047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. 82,~~842~~ 482
ROBERT N. SMITH,	:	
Respondent.	:	
	:	

FILED
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JAN 7 1994
CLERK, SUPREME COURT
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DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as accurate.

SUMMARY OF THE ARGUMENT

Section 322.34(3) unconstitutionally criminalizes simple negligence. The statute also violates due process by omitting any causation requirement.

ARGUMENT

ISSUE

WHETHER SECTION 322.34(3), FLORIDA STATUTES (1991), IS UNCONSTITUTIONALLY VAGUE, OVERBROAD AND INDEFINITE?

The Second District Court of Appeal properly determined that Section 322.34(3), Florida Statutes (1991), is unconstitutionally vague. The statute makes simple negligence in operating a motor vehicle a crime. This Court has previously held that simple negligence, standing by itself, cannot constitute a criminal act. State v. Joyce, 361 So. 2d 406 (Fla. 1978). Therefore, the statute is unconstitutional.

The Petitioner argues that the negligence standard is sufficiently precise to be criminalized by the legislature. The Respondent disagrees. A mere negligence standard is unconstitutionally vague; a culpable negligence standard is not. State v. Greene, 348 So. 2d 3 (Fla. 1977). Culpable negligence is negligence of a gross and flagrant character which evinces a reckless disregard for the safety of others. Killingsworth v. State, 584 So. 2d 647 (Fla. 1st DCA 1991). Establishing culpable negligence requires a degree of negligence higher than that required to establish civil liability. Graham v. State, 362 So. 2d 924 (Fla. 1978); Behn v. State, 621 So. 2d 534, 537 (Fla. 1st DCA 1993). This requirement of willfulness or culpability is necessary to prevent a person with no intent to do a wrong from being criminally punished.

In contrast, mere or ordinary negligence is defined as:

> ...the failure to use reasonable care. Reasonable is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

State v. Winters, 346 So. 2d 991, 993 (Fla. 1977).

Ordinary negligence is not a suitable standard for criminal law. Culpable negligence is of much greater import than ordinary negligence. Chieves v. State, 328 So. 2d 264, 265 (Fla. 1st DCA 1976). The "reckless disregard" shown by a perpetrator makes culpable negligence equivalent to an intentional violation of the rights of others. Id. at 265. It is only this disregard for the safety of others which makes a person criminally liable because a defendant should know that such acts are outlawed. State v. Greene, 348 So. 2d at 4. Culpable negligence depends on the extreme character of the conduct itself, not its illegality. Logan v. State, 592 So. 2d 295, 299 (Fla. 5th DCA 1991). In Logan, the court found that the commission of traffic infractions was not sufficient, without more, to support a conviction for culpable negligence manslaughter. Under section 322.34(3), a defendant may be guilty only of traffic infractions, yet be subject to criminal penalties for what is not even culpable negligence. Without the requirement of willfulness or culpable negligence, the statute is unconstitutional.

Due process demands that statutes have a definite and certain meaning, so that citizens are not forced to guess what it

proscribes. This is particularly true for penal statutes which are strictly construed and require greater certainty than other statutes. Winters; Bertens v. State, 453 So. 2d 92 (Fla. 2d DCA 1984). The instant statute fails to meet this due process requirement because an ordinary negligence standard is too nebulous to be strictly defined for a criminal statute.

Negligence is the failure to act reasonably. This is a vague concept which is hard to define because it is difficult if not impossible to obtain overwhelming consent on when an act or omission is reasonable. The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. Brown v. State, No. 81,189 p.3 (Fla. January 6, 1994). An ordinary person cannot always be expected to know when conduct is reasonable. The "void-for-vagueness doctrine requires that a penal statute 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." Kolender v. Lawson, 461 U.S. 352, 357-358 (1983). The state should not be given the power to decide when conduct is or is not reasonable. This invariably leads to arbitrary enforcement of the law.

