OA 10-5-94

027

IN THE SUPREME COURT OF FLORIDA

SARA GILBREATH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

SUPREME COURT
CASE NO. 83,090

DISTRICT COURT OF APPEAL
CASE NO. 93-03330

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

PETITIONER'S INITIAL BRIEF

GARY R. GOSSETT, JR.
Attorney for Petitioner
1755 U. S. 27 South
Sebring, FL 33870
(813) 471-1119
Florida Bar No. 0801194

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INTRODUCTION

This case is before the Court on a Petition for Discretionary Review seeking review of the certiorari Opinion issued by the District Court of Appeal, Second District, below on December 22, 1993. See, Gilbreath v. State, 629 So. 2d 962 (Fla. 2DCA 1993)

The Petitioner, Sara Gilbreath, will be referred to by name or as Petitioner, Appellant, or Defendant. The State of Florida will be referred to as the Respondent, Appellee, or State. References to the record contained in the file shall be made as (R-) including the appropriate page number. References to the material contained in the Appendix to this brief shall be made as (A-) including the appropriate page number.

Below, the District Court of Appeal, Second District had the benefit of the entire appellate record during its certiorari review. Additionally, an appendix was filed in the District Court of Appeal. Any reference to the appendix filed in the District Court of Appeal or the page numbers of the items in the appendix will correspond to the same page number in the record.

STATEMENT OF THE CASE

The Defendant below was charged with making an obscene or harassing phone call by complaint affidavit filed with the Court on June 29, 1992. (R-94) The Defendant, Sara Gilbreath, filed a Written Plea of Not Guilty on July 20, 1992. (R-97) On July 7, 1992, the Honorable Olin W. Shinholser, Highlands County Judge, recused himself from this cause, and the case was reassigned to Administrative Circuit Judge, J. David Langford. (R-102, 103) The case was later assigned to Circuit Judge Joe R. Young to try the case as an acting County Judge. On August 4, 1992, the State filed a Notice of Intent, pursuant to the Williams rule to introduce evidence of other bad acts. (R-108) On November 9, 1992, the State filed its Information for purposes of trial. (R-137) After the Defendant's waiver of trial by jury, the Court conducted a bench trial on November 13, 1992, the result of which was that the Defendant was found guilty and was sentenced. (R-139, 140, 141) The Defendant filed a timely Notice of Appeal on December 3, 1992. (R-141) In December, 1992 the State filed an ex parte Petition for Rule to Show Cause against the Defendant. (R-147) A Rule to Show Cause was issued by the Court. (R-149) The Defendant filed a written response to the Rule to Show Cause on December 15, 1992 (R-150) and a Motion for Stay Pending Review. (R-147, 142) The Court ultimately found the Defendant not to be in contempt of Court. (R-160) Further, the Court granted Defendant's Motion for Stay Pending Review. (R-159)

The Defendant was originally sentenced after being found guilty on November 13, 1992. Additionally, after the hearing on the Rule to Show Cause, the Court modified it's sentence without notice by sentencing the Defendant to a period of six (6) months probation. (R-89) At the time that the Court modified its sentence, counsel for the Defendant informed the Court that a timely Notice of Appeal had been filed on December 3, 1992. (R-89, 90) The matter then went to the Circuit Court on appeal.

The Circuit Court's "Order on Appeal" was entered on September 8, 1993 (A-1) and affirmed Petitioner's conviction, but reversed that part of the lower court's sentence that required her to be on probation and to seek mental health evaluation and treatment. The Circuit Court determined that since the Petitioner's Notice of Appeal has been filed prior to the modification of her sentence that such a sentence was made without jurisdiction. Although, the Circuit Court reversed the sentence of probation and mental health counseling, it also held that such a sentence would be proper on remand.

On Petition for Writ of Certiorari the District Court of Appeal, Second District, affirmed the Opinion of the Circuit Court and held that 365.16(1)(a) Fla. Stat. (1991) was valid under the U. S. Constitution's First Amendment. (A-6) The Opinion of the Circuit Court and of the District Court of Appeal is contained in the Appendix hereto.

