

ORIGINAL

FILED

SID J. WHITE

FEB 8 1999

IN THE SUPREME COURT OF FLORIDA

Case No. 94,800

CLERK, SUPREME COURT  
By

Chief Deputy Clerk

THERESA SIENIARECKI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

\*\*\*\*\*  
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL  
\*\*\*\*\*

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL  
Tallahassee, Florida

ETTIE FEISTMANN  
Assistant Attorney General  
Florida Bar No.: 0892830  
1655 Palm Beach Lakes  
Blvd., Ste. 300  
West Palm Beach, FL 33401  
Telephone (561) 688-7759  
Fax (561) 688-7771

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . ii

CERTIFICATE OF TYPE SIZE AND STYLE . . . . . iii

TABLE OF AUTHORITIES . . . . . iv

PRELIMINARY STATEMENT . . . . . 1

STATEMENT OF THE CASE AND FACTS . . . . . 2

SUMMARY OF THE ARGUMENT . . . . . 2

ARGUMENT . . . . . 3

    THIS COURT SHOULD DECLINE TO EXERCISE ITS  
    DISCRETIONARY JURISDICTION TO REVIEW THE INSTANT  
    CASE BECAUSE THE OPINION OF THE FOURTH DISTRICT  
    COURT OF APPEAL IS LEGALLY CORRECT.  
    . . . . . 3

CONCLUSION . . . . . 5

CERTIFICATE OF SERVICE . . . . . 5

CERTIFICATE OF TYPE SIZE AND STYLE

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 for the State of Florida, Respondent herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

TABLE OF AUTHORITIES

**STATE CASES**

State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982) . . . . . 3

Sieniarecki v. State, 24 Law Weekly D112 (Fla. 4th DCA December 30, 1998) . . . . . 4

**MISCELLANEOUS**

Philip J. Padovano, Appellate Practice, § 2.7 (1988 ed.) . . . . 4

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i) . . . . 3

Art. V § 3(b)(3) Fla. Const. (1980). . . . . 3

## PRELIMINARY STATEMENT

The petitioner was the appellant in the appeal proceedings and the defendant at trial in the circuit court of the 17th Judicial Circuit in and for Broward County. The respondent, State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used: "A" Appendix.

## STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts for purposes of this appeal in so far as it presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth in the argument portion of this brief and in the district court's opinion.

## SUMMARY OF THE ARGUMENT

Although this Court has the authority to exercise its jurisdiction, the State of Florida strongly disagrees with the suggestion that it do so, because the opinion of the fourth district court is correct.

## ARGUMENT

THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE INSTANT CASE BECAUSE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IS LEGALLY CORRECT.

Petitioner claims that this Court should exercise its discretionary jurisdiction, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i), to review the fourth district's decision in Sieniarecki v. State, 24 Florida Law Weekly D112 (Fla. 4th DCA December 30, 1998). Respondent agrees that this Court has discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i) and may review a decision of a district court of appeal that expressly declares a state statute valid. See generally Philip J. Padovano, Appellate Practice, § 2.7 (1988 ed.); Art. V § 3(b)(3) Fla. Const. (1980). The state, however, strongly disagrees with the suggestion that it do so.

In Sieniarecki v. State, 24 Florida Law Weekly D112 (Fla. 4th DCA December 30, 1998), the Fourth District Court of Appeal reviewed the constitutionality of §§ 782.07(2) and 825.102(3)(a), Florida Statutes (1997). Petitioner's first claim was that the statutes, that do not contain a specific intent requirement, violate due process by imposing an affirmative duty upon her to act. Citing to State v. Oxx, 417 So. 2d 287, 289 (Fla. 5th DCA 1982), the fourth district held that 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." Id. The fourth district concluded that the statute was not facially unconstitutional even though it penalizes the failure to act without containing an element of specific intent, and that these statutes do not punish mere presence or passive conduct. Rather, the statutes penalize the failure to provide the basic needs of life to petitioner's dependent mother where petitioner assumed the duty to do so. Sieniarecki v. State, 24 Florida Law Weekly D112.

Based on established cases, the fourth district rejected a claim of vagueness, because petitioner's conduct fell within the conduct proscribed by the challenged statutes. Additionally, the fourth district rejected the claim that § 782.07(2), Florida Statutes, violated the right to privacy of petitioner's mother, explaining that "constitutional rights are personal in nature and generally may not be asserted vicariously." Id.

The statute complained of by petitioner is not facially unconstitutional, nor was it unconstitutionally applied to her. This Court should reject petitioner's suggestion that it exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal.



CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully contends that the Fourth District Court of Appeal did not err in its decision. This Court should decline to exercise its discretionary jurisdiction to review that decision.

Respectfully submitted,

**ROBERT A. BUTTERWORTH**  
Attorney General  
Tallahassee, Florida



Ettie Feistmann  
Assistant Attorney General  
Florida Bar No.: 0892830  
1655 Palm Beach Lakes Blvd  
Suite 300  
West Palm Beach, FL 33401  
Telephone (561) 688-7759  
FAX (561) 688-7771

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" was sent by United States mail to Joseph Chloupek, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, FL. on February 1<sup>st</sup>, 1999.



Ettie Feistmann  
Counsel for Respondent



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

JULY TERM 1998

TERESA 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.<sup>1</sup> It is well established that

---

<sup>1</sup>Section 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.**