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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

OLIVER HOLLIDAY
Petitioner,
v.
STATE OF FLORIDA,
Respondent,

Case No. 78,170

AN APPEAL FROM A CERTIFIED QUESTION FROM THE SECOND
DISTRICT COURT OF APPEAL, LAKE LAND, FLORIDA

INITIAL BRIEF OF PETITIONER

JUDGE E. LUCKEY
PUBLIC DEFENDER

GARY O. WELCH ✓
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.PRELIMINARY STATEMENT

Oliver Holiday will be referred to as the Respondent and the Petitioner will be referred to as the State of Florida. The record on appeal consists of 1 volume and will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by information with one count of loitering while manifesting the **purpose** of illegally using a controlled substance. (R 5-6) Subsequently, the Petitioner moved to have the prosecution dismissed on various grounds. (R 7-8) On September 24, 1990 the Petitioner plead no contest to the manifesting charge while reserving his right to appeal **the** facial validity of the ordinance. (R 40 -44) The lower Court determined that the issue of facial validity of the ordinance was a dispositive issue , accepted the Petitioner's **plea**, and sentenced the Petitioner to 60 days in County Jail. (R 45-46) A timely **Notice of Appeal** was filed on September 28, 1990. (R 31) On March 11, 1991 the Thirteenth Judicial Circuit entered a per curiam affirmance in the cause. The Petitioner sought a Writ of Certiorari from the Second District Court of Appeal. On May 24, 1991 the Second District certified the issue as being a question of great public importance. **I**t is from this posture that the instant case presents itself for review.

SUMMARY OF ARGUMENT

Chapter 24, Article 11, Section 24-43, City of Tampa Code:

1) impinges upon basic First Amendment Rights of Association;
2) is without sufficient specificity *so* as to provide a citizen of ordinary intelligence as to what acts **violate** the ordinance (*vis a vis* the exercise of fundamental rights); 3) allows unbridled enforcements to whim of law enforcement; and
4) **violates** the Fourth Amendment of the United States Constitution by authorizing arrests and convictions when there is insufficient evidence to warrant **an investigative stop.**

ARGUMENT

**WHETHER CHAPTER 24, ARTICLE 11, SECTION 24-43, CITY OF TAMPA
CODE, IS FACIALLY UNCONSTITUTIONAL?**

Chapter 24, Article 11, Section **24-43**, City of Tampa
Code, **is** provides:

- (a) It shall be unlawful for any person to loiter in a public place in a manner and under circumstances manifesting the purpose of illegally using, possessing, transferring or selling any controlled substance as that term is defined in Section 893.02 Florida Statutes (1988), as now enacted or hereafter amended or transferred. Among the circumstances which may be considered in determining whether such a purpose is manifested are:
- (1) The person is a known illegal user, possessor or seller of controlled substances, or the person is at a location frequented by persons who illegally use, possess, transfer or sell controlled substances; and
 - (2) The person repeatedly beckons to, stops, attempts to stop or engage in conversations with passers-by, whether such passers-by are on foot or in a motor vehicle, for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer, or buy any controlled substances; or
 - (3) the person repeatedly **passes** to or receives from passers-by, whether such passers-by are on foot or in a motor vehicle, money, objects or written material for the purpose of inducing, enticing, soliciting or procuring another to illegally **possess**, transfer or buy any controlled **substance**.
- (b) In Order for there to **be** a violation of subsection (a), the person's affirmative language or conduct must be such as to demonstrate by its express or **implied** content or appearance a specific intent to induce, entice, solicit or procure another to illegally possess, transfer or buy a controlled substance.

- (c) No arrest shall be **made** for a violation of subsection (a) unless the arresting officer first affords the person an opportunity to explain his conduct, and no one shall be convicted of violating subsection (a) **if it** appears that the explanation given was true and disclosed a lawful purpose.
- (d) For the purpose of this section, a known illegal user, **possessor** or seller of controlled substances is a **person** who, within one (1) year previous to the date of arrest for violation of this section, has within the knowledge of the arresting officer been convicted of illegally manufacturing, using, possessing, selling, purchasing or delivering any **controlled** substance.

The Petitioner submits that the instant ordinance fails to provide a citizen of ordinary intelligence **as** to what acts violate the ordinance with sufficient particularity so as to allow a **law** abiding citizen to conform his conduct and **escape** the grasp of this ordinance. The ordinance, in part, provides that an element of the offense is to **loiter**. There is no definition provided which would limit this element to those definitions of criminal loitering **as** provided in §856.021, Florida Statutes (1989). At first blush it **seems** as though this **is** a spacious argument in light of the fact that reviewing courts are to apply the restrictive construction doctrine to cure any defect and that can **be** done in the instant case by applying the qualitative factors as found in §856.021 (1), Florida Statutes. However, the application of the restrictive construction **doctrine is** not **to be** applied **so** as to defeat legislative (in this case the city commission's) intent. In **the** instant ordinance there

is a specific reference to Chapter 893. In doing so, the city commission has shown that it has considered definition by reference to the laws of Florida as codified; **y**et there is a complete absence or **r**eference to the loitering statute or any language which would limit the application of the ordinance to a time or manner which would be unusual for law-abiding individuals. **A**s such, it **i**s clear that from both the exclusion of statutory reference and the plain language of the instant ordinance that it was not the city commission's intent to have this ordinance limited to a time or manner which would **b**e unusual for law-abiding individuals. Since the restrictive construction doctrine can not be applied (since to do **s**o would frustrate intent), **t**he facially unmitigated breadth of the term loitering as provided in the instant ordinance does not provide a citizen of ordinary intelligence with notice **a**s to what acts violate the ordinance, *vis a vis*, the normal societal activities that are inherent in the American scheme of life. Accordingly, the instant ordinance is unconstitutional on due process grounds due to the vagueness *of* the loitering element *of the* offenses which leaves law enforcement with unrestrained discretion in applying the ordinance. Kolender v. Lawson, **461 US 352 (1983)**.

