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 THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. A three volume record on appeal, including transcripts, will be referred to as "R," followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Brown v. State, 610 So. 2d 1356 (Fla. 1st DCA 1992). The issue presented in this case is also pending review before this Court in Turner v. State, case no. 81,519, Bailey, et al. v. State, case no. 81,621, State v. Thomas, et al., case no. 81,724, and State v. Kirkland, case no. 81,725.

II STATEMENT OF THE CASE AND FACTS

By information filed March 13, 1991, petitioner was charged with sale of cocaine within 200 feet of a public housing facility (R 133). The cause proceeded to jury trial on May 28, 30, 1991, and at the conclusion thereof petitioner was found guilty as charged (R 142).

The state's evidence tended to prove that on January 16, 1991, the Panama City Police Department conducted a controlled buy of drugs using confidential informant Ronald Reed. Officer Jimmy Stanford monitored the buy in "the area by the Masselina Projects, between Masselina Projects and the Neota Motel, which is the 1400 block of Palo Alto Avenue" (R 38). Reed purchased a piece of crack cocaine from petitioner. The transaction occurred "between 14th Street and 14th Court on Palo Alto Avenue" (R 42). The witness further stated, when asked if it was within 200 feet of a public housing project: "it is within 20 or 30 feet, but it was on, actually occurred on, on the roadway" (R 44).

Virgil Tinklenberg, executive director of the Panama City Housing Authority, testified that his agency owned the Masselina Projects, and that it was bordered on the west by Palo Alto Avenue (R 69-71). Officer Jake Tankersly saw petitioner on the corner of 14th and Palo Alto after the buy (R 71-73).

On July 9, 1991, petitioner was adjudicated guilty and sentenced to 12 years in prison, with credit for 153 days served, followed by 10 years probation (R 154-55; 189-90). On

July 26, 1991, a timely notice of appeal was filed (R 173). On November 13, 1991, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner challenged the statute under which he was convicted, §893.13(1)(i), Fla. Stat. (Supp. 1990), because the failure of the legislature to define "public housing facility" rendered it unconstitutionally vague.

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 should know what was intended by the phrase. Appendix at 3; 610 So. 2d at 1358; emphasis added.

Petitioner also attacked a condition of his probation because the written order did not conform to the oral pronouncement and because the judge improperly delegated to the probation officer the duty to define a "high drug" area. The lower tribunal did not address this issue.

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. On May 24, 1993, this Court accepted review and scheduled oral argument for November 1, 1993.

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, making the crime a first degree felony, and prohibiting release through control release or the accumulation of gain time.

An opinion from this Court will notify citizens of this state what conduct is prohibited. The First District's opinion assumes the general public knows what a "public housing facility" is, although 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.

The due process vagueness doctrine requires a statute to both give notice to its citizens what conduct is prohibited and prevent discriminatory enforcement.

The Second District has criticized the lower tribunal's opinion and declared the statute to be unconstitutionally vague. The Third District has agreed with the First. This Court should adopt the position of the Second District, quash the First and Third Districts, and declare the statute unconstitutionally vague on its face.

Petitioner also attacked a condition of his probation because the written order did not conform to the oral pronouncement and because the judge improperly delegated to the

probation officer the responsibility to define what a "high drug area" was. The lower tribunal did not address this issue, but this Court should strike the condition, as part of its exercise of jurisdiction over the entire case.

IV ARGUMENT

ISSUE I
SECTION 893.13(1)(i), FLORIDA STATUTES, IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

The First District's construction of §893.13(1)(i), Fla. Stat. (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).

The statute makes the crime a first degree felony, and exempts the offender from consideration for control release and gain time.[1]

Petitioner contended below and argues here that this statute violates State and Federal due process guarantees, because it does not give notice of what is prohibited, in that "public housing facility" is not defined. The due process vagueness doctrine requires a statute to both give notice to its citizens what conduct is prohibited and prevent discriminatory enforcement.

---

[1]The undersigned could not locate a parallel federal criminal statute on point. 21 U.S.C. §860 doubles the penalties for distribution of controlled substances within 1000 feet of a school, much like §893.13(1)(e), Fla. Stat., but does not speak to public housing facilities. The federal government encourages the eviction of residents of housing facilities owned by HUD, who are involved in drugs, 42 U.S.C. §1437d(1), but that policy has come under some criticism. Comment, 36 Loyola L. Rev. 137 (1990).

In Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), the court ruled the California loitering statute unconstitutionally vague. The court set forth this test:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with such sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

In Bertens v. Stewart, 453 So. 2d 92, 93 (Fla. 2d DCA 1984), the court said, citing State v. Wershow, 343 So. 2d 605 (Fla. 1977):

> 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.

A statute is unconstitutionally vague if 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 Bertens, the court held a rule, which prohibited personal possession of "medicine" at school, was unconstitutional because it failed to give adequate notice what is required under due process.

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. Rather, the court looked to the "ordinary" meaning of the term "medicine." The court concluded that the dictionary definition did not cure the infirmity and that the term "medicine" was impermissibly vague.

See also Linville v. State, 359 So. 2d 450 (Fla. 1978), in which this Court declared unconstitutional a statute which outlawed the sniffing of a "chemical substance," because it too broadly encompassed an unduly large number of materials and objects.

Penal statutes must be strictly construed, §775.021(1), Fla. Stat., and they require greater certainty than other statutes. State v. Winters, 346 So. 2d 991 (Fla. 1977).

The First District held in this case that:

> 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. Appendix at 3; 610 So. 2d at 1358; emphasis added.

But this is not the test; it is not whether a person should know; rather, it is whether a person of common intelligence does know what the term means by reading the statute.

The Third District made the same mistake in Williams v. State, 18 Fla. L. Weekly D1220 (Fla. 3rd DCA May 11, 1993), when it ruled the same statute constitutional because its judges knew what the term meant:

> The term "public housing," in common parlance, is understood to to encompass affordable, government subsidized housing

> for individuals or families with varied needs.

Id. at 1221.

The Second District reached the proper result in State v. Thomas, et al., 18 Fla. L. Weekly D1067 (Fla. 2nd DCA April 21, 1993), review pending, case no. 81,724, when it ruled the statute unconstitutionally vague. First, it criticized the lower tribunal for its cursory examination of the statute:

> We find Brown, however, to be neither helpful nor persuasive as the discussion therein regarding the vagueness of the statute is limited to one paragraph ... .
>
> While the Brown court concludes that "a person of ordinary intelligence should know what was intended by the phrase public housing facility, we have not been able to decipher the intended meaning of the phrase with any degree of precision. The phrase is not defined in any dictionary, case law or sufficiently related statute that we can discover. While each of the three words of the phrase can be independently and easily defined, when used together in the statute, they present a veritable quagmire for any attempt at uniform enforcement.

Id; emphasis in original.

Next, the Second District struggled to find a way to place a judicial gloss on the statute which would make it constitutional.

> We used several approaches as we analyzed the alleged vagueness of this statute. We first considered whether we could articulate a precise jury instruction that would adequately advise a jury how to apply the statute in any particular set of circumstances. We were unable to do so. We also considered whether we could advise law enforcement officers in the field as to a precise standard to apply in enforcing the statute. We were unable to do so. We

> then considered at great length the myriad circumstances under which the statutory prohibition might be applicable. Although we could provide a long list of such circumstances, we set forth here only a few of the possibilities that raised sufficient doubt in our minds to require us to conclude the statute is unconstitutionally vague.

The Second District next looked at each individual term, beginning with the term "public:"

> In regard to the "public" aspect of the "public housing facility" provision, we have no way of definitively ascertaining whether the legislature intended the phrase to apply to publicly-owned housing to the exclusion of privately-owned housing; to housing available for occupancy by the "public" in general or for low income occupants only; to housing that is government financed or built; to housing that is privately owned but government financed or built; or to housing that is privately-owned but leased to a government agency for availability to public welfare recipients. We simply have no idea as to the limitations that might be or should be applied to the "public" aspect of a "public housing facility."

Id. The Second District then looked at the term "housing:"

> The same problem exists in trying to correctly determine the parameters of the term "housing." Does that term apply to rental units only? Does it refer to multifamily housing only or also to single family units? Does it apply to dormitory and congregate living facilities? Are military housing facilities included? Are religious or charitable owned and operated facilities available for occupancy or "shelter use" by the public included? The possibilities extend ad infinitum.

Id. The Second District finally examined the term "facility:"

> Finally, the term "facility" is open to so many possible interpretations as to be bewildering. Are the corporate offices

> of a "public housing facility" included? Are government offices that operate low income housing included? Are sewage, water and utility facilities included?

Id. The Second District then declared the statute to be unconstitutionally vague:

> In our opinion the possibilities for a misapplication of the term "public housing facility" are too numerous to allow that provision to section 893.13(1)(i) to withstand constitutional scrutiny.