The Petitioner now timely seeks discretionary review of

the Opinion of the District Court of Appeal, Second District.

By Order of this Honorable Court dated May 11, 1994, this Court accepted jurisdiction of this case to review the Opinion of the District Court of Appeal, Second District, issued on Certiorari review. As this Honorable Court has accepted jurisdiction of this cause, it may now consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. see, Savoie v. State, 422 So.2d 308 (Fla. 1982).

STATEMENT OF THE FACTS

At trial the State produced testimony to prove the following facts: that on May 12, 1992 the alleged victim, Ron Hegadis, and his step son, Tod Silverwood, were at the Hegadis home when the phone rang at 12:00 p.m. (R-10) Tod Silverwood answered the phone and recognized the caller as the Defendant, Sara Gilbreath. (R-10) Further, Mr. Silverwood testified that he could recognize the Defendant's voice because he had spoken to her many times before. (R-8) Tod Silverwood testified that once he answered the phone that the Defendant, Sara Gilbreath, asked to speak to Mrs. Hegadis. (R-11) Silverwood responded that his mother was not home. (R-11) Mrs. Gilbreath then asked to speak to Ron Hegadis and at that time Silverwood summoned Hegadis to the phone. (R-11) Additionally, Silverwood testified that he had heard the alleged victim, Ron Hegadis, use profane language in the past. (R-11) Further, Mr. Silverwood testified that he had known the Defendant, Sara Gilbreath, for approximately nine (9) years as she was a family friend. (R-12)

At trial, the alleged victim, Ron Hegadis, testified that he had known the Defendant for over eight and a half (8 1/2) years and that he considered her a friend. (R-16). Further, Mr. Hegadis testified at first that he never socialized with Mrs. Gilbreath or her husband, and then later testified that he had been to the Gilbreath home and had eaten dinner there. (R-15) Mr. Hegadis testified that prior to the subject phone call placed by the Defendant he

had maintained a friendship with the Defendant and her husband. (R-16) The alleged victim went on to testify that every time he spoke on the phone to the Defendant, that he heard profanity, swearing, harassing words, and threats directed at third parties in the postal system where both Hegadis and Mr. Gilbreath were employed. (R-16) The alleged victim admitted that the Defendant had called him many times in the past. (R-17) Further, Ron Hegadis testified at trial that before he agreed to speak to Sara Gilbreath on May 12, 1992, that Todd Silverwood indicated to him that Sara was using profanity. (R-25)

Prior to the phone call, the subject of the criminal proceeding below, the alleged victim admitted that he consented to speak to Mrs. Gilbreath and explained, "I didn't want to be rude to her." (R-19) During the phone call, Mr. Hegadis testified that the Defendant started off by inquiring into the whereabouts of Mrs. Hegadis. After that question was answered, Mr. Hegadis testified that Mrs. Gilbreath began using the usual foul language regarding third parties employed by the federal postal system in Highlands County. (R-20-21) Additionally, Mr. Ron Hedgadis testified that the profantiy was not directed at him, and was not uttered to "cuss him out". (R-27, 28) Instead, he said the profane language was used in describing members of management in the Sebring post office where both Mr. Ron Hegadis and Petitioner's husband worked. (R-27, 28) At the time the subject call was placed Sara Gilbreath had permission to call

the Hedgadis home and speak to Mrs. Hedgadis. Sara did this frequently. (R-25)

At trial the Defendant entered testimony that she did not use profanity in the alleged conversation. (R-42) Further, the Defense presented the testimony of Roger Sams who testified that he had known Mr. Hegadis for an extended period of time, and that Mr. Hegadis quite frequently used very vulgar profanity in his conversations. (R-34, 35)

SUMMARY OF ARGUMENT

ISSUE I

The Statute the Appellant stands convicted of, section 365.16(1)(a) Fla. Stat. is unconstitutionally vague and overbroad in violation of Florida and federal free speech protections. If this Court should decide that the challenged statute is not void, then the Petitioner's conviction on the facts presented violated the same constitutional protections.

