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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,
Appellant

V.

RAYMOND G. MULLER
Defendant, Appellee

: Case No. 88, 221

: 2d DCA Case No. 94-02958
: Pasco Co. No. CRC94-10571XTWS

APPELLANT, STATE OF FLORIDA, INITIAL BRIEF

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

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SUMMARY OF ARGUMENT

Section 316.193(6) (d), Florida Statutes (1993), providing impoundment of an automobile driven by one who is convicted of Driving Under the Influence of Controlled Substance, is not unconstitutionally vague. The ordinary meaning of the words of the statute clearly provide notice that an automobile used to commit the crime of Driving Under the Influence will be impounded.

That the statute fails to provide an enforcement mechanism does not make it unconstitutionally vague. Vagueness must affect the constitutional rights of the defendant. It is of no legal consequence to the defendant how or by whom the vehicle is impounded or immobilized.

The statute is sufficiently clear to avoid arbitrary and discriminatory enforcement, the only requirement to avoid vagueness of the enforcement provisions.

The enforcement concerns of the court arise after the trail court's ordered impoundment, a matter of procedure rather than substance. The legislature has provided enforcement mechanism for court orders, in the office of the sheriff.

The trial court does not lose jurisdiction to impose and to effectuate a nonfinal sentencing order, and has continuing jurisdiction of enforcement.

STATEMENT OF THE CASE AND FACTS

Raymond Muller, case No. 94-105751XTWS, was arrested in Pasco County on March 8, 1994, for Driving Under the Influence of Alcohol, contrary to Section 316.193, Florida Statutes. (94-02958,

R.1-7) Appellee was apparently driving his own truck. (R.l, 4, 11, **38-41)** He was one of the defendants on whose behalf the Public Defender filed on March 18, 1994, a combined, pretrial Motion to Declare Section 316.193(6)(d), Florida Statutes (1993), Unconstitutional. (R.11-14) (As to the other defendants, see State v. Peloquin, et al. 20 Fla.L.Weekly D2744.) The Motion was heard on April 8, 1994, (R.33-53), and the trial court's order granting the motion as to Raymond Muller was filed April 13, 1994. (R.18-22) Appellee Muller pled no contest on April 25, 1994, (R.24), was adjudicated, "sentenced" to one-year probation and his license revoked for five years. (R.25) The judge entered a separate order on April 25, 1994, that the vehicle driven by Appellee Muller was not to be impounded because he had declared the statute unconstitutional. (R.26) The Appellant's Notice of Appeal was filed May 2, 1994. Affidavit of Violation of Probation was filed June 3, 1994, alleging failure to report for probation, failure to complete the DUI program and failure to pay costs. (R.32)

The Second District entered its Opinion May **17,** 1996, affirming the order of the trial court finding Sec. 316.193(6) (d), the DUI Impoundment Law, unconstitutionally vague. The Opinion is reported at 21 Fla.L.Weekly D 1176.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 9.030(a) (1) (ii), Fla.R. App.P. The State seeks the mandatory appellate review pursuant to 9.110, Fla.R.App.P.

ARGUMENT

ISSUE: THE COURT ERRED IN FINDING SECTION 316.193(6)(d)d, Fla.Stat. (1993), TO BE UNCONSTITUTIONALLY VAGUE.

More typically, a statute has been found to be unconstitutionally vague if it fails to give adequate notice of conduct that is prohibited. See Brown v. State, 629 So. 2d 841 (Fla. 1994). Section 316.193(6)(d), Fla. Stat. (1993), has been found to provide sufficient notice to be constitutional. State v. Ginn, 660 So. 2d 1118 (Fla. 4th DCA 1995), rev. den. 669 So. 2d 251 (Fla. 1996). In the instant case, however, the court found 316.193(6)(d) to be unconstitutionally vague "because it provides no mechanism for enforcement. It does not state how the vehicle is to be impounded or define immobilization." The court attempts to fit this holding into traditional vagueness analysis by citing to, and quoting from, Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995).

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application....
>
> Gravned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed. 2d 222 (1972) (footnotes omitted). In other words, a government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

That Sec. 316.193(6)(d) fails to state how the vehicle is to be impounded, i.e., who is to accomplish the seeking out and taking into custody, does not result in its being unconstitutionally vague. The statute permits no arbitrary or discriminatory enforcement. The trial judge makes the determination for impoundment as part of the sentencing function. Law enforcement has no role in the sentencing decision. Section 316.193(6)(d) is not a substantive criminal provision that can be violated, but is a procedural penalty provision. It is not in the nature of a substantive law as is the ordinance prohibiting loitering for the purpose of prostitution which was found unconstitutional in Wyche v. State, 619 So. 2d 231, 233 (Fla. 1993), as "too vague because a violation of the law is determined based on law enforcement officers' discretion;..."

