IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JOHN T. MINCEY,

Respondent.

Case No. 86,177

RESPONDENT'S BRIEF ON THE MERITS

On Review from the District Court of Appeal,
Fourth District

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PRELIMINARY STATEMENT

Respondent was the defendant in the County Court for Palm Beach County and appellee in the Fourth District Court of Appeal. Appellee, the State of Florida, was the prosecution and the appellant.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts in the state's brief on the merits, with the following additions:

The notice to appear stated the charge as "child negligent" (R 35).

In the trial court the prosecutor's argument was entirely directed at the term "negligently" in the statute (R 12-26).

The defense's written motion to dismiss was not included in the record (see affidavit of clerk following the index to the record). A copy is therefore included in the appendix to this brief.

SUMMARY OF ARGUMENT

In 1977 this Court unequivocally declared unconstitutional the "negligent treatment of children" statute. Later amendments to the statute have totally failed to remedy the constitutional defect found by this Court. The statute therefore remains unconstitutional.

ARGUMENT

SECTION 827.05 OF THE FLORIDA STATUTES IS UNCONSTITUTIONAL.

The issue presented in this case, the constitutionality of Section 827.05, Florida Statutes (1993), is entirely disposed of by this Court's decisions in State v. Winters, 346 So. 2d 991 (Fla. 1977), and State v. Joyce, 361 So. 2d 406 (Fla. 1978). Subsequent amendments by the legislature have done nothing to correct or even address the constitutional defects found by this Court.

Winters directly addressed the constitutionality of the 1975 version of the statute and found it unconstitutional because it criminalized acts of simple negligence without setting forth specific standards. Joyce, addressing another statute, then explicitly explained, in case there was ever any doubt, that the basis for the holding in Winters was that "the negligent treatment statute made criminal acts of simple negligence - conduct which was neither willful nor culpably negligent." 361 So. 2d at 407. The defect in the statute, therefore, is in its use of the term "negligently."

The later amendments to the statute have left the term "negligently" intact without adding any standards such as Winters declared would be required for the statute to pass constitutional muster. Winters pointed out that the problem is the statute's failure to provide a sufficiently defined degree of intent: "Under the statute, a person with no intent to do a wrong may be punished. His action need not be willful nor culpably negligent." 346 So. 2d at 991. Joyce once again reinforced Winters in its discussion upholding the other statute, which specified willfulness or culpable negligence. Joyce stated that this requirement "avoids the infirmity found in Winters...." 361 So. 2d at 407.

In the instant case the District Court correctly based its decision against the statute on this interpretation of Winters and Joyce. It also cited State v. Smith, 638 So. 2d 509, 510 (Fla. 1994), in which this Court cited Winters as having found a simple negligence statute unconstitutional.

The amendments to the statute entirely fail to address the fundamental defect found in Winters. Two changes were made in the statute: first, the term "though financially able" was inserted as a modifier. No issue was made of financial ability in the instant case. Nonetheless, this new term only exacerbates the statute's constitutional difficulties. See State v. McBride, 1 Fla. L. Weekly Supp. 406 (County Court, Escambia County, June 1, 1993) (copy in appendix to this brief).

Second, a new clause was added in the disjunctive: "or permits a child to live in an environment" (emphasis added) with one of a variety of deficiencies. Since the term is in the disjunctive, it in no way modifies the other deficient terms in the statute. And, again as shown in McBride, supra, the added term only adds further constitutional problems to the statute.

The state in its brief now incorrectly attempts to rely on the new "environment" clause. The state's brief claims, "The State was proceeding against the defendant under the amended portion of the statute ..." regarding environment (page 7 of brief). In fact, on the record as it stands the amendment does not even come into play. The charging document alleged the crime as "child negligent" (R 35). In the trial court the prosecutor devoted his entire argument to the statutory term "negligently" (R 12-26), mentioning the amendment only to claim (incorrectly, because it is in the disjunctive) that it somehow "create[d] something more than mere negligence" (R 24, 26). The state now repeats this claim with the wholly unsustainable assertion (page 8 of brief) that "A conviction of the defendant would have been predicated on a finding of willfulness rather than negligence ...."

The legislature was clearly shown the deficiency in the statute by this Court in 1977. In its amendments since, the legislature has utterly failed to address the glaring constitutional defect in the statute. "As pointed out in Winters, the simple remedy to the disability under consideration is to make the standard one of culpability or willfulness." McBride, supra, 1 Fla. L. Weekly Supp. at 406. This Court's clear pronouncements in Winters and Joyce leave this Court no choice but to declare that the statute remains unconstitutional and to affirm the District Court's decision so holding.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, REspondent respectfully requests this Court to affirm the decision of the District Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Patricia Ann Ash, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 15th day of September, 1995.

ALLEN J. DeWEESE
Assistant Public Defender