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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES CUDA a/k/a JAY CUDA,

Petitioner,

v.

CASE NO. 82,203

STATE OF FLORIDA,

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

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information dated December 9, 1991, with one count of abuse of an aged person by exploitation in violation of section 415.111(5), Fla. Stat. (1991). (R 60). On February 4, 1992, Petitioner moved to dismiss the case on the ground that the statute was unconstitutionally vague. (R 61-62). By order, dated August 3, 1992, the trial court granted the motion.

The factual basis for the charge was that "...the defendant befriended the eighty-eight year old victim and eventually convinced the victim to invest and loan substantial amounts of money ($498,765.00 in investments and $421,000.00 in loans) to limited partnerships. Purported investment experts interviewed by the investigator indicated that the victim's assets were mismanaged. Tax free unit trusts and insured bonds and blue chip stocks were sold to provide the investment/loan funds. The result was significant capital gains tax liability, the lack of diversification with higher risk, less liquidity, less income, and loan notes set beyond the victim's actual life expectancy. Interviews with the victim's doctor, yardman, housekeeper, and neighbors indicate impaired mental status." (R 64).

The state filed a timely notice of appeal to the District Court of Appeal, Fifth District. After briefs were filed and oral argument on the case, the court issued its decision on July 16, 1993, reversing the order of the trial court and remanding for trial. State v. Cuda, 622 So. 2d 502 (Fla. 5th DCA 1993). Notice to invoke this Court's jurisdiction was timely filed on

August 11, 1993. This Court accepted jurisdiction of this case on September 15, 1993, setting oral argument for January 5, 1994.

SUMMARY OF ARGUMENT

Respondent suggests that the challenged statutory language provides sufficient warning as to the conduct which it proscribes. As originally enacted, the prohibition against "improper or illegal use" of an aged person's funds "for profit" meets the standard for vagueness that persons of common intelligence need not guess at its meaning.

Alternatively, the state would urge this Court to adopt the construction of the term "illegal" provided by the district court which severed the word "improper" from the statute. This statute, in keeping with the expressed legislative intent, should be read to prohibit acts which subject one to criminal penalties done with the intent to profit from the use or management of an aged person's funds.

Respondent urges this Court to uphold the statute, as originally enacted, as constitutionally valid. In the alternative, Respondent suggests that this Court affirm the construction and ruling of the appellate court finding the statute to meet the constitutional standard for vagueness.

ARGUMENT

THE CHALLENGED STATUTORY TERM "ILLEGAL" CONVEYS A SUFFICIENTLY DEFINITE WARNING AS TO THE PROSCRIBED CONDUCT SUCH THAT THE STATUTE WITHSTANDS PETITIONER'S VAGUENESS ATTACK.

Petitioner challenges the ruling of the District Court of Appeal, Fifth District, upholding the constitutionality of §415.111(5), Fla. Stat. (1991). State v. Cuda, 622 So. 2d 502 (Fla. 5th DCA 1993). As found by the trial court, Petitioner seeks a determination that the language "improper or illegal," as used in §415.111(5), Fla. Stat. (1991), is unconstitutionally vague.

The challenged statute provides as follows:

> A 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.

§415.111(5), Fla. Stat. (1991). The appellate court below found this language, after severing the word "improper," sufficient to withstand Petitioner's vagueness attack. State v. Cuda, 622 So. 2d 502 (Fla. 5th DCA 1993).

Legislative enactments are presumed valid. When reasonably possible and consistent with the protection of constitutional rights, this Court will resolve all doubts as to the validity of a statute in favor of its constitutionality. State v. Rodriquez,

365 So. 2d 157, 158 (Fla. 1978), citing Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976). See also Falco v. State, 407 So. 2d 203, 206 (Fla. 1981), citing Brown v. State, 358 So. 2d 16 (Fla. 1978). The test to determine whether a statute is unconstitutionally vague is whether persons 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, citing Zachary v. State, 269 So. 2d 669 (Fla. 1972).

