IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA
Petitioner,

vs. **FSC NO.: SC00-119**

JAMES E. BRAKE, JR.,
Respondent.
_____/

REVIEW OF THE DECISION OF THE
DISTRICT COURT OF APPEAL,
SECOND DISTRICT

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY AUTHORITIES

PRELIMINARY STATEMENT

All references to the record on appeal shall be designated by the letter "R" followed by the page number. Petitioner shall be referred to as the State or Petitioner, and Respondent shall be referred to as Respondent or Defendant.

STATEMENT REGARDING TYPE

The style of type used in this brief is 12 point. It is typed with a font that is proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts, but would additionally note as follows:

The sentencing guidelines filed and approved in this case do not reflect legal status violation points, nor community sanction violation points (R. 47).

SUMMARY OF THE ARGUMENT

Section 787.025 is unconstitutional, and violates the United States Constitution Amendments One, Five, Fourteen, in addition to the Florida Constitution Article One Section Nine. The statute is overbroad on its face, and Respondent surely had standing to argue the unconstitutionality of this statute, both on overbreadth and vagueness grounds.

The statute also has an unconstitutional delegation of power to courts and juries by failing to define what is "other than a lawful purpose".

As a final note, the statute is burden shifting by providing that a prima facie can be made on the element of lack of a lawful purpose, and then creating an affirmative defense that the defendant can show a "lawful purpose". This burden shifting provision is violative of the U.S. Constitution Amendment Fourteen.

ARGUMENT

ISSUE ONE

SECTION 787.025 WHICH PROSCRIBES LURING OR ENTICING A CHILD TO ENTER A DWELLING, STRUCTURE, OR CONVEYANCE, FOR OTHER THAN A LAWFUL PURPOSE IS UNCONSTITUTIONALLY VAGUE

The Second District Court of Appeals held that the statutory provision relating to the crime of Luring or Enticing a Child is unconstitutionally vague. See Brake vs. State, 746 So.2d 527 (Fla., 2nd DCA 1999). Primary reliance was predicated upon this Court's previous decision in Cuda vs. State, 639 So.2d 22 (Fla., 1994), which held that the exploitation of the elderly or disabled by the improper or "illegal use" or management of funds of that person was unconstitutionally vague, due to the lack of statutory definition of the offending language, of "illegal use", and this Court's finding that the phrase was too vague to give notice to the public of the proscribed conduct. As such, the determination of the standard of guilt to be applied was left to the courts or juries, which was an unconstitutional delegation of legislative authority. This Court's prior decision in Cuda mandates an affirmance of the Second District Court of Appeals decision in this case.

As noted by the Second District Court of Appeals decision, this Court's Cuda decision compared and contrasted its prior holdings in State vs. Rodriguez, 365 So.2d 157 (Fla., 1978), and Locklin vs. Pridgeon, 30 So.2nd 102 (1947). In Rodriguez, the food stamp fraud statute phrase "not authorized by law" was not unconstitutionally vague because Chapter 409 gave notice that it was a federal program with federal regulations, and accordingly, the "not authorized by law" phrase related to conduct not authorized by state and federal food stamp law. In

contrast, in Locklin vs. Pridgeon, the language "authorized by law" in a statute which prohibited federal and state employees from using their authority to commit an "act not authorized by law", was held unconstitutionally vague, due to the lack of statutory definition, or plain meaning so as to a) put the public on notice of the forbidden conduct; and b.) prevent law enforcement from arbitrary and selective enforcement. Additionally, the Second District Court of Appeals decision in Brake rejected the use of the "lawful purpose" affirmative defense, noting that it was unconstitutionally burden shifting, and circuitous to say that the affirmative defense gave meaning to the otherwise vague element of "other than a lawful purpose".

In addition to this Court's Cuda decision, two other decisions on overbreadth analysis, not cited by Petitioner at the district court level, nor before this Court, compel a conclusion that the instant statute is overbroad on its face as it impacts on First Amendment protected speech and the right of association. In Wyche vs. State, 619 So.2d 231 (Fla., 1993), this Court held a Tampa city statute on loitering for the purpose of prostitution unconstitutional on its face where a known prostitute who, within one year previous to the date of occurrence had been convicted of prostitution, was prohibited to loiter in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing prostitution. This law was also found to be too vague because: a violation of this law was determined based on law enforcement officer's discretion; it violated substantive due process by punishing innocent activities; and impermissibly provided a greater penalty than that imposed by state statutes for similar criminal conduct. In the instant case involving Respondent Brake, the Court's first two rationales for rejecting the Tampa city code statute on loitering for purposes of prostitution are fully impacted herein.