Id.

The term "public housing facility" is not defined in the drug abuse statute. A search of the Florida Statutes related to housing does not reveal a definition for the term "public housing facility." The only passage of the statutes where the term "public housing" is used is in connection with the State Housing Incentive Partnership (SHIP) Act of 1988. Chap. 420, Fla. Stat., Part I. "Public housing" is mentioned in §420.00003(3)(d), Fla. Stat., but this is a legislative intent section and not a definitional section:

> Public Housing. -- The important contribution of public housing to the well-being of low-income citizens shall be acknowledged through state and local government efforts to provide services and assistance through existing programs to public housing facilities and tenants.

The definitional portion of the act, §420.00004, Fla. Stat., does not define the term. "Facility" is not defined anywhere in Chapter 420.

Chap. 421, Fla. Stat., governs public housing. The term "public housing facility" does not appear therein, but the term

"housing project" does. Section 421.03(9), Fla. Stat., defines "housing project" 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. Even if the legislature intended for the traditional low-income "housing project" to be targeted in §893.13(1)(i), the legislature did not use this statutory term; rather, it used "housing facility," a term with no definition. And even if the state uses this definition to attempt to save the statute, the statute is still vague.

A vacant lot could be a "housing project" within subsection (a) of the statutory definition, if it is some day envisioned as a dwelling place. A vegetable garden could be a

"housing project" within subsection (b) of the statutory definition, if it is in some way connected to a dwelling place. An abandoned building could be a "housing project" within subsection (c) of the statutory definition, if it is some day remodeled into a dwelling place. People of common intelligence must still guess as to the statute's meaning.

This Court has no power to rewrite the statute to make it constitutional. That is a job for the legislature. State v. Wershow, supra. In Brown v. State, 358 So. 2d 16 (Fla. 1978), this Court declared the open profanity statute unconstitutionally overbroad, and impossible to save by a limiting judicial construction:

> The Florida Constitution requires a certain provision defined by the legislature, not legislation articulated by the judiciary. ... This constitutional mandate obtains for two reasons. First, if legislative intent is not apparent from the statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent. Second, in some circumstances, doubts about judicial competence to authoritatively construe legislation are warranted. Often a court has neither the legislative fact-finding machinery nor experience with the particular statutory subject matter to enable it to authoritatively construe a [statute].

Id. at 20; citations omitted.

Even if "low income" is judicially engrafted onto "housing facility," in an attempt to save the statute, the statute remains vague. Section 421.03(10), Fla. Stat., defines "low income" as:

> "Persons of low income" shall mean persons or families who lack the amount of income which is necessary, as determined by the authority undertaking the housing project, to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

Equating "low income" with "public" is internally inconsistent with other portions of the statute. The statute also enhances the penalties for drug transactions close to public schools and public parks. One does not have to be a low income person to attend public school or play basketball in a public park. Even rich people are allowed to use these places too.

Moreover, the concept of "low income" is not susceptible to quantification, but the statute leaves that determination to the local housing authority. A person of common intelligence must necessarily guess whether the housing authority will classify someone as "low income."

Moreover, some single parents employed as secretaries by the state, with several dependants, may believe they meet the definition, even if the housing authority does not. In short, restricting the statute's scope to low income housing does not alleviate any of its vagueness.

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). In the absence of a statutory definition, case law, or related statutory provisions which define a statutory term, the

next step is to consult a dictionary to determine the meaning of the term. Bertens v. Stewart, supra, 453 So. 2d at 94.

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 term "public" could be construed as "available to the public." This construction does little to save the statute. Such an interpretation would include within the statute virtually all housing developments, since in this country, those with sufficient funds may buy or rent any housing which they can afford.

The term "public" could be construed as "owned by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place owned by the local, state, or federal governments. It would include college dormitories, military barracks, the Governor's mansion, juvenile detention homes, illegal alien detention camps, probation and restitution centers, migrant housing, homeless shelters, park ranger residences, prisons, jails, halfway houses, nursing or retirement homes, and

residential schools for the deaf, blind, or physically handicapped.

The confusion increases when one considers that many places traditionally owned by the public are now leased by the government from private owners, such as jails and prisons.