ISSUE II

The evidence presented by the State at trial proved the alleged victim consented to the subject conversation with the Petitioner knowing she would use the profane language she did and, therefore, the evidence fails to prove all essential elements of the crime charged, as required by federal due process protections.

ARGUMENT

I.

The trial Court erred in finding the Appellant guilty of the crime of making a harassing or obscene phone call, a violation of F.S. 365.16 (1) (a), where that criminal statute presents an unconstitutional infringement of the Defendant's rights under the First and Fourteenth Amendments to the United States Constitution and under Article I, Section 4 of the Florida Constitution; or, alternatively Defendant's conviction on these facts violated the same protections.

On May 12, 1992, the Petitioner/Defendant, Sara Gilbreath, sought to avail herself of her rights of freedom of speech guaranteed in the United States Constitution's First and Fourteenth Amendments, and the Florida Constitution's Article I, Section 4. On that day she called a family friend in order to speak with him regarding matters that had occurred at his place of employment, where the Petitioner's husband was also working. However, after availing herself of her rights to freedom of speech on May 12, 1992, the State of Florida intervened and criminally prosecuted the Petitioner for her call to the family friend and thereby violated the Petitioner's protections of freedom of speech.

The First Amendment to the United States Constitution provides that,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, Section 4 of the Florida Constitution provides that,

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right.
>
> No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

In the present case this Court may review the argument of Petitioner on this issue as she properly has standing to raise this issue as she was convicted of the unconstitutional statute she seeks to challenge here. A prior version of Section 365.16(1)(a) Fla. Stat. has already been struck down by this Court in it's Opinion in State v. Keaton, 371 So.2d 86 (1979). In Keaton this Court held that the prior version of section 365.16(1)(a) would punish protected speech, and was therefore unconstitutionally overbroad. In State v. Elder, 382 So.2d 687 (Fla. 1980) this Court clarified its Keaton Opinion and stated that,

> What was broadly prescribed under section (1)(a), then, was not simply the act of making an uninvited obscene telephone call, but also the content of pure speech consentually communicated through a telephone. We declined in Keaton to uphold Section 365.16(1)(a) by narrowly construing it prescribed 'obscenity' as defined under Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), a form of expression unprotected in the public forum because the statute could nevertheless contravene the first amendment in failing to contain the essential qualifying element of an unwilling listener.

However, in construing a state statute this Court has determined previously that it has a responsibility to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided the statute may be given a fair

construction that is consistent with the federal and state constitutions as well as with the legislative intent. see, Elder at P. 690; see also, Keaton, supra. Additionally, in dealing with statutory regulation of first amendment activity this Court has in the past strictly construed the challenged statute to uphold it against vagueness or overbreath attacks. see, Elder at P. 691. On it's face the scope of the present section 365.16(1)(a) is not specifically limited to cases where the listener does not consent to the use of the prescribed language, despite this Court's holding in Keaton.

Section 365.16 (1)(a) 1991 Fla. Stat. provides that:

> (1) Whoever:
> (a) Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number; ...is guilty of a misdemeanor of the second degree...

Citizens reading this statutory provision might reasonably believe it criminalizes telling off-color jokes to a willing listener, or forbid sexually orientated conversation between lovers, or other consenting adults. Despite this Court's advisory language contained in Keaton, the language eventually adopted by the legislature in the new statute does not state a requirement for an unwilling listener. The statute in its present form is still so broad that it has a chilling effect on the freedom of speech and allows the prosecution of those individuals whose speech may not be constitutionally proscribed. Here, the vague language

of section 365.16(1)(a) has resulted in Petitioner's wrongful conviction. The language of section 365.16(1)(a) allowed the trial Court to convict the Petitioner where the alleged victim consented to the conversation. By the victim's own admission he testified that he knew Sara Gilbreath would utter profane language before he (victim) accepted the call. (R-19, 25) Section 365.16(1)(a) was originally adopted in 1977 and then modified in 1979 after being declared void in Keaton, supra. The language is still unconstitutionally overbroad and vague in violation of the Florida and federal constitutions free speech protections. The mere use of obscene language in a telephone conversation is not punishable. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

