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

CASE NO. 98-997

THERESA SIENIARECKI,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

****
ON APPEAL FROM THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)
****

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

ETTIE FEISTMANN
Assistant Attorney General
Florida Bar No. 892830
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (561) 688-7759

Counsel for Appellee

F:\USERS\APPEALS\ETTIE\9815768.AB1

CASE NO. 98-997

Theresa Sieniarecki v. State Of Florida

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, appellee herein, certifies that the following additional persons or entities have or may have an interest in the outcome of this case.

Ettie Feistmann, Assistant Attorney General
(Appellate counsel for the State of Florida, Appellee)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

In this brief, the following symbols will be used:

"R" = Record on appeal;

"T" = Transcript of the trial.

All emphasis in this brief is supplied by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts for purposes of this appeal subject to the additions and clarifications set forth and in the argument portion of this brief which are necessary to resolve the legal issue presented upon appeal.

Appellant was charged by information with one count of aggravated manslaughter of a disabled adult (R 4). Appellant was tried by a jury and was found guilty of neglect of the disabled person, a lesser included offense (R 48).

The record shows that appellant and her family lived in a dilapidated house, from which the family had to move out. Prior to moving out of the house, appellant's father died and the mother had to undergo two hip surgeries, after which she could not walk on her own (T 213). Because appellant did not work, appellant and her brothers reached an agreement that appellant would care for the mother (T 156-157). Each family member moved to a different location. Appellant's three younger brothers moved out of the house to live with friends, and appellant moved into an apartment with her mother (T 156-157). The brothers took care of the financial needs of appellant and their mother while appellant was to take care of her mother in her apartment.

Appellant's mother, the victim, was a sick and frail woman. The victim became sicker and weaker after her surgeries. She was

not eating well, and her weight dropped to 68 pounds while her height was 5'3" (T 249). The victim was seen mumbling to herself in an understandable manner, and often asked about her husband, long after he was dead (T 188, 189).

The victim, who could not walk on her own, was carried up the stairs to the apartment, was placed in her bedroom, and was never seen outside (T 153, 190, 191, 238, 481). The apartment did not have electricity, and thus obviously no air conditioner or a refrigerator (T 153). Appellant stored her food in an ice box (T 156).

Appellant's mother was bedridden and depended on her daughter for everything (T 470). Appellant knew that she was the only one to take care of her mother. Appellant knew that she was to take care of changing the mother's diapers, cleaning her, dressing her, providing her food and drinks, calling for medical assistance, and just about every other need (T 463, 470). The mother could not do anything for herself. Except for occasional visits, none of the three brothers helped in the daily care of the mother (T 158, 220, 225, 470).

Appellant testified that she was never concerned about her mother not eating (T 479). Appellant did not notice that her mother's eyes were sunken in and that she had sores, and appellant did not call a doctor when her mother was sick (T 478-479). Although appellant knew that her mother was bedridden, and depended

on her, appellant did not go to see her before her death for twelve hours.

Some of the witnesses testified that they heard the victim state that she did not like doctors ever since her hip surgeries, but no one heard the victim mention that she wanted to die (T 160).

The physician, who performed the autopsy, gave a detailed testimony of the mother's serious health problems. The doctor testified that the mother was found dead laying on a soiled mattress covered with human feces all over (T 238). The mother's skin was peeled off, her eyes were sunken in, and she had no teeth in her mouth (T 244-246). The mother suffered from acute abnormality to her bladder and vagina, caused by a severe infection (T 259-260, 290-291, 294, 319). Doctor Price opined that the bladder infection probably caused the mother's death, and that the poor hygiene was a factor in causing the infection (T 265-266). The victim's poor muscle mass was caused due to malnutrition, and she suffered from dehydration (T 169-271). The doctor went into detailed testimony about her skin slippage, her hemorrhages and her diaper rash and other skin sores due to pressure.

SUMMARY OF THE ARGUMENT

Section 825.102(3), Florida Statutes (1997) is constitutionally valid on its face and as applied. A person with common intelligence could understand his legal duty as proscribed by the statute. The legislature's failure to define a statutory

term does not in and of itself render the statute unconstitutionally vague, when the statute is written in a language which is understood by today's society.

ARGUMENT

POINT I

APPELLANT'S CONVICTION SHOULD BE AFFIRMED BECAUSE SECTION 825.102(3), FLORIDA STATUTES, IS CONSTITUTIONALLY VALID AS APPLIED TO APPELLANT WHO WAS THE CAREGIVER OF THE VICTIM.

Appellant attacks the constitutionality of section 825.102(3), Florida Statutes (1997). Appellant's main contention is that the statute is vague for failing to define some of its terms, and for failing to give her notice. The state disagrees.

In response to the defendant's allegation that a Florida statute was vague for failing to define a word in the statute, this court said the following, in McCann v. State, 23 Fla. L. Weekly D1293 (Fla. 4th DCA May 27, 1998):

> Defendant thus argues that since the term "procure" is not defined he had no way of knowing which of the several definitions of "procure" the legislature was prohibiting. Our supreme court recently reiterated that "if reasonably possible and consistent with constitutional rights, [courts] should interpret statutes in such a manner as to uphold their constitutionality." State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997) (not cited). "A statute will withstand constitutional scrutiny under a void-for-vagueness challenge if it is specific enough to give persons of common intelligence and understanding adequate warning of the

> proscribed conduct." Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982); see Mitro, 700 So. 2d 643; State v. Conforti, 688 So. 2d 350 (Fla. 4th DCA 1997), review denied, 697 So. 2d 509 (Fla. 1997). A statute must be written in language which is relevant to today's society. See Warren v. State, 572 So. 2d 1376 (Fla. 1991). However, a statue need not be "a paradigm of legislative drafting" to be valid. See Jennings v. State, 667 So. 2d 442 (Fla. 1st DCA), approved, 682 So. 2d 144 (Fla. 1996). The legislature's failure to define a statutory term does not in and of itself render the statute unconstitutionally vague. See Mitro at 645. It is not the role of the courts to imagine odd scenarios that might test limits of a statute, but rather, courts should read the language of the statute from the perspective of a "normal reader." See Johnson v. State, 701 So. 2d 367 (Fla. 2d DCA 1997). Undefined words are construed in their plain and ordinary sense. See Mitro. Courts may refer to a dictionary to ascertain the plain meaning intended by the term. See L.B. v. State, 700 So. 2d 370 (Fla. 1997).

The legislature has the power to prohibit any act, determine the class of an offense, and prescribe the punishment. State v. Bailey, 360 So. 2d 772 (Fla. 1978). "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975).

To argue vagueness, appellant must establish that the statute is "so vague and lacking in ascertainable standards of guilt that, as applied [to her] it failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." State v. Barnes, 686 So. 2d 633, 636 (Fla. 2d DCA

1996)(citing Palmer v. City of Euclid, Ohio, 402 U.S. 544 (1971) (quoting United States v. Harriss, 347 U.S. 612 (1954))). See also United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) ("Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that *his* contemplated conduct is proscribed.") (emphasis added); State v. Hamilton, 388 So. 2d 561, 562 (Fla. 1980) (defendant whose conduct clearly falls within statutory prohibition may not complain of the absence of notice). Thus, a defendant who only establishes that the statute "might operate unconstitutionally under some conceivable set of circumstances" fails to demonstrate that the statute is wholly invalid. Barnes.

In evaluating a vagueness claim in which First Amendment rights are not at issue, "[a] court should [first] examine the complainant's conduct before analyzing other hypothetical applications of the law." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982). "There are areas of human conduct where by the nature of the problems presented, legislatures simply cannot establish standards with great precision." State v. Manfredonia, 20 Fla. L. Weekly S58 (Fla. February 9, 1995)(Citing Smith v. Goguen, 415 U.S. 566 (1974)).

Additionally, the fact that the legislature could have chosen clearer language to achieve the desired statutory goal does not render the actually drafted statute unconstitutionally vague.

United States v. Powell, 423 U.S. 87 (1975). A defendant must establish that the statute is facially unconstitutional in that there exists no set of circumstances in which the statute can be constitutionally applied. United States v. Salerno, 481 U.S. 739, 745 (1987).

When a term is not defined in the statute, it should be given its plain and ordinary meaning. State v. J.H.B., 415 So. 2d 814 (Fla. 1st DCA 1982). See also State v. Efthimiadis, 690 So. 2d 1320 (Fla. 4th DCA 1997); State v. Sailer, 645 So. 2d 1114, 1116 (Fla. 3d DCA 1994)(a court of appeal must reject a statutory vagueness challenge if the statute is susceptible of interpretation through ordinary logic and common understanding; nothing is required beyond resort to the common usage of the challenged terminology); State v. Williams, 584 So. 2d 1119 (Fla. 5th DCA 1991)(court should avoid holding a statute unconstitutional if a fair construction of the legislation will allow it); Priest v. Clark, 447 So. 2d 338 (Fla. 4th DCA 1984)(statutory language should be accorded its common everyday meaning).

