D.A. 1-5-94 097

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SID J. WHITE
OCT 13 1993
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IN THE SUPREME COURT OF THE STATE FLORIDA

JAMES CUDA a/k/a JAY CUDA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: 82,203

District Court of Appeal
5th District - No. 92-1950

PETITIONER'S INITIAL BRIEF ON MERITS

FLEM K. WHITED, III
724 S. Beach Street, Suite 2
Daytona Beach, Florida 32114
(904) 253-7865
Florida Bar No.: 0271071

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STATEMENT OF THE CASE AND FACTS

Defendant was charged by Information with Abuse of an Aged Person by Exploitation in violation of s. 415.111(5), a third degree felony. Specifically, the Information charged:

> In that James Cuda a/k/a Jay Cuda, on or between August 1989 and October 1991, within Volusia County, Florida, did knowingly or wilfully exploit an aged person, to-wit: Elsie E. Harvey, by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person, to-wit: did illegally use or manage the funds, assets, property or power of attorney given to him by Elsie E. Harvey for profit.

Section 415.111(5), Fla. Stat. (Supp. 1991), provides:

> Any person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 415.102(3), Fla. Stat. (Supp. 1991), defines "aged person" as:

> a person 60 years of age or older who is suffering from the infirmities of aging as manifested by organic brain damage, advanced age, or other physical, mental, or emotional dysfunctioning to the extent that the person is impaired in his ability to adequately provide for his own care or protection.

Section 415.102(9), Fla. Stat. (Supp. 1991), defines "exploitation" as including, but not limited to:

> the improper or illegal use or management of an aged person's or disabled adult's funds, assets, or property or the use of an aged person's or disabled adult's power of attorney or guardianship for another's or one's own profit or advantage.

The statute fails, however, to define the term "improper or illegal use or management of the funds . . . ."

Defendant subsequently filed a Motion to Dismiss (R. 61-62) on the basis that the statute was unconstitutionally vague in violation of Article I, Section 9, Florida Statutes, in that it did not place persons of common understanding and intelligence on notice of the acts or omissions which the statute sought to prohibit. Specifically, the Motion argued that the phrase "improper or illegal use or management of the funds" was vague.

After a hearing on the Motion to Dismiss, the trial court granted the Motion on the grounds that s. 415.111(5), Fla. Stat. (Supp. 1991), was unconstitutionally "vague and not amenable to a saving construction." (R. 68) While the Court was of the opinion that the terms "use" and "management" conveyed "a sufficiently definite meaning so as to be understood by a person of ordinary intelligence," the Court found that the adjectives "improper or illegal" created a constitutional vagueness problem in that the term failed "to convey a sufficiently definite meaning as to the prescribed conduct." (R. 67)

In discussing the vagueness problem, the Court raised several questions regarding the conduct sought to be proscribed:

> When funds are being used or managed for investment how much tax liability, diversification, risk, liquidity, and income is proper or legal versus improper or illegal. What loan parameters are appropriate? Neither the statutes, case law, nor the plain and ordinary meaning of the statutory language gives any standards or suggestion as to what conduct is forbidden. It likewise fails to give police, prosecutors, judges or juries explicit standards to apply. There are no standard jury instructions which clarify the terms in question. It is interesting to note that the term "exploitation" includes the "improper or illegal use or management of the funds . . . " but is not limited thereto. The statute or statutory definitions fails to specify what other acts

amount to exploitation.

(R. 67)

The State subsequently appealed the trial court's Order to the Fifth District Court of Appeals.

In ***State v. Cuda***, 18 FLW D1612 (Fla. 5th DCA July 23, 1993) the district court affirmed the trial court's Order as to the word "improper". They reversed as to the word "illegal".

The District Court, while observing that the word illegal meant "behavior that is proscribed by law" went on to hold that, within the meaning of the statute in question, **illegal** referred to the violation of a criminal act which they viewed as any act subjecting one to criminal penalties.

The District Court went on to hold that to be guilty of a violation of the statute in question the "...perpetrator must be found to have violated another criminal statute but not necessarily charged with a violation of that statute."

It is from this opinion the Petitioner sought and obtained review.

SUMMARY OF ARGUMENT

The trial court's Order holding that s. 415.111(5), Fla. Stat. (Supp. 1991), is unconstitutionally vague and should be upheld. The statute fails to define what is meant by the illegal use of the funds, . . . " Due process of law requires that the statutory language convey sufficiently definite warnings to people of common intelligence of the acts sought to be proscribed by the statute. As s. 415.111(5) is currently drafted, a person of common intelligence must necessarily guess, at his own peril, what conduct the statute forbids.

ARGUMENT

Statutory Construction Issue

The Supreme Court of Florida has stated that:

> The test to determine whether a statute is unconstitutionally vague is whether men of common understanding and intelligence must necessarily guess at its meaning. To meet the constitutional challenge of vagueness, a statute must convey a sufficiently definite warning as to what conduct is proscribed.