The Petitioner's conviction is clear proof that section 365.16(1)(a), is vague and overbroad. The victim in this case, (1) consented to speak to the petitioner, (R-19); (2) testified that his step-son, who answered the telephone, indicated to him that she was using profanity at the time he gave his consent, (R-25); and (3) the victim said that he was a friend of the Petitioner and everytime he had spoken to her in the past she had used profane language. (R-18) Here these facts prove Mr. Ron Hedgadis was a willing listener.

The threshold analysis that must be made to determine whether or not the State has violated the Petitioner's First Amendment rights is to determine the forum in which the rights are, or were, exercised in. Here, the Petitioner

exercised her rights to freedom of speech in the non-public forum. see, Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 799-800, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567, (1985); Operation Rescue v. Women's Health Center, Inc., 626 So.2d 664 (Fla. 1993). Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and and viewpoint neutral. See, Perry, infra, at 460 U.S. 49.Once the type of forum is determined this court must then turn to whether or not the statute is "narrowly tailored to serve a significant government interest and whether it leaves open ample alternative channels of communication". Perry Education Assn. v. Perry Local Educators Assn., 460 U.S.37, 103 S.Ct. 948, 74 L.Ed.2d 794, (1983). EU v. San Franscisco Cty. Dem. Cent. Com., 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) and Federal Election Comm. v. Mass Citizens For Life 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). The Petitioner recognizes that, "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Carey v. Brown, 447 U.S. 455 at 471, 100 S.Ct. 2286 at 2296 (1980). The United States Supreme Court has held that the home has a unique nature, "the last citadel of the tired, the weary, and the sick,". see, Gregory v. Chicago, 394. U.S. 111, at 125, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969). Further, in the case of Frisby

v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) the Court held at U.S. 483,

> "One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear. . .Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."

(3)

The Petitioner having recognized that the speech complained of occurred in a non-public forum and that the State has a significant interest in protecting unwilling listeners from any type of speech in their home, the next analysis must turn to whether the statute is narrowly tailored. It is not. The statute is too vague and overbroad. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. see, Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); Operation Rescue, supra at P. 674. On the question of the overbreath of Statutes like section 365.16(1)(a) the United States Supreme Court has noted that,

> A clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct. . . The crucial question, then, is whether the ban sweeps within its prohibitions what may not be punished under the First . . . Amendment.

Grayned at 408 U.S. 114-115, 92 S.Ct. at 2302; Operation Rescue at P. 674 and 675.

In the present case section 365.16(1)(a) meets the

definition of being vague in that the element of the crime of an unwilling listener is not stated, but is merely assumed. The fact that this element of the crime was added by this court in Keaton by judicial caveat does not save the language of present 365.16(1)(a) from not clearly defining its elements. Additionally, the statute is overbroad as demonstrated by the facts of the present case where the Petitioner was convicted, and here the residential listener consented to the conversation knowing that the Petitioner would use profane language during the course of the conversation. Therefore, here the prescription of section 365.16(1)(a) sweeps within its prohibitions what may not be punished under the First Amendment. Although, the listener here, after consenting to the conversation, did not like it's content, and then initiated a criminal prosecution pursuant to section 365.16(1)(a). The broad language of this statute allowed the prosecution to be brought where it should not have.