Respondent suggests that §415.111(5), Fla. Stat. (1991), as originally enacted, provides sufficient warning as to the prohibited conduct. The legislature has chosen the term "improper or illegal" on more than one occasion, without constitutional challenge. See §173.07, Fla. Stat. and §618.21, Fla. Stat. (1991). In fact, legislation of this same nature can be found in seven other states. Of these seven statutes, four define "exploitation" in the same manner as the challenged statute.[1] The Legislatures of North Carolina, Texas, Louisiana, and Washington have all chosen to protect the elderly from "illegal or improper" use of an aged person's funds for profit. See §131D-2(4), N.C. Stat. (1993); §48.002(3), Tex. Stat. (1993); R.S. 14:403.2(4), LA. Stat. (1993); and §74.34.020(5), Wash. Stat. (1993). Respondent contends that these other state

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[1] Connecticut, Oklahoma, and Illinois have similar statutes, but the language varies somewhat from the Florida statute in question. See §17a-430(4), Conn. Stat. (1993); §43A, §10-103(11), Okla. Stat. (1993); and 720 ILCS 5/16-1.3 Ill. Stat. (1993).

statutes are persuasive authority that the challenged statute is also valid. Since the legislature is presumed to know the rules of statutory construction, Respondent submits that the statute in question, as enacted, complies with such rules.

Alternatively, the Respondent would agree with the construction of §415.111(5) as provided in the lower opinion, and would urge this Court to adopt the same reasoning and result. The district court specifically found that one who commits a criminal act involving use or management of an aged person's funds with the purpose of profiting from the illegality is sufficiently put on notice that such conduct is proscribed by §415.111(5), Fla. Stat. (1991). State v. Cuda, 622 So. 2d 502, 505. The district court reached this conclusion by severing the word "improper" from the statute and relying on case law and the statute, as a whole, to define the term "illegal." Cuda, 622 So. 2d 502.

In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense. State v. Hagan, 387 So. 2d 943 (Fla. 1980) (citations omitted). Case law defined "illegal act" as "an act that subjects one to criminal penalties." Gates v. Chrysler Corp., 397 So. 2d 1187, 1190 (Fla. 4th DCA 1981). The lower court adopted this definition, considering that no definition of "illegal" appeared in the chapter. Cuda, 622 So. 2d at 504. In the context of the entire statute, this construction prohibits

acts subject to criminal penalties which are done with the intent to profit from the use or management of an aged person's funds. This definition is the same as the plain and ordinary meaning of "illegal" when read in conjunction with the remainder of the statute. The statutory language prohibits "illegal use or management" of an aged person's funds "for profit."

The district court's construction of the term "illegal" is readily distinguishable from the cases relied upon by Petitioner to support the vagueness challenge. As indicated by the opinion below, this statute "punishes only those who illegally use or manage an aged person's property with the intent of profiting from the [criminal] violation." State v. Cuda, 622 So. 2d at 504. In contrast to the challenged statute in Locklin v. Pridgeon, 158 Fla. 737, 30 So. 2d 102 (Fla. 1947), this statute "does not proscribe acts which, while done in good faith, are not specifically authorized." Id. Neither does the challenged language involve a subjective analysis, likely to differ from person to person, as did the phrase "legitimate business" in K.L.J. v. State, 581 So. 2d 920 (Fla. 1st DCA 1991).[2] Id. "Illegal" involves the more objective criteria of any behavior proscribed by law. Id. The challenged language adequately defines the precise conduct which it prohibits.

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[2] K.L.J. v. State, 581 So. 2d 920, is further distinguished from the case at bar because it considers a Jacksonville curfew ordinance, and curfew ordinances are highly suspect as infringements on basic constitutional rights. In the Interest of J.H., 18 Fla. L. Weekly D2185 (Fla. 1st DCA October 4, 1993).

To define "illegal" in the manner suggested by Petitioner would lead to an absurd result. The legislature did not intend this statute to apply to unknowing violations of civil statutes. It is even harder to imagine how one would knowingly intend to profit at another's expense by unintentionally violating a civil securities statute, for example. The district court construed "illegal" in order to avoid such absurd results, Sharon v. State, 156 So. 2d 677 (Fla. 3d DCA 1963), and to give effect to the clear legislative intent of the statute.

Based on this same reasoning, the amicus argument claiming the lower court's construction improperly incorporates future federal laws fails. In response to a similar argument in State v. Rodriquez, 365 So. 2d 157, 160, this Court concluded that the legislature intended only to incorporate federal laws and regulations in effect at the time the challenged statute was enacted.[3] Since the legislature is presumed to have enacted valid and constitutional statutes, Respondent argues that this same conclusion should apply to the construction of §415.111(5). Rodriquez, 365 So. 2d at 160. Once it is concluded that the challenged statute incorporates previously enacted federal law, there is no reason why the applicable federal law should not also be limited to those which subject one to criminal penalties.

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[3] It is well settled that the legislature may adopt the regulatory and statutory standards of the federal government as long as they are in existence at the time of the enactment of the statute. State v. Carswell, 557 So. 2d 183, 184 (Fla. 3d DCA 1990), citing Adoue v. State, 408 So. 2d 567 (Fla. 1981); State v. Rodriquez, 365 So. 2d 157 (Fla. 1978); Freinwuth v. State, 272 So. 2d 473 (Fla. 1972).

As noted by Petitioner, criminal statutes are to be strictly construed, but not so strictly as to emasculate the statute and defeat the obvious intention of the legislature. Strict construction is subordinate to the rule that the intention of the lawmakers must be given effect. State ex rel. Washington v. Rivkind, 350 So. 2d 575, 577 (Fla. 3d DCA 1977). See also Griffis v. State, 356 So. 2d 297 (Fla. 1978). The expressed legislative intent concerning this statute can be found in §415.101(2), Fla. Stat. (1991). Essentially, the legislature is striving to protect the elderly and disabled from abuse, neglect, and exploitation. To construe the challenged statute in the manner suggested by Petitioner would abrogate this intent. Those in need of protection from this legislation will not be harmed by unintentional and innocent civil violations. It is clear that this legislation was designed to protect against the evils which can arise where one with ill intent gains control of an elderly victim's finances.

Respondent urges this Court to uphold §415.111(5), Fla. Stat. (1991), as originally enacted by the legislature. In the alternative, Respondent would request this Court adopt the construction provided by the lower court in State v. Cuda, 622 So. 2d 502 (Fla. 5th DCA 1993). The statutory language used by the legislature sufficiently puts one on notice of the proscribed conduct so as to avoid the dangers of arbitrary enforcement. The statute in question withstands constitutional challenge.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. mail to Flem K. Whited, III, to 724 South Beach Street, Suite 2, Daytona Beach, Florida 32114, this 1st day of November, 1993.

KIMBERLY D. NOLEN
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES CUDA a/k/a JAY CUDA,

Petitioner,

v.

CASE NO. 82,203

STATE OF FLORIDA,

District Court of Appeal
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Respondent.

_____________________________/

APPENDIX

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DOCUMENT(S): **APPENDIX:**

DECISION - FIFTH DISTRICT COURT OF APPEAL
filed July 16, 1993....................................A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1993

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 92-1950
92-2227

JAMES CUDA a/k/a JAY CUDA and MICHAEL A. BOLAND,

Appellees.

Opinion filed July 16, 1993

Appeal from the Circuit Court for Volusia County,
Shawn L. Briese, Judge, and
R. Michael Hutcheson, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Barbara C. Davis, Assistant Assistant Attorney General, Daytona Beach, for Appellant.

Flem K. Whited, III, Daytona Beach, for Appellees.

James T. Miller of Florida Association of Criminal Defense Lawyers, Jacksonville, Robert A. Harper, Jr., of Florida Association of Criminal Defense Lawyers, Tallahassee, and Donnie Murrell, Jr., of Florida Association of Criminal Defense Lawyers, West Palm Beach, Amicus Curiae.

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PETERSON, J.

We have consolidated these two appeals because they have as a common issue the determination by the respective trial courts that section 415.111(5), Florida Statutes (1991), is unconstitutionally vague. The charges based upon violations of this statute were dismissed and the state appeals. We reverse.

APP. "A"

To punish those who would exploit the impaired elderly citizens of this state by diverting those elderly persons' funds for their own purposes and profit, the legislature enacted the following statutory provisions that were considered by the trial courts in the instant cases:

Section 415.111(5), Florida Statutes (1991):

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

Section 415.102(3), Florida Statutes (1991):

> "Aged person" means a person sixty 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), Florida Statutes (1991):

> "Exploitation" means, but is 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 . . . power-of-attorney or guardianship for another's or one's own profit or advantage.