State v. Rodriquez, 365 So.2d 157, 159 (Fla. 1978).

While it is true that "[l]egislative enactments are presumed valid" and that "[w]hen reasonably possible and consistent with the protection of constitutional rights," the courts are to "resolve all doubts as to the validity of a statute in favor of its constitutionality," *id*. at 158, it is also true that:

> When construing a penal statute against an attack of vagueness, where there is doubt, the doubt should be resolved in favor of the citizen and against the state. Criminal statutes are to be strictly construed according to the letter thereof.

State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). Because the Defendant has been charged with violation of a criminal statute, any doubt in its construction should be resolved in favor of Defendant and against the State.

The Florida Supreme Court also recognized this principle in ***State v. Llopis***, 257 So.2d 17 (Fla. 1971), in which the Court quoted with approval the following language from the trial court's order:

> The law of Florida is well settled that statutes penal in nature must be strictly construed according to the letter thereof. ***Ex parte Bailey***, [39 Fla. 734,] 23 So. 552 (Fla.1897); ***Reynolds v. Cochran***, 138 So.2d 500 (Fla.1962), ***reh. den.*** Moreover, such penal statutes are

> to be strictly construed ***in favor of the person against whom the penalty is sought to be imposed.*** ***Allure Shoe Corp. v. Lymberis***, 173 So.2d 702 (Fla.1965), reh. den. Such stricture thereby places a correlative duty upon our legislators to use clear, unambiguous language in the body of every statute penal in nature.
>
> When exercising its power to declare an offense punishable, the Legislature must inform our citizens with reasonable precision what acts are prohibited. There must be provided an ascertainable standard of guilt, a barometer of conduct must be established, so that no person will be forced to act at his peril. ***Cramp v. Board of Public Instruction of Orange County, Florida***, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275; ***Locklin v. Pridgeon***, [158 Fla. 737], 30 So.2d 102 (Fla.1947); ***State [ex rel. Lee] v. Buchanan***, 191 So.2d [33] 336 (Fla.1966). The determination of a standard of guilt cannot be left to be supplied by courts or juries. *Id.* [30 So.2d] at page 103. Nor can the Legislature predicate a crime on future acts or contingencies or on the taking place of some future act. ***Kelly v. State, ex rel. Rosowsky***, 55 So.2d 561 (Fla.1951).

257 So.2d at 18 (emphasis in original). See also ***State v. Winters***, 346 So.2d 991, 993 (Fla. 1977).

The Florida Supreme Court continues to recognize these fundamental principles of law. In ***Perkins v. State***, 576 So.2d 1310, 1312 (Fla. 1990) the court stated:

> Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property. ... Thus, to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused.

The Void-for-Vagueness Doctrine - Federal

As enunciated by the United States Supreme Court, under the void-for-vagueness doctrine:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend 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 policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-28 (1972) (footnotes omitted); accord ***Kolender v. Lawson***, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) ("a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); ***Roth v. United States***, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 1498 (1957) (as measured by common understanding and practice, the statutory language must convey sufficiently definite warnings of the proscribed conduct); ***511 Detroit Street, Inc. v. Kelley***, 807 F.2d 1293, 1295 (6th Cir. 1986). As the Supreme Court observed in ***Kolender***, "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement.'" ***Kolender v. Lawson***, 461 U.S. at 358 (quoting ***Smith v. Goguen***, 415 U.S. 566, 574 (1974)). The danger is that "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal

predilections." ***Kolender v. Lawson***, 461 U.S. at 358 (internal quotations and brackets omitted). See also ***Papachristou v. City of Jacksonville***, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); ***Interstate Circuit, Inc. v. City of Dallas***, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968).

The Due Process clause of the Constitution's Fifth Amendment requires that before an individual can be held to answer for the violation of a criminal statute, the statute itself must give fair warning of the precise conduct deemed unlawful. See ***Connally v. General Construction Co.***, 269 U.S. 385, 391 (1926) (a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process"); ***Pierce v. United States***, 314 U.S. 306, 311 (1941) (observing that the requirement that "crimes be defined with appropriate definiteness" is rooted in the common law as well); ***Raley v. Ohio***, 360 U.S. 423, 428, 79 S.Ct. 1257, 1266, 3 L.Ed.2d 1344 ("a state may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them."); ***Watkins v. United States***, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 ("a defendant has the right to have available, through a sufficiently precise statute, information revealing the standard of criminality before commission of the alleged offense."). Thus, under the protective mantle of due process, "[n]o one may be required at peril of life, liberty, or property to speculate as to

[the statute's] meaning ... . All are entitled to be informed as to what the [law] forbids." ***Lanzetta v. New Jersey***, 306 U.S. 451, 453 (1939).