As noted in Wyche, the First Amendment, and Article One Section Five of the Florida Constitution, protect the right of individuals to associate with whom they please, and to assemble with others for political or for social purposes. When law makers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed towards a legitimate public purpose, but they must be drawn as narrowly as possible. Statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct. The overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially "because it also threatens others not before the court - those who desire to engage in legally protected expression, but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid". See Wyche vs State supra, 619 So.2d at 234. Additionally, this Court found the Tampa ordinance to be unconstitutionally vague. See Wyche vs. State supra, 619 So.2d at 236; see also Kolender vs. Lawson, 461 U.S. 352 (U.S. 1983) (loitering statute held to be unconstitutionally vague by failing to clarify what was contemplated by the requirement that a suspect provide a "credible and reliable" identification); City of Houston vs. Hill, 482 U.S. 398 (1987) (ordinance making it unlawful to interrupt police officer in performing of duties). Finally in Wyche, this Court held that the Tampa ordinance also violated substantive due process since it may be used to punish entirely innocent activities. See Florida Constitution Article One, Section Nine; State vs. Saiez, 489 So.2d 1125, 1129 (Fla., 1986). In a recent unanimous decision, State vs. OC, 24 Florida Law Weekly (S) 425 (Supreme Court decided September 16, 1999), this Court declared unconstitutional the enhancement statute based on a defendant's membership in criminal street gangs since it was based on mere association and violated a defendant's substantive due process

rights under the Fourteenth Amendment to the United States Constitution and Article One Section Nine of the Florida Constitution.

In essence, the instant statute prohibits those like Respondent Brake, who has previously been convicted of a violation of Chapter 794 or Section 800.04 (or violation of similar law of another jurisdiction) from saying anything to a child under the age of twelve that might lure or entice or attempt to lure or entice that child into a structure, dwelling, or conveyance "for other than a lawful purpose". A prima facie case of "other than a lawful purpose" is made by introducing a lack of consent from the child's parent or legal guardian. In essence, this statute seeks to create a bubble around any First Amendment communication between a previously convicted sex offender and a child under twelve. It is noteworthy that violations of Chapter 794 also include adult sex offenders with adult victims, and those who have been convicted of Sexual Activity by Person in Familiar Custodial Authority, 794.011 (8), or former sec. 794.041. As to the latter, would there not be an affirmative defense to a convicted sex offender luring his own child or a child with whom he had a custodial relationship? Noteworthy, the statute does not apply to child pornographers, see Florida States sec. 827.071, child abusers sec. 827.03, nor commercial child pornographers, see Florida Statutes sec. 847.0145. This statute would apply to those convicted of sec. 794.05, both as presently written (individual engaging in sexual activity with a sixteen or seventeen year old when the defendant is above twenty-four years of age), or the prior version of 794.05 (any defendant over eighteen who engages in sexual activity with a sixteen or seventeen year old of prior chaste character). As to violations of 800.04, the 787.025 sweep would include those above eighteen who engaged in sexual activity with a child between the ages of thirteen and fifteen, and would preclude discussion with an individual under twelve

when such discussion could result in the enticement to enter a structure, conveyance or vessel (eg. "go home").

Additionally, the lack of a definition in sec. 787.025 for "other than a lawful purpose", leaves the determination of the standard of guilt to be supplied by the courts or juries which is an unconstitutional delegation of legislative power. See Cuda vs. State supra, 639 So.2d at 24; Locklin vs. Pridgeon supra, 130 So.2d at 103.

In Schmitt vs. State, 590 So.2d 404 (Fla., 1991), this Court held that the definition for purposes of the sexual performance statute to include acts or depiction involving actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or if female, breasts, was unconstitutionally overbroad and violated due process. As such, the provision prohibiting knowing possession of any depiction known to include sexual conduct by a child was overbroad to the extent it incorporated by reference the overbroad definitional element. In Schmitt, this Court salvaged that statute by severing the unconstitutional provision. In the instant statute, however, the overbroad provision, "other than a lawful purpose" cannot be salvaged without also deleting both proof of a prima facie case, and a statutory affirmative defense. To delete those sections, would basically rewrite the legislative act to create a blanket prohibition on communication with a child under twelve by certain previously convicted sex offenders that would lead to the child entering a dwelling, conveyance, or structure. It is submitted that such a severance of the unconstitutional portion might accord with the legislative intent of the statute, but would call into play far more serious concerns of overbreadth for purposes of association and speech.

