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IN THE SUPREME COURT OF FLORIDA

JAMES BROWN,

Petitioner,

v.

CASE NO. 81,189

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

JAMES BROWN,	:	
Petitioner,	:	
v.	:	CASE NO.
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal dated December 30, 1992, and the order denying rehearing dated January 29, 1993.

II STATEMENT OF THE CASE AND FACTS

The facts as related by the First District are essentially correct, and they will be recited here:

> Urging the unconstitutionality of section 893.13(1)(i), Florida Statutes (Supp. 1990) on several grounds, appellant, James Brown, seeks review of his conviction and sentence for the sale of a controlled substance within 200 feet of a public housing [facility]. ... We reject appellant's argument that the subject statute is unconstitutional and ... we affirm appellant's conviction and sentence. Appendix at 1-2; footnote omitted.

Petitioner challenged the constitutionality of the statute because it was vague for the failure of the legislature to define "public housing facility."

The First District disagreed and held the statute to be constitutional:

> Based upon dictionary definitions of the individual words, appellant suggests that the average person of common intelligence would interpret the phrase "public housing facility" as including any type of housing where the public is able to reside. In this manner, Brown ignores the fact that the phrase itself has a meaning more narrow than that gleaned from the definitions of its component words. Although the definition of "public housing facility" might not be included in a dictionary, a person of ordinary intelligence <u>should know</u> what was intended by the phrase. Slip opinion at 4; emphasis added.

On February 1, 1993, a timely notice of discretionary review was filed, pursuant to Art. V, §3(3)(b)(3), Fla. Const., and Rule 9.030(a)(2)(A)(i), Fla.R.App.P.

III SUMMARY OF THE ARGUMENT

The First District's opinion in this case expressly declares valid the state statute creating the crime of sale of a controlled substance within 200 feet of a public housing facility, and increasing the penalty for sale from a second degree to a first degree felony. Further review by this Court is desirable so that the citizens of this state will know what type of conduct is prohibited. The First District's opinion assumes the general public knows what a "public housing facility" is, even though that term was never defined by the legislature and cannot be found in the dictionary. In fact, the dictionary definitions of these words would lead a person of common intelligence to believe that any place where people live is a protected area. This Court should accept review and decide whether the statute is unconstitutionally vague on its face.

IV ARGUMENT

THE FIRST DISTRICT'S OPINION EXPRESSLY DECLARED VALID A STATE STATUTE AND FURTHER REVIEW BY THIS COURT IS DESIRABLE.

The First District's construction of Section 893.13(1)(i), Florida Statutes (Supp. 1990), is incorrect because it expressly declares valid an unconstitutionally vague statute. Section 893.13(1)(i) states, in pertinent part:

> it is unlawful for any person to sell, ... a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, ... (emphasis added).

Petitioner contended below that this statute related to public housing facilities violates State and Federal due process because it does not give notice of what is prohibited because "public housing facility" is not defined.

> It is constitutionally impermissible for a statute to contain such vague language that a person of common intelligence must speculate about its meaning and subject himself to punishment if his guess is wrong.

Bertens v. Stewart, 453 So. 2d 92, 93 (Fla. 2d DCA 1984), citing State v. Wershow, 343 So. 2d 605 (Fla. 1977). A statute is unconstitutionally vague where it:

> fails to give adequate notice of the conduct it prohibits and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement.

Id., citing Southeastern Fisheries Assoc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). In the absence of a statutory definition, case law, or related statutory

provisions which define a statutory term, may be resorted to in order to determine the meaning of the term. Id. at 94.

The controversy in Bertens arose when a student, Gaesel Bertens, was suspended from school for violating a rule which prohibited personal possession of "medicine" at school because she gave some vitamins to two of her fifth grade classmates. Id. at 93. The Second District Court of Appeal held that the rule was unconstitutional because it failed to give adequate notice that is required under due process. Id. at 94-95.

In reaching its decision that the rule was impermissibly vague, the court noted that the school board's failure to define medicine, did not, in and of itself, render the rule unconstitutional. Id. at 94. Rather, the court looked to the "ordinary" meaning of the term "medicine." Id. at 94. After looking at the ordinary dictionary definition of medicine, the court concluded that the dictionary definition did not cure the infirmity and that the term "medicine" was impermissibly vague. Id. at 94.

Like the situation in Bertens, the term "public housing facility" is not defined in the drug abuse statute. A search of the Florida Statutes related to housing reveals there is no definition for the term "public housing facility."

