047

IN THE SUPREME COURT OF

CLERK, SUPREME COURT
By
Chief Deputy Clerk

OLIVER HOLLIDAY,)
Petitioner,)
vs.) CASE NO. 78,170
STATE OF FLORIDA,)
Respondent.)

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) ON BEHALF OF PETITIONER

JAMES T. MILLER, ESQUIRE, ON
BEHALF OF FLORIDA ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
407 Duval County Courthouse
Jacksonville, Florida 32202
(904) 630-1548

ATTORNEY FOR AMICUS CURIAE
FACDL, ON BEHALF OF PETITIONER

FLORIDA BAR NO. 0293679

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i,ii
TABLE OF CITATIONS	iii,iv,v,vi
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF ARGUMENT	4
ARGUMENTS	
ISSUE I. Section 24-43, City of Tampa Code, LOITERING FOR THE PURPOSE OF USING/-SELLING DRUGS, IS OVERBROAD BECAUSE IT CAN PROHIBIT FIRST AMENDMENT ACTIVITIES, IS VAGUE AND PERMITS ARBITRARY AND CAPRICIOUS LAW ENFORCEMENT.	7
A. The overbreadth issue presented in this cause.	7
1. Section 24-43 can prohibit the exercise of First Amendment rights: free speech, association, movement and assembly.	10
2. The decisions in Northern Virginia Chapter, ACLU v. City of Alexandria, 747 F. Supp. 324 (E.D. Va. 1990) and Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980).	13
3. The overbreadth of 24-43 is real and substantial.	16
4. The Second District Court of Appeal gave no limiting construction to Section 24-43.	17

TABLE OF CONTENTS (CONT.): PAGE NO.

B. Section 24-43 permits arbitrary and capricious law enforcement because its provisions force the police to provide an ad hoc definition of what conduct constitutes loitering for the purpose of using/selling drugs and it therefore chills and deters the exercise of First Amendment rights because 24-43 is vague. 20

1. 24-43 permits arbitrary and capricious law enforcement. 24

2. Section 24-43 chills and deters the exercise of First Amendment rights. 26

ISSUE II. SECTION 24-43 IMPROPERLY ALLOWS FINDERS OF FACT AND THE POLICE TO CONSIDER A PERSON'S PREVIOUS CONVICTIONS AND ACTIVITY AS A DRUG USER/SELLER. 29

ISSUE III. SECTION 24-43 CONTRADICTS THIS COURT'S RULING THAT LOITERING LAWS ARE PERMISSIBLE ONLY IF THEY CRIMINALIZE LOITERING UNDER CIRCUMSTANCES WHICH GIVE RISE TO A JUSTIFIABLE BELIEF THAT THE PUBLIC SAFETY IS THREATENED. 33

CONCLUSION 35

CERTIFICATE OF SERVICE 35

TABLE OF CITATIONS

CASES CITED: PAGE NO.

Aladdin's Castle, Inc. v. Mesquite
630 F.2d 1029 (5th Cir.)
modified, 455 U.S. 283, 102 S.Ct. 1020,
71 L.Ed.2d 152 (1982) 12

B.A.A. v. State
356 So.2d 304 (Fla. 1978) 5,34

Barnes v. United States
412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973) 31

Bastien v. State
522 So.2d 550 (Fla. 5th DCA 1988) 26

Broadrick v. Oklahoma
413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) 9,16,27

Brown v. Municipality of Anchorage
584 P.2d 35 (Alaska 1978) 6,16

Brown v. State
358 So.2d 20 (Fla. 1978) 19

Bykofsky v. Borough of Middletown
401 F.Supp. 1242, (M.D. 1975)
aff'd without opinion, 535 F.2d 1245 (3d Cir.)
cert. denied, 429 U.S. 964, 97 S.Ct. 394,
50 L.Ed.2d 333 (1976) 15

Carroll v. State
361 So.2d 144 (Fla. 1978) 31

Christain v. City of Kansas City
710 S.W. 2d 11 (Mo. App. 1986) 5,15,16

City of Detroit v. Bowden
149 N.W.2d 771 (Mich. Ct. App. 1967) 32

Coates v. City of Cincinnati
402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) 15

Coleman v. City of Richmond
364 S.E.2d 239 (Va. Ct. App. 1988)
on rehearing, 368 S.E.2d 298 5,15,16
18,22,23

TABLE OF CITATIONS continued:

CASES CITED:	PAGE NO.
Craig v. Boren 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)	31
E.B. v. State 537 So.2d 148 (Fla. 2d DCA 1989)	26
Erznoznik v. City of Jacksonville 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1974)	9
Farber v. Rochford 407 F.Supp. 529 (N.D. Ill. 1975)	19
Gammon v. Cobb 335 So.2d 261 (FLa. 1976)	31
Gipson v. State 537 So.2d 1080 (Fla. 1st DCA 1989)	26
Gooding v. Wilson 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972)	17,22
Grand Faloon Tavern, Inc., v. Wicker 670 F.2d 943 (11th Cir. 1982) cert. den., 459 U.S. 859, 103 S.Ct. 132	9
Grayned v. City of Rockford 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)	9,23,24 25
Holliday v. City of Tampa 16 FLW D1408 (Fla. 2d DCA, 5/24/91)	2
In Re E.L. Circuit Court, Seminole Circuit Court, Case NO. 89-1876 CJA, Wood, J.	15
In Re Griffiths 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 910 (1973)	30
Jenkins v. State 524 So.2d 1108 (Fla. 3d DCA 1988)	26
Johnson v. Carson 569 F.Supp. 974 (M.D. Fla. 1983)	5,16,17 19,20,25

CASES CITED (cont): PAGE NO.

Case	Page No.
Kolender v. Lawson 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)	9,25
Lanzetta v. New Jersey 306 U.S. 451, 59 S.Ct. 618 (1939)	29
Leary v. United States 395 U.S. 6, 89 S.Ct. 1532 (1968)	31,32
Levy v. Louisiana 391 U.S. 68, 88 S.Ct. 1509 (1968)	30
Mosley v. State 519 So.2d 58 (Fla. 2d DCA 1988)	26
Northern Virginia Chapter, ACLU v. City of Alexandria 747 F.Supp. 324 (E.D. Va. 1990)	5,13,14 16,17,22 27
Papachristou v. City of Jacksonville 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)	12,19,21 29
People v. Gibson 521 P.2d 774 (Colo. 1974)	6,16
Profit v. City of Tulsa 617 P.2d 250 (Ok. Cr. App. 1980)	5,6,16
Ricks v. District of Columbia 414 F.2d 1097 (D.C. Cir. 1968)	25
Robinson v. California 370 U.S. 661, 82 S.Ct. 1417 (1962)	29
Ruddack v. State 537 So.2d 701 (Fla. 4th DCA 1989)	26
Sawyer v. Sandstrom 615 F.2d 311 (5th Cir. 1980)	5/13/14 15,16,17 19
Shelton v. Tucker 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)	9,19
Shuttlesworth v. City of Birmingham 394 U.S. 147, 89 S.Ct. 935 (1969)	25

CASES CITED (cont):	PAGE NO.
State v. Callaway Circuit Court, Brevard County Case No. 89-4717 CF-A, Antoon, J.	15
State v. Delaney 517 So.2d 696 (Fla. 2d DCA 1987)	27
State v. Ecker 311 So.2d 104 (Fla. 1975) cert. den., 423 U.S. 1019, 96 S.Ct. 455	5,33,34
Terry V. Ohio 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	25
Turner v. United States 396 U.S. 398, 90 S.Ct. 642 (1970)	31
V.E. v. State 539 So.2d 1170 (Fla. 3d DCA 1989)	25,26
Wyche v. State Case No. 77,440 573 So.2d 953 (Fla. 2d DCA 1991)	1,2,3,15
Yick Wo v. Hopkins 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)	31

OTHER AUTHORITIES:	
Chapter 24, Article II, Section 43, City of Tampa Code	7
Section 24-43, City of Tampa Code	4,7,9,10 11,12,13,14 16,17,18,19 20,21,22,23 24,25,26,27 29,30,31,32 33,34,35
Section 856.021, Florida Statutes	33,34
Section 893.02, Florida Statutes (1988)	1,7

PRELIMINARY STATEMENT

On July 26, **1991,** this Court granted permission to the Florida Association of Criminal Defense Lawyers (FACDL) to file an Amicus Curiae Brief on behalf of Petitioner.

FACDL is a not for profit Florida corporation formed to assist in the reasoned development of the criminal justice system. Its statewide membership includes lawyers who are daily engaged in the defense of individuals accused of criminal activity. The founding purposes of FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, **and** furthering the education of the criminal defense community through meetings, forums, and seminars. FACDL members serve in positions which bring them into daily contact with the criminal justice system.

The Tampa ordinance in question (hereafter Section 24-43) attempts to prohibit loitering for an illegal purpose: using, possessing, transferring or selling any controlled substance, **as** defined in Section **893.02,** Florida Statutes. This Court is presently reviewing the constitutionality of the Tampa loitering for the purpose of prostitution ordinance. **See** Wyche v. State, **Case** No. 77,440. FACDL also filed an Amicus Curiae brief in that case. In the decision in this cause by the Second District Court of Appeal, it acknowledged that it based its decision on Wyche v. **State, 573 So.2d 953 (Fla.** 2d DCA **1991).** The

Second District also noted that the only difference between the two ordinances was the underlying criminal conduct. See Appendix I Holliday v. City of Tampa 16 FLW D1408 (Fla. 2d DCA 5-24-91). The constitutional issues in the instant case and Wyche v. State, supra are virtually identical. Therefore, this Court should consider the briefs and arguments in Wyche v. State when it reviews this cause.

STATEMENT OF THE CASE AND FACTS

FACDL adopts the statement of the case and facts in Petitioner's initial brief on the merits. FACDL notes that this Court in Wyche v. State, Case No. 77,440 has accepted jurisdiction to review the constitutionality of Tampa's Loitering for the Purpose of Prostitution ordinance. FACDL filed an Amicus Curiae Brief in Wyche v. State. The constitutional arguments in Wyche and this case are substantially identical.

SUMMARY OF ARGUMENT

The Tampa loitering for the purpose of drug activity ordinance (Section **24-43)** is overbroad, vague and it permits arbitrary and capricious law enforcement. The essential problem with the ordinance is that it attempts to prohibit otherwise legal activities done with an illegal intent. The ordinance prohibits loitering, but **mere** loitering is a protected First Amendment activity. The ordinance includes several circumstances which *may* be considered to establish proof of illegal intent. (For example, talking to passersby or passing out written material). However, these circumstances are all protected First Amendment activities. The ordinance does not require actual proof of drug activity. The compelling question which arises from **a** consideration of **24.43,** is how does one tell, without a requirement of actual drug activity, that loitering is innocent conduct or illegal drug activity. The police and trier of fact will always have to guess at whether such conduct was for a legal or illegal purpose. The need for such subjective **ad** hoc judgments by the police and courts make 24-43 overbroad, vague and ensure that it will permit arbitrary and capricious law enforcement.

