IN THE SUPREME COURT OF FLORIDA

KIMBERLY S. SULT,	)	
	)	
Petitioner,	)	
	)	**CASE NO.: SC03-542**
vs.	)	**Lower Tribunal No.: 2D01-5013**
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S REPLY BRIEF

John H. Trevena, Esq.
Fla. Bar No. 527653
801 West Bay Drive
Largo, Florida 33770
(727) 581-5813 Phone
(727) 581-7758 Fax
Attorney for Petitioner Kimberly S. Sult

CALCUTT & CALCUTT
Patrick B. Calcutt
Fla. Bar No. 869971
Kathleen M. Calcutt
Fla. Bar No. 909998
702 Bay Street NE
St. Petersburg, Florida 33701
(727) 898-4198 Phone
(727) 823-6353 Fax
Co-Counsel for Petitioner Kimberly S. Sult

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

iii

ARGUMENT

SECTION 843.085, FLORIDA STATUTES IS UNCONSTITUTIONALLY VAGUE, OVERBROAD AND A VIOLATION OF SUBSTANTIVE DUE PROCESS.

In arguing against Petitioner's overbreadth challenge to Section 843.085, Florida Statutes, the State compares this case to D.P. v. State, 705 So.2d 593 (Fla. 3d DCA 1997), rev. denied, 717 So.2d 530 (Fla.), cert. denied, 525 U.S. 1028 (1998), in which the Third District Court of Appeal upheld the constitutionality of a Dade County ordinance prohibiting, in part, a minor's unsupervised possession of spray paint cans and jumbo markers (Answer Brief at 15). The State's reliance on D.P. is misplaced, as D.P. did not address an overbreadth challenge to the ordinance. Presumably, such a challenge could not be made, as the possession of a spray paint can or jumbo marker can hardly be deemed a form of expression. Conversely, the display of indicia of authority involves expression. For instance, an individual who wears an "NYPD" T-shirt is not merely making a fashion statement, but is likely expressing support for the fallen officers of September 11,

2001. As the Second District Court of Appeal itself recognized, it is well-settled that a T-shirt bearing a message is a form of expression protected by the First Amendment. Sult v. State, 839 So.2d 798, 802 (Fla. 2d DCA 2003). Therefore, the State's argument that the statute implicates no fundamental right is contrary to settled law.[1]

The State goes on to argue that the statute is not overbroad because ". . . there is no realistic danger that this statute would compromise First Amendment protections." (Answer Brief at 15-16). Yet there is such a "realistic danger," as demonstrated in the above example of an individual wearing an NYPD T-shirt. The statute is not limited to Florida agencies, and thus, it would apply to an individual wearing a New York Police Department shirt, or any other article depicting any number of law enforcement agencies, foreign or domestic. Significantly, the statute

[1] Because the State is incorrect that the statute does not implicate the First Amendment, its argument that the statute must be examined only as applied also fails. See, e.g., Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987)(stating, "Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face '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.'")(citation omitted). The Second District Court of Appeal below correctly held that the statute should be examined on its face. Sult, 839 So.2d at 803-804.

is not limited to "authorized" or "official" articles. It applies to *any* article that a reasonable person could erroneously perceive as authorized.

In support of its argument against the substantive due process challenge, the State further relies upon D.P., supra. Again, its reliance is misplaced. In addressing a due process challenge to the ordinance at issue in D.P., the Court based its holding on several factors unique to the ordinance at issue. For instance, the Court noted that the statute did not involve an outright ban on the possession of spray paint cans or markers; rather the possession merely had to be supervised. Furthermore, the Court distinguished the due process line of cases relied upon in the instant case by noting that the D.P. ordinance criminalized the purchase as well as possession of the items. The same distinction cannot be made here: Section 843.085 does not prohibit the purchase of the items. In fact many of the items potentially subject to the statute are lawfully available in the marketplace. The State claims this fact is of little or no import because the State established in the instant case that the "official uniform materials were to be purchased upon the showing of proper identification." (Answer Brief at 33). However, the statute is not limited to "official uniform materials," and even the purchase of official items without showing identification is lawful.

