IN THE

SUPREME COURT OF FLORIDA

MARCH TERM, 2011

Case No.SC11-300

Lower Tribunal No. 6D10-0427

Riley Gardner

Appellee

v.

State of Florida

Appellant

BRIEF FOR THE APPELLANT

ORAL ARGUMENT REQUESTED

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During the trial in the lower courts, Plaintiff Sidney Young sued Defendant Riley Gardner for the injuries caused in a car accident on May 12, 2008. At the end of the trial, the Plaintiff was awarded damages for the permanent injuries caused to her as a result of the car crash in which Defendant Riley Gardner was responsible for . Gardner was then convicted and charged of reckless driving as well as using a text messaging device while driving in violation of section 316.90, Florida Statutes. The decision was later appealed by the defendant to the District Court of Appeals. The Court of Appeals found in favor of the defendant, dismissing the charges against him. The State of Florida is now appealing the lower court's decision to the Supreme Court of Florida.

Questions Presented

The constitutional questions before this court are:

I. Whether Florida Statute section 316.90 is unconstitutionally vague as to the meaning of its term text message.

II. Whether Florida Statute section316.90 is unconstitutionally overbroad for its application to drivers who are either parked or stopped in a roadway.

Statement of the Case

On May 12, 2008, Riley Gardner along with Sidney Young and Alex Williams attended a party at Austin Cramer's house. During the party, defendant Riley Gardner suggested to Plaintiff Sidney Young to get some food with him; the reason being that the plaintiff had been drinking at

the party and therefore Mr. Gardner felt that food would help dissolve the alcohol. Following this, Sidney, Alex Williams and Guadeloupe got into the defendant's car. Riley advised to the passengers to put their seatbelts on when everyone got in the car. When getting out of the driveway the defendant received a text message from his girlfriend Taylor Bowling. After receiving this message, Riley tossed the phone to the passenger next to him in the car, who happened to be Sidney Young. Riley asked Sidney to respond to the text message for him, not too long after that the defendant lost control of the car. The car then jumped a curb, hit a telephone pole leading to severing injuries to Sidney Young.

The defendant was found guilty of reckless driving and using a text messaging device while driving in violation of section 316.90, Florida Statutes. Gardner is now appealing the lower court's decision of using a text messaging device in violation of section 316.90. The reason why the decision is being appealed is because the Defendant was using an Apple iPhone and had been communicating with his girlfriend; Taylor Bowling via a chat session on his Facebook app at the time he lost control of his vehicle. Therefore Gardner is now arguing that section 316.90 is unconstitutionally vague in its meaning of the term "text message" since he had been using a chat session on type of social network. Not only is Gardner arguing the vagueness of section 316.90 but also overbreadth. Gardner's argument for the overbreadth statute is that the statute is overbroad for its application to drivers who are either parked or stopped in a roadway.

The trial court found the statutes to be constitutional and therefore denied Gardner's motion. However, The Florida District Court of Appeals reviewed Gardner's argument and found the statutes to be unconstitutional and therefore agreed to dismiss the count for violation of section 316.9. Gardner also argued that since the statute is unconstitutionally vague and overbroad, then

it also violates his due process. The District court agreed and reversed the trial court's order , making Gardner not convicted of the charges stated above .

Summary of Argument

The night of the accident, many witnesses admitted they had seen Gardner "texting" on his cell phone while driving at the time where he had lost control of the car. With further investigation, it was revealed that the Defendant had been on Facebook using the "chat" option on his iPhone's Facebook application. According to Officer Adrian Knight, Riley Gardner was charged with reckless driving and using a text messaging device while driving. This is a violation of Florida Statute 316.90, which prohibits the use of "a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway." Riley Gardner is now arguing that the statute is unconstitutionally vague as to the term "text message." However, the State argues that the term is clear when it is read in context and that "text message" refers to any type-written messages from the sender to another person or group of people, therefore, not rendering Florida Statute 316.90 unconstitutionally vague.

The Defendant as mentioned before is arguing the vagueness of the statute but the overbreadth as well. However, we representing the State are arguing that section 316.90 is not overbroad. Section 316.90 only restricts the means of speech (a text message) and a driver cannot communicate using a cell phone while driving under the circumstances where it is not safe to do so. In addition to that , the defendant's vehicle was in motion at the time the message was written, therefore still violating the legislation against writing messages while driving or merely just using a phone. Furthermore, if a driver is using a phone he is still at fault because instead of paying attention to the road, he is sending a text message. Therefore, no matter where

he was; whether he was stopped at a stop sign or just parked on a driveway, the driver is always responsible for the safety of the passengers in the car.

During the civil trial, the Plaintiff argued that the defendant had been texting while driving, had been speeding and therefore the defendant had been negligent. The defense argued that their client had not been texting while driving because after receiving the text message, he passed the phone to the Plaintiff Sidney Young. The prosecution argued that the injuries caused to their clients was a result of the defendant's negligent driving. The defendant was then convicted of reckless driving as well as using a text messaging device while driving.

Arguments

Vagueness

In the case of Riley Gardner v. State of Florida, Gardner was charged with reckless driving and using a text messaging device while driving. According to Florida Statute 316.90, it is prohibited to use a text messaging device to write or send a text message while operating a motor vehicle in motion. However, the Defendant is arguing that the term of "text message is too vague." In everyday language the term "text message" refers to a short message being sent from one cell phone to another via a cellular network. This is the typical understanding that many would come to believe the terms "texting" or "text" have come to be. Therefore, according to Riley Gardner, making other forms of communicating electronically, "post," "posting," "e-mail," and "e-mailing," not the same as what would fall under the term "text message" or "text messaging device." However, the State argues that Florida Statute 316.90 clearly defines what the term "text message" really is and any reader could easily determine for themselves what the term is implying.

A vague statute is one in which it fails to clearly state what action is disallowed and, because of this, arbitrary and discriminatory enforcement is involved. However, courts cannot expect the Legislature to come up with specific laws in which the purpose of the law could be easily avoided, as stated in the case of *Se. Fisheries Ass'n Inc. v. Dep't of Natural Res.* 453 So. 2d 1351, 1353 (Fla. 1984). This case was about the fact that the fishing industry believed that the term "fish trap" was unconstitutionally vague. However, the district court had concluded that "the term 'fish trap' is not so vague that men of common intelligence must necessarily guess at its meaning." The Supreme Court of Florida agreed with the district court stating that the statute did warn the fishermen that fish traps are unlawful, and that the certain exceptions were sufficiently described. If the term "fish trap" was any more specific, then the purpose of the statute could be easily evaded. According to the Supreme Court of Florida, the term was not vague that people of common intelligence had to guess at its meaning.

In addition, in the case of *Travis v. State* 700 So. 2d 104 (1997), the Defendant, Kemrick Travis, was charged with aggravated fleeing and eluding, resisting arrest without violence, and driving with a suspended license. This is due to the fact that Mr. Travis was driving the wrong way on a one-way street with his headlights off and an officer tried to stop him by stopping in the middle of the road. However, the Defendant went around the cop car and kept going. The officer then had to pursue down several streets after Mr. Travis, reaching up to 90 miles an hour, until he wrecked his car in a residence, in which then, Mr. Travis continued fleeing on foot. Finally the officer caught up with him and arrested him. The Defendant then challenged the statute used against him stating that fleeing and eluding an officer is a third-degree felony if the offender causes the officer to engage in a "high-speed pursuit," but that the term "high-speed pursuit" was unconstitutionally vague because it does not give adequate notice of the conduct

that amounts to "high-speed pursuit." The District Court of Appeals of Florida decided that the statute is constitutional on its face because it did give adequate notice that Mr. Travis's actions were unlawful and so, it is not vague in its applications.

Last but not least, the *Merriam-Webster Online Dictionary* defines the term "text message" as "a short message sent electronically, usually from one cell phone to another." The definition does suggest that the term "text message" is mostly used to refer to the short message being sent from cell phone to cell phone via a cellular network. However, the definition does include the word "usually." With this word affirmed in the definition, the meaning of the term "text message" must be interpreted to mean that there are other forms of "text messages." The words "A short message sent electronically…" can mean a variety of messages, including an e-mail or a post or message to a social networking website. Now the Defendant in our case was using his iPhone's Facebook application to chat with his girlfriend. Facebook does fall under a social networking website and chatting on it does count as messaging, or in this case, "text messaging." With the definition provided by the *Merriam-Webster Online Dictionary*, one could reasonably conclude that any considerable communication method on a cell phone could fall under the term "text message." Simply opening an Internet browser on a cell phone could represent sending a "text message" since the "Internet" is an "electronic *communications* network."