Section 24-43 chills and deters the exercise of legitimate First Amendment rights. The ordinance permits a consideration of the fact that a person is in an area of known drug activity. Therefore, an innocent person may forego First Amendment activities in such an area in order to avoid contact with the police. Given the extent of drug use in our society

today, what area of a given city or county is not a known drug area? The Tampa ordinance also contains a known drug user/seller provision. This Section violates **Due** Process because it punishes individuals for their status, not necessarily their conduct. Section **24-43** also conflicts with this Court's decisions on the validity of loitering laws because it does not require proof of a threat to public or personal safety or conduct done in a manner not usual for law-abiding citizens. See State v. **Ecker**, **311** So.2d **104** (Fla. **1975)**, **cert.** den., **423** U.S. **1019**, **96** S.Ct. **455;** B.A.A. **v.** State, 356 **So.2d** 304 (Fla. **1978).** These requirements help guarantee that innocent First Amendment activities will not be mistaken for illegal conduct.

There is simply no need for **a** loitering for the purpose of drug activity ordinance if the First Amendment is to be protected. The only way to avoid the possible punishment of legal activity is to require actual proof of illegal activity. However, such proof would make a loitering for the purpose of drug activity law superfluous. Two federal courts have found such loitering laws to be overbroad. **See** Northern Virginia Chapter, **ACLU** v. **City** of Alexandria, **747** F.Supp. 324 (E.D. Va. 1990); Sawyer v. Sandstrom, 615 F.2d **311** (5th Cir. **1980).** Other state and federal courts have found similar loitering for the purpose of prostitution ordinances to be unconstitutionally overbroad. **See** Coleman v. City of Richmond, 364 S.E.2d 239 (Va. Ct. App. **1988) on** rehearing, **368 S.E.2d 298;** Christain v. City of Kansas City, 710 **S.W.2d 11 (Mo. App. 1986);** Johnson **v.** Carson, **569** F.Supp. **974** **(M.D.** Fla. **1983);** Profit v. **City** of Tulsa, 617 P.2d **250** (Ok. Cr.

App. 1980); Brown v. Municipality of Anchorage, 584 P.2d 35 (Alaska 1978); People v. Gibson, 521 P.2d 774 (Colo. 1974).

ARGUMENT

ISSUE I

Section 24-43, City of Tampa Code, LOITERING FOR THE PURPOSE OF USING/-SELLING DRUGS, IS OVERBROAD BECAUSE IT CAN PROHIBIT FIRST AMENDMENT ACTIVITIES, IS VAGUE AND PERMITS ARBITRARY AND CAPRICIOUS LAW ENFORCEMENT.

A. The overbreadth issue presented by this cause.

Chapter 24, Article II, Section 43, City of Tampa Code, states:

> (a) It shall be unlawful for any person to loiter in a public place in a manner and under circumstances manifesting the purposes of illegally using, possessing, transferring or selling any controlled substance as that term is defined in Section 893.02, Florida Statutes (1988), as now enacted or hereafter amended or transferred. Among the circumstances which may be considered in determining whether such a purpose is manifested are:
>
> (1) The person is a known illegal user, possessor or seller of controlled substances, or the person is at a location frequented by persons who illegally use, possess, transfer or sell controlled substances; and
>
> (2) the person repeatedly beckons to, stops, attempts to stop or engage in conversations with passers-by, whether such passers-by are on foot or in a motor vehicle, for the purpose of inducing, enticing, soliciting or procuring another to

illegally possess, transfer, or buy any controlled substances; or

(3) the person repeatedly passes to or receives from passers-by, whether such passers-by are on foot or in a motor vehicle, money, objects or written material for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer or buy any controlled substance.

(b) In order for there to be a violation of subsection (a), the person's affirmative language or conduct must be such as to demonstrate by its express or implied content or appearance a specific intent to induce, entice, solicit or procure another to illegally possess, transfer or buy a controlled substance.

(c) No arrest shall be made for a violation of subsection (a) unless the arresting officer first affords the person an opportunity to explain his conduct, and no one shall be convicted of violating Subsection (a) if it appears that the explanation given was true and disclosed a lawful purpose.

(d) For the purpose of this section, a known illegal user, possessor, or seller of controlled substances is a person who, within one (1) year previous to the date of arrest for violation of this section, has within the knowledge of the arresting officer been convicted of illegally manufacturing, using, possessing, selling, purchasing or delivering any controlled substance.

A law is overbroad if can prohibit constitutionally protected conduct as well as unprotected conduct; even if a law does reach prohibited conduct it may still be overbroad, if it

also infringes upon the unfettered exercise of First Amendment rights. Grand Faloon Tavern, Inc. v. Wicker 670 F.2d 943 (11th Cir. 1982), cert, den., 459 U.S. 859, 103 S.Ct. 132; Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Overbroad laws are unconstitutional because the First Amendment needs breathing space and statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn to prohibit only criminal conduct. Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231(1960).

The United States Supreme Court has held that a law will be held overbroad if a limiting constitution cannot be readily placed upon it and the overbreadth of the challenged provision is both real and substantial. See Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1974). Therefore, this Court must review Section 24-43 to determine: 1) If it can prohibit legal as well as illegal activities, 2) the overbreadth is both real and substantial; and 3) whether a limiting construction can be placed upon Section 24-43.

This case presents an important question to this Court: Whether a city can prevent individuals from exercising their guaranteed First Amendment rights on the streets and public places when certain conduct appears to police officers to be possibly for the purpose of using/selling drugs. Like most such similar laws, Section 24-43 will affect mostly the poor, minorities or individuals who are unfortunate enough to live in a "high drug

crime area". Section **24-43** is an **obvious** legislative "shortcut" to stop illegal drug seizures. Section **24-43** <u>does not</u> require actual proof of illegal drug activities. Although Tampa's attempt **to** stop drug activities is a permissible governmental interest, this Court must decide whether the method chosen by Tampa violates the First Amendment to the United States Constitution **and** Article I, Sections **4** and **9** of the Florida Constitution.

1. <u>Section **24-43** can prohibit the exercise of **First** Amendment rights: free speech, association, movement and assembly.</u>

Section **24-43** attempts to prevent individuals from loitering in such a manner which manifests the purpose of using, possessing, transferring or selling any controlled substance. Section **24-43** lists a series of circumstances which *may* be considered to determine if **a** citizen is loitering for the purpose of using/selling drugs. There is no requirement in Section **24-43** that these circumstances must be considered. These circumstances are ostensibly not elements of the crime, but merely **ways** of proving circumstantially a violation of **24-43** or providing probable cause for arrest. The only essential elements of **24-43** are - loitering in a public place in **a** manner **and** under circumstances manifesting the purpose of illegally using, possessing, transferring or selling any controlled substance.

The circumstances allegedly manifesting the purpose of using/selling drugs listed in **24-43** are: The person is a known illegal user, possess or seller of controlled substances **(a** person

who, within one year previous to the date of arrest for violation of this Section, has within the knowledge of the arresting officer been convicted of illegally manufacturing, using, possessing, selling, purchasing or delivering any controlled substance) or the person is at a location frequented by persons who illegally use, possess, or sell controlled substances. (2) the person repeatedly beckons to, stops, attempts to stop or engage in conversations with passers-by, whether such passers-by are on foot or in a motor vehicle, for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer, or buy any controlled substances or, (3) the person repeatedly passes to or receives from passers-by, whether such passers-by are on foot or in a motor vehicle, money, objects or written material for the purpose of inducing, enticing, soliciting, or procuring another to illegally possess, transfer or buy any controlled substance.

Section **24-43** also states that for there to be a violation of the Section, "the person's affirmative language or conduct must be such as to demonstrate by its express or implied content or appearance a specific intent to induce, entice, solicit or procure another to illegally possess, transfer or buy a controlled substance" (emphasis supplied). Subsection (C) of **24-43** states that "no arrest shall be made for a violation of substance unless the arresting officer first affords the person an opportunity to explain his conduct, and no one shall be convicted of violating subsection (c) if it appears that the explanation given was true and disclosed a lawful purpose."

Subsection (b) of 24-43 seems to require proof of specific intent; it appears to state that the person's affirmative language or conduct **(as** evidenced by the circumstances delineated in subsection a), or by other circumstances as demonstrated by its express or implied contact, must establish specific intent.

Section 24-43 unquestionably could prohibit protected First Amendment activities. First, there is no requirement in Section 24-43 that the circumstances listed in Subsection (a) must be considered. **A** consideration of these terms is completely discretionary; Section 24-43 is not limited to "known drug users". Any citizen engaging in the conduct listed in the ordinance could be arrested. This possibility is ensured by the ordinance because it permits a consideration of the fact that the citizen is at **a** location frequented by persons who use/sell drugs. It does not take **a** vivid imagination to realize that a person merely hanging out and talking to persons at a corner "known for drug activity" could be arrested under **24-43.**

A loitering for drug activity law affects protected First Amendment activities because it involves: **1)** Loitering, **2)** Beckoning or stopping passers-by to engage them in conversations, **3)** passing money, objects or written material to passers-by. All of these activities are protected by the First Amendment, absent additional proof of actual criminal activity. Mere loitering is constitutionally protected activity. **See** Aladdin's Castle, Inc. v. Mesquite, 630 F.2d **1029** (5th **Cir.),** modified, **455** U.S. **283,** 102 S.Ct. **1020,** 71 L.Ed.2d **152 (1982);** Papachristou **v.** City of Jacksonville, **405** U.S. 156, **92** S.Ct. 839, 31 L.Ed.2d **110** (1972).

Talking to passersby or exchanging objects with them, especially written material, are protected activities. **See** Northern Virginia Chapter, ACLU v. City of Alexandria, **747** F.Supp. **324** (**E.D.** Va. **1990)**; Sawyer v. Sandstrom, **615 F.2d 311** (5th Cir. **1980).**

The Tampa ordinance manifestly affects the exercise of First Amendment rights because it does not necessarily require actual proof of illegal drug activity. Section **24-43** explicitly permits the consideration of the implied content or appearance of conduct or language to prove loitering with an illegal purpose. The implied content of a person's conduct could be mistaken as loitering for the purpose of selling/using drugs. The actual content of such conduct could be merely talking to friends, passing out written lawful literature or repaying **a** friend a debt owed. The police or a trier of fact may mistakenly punish innocent conduct, due to its implied **content.** The implied content provision could easily be used against innocent persons who happen to live or be in an area of known drug activity.