Legislative intent is the polestar by which the court must be guided in construing enactments of the legislature. Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997). Here, the legislature intended to criminalize and punish the behavior that amounts to neglect of the disabled adult. The legislature

carefully defined many terms in the statute, and drafted the statute by using and comparing it to the child abuse statute. See The House Staff Analysis Report, Fla. H.R. Comm. on Crim. Just., CS/HB 189 (1996).[1]

Appellant was convicted and adjudicated guilty of neglect of a disabled person, in violation of § 825.102(3), Florida Statutes (1997) (R 46, 48). Section 825.102(3), Florida Statutes (1997), provides the following:

> (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

---

[1] The legislature created chapter 825, Florida Statute, defining and providing criminal penalties for the neglect of disabled adults. The legislature included definitions in § 825.101, Fla. Stat. (1997). House Bill 79, 1995, was created to provide criminal penalties for the neglect of the disabled adult. The new statute replaced the previous repealed statute as a result of the court's decision in Cuda v. State, 639 So. 2d 22, 25 (Fla. 1994). The new statute patterned after the one in Illinois which the Florida supreme court used for guidance.

This statute remained unchanged until 1996, when the legislature substantially revised it with an effective date of October 1, 1996. See Ch. 96-322, § 2, Laws of Fla. (codified at § 825.102, Fla.Stat. (Supp. 1996)), Senate Bill 116.

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 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.

Section 825.101(2), Florida Statutes (1997) defines caregiver

"Caregiver" means a person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person or disabled adult. "Caregiver" includes, but is not limited to, relatives, court-appointed or voluntary guardians, adult household members, neighbors, health care providers, and employees and volunteers of facilities as defined in subsection (7).

Section 825.102(3), Florida Statutes, punishes conduct which could include passive forms of abuse, such as neglect. Appellant was charged with unlawfully causing the death of Patricia Sieniarecki, a disabled adult, by culpable negligence and without lawful justification, while appellant was in the position of a

caregiver (R 4). Appellant was accused of failing to or omitting to provide her mother with the care, supervision, or services necessary to maintain her mother's physical health or well being, including supervision and medical service (R 4). The neglect that created the criminal liability was, then, appellant's failure to act, the failure to provide her mother with nutrition and medical care.

Thus, because appellant was caught violating the specific conduct for which the statute was designed to prohibit, she has no standing to question the vagueness as applied to the hypothetically innocent conduct of others. Bryant v. State, 23 Fla. L. Weekly D1429 (Fla. 2d DCA June 12, 1998)(citing Village of Hoffman Estates, 455 U.S. 489, 494-95 (1982) and State v. Baal, 680 So. 2d 608, 610 (Fla. 2d DCA 1996)); People v. McKelvey, 230 Cal. App. 3d 399 (Cal. 2d Ct. App. 1991).

Section 825.102(3), Florida Statutes (1997), sets forth what behavior constitutes neglect of a disabled adult: failure or omission to provide a disabled adult with the care, supervision, and services necessary to maintain the disabled's physical and mental health, including, food, nutrition, clothing, shelter, medicine, and medical services that prudent person would consider essential for the well-being of the disabled. Conduct which results in a serious injury or substantial risk of death could constitute neglect. Section 825.102(3) also sets forth the

punishment for such a conduct: a person who wilfully or by culpable negligence neglects a disabled adult commits a felony of the third degree. Section 782.07(2) Florida Statutes (1997) sets forth: a person who causes a disabled adult by culpable negligence commits aggravated manslaughter of a disabled adult. Thus, on its face, the statute is constitutional. Appellee contends that as applied the statute is also constitutional.

Appellant's Duty to Act

Appellant's failure to act constitutes a breach of a legal duty. There are four situations that would give rise to a legal duty to act: First, where a statute imposes a duty to care for another. Second, where one stands in a certain status relationship to another. Third, where one has assumed a contractual duty to care for another. And fourth where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. See (Rest. 2d Torts, §§ 316-319, pp. 123-130); Jones v. U.S., 308 F. 2d 307, 308 (C.A.C. 1962); LaFave & Scott, Criminal Law, § 3.3 (2d ed. 1986); Wharton's, Criminal Law, § 173 (15th ed. 1994). Although generally there is no duty to act or to rescue a stranger in peril, for example, once a person undertakes to help he may have "a duty to see the job through." See Wayne R. LaFave, Substantive Criminal Law, § 3.3 (1986 ed.). Imposition of a duty on those having care of a disabled adult is expressly set forth in the statute. A caregiver could be a person

who assumed responsibility to care for the disabled adult, where the caregiver is a voluntary guardian or an adult household member.

Here, it is undisputed that the mother was disabled, mentally and physically. The mother was seen mumbling to herself and often asked about her husband long after he was dead (T 188, 189). The victim was sick and frail and could not walk on her own. She suffered from bed sores, serious infections, malnutrition, and dehydration (T 153, 190, 191, 238, 249, 259-266, 290-291, 319, 294, 481).