Thus, Florida Statute 316.90 is not unconstitutionally vague because the term "text message" was intended to mean any messages that can be sent from a cell phone. The broad definition of "text messaging device" should lead to using a similarly broad interpretation of "text message." In all, one could reasonably conclude that the statute puts a stop to all forms of messaging on a cell phone. According to the statute, using a cell phone to "text message" is prohibited and is lawful in all its applications to the Defendant, Riley Gardner.

Overbreadth

As mentioned before appellee Riley Gardner argued in the lower court that section 316.90 Florida Statutes was unconstitutionally overbroad "for its application to drivers who are parked or stopped at a roadway." However, we representing the State of Florida are appealing asking to reverse the lower court's decision which stated that section 316.90 was unconstitutionally overbroad and vague.

Judge Gary J. from the District Court of Appeals dissented and with that stated that he finds section316.90, Florida Statutes to be neither vague nor overbroad. In his dissenting opinion, Judge Gary stated, "The overbreadth doctrine is an unusual doctrine that must be used sparingly, especially where the statute in question is primarily meant to regulate conduct and not pure speech."As many know, many accidents are caused due to distracted drivers usually speaking on the phone or using their phone for other purposes. Therefore section 316.90 is very useful and important because it helps prevent distracted driving as well as the bodily and/or mental injuries. Section 316.90 is also crucial in the sense that it helps maintain drivers alert to danger even if the car is stopped. Even if a driver is stopped at a traffic light he or she should not be paying attention to their phones, they should be focusing their attention to the road. In addition, if a vehicle is stopped on a roadway, many dangerous occurrences could happen such as another car heading toward the vehicle. All in all section 316.90 helps lower accidents due to distracted drivers. Needless to say that it is not important whether or not is vehicle is stopped at a roadway or at a stop sign. However what is important is the fact that section 316.90 is not overbroad and has been proven very crucial to the safety of drivers.

In *J.L.S v. State,* J.L.S *trespassed* in a safety school zone in violation of section 810.0975 Florida Statutes. J.L.S was then arrested but moved to dismiss the petition for delinquency arguing that section 810.0975 was unconstitutionally overbroad and vague on its face .According to J.L.S section 810.0975 is overbroad due to "its prohibition of entirely innocent activities such as leisurely walking or driving about the school zone." However the District Court of Appeals disagreed with the argument that the statute was unconstitutionally overbroad. According to the District Court of Appeals, Third District, "The issue of overbreadth is one of the few exceptions to the traditional questions beyond the scope of the case at hand." The purpose of section 810.0975 is to protect children in school. The same can be said with section 316.90 ; being that its objective is to prevent distracted driving and enforce the fact that the driver should be focusing on the road at all times no matter how the vehicle is positioned.

On the night that the accident occurred Gardner had been using his phone in the car. When the "text message" was written the vehicle was still in motion and therefore violating Florida Statute 316.90 stating "Subject to subsection of this section a person, may not use a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the driveway." Therefore Gardner is still at fault and therefore should still be charged for reckless driving.

In State v. DuFresne , the appellee DuFresne was arrested and charged with five counts of child abuse involving different children, as opposed to section 827.03.DuFresne argued that the state was unconstitutional due to its vagueness and overbreadth. The reason that the statute was overbroad was according to him "the statute applied to speech protected by the First Amendment." However when the case was reviewed by the Court of Appeals, the court stated that the statute was not overbroad. According to *Schmitt v. State* the "application of the

overbreadth doctrine is particularly appropriate where the statute clearly infringes upon protected forms of free speech."

Section 316.90 is meant to only regulate conduct such as the action of texting rather than pure speech. "To be unable to type or send a text message while driving a car on the traveled portion of a roadway is 'a minimal inconvenience which affords effective protection against a significant possibility of grave or fatal injury'" *State v. Eitel*. According to *People v. Neville*, "This limited inconvenience is no greater than requiring the use of seat belts or motorcycle helmets." The legislature has stated that section 316.90 exist for public safety. Therefore for the reasons stated above we, representing the State of Florida disagree with Mr. Gardner 's claim that section 316.90 is unconstitutionally overbroad.

Conclusion

The lower court, the District Court Of Appeals reversed the civil court's decision finding section 316.90 unconstitutionally vague and overbroad. The lower court dismissed the count for violation of section 316.90. However we representing the State of Florida/Appellant argue that the statute is constitutional and is neither vague nor overbroad. Therefore we ask that you reverse the lower court's decision and find in favor of the appellant, the State of Florida, declaring the statute neither vague nor overbroad.

Respectfully Submitted,

By:_____

By:_____

Counsel for Appellant