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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67249

FILED
SID J. WHITE
AUG 19 1985
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

SALVADORE SAIEZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner was the prosecution at the trial court level and the appellant on appeal. Respondent was the defendant at the trial level and the appellee in the Third District Court of Appeal. Parties will be referred to in this brief interchangeably as Petitioner/Defendant and Respondent/State. The letter "A" will be used to designate the appendix.

STATEMENT OF THE CASE AND FACTS

On February 24, 1984, Salvadore Saiez, was charged by information in counts one (1) through three (3) with violation of Florida Statute 817.63. Counts one (1) and three (3) charged unlawful possession of embossing machines. Count two (2) charged possession of incomplete credit cards and is not a subject of this appeal.

On June 25, 1984, the defendant filed a Motion to Dismiss counts one (1) and three (3) of the information, alleging that the statute under which he was charged was unconstitutional.

On June 29, 1984, the Honorable Arthur Snyder declared the statute unconstitutional and dismissed counts one (1) and three (3) of the information.

On July 17, 1984, the State of Florida, filed a timely Notice of Appeal from the trial court's order granting the defendant's Motion to Dismiss.

On May 18, 1985, the Third District Court of Appeal affirmed the trial court's order and held the statute unconstitutionally vague and overbroad.

This brief on the merits follows.

POINT ON APPEAL

WHETHER SECTION 817.63, FLORIDA
STATUTES (1983) IS NOT UNCONSTITU-
TIONALLY VAGUE AND OVERBROAD.

SUMMARY OF THE ARGUMENT

The Petitioner urges this Court to reverse the Third District Court of Appeal's finding of a portion of Section 817.63, Florida Statutes (1983) unconstitutionally vague and overbroad.

The statute warns the public what conduct is prohibited and would not include simple embossing machines because they are not designated to produce and counterfeit credit card.

ARGUMENT

SECTION 817.63, FLORIDA STATUTES
(1983) IS NOT UNCONSTITUTIONALLY
VAGUE AND OVERBROAD.

The Third District Court of Appeal in State v. Saiez,
___So.2d___ (Fla. 3d DCA 1985) (Case No. 84-1619; Opinion
filed May 28, 1985)[10 FLW 1328] affirmed the trial court's
holding which found a portion of Section 817.63 Florida
Statutes (1983) unconstitutional. (A.1). It provides:

[A] person possessing with knowl-
edge of its character any machin-
ery, plates or any other contri-
vance designed to reproduce instru-
ments purporting to be the credit
cards of an issuer who has not con-
sented to the preparation of such
credit cards, violates this subsec-
tion and is subject to the penal-
ties set forth in §817.67(2).

The court held the above-mentioned part of the statute vague
and overbroad. The statute was noted as "not amenable to a
saving construction unless the court were to virtually
rewrite it." State v. Wershow, 343 So.2d 605 (Fla. 1977).

The State submits now, as it did below, that the
statute is not vague. A statute is unconstitutionally vague
when men of common understanding and intelligence must
necessarily guess at its meaning. Zachary v. State, 269

So.2d 669 (Fla. 1972). There is no question that the aforementioned statute warns a public of common understanding and intelligence that possessing machinery designed to produce credit cards without the consent of the issuer is unlawful.

The Third District further found that one in possession of a simple embossing machine would be found in violation of the statute. The State would submit that the language "designed to reproduce" eliminates any overbreadth problem. The term designed has been defined as "fit, adapted, prepared, suitable, appropriate." Thomas v. State, 244 P. 816 (Criminal Ct. of Appeals of Oklahoma 1926); Bruce v. Sibeck, 78 P.2d 741 (Cal. 3d DCA 1938):

The word "design" means to devise or propose for a specific function; to create, plan or calculate for serving a predetermined end; to plan or produce with special intentional adaptation to a specific end.

Liberty Mut. Ins. Co. v. Allied Mut. Ins. Co., 442 F.2d 1151 (10th Cir. 1971).

Accordingly, once a counterfeit plate is placed in the machine, it would be "designed to reproduce" that counterfeit impression. Thus, a legitimate businessman would not fall under this statute because the plate placed in the machine would not be counterfeit.

For the foregoing reasons, the State would urge this court to reverse the holding of the Third District, and find the statute constitutional.¹

¹The State is not unmindful that the instant statute was repealed by the legislature in the 1985 session. It has been replaced by Section 817.631 Florida Statutes (1985), effective October 1, 1985. That statute provides:

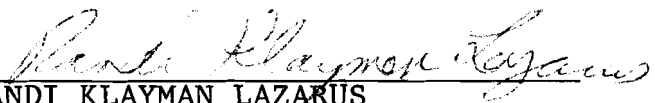
Possession and transfer of credit-card-making equipment.--A person who receives, possesses, transfers, buys, sells, controls, or has custody of any credit-card-making equipment with intent that such equipment be used in the production of counterfeit credit cards, violates this section and is subject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

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the order of the Third District Court of Appeal finding Section 817.63 Florida Statute (1983) unconstitutional should be reversed.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to STEVEN HAGUEL, ESQ., 1395 Coral Way, Miami, Florida 33145, on this 9th day of August, 1984.


RANDI KLAYMAN LAZARUS
Assistant Attorney General

/vbm