ORIGINAL

IN THE SUPREME COURT OF FLORIDA

EUGENE R. O'NEAL, :

Petitioner, :

vs. : Case No. 87,858

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

TABLE OF CITATIONS (continued)

STATEMENT OF THE CASE

This case is before this Honorable Court on discretionary review of a decision of the Second District Court of Appeals which expressly declared valid section 893.13(1)(c), Florida Statutes (1993), and rejected vagueness and lenity arguments expressly based on the Due Process Clauses of both the Florida and United States Constitutions. O'Neal v. State, 1996 WL 135502 (Fla. 2d DCA March 27, 1996).[1]

STATEMENT OF THE FACTS

On February 8, 1995, the State Attorney in and for the Tenth Judicial Circuit, Polk County, filed an information against Petitioner, EUGENE ROHALIA O'NEAL. (R. 2-4). The information charged Mr. O'Neal with two counts in a single information. Count I in case number CF95-0407, alleged:

> EUGENE ROHALIA O'NEAL on the 16th day of November, 1994, in [Polk County], between the hours of 6 a.m. and 12 a.m., unlawfully did possess a controlled substance, to-wit, cocaine, with intent to sell or deliver said controlled substance, and unlawfully did possess said controlled substance in, on or within 1,000 feet of the real property comprising a public or private elementary, middle or secondary school, to-wit, Roosevelt Vocational School, in violation of section 893.13, Florida Statutes, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Florida.

(R. 2-4) (emphasis supplied). Count II alleged:

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[1]A copy of the District Court's opinion is attached in the Appendix at A1.

> EUGENE ROHALIA O'NEAL on the 16th day of November, 1994, in [Polk County], between the hours of 6 a.m. and 12 a.m., unlawfully did sell or deliver a controlled substance, to-wit, cocaine, in, on or within 1,000 feet of the real property comprising a public or private elementary, middle or secondary school, to-wit, Roosevelt Vocational School, in violation of section 893.13, Florida Statutes, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Florida.

(R. 2-4) (emphasis supplied).

Defense counsel filed a motion to dismiss the information on June 21, 1995. (R. 11-13). In this motion, defense counsel alleged the sale of cocaine took place within 1000 feet of Roosevelt Vocational School at approximately 11:46 p.m. on May 16, 1994. (R. 11). The motion to dismiss was grounded in two arguments: 1) Roosevelt Vocational School was not a primary, middle or secondary school as defined in the statute, and 2) a prima facia case of guilt could not be established against Mr. O'Neal because his actions did not fall within the proscribed times of the statute. (R. 11-14).

Specifically, the motion asserted the statute in question was susceptible to more than one interpretation and should be construed in the light most favorable to the accused because "12 a.m." could mean either noon or midnight. (R. 11-14).

The State filed a traverse on June 19, 1995, contending the vocational school was a primary, middle or secondary school, and that the sale did take place within the statutory period.

Section 893.13(1)(c), Florida Statutes (1993), under which Mr. O'Neal was charged in these two counts, provides:

> (c) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle or secondary school between the hours of 6 a.m. and 12 a.m. Any person who violates this paragraph with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 and must be sentenced to a minimum term of imprisonment of 3 calendar years.
>
> 2. A controlled substance named or described in s. 893.(1)(c), (2)(c), (3), or (4) commits a felony of the second degree punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> 3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a $500.00 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(emphasis supplied).

The motions were heard by the Honorable Robert A. Young, Circuit Judge for the Tenth Judicial Circuit in and for Polk County, Florida. (R. 15). At the hearing, both the State and Defense indicated to the trial court the only issue in question was the time limits, and whether the action taken by Mr. O'Neal at approximately 11:46 p.m. fell between the times of 6:00 a.m. and 12:00 a.m. (R. 17-18). The State noted there were no cases on point, and defense counsel noted that with regard to the phrase "12 a.m.," both federal and state law "avoid that language like the plague." (R. 19-20).

Defense counsel argued the statute was vague and ambiguous because the terms "antemeridiem" and "postmeridiem," for which the terms "a.m." and "p.m." are short, both refer to noontime, with noon being the "meridiem." (R. 20-21). At one point in the discussion, even the trial court became confused as to the terms involved:

> MR. FORD: [T]he remainder of the argument would be the fact that all times during the day other than 12:00 o'clock noon either come before noon or they come after noon, they're either a.m. or p.m. with the exception of 12:00 o'clock noon. Having that argument 12:00 o'clock midnight occurring an particular day comes after noon which makes it p.m.
> THE COURT: But so does 1:00 o'clock a.m., doesn't it?
> MR. FORD: Pardon?
> THE COURT: 1:00 o'clock a.m. is afternoon.
> MR. FORD: 1:00 a.m. o'clock is in the morning, 1:00 o'clock p.m. would be afternoon, post-meridiem.
> THE COURT: Um-hum.
> MR. FORD: So midnight would be post-meridiem.
> THE COURT: Before morning.
> MR. FORD: No, it's after morning.

(R. 21).

The argument was, thus, that the statute is equally susceptible of defining a period of time of either six hours or eighteen hours. Therefore, the statute does not give a person of ordinary reason sufficient notice of exactly when the prohibited conduct falls within the embrace of the reclassification statute for enhanced punishment. Defense counsel also argued the rule of lenity under Florida law required the court to construe the statute strictly and in the light most favorably to the accused. (R. 15).

The State argued the statute proscribes the conduct between the hours of 6 a.m. and midnight because it was the "common sense interpretation." (R. 28). The State argued that midnight was the time intended by the legislature because "the legislature said what it meant and meant what it said and the conduct is proscribed up to and including the point that is midnight." (R. 29).

Finally, the trial court accepted into evidence a photograph of a sign at the Polk County jail describing visitors hours as: "8:00AM TO 10:30AM, 12:00am to 4:30pm." (R. 8, 22-23, 30-31).

The trial court granted defense counsel's motion to dismiss on June 27, 1996. (R. 32-35). The trial court noted that defense counsel withdrew the question of whether Roosevelt Vocational school was a primary, middle, or secondary school for the purposes of the statute, and urged dismissal because of the vagueness of the term "12 a.m." (R. 32). The trial court determined the law involved to be fundamental. (R. 32). The trial court explained the dictionary definitions of "a.m." and "p.m." were no help, nor were technical definitions found in celestial navigation texts. (R. 33).

The trial court noted in the many thousands of pages of Florida statutes, no other reference to "12 a.m." existed, although there were dozens of references to noon and midnight. (R. 33). The lower court then went through the rules that utilize the phrase 12 a.m. (R. 33). Examples were also given of where this Honorable Court, as well as the Second and Fifth District Courts of Appeal have either summarized evidence or quoted witnesses who used the term "12 a.m." to refer to both noon and midnight. (R. 33).

The trial court identified the issue as whether the use of "12 a.m." in the context of the drug law was so clear that a person of ordinary intelligence would be put on notice of the time periods which would subject him to a three-year minimum mandatory sentence. (R. 33). The trial court recognized the legislature intended to protect children from the scourge of drugs, but also noted that midnight is long past the school day, and that the statute applies with equal force on weekends, school holidays, and over summer vacations. (R. 34).