In the absence of statutory definition or a commonly accepted "dictionary" meaning, this

Court has not hesitated to declare legislative enactments unconstitutionally vague. See egs. Brown vs. State 629 So.2d 841 (Fla., 1994) (sentencing enhancement for narcotics activity in proximity to "public housing facility"); B.H. vs. State, 645 So.2d 987 (Fla., 1994) (juvenile escape statute unconstitutional for vagueness where HRS designation of restrictiveness level for commitment facility unbridled); State vs. Mincey, 672 So.2d 524 (Fla., 1996) (negligent treatment of children statute, sec. 827.05, held unconstitutionally vague); State v. Mark Marks, P.A., 698 So.2d 533 (Fla., 1997) (insurance fraud statute, sec. 817.234 (1), unconstitutionally vague as applied to attorneys based on lack of adequate notice of when an omission will result in an "incomplete" claim under the statute).

Recent District Court of Appeals decisions which also held statutory enactments unconstitutionally vague include State vs. McCarthy, 615 So.2d 784 (Fla., 2nd DCA 1993) [sec. 559.809 (1) relating to business opportunity sellers and misrepresentation of prospects or changes for success of proposed or existing business opportunity overbroad in violation of first amendment]; and State vs. Fuchs, 24 FLW (D) 2310 (Fla., 5th DCA decided October 8, 1999)(statute prohibiting contributing to delinquency or dependency of a child held unconstitutionally vague where no reference to the laws of Florida "contained in statute"; "delinquent" "dependent child" and "child in need of services" were not defined in the statute), since definitions of the terms were not included in the statute, nor subject to a commonly accepted meaning.

In cases in which this Court has rejected arguments that a statute is unconstitutionally vague, dictionary meaning has been more than adequate to make clear the meaning of the statute, see eg. State vs. Mitro, 700 So. 2d 643 (Fla., 1997, (statute regulating issuance of identification

card by private vendors not unconstitutional for lack of definitions of "authenticated" or certified copy, and "not available"), or the statute itself provides adequate definition for the subject term, see Bouters vs. State, 659 So.2d 235 (Fla., 1995) ("harasses" defined by statute and sufficiently similar to assault statute to place individual on notice of proscribed conduct for purposes of Stalking).

District Court of Appeals decisions have consistently upheld statutory enactments in which the claim of vagueness attacked a phrase or conduct which in general terms can be comprehended by persons of common understanding. See e.g. Falco vs. State, 669 So.2d 353 (4th DCA 1996) ("custodial authority"); State vs. Bley, 652 So.2d 1159 (Fla., 2nd DCA 1995) ("physical injury" in child abuse statute not vague).

As noted previously, Respondent Brake also argued that at the trial court that the use of the phrase "other than a"lawful purpose" served to delegate from the legislature to the courts and juries the responsibility to flesh out the meaning of such an element. Compare BH vs. State supra, 645 So.2d 990-992 (delegation to HRS to define restrictiveness levels for juvenile escape statute), with Avatar Development Corporation vs. State, 723 So.2d 199 (Fla., 1998) (sec. 403.161 which penalizes the willful violation of any administrative rule, regulation, or permit condition for purposes of preventing and controlling pollution held to be constitutionally valid delegation of legislative authority to administrative agency since DEP utilizes expertise and special knowledge to flesh out the legislature's stated intent to prevent pollution by creating rules, regulations and permit conditions necessary to effectuate same). At the trial level, the State placed primary reliance on Hankin vs. State, 682 So.2d 602 (Fla., 2nd DCA 1996), which upheld the definition given to "illegal act" for purposes of sentencing aggravation since the "illegal act"

was modified with "by means of concealment, guile or fraud", and the Second District concluded that a person of common intelligence would understand what conduct was to be punished with the statutory enhancement for an illegal act committed by means of concealment, guile or fraud.

In the only two decisions from other jurisdictions that Respondent could find dealing with the constitutionality of the luring statute, the legislation was radically different from the instant case. In a decision not reported in the North East Second Report, State vs. Bertke, 1988 W.L. 83491 (Ohio App. 1st District 1988), the 1st District Court of Appeals for Hamilton County held Ohio's Luring statute constitutional. The Ohio statute prohibited any person from knowingly soliciting, coaxing, enticing or luring any child under fourteen years of age to enter into a vehicle if the defendant did not have the express or implied permission of the parent, guardian or other legal custodian of the child and the defendant was not a law enforcement officer, medic, fire fighter, or other individual providing emergency services. The Ohio statute provided that it was an affirmative defense if the actor undertook the activity in response to a bona fide emergency or did so in a reasonable belief that it was necessary to preserve the health, safety or welfare of the child. The Ohio statute dealt strictly with Luring into a vehicle, a misdemeanor of the first degree. In rejecting overbreadth, the Court of Appeals for the First District, Hamilton County, stated that overbreadth is confined to First Amendment cases, and since First Amendment concerns were not raised at the trial level, the trial court erred in applying the doctrine. The Court also found that the definitions of all other terms were either described by statute ("privileged", "vehicle" and "knowingly",) or accorded an ordinary meaning from a dictionary ("solicit", "coax", "entice" and "lure"). It is noteworthy that the Ohio statute made no statement of "other than a lawful purpose". In a more recent decision from Washington State, State vs.