2. **The** decisions in Northern Virginia Chapter, ACLU v. City of Alexandria, 747 F.Supp. 324 (E.D. Va. **1990)** and Sawyer v. Sandstrom, 615 **F.2d** 311 (5th **Cir. 1980).**

Two Federal Courts have reviewed loitering for the purpose of using/selling drugs or loitering where drugs are used ordinances which are similar to Section **24-43.** In Northern, Virginia Chapter, ACLU v. City of **Alexandria,** supra, **the** United States District Court reversed **a** law which **was** similar to **24-43.**

The Alexandria ordinance permitted the consideration of the following circumstances: persons in the same general location for fifteen minutes; the person, while in that place, had two or more face-to-face contacts with other individuals; each of such contacts were with one or more different individuals, lasted no more than two minutes and individual actions consisted with an exchange of money or other small objects or involved efforts to conceal an object appearing to be drugs. The Alexandria ordinance also had an "opportunity to explain" provision. The Alexandria ordinance also provided that a person could not be arrested unless each of the delineated circumstances manifesting intent were present.

The United States District Court held the Alexandria ordinance overbroad in spite of its requirement that the seven circumstances listed must be present. Section 24-43, Tampa code, does not require proof of the delineated circumstances; therefore, the Tampa ordinance is less specific than the Alexandria ordinance. The District Court expressly found that the Alexandria ordinance prohibited protected conduct:

> "A person may be prosecuted under the ordinance for engaging in such activity as speaking a public place for fifteen minutes, shaking hands, and exchanging small objects such as business cards or phone numbers on small pieces of paper." 747 F.Supp at 328.

The Fifth Circuit Court of Appeals in Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) invalidated a Dade County loitering law which prohibited loitering where drugs were used.

The 5th Circuit found that the Dade County ordinance was overbroad and improperly infringed upon the freedom of "association **and** the rights of locomotion, freedom of movement, to go where one places and to use the public streets in a way that does not interfere with the personal liberty of others" which are implicit in the First and Fourteenth Amendments. **615** F.2d at **316**; See also Coates v. City of Cincinnati, **402** U.S. **611, 91** S.Ct. **1686,** 29 L.Ed.2d **214** (1971); Bykofsky v. Borough of Middletown, **401 F.Supp. 1242, 1254,** (M.D 1975), aff'd without opinion, 535 F.2d **1245 (3d** Cir.), cert. denied, **429** U.S. **964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1976).** Two Florida Circuit Courts have declared loitering for **the** purpose of drug activity ordinances unconstitutional. As these decisions have not been reported, FACDL has included them in Appendix II. See In Re E.L., Circuit Court, Seminole Circuit Court, **Case** No. 89-1876 CJA, Wood, J.; State v. Calloway Circuit Court, Brevard County, Case No. **89-4717** CF-A, Antoon, **J.**

Other State and Federal Courts have held loitering **for** the purpose of prostitution ordinances overbroad. The Second District Court found that the loitering for the purpose of using/selling drugs ordinance in this cause was not significantly different than the loitering **for** the purpose of prostitution **ordinance on review before this Court in Wyche v. State.** Therefore, these cases are applicable to this cause. The following cases have found loitering for the purpose of prostitution ordinances unconstitutional. **See** Coleman v. City of Richmond, 364 S.E.2d 239 **(Va. Ct. App.** 1988), on rehearing, 368 S.E.2d 298; Christain v. City of Kansas City, **710 S.W.** 2d **11 (Mo.**

App. 1986); Johnson v. Carson, 569 F.Supp. 974 (M.D. Fla. 1983); Profit v. City of Tulsa, 617 P.2d 250 (Ok. Cr. App. 1980); Brown v. Municipality of Anchorage, 584 P.2d 35 (Alaska 1978); People v. Gibson, 521 P.2d 774 (Colo. 1974). The common thread of these cases is that a loitering fox the purpose of an illegal activity law is overbroad because it can prohibit lawful activity - the circumstances manifesting the illegal purpose can also manifest a legal purpose. The fact that the police must always guess at the purpose under such laws makes them intrinsically overbroad. If the police have actual proof of illegal activity, then a loitering law involving such illegal purpose is superfluous.

3. The overbreadth of 24-43 is real and substantial.

The United States Supreme Court in Broadrick v. Oklahoma, supra, held that a law is unconstitutional if the overbreadth is both real and substantial. The federal Courts in Sawyer v. Sandstrom, supra and Northern Virginia Chapter, ACLU v. City of Alexandria, supra specifically found that the overbreadth from loitering-drug laws was real and substantial. The courts in Coleman v. City of Richmond, supra and Johnson v. Carson, supra also found that the overbreadth from loitering for the purpose of prostitution ordinances was substantial and real. The undersigned counsel participated in the Johnson v. Carson case. He provided the District Court with proof of numerous arrests of innocent persons under the Jacksonville loitering for the purpose of prostitution ordinance. Consequently, in Johnson v. Carson court recounted

specific examples of illegal arrests due to the overbroad Jacksonville ordinance: arrests for mere hitchhiking, getting in a car with another person; waving at passing vehicles, See **569** Support 978.

Under Section 24-43 similar arrests for legal conduct could occur: engaging passersby in conversation, handing someone a note or exchanging an address or phone number; passing out business flyers or political literature. The United States District Court found such examples of overbroad application in Northern Virginia Chapter, ACLU v. City of Alexandria, supra. These examples of overbroad applications prove the overbreadth of loitering for prostitution - drug use laws because the conduct allegedly prohibited by such ordinances is not inherently illegal. Such conduct could equally be innocent well as illegal. Without actual proof of illegal activity, the police and trier of fact will always have to guess/speculate whether such conduct was for a legal or illegal purpose.

4. **The Second District Court of Appeal gave no limiting construction to Section 24-43.**

An appellate court can save an overbroad ordinance if it is possible to place a limiting construction upon the ordinance. Gooding v. Wilson, 405 U.S. 518, **92 S.Ct. 1103, 31 L.Ed.2d 408** (1972); Sawyer v. Sandstrom, **615** F.2d 311 (5th Cir. 1980). In this cause, the Second District Court of Appeal made no effort to place a limiting construction upon 24-43. Consequently, this

Court is free to consider the facial overbreadth of **24-43** because it is impossible to place a valid limiting construction upon **24-43.** FACDL submits there is simply no method to cure the overbreadth of a loitering for the purpose of using/selling drugs law, short of requiring actual proof of acts of drug use. However, if proof of actual acts of illegal drug use is necessary, there is no need for such loitering laws. In the context of a loitering for the purpose of prostituion law, the Virginia Court in Coleman v. City of Richmond, supra, considered this question and stated:

> "There are already in place statutes and ordinances prohibiting solicitation for prostitution as well as harassment, disorderly conduct and breaching the pleace. In this case and in virtually every case where the city could establish the intent element of the ordinance in question, it is likely the city could establish the elements of solicitation. To establish intent under the ordinance there must be an overt act which demonstrates the intent; that act will generally be sufficient to show solicitation, thus, less restrictive reasons for addressing the problem already exist." 364 S.E.2d at **244.**

Loitering for the purpose of **drug** laws are mere law enforcement shortcuts which attempt to "nip crime in the bud," without adequate proof that an actual crime has or will occur. Therefore, it is impossible to give a limiting construction to such a law because it attempts to prohibit conduct which may not be illegal. The United States Supreme Court, in reviewing a Jacksonville vagrancy law, condemned such statutes which trampled

upon constitutional rights. See Papachristou v. City of Jacksonville, supra; Farber v. Rochford, 407 F.Supp. 529 (N.D. Ill. 1975).

Section 24-43 also cannot be given a valid limiting construction because a law which affects the potential exercise of First Amendment Rights must use the least intrusive alternative of achieving the State purpose. Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). The obvious state purpose in this case is stopping drug activities. The Fifth Circuit in Sawyer v. Sandstrom, supra, found that the State of Florida had provided law enforcement officers with a vast array of tools (other than the drug loitering law) with which to combat illegal narcotics activity. 615 F.2d at 318. These tools are the least intrusive ways to combat drug activity, without infringing upon First Amendment activities. In Johnson v. Carson, supra, the United States District Court found that the least intrusive means of stopping prostitution was to enforce the State prostitution or breach of the peace laws. 569 F.Supp. at 980.

As Section 24-43 does not require actual proof of drug activity, this Court would have to re-write it to make it constitutional. This Court should not invade the province of the legislature by judicially re-writing a law. See Brown v. State, 358 So.2d 20 (Fla. 1978). As it is impossible to limit 24-43 to avoid possible infringement on First Amendment activities and use the lease intrusive means of stopping drug activity this Court must declare 24-43 overbroad on its face.

B. Section **24-43** permits arbitrary and capricious law enforcement because its provisions force the police to provide an ad hoc definition of what conduct constitutes loitering for the purpose of using/selling drugs and it therefore chills and deters the exercise of First Amendment rights because **24-43** is vague.

The most evil aspect of Section **24-43** is that it farces the police to decide, on an ad hoc basis, whether particular conduct is loitering for the purpose of drug activity. Section **24-43** does not give adequate guidance to the police; it mandates **a** subjective judgment on whether certain conduct is mere loitering or loitering for the purpose of drug use. By its very terms, Section 24-43 invites arbitrary and capricious law enforcement. **As** Section 24-43 does not require **a** consideration of the circumstances which allegedly manifest the purpose of drug activity, how will a police officer know when mere loitering or other legal conduct is for the purpose of drug activity? Even if the police refer to the circumstances delineated in **24-43,** they will **still** have to guess subjectively when the loitering Is for the purpose of drug use.

An examination of each of the circumstances in Section **24-43** will demonstrate this subjectivity. Section **24-43** permits a consideration of the fact of the person being **a** known drug user. **Does** Section **24-43** permit an **officer** to arrest a known drug user for merely loitering? If a person was convicted of **a** drug offense more than **a** year ago, may the officer still consider this fact? **As** was demonstrated in Johnson v. Carson, supra, the police will

arrest known prostitutes for merely loitering, pursuant to a loitering for the purpose of prostitution law. Such arrests are patently unconstitutional. See Papachristou v. City of Jacksonville, supra. However, Section 24-43 permits such arbitrary arrests because it does not require proof (of the illegal content) of any of the circumstances, it only permits a consideration of them.

Section 24-43 also permits a consideration of repeated beckoning, stopping or engaging of passers-by in conversation. How many times is meant by repeatedly? Does 24-43 mean repeatedly within the same time-frame or does it mean repeatedly day after day or night after night? The lack of definitions within 24-43 force each police officer to decide what repeatedly means.

What does beckoning mean? If the police do not have to hear the contents of a beckoning, each officer will have to decide whether a beckoning is merely an innocent calling/talking to a friend or the hailing of a taxi as opposed to a beckoning for the purpose of drug activity. Without a requirement to prove the actual content of these actions, any interpretation of such acts will be, by definition, subjective. Section 24-43 further invites subjective judgments because it allows a consideration of the implied context or appearance of conduct. The appearance or implied meaning of conduct within this context is inherently subjective.

