IN THE SUPREME COURT OF FLORIDA

JENNIFER JOHNSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee,

_____/

CASE NO.

(Fla. 5th DCA Case No. 89-1765)

DISCRETIONARY REVIEW OF A DECISION
OF THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

INITIAL BRIEF OF AMICUS CURIAE, A GROUP OF FLORIDA LEGISLATORS, ON BEHALF OF APPELLANT

CHARLENE MILLER CARRES
Fla. Bar #244953
Attorney for Amicus,
A Group of Florida Legislators
P.O. Box 1031
Tallahassee, Florida 32302
(904)224-2007

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INTEREST OF THE AMICUS

Amicus, a Group of Florida Legislators, wish to have the opportunity to clarify for the Court its intent concerning legislation it has passed dealing with the issue of application of Florida laws to women who give birth to drug exposed infants. The following legislators are parties to this brief and have authorized undersigned counsel to represent them in this cause:

Michael Abrams, Representative District 101

Jack Ascherl, Representative District 30

James Burke, Representative District 107

John F. Cosgrove, Representative District 119

Lois J. Frankel, Representative District 83

Michael Friedman, Representative District 103

Susan Guber, Representative District 117

James T. Hargrett, Representative District 63

Mary Ellen Hawkins, Representative District 75

Fred Lippman, Representative District 97

Anne Mackenzie, Representative District 95

Steve Press, Representative District 86

W. C. Young, Representative District 99

Undersigned counsel contacted each member of the Legislature who voted affirmatively on the floor of the House and Senate on HB 155 and still serves in the Legislature. (The vote was unanimous in both houses.) The members listed here responded with written authorization. While many members did not respond, undersigned counsel received only one objection by a member contacted.

STATEMENT OF THE CASE AND FACTS

Amicus, a Group of Florida Legislators, adopts the Statement of the Case and Fact as contained in the Initial Brief of Appellant, Jennifer Johnson.

SUMMARY OF THE ARGUMENT

Amicus, a Group of Florida Legislators, contends that the Legislature's passage in 1987 of an amendment to the child abuse and neglect laws evidenced a clear intention not to criminalize giving birth to a drug exposed infant. The Legislature clearly prohibited the criminal investigation of a parent who had given birth to a child who was drug dependent and exempted the Department of Health and Rehabilitative Services from reporting such situations to law enforcement. The choice was to deal with this problem through the social services system and not to risk jeopardizing the privacy rights of Florida's women by subjecting them to criminal prosecution for acts engaged in during pregnancy but prior to completing delivery of their children.

ARGUMENT

I. INTRODUCTION

In 1987, the Florida Legislature considered two bills dealing with the issue of whether mothers could be prosecuted when their infants are born drug exposed. The legislative history of those bills clearly establishes that such prosecutions are contrary to legislative intent and are not permitted under Florida law. In fact, not only did legislators recognize that no statute in Florida, including the drug delivery statute, imposes criminal penalties for such births, they passed legislation specifically proscribing criminal prosecutions of women solely on the basis of their newborns' drug exposure.

The legislature has made a clear statement that giving birth to a drug exposed infant is not a crime but rather a public health and social problem to be addressed by social service agencies. It is not the province of the executive or judicial branch to usurp the legislative function by creating new crimes which were never intended by the legislature.

II. LEGISLATIVE HISTORY

A. Bill #1

Representative Fred Lippman prefiled House Bill 155 on February 2, 1987; its companion, Senate Bill 323 was filed on

March 4 by Senator Peter Weinstein. Fla. Legis., History of Legislation, 1987 Regular Session, History of House Bills at 42, HB 155; Fla. Legis., History of Legislation, 1987 Regular Session, History of Senate Bills at 84, SB 323. As originally worded, House Bill 155 granted the Department of Health and Rehabilitative Services (hereinafter "HRS") jurisdiction over drug dependent newborns by expanding the definition of "child abuse or neglect" to include drug exposure of newborn infants as a result of their mother's addiction. Fla HB 155 (1987) (An exception is provided if the drugs were administered pursuant to a detoxification program or any other medically approved treatment modality. Ch. 87-90, 1987 Fla. Laws 333). House Bill 155 was initially sent to the House Committee on Health and Rehabilitative Services; Subcommittee on Social, Economic and Developmental Services, History of House Bills at 42, where the bill was substantially modified.