The trial courts focused upon the words "improper or illegal" to find section 415.111(5) unconstitutionally vague. The courts opined that the words failed to convey a sufficiently definite meaning to one who manages the funds of an aged person of what constitutes a violation of the statute. The courts below rhetorically asked: "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?" The trial courts also noted that no standards of management or investment nor standard jury instructions have been promulgated to suggest the conduct that would incur criminal liability.

The only reported case construing section 415.111(5) is a recent Second District case. In *State v. Dyer*, 607 So. 2d 482 (Fla. 2d DCA 1992), the defendants were charged with grand theft and financial exploitation of an aged person pursuant to section 415.111(5) for using high pressure sales tactics or fraudulent schemes to convince aged victims to pay exorbitant prices for emergency response systems. The court affirmed the dismissal of the exploitation charges stating that while the "alleged sales conduct may be 'exploitation' in a general sense . . . it does not involve use or management of the aged persons's funds for profit."[1] *Id.* at 482. The *Dyer* case did not involve the question of the statute's constitutionality.

We agree with the trial courts in the instant appeal that the legislature's choice of the word "improper" to describe the activity incurring criminal liability was poor. The use of the word in the statute does not provide a sufficiently definite warning of the proscribed conduct. A fiduciary of a protected person's assets who is paid for and renders services with the best of honest and faithful intentions could be exposed to prosecution under the statute for investment decisions or oversights that were later found to be unwise. We do not believe that the statute was meant to apply to those situations. The statute's use of the word "improper" leaves such fiduciaries and others "of common understanding and intelligence [guessing] at its meaning." *State v. Rodriquez*, 365 So. 2d 157, 159 (Fla. 1978). We therefore agree with the trial courts that the word "improper" as it is used in this statute is unconstitutionally vague.

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[1] We construe the use of the word "profit" in both *Dyer* and in the statute as relating to the motive or reason for the commission of the illegal act and not the management or use of the funds solely to create a profit for the benefit of the aged person.

The appellees argue in support of the dismissals of the charges against them that the word "illegal" is also unconstitutionally vague, and they rely primarily on three cases: *Rodriquez*; *Locklin v. Pridgeon*, 158 Fla. 737, 30 So. 2d 102 (Fla. 1947); and *K.L.J. v. State*, 581 So. 2d 920 (Fla. 1st DCA 1991). In *Locklin*, the supreme court found unconstitutionally vague a statute which made it unlawful for a public employee to act in a manner not authorized by law. The court noted:

> Under the provisions of this Act, an officer or an employer is just as amenable to prosecution for an act done in good faith, when that act is not specifically authorized by law, as he would be for the commission of an act done with evil intent and willfully done in violation of the law. So the determination of a standard of guilt is left to be supplied by courts or juries. This is an unconstitutional delegation of legislative power.

30 So. 2d at 103. In the instant case, the statute in question (excluding the word "proper") requires the performance of an illegal act for the purpose of profiting from it. Unlike the statute in *Locklin*, it does not proscribe acts which, while done in good faith, are not specifically authorized. The statute rather punishes only those who illegally use or manage an aged person's property with the intent of profiting from the violation.

In *Rodriquez*, the supreme court upheld a statute which made it a crime to use food stamps "in any manner not authorized by law." The court distinguished its earlier *Locklin* decision by noting that the term "in any manner not authorized by law" referred only to violations of state and federal food stamp law. The court found that the statute making it a crime to use food stamps in a manner not authorized by the food stamp laws was sufficiently definite to inform the defendant that his conduct in selling non-food items for food stamps was proscribed. In the instant case we find the law in

question is sufficiently definite. It proscribes the illegal use or management of an aged person's funds with the intent to profit thereby.

The final case appellees rely on in arguing that the term "illegal" is vague is *K.L.J. v. State*, 581 So. 2d 920 (Fla. 1st DCA 1991), in which the First District found a curfew ordinance for minors, which contained an exception for minors on "legitimate business," under the age of sixteen, to be unconstitutionally vague and overbroad. The term "legitimate business," however, cannot be fairly analogized to the word "illegal." Determining what constitutes "legitimate business," like determining what is "proper," involves essentially a subjective analysis which is likely to differ from person to person. The word "illegal", in contrast, involves the more objective criteria of any behavior that is proscribed by law. In *Gates v. Chrylser Corp.*, 397 So. 2d 1187, 1190 (Fla. 4th DCA 1981), the court defined "illegal act," as that term is used in section 320.64(4), Florida Statutes (1979), as an act that subjects one to criminal penalties. We view the use of the word "illegal" in section 415.111(5) in the same manner and hold that one who commits a criminal act involving use or management of an aged person's funds with the purpose of profiting from the illegality is sufficiently put on notice that such conduct is proscribed by the statute in issue.

