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IN THE SUPREME COURT OF FLORIDA

FREDERICK BAILEY, MARIO M. GOULD, and MARCUS GORDON,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

CASE NO 81621

1DCA CASE NO.
92-1064
92-1076
92-1243
(Consolidated)

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS ON JURISDICTION

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BRIEF OF PETITIONERS ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioners were the defendants in the trial court and the appellees in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal dated March 30, 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:

> The state appeals orders which granted motions to dismiss in three criminal cases. The appeals have been consolidated because all involve the same issue. In each case, the trial court dismissed the information based upon its conclusion that section 893.13(1)(i), Florida Statutes (Supp. 1990), is unconstitutionally vague because the term "public housing facility" is undefined. Appendix at 1.

The First District held the statute to be constitutional, on authority of two prior decisions which are currently pending discretionary review in this Court:

> Subsequent to the trial court's decisions in these cases, this court has addressed the precise issue raised here, concluding that the statute is not unconstitutionally vague. Brown v. State, 18 Fla. L. Weekly D173 (Fla. 1st DCA Dec. 30, 1992) [review pending, case no. 81,189]; Turner v. State, 18 Fla. L. Weekly D773 (Fla. 1st DCA Mar. 16, 1993) [review pending, case no. 81,519]. Appendix at 2.

On April 19, 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, along with the prior Brown and Turner cases, which are pending review in this Court, so that the citizens of this state will know what type of conduct is prohibited. The First District's opinion in Brown assumed 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 along with Brown and Turner 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).

Petitioners 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 in Brown 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 of this case along with Brown and Turner.

V CONCLUSION

Based upon the arguments presented here, the respondents respectfully ask this Court to grant and accept review in this case, along with Brown and Turner, because all significantly affect 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 Marilyn McFadden, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and by mail to each petitioner, on this 21st day of April, 1993.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

FREDERICK BAILEY,
MARIO M. GOULD and
MARCUS GORDON,

Appellees.

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

CASE NO. 92-1044
92-1076
92-1243
(CONSOLIDATED)

Opinion filed March 30, 1993.

An appeal from the Circuit Court for Alachua County.
Robert P. Cates, Judge.

Robert A. Butterworth, Attorney General; Marilyn McFadden, Assistant Attorney General, for Appellant.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, for Appellees.

PER CURIAM.

The state appeals orders which granted motions to dismiss in three criminal cases. The appeals have been consolidated because all involve the same issue. In each case, the trial court dismissed the information based upon its conclusion that section 893.13(1)(i), Florida Statutes (Supp. 1990), is unconstitutionally vague because the term "public housing facility" is undefined.

Subsequent to the trial court's decisions in these cases, this court has addressed the precise issue raised here, concluding that the statute is not unconstitutionally vague. Brown v. State, 18 Fla. L. Weekly D173 (Fla. 1st DCA Dec. 30, 1992); Turner v. State, 18 Fla. L. Weekly D773 (Fla. 1st DCA Mar. 16, 1993). Accordingly, in all three cases, we reverse and remand with directions that the trial court reinstate the information.

REVERSED and REMANDED, with directions.

SMITH, KAHN and WEBSTER, JJ., CONCUR.