IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,177

STATE OF FLORIDA,

Petitioner,

vs.

JOHN T. MINCEY,

Respondent.

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, **THE STATE OF FLORIDA**, was the prosecution in the trial court and the Appellee in the Fourth District Court of Appeal. Respondent, **JOHN T. MINCEY**, was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. The parties shall be referred to as they stood before in the trial court. References to the record shall be symbolized by "R."

STATEMENT OF THE CASE AND FACTS

The defendant was charged by Notice to Appear with violating section 827.05 Florida Statutes (1991) (R 35-38). The defendant's five year old stepson, C was found wandering the streets of Riviera Beach at 10:00 P.M. in pajamas and bare feet.

A motion to dismiss was filed by the defendant challenging the statute twofold. The statute was challenged on its face in that it was "unconstitutionally vague, indefinite and overbroad," and additionally objectionable because it provides criminal penalties for acts of simple negligence. After hearing (R 3-30), the lower court granted the motion based upon the rulings in State v. McBride, 1 FLW Supp. 406 (June 1, 1993, Escambia County) and State v. Winters, 346 So.2d 91 (Fla. 1977). The lower court further certified the issue as a matter of great public interest (R 55-57).

The Fourth District Court of Appeal affirmed the lower court and certified the question to this Court. State v. Mincey, 20 Fla.L.Weekly D1597 (Fla. 4th DCA, July 12, 1995).

This appeal follows.

SUMMARY OF ARGUMENT

The State Legislature amended Section 827.05 Florida Statutes in 1991 to make willful negligent treatment of a child punishable as a misdemeanor in the second degree. The addition of the standard of willfulness remedies the earlier disability in the statutory construction and the public is capable of understanding what acts are made criminal by the statute.

ARGUMENT

THE AMENDED SECTION 827.05 FLORIDA STATUTES (1991) IS NOT UNCONSTITUTIONAL.

The defendant claimed and the trial court agreed, that Section 827.05 Florida Statutes (1991) violates his state and federal constitutional rights to due process of law because it is allegedly "vague."

This Section provides:

> Whoever, though financially able, negligently deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment, when such deprivation or environment causes the child's physical or emotional health to be significantly impaired or to be in danger of being significantly impaired shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

In State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981), the Florida Supreme Court articulated the following general principle for judicial examination of allegedly unconstitutional statutes:

> [There is a] strong presumption in favor of the constitutionality of statutes. It is well established that all doubt will be resolved in favor of the constitutionality of a statute...., and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.

Accord, Falco v. State, 407 So. 2d 203, 206 (Fla. 1981) and State v. Burch, 545 So. 2d 279, 280 (Fla. 4th DCA 1989), approved, Burch v. State, 558 So. 2d 1, 3 (Fla. 1990). In the particular context of claimed due process violations, "it is well settled

the language of a statute or ordinance must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." Marrs v. State, 413 So. 2d 774, 775 (Fla. 1st DCA 1981). "A vague statute is one that fails to give adequate notice of what conduct is prohibited and which because of its imprecision, may also invite arbitrary and discriminatory enforcement." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353-1354 (Fla. 1984). Accord, State v. Burch, 545 So. 2d 279, 282. "When people of ordinary intelligence must necessarily guess at its meaning and differ as to its application, the statute or ordinance violates the due process clause[s]." Marrs v. State, 413 So. 2d 774, 775. However, "courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353.

As noted, section 827.05 now provides that whoever negligently deprives a child... or permits a child to live in an environment...to be in danger of being a significantly impaired shall be guilty of a misdemeanor of the second degree. The State submits that this legislative declaration clearly put this defendant on adequate notice that his alleged lack of knowledge of the whereabouts of his stepson did not shield him from guilt. If the mere subjective good-faith belief of a parent in the defendant's situation sufficed, the legislature would not have included the words "or permit" in the statutory scheme. See

Donovan v. Kaszychi & Sons Contractors, Inc., 599 F. Supp. 860, 871 (S.D. N.Y. 1984).

Properly read in pari materia, see e.g. Ferguson v. State, 377 So. 2d 709, 710 (Fla. 1979), it is clear that section 827.05 imposes an obligation upon a parent to take some affirmative action to prevent danger of significant impairment. Therefore, the negligence standard does not render the instant statute "vague." Furthermore, the courts have upheld statutes which are less precisely worded than §825.05 against challenges that they were void for vagueness. In Powell v. State, 508 So. 2d 1307, 1308-1311 (Fla. 1st DCA 1987), review denied, 518 So. 2d 1277 (Fla. 1987), the First District held that section 950.09 Florida Statutes which proscribes "malpractice by a jailer" through "willful inhumanity and oppression to any prisoner," was not unconstitutionally vague. In Campbell v. State, 240 So. 2d 298 (Fla. 1970) the Supreme Court found that men of common understanding could comprehend the meaning of the words "unnecessarily or excessively chastise" when read in conjunction with the entire statute (§828.04 F.S.A.). See also State v. Raffield, 515 So. 2d 283 (Fla. 1st DCA 1987), affirmed, Raffield v. State, 565 So. 2d 704, 706 (Fla. 1990), cert. denied 498 U.S. 1025 (1991) and Schmidt v. State, 590 So. 2d 404, 413 (Fla. 1991) cert. denied ____ U.S. ____, 118 L.Ed.2d 216 (1992).

