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FILED

IN THE SUPREME COURT OF THE STATE OF FLORIDA SID J. WHITE

JAN 21 1999

THERESA SIENIARECKI,

Petitioner,

vs.

CASE NO. 94,800

STATE OF FLORIDA,

Respondent.

CLERK, SUPREME COURT
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PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and was the appellant in the District Court of Appeal, Fourth District. She will be referred to by name and as Petitioner in this brief.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2 (d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with aggravated assault of a disabled person pursuant to Florida Statutes, Section 782.07(2) (1995). Prior to trial, defense counsel filed a motion to dismiss this statute as unconstitutional, both facially, and as applied (R 25-34). This motion was denied by the trial court (R 39). Thereafter, Petitioner was found guilty of the lesser-included offense of neglect of a disabled person (R 48-49, 572). Subsequently, Petitioner was sentenced to twenty two months imprisonment (R 57, 60, 582).

Thereafter, Petitioner appealed her conviction and sentence to the Fourth District Court of Appeal (DCA), contending that both Sections 782.07 (2) and 825.102 (3) (a) (1997) were facially unconstitutional, due to a lack of a specific intent requirement, vagueness of various statutory terms defining these crimes, and the improper imposition of an affirmative duty of care for her elderly mother, Sieniarecki v. State, 24 FLW D112 (Fla. 4th DCA, December 30, 1998). In a brief per curiam decision, that Court rejected Petitioner's constitutional challenges in toto, 24 FLW at D112. Petitioner filed her notice of intent to invoke this Court's discretionary jurisdiction, pursuant to Florida Rule of Appellate Procedure 9.030 (a) (2) (a) (1), on January 15, 1999.

SUMMARY OF ARGUMENT

This Court should exercise its discretionary jurisdiction, pursuant to Florida Rule of Appellate Procedure 9.030 (a) (2) (a) (1) to review the Fourth DCA's decision in Sieniarecki v. State, 24 FLW D112 (Fla. 4th DCA, December 30, 1998), since that decision expressly upheld the constitutionality of Florida Statutes, Sections 782.07 (2) and 825.102 (3) (a), Florida Statutes (1997).

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE FOURTH DCA'S DECISION IN SIENIARECKI V. STATE, 24 FLW D112 (FLA. 4TH DCA, DECEMBER 30, 1998), SINCE THAT DECISION EXPRESSLY UPHELD THE CONSTITUTIONALITY OF FLORIDA STATUTES, SECTIONS 782.07 (2) AND 825.102 (3) (a), FLORIDA STATUTES (1997).

Under Florida Rule of Appellate Procedure 9.030 (a) (2) (a) (1), this Court has discretionary jurisdiction to review decisions by District Courts of Appeal that "expressly declare valid a state statute". In Petitioner's case, the Fourth DCA upheld her due process and void for vagueness challenges to Florida Statutes, Section 782.07 (2) and 825.102 (3) (a) (1997), 24 FLW D112 (Fla. 4th DCA, December 30, 1998). Petitioner contended below that these statutes violated her right to due process by imposing an affirmative duty to act in providing dependent care to her elderly mother, while penalizing Petitioner's failure to so act without requiring specific criminal intent, citing Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) and State v. Gruen, 586 So.2d 1220 (Fla. 3d DCA 1991); additionally, Petitioner contended that the before-mentioned statutes were unconstitutionally vague as applied in all their applications, due to a failure to sufficiently define the statutory terms "care, supervision, [and]

services" and "entrusted, assumed, [and] responsibility," see Florida Statutes, Section 825.010 (2) (3). Finally, Petitioner contended that the statutes upheld in Sieniarecki by the Fourth DCA violated the right of Petitioner's mother, Patricia Seiniarecki, to privacy to refuse medical services. Under such circumstances, where a statute is upheld despite substantial constitutional challenge, this Court should exercise its discretionary jurisdiction to review a District Court of Appeal decision rejecting such a constitutional challenge, see e.g. Warren v.State, 572 So. 2d 1376, 1377 (Fla. 1991) reviewing State v. Warren, 558 So.2d 55 (Fla. 2d DCA 1990) (vagueness challenge to statute prohibiting keeping "a house of ill fame . . . for the purpose of prostitution or lewdness"; Supreme Court reviewing statute upheld by DCA, find statute void for vagueness).

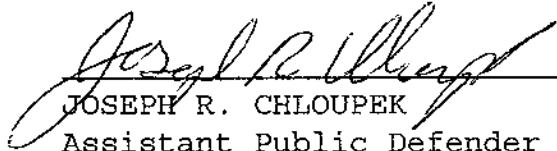
As a consequence, Petitioner requests this Court exercise its discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030 (a) (2) (a) (1) to review Sieniarcki v.State, 24 FLW D112 (Fla. 4th DCA, December 30, 1998).