In the case of Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), the Court determined a challenge to a Georgia statute that proscribed certain language with the result that the statute was struck down. In Gooding the high Court determined that the Georgia statute punished only spoken words. Holding,

> Section 26-6303 punishes only spoken words. It can therefore withstand Appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia court's, it is not susceptible of application to speech, although vulgar or offensive,

that is protected by the First and Fourteenth Amendment. Further, in Gooding at U.S. 521 the Court noted that,

> Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as to others. And if the law is found deficient in one of these respects, it may not be applied to him either until and unless the satisfactory limiting construction is placed on the statute.

citing to Coates v. City of Cincinnati, 402 U.S. 611, 619-20, 91 S.Ct. 1686, 1691, 29 L.Ed.2d 214 (1971); The analysis that the Court used in Gooding to strike down the Georgia statute would appear to require this Court to strike down section 365.16(1)(a). The Petitioner's conviction below is proof that the statute, as phrased, is subject to misapplication by the police, prosecutor's, and trial Courts.

If this Honorable Court determines that section 365.16(1)(a) is not void, then the Petitioner would provide that her conviction on these facts violated the constitutional protections enumerated above. Where, as here, the listener was willing, even after his step-son advised him that the caller was using profanity (R-25). The Petitioner's conviction cannot stand under this Court's ruling in Keaton, supra.

II.

The trial Court erred in finding the Defendant guilty of a violation of F.S. Section 365.16 (1) (a) where the evidence presented at trial was insufficient to prove every element of the crime charged.

If this Honorable Court finds against Petitioner on her first issue, then the Petitioner raises this issue as the next logical step in the Court's analysis of this case. At trial, the State failed to prove that the Defendant committed every element of the crime charged beyond a reasonable doubt. The State solicited testimony from the alleged victim, Ron Hegadis, that the Defendant frequently called his home, and that he consented to speak with her prior to the alleged obscene remarks that led to the criminal charge against the Defendant. (R-9, 19, 20, 21) The alleged victim testified that the Defendant was assisting his wife in obtaining a real estate salesperson's license from the State of Florida. He further testified that he had spoken with the Defendant on a number of occasions, and that on all of these occasions the Defendant used profane language similar to that used in the alleged criminal act. (R-16, 17, 18) The alleged victim's act of consenting to speak on the phone with the Defendant demonstrated his actual, and/or, constructive consent to the call, and to the standard, or usual, profane language allegedly used by the Defendant. If the alleged victim consented to the conversation knowing that the Defendant would use profane language regularly during that conversation because the same language had been used in previous

conversations, the State has failed to prove the Defendant's intent to offend, annoy, abuse, threaten, or harass the alleged victim, and the absence of listener consent as required by Section 365.16(1)(a).

In the case of State v. Keaton, 371 So. 2d 86 (1979), this Court struck down F.S. 365.16 (1)(a) (1977) as unconstitutionally overbroad. In the court's dicta contained in Keaton, it recommended language to the Florida Legislature that it deemed to be constitutional. This language was adopted in the new Section 365.16 (1)(a) passed by the 1979 Florida Legislature. In Keaton at 371 So. 2d 90, at 91 the Court held that for a permissible conviction pursuant to an obscenity statute to lie the telephone listener must not consent to the conversation. Further, the Court added that if a consenting listener hears obscene language, that a conviction of the caller for the obscenity would be in violation of the federal First Amendment freedom of speech protections of such caller. Additionally, the mere use of obscene language in a telephone conversation is not punishable as protected under the federal First Amendment. See, Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

Since the 1979 Florida Legislature adopted the Keaton language it must be concluded that listener consent must be lacking for a conviction to lie under the new Section 365.16 (1)(a) (1979).

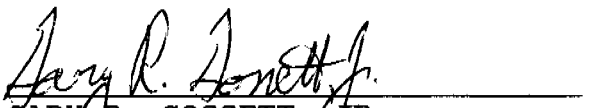
The alleged victim's testimony at R-19-21 that he

consented to the subject call knowing the Defendant would use profanity requires this Court reverse the Appellant's conviction. Where a conviction is affirmed by an appellate court and the essential elements of the crime are not proven beyond a reasonable doubt a federal due process violation occurs under the United States Fourteenth Amendment. See, In Re Winship, 397 U.S. 358 90 S.Ct. 1068 (1970) 25 L.Ed.2d 368, Vachon v. New Hampshire, 414 U.S. 478, 38 L.Ed.2d 666, 945 S.Ct. 1477 (1974); Smith v. State, 558 P.2d 39 (N.M. 1976).

