DA 10-5-94

047

FILED
SID J. WHITE
JUL 18 1994
CLERK, SUPREME COURT
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Chief Deputy Clerk

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 REPLY BRIEF

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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.

The argument contained in the Respondent's answer brief demonstrates the illicit advantage given to the State by operation of the subject statute, section 365.16(1)(a) Fla. Stat. In it's answer brief at page four (4) the Respondent argues that,

> As this Honorable Court made clear in Keaton, however, the intent to harass provision presumes an unwilling listener.

Further, the argument was continued,

> 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.

What the Respondent argues in essence is that section 365.16(1)(a) Fla. Stat. creates a presumption against anyone charged with its violation that the listener was unwilling. Such a presumption gives the State an evidentiary advantage when it seeks to limit the full exercise of freedom of speech by an individual.

Next the Respondent seems to argue that a caller may be punished where a listener willingly takes a call, and the caller does not intend to harass by making the call, but

caller does not intend to harass by making the call, but nonetheless uses obscene language during such call. Surely, this operation of the statute is without the permissible legislative authority of the State. It has been held,

> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U. S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405 (1963), and that the constitutional guarantees of freedom of speech forbid the State to punish the use of words or language not within "narrowly limited classes of speech." Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S. Ct. 766, 769, 86 L. Ed. 103 (1942).

Section 365.16(1)(a) punishes only spoken words. It can therefore withstand Petitioner's attack upon its facial constitutionality only if, as authoritatively construed by the Florida courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. Cohen v. California, 403 U. S. 15, 18-22, 91 S. Ct. 1780, 1784-1786, 29 L. Ed. 2d 284, (1971).

Here, as applied by the lower courts, section 365. 16(1)(a) Fla. Stat. is not the sensitive tool required by the First Amendment to separate legitimate from illegitimate speech calls. see, Speiser v. Randall, 357 U. S. 513, 525, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958). In the instant case Justice requires that the statute be struck down, or authoritatively construed to bring it in accord with

the Florida and United States Constitutions, and that the Petitioner's conviction be reversed. Gooding v. Wilson, 405 U. S. 518, 521, 92 S. Ct. 1103, 1105, 31 L. Ed. 2d 408.

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.

The Petitioner relies on the argument contained in her Initial Brief in this issue, and provides that a reply to Respondent's brief as to this issue is unwarranted.

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,

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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 **MS. BRENDA S. TAYLOR, Office of the Attorney General**, 2002 North Lois Avenue, Westwood Center, 7th Floor, Tampa, FL 33607 this 15th day of July, 1994.

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