Another crucial distinction between D.P. and this case is that, as the D.P. Court noted, the Dade County ordinance implicated no fundamental right. Again, the same cannot be said of the statute at issue here. It is also significant that the ordinance in D.P. prohibited the *sale* of the undesirable items, at least to minors. There is no Florida statute prohibiting the sale of the items subject to Section 843.085. Additionally, in contrast to the instant statute, the D.P. ordinance had a specific intent element with respect to all individuals: it prohibited any individual's possession of spray paint or jumbo markers *with the intent* to make graffiti. Finally, the D.P. ordinance was a minimally restrictive ordinance in that it only applied to minors, and even then, it only applied to a minor's unsupervised possession. Conversely, Section 843.085 applies to any individual, irrespective of intent, and covers a broad spectrum of potential activity. Because such fundamental differences exist between the Dade County anti-graffiti ordinance and the statute at issue here, D.P. cannot logically be compared to this case.

The State also relies upon Arizona v. McLamb, 932 P.2d 266 (Ariz. Ct. App. 1996), where the Arizona Court of Appeals rejected a constitutional attack on a city ordinance making it unlawful to wear without authorization a badge or insignia of any public officer. Interestingly, McLamb does not support the State's argument,

but rather, supports Petitioner's vagueness challenge to the instant statute. In rejecting the vagueness challenge to the Arizona statute, the Court reasoned, in part, that:

> The ordinance sufficiently defines the behavior prohibited: wearing the insignia of any city officer when not properly authorized to wear such insignia. *The code section does not apply to a replica, facsimile or other likeness of an insignia. Thus, interpretation of the ordinance is not dependent on the judgment of police officers.* To the contrary, the ordinance "gives fair and objective guidelines to both potential offenders and law enforcement personnel" exactly what behavior is prohibited.

Id. at 271 (emphasis added)(citation omitted). Unlike Section 843.085, the Arizona ordinance applied only to official insignia. In contrast, Florida's statute applies to a "replica, facsimile, or other likeness of an insignia,"[2] and as such, it improperly leaves the interpretation of the statute to the judgment of police officers. As the State recognizes, one purpose of the void-for-vagueness doctrine is to ". . . curb the discretion afforded to law enforcement officers and administrative officials in initiating criminal prosecutions." (Answer Brief at 22)(citations omitted).

The State also argues that the Legislature has an interest in ensuring that law enforcement officers are easily identified, and that the statute as written furthers this

[2] Section 843.085 applies to "authorized indicia of authority" or "*any colorable imitation thereof*." (emphasis added).

interest. However, the statute does not require that a reasonable person mistakenly believe the individual is a law enforcement officer. It merely requires that a reasonable person could interpret the item as *authorized* by law enforcement for use by the person wearing or displaying the item. For example, an individual who, without authorization, simply wears a hat bearing the words, "New York Police" is in violation of the statute: a reasonable person could believe that the New York Police Department authorized the individual to wear the hat. The statute does not require that the "reasonable person" erroneously believe the individual is actually a New York Police Officer.

CONCLUSION

For the above-stated reasons, as well as the reasons set out in Petitioner's Initial Brief, Petitioner requests this Court to quash the decision of the Second District Court of Appeal upholding the constitutionality of the statute, and to remand with directions to reverse Petitioner's conviction and sentence and to discharge the her. Alternatively, Petitioner requests this Court to reverse the decision of the Second District Court of Appeal, and to remand with directions to apply strict scrutiny to the challenged statute.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true original and seven copies of the foregoing have been furnished to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 by United States Mail delivery this _____ day of June, 2003.

Copies Also Furnished To:
Honorable Bernie McCabe
John M. Klawikofsky, Esq.
Honorable James Birkhold, Clerk of the Second DCA

CERTIFICATE REGARDING FONT

The undersigned further certifies that the font used herein is Times New Roman 14-point, in accordance with Rule 9.210(a)(2), Florida Rules of Appellate

Procedure.

Respectfully submitted,

_____

John H. Trevena, Esq.
Fla. Bar No. 527653
801 West Bay Drive
Largo, Florida 33770
(727) 581-5813 Phone
(727) 581-7758 Fax
Attorney for Petitioner Kimberly S. Sult

_____

CALCUTT & CALCUTT
Patrick B. Calcutt
Fla. Bar No. 869971
Kathleen M. Calcutt
Fla. Bar No. 909998
702 Bay Street NE
St. Petersburg, Florida 33701
(727) 898-4198 Phone
(727) 823-6353 Fax
Co-Counsel for Petitioner Kimberly S. Sult