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Petitioner prays that this Honorable Court review this cause and reverse the Opinion of the District Court of Appeal, Second District, and thereby the Petitioner's conviction and sentence below.

Respectfully Submitted,



GARY R. GOSSETT, JR.
Attorney for Petitioner
1755 U. S. 27 South
Sebring, FL 33870
(813) 471-1119
Florida Bar No. 0801194

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MS. BRENDA S. TAYLOR, Office of the Attorney General,** 2002 North Lois Avenue, Westwood Center, 7th Floor, Tampa, FL 33607 this 3rd day of June, 1994.

Gary R. Gossett, Jr.
GARY R. GOSSETT, JR.

IN THE SUPREME COURT OF FLORIDA

SARA GILBREATH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

SUPREME COURT
CASE NO. 83,090

DISTRICT COURT OF APPEAL
CASE NO. 93-03330

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

APPENDIX TO PETITIONER'S INITIAL BRIEF

GARY R. GOSSETT, JR.
Attorney for Petitioner
1755 U. S. 27 South
Sebring, FL 33870
(813) 471-1119
Florida Bar No. 0801194

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR ~~POLK~~ Highlands COUNTY, FLORIDA

SARA GILBREATH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPEAL NO: 92-55
CASE NO: MM92-1056A1-XX

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CLERK

ORDER ON APPEAL

APPELLANT, Sara Gilbreath, seeks review of the trial court's decision finding her guilty of the offense of making an obscene or harassing phone call in violation of §365.16(1)(a), FLA. STAT. The record reveals that Appellant was charged with this offense after making a phone call to the victim, Ron Hegadis, in which she used obscene and threatening language. Mr. Hegadis stated that he had received such calls from Appellant in the past and had asked her not to call him again as he did not like the language Appellant used or the threats she made. After a bench trial on November 11, 1992, Appellant was found guilty and was sentenced. The trial court withheld adjudication and ordered Appellant to file a mental evaluation report that had been prepared by a Dr. Mercer with the State. The agreement was that if the state approved of the report, which supposedly suggested that Appellant did not need any counseling, then no counseling would be ordered by the trial court. Appellant filed a timely notice of appeal on December 3, 1992. In response to an ex parte Petition for Rule to Show Cause from the State, the trial court issued a Rule to Show Cause to Appellant setting a hearing at which time she could show cause why she should not be held in contempt for her failure to produce the report. Appellant filed a written response to the Rule to Show Cause on December 15, 1993 along with a motion for Stay Pending Review. A hearing was held by the trial court on December 21, 1992, at which time the trial court, notwithstanding Appellant's advisement that a notice of appeal had been filed, placed Appellant on six months probation and ordered Appellant

to undergo a mental evaluation. By written orders on January 11, 1993, the trial court granted Appellant's Motion for Stay Pending Review and on the rule to show cause, specifically found Appellant not to be in contempt of court.

Appellant raises three issues on appeal:

1 - Whether §365.16(1)(a), Fla. Stat., presents an unconstitutional infringement on Appellant's rights.

2- Whether the trial court erred in finding Appellant guilty of a violation of §365.16(10(a), where the evidence presented at trial was insufficient to prove the crime charged.

3- Whether the trial court erred in sentencing the Appellant to obtain a psychiatric evaluation and treatment and in modifying its sentence after a timely notice of appeal was filed.

Appellant correctly argues that although the constitutionality issue was not raised at trial, this Court can review the issue as it may involve fundamental error. *State v. Smith,* 240 So. 2d 807. There are two arguments to Appellant's first issue on appeal: first, the statute is void as being in violation of free speech protections; and, second, when Appellant was charged with this "void crime", her right to due process was violated. The Court will address these contentions together by discussing the case law surrounding the statute in question.