The term "public" could be construed as "financed by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place where the resident receives government funds to assist in housing expenses. Such a construction would necessarily include private homes purchased with Farmer's Home, FHA or VA funds. It would include first-time home buyers who receive local bond money to assist in their payments. It would include apartments close to the FAMU campus, which the developer proposes to build with government funds. It would include off-base housing for military personnel.

The term "public" could be construed as "subsidized by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place where the developer receives government funds to construct or maintain the project. It would include private not-for-profit groups, such as Habitat for Humanity, which depend on some government assistance in building affordable housing.

Scattered throughout Chap. 420, Fla. Stat., are programs for the state to subsidize private housing: the State Housing Trust Fund, §420.0005, Fla. Stat.; the Housing Development

Corporation of Florida, §420.101, Fla. Stat.; the Housing Predevelopment Trust Fund, §420.307, Fla. Stat.; the Elderly Homeowner Rehabilitation Program, §420.34, Fla. Stat.; the Florida Elderly Housing Trust Fund, §420.35, Fla. Stat.; the Neighborhood Housing Services Grant Fund, §420.4255, Fla. Stat.; the Florida Housing Finance Agency, §420.504, Fla. Stat.; the State Apartment Incentive Loan Program, §420.5087, Fla. Stat.; the Florida Homeownership Assistance Program, §420.5088, Fla. Stat., the Florida Affordable Housing Trust Fund, §420.603, Fla. Stat.; the Pocket of Poverty Trust Fund, §420.805, Fla. Stat.; and the Maintenance of Housing for the Elderly Trust Fund, §420.905, Fla. Stat.

Petitioner asks: which of these "public housing facilities" did the legislature intend to be included within the proscription of §893.13(1)(i)? All of these laudable programs are surely "public," but they are not included within the chapter dealing with "public housing."

Chap. 421, Fla. Stat., is entitled "Public Housing." It creates local housing authorities in §421.04, Fla. Stat., and regional housing authorities in §421.28, Fla. Stat., but it never defines "public housing facility."

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

Webster's New World Dictionary (2d college ed.) at 681. This definition is fairly straightforward, so petitioner will not

quarrel with it, except to note that it applies to all of the lodging mentioned above in connection with the term "public." Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for lodging the public, is a "public housing facility" within the dictionary definition.

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.

"Facility" may refer only to actual residences, or it could refer to anything associated with a dwelling place. These facilities may or may not include swimming pools, sheds, garages, garbage dumpsters, playgrounds, or parking lots across the street.

This definition is fairly straightforward, so petitioner will not quarrel with it, except to note that it applies to all of the lodgings mentioned above in connection with the term "public." Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for lodging the public, is a "public housing facility" within the dictionary definition.

Thus, the dictionary definition of each individual word does not provide a satisfactory definition. The dictionary meaning of the words together would lead a reasonable person to

conclude that any type of housing available to the public would be a public housing facility. The dictionary definition of the words together would cause a reasonable person to guess at the meaning of 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 may reside.

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 meaning, the statute is unconstitutionally vague in that it fails to provide adequate notice of the prohibited conduct.

The undersigned, in limited research of the law of other states, located only three states with statutes similar to ours. Code of Ala. §13A-12-270, provides for an additional five year prison term for a drug sale with three miles of a "public housing project owned by a housing authority." This language makes this statute a little less vague than ours.[2]

Illinois has a statutory scheme which reclassifies drug crimes which occurred within 1000 feet of "residential property owned, operated and managed by a public housing agency." Ill.

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[2]The statute has been upheld against a constitutional attack on separation of powers grounds, but no vagueness argument was made in Burks v. State, 611 So. 2d 487 (Ala. Ct. Crim. App. 1992).

Rev. Stat. ch. 56 1/2, para. 1407(b). Again, this language makes this statute a little less vague than ours.[3]

Georgia has the most explicit language. It penalizes drug crimes:

> in, on, or within 1,000 feet of any real property of any publicly owned or publicly operated housing project ... . For the purposes of this Code section, the term "housing project" means any facilities under the jurisdiction of a housing authority which constitute single or multifamily dwelling units occupied by low and moderate-income families ... .

Ga. Code §16-13-32.5(b). The statute further provides:

> The governing authority of a municipality or county may adopt regulations requiring the posting of signs ... designating the areas within 1,000 feet of the real property of any publicly owned or publicly operated housing project as "Drug-free Residential Zones."

Ga. Code §16-13-32.5(f).

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 required to guess what the words mean. This Court must quash the First and Third Districts and adopt the position of the Second.