Because, the trial court concluded, the term was ambiguous to people of common intelligence, the statute was determined not to withstand constitutional scrutiny. (R. 34). As noted above, the motion to dismiss was granted. (R. 35). The State timely filed a notice of appeal on July 2, 1995. (R. 36).

On appeal to the Second District, the State made the same arguments it did below, namely that the statute was not unconstitutionally vague and the plain and common usage of the terms "a.m." and "p.m." was sufficient to put all those of average intelligence on notice of the statutory proscriptions. State's Initial Brief at 5. Mr. O'Neal argued section 893.13(1)(c) was unconstitutionally vague on its face, and even if constitutional, it should be narrowly construed in Mr. O'Neal's favor under the rule of lenity. The arguments were expressly predicated on the Due Process Clauses of both the United States and Florida Constitutions.

The Second District Court of Appeals reversed with a written opinion stating only "Reversed, See, Jennings v. State, [667 So. 2d 442 (Fla. 1st DCA 1996)]."[2]

Mr. O'Neal moved for rehearing en banc and to certify a question of great public importance. The motion was stuck for failure to comply with Florida Rule of Appellate Procedure 9.331, because it was not made in conjunction with a motion for rehearing. Petitioner timely filed a notice to invoke this Honorable Court's jurisdiction.

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[2]A copy of the First District Court of Appeals' Jennings opinion is attached in the Appendix at A6-A9.

SUMMARY OF THE ARGUMENT

Section 893.13(1)(c), Florida Statutes (1993) reclassifies the crimes charged and enhances the punishment if the criminal conduct occurs between the hours of 6 a.m. and 12 a.m. That time period is ambiguous and unconstitutionally vague because it is equally susceptible of meaning either 6 a.m. to noon or 6 a.m. to midnight; two reasonable constructions in common usage or practice. The vague and ambiguous time period renders the reclassification and penalty enhancement statute facially unconstitutional.

Even if the statue is not facially unconstitutional, the statute cannot be constitutionally applied to petitioner because his conduct occurred between noon and midnight, during the period for which the clarity of the statute is in doubt. At the very least, this admittedly ambiguous provision should be strictly construed in the way most favorable to the accused under the constitutional and statutory rule of lenity. For the purposes of an inquiry based on vagueness and the rule of lenity, legislative intent is irrelevant.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S ORDER TO DISMISS THE INFORMATION CHARGING PETITIONER UNDER SECTION 893.13-(1)(c), FLORIDA STATUTES (1993), A CRIMINAL PUNISHMENT STATUTE DEFINING AN ELEMENT OF THE OFFENSE WITH THE VAGUE AND AMBIGUOUS TERM "12 A.M.," AND FAILING TO NARROWLY CONSTRUE THE STATUTE IN QUESTION IN THE MANNER MOST FAVORABLE TO THE ACCUSED?

This petition concerns only the statutory reclassification of offenses under section 893.13(1)(a)1.(c), Florida Statutes (1993), which apply when the act of sale or possession with intent to sell occur "in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 a.m." Subsection 893.13(1)(a)1.(c) reclassifies the offense from the second degree felony defined in section 893.13(1)(a) to a first degree felony punishable by a minimum mandatory term of three years incarceration.

Mr. O'Neal challenges the statute in question on its face and as applied because it fails to reasonably inform a citizen of when the conduct in question is prohibited. The bottom line in this case is whether persons of common intelligence must necessarily guess at the statute's meaning and differ as to its application. Connelly v. General Const. Co., 269 U.S. 385, 291, 46 S. Ct. 126, 70 L. Ed. 2d 322 (1926); State v. Thomas, 616 So. 2d 1198 (Fla. 2d DCA 1993). Because the legislature, in composing section 893.13-

(1)(c), used the ambiguous and vague term "12 a.m.," persons of common intelligence must guess as to whether the period of time in which an offense is subject to reclassification ends is at noon or midnight.

Due Process demands that statutes have a definite and certain meaning, so that citizens are not forced to guess what it proscribes. This is particularly true for penal statues, which are strictly construed and require greater certainty than other statutes. State v. Winters, 346 So. 2d 991 (Fla. 1977); Bertens v. Stewart, 453 So. 2d 92 (Fla. 2d DCA 1984).

In Brown v. State, 629 So. 2d 841 (Fla. 1994), this Court announced some of the controlling principles that govern this case. Accord, Cabal v. State, 21 Fla. L. Weekly S255 (Fla. June 13, 1996); Perkins v. State, 576 So. 2d 1310 (Fla. 1991). Brown addressed the principle with respect to a closely related statute, section 893.13(1)(i), Florida Statues (Supp. 1990), and found the term "public housing facility" unconstitutionally vague in violation of the Due Process Clause of the Florida Constitution. The Brown court held:

> The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). "The language of the statute must 'provide a definite warning of what conduct' is required or prohibited 'measured by common understanding and practice.'" Warren v. State, 572 So. 2d 1376, 1377 (Fla. 1991) (quoting State. v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985)). Because of its imprecision, a vague statute may invite arbitrary or

> discriminatory enforcement. Southeastern Fisheries [Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984)] at 1353. A statute is not void for vagueness if the language "'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" Hitchcock v. State, 413 So. 2d 741, 747 (Fla.) (quoting United States v. Petrillo, 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947), cert. denied, 459 U.S. 960 103 S. Ct. 274, 74 L. Ed. 2d 213 (1982).
>
> When reasonably possible and consistent with constitutional rights, this Court should resolve all doubts of the statute in favor of its validity. State v. Wershow, 343 So. 2d 605, 607 (Fla. 1977). But this Court has also held that when there is doubt about a statute in a vagueness challenge, the doubt should be resolved "in favor of the citizen and against the state." Id. at 608. In the instant cases, there is sufficient doubt about the statute, requiring the doubt to be resolved in favor of the citizen and against the State. Thus, we find the statute facially invalid under the void-for-vagueness doctrine.

Brown, 629 So. 2d at 842-43).

When the question of void-for-vagueness is raised, the statutory requirements concerning the rule of lenity requiring the strict construction of penal statutes in favor of the accused must also be considered. As noted by this Court, one of the most fundamental principles of Florida law is that penal statutes must be strictly construed to their letter. State v. Camp, 596 So. 2d 1055 (Fla. 1992); State v. Jackson, 526 So. 2d 58 (Fla. 1988).

This was reiterated by this Court in Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1992):

> This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. E.g., Brown v. State, 358 So. 2d

16 (Fla. 1978); Franklin v. State, 257 So. 2d 21 (Fla. 1971); State v. Moo Young, 566 So. 2d 1380 (Fla. 1st DCA 1990). Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property. Scull v. State, 569 So. 2d 1251 (Fla. 1990) (on petition for clarification); Franklin, 257 So. 2d at 23. For this reason,

> [a] penal statute must be written in language sufficiently definite when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation.