The constitutionality of this statute originally came into question and was addressed by the Florida Supreme Court in *State v. Keaton,* 571 So. 2d 86 (Fla. 1979). The statute originally was worded: "365.16(1) Whoever by means of telephone communication: (a) Makes any comment, request, suggestion, or proposal which is obscene, lewd lascivious, filthy, or indecent ... shall be guilty of a misdemeanor of the second degree ..." The *Keaton* court held that the statute was unconstitutional as it was not limited to cases where the listener did not consent to the use of the proscribed language and that it therefore in violation of the First Amendment freedom of speech. That court specifically stated:

> We do not hold that the state may not proscribe obscene telephone communications regardless of the circumstances. Were section 365.16(1)(a) limited to obscene calls to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass the listener, the enactment

> would pass constitutional muster. Because such a statute would assume the existence of a listener who is unwillingly subjected to vulgar or obscene epithets, it would constitute a valid legislative attempt to protect the substantial privacy interests of the listener.

After this case was decided, the legislature amended the statute to read:

> 365.16. **Obscene or harassing telephone calls**
>
> (1) Whoever:
>
> (a) Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number;
>
> ***
>
> is guilty of a misdemeanor of the second degree ...

The amended statute complies with the express requirements of the Florida Supreme Court as announced in *Keaton.* The issue of the constitutionality of the amended statute has never arisen, although subsections (b) through (d) were deemed not to be violative of constitutionally protected rights in *State v. Elder,* 382 So. 2d 687 (Fla. 1980). The *Elder* court mentions subsection (1)(a) only for the purpose of discussing its decision in *Keaton.* There are no cases dealing specifically with the constitutionality of §365.16(1)(a).

Appellant argues that lack of consent is a specific constitutional requirement for a statute such as §365.16. However, the Florida Supreme Court stated in *Keaton* that a statute worded as the amended statute is would assume an unwilling listener. *Keaton* at 92. The Appellee argues that the phrase "... to a location at which the person receiving the call has a reasonable expectation of privacy; ..." allows for the constitutionality of the statute per *Rowan v. United States Post Office Dept.* 397 U. S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1979). This Court agrees with that position and

recognizes that the right of free speech is sometimes outweighed by privacy interests, here the privacy interests of the listener, Mr. Hegadis. *Elder* at 692. Accordingly, this Court finds that §365.16(1)(a) is not in violation of Appellant's constitutional rights of free speech or due process.

Appellant's second issue on appeal centers around the argument that the Appellee failed to prove Appellant committed the crime charged beyond a reasonable doubt. To the contrary, this Court finds the record is clear that the victim had asked Appellant not to call him at home because he did not like the language or threats, that Appellant did call the victim at home, which goes only to show that he consented to take the call - not that he consented to being confronted with abusive language, that the language used by Appellant was obscene, lewd, lascivious, filthy, vulgar, or indecent, and that when Appellant had been requested by the victim to not call him and speak thusly and she, nonetheless did just that, it could only have been Appellant's intent to offend the victim. Even were this not the case, because of the presumption that the decision of the trial court will not be disturbed on appeal absent a showing of an abuse of discretion by the trial court, this Court would find no error as Appellant has failed to show an abuse of discretion. *Delgado v. State,* 360 So. 2d 73 (Fla. 1978).