Thus, appellant had a legal duty to act as proscribed by the statute, because she voluntarily assumed responsibility over her mother when appellant took her mother to her apartment (T 156-157). Appellant's father was dead, and appellant's brothers relied on appellant's representation to them that she would take care of the mother. The record shows that except for occasional visits the victim's sons did not help to care for the mother (T 158, 220, 225, 470). By offering to take care of the mother and moving in with her, appellant secluded the victim from the rest of the world for any help. E.g. People v. Heitzman, 886 P. 2d 1229, 1238 (Cal. 1994). So because appellant gratuitously assumed responsibility for her helpless mother, she had the legal duty to take care of her, and the failure to act, which resulted in the victim's death, constitutes a criminal offense. See Cornell v. State, 159 Fla. 687, 32 So. 2d 610 (1947)(grandmother who took over care of grandchild

from mother, and then got so drunk she let it smother to death, was guilty of manslaughter).

During her testimony appellant conceded that she knew that she was to take care of the mother's daily needs, such as changing her diapers, cleaning her, dressing her, providing her food and drinks, calling for medical assistance, and just about every other need for survival (T 463, 470). The mother could not survive without appellant's care, and appellant knew it. Nonetheless, appellant did not go to see her before her death for twelve hours, and she also failed to call medical professionals for help. Thus, appellant's failure to act constitutes breach of a legal duty.

A statute which penalizes the failure to act and which does not contain 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. State v. Gruen, 586 So. 2d 1280, 1282 (Fla. 3d DCA 1991). Here, appellant was penalized for the failure to provide basic food, shelter, clothing and medical needs, because she assumed such a duty.

The Terms of Statue are not Vague

Furthermore, § 825.102(3)(c), Florida Statutes (1997) is constitutionally valid because it requires conduct which is either willful or requires culpable negligent of the disabled adult. See, e.g. State v. Joyce, 361 So.2d 406, 407 (Fla.1978) (in the face of

a vagueness challenge, the Court upheld section 827.04(2), Florida's simple criminal child abuse statute, which prohibits the willful [scienter] or culpably negligent deprivation of necessary food, clothing, shelter or medical treatment); State v. Marks, 698 So. 2d 533, 534 (Fla. 1997)(a scienter requirement may save a statute from the objection that it punishes without warning an offense of which the accused was unaware where the statute forbids a clear and definite act).

The plain language of the statute mandates that a caregiver perform acts which he knows or reasonably should know are necessary to maintain the disabled's health. Appellant should have known that nutrition and medical care are basic needs for survival. Appellant's contention that the statute is vague because the words entrusted, assumed, responsibility, care, supervision, services, limitations, restrictions, normal activities of daily living, are not defined must fail. These terms have an ordinary meaning, which are commonly understood by today's society, and can be found in a dictionary. Further, appellant's conduct fell squarely within the conduct prescribed by the statute.

The dictionary includes the following definition for "Entrust":

> 1. to invest with a trust, or responsibility; charge with a specified office or duty involving trust: *we entrusted him with our lives.* 2. to commit (something) in trust to; confide, as for care, use, or performance: *to entrust a secret, money, powers, or work.*

Webster's Encyclopedic Unabridged Dictionary, p. 477 (1989 ed. unabr.).

"Assume" is defined as

> To take upon oneself; undertake: *to assume an obligation.*

Webster's Encyclopedic Unabridged Dictionary, p. 91 (1989 ed. unabr.).

"Responsibility" is defined as

> A particular burden or obligation who is responsible. Something for which one is responsible.: *A child is responsibility to its parents.* Reliability or dependability.

"Responsible" is defined as

> Answerable or accountable, as for something within one's power, control, or management.

Webster's Encyclopedic Unabridged Dictionary, p. 1222 (1989 ed. unabr.).

"Take care of" is defined as

> A. to watch over; be responsible for: *to take care of an invalid.*

Webster's Encyclopedic Unabridged Dictionary, p. 223 (1989 ed. unabr.).

"Service" is defined as

> an act of helpful activity; help; aid: *to do someone a service.*

Webster's Encyclopedic Unabridged Dictionary, p. 1304 (1989 ed. unabr.).

"Restricted" is defined as

> confined; limited.

Webster's Encyclopedic Unabridged Dictionary, p. 1223 (1989 ed.

unabr.).

"Limitation" is defined as

> 1. that which limits; a limit or bound; restriction. *An arms limitation;* a limitation on imports. 2. A limiting condition; restrictive weakness;

Webster's Encyclopedic Unabridged Dictionary, p. 831 (1989 ed. unabr.).

People with common intelligence know that normal activities of daily life include eating, drinking, and getting medical attention. The neglect statute is not vague. See, e.g. Kerlin v. State, 573 N.E. 2d 445 (Ct. App. Ind. 1991).

The statute did not violate appellant's mother right to privacy because, "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 (1991).

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, appellee respectfully requests this Court AFFIRM the trial court's judgment and sentence.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

ETTIE FEISTMANN
Assistant Attorney General
Florida Bar No. 892830
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by Carrier to: JOSEPH 1. CHLOUPEK, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401, on February 10, 1999.

Counsel for appellee