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[3]The statute has been upheld against an equal protection attack, but no vagueness argument was made in People v. Shephard, 605 N. E. 2d 518 (Ill. 1992).

ISSUE II

THE LOWER COURT ERRED IN IMPOSING AN ILLEGAL PROBATION ORDER.

At sentencing, the court orally stated, as a condition of probation: "stay away from areas known for, as drug areas to be outlined by your probation officer." (R 125).

The probation order states:

> You will stay away from the following areas: If you are found within any of the proscribed areas, you are subject to immediate arrest:
>
> a. You will stay away from 9th Court and Cove Boulevard, including a one block area in all directions and including both sides of the perimeter streets.
> b. Massalina Memorial Homes Project as bordered by Palo Alto Avenue, 15th Street, Mercedes Avenue, and 14th Street.
> c. Foxwood Housing Project with boarders defined as within 50 feet of the outside boundary of the Foxwood Housing Project.
> d. The Panama Villa Apartments and/or Panama Garden Apartments as bordered by 17th Street, Friendship Avenue, 18th Street, and Flowers Avenue, including both sides of these perimeter streets.
> e. You will stay away from the Safari, Midnight Lounge, Little Savoy, Alvin's 007, including the premises and parking lot areas.
>
> If you are currently a resident within any of the proscribed areas, you must obtain permission from your supervising officer to maintain the residence.
> (R 189, condition (17)).

This probation order is illegal, because a written probation order must conform to the judge's oral pronouncement.

In Williams v. State, 542 So. 2d 479 (Fla. 2nd DCA 1989), the judge announced no special conditions of probation at sentencing, but included some in the written sentence and

probation order. The court remanded for the court to conform the written order to the oral pronouncement. See also Boatwright v. State, 549 So. 2d 1173 (Fla. 2d DCA 1989).

In Sumter v. State, 570 So. 2d 1039 (Fla. 1st DCA 1990), the court orally stated that the defendant would be subject to the "drug package" while on probation, but the written order contained several special conditions of probation. The court remanded for the judge to conform his written order to the oral pronouncement.

In Petrillo v. State, 554 So. 2d 1227 (Fla. 2d DCA 1990), the defendant was orally assessed restitution, but the court later increased that amount by over $6,000. The court held that such modification was improper without notice and a hearing.

Likewise, the judge cannot delegate to the probation officer the power to outline areas in which the defendant's presence is prohibited. Edmunds v. State, 559 So. 2d 415 (Fla. 2d DCA 1990); Henshaw v. State, 564 So. 2d 541 (Fla. 2d DCA 1990); and Carroll v. State, 578 So. 2d 868 (Fla. 2d DCA 1991).

This Court must vacate the order and direct the lower court to fashion a sentence not in violation of these principles.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court declare the statute unconstitutional, because it significantly affects the rights of citizens of the state to know what criminal conduct is prohibited. In addition, petitioner asks that condition (17) of his probation order be stricken.

Respectfully submitted,

NANCY A. DANIELS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief has been furnished to Gypsy Bailey, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, on this 18th day of June, 1993.

P. DOUGLAS BRINKMEYER

laterally apply a social security offset to workers' compensation benefits.

We adhere to the law established in the cited decisions that a social security disability offset may be taken only prospectively, and reverse the appealed ruling that Employer and Carrier could apply the social security offset to Claimant's past-due benefits derived from the adjustment of AWW during the period Claimant received temporary benefits. We remand with directions to require payment of the full past-due portion of Claimant's TTD benefits. The order is affirmed in all other respects.

AFFIRMED in part, REVERSED in part, and REMANDED.

ERVIN and BARFIELD, JJ., concur.

James BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. 91-2435.

District Court of Appeal of Florida, First District.

Dec. 30, 1992.

Rehearing Denied Jan. 29, 1993.

Defendant was convicted in the Circuit Court, Bay County, Clinton E. Foster, J., of selling controlled substance within 200 feet of public housing facility, and he appealed. The District Court of Appeal, Miner, J., held that: (1) defendant's attack upon facial validity of statute prohibiting sale of drugs within 200 feet of public housing facility could be raised for first time on appeal; (2) phrase "public housing facility" used in statute was not unconstitutionally vague; (3) statute did not violate equal protection clause or due process protections; and (4) dollar assessment defendant was ordered to pay should be stricken.

Modified and, as modified, affirmed.

1. Criminal Law ⇐1030(1)

Appellate courts have inherent power to correct fundamental error in absence of preservation by timely objection in trial court.