Chapter 421, Florida Statutes, governs public housing. The term "public housing facility" does not appear therein. Section 421.03(9), Florida Statutes, defines housing projects as:

> "Housing project" shall mean any work or undertaking:
>
> (a) To demolish, clear, or remove buildings from any slum area; such work or undertaking may embrace the adaptation of such area to public purposes, including parks or other recreational or community purposes; or
>
> (b) To provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities or other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare or other purposes; or
>
> (c) To accomplish a combination of the foregoing. The term "housing project" also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, restoration, alteration and repair of the improvements and all other work in connection therewith.

These definitions are not particularly helpful to understand what a "public housing facility" is. Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for use by the public, is a "public housing facility" within the statutory definition.

Because there is no statutory definition for "public housing facility," the words must be construed according to their plain meaning. State v. Hagen, 387 So. 2d 943 (Fla. 1980).

Webster's New World Dictionary (2d college ed.) defines the adjective "public" as:

> 1. of, belonging to, or concerning the people as a whole; of or by the community at large
> 2. for the use or benefit of all; esp. supported by government funds
> 3. as regards community, rather than private, affairs
> 4. acting in an official capacity on behalf of the people as a whole
> 5. known by, or open to the knowledge of, all or most people

Id. at 1149.

The noun "housing" is defined as:

> 1. the act of providing shelter or lodging
> 2. shelter or lodging; accommodation in houses, apartments, etc. ...
> 3. houses collectively
> 4. a shelter; covering

Id. at 681.

The noun "facility" is defined as:

> 1. ease of doing or making; absence of difficulty
> 2. a ready ability; skill; dexterity; fluency
> 3. the means by which something can be done
> 4. a building, special room, etc. that facilitates or makes possible some activity

Id. at 501.

The dictionary definition of each individual word does not provide a satisfactory definition. The dictionary definition of the words together would lead a reasonable person to the conclusion that any type of housing available to the public would be a public housing facility. Surely, the legislature did not intend to elevate the penalty for drug offenses within 200 feet of any place where the public is able to reside.

Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for

use by the public, is a "public housing facility" within the dictionary definition.

Consequently, because the term "public housing facility" does not have a statutory definition, and there is no dictionary or plain and ordinary definition that provides a clear definition, the statute is unconstitutionally vague in that it fails to provide adequate notice of the prohibited conduct.

The First District's conclusion that the statute was constitutional because a person of ordinary intelligence "should know what was intended by the phrase" is patently erroneous. A vague statute cannot be saved by what a person "should know;" it can only be saved by the terms the legislature used in the statute. A person cannot be given the chance to guess what the words mean. This Court must accept review.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court to grant and accept review in this case, because it significantly affects the rights of citizens of the state to know what criminal conduct is prohibited.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief has been furnished by delivery to Gypsy Bailey, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, on this 9th day of February, 1993.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JAMES BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-2435

Opinion filed December 30, 1992.

An appeal from the Circuit Court for Bay County, Clinton E. Foster, Judge.

Nancy Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

MINER, J.

Urging the unconstitutionality of section 893.13(1)(i), Florida Statutes (Supp. 1990) on several grounds, appellant, James Brown, seeks review of his conviction and sentence for the sale of a controlled substance within 200 feet of a public

housing project. Additionally, he argues that the trial court imposed an illegal sentence upon him. We reject appellant's argument that the subject statute is unconstitutional and, other than striking the requirement that appellant pay one dollar to the First Step program, we affirm appellant's conviction and sentence.[1]

The statute under which appellant was tried and convicted provides, in pertinent part:

> Except as authorized by this chapter, it is unlawful for any person to sell, purchase, manufacture, or deliver, or to possess with the intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, within 200 feet of the real property comprising a public or private college, university, or other postsecondary educational institution, or within 200 feet of any public park.

(Emphasis added). The statute increases the degree of the offense where the prohibited activity takes place within the specified areas. Thus, appellant's sale of cocaine is increased from a second to a first degree felony by virtue of his proximity to a public housing facility. See §893.13(1)(i)1., Fla. Stat. (Supp. 1990).

---

[1] The state concedes that an improper intermittent sentencing scenario is created when the sentence imposed in the instant case is combined with that imposed by the trial court in a related case which is also on appeal before this court. We note that appellant's convictions in the related case have been reversed, and the case has been remanded for a new trial. See Brown v. State, 17 F.L.W. D2499 (Fla. 1st DCA November 2, 1992). Consequently, we see no need to address the intermittent sentencing problem raised by the state.

