OA 9-294

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JUN 10 1994
CLERK, SUPREME COURT
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ON APPEAL TO THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MARY LEE MANFREDONIA,

Respondent,

VS.

Appeal Number: 93-01162

STATE OF FLORIDA,

Petitioner.

BRIEF OF RESPONDENT ON MERITS

ROBERT E. JAGGER, PUBLIC DEFENDER
SIXTH JUDICIAL CIRCUIT IN AND FOR
PINELLAS COUNTY, STATE OF FLORIDA

By: Marc A. Falco, Esquire
On behalf of the Office of the
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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE FACTS

AND

STATEMENT OF THE CASE

It is alleged that on December 25, 1992, Mary Lee Manfredonia held an "open house party" where beer was consumed by minors. (R-12) On February 2, 1993, Ms. Manfredonia was charged by criminal information with a Violation of § 856.015, Florida Statutes (1991). (R-13) On March 10, 1993, Judge Peter Ramsberger conducted a status check hearing on the constitutionality of the statute. (R-39, 41)

At the states check hearing, the attorney for Ms. Manfredonia made a oral Motion to Dismiss the information based upon a prior ruling in another District that found the statute unconstitional. (R-40) The Assistant State Attorney having no objection, the court then granted the Motion to Dismiss based upon the recent District Court of Appeal case finding the statute unconstitutional. (R-40) On March 24, 1993, the trial court entered an order which consolidated the Mary Lee Manfredonia and the James D. Slayton cases for appellate review. (R-11)

On December 22, 1993, the Second District Court of Appeals filed its opinion dismissing the appeal as to Mary Lee Manfredonia determining that the notice was filed untimely; and, the Second District affirmed Judge Ramsberger's dismissal of the charges as to James Slayton and adopted the reasoning of the Fifth District in State v. Alves, 610 So.2d 591 (Fla. 5th DCA 1992). See, State v. Manfredonia, 629 So.2d 306 (Fla. 2nd DCA 1993).

On April 28, 1994, this court entered an order excepting jurisdiction and calendaring oral argument for September 2, 1994.

SUMMARY OF THE ARGUMENT

The respondent, Mary Lee Manfredonia, has standing to challenge the constitutionality of § 856.015 Florida Statutes (1991). Both the Second District Court of Appeals and the Fifth District Court of Appeals have found the statute unconstitutionally vague in violation of fundamental due process.

The wording of the "Open House Party" statute is entirely vague, specifically the words "reasonable steps". A person of common understanding and intelligence would be unclear as to what conduct is authorized or prohibited by the statute and thus would be exposed to criminal liability without fair notice. In addition to inadequate notice, the statute also does not provide guidelines to govern law enforcement officials from arbitrarily or discriminatorily initiating criminal prosecutions. The statute is vague beyond redemption and respondent requests this court to follow the rulings of both the Second District of Appeals and the Fifth District Court of Appeals.

ARGUMENT

ISSUE ONE

WHETHER SECTION 856.015, FLORIDA STATUTE (1991)

IS UNCONSTITIONALLY VAGUE?

A statute which either authorizes or forbids the doing of an act in terms so vague that anyone of common intelligence must necessarily guess as to it's meaning or differ as to it's application violates the essential requirements of due process of law. Brock B. Hardie, 154 So.2d 690 (Fla. 1934). A statute's language must convey a sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed 2d 1498 (1957). Herein lies the problem with the "open house party" statute. There is no sufficient, definite warning as to the required action or inaction. In State v. Alves, 610 So.2d 591 (Fla. 5th DCA 1992), the District Court found the statute exposed an otherwise innocent adult to criminal liability if in hindsight the "state" disagreed with what the adult deemed to be "reasonable steps" in dealing with the discovery of an illicit substance in the possession of a minor.

By who's standard are we to define "reasonable steps." There is no common or traditional definition for "reasonable steps" in this context. As the petitioner has suggested "reasonable steps" is merely to "interrupt with an unequivocal action" the consumption of alcohol or illicit drugs of a minor. Petitioner suggests that this unequivocal action could be the seizure of the contraband; the destruction of the contraband; notification of the legal

guardian and/or law enforcement. Which is it? It is certainly possible that a law enforcement officer may not deem the destruction of contraband as a "reasonable step." It is also possible that an Assistant State Attorney may not deem it reasonable to merely call the legal guardian of a minor in possession of illegal contraband as opposed to calling a law enforcement officer.

The U.S. Supreme Court appears more concerned with arbitrary enforcement than actual notice to citizens when determining whether a statute is unconstitutionally vague. In Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed. 2d 903 (1983) the court explained that it recognized recently the more important aspect of the vagueness doctrine "is not actual notice, but the other principle element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." Citing Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed. 2d 605 (1974) "Where 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 own personal predilections." Id, at 575, 94, U.S. Supreme Court, at 1248.

In Kolender, the Supreme Court found the California Statute requiring persons who loiter or wander on streets to provide "credible and reliable" identification and to account for there presence was unconstitutionally void for vagueness. The Kolender court noted that the concern for minimal guidelines for law enforcement has its roots as far back as 1876. Kolender, 103 S.Ct. at 1858, citing United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1876). Of course the petitioner requests that the "open house party" statute not be subjected to the same constitutional "infirmities" published in Kolender.