How will an officer decide that the engaging of passers-by in conversation is not innocent discourse instead of conversation about illegal drug activities? No matter how one

approaches this question, the controlling issue is that, without actual proof of the conversation, **a** police officer will always have to guess at the intention of the person arrested.

Section 24-43 also permits **a** consideration of the fact that a person passes or receives from passers-by, money, objects or written material. 24-43 requires that such money, objects or written material be for the purpose **af** illegal activity. But how does an officer (short of having actual drug lingo written on a **paper)** know that the exchange of money, objects or especially written material is for the purpose of illegal drug activity? In Northern Virginia, ACLU v. City of Alexandria, supra, at 328, the District Court discussed this precise point and noted that a police officer could arrest someone for exchanging business cards, phone numbers on pieces of paper or distributing campaign literature; this possibly could prevent protected expression. See also Gooding v. Wilson, 405 U.S. **518**, 521, **92** S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972).

The necessity that the police guess at the individual's purpose under 24-43 makes it vague; this vagueness virtually ensures arbitrary **and** capricious law enforcement. The vagueness of 24-43 is inherent within its provisions. In Coleman v. City of Richmond, supra, the Virginia Court of Appeals found a loitering for the purpose of prostitution law vague because

> "Though the language of this ordinance is clear, the public is not adequately apprised of the behavior that is proscribed. Indeed, the statute essentially proscribes loitering with an unlawful intent; since loitering is not unlawful, the

> statute proscribes no illegal conduct If no particular act is proscribed. those wishing to conform to the ordinance do not know what conduct to avoid." **364** S.E.2d at **243-244.**

Section **24-43** does not proscribe any particular conduct; it attempts to prohibit otherwise legal conduct done with an illegal purpose. Therefore, citizens and the police will have to guess at the meaning of Section **24-43** and decide whether particular conduct, legal by itself, secretly evinces an illegal purpose. The United States Supreme Court in Grayned v. City of Rockford, **supra,** discussed the evils of such vague laws which affected the exercise of First Amendment Rights:

> "Vague laws offered several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, **so** that he may act accordingly. vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. **A** vague law impermissibly delegates basic policy matters to policement, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, when a vague statute 'abut{s} upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of {those} freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone...than if the boun-

daries of the forbidden areas were clearly marked"' (footnotes omitted) 408 U.S. at 108-09, 92 S.Ct. at **2298-99.**

Section **24-43** does not give fair warning of the conduct it seeks to prohibit. **A** citizen reading **24-43** would know that it is unlawful to loiter for the purpose of using/selling drugs. If persons lacked the intent of loitering for the purpose of drug activity, would they **also** know that certain innocent activities could lead to an arrest or investigatory stop by the police? Would a known drug dealer/user know tht merely talking to individuals on a street corner could lead to arrest? Would an innocent person know that talking to persons in a know drug area could lead to arrest or a stop by the police? **24-43** is vague because citizens and the police alike must necessarily guess at its meaning in **a** particular context.

2. <u>**24-43** permits arbitrary and capricious law enforcement</u>.

Police officers, on the street and on an <u>ad hoc</u> basis, give definition to **24-43.** Even if one assumes complete good faith by the police, **24-43** permits arbitrary and unequal law enforcement. Each offices can decide which if any of the circumstances delineated in **24-43** manifest loitering for the purpose of drug activity in each individual case. Some officers may require the presence of all the circumstances; others may require none of them because **24-43** does not require the presence

of the standards. **24-43** implicitly embodies a "I know it when I see it standard" of law enfarcement. However, different persons may disagree on when a violation has occurred and worse yet innocent conduct could be honestly mistaken for criminal activity under **24-43.** **As** was noted in Johnson v. Carson, supra, in a case involving loitering for the purpose of prostitution law, the police will arrest innocent persons under such laws. See ***569*** F.Supp. at **978.** Such laws violate due process because they fail to provide explicit standards so as to prevent arbitrary and capricious law enforcement. Grayned v. City of Rockford, supra; Shuttlesworth v. City of Birmingham, **394** U.S. **147, 89 S.Ct. 935** **(1969).**

The "opportunity to explain" provision in Section **24-43** does not eliminate the opportunity for arbitrary and capricious law enforcement. If persons stopped refuse to explain their conduct, the police still have to guess at the meaning of their conduct. Even if such persons explain their conduct, the police will have to evaluate it. Several courts have directly decided that such a provision does not save **a** loitering for the purpose of committing an offense law. ***See*** Johnson v. Carson, supra at 900; Ricks v. District of Columbia, **414 F.2d** 1097 **(D.C.** Cir. 1968); ***See*** also Kolender v. Lawson, 461 U.S. **352, 103** S.Ct. **1855 (1983);** Terry v. Ohio, **392** U.S. **1, 88** S.Ct. **1868,** 20 **L.Ed.2d 889** (1968) (refusal of person to answer questions by police cannot form a basis for arrest.)

Florida courts have held that a failure to explain one's self is not an element of a loitering charge. See V.E. v. State,

539 So.2d 1170 (Fla. 3d DCA 1989); E.B. v. State, 537 So.2d 148 (Fla. 2d DCA 1989). Therefore, the opportunity to explain provision does not prevent arbitrary police action. The provision encourages arbitrary police action because the police officer must judge whether the explanation given proves/disputes the officer's initial suspicion. This provision makes the police officer an ad hoc judge and jury.

3. Section 24-43 chills and deters the exercise of First Amendment Rights.

An overbroad and vague law chills and deters the exercise of legitimate First Amendment Rights because the mere possibility of an arrest or investigatory stop could force some individuals to forego the exercise of First Amendment Rights to avoid entanglement with the police. This possibility is not hypothetical. Assume a person is standing on the corner in a high drug area. Such areas seem to be growing ever larger and exist wherever the police want them to. However, Florida Courts have refused to allow the high crime talisman to justify otherwise invalid investigatory stops. See Ruddack v. State, 537 So.2d 701 (Fla. 4th DCA 1989) (quick movement as if to conceal something in high crime area); Gipson v. State, 537 So.2d 1080 (Fla. 1st DCA 1989) (flight in high crime area); Bastien v. State, 522 So.2d 550 (Fla. 5th DCA 1988) (flight from bar in high crime area); Jenkins v. State, 524 So.2d 1108 (Fla. 3d DCA 1988) (hand behind back in high crime area); Mosley v. State, 519 So.2d 58 (Fla. 2d DCA 1988)

(talking to drug dealer in area of drug sales); State v. Delaney, 517 So.2d 696 (Fla. 2d DCA 1987) (man talking to people in a car in an area of drug sales). The person on the corner is passing out political literature or business flyers. The police observe this conduct and detain the person under **24-43** (This conduct - passing out written literature - is embodied in one of the circumstances allegedly manifesting an illegal purpose). Even if the police are convinced the person was engaged in legitimate activities, Section **24-43** would permit such an investigatory stop. This possibility alone could chill and deter the exercise of First Amendment Rights. In Northern Virginia Chapter, ACLU v. City of Alexandria, supra, the Court specifically found that such loitering laws could chill and deter the exercise of First Amendment activities.

Section **24-43** manifestly chills and deters the exercise of First Amendment Rights because **persons** convicted of past drug crimes or individuals in an area of drug activity may forego First Amendment activities to avoid arrest or a stop under **24-43,** due to a police officer's "opinion" that such activities look like loitering for the purpose of drug activity. The fact that an innocent person may be exonerated at trial does not remove the chilling affect of **24-43.** Such a person would have to run the gauntlet of arrest, possible incarceration and the anxiety of trial, all to exercise supposedly guaranteed rights. The First Amendment needs breathing space to prevent individuals from refraining from First Amendment activities to avoid arrest. See Broadrick v. Oklahoma, supra. Section **24-43** does not provide that

space and is not narrowly drawn to prohibit only illegal activities.

ISSUE II

SECTION 24-43 IMPROPERLY ALLOWS FINDERS OF FACT AND THE POLICE TO CONSIDER A PERSON'S PREVIOUS CONVICTIONS AND ACTIVITY AS A DRUG USER/SELLER.

Section 24-43 violates due process because it allows the police to consider the status of an individual to decide whether otherwise legal First Amendment activities are illegal. Section 24-43 directly permits the use of the status of individuals to decide if certain conduct is illegal. This status classification is repugnant to due process and creates a suspect classification prohibited by the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 2 and 9, of the Florida Constitution.

The United States Supreme Court has resolutely condemned such criminal status classifications. In Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939), the court invalidated a law which created the status offense of being a gangster. The criminal status of being a narcotic addict was found to be unconstitutional in Robinson v. California, 370 U.S. 661, 82 S.Ct. 1417 (1962). In Papachristou v. City of Jacksonville, supra, the Supreme Court invalidated an ordinance which punished the status of being a common gambler, drunkard, thief, pilferer, pick pocket or night wanderer. All those cases hold that under the American system of jurisprudence one should be punished for what one does, not for what one is or was.

Section 24-43 does not directly punish an individual for being a known drug user. However, the ordinance creates a pernicious suspect classification for at least one year: the police and courts can take into account the fact of a prior drug conviction to infer that otherwise legal conduct is illegal. The problem with 24-43 is that a person who was a drug user yesterday may not be a drug user today or tomorrow. Section 24-43 brands a person with the equivalent of a scarlet letter for at least one year. A person who has been previously convicted of drug activity may now attempt to engage in lawful activities, but could be arrested because the police think the now lawful activities were for the purpose of drug activity.

Known drug users may not be able to engage in lawful activities which other citizens can enjoy, without fear that their activities will be considered loitering for the purpose of drug activity. Consequently, for one year such a person will have an immutable, unalterable status and will be denied equal protection under the laws. See Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1968).

The Supreme Court in In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 910 (1973), enunciated the standard of review where suspect classifications are present:

> "In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary ... to the accomplishment of its purpose or the safeguarding of its interest." 93 S.Ct. at 2855.

Florida courts have followed a similar test for equal protection - "for a statutory classification not to deny equal protection, it must rest on some difference bearing a just and reasonable relation to the statute in respect to which the classification is proposed." Carroll v. State, 361 So.2d 144 (Fla. 1978); Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); See also Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).

The City of Tampa certainly has a constitutionally permissible and substantial interest in stopping drug activity. However, under the methods used in 24-43 to achieve that purpose, the methods are not substantially and reasonably related to the goal. The methods lack a substantial relation because 24-43 simply creates a presumption that a person who was once a drug will still be a drug user up to one year later. Section 24-43 also creates a presumption that a known drug user engaging in certain otherwise legal activities will actually be engaging in them for the purpose of drug activity. This irrebuttable presumption is simply not substantially related to its purpose; it also is simply not substantially true.

The United States Supreme Court in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), held that where there is a possibility of an inference of innocence arising from a circumstance that involves the exercise of a fundamental right, then the inference (of guilt) lacks the substantial connection to the government interest. See also Turner v. United States, 396 U.S. 398, 90 S.Ct. 642 (1970); Leary v. United States,

395 U.S. 6, 89 S.Ct. 1532 (1968). All of the circumstances delineated in 24-43 carry a strong inference of innocence - for example - two people talking on a corner are simply talking about the weather or the time of day, not about drug activities.

The Michigan Court of Appeals in City of Detroit v. Bowden, 149 N.W.2d 771 (Mich. Ct. App. 1967), considered this precise question in a loitering for the purpose of prostitution case. The Bowden court held a known prostitute provision (convicted within the last two years) invalid because:

> "The ultimate issue in a violation of the ordinance is whether the accused was, in fact, soliciting when she waved. The plaintiff argues that it is difficult to produce evidence of street solicitation without the language which amended this ordinance. This difficulty of proof without the 'conclusive presumption' that one who has been convicted of such a crime within the last two years is a 'known prostitute,' will not justify the amendment. Neither will calling the proof of this conviction an element of the crime cure the constitutional infirmity. As it is not permissible to shift the burden of proof to the defendant, so it is also not permissible to strip her of all defense because of her prior conviction." 149 N.W.2d 776.

Therefore, the known drug user provision of 24-43 violates due process and equal protection because it permits proof of bad character before the trier of fact and permits the police to infer illegal conduct from otherwise legal activities, based solely upon the status of the actor.

ISSUE 111

SECTION **24-43** CONTRADICTS THIS COURT'S RULING THAT LOITERING LAWS **ARE** PERMISSIBLE ONLY IF THEY CRIMINALIZE LOITERING UNDER CIRCUMSTANCES WHICH GIVE RISE TO A JUSTIFIABLE BELIEF THAT THE PUBLIC SAFETY IS THREATENED.

This Court in State v. Ecker, 311 So.2d **104** (Fla. **1975), ** cert. den., 423 U.S. **1019, 96 S.Ct. 455,** upheld the state loitering law against First Amendment attacks of vagueness and overbreadth. The Court upheld the state loitering law against such attacks primarily because the state loitering law requires two elements: 1) loitering or prowling in **a** place at a time and in a manner not usual for law-abiding individuals; and 2) such loitering and prowling were under circumstances that threaten the public safety. These two elements eliminate First Amendment problems because they decrease the possibility that legitimate First Amendment activities would be mistaken for illegal conduct.

The "time, place and manner not usual for law-abiding citizens" provision is significantly different than Section **24-43.** In Section **856.021,** Florida Statutes, the loitering must not be in **a** manner for law-abiding individuals: for example, hiding in the bushes next to a house at 3:00 a.m. with a screen removed from the window. There is simply no First Amendment activity involved in such a situation. However, **24-43** does not limit its scope to activity done in a manner not usual for law-abiding citizens. The conduct outlined in **24-43** is most usual for law-abiding citizens and such conduct is at the core of

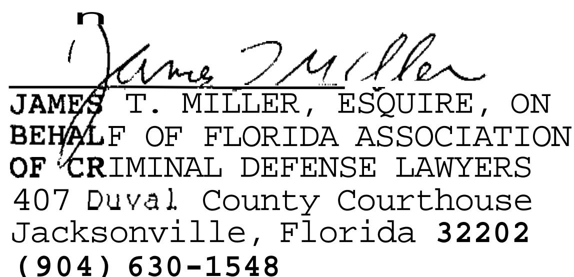
legitimate First Amendment activities: for example, standing on a street, engaging people in conversation, beckoning or pssing objects to others. Therefore, unlike Section 856.021, Florida Statutes, Section **24-43** does not limit its scope to conduct which is not within the ambit of the First Amendment. Section **856.021** also requires proof of conduct which threatens the public safety; this requirement prevents unnecessary intrusion upon First Amendment activity. Conduct which, by itself, threatens the public safety cannot be easily mistaken for First Amendment activities. Section **24-43** lacks such a public safety requirement and, therefore, conflicts with State v. Ecker, supra.

This Court in **B.A.A.** v. State, 356 So.2d 304 (Fla. 1978), specifically held that a person loitering for the purpose of prostitution could not be charged under Section 856.021 because there was no alarm for the safety of persons or property. A person loitering for the purpose of drug activity would also not threaten the safety of persons or property. Although such a person may threaten a breach of the peace, the lack of proof of a threat to personal property ensure that legitimate conduct could be mistaken for illegal activity. Therefore, **24-43** conflicts with **B.A.A.** v. State, supra.

<u>CONCLUSION</u>

This Court should declare Section 24-43, City of Tampa Code unconstitutional on its face.

Respectfully submitted,



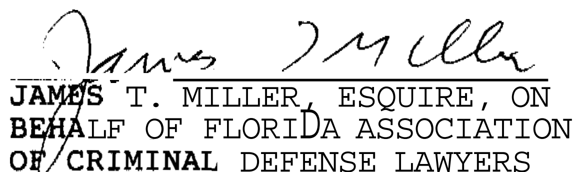
JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
407 Duval County Courthouse
Jacksonville, Florida 32202
(904) 630-1548

ATTORNEY FOR AMICUS CURIAE FACDL ON BEHALF OF PETITIONER

FLORIDA BAR NO. 0293679

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to Attorney for Petitioner, Gary O. Welch, Assistant Public Defender, Hillsborough County Courthouse Annex, Fifth Floor, 801 East Twiggs Street, Tampa, FL 33602-3597, and Attorney for Respondents, Peggy Quince, Bureau Chief, Office of the Attorney General, 202 North Lois Avenue, Tampa, FL 33607-2366 this 7th day of August, A.D. 1991.



JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,170

OLIVER HOLLIDAY,

Petitioner,

vs.

CITY OF TAMPA AND STATE OF FLORIDA,

Respondents.

_________________________________/

A P P E N D I X I

Holliday v. City of Tampa
16 FLW D1408 (Fla. 2d DCA, May 24, 1991)

We must also reverse the judgment on count two which held that the damages as determined by the jury were too speculative and without factual or economic basis. Despite difficulty in assigning a numerical value to deterioration of common elements in the park and diminution of services and access, the jury viewed the park and had competent substantial evidence before it of such deterioration and diminution. Therefore, the values it assigned as damages should not have been set aside unless they "shocked the judicial conscience." No such basis exists here.

We reverse and remand with instructions to the trial court to enter a judgment in favor of the appellants as to damages for the statutory violations and to fashion equitable relief for the unconscionable rents for the years in question guided by the criteria set out in section 723.033, Florida Statutes. As the appellee is no longer the prevailing party, the order awarding it fees and costs is also reversed. Upon remand, the trial court shall award the appellants their fees and costs instead. (RYDER, A.C.J., and DANAHY and CAMPBELL, JJ., Concur.)

* * *

FREDERICK JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01850. Opinion filed May 22, 1991. Appeal from the Circuit Court for Hillsborough County; Susan C. Bucklew, Judge. James Marion Moorman, Public Defender, and Jennifer Y. Fogle, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carol M. Dittmar, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) On the authority of *Walker v. State*, 567 So.2d 546 (Fla. 2d DCA 1990), we reverse appellant's sentences and remand for resentencing. (DANAHY, A.C.J., and PARKER and PATTERSON, JJ., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Downward departure sentence imposed as result of plea agreement between trial court and defendant to which state was not party must be supported by written reasons—Remand for resentencing within guidelines should defendant not elect to withdraw plea

STATE OF FLORIDA, Appellant, v. WALTER E. JONES, Appellee. 2nd District. Case No. 90-01305. Opinion filed May 24, 1991. Appeal from the Circuit Court for Pinellas County; Ray E. Ulmer, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Brenda S. Taylor, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender, Bartow, and Allyn Giambalvo, Assistant Public Defender, Clearwater, for Appellee.

(PER CURIAM.) We reverse the defendant's sentence because the trial court failed to provide written reasons for the downward departure. Although generally, no written reasons are required for a departure based upon a negotiated plea agreement, see *Smith v. State*, 529 So.2d 1106 (Fla. 1988); *Long v. State*, 540 So.2d 903 (Fla. 2d DCA 1989), the state was not a party to the plea agreement between the court and the defendant in this case. Upon remand, the trial court shall give the defendant the opportunity to withdraw his plea. See *Stranigan v. State*, 457 So.2d 546 (Fla. 2d DCA 1984). If the defendant does not elect to withdraw his plea, then the trial court shall sentence him within the guidelines. See *State v. Cook*, 571 So.2d 22 (Fla. 2d DCA 1990). (DANAHY, A.C.J., and PARKER and PATTERSON, JJ., Concur.)

* * *

Criminal law—In absence of plea of insanity from defendant, trial court properly excluded testimony regarding defendant's alleged epileptic condition—Sentencing—Guidelines—Departure—Trial court properly departed from guidelines on basis of contemporaneous capital felony conviction when imposing sentence for kidnapping although scoresheet included points for severe death or severe injury of kidnapping victim—Question certified whether, in sentencing for felony where there is a contemporaneous conviction of an unscored capital felony, it is proper to depart based on defendant's capital conviction when applicable guidelines provide that victim injury is scoreable

GERALD WAYNE BUNNEY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-01781. Opinion filed May 24, 1991. Appeal from the Circuit Court for Hillsborough County; M. William Graybill, Judge. Stevan T. Northcutt of Levine, Hirsch, Segall & Northcutt, P.A., Tampa, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Stephen A. Baker, Assistant Attorney General, Tampa, for Appellee.

(SCHEB, Acting Chief Judge.) The defendant, Gerald Wayne Bunney, was convicted after a jury trial, of first degree murder and kidnapping. These offenses occurred on September 23, 1988. For the murder, he was sentenced to life imprisonment with a mandatory sentence of 25 years. For the kidnapping, he was sentenced to a consecutive term of life imprisonment, an upward departure from the recommended guidelines sentence of five and one-half to seven years. We affirm his convictions and sentences.

On appeal, the defendant raises four points, only two of which merit discussion. First, he challenges the trial court's refusal to allow into evidence testimony regarding an alleged epileptic condition. We think that in the absence of a plea of insanity from the defendant, the trial court properly excluded the testimony under *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989).

Second, the defendant contends that the trial court erred in imposing a departure sentence for the kidnapping conviction. The trial judge scored twenty-four points for death or severe injury. He then departed from the recommended range, giving as his reason that "the scoresheet fails to take into consideration defendant also stands convicted of murder in the first degree arising out of the same criminal episode." The defendant *argues* that this was error because the trial judge departed based on a consideration already factored into the presumptive sentence. We disagree.[1]

Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), and *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988), hold that a contemporaneous conviction of an unscored capital felony is a valid reason for departure. We recognize that those decisions preceded the 1987 amendment which states that victim injury during a criminal episode or transaction is scoreable for offenses occurring after July 1, 1987. *Florida Rule of Criminal Procedure Re Sentencing Guidelines Rules (3.701 and 3.988)*, 509 So. 2d 1088 (Fla. 1987). Nevertheless, we find *Hansbrough* and *Livingston* controlling.

Accordingly, we affirm the defendant's convictions and sentences. However, we certify the following question to the supreme court as one of great public importance:

> IN SENTENCING FOR A FELONY WHERE THERE IS A CONTEMPORANEOUS CONVICTION OF AN UNSCORED *CAPITAL* FELONY, IS IT PROPER TO DEPART BASED ON THE DEFENDANT'S CAPITAL CONVICTION WHEN THE APPLICABLE GUIDELINES PROVIDE THAT VICTIM INJURY IS SCOREABLE?

(FRANK and PATTERSON, JJ., Concur.)

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[1]Under the interpretation urged by the defendant, an anomalous result could occur. For example, if defendant had been convicted of second degree rather than capital murder, his scoresheet on the kidnapping offense would include points for "victim injury or death," thereby resulting in his receiving a longer sentence than if he had been convicted of capital murder.

* * *

Criminal law—Municipal ordinance prohibiting loitering for purpose of selling drug is facially constitutional—Question certified

OLIVER HOLLIDAY, Petitioner, v. CITY OF TAMPA, Respondent. 2nd District. Case No. 91-01215. Opinion filed May 24, 1991. Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Richard A. Lazzara, Judge. Judge C. Luckey, Jr., Public Defender, and Gary O. Welch, Assistant Public Defender, Tampa, for Petitioner.

(PER CURIAM.) Petitioner seeks certiorari review of the circuit court's order affirming his conviction of loitering for the purpose of selling drugs. § 2433, City of Tampa Code (1989). Petitioner

...llenges only the facial constitutionality of the city ordinance. In *Wyche v. State*, 573 So.2d 953 (Fla. 2d DCA 1991), this court upheld the facial constitutionality of the Tampa ordinance prohibiting loitering for the purpose of prostitution. We find that the only difference between the two ordinances is the underlying criminal activity. Thus, the petition for certiorari is denied.

In order to give the supreme court discretion to review this decision, we certify the following question of great public importance to the Supreme Court of Florida:

IS SECTION 24-43, CITY OF TAMPA CODE (1989), FACIALLY CONSTITUTIONAL?

(FRANK, A.C.J., and PATTERSON and ALTENBERND, JJ., Concur.)

* * *

Criminal law—Sentencing—Denial of motion to correct sentence

WILLIE SETH CRAIN, JR., Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 91-01292. Opinion filed May 24, 1991. Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Hillsborough County; B. Anderson Mitcham, Judge.

(PER CURIAM.) We affirm the trial court's denial of appellant's motion to correct sentence. To the extent appellant alleges he is being denied gain time in violation of *Waldrup v. Dugger*, 562 So.2d 687 (Fla. 1990), our decision is without prejudice to appellant filing a petition for writ of mandamus in the circuit court in and for the county where he is presently confined. See *Hall v. Wainwright*, 498 So.2d 670 (Fla. 1st DCA 1986). (CAMPBELL, A.C.J., and FRANK and PATTERSON, JJ., Concur.)

* * *

Criminal law—Search and seizure—Defendant validly stopped for littering—Even if officers reasonably feared that defendant was armed with a deadly weapon, officers exceeded permissible scope of stop and frisk when they asked defendant to open paper bag he was carrying on handlebars of bicycle and shined flashlight inside bag

ROBERT LENCSAK, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-00885. Opinion filed May 24, 1991. Appeal from the Circuit Court for Charlotte County; Elmer O. Friday, Judge. Richard 1. Sanders, Gulfport, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Charles Corces, Jr., Assistant Attorney General, Tampa, for Appellee.

(FRANK, Acting Chief Judge.) Robert Lencsak has appealed from the denial of his motion to suppress, contending that the police improperly searched a paper bag in his possession which ultimately was found to contain marijuana. We reverse.

In the early morning hours two police officers standing in the parking lot of the city hall in Punta Gorda observed Lencsak ride by on a bicycle and throw a soda can to the ground. The officers stopped him and issued a citation far littering. They demanded that he reveal the contents of a paper bag he was carrying on his handlebars. Lencsak told them that the bag contained a pair of pants, and one officerrequested that he open the bag for inspection. Lencsak placed the bag on the ground and opened it to reveal that there was, indeed, a pair of pants inside. Not content with this disclosure, however, the second officer shined his flashlight inside and illuminated a baggie of marijuana. The marijuana was seized, Lencsak was arrested, a nolo plea was entered, and this appeal was initiated.

At the suppression hearing the police officers attempted to justify their search of the bag on the basis of officer safety. The trial court concluded that the search was legal because it was a nighttime confrontation with a person carrying a sizable container of unknown contents. Both officers testified, however, that the presence of the bag did not alarm them. One stated that he had no specific indication that Lencsak might have been carrying a weapon, but in the darkness of early morning he treats all individuals as if they might be carrying a weapon. The second officer testified similarly: although the hag did not immediately arouse his suspicions, he was "concerned with any container that could possibly carry a weapon." The officers' concern for their safety, if any, was thus based upon a generalized view of the events rather than upon specific factors inducing the belief that Lencsak was carrying a weapon or was dangerous.

We find no problem with the initial stop in this case; however, as we noted in *Thomas v. State*, 533 So.2d 861, 862 (Fla. 2d DCA 1988),

> Although we think the stop was proper, the right to search does not automatically follow once the right to detain is established, *Sanders v. State*, 385 So.2d 735, 737 (Fla. 2d DCA 1981). A frisk or pat-down incident to an investigatory stop may be conducted only where the officer has probable cause to believe that *the* person detained is armed with a dangerous weapon. §901.151, Fla. Stat.

This case is similar to *J.R.H. v. State*, 428 So.2d 786 (Fla. 2d DCA 1983). When confronted with a juvenile who had a brown suede satchel attached to his belt, the officer asked the youngster what was in it, and he voluntarily turned over its contents—marijuana cigarettes. We held that the officer's inquisitiveness exceeded the extent of inquiry or search permitted by section 901.151, Florida Statutes (1981), the Stop and Frisk Law. At most, the officer "could have asked appellant if the bag contained a dangerous weapon or could have conducted a pat-down search of the bag," 428 So.2d at 787-88. We find additional support for our result in *State v. Gary*, *466* So.2d 1199 (Fla. 3d DCA 1985), in which the court held that the police had no justification to search a woman's handbag without first conducting a pat-down for weapons.

Having properly stopped Lencsak after observing him litter, the officers—if indeed they possessed a reasonable fear that he was armed with a dangerous weapon—would have been justified in conducting a pat-down of him and the paper bag. The full search they conducted in this case was impermissible, however, and the evidence should have been suppressed.

Reversed. (HALL and ALTENBERND, JJ., Concur.)

* * *

Jurisdiction—Trial court had jurisdiction to enforce settlement while case was pending in appellate court where appellate court entered order authorizing trial court to proceed with hearing on the settlement at the request of the parties

THOMAS S. RUSSELL and JUNE M. RUSSELL, Appellants, v. HILTRUD SCOTT, Appellee. 2nd District. Case Nos. 90-00556, 90-02612, Consolidated. Opinion filed May 24, 1991. Appeal from the Circuit Court for Collier County; Hugh D. Hayes, Judge. Robert G. Hines, Naples, for Appellants. James H. Siesky of Siesky and Lehman, P.A., Naples, for Appellee.

(ALTENBERND, Judge.) In these consolidated appeals, Thomas S. Russell and June M. Russell appeal a final *summary* judgment entered in favor of Hiltrud Scott on November 10, *1989*, and an order enforcing settlement entered on July 9, 1990. We affirm the order enforcing settlement and, accordingly, dismiss the earlier appeal pursuant to the settlement.

The Russells filed their appeal from the summary judgment in favor of Ms. Scott in February 1990.[1] In May, Ms. Scott filed a motion in this court to relinquish jurisdiction to the trial court. The motion explained that, although the parties had settled the *case* on April 2, 1990, the Russells had failed to comply with the terms of the settlement. The motion was unopposed, and this court relinquished jurisdiction to the trial court to entertain a motion to enforce the settlement.

The trial court *then* held an evidentiary hearing and determined that *the* parties had in fact settled their dispute. It found that the Russells had agreed to dismiss their appeal of the summary judgment in exchange for a satisfaction of the judgment for costs and attorney's fees that Ms. Scott had received against them.

In the appeal of the settlement order, the Russells do not dispute the trial court's findings of fact or legal conclusions. They

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,170

OLIVER HOLLIDAY,

Petitioner,

vs.

CITY OF TAMPA AND STATE OF FLORIDA,

Respondents.

______________________________/

A P P E N D I X I I

In Re, E.L., Order of Circuit Court, Seminole County, Wood, J., declaring Sanford Loitering for the Purpose of Engaging in Drug Related Activity Unconstitutional; State v. Calloway, Order of Circuit Court, Brevard County, Antoon, J., declaring Melbourne Loitering for the Purpose of Engaging in Drug Related Activity Unconstitutional

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY,
FLORIDA
CASE NO. 89-1876-CJA

IN THE INTEREST OF

E. L.,
a child.
_______________________________/

ORDER

On August 17, 1989, E. L. was arrested by officers of the Sanford Police Department for an alleged violation of Sanford Ordinance No. 2032.[1] This Ordinance prohibits "Loitering For the Purpose of Engaging in Drug Related Activity," and lists ten (10) circumstances which Law Enforcement may consider in determining whether such a purpose is manifest.

Counsel for E.L. filed a Motion to Dismiss on the grounds that Sanford Ordinance No. 2032 is unconstitutional. On December 5, 1989, this Court heard oral argument by the State and Counsel for the child on that issue. For the reasons set forth below, the Court finds Sanford Ordinance No. 2032 to be unconstitutional and grants the Motion to Dismiss.

The defense argues that Sanford Ordinance No. 2032 is unconstitutinally vague. A challenge to an enactment on the ground that it is unconstitutionally vague requires the court to answer two questions: (1) Does it define the criminal offense with sufficient definiteness that ordinary persons understand what is prohibited?; and (2) Does it encourage unfettered, arbitrary and discriminatory enforcement? Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). In this

case, the first question must be answered in the negative, the second in the affirmative.

Sanford Ordinance No. 2032 lists ten (10) "circumstances"[2] which may be considered by law enforcement as grounds for arrest, but it fails to define them with sufficient clarity. The terms "high drug activity geographic area," "an area of unlawful drug use and trafficking" and "place suspected of drug activity" are employed throughout the ordinance. These phrases are by their *very* nature vague and ill-defined, and persons of ordinary intelligence are forced to guess at their meaning. Does one drug arrest on that street "qualify" a location as a "high drug activity geographic area?" How about ten arrests, but no convictions? These are reasonable interpretations, yet the ordinance provides no guidance in this area.

Sanford Ordinance No. 2032 fails the second prong of the vagueness doctrine by failing to establish sufficient guidelines in the enactment to prevent law enforcement and prosecutora'from engaging in standardless sweeps, Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855, (1983). Law enforcement officials are left with unfettered discretion in the application and enforcement of this ordinance.

The ordinance lists ten circumstances which "may" be considered in determining whether a person is "manifesting the purpose to engage in drug related activities."[3] There is no guidance as to how many, or which combination of the enumerated circumstances must be present for an officer to arrest under the ordinance. As noted by President Roosevelt in vetoing a vagrancy

law for the District of Columbia:

> "It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and procecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms." H.R. Doc. No. 392, 77th Cong., 1st Sess.

Papachristou v. City of Jacksonville, 405 U.S. 156,167, n. 10, 31 L. Ed. 2nd 110, 118, n. 10, 92 S. Ct. 839 ,848, n. 10.

The: defense also argues that Sanford Ordinance No. 2032 is unconstitutionally overbroad. A legislative enactment is unconstitutionally overbroad if it achieves its purpose of controlling activities that may properly be regulated by means that sweep too broadly, into constitutionally protected areas. State v. Gray, 435 So. 2d 816 (Fla. 1983). This Court finds Sanford Ordinance NO. 2032 overbroad, because it impinges upon the First Amendment freedoms of association, assembly, and speech.

"The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are implicit in the first and fourteenth amendments." Sawyer v Sandstrom, 615 F. 2d 311 (1980), Bykofsky v. Borough of Middleton, 401 F. Supp. 1242, 1254 (M.D. 1975), aff'd without opinion, 535 F. 2d 1245 (3d Cir.), cert. denied, 429 U.S. 964, 97 S.Ct. 394, 50 L. Ed. 2d 333 (1976).

This ordinance would permit the arrest of a person for merely standing on a street corner in a part of town that law enforcement has unilaterally determined to be a "high drug activity geographic area".[4] An individual who had been convicted of a drug offense 3 years ago is subject to arrest for being present on city streets, even though he is committing no other offense.[5] Likewise, a person could be prosecuted for talking to an individual in a car, if that car is registered to a person who is a "known unlawful drug user". [6]

Because Sanford Ordinance No. 2032 clearly encompasses non-offensive activities protected by the First Amendment, it is constitutionally overbroad. While the professed purpose of reducing drug related crime is an admirable one, this ordinance attempts to accomplish that purpose in a manner which cannot be tolerated. In Sawyer v. Sandstrom, 615 F. 2d 311 (5th Cir. 1980) the court struck down as unconstitutionally overbroad a Dade County ordinance which prohibited loitering with one or more persons, knowing that a narcotic or dangerous drug is being used or possessed.

The court quoted with approval from Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed 2d 231 (1960):

> "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

Sawyer v. Sandstrorn, 615 F. 2d 311, 317, (5th Cir. 1980). As the court noted in Sawyer, the State and law enforcement currently possess a vast assortment of legitimate tools, pursuant to Chapter 893, Florida Statutes, to combat illegal drug activity.

This Court also finds that Sanford Ordinance No. 2032 is violative of the Due Process clause of the Fifth and Fourteenth Amendments *to* the U.S. Constitution, as well as the Fourth Amendment prohibition against unreasonable searches and seizures.

It is clearly established that law enforcment must have reasonable suspicion to stop and detain, and probable cause to arrest.[7] Sanford Ordinance No. 2032 attempts to abridge those liberty protections by attempting *to* create reasonable suspicion and probable cause where none otherwise exists.

- Circumstance (1) states that an individual with "needle tracks" on his or her arm may be classified as a "known unlawful drug user" and arrested under the ordinance in question. Yet that factor alone would furnish neither reasonable suspicion nor probable cause.

Circumstance (4) subjects a person to arrest if he is "physically identified by the officer as a member of a "gang" or association which has as its purpose "illegal drug activity." Such information may be based on the merest, uncorroborated suspicion. Even more importantly, membership in such an organization is an insufficient basis for a conviction pursuant to the reasoning of Scales v. United States, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961) and Sawyer v. Sandstrom, 615 F. 2d 311 (5th Cir. 1980). "[K]nowing association with a group

cannot be made a punishable act just because some of the group members are engaged in criminal conduct." Sawyer, at 317.

Circumstance (6) states that a person may be arrested if he takes flight upon the appearance of law enforcement. The courts of this state have repeatedly held that that factor alone does not provide reasonable suspicion to detain. Bastien v. State, 522 So 2d 550 (5th DCA 1988): Taylor v. State, 14 FLW 749 (5th DCA 1989): Gipson v. State, 14 FLW 245 (1st DCA 1989); Cobb v. State, 511 So. 2d 698 (3rd DCA 1987).

It is apparent that Sanford Ordinance No. 2032 attempts to circumvent the established safeguards of the due process clause, the Fourth Amendment and binding precedent. "[T]his type of ordinance seeks a shortcut, and shortcuts cannot trespass across constitutional rights," See Farber v. Rochford, 407 F. Supp. 529, 534 (N.D. Ill. 1975), in which the District Court held unconstitutional an ordinance which forbade persons known to be prostitutes or drug addicts from congregating with other persons of the same "classes" in public places.

In Johnson v. Carson, 569 F. Supp 974 (M.D. Florida 1983) a similar ordinance enacted by the City of Jacksonville was declared unconstitutional, That ordinance forbade loitering for the purpose of engaging in prostitution. The circumstances to be considered by law enforcement included the suspects: being a known prostitute; beckoning to, attempting to stop, or stopping passers-by in conversation; or repeatedly attempting to stop motor vehicle operators by waving. That court adopted the special master's holding that the ordinance was unconstitu-

tionally overbroad and abridged first Amendment freedoms. The court observed that sufficient statutory authority existed that criminalized prostitution and disorderly conduct. It quoted with approval the following language from Papachristou v. Jacksonville, 405 U.S. 156, 170, 31 L. Ed. 2d 110, 120, 92 S. Ct. 839, 847 (1972):

> "It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrance Act, 1824."

Johnson at page 979.

This Court has searched for grounds upon which Sanford Ordinance No. 2032 could be sustained. Its avowed purpose, that of curtailing of illicit drug activity, is laudatory. However, it attempts to achieve that purpose by means which trample an constitutionally protected grounds. It is therefore

ORDERED AND ADJUDGED, that Sanford Ordinance No, 2032 is unconstitutional.

DONE AND ORDERED at Sanford, Seminole County, Florida, Florida, this 30th day of March, 1990.

LEONARD V. WOOD
CIRCUIT JUDGE

Copies to:
State Attorney
Public Defender

FOOTNOTES

[1] Sanford Ordinance No. 2032, enacted May 22, 1989, provides as follows:

ORDINANCE NO. 2032

AN ORDINANCE OF THE CITY OF SANFORD, FLORIDA, RELATING; TO THE PUBLIC SAFETY AND WELFARE PROHIBITING LOITERING FOR THE PURPOSE OF ENGAGING IN DRUG RELATED ACTIVITY SETTING FORTH CIRCUMSTANCES WHICH MAY BE CONSIDERED AS MANIFESTING SUCH PURPOSE, DECLARING SAID CONDUCT TO BE A MISDEMEANOR AND PROVIDING A PENALTY THEREFORE; PROVIDING FOR SEVERABILITY, CONFLICTS AND EFFECTIVE DATE.

NOW, THEREFORE, BE IT ENACTED BY THE PEOPLE OF THE CITY OF SANFORD, FLORIDA:

SECTION 1: The City Commission of the City of Sanford finds the public safety and morals of the citizens of the City of Sanford is being endangered by an increasing illicit drug trafficking and use in the City of Sanford. That said drug use is increasing rapidly causing immediate and imminent danger to the public health and safety and to property in the area where drug use is taking place and that said drug problem is being significantly increased by the presence of numerous Persons loitering in certain areas of the City for the purpose of engaging in drug related activity.

SECTION 2: Chapter 18 of the City Code of the City of Sanford is hereby amended by the addition thereto of Section 34 as follows:

ARTICLE 111: LOITERING FOR THE PURPOSE OF ENGAGING IN DRUG RELATED ACTIVITY.

A. Drug related loitering prohibited.

It shall be unlawful for any person to loiter in or near any

public street, right of way, or place open to the public, or in or near any public or private place in the City of Sanford in a manner and under circumstances manifesting the purpose to engage in drug related activities contrary to the provisions of Chapter 893, of the Florida Statutes.

B. Section 21-21, Circumstances Manifesting such purposes enumerated.

Among *the* circumstances which may be considred as determining whether such purpose is manifest, are:

1. Such person is a known unlawful drug user, possessor, or seller. For purposes of this chapter, a "known unlawful drug user, possessor, or seller" is a person who has, within the knowledge of the arresting officer, been convicted in any court within this state any violation involving the use, possession, or sale of any of the substances referred to in' Chapter 893.03, Florida Statutes, or 817.564 or such person has been convicted of any violation of any of the provisions of said chapters.of Florida Statutes or substantially similar laws of any political subdivision of this state *of* any other state; or person who displays physical characteristics of drug intoxication or usage, such as "needle tracks"; or a person who possesses drug paraphernalia as defined in Section 893.145, Florida Statutes.

2. Such person is currently subject to an order prohibiting his/her presence in a high drug activity geographic area;

3. Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about *to* engage in or is

then engaged in an unlawful drug-related activity, including by way of example only, such person acting as a "lookout";

4. Such person is physically identified by the officer as a member of a "gang" or association which has as its purpose illegal drug activity:

5. Such person transfers small objects or packages for currency in a furtive fashion;

6. Such person takes flight upon the appearance of a police officer:

7. Such person manifestly endeavors to conceal himself or herself or any object which reasonably could be involved in an unlawful drug-related activity:

8. The area involved is by public repute known to be an area of unlawful drug use and trafficking;

9. The premises involved are known to have been reported to law enforcement as a place suspected of drug activity;

10. Any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

C. Penalty

Any person who violates the provisions of this Article shall be guilty of a misdemeanor of the second degree punishable as provided in 775.082 or 775.083.

D. Arrest without warrant

Any law enforcement officer authorized to act within

the city limits of the City of'sanford, may arrest any suspected loiterer under the provisions of this Article without a warrant in case delay in procuring a warrant would probably enable such suspected loiterer to escape arrest.

SECTION 3: If any provision of this Article is held to be invalid, unconstitutional or unenforceable for any reason, such invalidity shall not affect any other provision, or the application thereof, which shall be given effect without the invalid provision or apliçation, to this and the provision of this Article are declared to be severable..