SEVERABILITY

It is the duty of this court when reasonably possible to construe a statute to avoid a conflict with the federal and state constitutions. *Rodriquez*, 365 So. 2d at 158 ("When reasonably possible and consistent with protection of constitutional rights, [the supreme court] will resolve all doubts as to the validity of a statute in favor of its constitutionality."); *Schultz v. State*, 361 So. 2d 416, 418 (Fla. 1978). In construing a statute as

constitutional, the court cannot rewrite the statute. Neither are courts at liberty to supply deficiencies or undertake to make a vague statute definite and certain. *State ex rel. Lee v. Buchanan*, 191 So. 2d 33, 36 (Fla. 1966). Courts have no power to define a crime differently than does the statute. *Jackson v. State*, 515 So. 2d 394 (Fla. 1st DCA 1987), *approved*, 526 So. 2d 58 (Fla. 1988).

While judicial rewriting is prohibited, offending or meaningless words in a statute have been excised to preserve the constitutionality of a statute. In *State v. Reese*, 222 So. 2d 732 (Fla. 1969), the supreme court considered the constitutionality of Florida's obscenity statute, section 847.011, Florida Statutes, which denounced the sale or possession of "any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic literature." The court was troubled by the inclusion of the word "immoral" in the statute since it had been previously held to be unconstitutionally vague. The court concluded:

> The elimination of the word "immoral" would not interfere with the operation of the remainder of the statute, and it cannot be said that the legislature would not have enacted the statute had it known that this word would be deleted. Accordingly, the word "immoral" is severable and should be deleted.

Id. at 735.

The supreme court in *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 112 S. Ct. 1572, 118 L. Ed. 2d 216, 60 U. S. Law Weekly 3674 (U.S. Fla. Mar. 30, 1992), affirmed the Fourth District's determination that section 827.071(1)(g), Florida Statutes (1987), was unconstitutionally overbroad. It refused, however, to follow the Fourth District which narrowed the statute by reading an element into it and instead adopted this district's remedy in *State v. Tirohn*, 556 So. 2d 447 (Fla. 5th DCA 1990). That remedy was severance of the portion of the statute identified as being overbroad.

Both this court in *Tirohn* and the supreme court in *Schmitt* applied the four-part test of *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962) in order to determine if unconstitutional subunits of the statute are severable. The *Cramp* test requires the following consideration:

> When a part of the statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) (quoting *Cramp*, 137 So. 2d at 830).

We apply the *Cramp* test to section 415.111(5):

(1) Separation of unconstitutional provisions from the remaining valid provisions. We find that deletion of the words "improper or " from section 415.111(5) as well as section 415.102(9), when the latter section is used for the purposes of defining the word "exploits" in the former, can clearly be separated from the remaining provisions with no effect.

(2) Accomplishment of legislative purpose. The legislative purpose of the section as well as Chapter 415, the Adult Protective Services Act, is set forth in section 415.101(2). The pertinent provisions of that subsection include an expression of legislative intent to provide for the detection and correction of exploitation of aged persons through criminal investigations. This intent is not thwarted by the deletion.

(3) Inseparability of good and bad features. The deletion has no effect upon this standard.

(4) Complete act. A complete act remains after the minor deletion that directly outlaws financial exploitation of the aged persons in a way that harmonizes with the Adult Protective Services Act.

After applying the *Cramp* test, we find that the word "improper" is severable from section 415.111(5) and should be deleted. Having done so, we construe the statute as proscribing unlawful acts involving the use or management of the funds, assets, property, power of attorney, or guardianship of aged persons in which there exists an intent to profit from the illegal act to the detriment of the targeted aged person. To be guilty of the crime, the perpetrator must be found to have violated another criminal statute but not necessarily charged with a violation of that statute.

We vacate the dismissals of the charges against the defendants and remand for further proceedings.

DISMISSALS VACATED; CAUSE REMANDED.

GOSHORN and THOMPSON, JJ., concur.