Before turning to the constitutional issues appellant raises, we first address the state's argument that Brown waived these challenges when he failed to raise them in the trial court. However, the state's argument notwithstanding, it appears to us that the constitutional points raised concern fundamental error and may be presented for the first time on appeal. Appellate courts have inherent power to correct fundamental error in the absence of preservation by timely objection in the trial court. Broward County v. Greyhound Rent-a-Car, Inc., 435 So.2d 309 (Fla. 4th DCA 1983); Keyes Co. v. Sens, 382 So.2d 1273 (Fla. 3rd DCA 1980). Although it is not pellucidly clear which issues qualify as fundamental error, the general rule is that arguments relating to the constitutionality of the statute must be preserved by motion or objection at the trial court level unless the error independently qualifies as a fundamental error. A constitutional challenge to the facial validity of a criminal statute forming the basis of the charge against the defendant is the type of argument that could be presented for the first time on appeal. However, an error in determining the constitutionality of the statute as applied to a criminal case is not a fundamental error. Padovano, Florida Appellate Practice, §5.8 (1988). Because appellant's attack is upon the facial validity of the statute, it can properly be raised for the first time on appeal.

Appellant first asserts that the phrase "public housing facility" as used in the statute is unconstitutionally vague. We disagree. The proper standard for testing vagueness under

Florida law is whether the language gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). The language of the statute must "provide a definite warning of what conduct" is required or prohibited, "measured by common understanding and practice." Warren v. State, 572 So.2d 1376, 1377 (Fla. 1991) (quoting State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985)). Based upon dictionary definitions of the individual words, appellant suggests that the average person of common intelligence would interpret the phrase "public housing facility" as including any type of housing where the public is able to reside. In this manner, Brown ignores the fact that the phrase itself has a meaning more narrow than that gleaned from the definitions of its component words. Although the definition of "public housing facility" might not be included in a dictionary, a person of ordinary intelligence should know what was intended by the phrase.

Appellant also maintains that the challenged statute violates the equal protection clause because its distance classification is not rationally related to any legitimate objective. He claims that no ascertainable legislative intent is furthered by the adoption of a distance classification. Again, we disagree. In State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989), approved, 558 So.2d 1 (Fla. 1990), the court upheld a similar distance classification that increased the penalty for drug activity conducted within 1000 feet of a school. The court

noted that the purpose of the statute -- to reduce drug use by children -- was reasonably served by the creation of a drug-free zone around schools that would be enforced by stiff penalties for drug pushers. It was not fatal to the statute that it could apply to drug activity conducted after school hours or in places within the zone not frequented by children, or between persons not involved in making drugs available to children. Similarly, the statute at issue protects children and other tenants of public housing projects from drug-related crime that is, by all accounts, rampant in such areas. See 42 U.S.C.A. §11901 (West 1992). We find that the distance classification in the subject statute is a reasonable means of achieving this objective.

Next, appellant argues that the challenged statute violates due process protections because it does not require proof that the defendant had knowledge of his proximity to the prohibited area. He asserts that where no valid malum in se exception exists, the state must plead and prove his intent for purposes of satisfying the mens rea requirement. In Burch, the court rejected an identical attack upon the 1000 foot drug-free zone surrounding a school. The court reasoned that the statute did not require knowledge of the proximity, and that such a requirement would undercut the purpose of creating a drug-free zone. Burch, 545 So.2d at 283. For these same reasons, we find appellant's argument in this regard unavailing.

Lastly, appellant urges that the statute in question is an invalid exercise of the police power because the prohibition

against selling drugs within 200 feet of a public housing facility has no conceivable purpose of benefit to the general public. We find no merit in this argument. Florida law provides that prohibitions rooted in the exercise of the police power must relate to public health, morals, safety, or welfare. Failing this, the prohibition will be deemed arbitrary and capricious. Conner v. Cone, 235 So.2d 492 (Fla. 1970). The Burch court found a rational connection between the police power and the Florida statute banning drug sales within 1000 feet of a school, and quoted with approval United States v. Agilar, 612 F.Supp. 889, 890 (S.D.N.Y. 1985): "Congress has a legitimate and powerful interest in protecting school children . . . presumably on the assumption that a drug dealer who knew that an enhanced penalty would be imposed is less likely to distribute narcotics near a school." Burch, 545 So.2d at 284. We believe the statute at issue provides similar protection for children and adult tenants of public housing.

Accordingly, we affirm appellant's conviction and sentence except that we herewith strike the one dollar assessment appellant was ordered to pay to First Step of Bay County.

ERVIN and WOLF, JJ., CONCUR.

Brinkmeyer APD

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

January 29, 1993

CASE NO: 91-02435

L.T. CASE NO. 91-309

James Brown v. State of Florida

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for clarification, filed January 11, 1993, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: _____
Deputy Clerk

DISTRICT COURT OF APPEAL FIRST DISTRICT STATE OF FLORIDA

Copies:

P. Douglas Brinkmeyer
Gypsy Bailey

James W. Rogers

JAN 29 1993

PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT