1-1-1971

The Florida Vagrancy Statute: Here Today, Gone Tomorrow -- Hopefully

Harold G. Melville

THE FLORIDA VAGRANCY STATUTE: HERE TODAY, GONE TOMORROW—HOPEFULLY

Petitioner was convicted of vagrancy under Florida Statute Section 856.02 for "wandering and strolling around from place to place without any lawful purpose or object." Petitioner contended on appeal to the Florida Supreme Court that the statute proscribed no ascertainable standard of criminal conduct and that it thus violated the due process clauses of both the Florida Constitution and the United States Constitution. The Florida Supreme Court, *held,* affirmed: the statute was not so vague as to be constitutionally invalid. *Smith v. State*, 239 So.2d 250 (Fla. 1970).

The Florida vagrancy statute, Florida Statutes Section 856.02, is derived from a line of English vagrancy acts dating back to the fourteenth century.[1] These acts were used to prevent those who had been freed from the decaying feudal estates from wandering, and to keep them in their own parish where they could be forced to work for wages.[2]

The English vagrancy acts, however, were not designed purely for economic reasons. From the time of the Black Death until the middle of the seventeenth century, the roads of England were crowded with the unemployed. Some were honest laborers, but many were the "wild rogues" of Elizabethan times who had been born to a life of idleness and who had no intention of following any other life. Thus, vagrancy became prohibited as a criminal activity, the penalties of which were extremely severe.[3] Execution was the penalty for the third offense.[4]

The present Florida vagrancy statute was enacted in 1907.[5] In part, it repeats legislation enacted by the English Parliament more than four hundred years ago in the immediate aftermath of the Black Death. One

---

1. The first vagrancy statute was apparently the Statute of Laborers, 23 Edw. 3 (1349). For a full history of vagrancy statutes, see 3 J. STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND ch. 32 (1883).

2. *See* 3 J. STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 274-75 (1883).

3. *See* Ledwith v. Roberts, [1937] 1 K.B. 232, a leading English decision on vagrancy.

4. An Act for the punishment of vagabonds and for the relief of poor and impotent persons, 1 Edw. 6, c. 3 (1547).

5. Fla. Laws 1907, ch. 5720, § 1; FLA. STAT. § 856.02 (1969):

Vagrants—Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling, or unlawful games or plays, common pipers and fiddlers, common drunkards, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them and misspend what they earn without providing for themselves or the support of their families, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or tippling shops, persons able to work but habitually living upon the earnings of their wives or minor children, and all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness, shall be deemed vagrants, and upon conviction shall be subject to the penalty provided in § 856.03.

authority has noted that the Florida statute seems distinctly Elizabethan.[6]

In the instant case, the appellant attacked Florida Statute Section 856.02 as being in violation of the due process requirement of certainty in that it failed to proscribe any ascertainable criminal conduct. The Florida Supreme Court in *Brock v. Hardie*[7] held this standard to be:

> a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[8]

In the recent case of *State ex rel. Lee v. Buchanan*[9] the Florida Supreme Court reaffirmed the standards set out in *Brock* by quoting at length from that opinion.[10] In addition, the court held that the due process requirement of certainty was of special importance in criminal statutes and that the courts were not at liberty to supply the needed elements to make a vague statute meet the standards of certainty.

The instant case is not the first that has considered the Florida vagrancy statute in relation to these due process requirements. In *Headley v. Selkowitz*,[11] the Florida Supreme Court found Section 43-10.5 of the City Code of the City of Miami (1957)[12] "too vague to withstand constitutional tests."[13] However, in contrast to Section 43-10.5 of the Miami Code, the Court mentioned the Florida vagrancy statute:

> When compared and contrasted with our state statute (F.S. Section 856.02, F.S.A.) defining vagrants, the excessive broadness and vagueness of the Miami ordinance becomes readily apparent.[14]

The first and only direct challenge to the Florida vagrancy statute, other than the instant case, was made in *Johnson v. State*.[15] The petitioner

---

6. Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 560 (1960).

7. 114 Fla. 670, 154 So. 690 (1934).

8. *Id.* at 678, 154 So. at 694.

9. 191 So.2d 33 (Fla. 1966).

10. *Id.* at 34.

11. 171 So.2d 368 (Fla. 1965).

12. Section 43-10.

Disorderly conduct generally. Any person in this City shall be deemed guilty of disorderly conduct who:

(5) Is found standing, loitering or strolling about in any place in the City and not being able to give a satisfactory account of himself, or who is without any lawful means of support.

13. Headley v. Selkowitz, 171 So.2d 368, 370 (Fla. 1965). The tests to which the Court explicitly referred were those previously propounded by the Second District Court of Appeal in City of St. Petersburg v. Calbeck, 114 So.2d 316 (Fla. 2d Dist. 1959).

> [T]he ordinance or statute must be sufficiently explicit in its description of the acts, conduct or conditions required or forbidden, to prescribe the elements of the offense with reasonable certainty, and make known to those to whom it applies what conduct on their part will render them liable for its penalties. *Id.* at 320.

14. Headley v. Selkowitz, 171 So.2d 368, 370 (Fla. 1965).

15. 202 So.2d 852 (Fla. 1967).

in *Johnson* challenged the statute as being violative of due process in that it failed to proscribe any ascertainable standard of criminal conduct. The Florida Supreme Court held in a per curiam decision that the trial court was correct in finding the statute to be constitutional. No explanation was given by the majority. Justice Ervin, concurring in part, found that the statute met the tests of certainty which were outlined in *State ex rel. Lee v. Buchanan*;[16] but, dissenting in part, he found this to be an unconstitutional application of the statute in that there was no evidence that the defendant was a habitual wanderer or stroller.[17] *Johnson* was heard by the United States Supreme Court, which declined to decide the constitutional issues but reversed the decision upon the facts.[18]

Throughout these decisions on the due process requirement of certainty, the Florida courts have attempted to track the language of the United States Supreme Court.[19] Thus, it is not surprising that the holding in *Giaccio v. Pennsylvania*,[20] a recent United States Supreme Court case, sounds substantially similar to the Florida decisions:

> [A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.[21]

On the basis of the language in previous cases, one might logically conclude that the decisions of the federal courts and the Florida courts on the validity of the same vagrancy statute would not be radically different. The conclusion would, however, prove false. In *Lazarus v. Faircloth*,[22] a three judge federal court sitting in the Southern District of Florida found Florida Statute Section 856.02 to be unconstitutional due to its vagueness and overbreadth.[23] The federal court found that while there might have been some valid segments of the statute, they were so inextricably intertwined with the invalid sections that separation was impossible.[24]

The instant case advanced basically the same arguments as those advanced in *Johnson*. Once again, however, the Florida Supreme Court, even in light of the *Lazarus* decision, upheld the statute.[25] In the majority

16. 191 So.2d 33 (Fla. 1966).
17. 202 So.2d at 855.
18. Johnson v. Florida, 391 U.S. 596 (1968).
19. In Brock v. Hardie, 114 Fla. 670, 154 So. 690 (1934), the Florida Supreme Court considered at length the United States Supreme Court case of Cline v. Frink Dairy Co., 274 U.S. 445 (1927), while in City of St. Petersburg v. Calbeck, 114 So.2d 316 (Fla. 2d Dist. 1959) the District Court quoted from United States v. Petrillo, 332 U.S. 1 (1947).
20. 382 U.S. 399 (1966).
21. *Id.* at 402-03.
22. 301 F. Supp. 266 (S.D. Fla. 1969).
23. *Id.* at 271.
24. *Id.* at 273.
25. Smith v. State, 239 So.2d 250, 251 (Fla. 1970).

opinion, Justice Roberts cited part of the concurring opinion of Chief Justice Ervin in the *Johnson* case:

> [The statute] appears to be of the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.[26]

The majority also held that the statute met the previously enunciated tests for certainty.[27]

Unlike the decision in *Johnson*, however, this decision was not unanimous. Justice Boyd and Justice Drew dissented, finding that the statute was "too vague to notify the public as to what standard of conduct the State requires,"[28] and that "[t]he burden must be upon the State to prove one is doing an unlawful act."[29]

Considering the holdings of *Lazarus* and the instant case, the decision in *Lazarus* appears to state the better view. The vagrancy laws were drafted to deal with problems of the fourteenth century which have long since disappeared. To accomplish the purpose for which they were originally drafted, these statutes were designed to be vague.[30] Vagrancy, and other violations such as disorderly conduct, which are poorly defined and produce easily justifiable arrests, have long been used as a tool for police harassment and as a means of validating unlawful arrests.[31] As Justice Boyd noted in the instant case, vagrancy statutes are now "widely used by police authorities to hold people remotely suspected of crime while investigations were conducted."[32]

Contrary to the finding of the Florida Supreme Court that Florida Statute Section 856.02 is "of the genre of vagrancy laws which have long been upheld,"[33] are numerous recent cases in which similar vagrancy statutes have been declared invalid.[34] The Florida vagrancy statute seems to fall into the class of statutes which have been declared impermissibly vague. It also appears so overbroad as to include many innocent activities within its scope.[35]

---

26. *Id.* at 251.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See,* Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203 (1953).

31. *See* note 34 *infra* and Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons,* 59 YALE L.J. 1351 (1950).

32. Smith v. State, 239 So.2d 250, 252 (Fla. 1970).

33. *Id.* at 251.

34. *See, e.g.,* Smith v. Hill, 285 F. Supp. 556 (E.D.N.C. 1968); Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968); Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967); Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426 (1967).

35. *E.g.,* it could be argued a law student living on the earnings of his wife would be engaging in criminal conduct under the language of Florida Statute § 856.02.

At present, arrests are still being made under the Florida vagrancy statute. However, both *Lazarus* and the instant case are being appealed to the United States Supreme Court. Hopefully, that court will lay the abuses of Florida Statute section 856.02 to rest.

HAROLD G. MELVILLE

HEPATITIS AND STRICT LIABILITY

Plaintiff, a patient in defendant hospital, received several transfusions of whole blood as part of a course of treatment. She developed serum hepatitus which required further hospitalization. Her suit against the hospital, sounding in strict liability in tort, was dismissed by the Circuit Court of Cook County. On appeal, the Illinois appellate court held that the complaint stated a cause of action and remanded the cause for trial.[1] A certificate of importance was granted by the appellate court and the cause was heard by the Supreme Court of Illinois which *held:* affirmed: The doctrine of strict liability based upon sale of a defective product in an unreasonably dangerous condition is applicable to an eleemonsynary hospital which transfuses blood to a patient as part of its general services. *Cunningham v. MacNeal Memorial Hospital,* — Ill. 2d —, 266 N.E.2d 897 (1970).

The majority of cases involving blood transfusions have been based on the theory of breach of an implied warranty, under first, the UNIFORM SALES ACT and, more recently, the UNIFORM COMMERCIAL CODE. The leading case is *Perlmutter v. Beth David Hospital.*[2] In that case, plaintiff sought to recover on the theory that supplying blood was a sale within the provisions of the SALES ACT and that, consequently, a warranty that the blood was reasonably fit for the purpose intended was implied from the sale. In a four-to-three decision, the New York Court denied recovery, holding that the contract between the hospital and the patient was one for services—not for the sale of goods—and was not divisible into sale and service components.[3]

> The conclusion is evident that the furnishing of blood was only an incidental and very secondary adjunct to the services performed by the hospital and, therefore, was not within the provisions of the Sales Act.[4]

The majority of the reported cases are in accord with the *Perlmutter* decision.[5] However, some courts have differentiated between a hospital

1. Cunningham v. MacNeal Memorial Hosp., 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969).
2. 308 N.Y. 100, 123 N.E.2d 792 (1954).
3. *Id.* at 104, 123 N.E.2d at 794.
4. *Id.* at 106, 123 N.E.2d at 795.
5. *Accord,* Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964);