Part of Appellant's third issue, that the trial court lacked jurisdiction to modify Appellant's sentence after Appellant had filed a timely notice of appeal, is correct. *Critton v. State,* 604 So. 2d 933 (Fla. 1 DCA 1992); *Dailey v. State,* 575 So. 2d 237 (Fla. 2 DCA 1991). Appellee's argument that the trial court's 60 day sentence was for contempt of court is clearly erroneous as the record contains a written order of the trial court specifically stating that Appellant was found to not be in contempt of court. Therefore, the order of the trial court sentencing Appellant to 60 days probation and requiring her to have a mental evaluation is REVERSED AND REMANDED. Upon remand, at which time proper jurisdiction will lie with the trial court, Appellant may be sentenced to 60 days probation. This Court would also find no error in a requirement that Appellant undergo a psychiatric or mental evaluation to determine the need for counseling or treatment. Appellee is correct that §948.011, FLA. STAT., gives the trial court discretion to assign probation as well as conditions for that probation. Appellant argues that the condition of probation that she undergo a mental evaluation and possible treatment is not related to the offense of conviction and cites *Rodriguez v. State,* 378 So. 2d 7 (Fla. 2d DCA 1979). Appellant

further contends that there is nothing in the record to indicate that Appellant had a mental defect or that such a condition contributed to the commission of the crime. While there may be no specific allegation that Appellant had a mental defect, the trial court certainly had the advantage of seeing Appellant and hearing all of the testimony in making its determination that there may be some continuing problem and that there may be some way to avoid that problem. Even this Court, taking into consideration the nature of Appellant's threats, would question the cause of Appellant's actions, and accordingly agrees with the trial court's actions. Besides that, Appellant never objected to this condition and presumably even predicted that it may be imposed as evidenced by the pre-trial evaluation supposedly performed by Dr. Mercer. In any case, this Court would find no error if, on remand, the trial court reimposed this condition upon Appellant.

It is therefore

ORDERED AND ADJUDGED that the conviction of Appellant is AFFIRMED. The sentence of 60 days probation and the conditions placed on that probation is, however, REVERSED AND REMANDED.

DONE AND ORDERED on this 8 TH day of ~~August~~ SEPT., 1993.

RANDALL G. MCDONALD
Chief Judge

Copies furnished to:

Gary R. Gossett, Jr., Esquire
3750 U. S. 27 North, Suite 12
Sebring, Florida 33870

Linda Davis Grable, Assistant State Attorney
534 South Commerce Avenue
Sebring, Florida 33870

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SARA GILBREATH, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO. 93-03330

Opinion filed December 22, 1993.

Petition for Writ of Certiorari
to the Circuit Court for the
Tenth Judicial Circuit for
Highlands County, sitting in
its appellate capacity.

Gary R. Gossett, Jr.,
Sebring, for Petitioner.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Brenda S. Taylor,
Assistant Attorney General,
Tampa, for Respondent.

PER CURIAM.

Sara Gilbreath seeks certiorari review of the circuit court's order affirming her conviction for "obscene or harassing telephone calls." § 365.16(1)(a), Fla. Stat. (1991).

Of the several issues raised in the petition, only one warrants extended discussion. Gilbreath argues that the statute under which she was charged is facially unconstitutional for two reasons. First, she claims that the statute infringes upon First Amendment guarantees of free speech. Second, she argues that the statute is impermissibly overbroad and subject to misapplication. The circuit court disposed of both arguments in a well-reasoned order, which we affirm.

A prior incarnation of the statute was invalidated on constitutional grounds. State v. Keaton, 371 So. 2d 86 (Fla. 1979). The old statute arguably penalized obscene calls without regard to whether the recipient consented to hear them. Accordingly, the supreme court found the statute unacceptably vague and potentially violative of First Amendment rights of free speech. In declaring the statute invalid, the court made it clear that the state could "proscribe obscene telephone communications . . . to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass the listener." 371 So. 2d at 92. This "expectation of privacy" language was then explicitly written into the statute, and certain confusing phraseology was clarified, by legislative amendment. In the view of the circuit court, and ours, the constitutional infirmities that prompted the decision in Keaton have thereby been cured. And see State v. Elder, 382 So. 2d 687 (Fla. 1980), involving subsection (b) of the same statute, which proscribes anonymous calls which are intended to annoy or harass.

Petition denied.

SCHOONOVER, A.C.J., HALL and BLUE, JJ., Concur.