The primary "vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." ***United States v. Cardiff***, 344 U.S. 174, 176 (1952) (internal citation omitted).

Thus, the void-for-vagueness doctrine requires the legislature to define criminal offenses with sufficient clarity so that two objectives are met: (1) ordinary people can understand what conduct the statute prohibits; and (2) law enforcement officials are not encouraged to arbitrarily enforce the statute. ***Kolender v. Lawson***, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

The Void-for-Vagueness Doctrine - Florida

The Florida Supreme Court has stated that this first requirement, that of notice, is important because:

> The requirements of due process of Article I, Section 9, Florida Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States are not fulfilled unless the Legislature, in the promulgation of a penal statute, uses language sufficiently definite to apprise those to whom it applies what conduct on their part is prohibited. It is constitutionally impermissible for the Legislature to use such vague and broad language that a person of common intelligence must speculate about its meaning and be subjected to arrest and punishment if the guess is wrong.

State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). See also ***Linville v. State***, 359 So.2d 450 (Fla. 1978) (finding the term

"chemical substance" vague); ***State v. Cohen***, 568 So.2d 49 (Fla. 1990) (finding the witness tampering statute vague); ***Warren v. State***, 572 So.2d 1376 (Fla. 1991) (finding the term "house of ill fame" void for vagueness).

Most recently this Court has addressed the void for vagueness doctrine in ***Wyche v. State***, 619 So.2d 231 (Fla. 1993) and ***E.L. v. State***, 619 So.2d 252 (Fla. 1993). In both cases, the Court reviewed the relevant issues present with relation to this argument and found the ordinances in question void for vagueness.

The Statute in Question

Section 415.111(5), Fla. Stat. (Supp. 1991), provides that:

> Any person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree, ...

While s. 415.102 defines "aged person," see s. 415.102(3), Fla. Stat. (Supp. 1991), the statute's attempt to define "exploitation" is less than illuminating, merely repeating the language contained in s. 415.111(5). Thus, s. 415.102(9), Fla. Stat. (Supp. 1991), defines "exploitation" as including, but not limited to, "the improper or illegal use or management of . . . funds, assets," etc. The statute does not undertake to define the term "improper or illegal use or management of . . . funds." Defendant submits that the use of the term **illegal** fails to convey a sufficiently definite warning as to what conduct the statute seeks to proscribe. Further the District Court committed reversible error in holding the term illegal mean the commission of a criminal act.

The trial court defined the term **illegal** in it's order. (R-63-69) There can be no question but that the term illegal means not authorized by law. Both Black's Law Dictionary and Webster's Seventh New Collegiate Dictionary convey the same meaning for the word illegal. For once, maybe the law and common sense agree.

The above references go on to use such phrases as "unlawful", "contrary to law", "not sanctioned by official rules".

It should be clear that an illegal act that subjects one to criminal penalties is but one form of illegal act. The district court should not be allowed to rewrite the dictionary. This would be contrary to the rule of law that requires courts give words of common usage their plain and ordinary meaning in the absence of some specific statutory definition. ***State v. Hagan***, 387 So.2d 943 (Fla. 1980); ***Southeastern Fisheries Association, Inc. v. Department of Natural Resources***, 453 So.2d 1351 (Fla. 1984).

Another example of the district court's error in holding an illegal act to be one subjecting one to criminal penalties is how the phrase "illegal act" has been used in other contexts. In ***University of Florida v. Massie***, 602 So.2d 516 (Fla. 1992) Justice Shaw referred to the purchase of equipment for a state run FM radio station in violation of Florida Statutes or regulatory requirements as an "illegal act".

Florida Rule of Criminal Procedure 3.800(a) provides that a court may correct an illegal sentence at anytime. Surely the imposition of an illegal sentence should not subject the trial court to criminal penalties. The sentence is illegal because it

was not authorized by law.

In ***Evanston v. City of Homestead***, 563 So.2d 755 (Fla. 3d DCA 1990), an illegal act was referred to as something you can't do by virtue of some constitutional or statutory prohibition. In ***Roberts v. Yusem***, 559 So.2d 1185 (Fla. 3d DCA 1990), the use of land in violation of zoning regulations was referred to as an illegal act.

The use of the word illegal is synonymous with the phrase not authorized by law.

The use of the word illegal in s. 415.111(5) is no different than saying that a person shall not, under the possibility of criminal penalties, do anything improper or not authorized by law with regard to the use or management of an aged persons funds.

In ***Locklin v. Pridgeon***, 30 So.2d 102 (Fla. 1947), the Florida Supreme Court held that the term "not authorized by law" was unconstitutionally vague in the context of s. 839.22, Fla. Stat. (Supp. 1946). That statute declared it unlawful:

> for any person to commit any act under color of authority as an officer, agent or employee of the United States government, State of Florida, or any political subdivision thereof when such act is not authorized by law.