The lower court's finding was specifically predicated on the standard of simple negligence recited in section 827.05 Florida Statutes. The court found that simple negligence is an unconstitutional standard to proscribe and punish conduct in

criminal cases, relying on State v. Winters, 346 So. 2d 991 (Fla. 1977) and State v. Joyce, 361 So. 2d 406 (Fla. 1978). Both of these cases deal solely with the statute prior to its amendment in 1991. Although the first clause of the new version of section 827.05 Florida Statutes is similar to the previous version cited in these cases in that the term "negligently" is specifically mentioned, neither of the cases deal with the amendment. The State was proceeding against the defendant under the amended portion of the statute which states:

> ...or permits a child to live in an environment, when such deprivation or environment causes the child's physical or emotional health to be significantly impaired shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Fla. Stat. 827.05 (1991).

The State would contend that the amendment of the statute raises the degree of negligence to a higher degree than that established to cure liability. The burden of proof authorizing a recovery of exemplary or punitive damages by a plaintiff for negligence must show a gross and flagrant character, evincing reckless disregard for human life or the safety of the child exposed to its dangerous effects; or that the entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless indifference to the rights of others, which is an intentional violation of them. Graham v. State, 362 So. 2d 924 (Fla. 1978) quoting from Rusor v. State, 140 Fla. 217, 191 So. 296 (1939); State v. Greene, 348 So. 2d 3 (Fla. 1977); State v.

Winters, 346 So. 2d 991 (Fla. 1977). A conviction of the defendant would have been predicated on a finding of willfulness rather than negligence and therefore sufficient to warrant criminal responsibility. Graham at 926.

Generally, words in a statute should be given their plain and ordinary meaning. Pederson v. Green, 105 So. 2d 1 (Fla. 1958); American Bankers Life Assurance Co. of Florida v. Williams, 212 So. 2d 777 (Fla. 1st DCA 1968). The State would argue that the defendant's acts could have been found to be willful when the statute dictates "or permits." Permit is defined as an express assent, agreement or allowance. Black's Law Dictionary (5th Edition 1979); West's Legal Thesaurus/Dictionary (1985). The requirement of willfulness (scienter) in the amended statute, therefore, avoids the infirmity found in Winters with respect to the pre-amended section 827.05 (unintentional acts or conduct which is not the product of willfulness might be proscribed by the statute). State v. Joyce, 361 So. 2d 406, 407 (Fla. 1978).

The State disagrees with the county court's finding in State v. McBride, ____ Fl.Supp. ____, Fla.L.Weekly Supp. 406 (June 1, 1993). The county clerk ruled that the amendment does not deal with the disability pointed out in Winters and discussed in Joyce. McBride does acknowledge that the problem for which the statute was struck in Winters was because criminal penalties could be inflicted on someone for an act of simple negligence. The McBride court went on to say, as in Winters, the simple remedy to that disability would be to make the standard one of

culpability or willfulness. The State, as previously discussed, argues that the amendment, making the standard one of willfulness, has remedied the disability considered in Winters.

Further, this Court has previously noted that, "even where the statute is reasonably susceptible of two interpretations, one which would render it invalid and the other valid, we must adopt the constitutional construction." State v. Lick, 390 So. 2d 52, 53 (Fla. 1980).

CONCLUSION

WHEREFORE, for the foregoing argument and authority, the State of Florida requests that this Court reverse the Fourth District Court of Appeal and unhold the constitutionality of Section 827.05 (1991).

Respectfully submitted,

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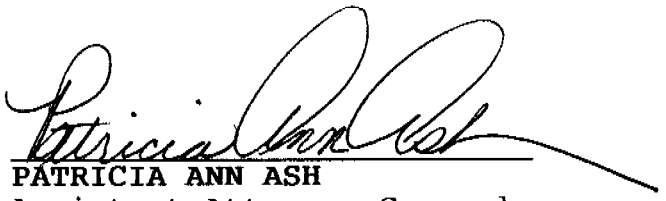

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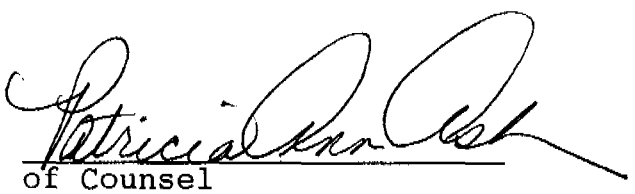
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF ON THE MERITS** has been furnished by Courier to: **ANTHONY CALVELLO, ESQUIRE,** Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, Florida, 33401, this 28th day of August, 1995.



of Counsel