Gluesenkamp v. State, 391 So. 2d 192, 198 (Fla. 1980), cert. denied, 454 U.S. 818, 102 S. Ct. 98, 70 L. Ed. 2d 88 (1981) (citations omitted). Elsewhere, we have said that

> [s]tatutes criminal in character must be strictly construed. In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance.

State ex re. Lee v. Buchanan, 191 So. 2d 33, 36 (Fla. 1966) (citations omitted); accord State v. Valentin, 105 N.J. 14, 519 A.2d 322 (1987). Thus, to the extent that definiteness is lacking, a statue must be construed in the manner most favorable to the accused. Palmer v. State, 438 So. 2d 1, 3 (Fla. 1983); Ferguson v. State, 377 So. 2d 709 (Fla. 1979).

The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. Borges v. State, 415 So. 2d 1265, 1267 (Fla. 1982); accord United States v. L. Cohen Grocery Co., 255 U.S. 81, 87-93, 41 S. Ct. 298, 299-301, 65

L. Ed. 516 (1921) (applying same principle to Congressional authority). As we have stated,

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. See, Article II, Section 3, Florida Constitution.

Brown, 358 So. 2d at 20, accord, Palmer, 438 So. 2d at 3. This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do so otherwise would violate the separation of powers. Art. II, Sec. 3, Fla. Const.

Explicitly recognizing the principles described above, the legislature has codified the rule of strict construction within the Florida Criminal Code:

> the provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

§ 775.021(1), Fla. Stat. (1987).

We thus must determine whether the district court honored the legal rule described here.

See also, Cabal v. State 21 Fla. L. Weekly S255 (Fla. June 13, 1996); Scates v. State, 603 So. 2d 504 (Fla. 1992).

In this instance, the term "12 a.m." is not otherwise defined in section 893.13(1)(c) or in other statutes. Consequently, this Court must look to the ordinary meaning and common understanding of these words. Bertens v. Stewart, 453 So. 2d 92 (Fla. 2d DCA 1984). However, the plain and ordinary meaning of "12 a.m." is not clear.

On its face the term is vague because it encompasses more then one possible valid interpretation. See, Cabal v. State, 21 Fla. L. Weekly S255 (Fla. June 13, 1996) ("when a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused") (quoting Scates v. State, 603 So. 2d 504 (Fla. 1992)); Linville v. State, 359 So. 2d 450 (Fla. 1978) ("chemical substance" broadly encompassed unduly large number of materials and objects); Bertens, supra ("medicine" included too many substances).

In this case, it is the time frame that is in question. Section 893.13(1)(c) proscribes the possession with intent to deliver within 1000 feet of a school "between the hours of 6 a.m. and 12 a.m. . . ." Petitioner does not disagree with the State's contention that 6 a.m. is 6:00 in the morning. However, as stated above, what is in contention is whether the term "12 a.m." refers to noon or midnight. In its order dismissing the information, the trial court found the term "12 a.m." to be ambiguous to people of common intelligence. (R. 34). The trial court's finding of fact is supported by evidence and therefore cannot be disturbed on appeal. See, e.g., Doctor v. State, 665 So. 2d 1040 (Fla. 1995).

Webster's New World Dictionary defines "antemeridiem" as "before noon." "Postmeridiem" is likewise defined as "after noon." Similarly, Black's Law Dictionary also defines "a.m." to mean "before noon" while "p.m." is defined as "afternoon" Id. at 79, 1155 (6th ed. 1990). See, American Heritage Dictionary, 66, 2217 (1990 ed.).

As such, 11:59 in the morning is 11:59 a.m. and 12:01 in the afternoon is 12:01 p.m. The "meridiem" of the day, therefore, is noon. As awkward as it may appear, the correct shorthand for noon would thus be 12:00 M.

The term midnight is frequently used as a deadline or cutoff time in statutes and in contracts and has been interpreted as the last moment of any given day. An example of this is that income tax returns must be postmarked by midnight of April 15. That being so, anything that occurs at midnight on a given day occurs after noon, and should be treated as post-meridiem, or "p.m."

The trial court also resorted to dictionary definitions and agreed the term "12 a.m." has no clear meaning:

> Of course, the court must accord to the disputed meanings. Only if they are susceptible of two or more meanings in this context, may the court employ rules of statutory construction. Defendant urges this court to consult popular dictionaries. The usual definition of "A.M." as before, and "P.M." as after, noon are of no help. Technical definitions found in a popular celestial navigation text is likewise unavailing.

(R. 33). The sentiment was echoed by the First District Court in Jennings, 667 So. 2d 442 (Fla. 1st DA 1996):

> "A.M." is an abbreviation for the Latin phrase ante meridiem, or "before noon." Webster's Third New International Dictionary, 91 (193); see also Black's Law Dictionary 79 (6th ed. 1990). Similarly, "P.M." is an abbreviation for the Latin phrase post meridiem, or "after noon." Webster's Third New International Dictionary 1773 (1993); see also, Black's Law Dictionary 1155 (6th ed. 1990). Neither "12 a.m." not "12 p.m." is an appropriate way to denote "noon." Either notation is also a problematic designation for midnight, although either appears equally (in)appropriate because

> midnight can be viewed with equal justification as the end of one day of the beginning of the next. Midnight is the only twelve o'clock that falls before (or after) noon.

Jennings, 667 So. 2d at 444.

Subsequent to the Initial and Answer Briefs in the instant case being filed in the District Court, another Tenth Judicial Circuit Court Judge held section 893.13(1)(c) to be unconstitutionally vague. What makes the decision in State v. Bonney, Case No. CF95-5030A2-XX (Fla. 10th Cir. Ct., Feb. 27, 1996), so important is that it was issued after Jennings was decided favorably to the State. In Bonney, Circuit Judge Robert Doyel expressly rejected the Jennings rationale. Judge Doyel noted, ironically, that the second half of Jennings was specifically what showed section 893.13 to be unconstitutionally vague notwithstanding the ultimate outcome of the opinion.[3]

The converse of the ambiguity present in the instant case prompted at least one other court to strike down a similarly unconstitutional statute. In State v. Hart, 530 A. 2d 332 (N.J. Ct. App. 1987), the New Jersey Court of Appeals was faced with a prosecution that criminalized behavior for parking at an expired meter during a time period that was marked on the meter to be from 8 a.m. to "12 p.m.," where the underlying municipal ordinance regulated such parking from "8:00 a.m. to midnight." The Hart court was faced with the question of whether the sign, the only notice given, provided sufficient clarity to maintain the prosecu-

[3]A copy of Bonney is attached in the Appendix as pp. A2-A5.

tion, or whether the ambiguity should be strictly construed in favor of the defendant and against the State.

Hart, which was presented as supplemental authority to the District Court, first noted that defining "12 p.m." by the number of hours before and after "meridiem" produced illogical results and failed to clearly define "12 p.m." (much as the trial court did in the instant case). The Hart court then rejected the trial court's conclusion that reason, logic and "good discretion" favor a construction of midnight for "12 p.m." since meter revenues would be collected throughout the day. Instead, the appellate court said another construction of the statutes was possible. Id. at 333.

Next, the Hart court looked to varying definitions of "12 a.m." and "12 p.m." in New Jersey law and concluded that there had been no consistency. Id. at 333-34. Finally, the court took judicial notice of the position taken by the Time Service Division of the United States Naval Observatory, which recommended against using "12 a.m." and "12 p.m." specifically because the terms cause confusion. As a result, the Hart court reversed the conviction, finding:

> We are thus loath to apply an absolute definition of the term 12 p.m. in a quasi-criminal context, especially where the municipality chose not follow its own ordinance and use the word "midnight," but rather employed an ambiguous term in giving notice to the public.

Id. at 334.

As noted by the trial court in its order granting defense counsel's motion to dismiss, a survey of the many thousands of pages of Florida statutes reveals there is not one other reference

to "12 a.m.," although there are dozens of references to noon and midnight. (R. 33):

> The [Florida] Supreme Court has referred to 12 A.M. as the starting time for a new Rule of Juvenile Procedure to become effective. In re: Amendments to the Florida Rules of Juvenile Procedure Guardian Advocates for Drug-Dependant Newborns), 549 So. 2d 66 (Fla. 1989). But more often it used "12:01 A.M." or "midnight." See, e.g., In re: Florida Rule of Criminal Procedure (Sentencing Guidelines), 628 So. 2d 1084 (Fla. 1993); the Florida Bar In re: Criminal Rules, 389 So. 2d 610 (Fla. 1980). It has summarized evidence in the court below referring to the arrival of a witness at "about 11 P.M. or 12 A.M. on the night of March 30 . . ." Craig v. State, 585 So. 2d 278 (Fla. 1991).
>
> Witnesses who have ben quoted by appellate courts have used the term "twelve A.M." to refer both to the noon hours (Wynn v. Pound, 653 So. 2d 1116 [Fla. 5th DCA 1995]); and to midnight (State ex rel. Wheeler v. Cooper, 157 So. 2d 875 [Fla. 2d DCA 1963]).

(R. 33). However, when drafting other statutes, the Legislature apparently was cognizant of the inherent confusion and worked around it so that when time was a critical element, the Legislature's intent was clear and unambiguous.[4]

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[4]Compare § 893.13(1)(c), Fla. Stat. (1993) ("between the hours of 6 a.m. and 12 a.m.) with § 48.091(2), Fla. Stat. (1993) ("Every corporation shall keep the registered office open from 10 a.m. to **12 noon**"); § 112.061(5)(b)2. ("Lunch--when travel begins before **12 noon** and extends beyond 2 p.m..."); § 198.331 (applying various provisions "to estates of decedents dying after **12:01 a.m.**, Eastern Standard Time, October 1, 1993); § 324.251 ("This chapter [] shall become effective at **12:01 a.m.**, October 1, 1955."; § 373.069(1) ("At **11:59 p.m.** on December 31, 1976, the state shall be divided into the following water management districts..."); § 373.0693(7) ("At **11:59 p.m.** on December 31, 1976, the Manasota Watershed Basin..."); § 373.0693(8)(a) ("At **11:59 p.m.** on June 30, 1988, assets and liabilities of..."); § 381.00897(2) ("Owners and operators of migrant labor camps or residential migrant housing may adopt reasonable rules regulating hours of access each day during nonworking hours Monday through Saturday and between the hours of

The trial court found only one other situation where the legislature used a term similar to the one in question here. In the obverse of this situation, a precursor to the Florida statute regulating the hours of alcoholic beverage sales said "no sales or service of intoxicating beverages may be made between twelve o'clock P.M. Saturday and seven o'clock A.M. Monday, except. . ." Laws 1943, c. 21944 §§ 1-4. That being true, should this Court find the statute in dispute in the instant case to be unconstitutional, it would be a narrow holding that would not appear to affect any other current statute.

Over a century ago, this Court warned "[f]ractions of days are not regarded in the law except where justice requires a careful examination as to the precise time of day at which an act was performed, in order to do right as between the parties." Savage v. State, 18 Fla. 970, 973 (1880). However, the measure of time in section 893.13(1)(c), which must be precisely defined according to Due Process principles and "to do right between the parties," cannot be determined from the language of the statute where the critical term is clearly susceptible of two different, but equally valid interpretations.

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12 noon and 8 p.m. on Sunday"); § 440.05(4) ("such notice is effective as of **12:01 a.m.** of the day following the date it is mailed to the division in Tallahassee."); § 562.14(1) (precluding the sale of alcoholic beverages "between the hours of **midnight** and 7 a.m. of the following day"); § 671.301(1) ("This act shall take effect at **12:01 a.m.** on January 1, 1980."); § 713.36 (Chapter 63-135 shall take effect at **12:01 a.m.**, October 1, 1963."); § 900.02 ("The Criminal Procedure Law shall become effective at **12:01 a.m.**, January 1, 1971"). (Emphasis supplied).

In determining what construction, if any, can be afforded to this statute, this Court can find counseling in its past holdings.

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. this constitutional mandate obtains for two reasons. First, if legislative intent is not apparent from the statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent. Second, in some circumstances, doubts about judicial competence to authoritatively construe legislation are warranted. Often a court has neither the legislative fact-finding machinery nor experience with the particular statutory subject matter to enable it to authoritatively construe a state (sic). The judicial body might question with justification whether its interpretation is workable or whether it is consistent with legislative policy which is, as yet undetermined.

Brown v. State, 358 So. 2d 16, 20 (Fla. 1978).

The bottom line in this case is that the statute in question can only have one of two meanings: either it proscribes the activity in question between the hours of 6 a.m. and noon, or 6 a.m. and midnight. A court must accord to the disputed words their ordinary meanings. Citizens of State v. Public Service Com., 425 So. 2d 534 (Fla. 1982); State v. Cormier, 375 So. 2d 852 (Fla. 1979). However, the legislature, in this instance, has simply left the public to guess at what the meaning is. Neither definition, at first blush, should be given preference over the other since both will make the statute operative rather than void.

It is precisely because of this ambiguity, though, that the statute must fail as unconstitutionally vague. Where men of common intelligence must necessarily guess at a statute's meaning and

differ as to its application, the statute cannot be said to put a person on notice of what it proscribes. Connelly v. General Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 2d 322 (1926); State v. Thomas, 616 So. 2d 1198 (Fla. 2d DCA 1993). The First District's decision in Jennings, upon which the Second District relied in the instant case, is wrong because the vagueness of the statue is apparent on its face, defining the critical provision that restricts liberty by using a term that defies understanding and definition in dictionaries, court opinions and even common usage.

Perhaps it was best summed up by Judge Doyel in Bonney where he noted that pages 4 to 6 of the slip opinion in Jennings established just how vague the challenged statute is. Most compelling, though, is the Jennings decision itself, where the First District determined the statute not to be vague, but then concluded the opinion by counselling the Legislature to fix the problem. Jennings, 667 So. 2d at 445 (Fla. 1st DCA 1996).[5]

Even assuming, arguendo, the statute is not facially unconstitutional, it cannot be constitutionally applied to Mr. O'Neal. It is undisputed that even with the facts taken in the light most favorable to the State, the alleged activity occurred at approximately 11:46 p.m., well outside the time perio

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[5]The actual opinion reads: "Perhaps the Legislature will also amend section 893.13(1)(c), Florida Statutes (1993), in a similar fashion [referring to the former laws regulating alcoholic beverage sales mentioned supra], to bring it up to its customary standard of precision." Id.

d for which a clear definition, if any, arguably existed. That being so, there was no notice provided to Mr. O'Neal by the statute's language. See, e.g., Fiske v. State, 366 So. 2d 423, 424.

At oral argument, the State argued that a notice violation is not a relevant consideration for this cause because the activity itself was unprotected. Specifically, the Assistant Attorney General argued that if Mr. O'Neal had simply waited 15 minutes, then he would not have been in the current situation. In its Initial Brief, the State argued that any time concerns go to mitigation of sentence, not to the constitutionality of the statute. Initial Brief at 12.

By merely citing to Jennings in reversing the order of the trial court, the Second District seems to have accepted that argument. Jennings found:

> The present statute poses no danger, moreover, that innocent conduct will be punished as a crime. Section 893.13(1)(a) prohibits the sale and possession of controlled substances whatever time of day. Subsection (1)(c) merely increases the gravity of the offense and the severity of the penalty when the sale (or possession with intent to sell) occurs without 1000 feet of a school during the time period specified.

Id. at 444. That analysis is improper and was entirely disapproved of by this Court's decision in Brown v. State, 629 So. 2d 841 (Fla. 1994). Brown quashed another First District decision and struck down a closely related drug offense penalty enhancement statute, section 893.13(1)(i), Florida Statutes (Supp. 1990), holding the term "public housing authority," used to define an area within

which drug dealing merits more severe punishment was unconstitutionally vague.[6]

The State also argued in its Initial Brief that the plain and ordinary meaning of the terms "a.m." and "p.m." are readily understandable by a person of average and ordinary intelligence who:

> would have fair warning that the statute is referring to a period of time in which the school might either be in session for the regular or summer session, for either daytime or evening hours, including early and late classes for those who work, and encompassing times for evening events, laboratory or library hours, and the like.

Initial Brief at 14. Thus, the State argued that the decision of the Court should have been guided by the legislative intent of protecting school children from the scourge of drugs (as stated by the trial court in its order granting defense counsel's motion to dismiss. (R. 33-34)). The Jennings court appears to have been convinced by that argument as well stating:

> In this way, the statute exhibits special concern that controlled substances not be peddled to school children. "In determining the intent of the Legislature, the courts must construe a statue in light of the purposes for which it was enacted, and the evils it was intended to cure." (citations omitted). We do not believe "common understanding and practic-

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[6]This can also be analogized to those capital punishment cases that require the strict construction of aggravating factors that can be used by the jury in making a recommendation of possible death penalty sentencing. See, Merck v. State, 664 So. 2d 939 (Fla. 1995); Trotter v. State, 576 So. 2d 691 (Fla. 1990) ("Penal statutes must be strictly construed in favor of the one against whom a penalty is imposed." Id. at 694, citing Reino v. State, 352 So. 2d 893 (Fla. 1977), receded from on other grounds, Perez v. State, 545 So. 2d (Fla. 1985)).

> es" lend support to the view that the Legislature intended to provide a greater penalty for drug sales at morning recess than for sales during the lunch hour or after school lets out. We can think of little justification for such an interpretation of the statute. In context, it is clear that the term "12 a.m." in section 893.13(1)(a), Florida Statutes (1993), must mean "midnight," by which time--the Legislature had reason to hope--school children will be home fast asleep.

Id. at 444. Once again, settled principles of law dictate that the First District Court erred: A vagueness challenge, such as the one here, does not hinge on legislative intent, making such analysis inappropriate.

In Linville v. State, 359 So. 2d 450 (Fla. 1978), this Court reversed a drug conviction, finding the terms "chemical substance" to be unconstitutionally vague, regardless of what the Legislature actually may have intended the statute to mean, because the language of the statute itself did not "convey sufficiently definite warnings of the proscribed conduct when measured by common understanding and practice." Id. at 451-52. This Court held:

> Regardless of whether the legislature in fact intended to proscribe the inhalation of the fumes from these products, the statute suffers from constitutional infirmities because due process will not tolerate a law which forbids or requires the doing of an act in terms so vague that the person of common intelligence must necessarily guess at its meaning.

Id. (Emphasis supplied). See also, Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971) ("Common law definitions are of course resorted to when the forbidden conduct is not defined. This may supply the deficiency for a legal understanding of a vague statute, but it cannot meet the constitutional requirement that the language of the

statute be understandable to the common man." (emphasis in original)).

As was true in Franklin and Linville, this Court should not seek to divine the intent of what the statue is to determine whether "12 a.m." is sufficiently clear so as to put the average person of common intelligence on notice of its meaning. This is highlighted by confusion over what the legislative intent of this statute is. In its Initial Brief in the District Court, the State argued the statute extended to midnight to cover "late classes for those who work." However, at the same time, the Jennings court was concerned with having the statute mean midnight because the legislature had reason to hope that by that time "school children will be at home fast asleep." Jennings, 667 So. 2d at 444, Initial Brief at 14. This, coupled with the fact that a court would have to look to an outside source to determine whether forbidden conduct is included underscores Petitioner's argument that the statute is not sufficiently clear to withstand a vagueness challenge as demonstrated in Linville, or a strict construction in accordance with the rule of lenity.

Lastly, this Court must consider the application of the rule of lenity to this case. Most recently in Cabal v. State, 21 Fla. L. Weekly S255 (Fla. June 13, 1996), this Court reiterated the rule announced in Perkins v. State, 576 So. 2d 1310 (Fla. 1991). In Cabal, this Court found the statute imposing an extra punishment for wearing a mask during a robbery created a punishment enhancement and was not a reclassification of the underlying crime that

would have made it higher degree felony. Part of this Court's rationale was that:

> Rules of statutory construction require penal statutes to be strictly construed. State v. Camp, 596 So. 2d 1055; Perkins v. State, 576 So. 2d 1310 (Fla. 1991). Further, when a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. Scates v. State, 603 So. 2d 504 (Fla. 1992).

Id. at S256.

Perkins, one of the cases upon which Cabal relied, held that if a word of phrase in a statute is vague or ambiguous, "the district court was under an obligation to construe it in the manner most favorable to the accused. Art. I, § 9, Art. II, § 3, Fla. Const.; § 775.021(10), Fla. Stat. (1987)." Perkins, 576 So. 2d at 1313. By strictly construing the statute which defined a "forcible felony," the Perkins court quashed a district court's decision that failed to follow the rule of lenity's strict construction requirement.

Scates, another case upon which Cabal relied, also relied on the rule of lenity to limit the coverage of yet another subsection of section 893.13(1)(e)(1), Florida Statutes (1989), by holding that judges may refer defendants convicted under that section to a drug abuse program rather than impose a three year minimum mandatory sentence.

At the very least, assuming section 893.13(1)(c) is not unconstitutionally vague either on its face or as applied, this Court should apply the rule of lenity, as required by its precedent, Florida statutory law and the Florida Constitution, to

strictly construe the ambiguous term "12 a.m." to mean Noon rather than Midnight. If the Legislature means otherwise, it can always accept the First District's invitation in Jennings to clearly and unambiguously say so.

CONCLUSION

WHEREFORE, based on the above argument, citations to authority, and references to the record, this Court should reverse the decision under review, and reinstate the order granting defense counsel's motion to dismiss.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. EUGENE R. O'NEAL, Appellee.	)	CASE NO. 95-02732

Opinion filed March 27, 1996.

Appeal from the Circuit Court for Polk County; Robert A. Young, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Erica M. Raffel, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, Bartow, and Wayne S. Melnick, Assistant Public Defender, Bartow, for Appellee.

PER CURIAM.

Reversed. See Jennings v. State, 21 Fla. L. Weekly D264 (Fla. 1st DCA Jan. 26, 1996).

THREADGILL, C.J., CAMPBELL and FRANK, JJ., Concur.

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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CF95-5030A2-XX
	)	
KENNETH TYRONE BONNEY,	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING MOTION TO DISMISS 1000 FOOT PORTIONS OF INFORMATION

The defendant has challenged the portion of Section 893.13(1)(c), Florida Statutes, which enhances certain violations if they occur "between the hours of 6:00 a.m. and 12:00 a.m." on the grounds that the quoted phrase is unconstitutionally vague. The court agrees.

The First District Court of Appeal, in a decision which is not yet final and, therefore, not binding on this court, Jennings v. State, No. 95-411 (Fla. 1st DCA 1/26/96) (slip op.), has found otherwise. But the following paragraphs from pages 4-6 of the Jennings slip opinion establish just how vague the challenged language is:

> "A.M." is an abbreviation for the Latin phrase ante meridiem, or "before noon." Webster's Third New International Dictionary 91 (1993); see also Black's Law Dictionary 79

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(6th ed. 1990). Similarly "P.M." is an abbreviation for the Latin phrase post meridiem, or "after noon." Webster's Third New International Dictionary 1773 (1993); see also Black's Law Dictionary 1155 (6th ed. 1990). Neither "12 a.m." nor "12 p.m." is an appropriate way to denote "noon." Either notation is also a problematic designation for midnight, although either appears equally (inappropriate, because midnight can be viewed with equal justification as the end of one day or the beginning of the next. Midnight is the only twelve o'clock that falls before (or after) noon.

A New Jersey appellate court reports that the Time Service Division of the U.S. Naval Observatory recommends against the use of the terms "12 a.m." and "12 p.m."

> We take judicial notice under Evid. R. 9(2)(e) that the Time Service Division of the U.S. Naval Observatory in an official statement dated January 1, 1985 entitled "Designation of Noon and Midnight" recommends that the abbreviations 12 a.m. and 12 p.m. not be used because they cause confusion. Instead, the Naval Observatory suggests the usage of the complete words "noon" and "midnight," of times such as 12:01 a.m. or 11:59 p.m. or of the 2400 system.

State v. Hart, 530 A.2d 332, 334 n.1 (N.J. Super Ct. App. Div. 1987). The Florida Legislature is not, of course, under any obligation to follow recommendations from the Naval Observatory, official or otherwise.

With the exception of section 893.13(1)(c), Florida Statutes (1993), however, the Legislature has avoided confusion that might flow from use of the terms "12

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a.m." and "12 p.m.," opting instead for clearer language. See Section 48.091(2), Fla. Stat. (1993) ("Every corporation shall keep the registered office open from 10 a.m. to 12 noon ...."); Section 112.061(5)(b)2., Fla. Stat. (1993) (allowance for lunch for public officers, employees, and authorized persons "[w]hen travel begins before 12 noon and extends beyond 2 p.m."); Section 198.331, Fla. Stat. (1993) (retroactive effect of statutes to "estates of decedents dying after 12:01 a.m."); Section 373.069(1), Fla. Stat. (1993) (dividing the state into various water management districts at "11:59 p.m."); Section 381.00897(2), Fla. Stat. (1993) (access to migrant labor camp or residential migrant housing "between the hours of 12 noon and 8 p.m."); Section 440.05(4), Fla. Stat. (1993) (notice effective as of "12:01 a.m."); Section 562.14, Fla. Stat. (1993) (regulating the sale of alcohol "between the hours of midnight and 7 a.m."); Section 671.301(1), Fla. Stat. (1993) (act to take effect "at 12:01 a.m."); Section 713.36, Fla. Stat. (1993) (chapter to take effect at "12:01 a.m."); Section 900.02, Fla. Stat. (1993) (criminal procedure law to become effective "at 12:01 a.m.")

We have found only one instance where the Florida Legislature used the term "12 p.m." Section 562.14(1), Fla. Stat. (Supp. 1945) (prohibiting the sale and service of intoxicating beverages "between twelve o'clock p.m. Saturday and seven o'clock a.m. Monday"). The Legislature subsequently amended this section to read, "between twelve o'clock midnight Saturday and 7:00 o'clock A.M. Monday." Ch. 23746, Laws of Fla. (1947). Perhaps the Legislature will also amend section 893.13(1)(c), Florida Statutes (1993), in a similar fashion, to bring it up to its customary standard of precision.

This issue has previously been addressed by Circuit Judge

Robert A. Young of this circuit in an order dated June 26, 1995, in State v. Eugene Rohalia O'Neal, CF95-0407, a copy of which is attached hereto and made a part hereof by this reference. For reasons set forth in Judge Young's order, and relying generally on Rogue v. State, 20 Fla. L. Weekly S476 (Fla. Sept. 21, 1995) (commercial bribery statute unconstitutionally vague); Cuda v. State, 639 So.2d 22 (Fla. 1994) (terms "improper" and "illegal" in exploitation of the elderly statute unconstitutionally vague); Wyche v. State, 619 So.2d 231 (Fla. 1993) (loitering and purposes of prostitution statute unconstitutionally vague); Bertens v. Stewart, 453 So.2d 92 (Fla. 2d DCA 1984) (word "medicine" in school board student conduct code unconstitutionally vague), the court finds that the defendant's motion should be granted. It is, therefore,

ORDERED AND ADJUDGED that the defendant's Motion to Dismiss 1,000 Foot Portions of Information is GRANTED.

DONE AND ORDERED this 27 day of February, 1996.

ROBERT L. DOYEL
Circuit Judge

xc: John Lynch, APD
Monica Kay, ASA

A5

Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge.

Robin C. Lemonidis of Robin C. Lemonidis, P.A., Melbourne, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Senior Assistant Attorney General, Daytona Beach, for Appellee.

THOMPSON, Judge.

Scott McQuirk appeals his conviction for sexual battery[1] on the daughter of his former girlfriend. Testimony established that the victim was 19 at the time of the crime, but because she is mildly retarded, she perceives reality as a 10 to 12 year old. We affirm.

On appeal, McQuirk raised three issues concerning the admission of testimony at trial: 1) whether the trial court erred in allowing two experts to testify to the victim's credibility that, in their opinion, the victim was "very capable of telling the truth;" 2) whether the trial court erred in restricting the cross-examination of witnesses which adversely affected McQuirk's ability to develop his defense theory of the case; and 3) whether the cumulative errors of the trial court constituted fundamental error. Unfortunately, we are unable to review the alleged errors.

[1, 2] The general rule in Florida is that an attorney must make a contemporaneous objection to a trial court's ruling in order to preserve the error for appeal. This rule does not apply if the trial court commits fundamental error. *See Castor v. State*, 365 So.2d 701, 703 (Fla.1978) (holding that unless fundamental error, appellate courts will not review for first time on appeal points not preserved by contemporaneous objection by trial counsel and that appellate counsel is bound by acts of trial counsel). McQuirk's privately retained counsel never made specific, contemporaneous objections to the rulings of the trial court. Thus, they were not preserved for appeal. Further, we hold that the trial court committed no fundamental error in this sexual battery case. *See Assiag v. State*, 565 So.2d 387, 388 (Fla. 5th DCA 1990) (holding that issue of whether trial court allowed two psychological experts to improperly vouch for credibility of sex crime victim was not preserved for appellate review by specific, contemporaneous objection at trial); *see also Glendening v. State*, 536 So.2d 212, 221 (Fla.1988), *cert. denied*, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989) (holding that expert's improper testimony that in her opinion child's father was person who committed sexual battery upon child was not preserved for appellate review where there was no contemporaneous objection at trial, nor was it fundamental error). Because the issues were not preserved for appeal and there was no fundamental error, we affirm.

AFFIRMED.

GOSHORN and GRIFFIN, JJ., concur.

1. § 794.011(5), Fla.Stat. (1993).

WEST KEY NUMBER SYSTEM

Mario Lavon JENNINGS, Appellant,

v.

STATE of Florida, Appellee.

No. 95–411.

District Court of Appeal of Florida, First District.

Jan. 26, 1996.

Rehearing Denied Feb. 22, 1996.

Defendant was convicted before the Circuit Court, Columbia County, Paul S. Bryan, J., of sale of cocaine within 1,000 feet of a school, three counts of possession of cocaine within 1,000 feet of a school with intent to sell it, and possession of drug paraphernalia, and he appealed. The District Court of Appeal, Benton, J., held that statutory section making sale of cocaine within 1,000 feet of a school a more serious crime if committed

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Affirmed.

1. Criminal Law ⇐13.1(1)

Statute is not void for va
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2. Criminal Law ⇐13.1(1)

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3. Statutes ⇐184

In determining intent
courts must construe statute i
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4. Drugs and Narcotics ⇐43.1

Statute which makes sa
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§ 893.13(1)(c).

An appeal from the Circuit
lumbia County, Paul S. Bryan, J

Nancy A. Daniels, Public De
Kaufman, Assistant Public De
hassee, for Appellant.

Robert A. Butterworth, Atto
Mark Menser, Assistant Attor
Tallahassee, for Appellee.

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between the hours of 6:00 a.m. and 12:00 a.m." is not unconstitutionally vague.

Affirmed.

1. Criminal Law ⇐13.1(1)

Statute is not void for vagueness if its language conveys sufficiently definite warning as to proscribed conduct when measured by common understanding and practices.

2. Criminal Law ⇐13.1(1)

Although language of statute must provide definite warning of what conduct is required or prohibited, measured by common understanding and practice, it need not attain ideal linguistic precision. U.S.C.A. Const.Amend. 14.

3. Statutes ⇐184

In determining intent of legislature, courts must construe statute in light of purposes for which it was enacted and evils it was intended to cure.

4. Drugs and Narcotics ⇐43.1

Statute which makes sale of cocaine within 1,000 feet of a school a more serious crime if committed "between the hours of 6:00 a.m. and 12:00 a.m." is not unconstitutionally vague, on ground that term "12:00 a.m." is ambiguous; in context, term "12:00 a.m." means "midnight" by which time school children will be at home fast asleep; legislature could not have intended to provide greater penalty for drug sales at morning recess than for sales during the lunch hour or after school lets out. West's F.S.A. § 893.13(1)(c).

An appeal from the Circuit Court for Columbia County, Paul S. Bryan, Judge.

Nancy A. Daniels, Public Defender; Chet Kaufman, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Mark Menser, Assistant Attorney General, Tallahassee, for Appellee.

BENTON, Judge.

Mario Lavon Jennings appeals his convictions for sale of cocaine within 1000 feet of a school, possession of cocaine within 1000 feet of a school with intent to sell it (three counts), and possession of drug paraphernalia. On appeal, Mr. Jennings argues that section 893.13(1)(c), Florida Statutes (1993), which makes such a sale of cocaine—or its possession in such circumstances with intent to sell—a more serious crime if committed "between the hours of 6 a.m. and 12 a.m.," is unconstitutionally vague. We find no constitutional infirmity and affirm.

Section 893.13(1)(a), Florida Statutes (1993), outlaws the sale, manufacture, delivery—or the possession with intent to sell, manufacture, or deliver—of any of a number of controlled substances. The seriousness of the crime depends in part on the nature of the controlled substance. In addition, subsection (1)(c) provides:

> Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle or secondary school between the hours of 6 a.m. and 12 a.m.

§ 893.13(1)(c), Fla.Stat. (1993). The sale of cocaine or its possession with the intent to sell, although otherwise a second degree felony, is a first degree felony if the crime is committed within 1,000 feet of a school and occurs "between the hours of 6 a.m. and 12 a.m." The conduct for which Mr. Jennings was convicted under subsection (1)(c) occurred after noon but before midnight.

Mr. Jennings argues on appeal that the subsection is unconstitutionally vague because the term "12 a.m." is ambiguous. He contends that section 893.13(1)(c), Florida Statutes (1993) fails to put reasonable people on notice whether the period in which selling or possessing cocaine with intent to sell constitutes a first degree felony (as opposed to a second degree felony) ends just before noon or twelve hours later.

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[1, 2] But "a statute is not void [for vagueness] if its language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Hitchcock v. State*, 413 So.2d 741, 747 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982) (quoting *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947)). Although "[t]he language of the statute must 'provide a definite warning of what conduct' is required or prohibited, 'measured by common understanding and practice,'" *Warren v. State*, 572 So.2d 1376, 1377 (Fla.1991) (quoting *State v. Bussey*, 463 So.2d 1141, 1144 (Fla.1985)), it need not attain ideal linguistic precision. *State v. Manfredonia*, 649 So.2d 1388, 1390 (Fla.1995) (Even if a statute "is not a paradigm of legislative drafting.... this reason alone cannot justify invalidating the statute.").

The present statute poses no danger, moreover, that innocent conduct will be punished as a crime. Section 893.13(1)(a) prohibits the sale and possession with intent to sell of controlled substances whatever the time of day. Subsection (1)(c) merely increases the gravity of the offense and the severity of the penalty when the sale (or possession with intent to sell) occurs within 1000 feet of a school during the time period specified.

