IN THE SUPREME COURT OF FLORIDA

FILED

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ROGER BENNETT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent

Case. No. 74,612

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF THE RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID R. GEMMER
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

OF COUNSEL FOR THE STATE

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SUMMARY OF THE ARGUMENT

Every issue raised by appellant has already been decided adversely in State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989), pending on certified question, No. 73,826 (Fla., oral argument held Sept. 7, 1989). The state adopts the state's arguments in Burch, and offers additional argument where appropriate.

ARGUMENT

Appellant's argument is a rehash of the argument rejected by the fourth district in State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989), pending on certified question, No. 73,826 (Fla., oral argument held Sept. 7, 1989). The state adopts the briefs of the state filed in this court in Burch.

As to the specific issues raised in appellant's initial brief, the state offers the following additional argument.

I. SINGLE SUBJECT RULE

The state adopts the brief filed in the single subject rule case from the second district, now pending before this Court. Blankenship v. State, No. 74,176 (Fla., pending decision without oral argument as of Oct. 30, 1989). A copy of the brief is attached.

II. POLICE POWER

Appellant's logic is flawed. Appellant argues that the statute, by encouraging sting operations near schools, will act to lure drug buyers to within 1,000 feet of school property, thwarting the goal of a "drug-free zone" around schools. However, buyers, knowing that police are running sting operations in school zones, will actually move away from school areas. "Legitimate" drug sellers, fearing the increased penalties for doing business near schools, will move elsewhere, so that drug buyers will know that only police sting operations, or very stupid sellers, will be operating close to schools.

Appellant's complaint that the crime can be committed even during nonschool hours overlooks the obvious, i.e. that school children can and do congregate on and around school property before and after school. Appellant acknowledges that his arguments were already rejected by the Burch court.

Appellant's argues that the prison terms imposed under the statute will have significant fiscal impact, contrary to the legislative fiscal impact analysis and, thus, questioning legislative intent. However, appellant argues that everyone convicted under section 893.13(1)(e) will serve a minimum of 3 1/2 years in prison. This is simply incorrect. Under the present guidelines, the permitted range for first-time conviction of a first degree drug felony is 2 1/2 - 5 1/2 years. But not all offenses under section 893.13(1)(e) are first degree felonies. The statute makes manufacture, sale, or purchase of hard drugs such as heroin a first degree felony, with hallucinogenic and other recreational drugs subject to second degree penalties. First-time second degree drug purchasers will be subject to any nonstate prison sanction. The law thus makes a proper distinction between recreational drug users and hard-core drug abusers.

~~III.~~ D~~UE~~ PROCESS ENTRAPMENT

There is simply no relationship between the reverse sting in this case and the unconstitutional fee arrangement with a confidential informant in State v. Glossen, 462 So.2d 1982 (Fla. 1985). Appellant's reliance on Glossen attempts to circumvent the Burch court's rejection of the entrapment argument based on

Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985). Cruz protects against entrapment; Glossen protects against perjury by an informant paid contingent on his testimony at trial. Cruz involves the supervisory power of the court; Glossen involves due process. There is neither a Cruz nor a Glossen problem with this case, or with the statute.

The state finds it particularly egregious that appellant appears to consider Cruz to be synonymous with Glossen. Glossen is not even cited in Burch, yet appellant's argument is that the Burch court failed to consider the Glossen rationale in light of the purported distinction between buyer and seller. The state assumes the confusion is the result of mistake rather than a deliberate attempt to confuse this court.

Appellant argues that purchasers are different from sellers, and, therefore, should be treated differently, because sellers choose where they sell their wares, while purchasers must go where the sellers are. However, as noted in appellant's statement of the facts, Appellant's Initial Brief at 3, "other areas on 27th Street, 36th Street, and 38th Street also had drug activity." In this case, and in any other drug case, the buyer is as free as the seller to choose a site other than within 1,000 feet of school property to transact his drug business.

IV. VAGUENESS

Appellant neglects to mention that the Burch court easily disposed of this argument. The Burch court found no problem with construing the statute to prohibit the proscribed activity within 1,000 feet of the school property's nearest boundary line. The

defendant in Burch had apparently argued that the distance to the property should be measured by some circuitous pedestrian route. Where a line must be drawn in a vagueness challenge, the courts have no problem marking it. See, e.g., Citg of Dastona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985) (ordinance prohibiting exposure of a woman's breasts "below the top of the areola" construed to mean "directly or laterally below the top of the areola" to settle vagueness challenge).

V. Intent

Appellant's concern that drug buyers be treated differently than sellers or manufacturers is touching. If drug buyers should be held to a lesser standard of culpability than drug sellers and manufacturers, then surely the drug sellers can argue they should be held to a lesser standard of culpability than the manufacturers. Why, most street drug sellers are but drug addicts themselves, selling drugs to raise enough money to support their own habits. Are they not just as much victims of the drug manufacturers as the purchasers? Carrying the argument further, perhaps drug manufacturers should be the least culpable of all. The manufacturers aren't actually selling in the forbidden zone, and, therefore, offer no threat of addicting schoolchildren to drugs. In addition, drug addicts, either purchasers or sellers, tend to be unstable, while manufacturers, with the wherewithal to operate a manufacturing operation, offer less of a threat to the children vis-a-vis crimes of violence or sex offenses.

Appellant attempts to distinguish the federal cases relied

upon by the Burch opinion on the basis that the Florida statute includes purchasers. Yet appellant fails to suggest any reason, other than the specious "lesser culpability" argument, why this is a distinction that makes any difference.

Finally, appellant cites to Medlock v. State, 537 So.2d 1030 (Fla. 2d DCA 1989), for the proposition that failure to introduce evidence of Bennett's knowledge required entry of a judgment of acquittal. Medlock does not stand for that proposition. Medlock merely held that where the state failed to properly introduce bank statements to prove unauthorized withdrawals from an automatic teller, and that was the only evidence of theft, then the defendant should have been granted a judgment of acquittal and discharged.

VI. CRUEL AND UNUSUAL PUNISHMENT

The purchaser of hard drugs deserves top be treated the same as a person committing armed robbery or setting fire to an occupied structure. Appellant's argument overlooks the two-tiered punishment scheme, with only hard-drug buyers being subjected to the more severe penalties. A buyer of marijuana, on first conviction, would be subjected to any nonstate prison sanction, the same penalty he faced before.

Appellant again neglects to mention that Burch disposes of this argument, to the point of making the dispositive distinction between Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and the instant case, which is consistent with Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

CONCLUSION

This Court should approve the decision below.

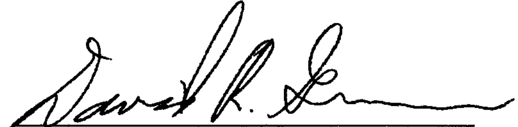
Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID R. GEMMER
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670
Florida Bar # 370541

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Andrea Steffen, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this date, October 30, 1989.



OF COUNSEL FOR THE STATE