House Bill 155 was seriously debated in subcommittee because as the bill was originally drafted HRS would have been required to report any finding of "abuse or neglect", under the relevant statutes, to the state attorney and appropriate law enforcement agency which would initiate a criminal investigation. Sect. 415.505, Fla. Stat. (1987). The possibility that the mothers might be subject to criminal charges concerned and alarmed many legislators. In response, the bill was amended in subcommittee to provide "that no parent of [a drug dependent] newborn infant

shall be subject to criminal investigation solely on the basis of such infant's drug dependency." Ch. 87-90 Fla. Laws 333 (amending Sect. 415.503(7)(a), Fla. Stat. (1985)). Thus amended, the Committee Substitute for House Bill 155 was passed through full committee, and adopted unanimously by the House and Senate. Fla. H.R. Jour. 581 (Reg. Sess. May 26, 1987).[1]

B. Bill #2 - House Bill 536

House Bill 536 was prefiled on March 16, 1987, by Representative Garcia and referred directly to the full House Committee on Health and Rehabilitative Services. History of House Bills at 142-143, HB 536. The adoption of House Bill 536 would have allowed prosecutors to charge the mothers of drug dependent newborn with aggravated child abuse. Fla. HB 536 (1987). The bill would have permitted such prosecutions by amending the definition of aggravated child abuse in Sections 827.01-.03 of the Florida Statutes (1987). The bill died in full committee without debate reflecting the legislature's rejection of any sort of prosecution. History of House Bills at 142-143, HB 536.

III. DISCUSSION AND ANALYSIS-Legislative Intent

Before either Bill had been filed, Representative Lippman requested the Florida Attorney General's opinion as to whether

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[1] The Committee Substitute for Senate Bill 323 was tabled. Id.

HRS had jurisdiction over drug-dependent newborns. In an informal opinion issued to Representative Lippman dated December 18, 1986, the Attorney General, after surveying a number of precedents, concluded that HRS did not have such jurisdiction. Informal AGO Opinion. Furthermore, the Attorney General stated that giving birth to children with drugs in their systems was not a crime nor even a tort under Florida law. Id. Significantly, the Attorney General framed the issue as one involving injury to a "fetus" and not a "child." The opinion cites many diverse cases showing that fetuses, even fetuses in the process of being born, are not "persons," "children," or "minors" in Florida. Id., e.g., Criminal: State v. McCall, 458 So. 2d 875 (Fla. 2d DCA 1984) (the term "human being" does not include a viable, full-term fetus in the process of being born); Civil: Stern v. Miller, 348 So. 2d 303 (Fla. 1977) (wrongful death); Duncan v. Flynn, 358 So. 2d 178 (Fla. 1978) (under wrongful Death Act, a child is not "born alive" until he or she acquires an existence separate from the mother). Therefore, the legislators proceeded under the assumption that the birth of a drug dependent child is not a crime under Florida law, statutory or common. With the Attorney General's definitive opinion as its context, House Bill 155 was filed.

In addition to the Attorney General's persuasive opinion, the subcommittee had the benefit of its own staff's analysis to rely upon in assessing House Bill 155. Fla. H.R. Comm. on HRS,

HB 155 (1987) Staff Analysis (Apr. 7, 1987). Significantly, a staff analysis of House Bill 536 was attached, even though House Bill 536 was never formally referred to the subcommittee, suggesting that the two bills were being considered simultaneously. Id. It is evident from reading both staff analyses, particularly the discussion of House Bill 536, that the staff did not believe the delivery of a drug exposed infant to violate any existing law. Id. The staff also voiced concerns that the passage of either bill unamended would likely infringe upon the mother's constitutional right to privacy, as well as violate the right to equal protection:

> The legislation raises some concern regarding equal protection and mother's privacy. As written the legislation provides a likelihood that a parent could be criminally prosecuted under chapter 891 by virtue of a child being born drug dependent. This might lead to the potential, probably unintended, criminal prosecution of the parent in cases where services could be provided for the protection of the child and stabilization and preservation of the family.

Fla. H.R. Comm. on HRS, HB 155 (1987) Staff Analysis, 1 (Apr. 7, 1987).

It was in the context of these concerns for the mother's rights that the subcommittee significantly amended House Bill 155, specifically providing "that no parent of [a drug dependent] newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency." Ch. 87-90, 1987 Fla. Laws 333 (amending Sect. 415.503(7)(a) Fla. Stat. (1985)). The legislators could only have passed this amendment to ensure

that they were not creating a new crime by unintentionally enlarging HRS's jurisdiction to encompass reporting drug dependent newborns to law enforcement agencies. The tabling of House Bill 536, which would have required charging these mothers with the crime of aggravated child abuse, supports this explanation.

Throughout the debate of House Bill 155, the legislators were concerned with preserving the family unit as well as getting treatment for addicted mothers. Fla. H.R., Comm. on HRS, Subcomm. on Social, Eco. & Dev. Sers., tape recording of proceedings (Apr. 15, 1987, on file with committee) [hereinafter "Subcomm. Tape"]. This concern was valid if House bill 155 was to coexist harmoniously with the Juvenile Justice Act [hereinafter the "Act"], the purpose of which was to assure that abused or neglected children receive, preferably at home, the care, guidance, and control that will best promote their welfare. Sect. 39.001-.415 at .001(2)(b), Fla. Stat. (1985 and 1987). The Act continues to seek to preserve and strengthen family ties whenever possible. Id. Indeed, a child is not to be removed from parental custody unless that is the only way to safeguard the child's welfare. Id. at 39.001(2)(c). See also Sect. 39.001(2)(e), Fla. Stat. (1990 Supp.) and the statutory scheme of protective services provided by Sect. 415.502-.514, Fla. Stat. (1989). As one prominent Florida state attorney has suggested,

> The permanent loss of custody of a child is a far more severe remedy than any other available in dependency proceedings and, indeed, it is one of the most severe

> decisions courts can make. Since it is such an extreme remedy, courts will usually first attempt other remedies including treatment, counseling, protective supervision and foster care. They will use performance agreements to attempt to push the parents or custodian into providing a proper setting for the child. When all else fails, and the prospect for abuse and neglect continues, the court must consider permanent commitment proceedings.

Reno & Smart, Dealing with Child Abuse and Neglect: A Prosecutor's Viewpoint, 8 Nova L.J. 271, 291 (1984). In fact, the legislators were clear in their debate of House Bill 155 that criminal prosecution would violate the spirit of Florida's comprehensive child protection laws by prematurely destroying the family unit before less drastic means, such as drug treatment, were tried. Subcomm. Tape. Undeniably, had the legislature wanted to criminalize the birth of a drug dependent child, it could have passed House Bill 536 or a similar bill. As Representative Lippman explained in subcommittee, "There was a well-founded anxiety that we were looking to arrest moms. We are not looking to do that," but "to intervene . . .[to] try to bring the family back together." Subcomm. Tape.

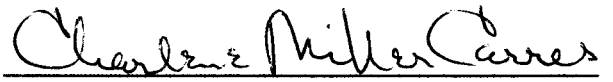
IV. CONCLUSION

While new and exotic theories of criminal misconduct are easily manufactured, it remains undeniable that Florida's legislature does not consider the transfer of drugs to an infant from the mother via the umbilical cord to be a criminal act. The passage of legislation in 1987 proscribing prosecutions of these

newborns' mothers, along with the failure of legislation which would have explicitly charged these same women with an existing crime, emphatically affirms the legislature's intent that these unfortunate mothers not be prosecuted.

Wherefore, Amicus respectfully requests this Honorable Court to reverse the decision below.

Respectfully submitted,



CHARLENE MILLER CARRES, ESQUIRE
Fla. Bar #244953
Attorney for Amicus, A Group of
Florida Legislators
P.O. Box 1031
Tallahassee, Florida 32302
(904)224-2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. mail to Belle B. Turner, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114; Jeffery D. Deen, Assistant State Attorney, 100 E. First Street, Sanford, Florida 32771; Jim Sweeting, III, 2111 E. Michigan Avenue, Orlando, Florida 32806; James Green, One Clearlake Centre, 250 Australian Avenue South, West Palm Beach, Florida 33401; and Lynn M. Paltrow, 132 West 43rd Street, New York, New York 10036, this 3rd day of July, 1991.

Charlene Miller Carres

CHARLENE MILLER CARRES

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July 3, 1991 3:55pm