Furthermore, a careful reading of Section 817.63 shows that the statute applies to all machines "designed to produce" unauthorized credit cards. In Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 US 489, 102 S. Ct. at 1195, (1982), the "designed for use" language as used in that statute was held by the United States Supreme Court to refer to the "design" of the manufacturer as shown in the physical appearance or attributes of the item itself (emphasis added). A "designed for use" statute such as Florida Statute 817.63 covers all items that have the physical attributes and functional capabilities that are described in the statute. The machines allegedly possessed by the Defendant were identical to the machines sold by

any dealer in design, in physical appearance, in physical attributes, in functional capabilities and in every other respect. The machines allegedly possessed by the Defendant were the same machines sold in the stores without restriction and the same machines that must be used by any business man who has a need for an embossing machine (ex.: Visa cards, hospital identification cards, membership cards, discount cards, etc.) Florida Statute 817.63 applies equally and without qualification to each of these embossing machines.

The 1985 Florida Legislature repealed Section 817.63 Florida Statutes and replaced it with Section 817.631 Florida Statutes (1985), which became effective October 1, 1985. That Statute provides:

Possession and transfer of credit-card-making equipment-- A person who receives, possess, transfers, buys, sell, controls, or has custody of any credit-card-making equipment with intent that such equipment be used in the production of counterfeit credit cards, violates this section and is subject to the penalties set forth in s. 817.67 (2).
(emphasis added)

By changing the statute from a "designed" statute to an "intent" statute, the legislature indicated it's desire to change the category of machines to be covered by the statute. The rule of statutory construction is that "when a statute is amended, it is presumed that the Legislature intend it to have a meaning dif-

ferent from that accorded to it before the ammendment." Arnold v. Shumpert, 217 So.2nd 116 (Fla. 1968); Reino v. State, 352 So.2nd 853 (Fla. 1977). The meaning of the new statute (Section 817.631) is to prohibit the possession of only those machines which are intended to be used in the production of counterfeit credit cards. This contrasts with the meaning of the old statute (Section 817.63) which is to prohibit the possession of all machines that have a given functional capability (i.e. the ability to emboss numbers onto a credit card). By changing the statute, the Legislature indicated that it was aware of the meaning of the old statute, and wished to change that meaning as expressed in the new statute. Arnold v. Shumpert, Supra; Reino v. State, Supra; Kelly v. Retail Liquor Dealers, Association of Dade County 126 So.2nd 299 (Fla. 3rd DCA 1961).¹

Florida Statute 817.63 is unconstitutionally vague and overbroad and sets too large a net that covers all embossing machines without exception. An analogous statute would be one that prohibits the possession of any pen that was designed to produce a check without the consent of the issuer (i.e. a forged check).

¹ By its recent filing of its Notice of Supplemental Authority containing Lowry v. Parole and Probation Commission, _____ So.2nd _____ (Fla. 1985) (Case No. 66,773; Opinion filed June 13, 1985) (10 FLW 314), the State seems to be suggesting that

Section 817.613 was enacted by the 1985 Florida Legislature for the purpose of clarifying Section 817.63. When this is the case however, the Legislature will so indicate clearly either in the body of the statute as it did in Lowry, or in the preamble to the law which contains the legislative intent. See State v. Lanier 464. So.2nd 1192 (Fla. 1985). There is no such unequivocal statement from the Legislature in Section 817.631.

CONCLUSION

BASED upon the foregoing authorities and reasons, the Respondent respectfully requests this Court to affirm the order of dismissal of the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 29th day of August, 1985, to: Office of the Attorney General, 401 N.w. 2nd Avenue, Suite 820, Miami, Florida, 33128.

By *Steven H. Haguel*
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