The lack of clear procedure for implementation does not render a statute unconstitutional. In Department of Law Enforcement v. Real Property, 588 So.2d 957, 966 (Fla. 1991), this Court quoted the Fourth District in agreeing that "forfeiture proceedings are 'procedural quagmires on account of the failure of the statute to provide measures to be followed other than to say "... by rule to show cause in the circuit court.""' However, this Court upheld the constitutionality of the statute and established the missing procedures as developed in appellate decisions. Department of Law Enforcement, 967-968.

The court's concern with who will be effecting the impoundment is of no concern to the DUI defendant whose car is to be impounded.

As found in Ginn, the DUI defendant is on notice of what is expected and what will befall the vehicle driven. Because the court did not certify conflict with Ginn, the court's quoting from that part of Bouters quoting from Connally can only be read to apply to the trial court's supposed problem of enforcement of the order of impoundment. Section 316.193(6)(d) requires the doing of an act, the procedural impoundment on the trial court's order, which the court believes is too vague to accomplish. This is not the intended analysis for whether a substantive statute is unconstitutionally vague.

The history of the regulation of the automobile in the interest of public safety is relevant to the consideration of whether Section 316.193(6)(d) is violative of due process. In the context of deciding that an attorney in a disbarment proceeding need not be afforded the Fifth Amendment rights enjoyed by a criminal defendant, the Court noted that Fourteenth Amendment Due Process is a consideration of what process is due in the circumstances. Cohen v. Hurley, 366 U.S. 117, 129, 81 S.Ct. 954, 965 (1961).

> "[W]hat procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and ... history is surely relevant to these inquiries." Cohen, 130, 81 S.Ct. 962.

Accord, Craig v. Carson, 449 F.Supp. 386, 390 (D.C. M.D. Fla. 1978). Cf. Eutsey v. State, 383 So.2d 219, 224 (Fla. 1980), holding that the habitual offender sentencing statute does not

require the same degree of due process procedures as are required for a guilt phase proceeding. Cf. McKeiver v. Pa., 403 U.S. 528, 548, 91 S.Ct. 1976, 1987, 29 L.Ed.2d 647 (1970), holding that jury trial is not required to afford due process to juveniles.

The court, in upholding a roadblock to check for drivers' licenses in Citv of Miami v. Aronovitz, 114 So.2d 784, 788 (Fla. 1959), referred to the over two and a-half million licensed drivers with over 100,000 traffic accidents and 1,139 deaths in Florida during 1958 to admonish courts that traffic regulations and enforcement thereof should be upheld. "Giving recognition to our established judicial viewpoint that an automobile is a dangerous instrumentality, we must conclude that any procedure lawfully directed toward the effective prevention of the negligent operation of the automobile and the imposition of requirements of competency on the part of the driver thereof, should meet with judicial approbation." Id. Statistics in a more recent case report 1,365 alcohol-related traffic fatalities in Florida in 1990. Lindsav v. State, 606 So.2d 652, 655 (Fla. 4th DCA 1992).

The trial court should be able to assume that its order of impoundment will be executed as any other judicial process, which is required to be executed by the sheriff. The legislature has already provided in Sec. 30.15, Fla. Stat., that sheriffs are obligated to "[e]xecute all process of the . . . circuit courts . . . ." In Cassadv v. Sholtz, 124 Fla. 718, 169 So. 487 (1936) this Court affirmed award of money judgment against the sheriff for failure to deliver, for sale, property levied on writ of attachment. The

opinion explained that "[t]he failure or refusal of the sheriff to deliver the property to the special master for purposes of sale in accordance with the final decree of the chancellor, affirmed by the Supreme Court, amounted to a failure or refusal on the part of the sheriff to execute the process of the circuit court in chancery; and was a clear violation of his official duty owed to individuals. Section 4572, C.G.L." Cassady at 489, emphasis added. The law then in effect was sufficiently similar to be analogous to the current Sec. 30.15, as shown in the Cassady opinion. "One of the duties of the office of sheriff as prescribed by statute is that he shall execute, either personally or by one of his deputies, all process of the circuit court. Section 4572, C.G.L." Id.