SECTION 4: That all ordinances or parts of ordinances in conflict herewith be and the same are hereby revoked.

SECTION 5: That this ordinance shall become effective immediately upon its passage and adopotion.

[2] Sanford Ordinance No. 2032, Article 111, §§ 1-10.

[3] Sanford Ordinance NO. 2032, Article III, A.

[4] Sanford Ordinance No. 2032, Article III, A, § 8.

[5] Sanford Ordinance No. 2032, ARticle III, A, § 1.

[6] Sanford Ordinance NO. 2032, Article III, A, § 10.

[7] United States Constitution, Amendment IV; Florida Statutes, Section 901.151 (1987).

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO. 89-4717-CF-A

STATE OF FLORIDA,

Plaintiff,

vs.

LAMAR CALLOWAY,

Defendant.

ORDER

This cause came before the court on defendant's Motion to Declare Melbourne City Ordinance 88-62 Unconstitutional, and the court having been fully advised, finder

A. Melbourne City Ordinance 88-62 *is* overbroad.

B. Melbourne City Ordinance 88-62 is vague.

C. The overbreadth of Melbourne City Ordinance 88-62 creates a chilling effect on First Amendment-freedoms.

D. That Melbourne *City* Ordinance 88-62 violates the due process claim *of* the Fourteenth Amendment and the Fourth Amendment of The United States Constitution.

It is therefore, €or the reasons set foxth below, ORDERED AND ADJUDGED that,

-Melbourne City Ordinance 88-62 is unconstitutional.

REASONS

I

The first issue is whether Melbourne City Ordinance 88-62 [Appendix A] is unconstitutional due to overbreadth. Ordinarily, in otder for the defendant to challenge a penal ordinance on the grounda of overbreadth he must "show that his own conduct is innocent and not subject to being regulated by a narrowly drawn statute." State v. Ashcraft, 378 So.2d 204 (Fla. 1979). This requirement is relaxed, however, when the alleged overbreadth has a chilling effect on First Amendment freedoms of association and assembly. In casos where such a chilling *effoot* does exist, a defendant does not havo to ehow that hie conduct is innocent in order to challenge a etatuto or ordinance because of over-

breadth. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); Ashcraft supra. On its face, the ordinance in question has a chilling effect on one's freedom of association. For instance, one may be arrested if an officer believes he is a member of a "gang" or an association involved in illegal drug activity, or if an officer sees him in certain locations. Calloway has standing to challenge the constitutionality of the ordinance for overbreadth.

Melbourne City Ordinance 88-62 is overbroad because it seeks to prohibit constitutionally protected conduct a8 well as unprotected conduct. The two elements of tho offense described by the ordinance are 1) that the defendant loiter In a public place, and 2) that the Loitering be done in "a manner and under circumstances manifesting the purpose to engage in drug-related activities , , ." Under this ordinance any person with a prior drug conviction could be prosecuted for simply standing on a street corner in a particular part of town. One could be prosecuted for selling a parcel of food ox any other small object for cash while on a public street. This ordinance would permit the prosecution of an innocent person waiting for a taxi cab in an area where illegal drug activity had taken place. It would even be possible for the state to seek conviction as a result of a person visiting a friend's home if the police had received information that tho home had been the place of an earlier drug transaction.

While the city has passed this legislation with tho noble goal of reducing drug-related crime, it has also given law enforcement and the state 'carte blanche" authority to prosecute innocent people exercising fundamental, personal liberties. It should be noted that there is no reference to public safety in this ordinance. On finding that Fla. Stat. §856.021 was constitutional the Supreme Court of Florida placed particular emphasis on the requirement that circumstances exist giving rise to immediate concern for public safety. See State v. Ecker, 311 So.2d 104 (Fla. 1975). Overbreadth exists when a statute, in achieving its legitimate governmental purpose of preventing

activities properly subject to,.regulation, sweeps too broadly into areas of constitutionally protected freedoms. State v. Gray, 435 So.2d 816 (Fla. 1983). Melbourne City Ordinance 08-62 is thetefore unconstitutionally overbroad.

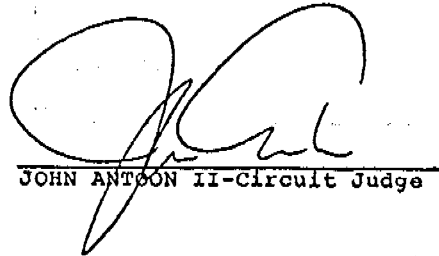
If

. The next coneideration is whether Melbourne Ordinance 88-62 is impermissibly vague. As generally stared, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient clarify that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed. 903, 909 (1983). This ordinance fails both parts of the test for vagueness. While attempting to abridge the protection of the Fourth Amendment requiring probable cause for arrest and the requirement that there be articulable or well-foundad suspicion established in order to stop and detain a citizen, the city has improperly required men of ordinary intelligence to guess at the meaning of the ordinance. See Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). The ordinance does not provide any guidance as to what is meant by an "area of unlawful drug use and trafficking" or "place suspected of drug activity." A parson innocently present in certain public areas may subject himself to arrest and prosecution. There is no guidance as to how many, or which combinations of the enumerated circumstances must exist in order for an officer to exercise his discretion under the ordinance.

In addition to tho notice requirement, the "void €or vagueness" doctrine requires that criminal legislation include some minimal guidelines controlling law enforcement. This requirement exists to protect against standardless sweeps which would allow police officers and prosecutors to arbitrarily arrest and prosecute. Xolonder v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Molbourne Ordinance 88-62 provides police officers tho broadeet discretion, allowing them to consider tho enumerated circumstances in detormining the manifest purpose

of the defendant in being in a public area and therefore whether he has violated the ordinance. The officer may arrest and the state may prosecute abaent probabls cause or even articulable suspicion that a defendant has committed or is about to commit a crime. This ordinance vests an officer with unrestrained power to arrest,

DONE AND ORDERED in Melbourne, Brevard County, Florida, this 12 day of December, 1909.



JOHN ANTOON II-Circuit Judge

Copies furniehed to:

Kathryn Nelson-Assistant State Attorney
James Kontos-Assistant Public Defender

ORDINANCE NO. 88-62

AN ORDINANCE OF THE CITY OF MELBOURNE, BREVARD COUNTY, FLORIDA, AMENDING CHAPTER 21 OF THE CODE OF ORDINANCES ENTITLED, "POLICE AND LAW ENFORCEMENT", BY PROHIBITING LOITERING FOR THE PURPOSE OF ENGAGING IN DRUG RELATED ACTIVITY; SETTING FORTH CIRCUMSTANCES WHICH MAY BE CONSIDERED AS MANIFESTING RUCH PURPOSE; DECLARING SAID CONDUCT TO BE A MISDEMEANOR; PROVXDINQ A PENALTY THEREFORE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED DY THE CITY COUNCIL OF THE CITY OF MELBOURNE, BREVARD COUNTY, FLORIDA, that:

SECTION 1. The City Council of the City of Melbourno finds the public safety and morals of the citizens of the City of Melbourne being endangered by increasing illicit drug trafficking and use in the City of Melbourne. Said drug us8 is increasing tepidly causing immediate and imminent danger to the public health and safety and to property in the area where drug use is taking place and that said drug problem is being significantly increased by the presence of numerous persons loitering in certain areas of the City for tha purpose of engaging in drug related activity..

SECTION 2. Tho City Code of the City of Melbourne is hereby amended by the addition of Article III to Chapter 21, Police and Lsw Enforcsment, to be known and designated as Sections 21-20 through 21-24 an# shell provide as follows:

ARTICLE III. LOITERING FOR THE PURPOSE OF ENGAGING IN DRUG RELATED ACTIVITY;

Section 21-20, Drug Related Loitering Prohibited.

It shall be unlawful for any person to loiter in or near any public street, 'right of way, or place open to the public, or in or near any public or private place in the City of Melbourne in a manner and under circumstances manifesting the purpose to engage in drug related activities contrary to the provisions of Chapter 893, of the Florida Statutes.

Section 21-21, Circumstances Manifesting Such Purposes Enumerated

Among tho circumstances which may be considered as determining whether such purpose is manifest, are:

(a) Such person is a known unlawful drug user, possessor, or seller. For purposes of this Chapter a "known unlawful drug user, possessor, or seller" is a person who has, within tho knowledge of the arresting officer, been convicted in any court within this state of any violation ,involving the use, possession, or sale of any of the substances referred to in Chapter 833.03, Florida Statues, or 817.564, or such person ha5 been convicted of any violation of any of tho provisions of said chapters of Florida Statutes or substantially similar laws of any political subdivision of this state or of any other state; or person who displays physical characteristics of drug intoxication or usage, such as "needle tracks"; or a person who possesses drug paraphernalia as defined in section 893,145, Florida Statutes.

(b) , Such person is currently subject to an order prohibiting his/her presence in a high drug activity geographic area;

(c) Such person behaves in such a manner as to raise a reasonable suspicion that ho or she is about to engage in or is then engaged in an unlawful drug-related activity, including by way of example only, such person acting as a "lookout";

(d) Such porson is physically identified by the officer as a member of a "gang" or association which has as its purpose illegal drug activity!

(e) Such person transfers small objects or packages for currency in a furtive fashion;

(f) such person takes flight upon the appearance of a police officer;

(g) Such parson manifestly endeavors to conceal himself or herself or any object which reasonably could bo involved in an unlawful drug-reletad activity]

(h) The area involved is by public repute known to be an area of unlawful drug use and trafficking;

(i) The premises involvad are known to have been reported to law enforcement as a place suspected of drug activity.

(j) Any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

Section 21-71 Severability

If any provision of this Article is held to be invalid, unconstitutional or unenforceable for any reason, such invalidity shall not affect any other provision, or the application thereof, which shall be given effect without the invalid provison or application, to this end the provisions of this Article are declared to be severable.

Section 21-23 Penalty'

Any parson who violates the provisions of this Article shall be guilty of a misdemeanor of the second degree punishable as provided in 778.082 or 775.083.

Section 22-24 Arrest Without Warrant

Any law enforcement officer authorized to act within the city limits of the city of Melbourne, may arrest any suspected loiterer under the provisions of this Article without a warrant,

SECTION 3. This ordinance shall become effective immediately upon adoption In accordance with the Charter of the city of Melbourne.

SECTION 4. It is the intention of the Mayor and the City Council of the City of Melbourne that the provisions of this ordinance shall be included in the City of Melbourne Code as a portion of Chapter 21, Article III, Sections 21-20 through 21-24.

SECTION 5. This ordinance was passed on the first reading at a Regular Meeting of the City council on the 27th day of December, 1988, and passed on the second and final reading at a Regular Meeting of the City Council on the 10th day of January, 1989.

BY: Joe W. Mullins
Mayor, City of Melbourne

ATTEST:
Lela M. Gaston, CMC
City Clerk