OA 10-5-94

IN THE SUPREME COURT OF FLORIDA

SARA GILBREATH,

Petitioner,

v.

Case No. 83,090

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

The trial court and the Second District Court of Appeal correctly found that §365.16(a), Fla. Stat. does not violate either the Federal or Florida Constitution. Petitioner's first amendment rights to free speech were not violated.

In Keaton, this Honorable Court expressed concern that the former statute was written in the disjunctive, banning "obscene or harassing telephone calls." Since the prohibition against obscene phone calls contained no "intent to harass" provision, "§365.16 (1)(a) [was] not limited to cases where the listener d[id] not consent to use of the proscribed language." The instant statute has been amended to provide the intent to harass provision. Accordingly, the validity of the statute must be upheld.

ARGUMENT

ISSUE

WHETHER §365.16(A), FLA. STAT. IS CONSTITUTIONAL.

The trial court and the Second District Court of Appeal correctly found that §365.16(a), Fla. Stat. does not violate either the Federal or Florida Constitution. Petitioner's first amendment rights to free speech were not violated.

An earlier version of the statute was held to be unconstitutional by this Honorable Court in State v Keaton, 371 So. 2d 86 (Fla. 1979). That statute was constitutionally infirm because it did not criminalize only obscene phone calls aimed at unwilling listeners and was not limited to locations where the listener enjoyed a reasonable expectation of privacy. See Id., at 91-92. The statute the court is confronted with in the instant case is cured of these infirmities.

In Keaton, this Honorable Court expressed concern that the former statute was written in the disjunctive, banning "obscene or harassing telephone calls," Id., at 89 (quoting statute) (emphasis in original). Since the prohibition against obscene phone calls contained no "intent to harass" provision, "§365.16 (1)(a) [was] not limited to cases where the listener d[id] not consent to use of the proscribed language." Id., at 90. Therefore, "a citizen reading the provision might reasonably believe that it criminalizes telling an 'off-color joke' to a willing listener or forbids a sexually oriented conversation between lovers." Id.

The instant statute has been amended to provide the intent to harass provision, the lack of which made the former statute constitutionally infirm. §365.16(1)(a) now provides that:

> whoever 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. (emphasis added).

As the above language makes clear, both of the constitutional defects this Honorable Court identified in Keaton have been cured. Thus, the following language in Keaton is controlling:

> 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.
>
> 371 So. 2d at 92.

Petitioner's first argument is thus foreclosed. See also State v. Elder, 382 So. 2d 687 (Fla. 1980).

Petitioner further complains that the State failed to prove that the victim was an unwilling listener, arguing that the victim willingly took the call, knowing that Petitioner would use

profanity. As this Honorable Court made clear in Keaton, however, the intent to harass provision presumes an unwilling listener. Petitioner confuses a willingness to take a phone call with a willingness to entertain obscene language that might be used in that phone call. The statute does not require (nor does the constitution) that the listener be unwilling to take the call itself, or that the perpetrator intend to harass by making the phone call. What the statute penalizes is the use of obscene language within the phone call, directed at an unwilling listener.

The State proved in the instant case that Petitioner had the requisite intent to harass by use of obscene language, which is all the statute and the Constitution require. Petitioner's argument is an extension of her position that the "intent to harass" provision of the statute does not adequately address this Honorable Court's concerns in Keaton. This argument must fail, as it is foreclosed by Keaton itself. As the Second District Court of Appeals recognized in the case below:

> 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 right 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.
>
> Gilbreath v. State, 629 So. 2d 962, 963 (Fla. 2d DCA 1993).

§365.16(1)(a), F.S. does not infringe on the constitutional right to free speech. Accordingly, the validity of the statute must be upheld.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

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 U.S. mail to GARY R. GOSSETT, JR., 1755 U.S. 27 South, Sebring, Florida 33870, this 30th day of June, 1994.

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