The sheriff, who is by law required to execute the court's process, often must seek out and take into custody the personal subjects of the court's directives. There is no reason why they cannot do the same as to vehicles to be impounded.

The court's claim that the impoundment is to be occasioned at a time when the trial court has lost jurisdiction is not legally correct. The legislature confers the court's jurisdiction and that jurisdiction has always been retained or extended, by inference if necessary, to accomplish implementation of court sentencing orders. See Posey v. Kaplan, 660 So. 2d 781, 782 (Fla. 4th DCA 1995), citing Monqiouvi v. State, 639 So. 2d 686 (Fla. 2d DCA 1994); Patten v. State, 531 So. 2d 203, 210 n.2 (Fla. 2d DCA 1988), citing Bush v. state, 369 So. 2d 674, 676 (Fla. 3d DCA 1979). The trial court orders the impoundment at the time of sentencing. The

impoundment is, in the statute, declared to be a part of the sentencing. That the defendant is to have served the incarcerative and/or probationary period of the sentence prior to the impoundment does not change that the impoundment is a part of the sentence. The sentence is not over until the impoundment period is over. The court has misconstrued the plain hearing of the statute, in this instance.

The penalty provision of impoundment is to be imposed at the time of sentencing or placement on probation, to be effected at the end of probation. The ordered impoundment is akin to an in rem proceeding which does not require personal jurisdiction for enforcement. Cf. forfeiture cases such as Department of Law Enforcement, supra. The ordered impoundment is also akin to a fine which may be enforced beyond the "jurisdiction" of the sentence, or a lien, the recording of which places all persons on notice of its encumbrance.

That "immobilized" is not defined in Sec. 316.193(6)(d), does not render the statute unconstitutionally vague as not occasioning arbitrary or discriminatory enforcement. The dictionary is often consulted to determine an ordinary meaning within the common understanding. See Newberger v State, 641 So. 2d 419, 420 (Fla. 2d DCA 1994). The dictionary definition of "immobilize" includes "to make immovable"; the definition of "immobile" includes the word "motionless." That some lock device could be utilized, rather than impoundment, is not a consequence that will cause a defendant to be treated differently than any other defendant. Neither method would

provide accessibility to the vehicle. "Immobility" of a vehicle is a concept within the understanding of the ordinary licensed driver, just as this court found the word "harasses" in the stalking statute not to be impermissibly vague but to be measured by the standard of the mind of a reasonable man. See also Warren v. State, 572 So. 2d 1376 (Fla. 1991), finding the words "ill fame" to be impermissibly vague but not the words "prostitution" and "lewdness." The trial court was reversed in State v. Hovt, 609 So. 2d 744 (Fla 1st DCA 1992), for finding Sec. 370.11(3), Fla. Stat. unconstitutionally vague for failure to define "shad" and "fishing." The court noted in Hoyt that:

> "An appellate court ... has a duty to find an allegedly unconstitutional statute constitutional if the application of ordinary logic and common understanding would so permit .... When a statute does not specifically define words of common usage, courts must construe such words according to the plain and ordinary meaning." Hoyt at 747, citations omitted.

The common and ordinary words of Section 316.193(6) (d) readily convey, with the use of "ordinary logic and common understanding," a "plain and ordinary meaning." Id.

This Court may take judicial notice that a similar provision for impoundment of vessels involved in a DUI conviction was passed by the last legislature to become effective July 1, 1996. CS/HB 173, 1851, 2547 creating 327.35(6)(d). Coon v. Bd. of Public Instruc. of Okaloosa Co., 203 So. 2d 497, 498 (Fla. 1967); Department of Rev. v. Fla. Home Builders Assn., 564 So. 2d 173, 176 (Fla. 1st DCA 1990).

CONCLUSION

WHEREFORE, Sec. 316.193(6)(d) is not unconstitutionally vague for lack of enforcement mechanism. The opinion of the Second District is in error and should be reversed. The trial court's order finding the statute unconstitutional is in error. Reversal of the Second District's order should remand with directions that the opinion be changed, to correct the trial court order.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the above Appellant, State of Florida, Initial Brief on Appeal from the Second District Court of Appeal has been furnished by U.S. Mail, to Robert E. Jagger, Public Defender, Pasco Government Center, 7530 Little Road, New Port Richey, Florida 34654, counsel for Defendant, Appellee Raymond G. Muller, this 24 day of June, 1996.

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