CONCLUSION

This Court should exercise its discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030 (a) (2) (a) (1) to review Sieniarcki v.State, 24 FLW D112 (Fla. 4th DCA, December 30, 1998).

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to
ETTIE FEISTMANN, Assistant Attorney General, Suite 300, 1655 Palm
Beach Lakes Boulevard, West Palm Beach, Florida 33401, by courier
this 19th day of January, 1999.



Attorney for Theresa Sieniarski

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

THERESA SIENIARECKI,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1998

THERESA SIENIARECKI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 98-0997

Opinion filed December 30, 1998

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William P. Dimitrouleas, Judge; L.T. Case No. 97-5483 CF10A.

Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ettie Feistmann, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Pursuant to section 825.102(3), Florida Statutes (1997), appellant was convicted of neglect of a disabled person arising from the death of her mother. She appeals her conviction on several grounds, none of which we find meritorious. We affirm.

Appellant first contends that sections 782.07(2) and 825.102(3)(a), Florida Statutes (1997), are facially unconstitutional because they do not contain a specific intent requirement and thereby violate due process by imposing an affirmative duty upon appellant to act, while penalizing her

failure to comply.¹ It is well established that

¹Section 782.07(2), Florida Statutes (1997), provides:

A person who causes the death of any elderly person or disabled adult by culpable negligence under s. 825.102(3) commits aggravated manslaughter of an elderly person or disabled adult, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 825.102(3), Florida Statutes (1997), provides:

(3)(a) "Neglect of an elderly person or disabled adult" means:

1. A caregiver's failure or omission to provide an elderly person or disabled adult with the care, supervision, and services necessary to maintain the elderly person's or disabled adult's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the elderly person or disabled adult; or
2. A caregiver's failure to make a reasonable effort to protect an elderly person or disabled adult from abuse, neglect, or exploitation by another person.

Neglect of an elderly person or disabled adult may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or psychological injury, or a substantial risk of death, to an elderly person or disabled adult.

(b) A person who willfully or by culpable negligence neglects an elderly person or disabled adult and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) A person who willfully or by culpable negligence neglects an elderly person or disabled adult without causing great bodily harm, permanent

statutes are presumptively constitutional. See *Brown v. State*, 629 So. 2d 841, 843 (Fla. 1994). In addition, the Legislature has the "power to dispense with the element of intent and thereby punish particular acts without regard to the mental attitude of the offender." *State v. Oxx*, 417 So. 2d 287, 289 (Fla. 5th DCA 1982). In *State v. Gruen*, 586 So. 2d 1280, 1282 (Fla. 3d DCA 1991), the third district held that a statute which penalizes the failure to act without containing an element of specific intent will withstand a due process attack if neglecting to take action under the circumstances would alert a reasonable person to recognize the consequence of his or her deeds. Similarly, in the present case, the sections at issue regarding the neglect of the elderly or disabled do not punish mere presence, or wholly passive conduct, but rather penalize the failure of a person to provide basic food, shelter, clothing and medical needs, only where he or she has assumed such a duty. For the above reasons, we hold that the statutes are not facially unconstitutional as violating due process.

Appellant next argues that the above sections are unconstitutionally vague. We have held that the challenge of a statute for vagueness will not prevail where the record establishes that the appellant engaged in conduct clearly proscribed by the meaning of the statute. See *Wilburn v. State*, 23 Fla. L. Weekly D1544, D1544 (Fla. 4th DCA June 24), *rev. denied*, 719 So. 2d 894 (Fla. 1998). We think the evidence at trial clearly showed that appellant's conduct fell squarely within the conduct proscribed by the statutes at issue. Thus, appellant's vagueness claim must fail.

disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Appellant's final claim on appeal is that section 782.07(2) violates her mother's right to privacy embodied in Article I, section 23 of the Florida Constitution. Specifically, she asserts that her mother had the right to refuse medical treatment, and as a result appellant cannot be convicted of neglect for failure to provide proper medical attention. However, "constitutional rights are personal in nature and generally may not be asserted vicariously." *State v. Long*, 544 So. 2d 219, 221 (Fla. 2d DCA 1989), *cert. denied*, 501 U.S. 1250, 111 S. Ct. 2888 (1991). Accordingly, we affirm on this issue.


AFFIRMED.

STONE, C.J., GUNTHER and WARNER, JJ.,
concur.

**NOT FINAL UNTIL THE DISPOSITION OF
ANY TIMELY FILED MOTION FOR
REHEARING.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Ettie Feistmann, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida this 19th day of January, 1999.



Attorney for Theresa Sieniarski