2. Criminal Law ⇐1030(2), 1044.1(1)

Arguments relating to constitutionality of statute must be preserved by motion or objection at trial court level, unless error independently qualifies as fundamental error.

3. Criminal Law ⇐1030(2)

Constitutional challenge to facial validity of criminal statute forming basis of charge against defendant is type of argument that could be presented for first time on appeal; however, error in determining constitutionality of statute as applied to criminal case is not fundamental error.

4. Criminal Law ⇐1030(2)

Defendant's attack upon facial validity of statute making it unlawful to sell controlled substance within 200 feet of public housing facility could be raised for first time on appeal. West's F.S.A. § 893.13(1)(i).

5. Criminal Law ⇐13.1(1)

Standard for testing whether statutory term is unconstitutionally vague under state law is whether language gives person of ordinary intelligence fair notice of what constitutes forbidden conduct.

6. Criminal Law ⇐13.1(1)

Language of statute must provide definite warning of what conduct is required or prohibited, measured by common understanding and practice, so as not to be considered unconstitutionally vague.

7. Drugs and Narcotics ⇐43

Phrase "public housing facility" used in statute making it unlawful to sell controlled substance within 200 feet of public housing facility was not unconstitutionally vague; although definition of "public hous-

ing facility" might not be included in dictionary, person of ordinary intelligence should know what was intended by phrase. West's F.S.A. § 893.13(1)(i).

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law ⇐250.1(2)
Drugs and Narcotics ⇐43

Distance classification in statute making it unlawful to sell controlled substance within 200 feet of public housing facility did not violate equal protection clause; purpose of statute was to protect children and other tenants of public housing projects from drug related crime and distance classification was reasonable means of achieving that objective. West's F.S.A. § 893.13(1)(i); U.S.C.A. Const.Amend. 14.

9. Constitutional Law ⇐258(3)
Drugs and Narcotics ⇐43

Statute making it unlawful to sell controlled substance within 200 feet of public housing facility did not violate due process protections; statute did not require knowledge of proximity to public housing project and such requirement would undercut purpose of creating drug free zone. West's F.S.A. § 893.13(1)(i); U.S.C.A. Const. Amends. 5, 14.

10. Constitutional Law ⇐81

Statutory prohibitions rooted in exercise of police power must relate to public health, morals, safety, or welfare; failing this, prohibition will be deemed arbitrary and capricious.

11. Drugs and Narcotics ⇐43

Statute prohibiting sale of drugs within 200 feet of public housing facility was valid exercise of police power; rational connection existed between police power and statute, which provided drug free zone for children and adult tenants of public housing. West's F.S.A. § 893.13(1)(i).

Nancy Daniels, Public Defender, P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Gypsy Bailey, Asst. Atty. Gen., Tallahassee, for appellee.

MINER, Judge.

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*, 608 So.2d 114 (Fla. 1st DCA 1992). Consequently, we see no need to address the intermittent sentencing problem raised by the state.

[1–4] 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.

[5–7] 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.

[8] 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.

[9] 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.

[10, 11] 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.

Keith Anthony KELVIN, Appellant,

v.

STATE of Florida, Appellee.

No. 91-2627.

District Court of Appeal of Florida, First District.

Dec. 30, 1992.

Defendant was convicted in the Circuit Court, Duval County, Donald R. Moran, Jr., J., of murder and attempted murder of undercover police officers, and he appealed. The District Court of Appeal, Ervin, J., held that: (1) evidence of belligerent statements made by the defendant during a prior arrest was relevant and admissible to show premeditated intent to use deadly force during an incident in which the defendant shot at police officers; (2) proposed cross-examination of an officer about whether he used profanity when he approached suspected drug sellers was relevant to support defendant's theory that he believed that the undercover officers were robbers; (3) a flight instruction amounted to an impermissible comment on the evidence; (4) the defendant waived errors in the prosecutor's opening statement; and (5) the evidence was sufficient to withstand a motion for judgment of acquittal under the "castle" doctrine.

Affirmed in part, reversed in part, and remanded for new trial.

1. Criminal Law ⇐371(4)

Evidence of belligerent statements made by defendant during prior arrest was relevant and admissible to show defendant's premeditated intent to use deadly force during incident in which he shot at police officers, even if it did reveal other crimes to jury.

2. Criminal Law ⇐412.1(1, 4)

Suppression of statements allegedly obtained in contravention of *Miranda* is required only if statements were product of