Dana, 926 P.2d 344 (Court of Appeals Division One 1996), the Washington statute made it a Class C felony for a person to order, lure, or attempt to lure a minor or developmentally disabled person into a structure that is obscured from or inaccessible to the public, or into a motor vehicle, if such a person did not have the consent of the minor's parent or guardian and was unknown to the child or developmentally disabled person. It is a defense to Luring, which the defendant must prove by a preponderance of the evidence, that his actions were reasonable under the circumstances, and that he did not have any intent to harm the health, safety or welfare of the minor or developmentally disabled person. In rejecting atacks on vagueness and overbreadth, the Court of Appeal of Washington, Division One noted that the attacks on the instant statute were limited to definitions of lure or luring, and rejected same since it was synonymous with entice, a term which is readily understood through common usage. As to the overbreadth argument, the Washington court held that the luring statute, by limiting speech to minors, did not impermissibly burden constitutionally protected speech, and was not facially overbroad, since the "enticement accompanying the invitation, be it conduct or words for example, sufficiently narrows the scope of the statute in relation to its plainly legitimate sweep". In any event, even if this statute results in strangers failing to offer children rides home in the rain, avoiding getting wet being the inducement - the risk to children from contact with strangers outweighs any perceived harm". See State vs. Dana supra, 926 P.2d at 347-348. Again, it is noteworthy that neither of these statutes includes an element that the defendant's conduct is "for other than a lawful purpose" .

The Second District Court of Appeals decision in Respondent Brake's case also noted the burden shifting nature of the affirmative defense created by sec. 787.025 (3) (b). Section 787.025 provides for a prima facie case by showing that the luring or attempted luring or enticing

of a child under twelve into a structure, dwelling or conveyance is for other than a lawful purpose if said action is done without the consent of the child's parent or legal guardian. In the next subdivision, however, the defendant can prove as an affirmative defense, that despite the lack of consent of the parent, that his reason for doing so was "for a lawful purpose". Besides being circuitous as noted by the Second District Court of Appeals, this also creates a burden shifting, rebuttable presumption which is violative of the Fourteenth Amendment due process clause. As noted by this Court in State vs. Cohen, 568 So.2d 49 (Fla., 1990), an "affirmative defense" is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse for justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense is , "yes, I did it, but I had a good reason:". A permissive inference was upheld in Marcolini vs. State, 673 So.2d 3 (Fla., 1996) where a fact finder would have to find four predicate elements prior to concluding more likely than not the presumed fact which violates sec. 812.14 exists i.e. theft of electricity through an intercepting device. In State vs. Rolle, 560 So.2d 1154 (Fla., 1990), this Court held that the statutory instruction that a defendant had a blood alcohol level of .10 percent or more would be sufficient by itself to establish that defendant was impaired, did not create an unconstitutionally mandatory rebuttable presumption on the issue of impairment, and the phrase " shall be prima facie evidence" of impairment created only a impermissive inference on the issue of impairment. In the instant statutory scheme, the permissive inference is created by lack of parental consent, and yet it is then placed as an affirmative defense on the defendant that his conduct was "for a lawful purpose". Respondent submits that this is an unconstitutional burden-shifting, rebuttable

presumption, prohibited by the Fourteenth Amendment. See Frances vs. Franklin, 471 U.S. 307 (1985); Sandstrom vs. Montana, 442 U.S. 510 (1979); Ulster County Court vs. Allen, 442 U.S. 140 (1979).

In sum, Respondent Brake submits that his conviction is infirm based on the overbreadth of sec. 787.025, which overbreadth is violative of the Fourteenth Amendment Due Process clause, and Article One, Section Nine of the Florida Constitution. The statute as written is void for vagueness in violation of the United States Constitution Fourteenth Amendment and Florida Constitution Article One, Section Nine, since a person of reasonable intelligence would not be capable of understanding what conduct is proscribed by that statute. This statutory scheme also reflects an unconstitutional delegation of legislative authority to jurors and courts in violation of Florida Constitution Article Two, Section Three.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Court affirm the decision of the Second District Court of Appeals, which reversed Respondent's conviction under F.S. sec. 787.025, and dismissed the information against him.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to DIANA K. BOCK, Assistant Attorney General, 2002 Lois Avenue, Suite 700, Tampa, Florida 33607, this _____ day of April, 2000.

PETER S. BARANOWICZ, ESQUIRE