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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

PETITIONER'S JURISDICTIONAL BRIEF

FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

GARY R. GOSSETT, JR.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER CITATIONS:

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. The Defendant, Sara Gilbreath, filed a Written Plea of Not Guilty on July 20, 1992. 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. On August 4, 1992, the State filed a Notice of Intent, pursuant to the Williams Rule to introduce evidence of other bad acts. On November 9, 1992, the State filed its Information for purposes of trial. After the Defendant's waiver of trial by jury, the Court conducted a bench trial on November 13, 1992, after which the Defendant was found guilty and was sentenced. The Defendant filed a timely Notice of Appeal on December 3, 1992. In December, 1992 the State filed an ex parte Petition for Rule to Show Cause against the Defendant. A Rule to Show Cause was issued by the Court. The Defendant filed a written response to the Rule to Show Cause on December 15, 1992 and a Motion for Stay Pending Review. The Court ultimately found the Defendant not to be in contempt of Court. Further, the Court granted Defendant's Motion for Stay Pending Review.

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. 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.

The Circuit Court's "Order on Appeal" was entered on September 8, 1993 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 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 Fla. Stat., Sec. 365.16(1)(a) was valid under the U. S. Constitution's First Amendment. That written opinion is contained in the Appendix hereto.

SUMMARY OF ARGUMENT

This Court's subject matter jurisdiction is to be liberally interpreted and should extend to all cases where it is arguable, at all, that such jurisdiction lies. See, The Florida Star vs. B.J.F., infra. In the instant cause the District Court of Appeal, Second District, expressed the view, in it's written opinion that Fla. Stat. Sec. 365.16(1)(a) was valid and did not violate the United States Constitution's First Amendment. That declaration vests discretionary subject matter jurisdiction in this Court under Article V, Section 3(b)(3) of the Florida Constitution.

ISSUE

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THIS CAUSE.

This Honorable Court has jurisdiction to review this cause in it's discretion as the opinion below of the District Court of Appeal, Second District, expressly declared valid Fla. Stat. Sec. 365.16(1)(a) (1991). See, Fla. R. App. P. 9.030(2)(a)(i). Further, the District Court of Appeal construed the First Amendment to the United States Constitution. See, Fla. R. App. P. 9.030(2)(a)(ii).

In it's opinion of December 22, 1993, the District Court of Appeal, Second District affirmed and, thereby, adopted the lengthy opinion of the Circuit Court. See, Appendix. Additionally, the District Court of Appeal held that, "In the view of the Circuit Court, and ours, the constitutional infirmities that prompted the decision in Keaton have thereby been cured. . ." After discussing the Keaton case in which former Fla. Stat. Sec. 365.16(1)(a) had been struck down by this Court and affirming the Circuit Court's opinion that the new statute, Fla. Stat. Sec. 365.16(1)(a) (1991) as changed by the legislature was valid.

The effect of the discussion of Keaton was to construe the First Amendment as permitting the Florida legislatures proscription of certain speech in the new (1991) version of the subject statute. See, State v. Keaton, 371 So.2d 86

(1979). According to the Court's opinion in The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), the subject matter jurisdiction of this Court is to be construed in it's broadest sense and should liberally extend to all possible cases where it is arguable, at all, that subject matter jurisdiction lies.

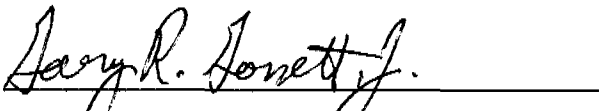
This Court may exercise it's discretionary jurisdiction bestowed upon it under Fla. Const., Art. V, Sec. 3 (b)(3) to review this cause as the lower Court's opinion expressly declared valid Fla. Stat. Sec. 365.16(1)(a) (1991) and expressly construed the U. S. First Amendment. See, Crane Rental of Orlando, Inc. v. Hausman, 532 So.2d 1057 (Fla. 1988); Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); Broward County v. La Rosa, 505 So.2d 422 (Fla. 1987).

APPENDIX

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court exercise it's discretionary jurisdiction and review this cause.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by US Mail to **MR. PETER ESTRADA,** A.S.A., Office of the State Attorney, at 534 South Commerce Avenue, Sebring, Florida 33870, and to the **OFFICE OF THE ATTORNEY GENERAL,** at Suite 700, 202 N. Lois Avenue, Tampa, Florida 33607; **this** 31st **day of January, 1994.**

Gary R. Gossett Jr.

GARY R. GOSSETT, JR.

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.

STATE OF FLORIDA
COUNTY OF POLK

THIS COPY IS A TRUE COPY OF ORIGINAL
Opinion
ON FILE IN THIS OFFICE.
WITNESS, MY HAND AND OFFICIAL SEAL THIS
14th day of January, 1994.
William A. Haddad
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL