IN THE SUPREME COURT OF FLORIDA

FILED
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MAY 13 1996
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Chief Deputy Clerk

EUGENE O'NEAL,

Petitioner,

v.

FSC NO. 87,858

STATE OF FLORIDA,

Respondent.

______________________________/

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

PAGE NO.

NOTICE OF SIMILAR ISSUE AND PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT

ISSUE. 4

WHETHER THE COURT SHOULD GRANT DISCRETIONARY REVIEW TO CONSIDER A CHALLENGE TO THE CONSTITUTIOALITY OF §893.13(1)(a), FLA. STAT. (1993)

CONCLUSION 9

CERTIFICATE 9

TABLE OF CITATIONS

PAGE NO.

Brown v. State,
629 So 2d. 841 (Fla. 1994) 7

Jenkins v. State,
FSC Case No. 87,587 1

State v. Mozo,
655 So. 2d 1115 (Fla. 1995) 5

State v. Manfredonia,
649 So. d. 1388 (Fla. 1995) 7

Warren v. State,
572 So.d. 1376, (Fla. 1991). 7

Young v. St. Vincents Medical Ctr. Inc.
653 So. 2d. 499, 506 (Fla. 1st DCA 1995) 7

OTHER AUTHORITIES

§893.13(1)(a), Fla. Stat. (1993) 4

Fla. R. A. P. P. 9.303(a)(2)(A)(I) 5

NOTICE OF SIMILAR ISSUE AND PRELIMINARY STATEMENT

A decision on Jurisdiction is now pending before this Court in Jenkins v. State, FSC Case No. 87,587 which presents the same issue as raised herein.

Petitioner, Eugene R. O'Neal, was the defendant in the trial court and the appellee in the district court. This brief will refer to Petitioner as such, or as the Defendant, or by proper name. Respondent, the State of Florida, was the Appellant below, and this brief will refer to Respondent as such, or as the prosecution, or the State.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. "JB" will designate Petitioner's Jurisdictional Brief. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within the original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

Relying upon the mantra "rule of lenity," the Petitioner applies a grossly unnatural and illogical construction to a Florida Statute in an effort to contest its constitutionality. It is respectfully submitted that this Court should not grant discretionary review to consider such challenges to Florida Statutes simply because the argument, as rejected by the District Court, addressed the constitutionality of the challenged statute.

ARGUMENT

WHETHER THE COURT SHOULD GRANT DISCRETIONARY REVIEW TO CONSIDER A CHALLENGE TO THE CONSTITUTIONALITY OF §893.13(1)(A), FLA. STAT. (1993)

The issue before this Honorable Court is whether discretionary review should be granted to review the Second District Court of Appeal's per curiam rejection of a constitutional challenge to §893.13(1)(a), Fla. Stat. (1993), by way of reference to Jennings v. State, 21 FLW D264 (1st DCA January 26, 1996). The State will not argue that the opinion of the Second District Court of Appeal is not an express finding of validity of a State statute but rather, it is submitted that the absence of any logical challenge to the statute should preclude discretionary review.

This Court has discretionary jurisdiction to review District Court rulings on the constitutionality of Florida Statutes. Fla. R. A.P. P. 9.030(a)(2)(A)(I) or (ii). The Court's discretionary review power gives it the ability not to burden itself with review of every constitutional challenge to every statute. The rule also enables the court to avoid addressing constitutional issues unnecessarily; to wit:

> Although this court acquires jurisdiction by virtue of the district court's ruling that expressly construes a provision of the Florida constitution, we adhere to the settled principle of constitutional law that courts should endeavor to implement the legislative intent of the statutes and avoid constitutional issues.

State v. Mozo, 655 So. 2d 1115 (Fla. 1995).

The case at bar provides an outstanding example of the kind of litigation the rule was created to avoid. The Petitioner argued that the statute in question was unconstitutionally vague and, in addition, alluded to application of the "rule of lenity."

The Petitioner's Jurisdictional Brief, again, addresses the "rule of lenity," thus clearly calling into question the issue the defense wants to argue. The "rule of lenity" does not provide a separate ground for discretionary Florida Supreme court review under Fla. R. A.P.. P. 9.303(a)(2)(A)(I) or (ii).

The Petitioner has failed to allege or show any actual error or infirmity in the First District court of Appeal's interpretation of the statute at issue as adopted in the opinion of the Second District court of Appeal. The First District carefully construed the statute in terms of "vagueness" and, as suggested by this court, in terms of obvious legislative intent, and the Second

District correctly adopted it in their per curiam reversal of the trial court's finding of vagueness.

The issue before the district court was whether the statute in question was unconstitutionally vague because of alleged confusion over the meaning of the abbreviation of "a.m." as applied to 12 o'clock. The argument tendered by the Petitioner was that the statute providing for enhanced penalties for pushing drugs near a school could be construed as only applying to drug sales taking place between six in the morning and "noon," but not to any drug sales committed during the lunch period or after school. Thus, according to Petitioner, pushers arrested near the schools during the afternoon were unfairly surprised by the stature. In support of this argument, the Petitioner came up with a circuit court order from another case as supplemental authority which cites an obscure federal memorandum from the U.S. Naval Observatory, relied on in a New Jersey case, construing "12 a.m." as "noon" rather than "midnight" as commonly understood. There was never any showing that the Petitioner relied upon the United States Naval Observatory Memo when scheduling his narcotics transactions.

The District Court in Jennings v. State, supra, determined that the constitutional issue was to be resolved according to the

standards announced in this Court's decision in Brown v. State, 629 So. 2d 841 (Fla. 1994); to wit:

> 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. ... "The language of the statute must 'provide a definite warning of what conduct is required or prohibited, measured by common understanding or practice.'" Warren v. State, 572 So.d. 1376, 1377 (Fla. 1991) (quoting State v. Bussey, 463 So.d. 1141, 1144.

The district court applied this reasoning and referred to the court's holding in State v. Manfredonia, 649 So. 2d. 1388, 1390 (Fla. 1995), that a statute, even if not "a paradigm of legislative drafting" need not require ideal linguistic precision in order to be valid, as well as the rule that the courts should construe a statute in keeping with the intent of the Legislature. Young v. St. Vincent's Medical Ctr. Inc. 653 So. 2d. 499, 506 (Fla. 1st DCA 1995), review granted, ___ So. 2d. ____ (Fla. 1995).

The District Court thus concluded that the statute, by any reasonable reading, conveyed the warning that illegal drug sales within 1,000 feet of a school during those hours when children might be present were subject to enhanced penalties.

Boiled down to its essence, the real request of the Petitioner is that this court employ the "rule of lenity" to apply

or unnatural meaning to statutory terms, and frustrate legislative intent for the benefit of drug dealers who prey on children. It is submitted that in the absence of any logical or cogent challenge to the well-reasoned decision of the First District Court of Appeal as adopted by the Second District Court of Appeal herein, , discretionary review should not be granted.

CONCLUSION

Based on the foregoing discussions, the State respectfully submits that discretionary review should not be granted.

Respectfully submitted,
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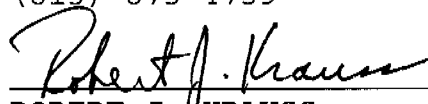

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Wayne S. Melnick, Assistant Public Defender, Public Defender's Office, P.O. Box 9000, Drawer P.D., Bartow, Florida 33830 on this 10th day of May, 1996.

OF COUNSEL FOR RESPONDENT