Adding culpability to negligence is necessary for a criminal statute to be legal. Reckless disregard for the safety of others is a more acceptable and understood standard. Only by requiring the willfulness (scienter), can a statute avoid being

unconstitutionally void for vagueness. Joyce, 361 So. 2d at 407. Otherwise, a person with no intent to do a wrong might be punished.

The Petitioner claims that the statute is essentially no different than felony murder because it "simply criminalizes an act, whose standard is the elements of negligence, when that act occurs in the presence of yet another substantive crime." (Petitioner's Brief p.10). This is an inapplicable comparison. Felony murder involves conduct which the violator should know is dangerous, even if the final results are unintended. By contrast, driving with a canceled, suspended, or revoked license is not dangerous at all. The Second District pointed out this very fact in its opinion when it explained why the present case is not analogous to DUI manslaughter. (Like felony murder, DUI manslaughter involves underlying conduct which is reckless and, therefore, culpable). A person driving without a valid license may or may not be a more dangerous driver than one with a valid license. The failure to drive carefully "relates solely to the state of mind and attentiveness of the driver at that given point in time and in light of all of the surrounding circumstances, not upon the status of the operator's driver's license." State v. Smith, 624 So. 2d 355, 359 (Fla. 2d DCA 1993). Without a causal connection between driving without the proper credentials and the subsequent injury, there is no basis for creating a new and distinct criminal offense.

Citing Lewis v. United States, 445 U.S. 55 (1980), the Petitioner argues that no causal connection is necessary for the statute to be constitutional. In Lewis, the Supreme Court held

valid a federal statute which made it a separate crime for a felon to possess a firearm. The Petitioner points out there is no causal connection between felonious status and the possession of a firearm. However, this is irrelevant to the present case because the sanction imposed by the Lewis statute attached immediately upon a defendant's first conviction. Lewis, 445 U.S. at 67. The future misconduct then triggered the imposition of the criminal sanction.

On the other hand, when a person drives with a canceled, suspended, or revoked license, he is already guilty of a crime. Thus, the instant case in effect involves enhanced penalties for criminal conduct based on subsequent noncriminal conduct. This subsequent conduct may occur despite the fact that the person may not have even acted recklessly or willfully. In contrast, a violator of the Lewis statute knowingly possesses a firearm. Also, the Lewis statute applied only to convicted felons; and the Supreme Court has "recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm." Id. at 66.

More importantly, Lewis creates a new crime, possession of a firearm, for a certain class of people, convicted felons. In the instant case, driving with an invalid license is already a crime. Subsequent injury caused by negligence would subject a driver to civil penalties. If a driver is culpably negligent, he may be convicted of manslaughter. Thus, there is no need to create a separate enhanced criminal penalty, especially when the defendant is not acting willfully or culpably.

Section 332.34(3) criminalizes simple negligence. As discussed in Winters and Joyce, negligence is too nebulous to allow for criminal punishment. Without the requirement of culpability, the statute is too vague to convey sufficiently "definite warning as to the proscribed conduct when measured by common understanding and practices." Brown, No. 81,789 at p.4. When there is doubt about a statute in a vagueness challenge, the doubt should be resolved in favor of the citizen and against the state. State v. Wershaw, 343 So. 2d 605, 607 (Fla. 1977).

Additionally, the statute ties subsequent injury to driving without a valid license although there is no relationship between the two. "There simply is no 'causation-in-fact' between the status of a person's privileges and subsequent injury." Smith, 624 So. 2d at 359. Without any causative link between the injury and an affirmative act of a defendant, the statute violates traditional Florida law. See Todd v. State, 594 So. 2d 802, 805 (Fla. 5th DCA 1992). The statute was properly held to be unconstitutional.

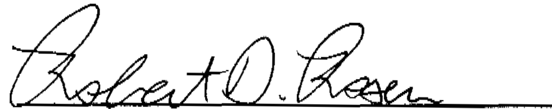
CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Respondent respectfully asks this Honorable Court to affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen A. Baker and Katherine V. Blanco, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 6th day of January, 1994.

Respectfully submitted,



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