[3, 4] In this way, the statute exhibits special concern that controlled substances not be peddled to school children. "In determining the intent of the Legislature, the courts must construe a statute in light of the purposes for which it was enacted and the evils it was intended to cure." *Young v. St. Vincent's Medical Ctr. Inc.*, 653 So.2d 499, 506 (Fla. 1st DCA 1995), *review granted*, 663 So.2d 633 (Fla.1995) (Mickle, J., concurring). We do not believe "common understanding and practices" lend support to the view that the Legislature intended to provide a greater penalty for drug sales at morning recess than for sales during the lunch hour or after school lets out. We can think of little justification for such an interpretation of the statute. In context, it is clear that the term "12 a.m." in section 893.13(1)(a), Florida Statutes (1993) must mean "midnight," by which time—the Legislature had reason to hope—school children will be at home fast asleep.

"A.M." is an abbreviation for the Latin phrase *ante meridiem*, or "before noon." *Webster's Third New International Dictionary* 91 (1993); *see also Black's Law Dictionary* 79 (6th ed. 1990). Similarly "P.M." is an abbreviation for the Latin phrase *post meridiem*, or "after noon." *Webster's Third New International Dictionary* 1773 (1993); *see also Black's Law Dictionary* 1155 (6th ed. 1990). Neither "12 a.m." nor "12 p.m." is an appropriate way to denote "noon." Either notation is also a problematic designation for midnight, although either appears equally (in)appropriate, because midnight can be viewed with equal justification as the end of one day or the beginning of the next. Midnight is the only twelve o'clock that falls before (or after) noon.

A New Jersey appellate court reports that the Time Service Division of the U.S. Naval Observatory recommends against the use of the terms "12 a.m." and "12 p.m."

> We take judicial notice under *Evid.R.* 9(2)(e) that the Time Service Division of the U.S. Naval Observatory in an official statement dated January 1, 1985 entitled "Designation of Noon and Midnight" recommends that the abbreviations 12 a.m. and 12 p.m. not be used because they cause confusion. Instead, the Naval Observatory suggests the usage of the complete words "noon" and "midnight," of times such as 12:01 a.m. or 11:59 p.m. or of the 2400 system.

State v. Hart, 219 N.J.Super. 278, 530 A.2d 332, 334 n. 1 (1987). The Florida Legislature is not, of course, under any obligation to follow recommendations from the Naval Observatory, official or otherwise.

With the exception of section 893.13(1)(c), Florida Statutes (1993), however, the Legislature has avoided confusion that might flow from use of the terms "12 a.m." and "12 p.m.," opting instead for clearer language. *See* § 48.091(2), Fla.Stat. (1993) ("Every corporation shall keep the registered office open from 10 a.m. to 12 noon...."); § 112.061(5)(b)2., Fla.Stat. (1993) (allowance for lunch for public officers, employees, and authorized persons "[w]hen travel begins before 12 noon and extends beyond 2 p.m."); § 198.331, Fla.Stat. (1993) (retroactive effect of statutes to "estates of decedents dying after 12:01 a.m."); § 321.251, Fla.Stat. (1993)

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Affirmed.

BOOTH and WOLF, JJ., c

WEST KEY NUMBER SYSTEM

FLORIDA DEPARTM
REVENUE and La
Fuchs, Appellan

v.

LIBERTY NATIONAL I
COMPANY, Appe

No. 94–3665.

District Court of Appeal
First District.

Jan. 26, 1996.

Insurance company chal
ment of Revenue's exclusion

A8

(chapter to become effective at "12:01 a.m."); § 373.069(1), Fla.Stat. (1993) (dividing the state into various water management districts at "11:59 p.m."); § 381.00897(2), Fla. Stat. (1993) (access to migrant labor camp or residential migrant housing "between the hours of 12 noon and 8 p.m."); § 440.05(4), Fla.Stat. (1993) (notice effective as of "12:01 a.m."); § 562.14, Fla.Stat. (1993) (regulating the sale of alcohol "between the hours of midnight and 7 a.m."); § 671.301(1), Fla.Stat. (1993) (act to take effect "at 12:01 a.m."); § 713.36, Fla.Stat. (1993) (chapter to take effect "at 12:01 a.m."); § 900.02, Fla.Stat. (1993) (criminal procedure law to become effective "at 12:01 a.m.").

We have found only one instance where the Florida Legislature used the term "12 p.m." § 562.14(1), Fla.Stat. (Supp.1945) (prohibiting the sale and service of intoxicating beverages "between twelve o'clock p.m. Saturday and seven o'clock a.m. Monday"). The Legislature subsequently amended this section to read, "between twelve o'clock midnight Saturday and 7:00 o'clock A.M. Monday." Ch. 23746, Laws of Fla. (1947). Perhaps the Legislature will also amend section 893.13(1)(c), Florida Statutes (1993), in a similar fashion, to bring it up to its customary standard of precision.

Affirmed.

BOOTH and WOLF, JJ., concur.

FLORIDA DEPARTMENT OF REVENUE and Lawrence Fuchs, Appellants,

v.

LIBERTY NATIONAL INSURANCE COMPANY, Appellee.

No. 94-3665.

District Court of Appeal of Florida, First District.

Jan. 26, 1996.

Insurance company challenged Department of Revenue's exclusion of certain statutorily required expenses from its calculation of retaliatory tax. The Circuit Court, Leon County, P. Kevin Davey, J., granted insurance company summary judgment, and Department appealed. The District Court of Appeal held that payments to state Comprehensive Health Association were not excludable from calculation of retaliatory tax.

Affirmed.

1. Insurance ⇐19

Payments by life and health insurer to state Comprehensive Health Association were within retaliatory tax exclusion for special purpose obligations or assessments imposed in connection with particular kinds of insurance, where at relevant times exclusion was limited to obligations on assessments imposed by another state. West's F.S.A. § 624.5091(3).

2. Insurance ⇐19

Amendment deleting phrase "by another state," from insurance company retaliatory tax exclusion for special purpose obligations or assessments imposed by another state in connection with particular kinds of insurance, did not operate retroactively, as retroactive amendment would have drastically altered tax liability for preceding years. West's F.S.A. § 624.5091(3).

An appeal from the Circuit Court for Leon County, Judge P. Kevin Davey.

Robert A. Butterworth, Attorney General, and C. Lynne Overton and Lisa M. Raleigh, Assistant Attorneys General, Tallahassee, for appellants.

Daniel C. Brown, Paul R. Ezatoff, and Richard E. Coates, of Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, Tallahassee, for appellee.

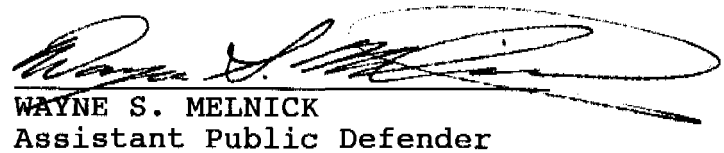
Michael R. Kercher of Broad & Cassel, Tallahassee, for amicus curiae, Paul Revere Ins. Co.

A9

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 8th day of August, 1996.

Respectfully submitted,



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