The Petitioner also submits that the instant ordinance fails to provided sufficient limitations on the application of the ordinance. There is a complete absence of language in

the ordinance which would minimize the intrusiveness of the ordinance on fundamental First Amendment activities.

The particular deficiencies which are inherent in this ordinance are only revealed after close scrutiny and elimination of redundant language. To this point, the defendant provides the following analysis.

The instant ordinance provides, in part, that a defendant must have the purpose to illegally use, possess, transfer or sell any controlled substance. Chapter 24, Article 11, Section 24-43 (a), City of Tampa Code. Thereafter this same section of the ordinance provides three (3) enumerated paragraphs as a means by which this ordinance may prove such a purpose. These three paragraphs are written so that the illegal purpose element may be proven by a factual showing of either paragraphs 1&2 or paragraphs 1&3. Both paragraphs 2 and 3 provide, in part, that there be a showing of a purpose to entice, solicit or procure another to illegally **possess**, transfer or buy a controlled substance. As such, the ordinance provides that purpose may be proven by proving purpose. Such redundant language provides no direction and reveals the bare bones of the ordinance when such language is set aside. When this is done, Section 24-43(a)(2) and Section 24-43 (a)(3), City of Tampa Code, provides **that** stopping and conversing with people and/or passing materials or **objects** to people can be sufficient to manifest illegal **purpose**. These activities are at the heart

of the right of speech and association. Nothing materially limits the discretion of law enforcement in the application of this ordinance. Since (1) the breadth of coverage includes Constitutionally protected areas and (2) there are no restrictions which would minimized the intrusion upon fundamental rights; the instant ordinance is unconstitutional on overbreadth grounds. Papachristou v. City of Jacksonville, 405 U.S. 156 at 170 (1972).

The Fourth and Fourteenth Amendment require police to have probable cause to make an arrest. The Petitioner submits that the instant ordinance violates the Fourth and Fourteenth Amendments since **it** permits arrest, prosecution and conviction for mere suspicion of illegal activity when the exact same acts would be clearly insufficient for any conviction (beyond a reasonable doubt) of a substantive drug related offense, would be insufficient to manifest probable cause of a substantive drug related offense and (in many cases) be insufficient for a Terry (founded suspicion) stop. As such, the instant offense clearly emasculates the substantive rights provided in the United States Constitution since **it** allows facts which amount to a mere suspicion of a Chapter 893, Florida Statutes, violation to be a substantive offense. This is exactly the fact pattern feared by Chief Justice Hewart in Frederock Dean, 18 Crim App 133 (1924), which was cited as authority cited by the United States

Supreme Court in Papachristou v. City of Jacksonville,

supra:

It would be in the highest degree unfortunate if in any part of the country **those** who **are** responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act

Papachristou v. City of Jacksonville, 405 U.S.
156 at 170 (1972), citing Frederock Dean, 18
Crim App 133 at 134 (1924),

CONCLUSION

Based on the foregoing argument and authority the Petitioner respectfully submits that the Tampa ordinance is unconstitutional. As such, the Petitioner **prays** that this Honorable Court find Chapter 24, Article 11, Section 24-43, City of **Tampa** Code, to be violative of the United **State** and Florida Constitutions and vacate the judgment and sentence of the lower Court.

RESPECTFULLY SUBMITTED

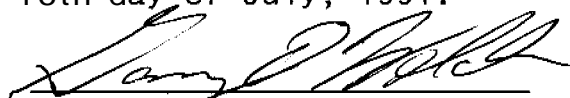
JUDGE C. LUCKEY, JR.
PUBLIC DEFENDER
13TH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, 2002 North Lois Ave., Suite 700, Tampa, Florida 33607, by hand delivery, this 16th day of July, 1991.



GARY O. WELCH
Assistant Public Defender

IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

OLIVER HOLLIDAY

Petitioner,

v.

STATE OF FLORIDA,

Respondent,

Case No. 78,170

AN APPEAL FROM A CERTIFIED QUESTION FROM THE SECOND
DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

APPENDIX

OPINION OF THE SECOND DISTRICT COURT OF APPEAL

MAY 2 1991

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED,

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

OLIVER HOLLIDAY,)
)
 Petitioner,)
)
 v.)
)
 CITY OF TAMPA,)
)
 Respondent.)
 _____)

Case No. 91-01215

Opinion filed May 24, 1991.

Petition for Writ of Certiorari
to the Circuit Court for
Hillsborough County;
Richard A. Lazzara, Judge.

Judge C. Luckey, Jr., Public
Defender, and Gary O. Welch,
Assistant Public Defender,
Tampa, for Petitioner.

PER CURIAM.

Petitioner seeks certiorari review of the circuit
court's order affirming his conviction of loitering for the
purpose of selling drugs. § 24-43, City of Tampa Code (1989).

Petitioner challenges only the facial constitutionality of the city ordinance.

In Wyche v. State, 573 So.2d 953 (Fla. 2d DCA 1991), this court upheld the facial constitutionality of the Tampa ordinance prohibiting loitering for the purpose of prostitution. We find that the only difference between the two ordinances is the underlying criminal activity. Thus, the petition for certiorari is denied.

In order to give the supreme court discretion to review this decision, we certify the following question of great public importance to the Supreme Court of Florida:

IS SECTION 24-43, CITY OF TAMPA CODE (1989),
FACIALLY CONSTITUTIONAL?

FRANK, A.C.J., and PATTERSON and ALTENBERND, JJ., Concur.