It's long been held in Florida that criminal statutes are to be strictly construed in favor of the person against whom the penalty is sought to be imposed. State v. Llopis, 257 So.2d 17 (Fla. 1971). This court in Llopis, in adopting the trial courts order, stated that there must be some ascertainable standard of guilt, a barometer of conduct must be established so that no person would be forced to act at his own peril. The standard of guilt cannot be left up to the courts or juries. State v Llopis 257 So.2d at 18. The U.S. Supreme Court also appears to agree. In Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 102 S.Ct. 1186, 1193 (1982) the court explains that vague laws offend several important values. Citing Grayned v. City of Rockford, 408 U.S. 104, 108 - 109, 92 S.Ct. 2294, 2298, 33 L.Ed 2d 222 (1972) the court explains that the first value is that man is free to steer between lawful and unlawful conduct and we must insist that the laws give the person of common intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent person by not providing adequate warning. Secondly, arbitrary and discriminatory enforcement must be prevented and laws must provide explicit standards for those who apply then. A vague law unconstitionally delegates basic policy matters to policeman, judges, and juries for resolution on a subjective basis with criminatory applications. Village of Hoffman, 102 S.Ct. at 1193. It is interesting to note that the court in Village of Hoffman differentiates between the civil statute it declared constitutional and criminal statutes when applying the vagueness standards. "The court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Village of Hoffman, 102 S.Ct. at 1193.

What are "reasonable steps?" What is the plain meaning to the words "reasonable steps?" Is an "adult in control" required to search the person of a minor when the adult finds that minor in the backyard smoking contraband. Does the adult then need to search the minor's vehicle. Obviously, if the minor has a marijuana cigarette its quite possible that he has additional marijuana somewhere close to his person if not on his person. Does the adult just take the unequivocal action of putting out the marijuana cigarette and sending the minor home in the minors vehicle? Or what if the minors parents are at the party? Does the adult in control leave the discipline of the child to his or her parents? If the adult finds the minor drinking a beer does the adult send the minor and his parents home? Does the adult call law enforcement and have the parents arrested for child abuse? The words "reasonable steps" leave much room for interpretation and provide no warning or notice to an otherwise innocent individual nor do the words provide proper guidelines for law enforcement.

Certainly the respondent has standing to challenge the statute at hand. Respondent has been charged and faces criminal sanctions under the statute. This court has held that a person subject to criminal prosecution clearly has a sufficient personal stake in the penalty to challenge the constitutionality of a statute. State v. Benitez, 395 So.2d 514, 517 (Fla. 1981).

This court in Smith v. State, 237 So.2d 139 (Fla. 1970) correctly upheld the constitutionality of § 317.221(1), Florida Statutes (1967). However, § 317.221(1), Florida Statute (1967) and the "open house party" statute can be distinguished. § 317.221(1), Florida Statute (1967), provides a description of what is "reasonable and prudent" by stating "in every event speed shall be controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on/or entering the highway with compliance with legal

requirements in the duty of all persons to use due care." Looking at such language in the context that persons who are licensed to drive and who do drive on the streets and highways of our state have experience and knowledge of what is "reasonable and prudent" and thus a common understanding of what is "reasonable and prudent." "Adults in control" due not take tests written or otherwise and do not receive a license to hold "open house parties." In addition, "adults in control" are not familiar with nor is there a common understanding of what exactly an "open house party" is or what it means to take "reasonable steps" when confronted with a minor consuming contraband. This lack of experience and common understanding are the very reasons the legislature has failed to provide adequate notice or to provide guidelines to govern law enforcement officials from possibly arbitrarily or discriminatorily enforcing the statute.

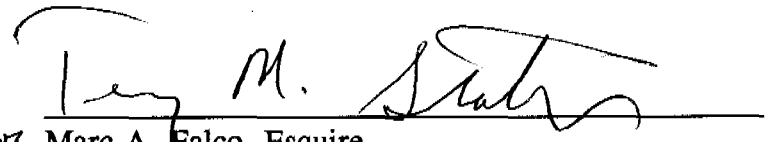
The question is not whether the mission of the "open house party" statute is laudable, but whether the wording of the statute passes constitutional muster under the fundamental precepts of due process. While acknowledging a special sympathy for legislation of this nature, our sympathy can not be allowed to impair our judgement. This statute is vague beyond redemption. State v. Llopis, 257 So.2d 17, 18 (Fla. 1971).

CONCLUSION

WHEREFORE, based upon the foregoing, Respondent prays this court renders an opinion approving both the decisions of the Second and the Fifth District Court of Appeals and holding the "open house party" statute void-for-vagueness and in violation of the fundamental precepts of due process.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by mail to William I. Munsey, Jr., Assistant Attorney General, c/o Attorney Generals Office, 2002 N. Lois Avenue, Westwood Center, 7th Floor, Tampa, Florida, 33607 this 9th day of June, 1994.



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