Id. at 103. As the Court stated:

> By the terms of this act every officer, agent or employee of the Federal Government, of the State and the political subdivisions of the State, is required to determine at his peril what specific acts are authorized by law and what are not authorized by law. Honest and intelligent men may reasonably have contrary views as to whether or not a specific act of an officer is or is not authorized by law and, therefore, the violation or non-violation of this statute may reasonably depend upon which view the court or a jury may agree with.

Id. at 105. See also ***K.L.J. v. State***, 581 So.2d 920 (Fla. 1st DCA

1991) (holding as vague ordinance which established midnight curfew for minors, except those accompanied by an adult or those upon "legitimate" business).

This Court in ***State v. Rodriguez***, 365 So.2d 157 (Fla. 1978) reaffirmed the holding in ***Locklin***. In ***Rodriguez***, a statute prohibited the use, transfer, acquisition, trafficking, alteration, forgery, or possession of "a food stamp . . . in any manner not authorized by law." *Id.* at 158 (quoting s. 409.325(2)(a), Fla. Stat. (Supp. 1976)). In upholding the statute, the Court distinguished ***Locklin*** on the basis that:

> the statute involved in *Locklin* was broader than Section 409.325(2)(a) because it prohibited a person from committing "any act under color or authority as an officer . . . when such act is not authorized by law." In the present food stamp cases, however, because of the peculiar nature of the food stamp program, because it is a federal program, and because Chapter 409 gives notice that it is a federal program with federal regulations, we conclude that the Legislature, by the use of the language "not authorized by law," means not authorized by state and federal food stamp law.

Id. at 159.

Section 415.111(5), Fla. Stat. (Supp. 1991), provides no such direction to assist a person in determining what use or management of funds may be considered **illegal**. While the ***Rodriguez*** court found that that statute pertained to state and federal food stamp laws, s. 415.111(5) contains no suggestion as to the meaning of "illegal." Does "illegal" pertain to laws for which Defendant might incur criminal or civil liability, or both? Will the unintentional violation of a guardianship law subject the guardian to a violation of this statute? Once could only speculate the

number of situations that are not authorized by law that could subject one to a violation of this statute.

Justice Sundberg, in a provocative opinion in which he dissented from the ***Rodriquez*** majority, illustrated this problem particularly well when he stated that:

> Although I cannot be absolutely sure of it, I believe that a majority of the Court today has potentially sanctioned an enactment by the Legislature which would make unlawful as a discrete crime "the doing of any and all acts in any manner not authorized by law." It could appropriately be entitled the "Omnibus Prevention of Unlawful Conduct Act." Of course, conduct not authorized by law is not limited to criminal conduct but includes any act in contravention of the common law or statute, civil or criminal. To my mind, there is little difference between my hypothetical "Omnibus Prevention of Unlawful Conduct Act" and the provision here under consideration. This statute does nothing more than to state that it shall be unlawful to act in any manner not authorized by law and then provides a criminal sanction.

Rodriquez, 365 So.2d at 161 (Sundberg, J., dissenting).[1]

While the purpose of this statute is laudable, it is the position of the Petitioner that this Court should reverse the district court and affirm the trial courts Order as in ***State v. Llopis***, 257 So.2d 17, 18 (Fla. 1971) where it was written:

> While we acknowledge a special sympathy for legislation of this nature, which is intended to safeguard the public and insure honesty and integrity in government, our sympathy cannot be allowed to impair our judgment. This statute is vague beyond redemption.

Like the statute in ***Llopis***, this statute is vague beyond redemption also. The word illegal should be defined exactly as it is in both Webster's and Black's dictionaries. If it is, then

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[1]Justices Adkins and Hatchett concurred in the dissent.

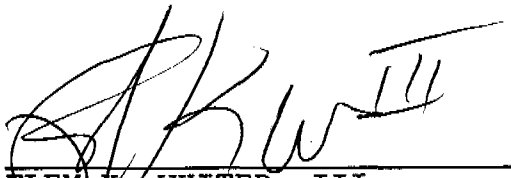
clearly persons of average intelligence acting in good faith may be subjected to criminal penalties because some prosecutor or police investigator believes he has acted illegally.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court to affirm the trial court's order finding s. 415.111(5), Fla. Stat. (Supp. 1991), unconstitutionally vague.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to: Belle Turner, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida; and to: James T. Miller, Office of the Public Defender, 330 East Bay Street, Suite 407, Jacksonville, Florida on this 11th day of October, 1993.

By: 

FLEM K. WHITED, III
724 S. Beach Street, Suite 2
Daytona Beach, Florida 32114
(904) 253-7865
Florida Bar No.: 0271071