IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-CA-00971

KRISTI FULGHAM — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF OKTIBBEHA COUNTY

REPLY BRIEF OF APPELLANT

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Oral Argument Requested

STATEMENT REGARDING ORAL ARGUMENT

This is a case of first impression and should be argued. Miss. R. App. P. 34. The State argues that Kristi Fulgham could voluntarily and knowingly plead guilty to an unconstitutionally vague criminal statute, even if that statute is unconstitutional on its face. This cannot be the law.

As a Mississippi trial court and the Mississippi Legislature have realized, Miss. Code Ann. § 47-5-193 was unconstitutionally vague at the time Fulgham entered her guilty plea. She entered her plea on the advice of counsel. Miss. Code Ann. § 47-5-193 was changed after Fulgham's plea to add the exact conduct for which she had been convicted under the old version of the statute. Fulgham subsequently challenged the constitutionality of the statute in her post-conviction appeal. Other courts have held that a defendant may challenge the unconstitutional vagueness of a statute on post-conviction.

The State wrongly attempts to argue that Fulgham waived her right to challenge the statute (which she did not), or, alternatively, that even if the statute is unconstitutional on its face, then it could still be constitutional *as applied* to Fulgham. No basis exists for this targeted and discriminatory approach in criminal law.

Given the significant consequences of allowing a defendant to plead guilty to an unconstitutionally vague statute, this case should be argued.

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I. INTRODUCTION

A defendant cannot knowingly and voluntarily plead guilty to an unconstitutionally vague statute. The State fails to cite a single case to refute this common sense principle. Instead, the State relies on two chief arguments: (1) that Fulgham waived her right to challenge the knowingness and voluntariness of her plea to an unconstitutionally vague statute, and (2) that Miss. Code Ann. § 47-5-193, even if it was unconstitutional on its face, could still be constitutional as applied to Fulgham. Neither argument prevails.

First, the State relies on case law that has no bearing on post-conviction appeals. The State's argument that Fulgham failed to raise her constitutional challenge to the trial court is defeated by the very fact that the trial court **ruled** on this issue. The Court acknowledged Fulgham raised unconstitutional vagueness as grounds to challenge § 47-5-193.

Second, the State's bizarre argument that a criminal statute may be unconstitutional on its face, but still constitutionally applied to a single individual, lacks any basis in law.

Last, the State makes a half-hearted attempt to defend the deficient conduct of Fulgham's trial counsel by suggesting it was "strategy" for Fulgham to plead guilty to an unconstitutionally vague criminal statute. It is hard to conceive of a more ineffective strategy.

For all the reasons discussed in Fulgham's Appellant's Brief, and discussed below, this Court must vacate Fulgham's guilty plea to Count II in the underlying indictment.

LAW AND ARGUMENT

II. VAGUENESS CHALLENGE PROPERLY RAISED BY FULGHAM AND CONSIDERED BY TRIAL COURT

The State claims Fulgham waived her right to challenge her guilty plea on two fronts: (1) she purportedly never raised the issue before the trial court, or (2) by pleading guilty, she cannot now attack that the statute was unconstitutionally vague in her post-conviction appeal.

A. Fulgham Clearly Raised Vagueness Challenge

Notwithstanding that the trial court actually ruled on Fulgham's vagueness challenge, there is no doubt that Fulgham asserted a vagueness challenge in her *pro se* post-conviction motion. In filing her post-conviction motion under Miss. Code Ann. § 99-39-1, *et. seq.*, Fulgham claimed that § 47-5-193 was unconstitutional "on the same grounds" discussed in a Sunflower County Circuit Court Order that found § 47-5-193 was unconstitutionally vague in *State v. Poag, et. al.,* Crim. No. 2006-0185 (Sunflower County Circuit Court, October 17, 2006). The Order is attached as Exhibit "D" to Fulgham's post-conviction motion. *See* CP at 19-20; RE 6.

In the Sunflower County Circuit Court Order, the trial court held that the defendant's challenge to the unconstitutional vagueness of § 47-5-193 warranted quashing the indictment.

Furthermore, the trial court below stated Fulgham challenged "that the statute she was charged under, § 47-5-193, was unconstitutionally vague..." Order at 1. CP 41; RE 2. The trial court understood that Fulgham raised the issue of unconstitutional vagueness. The State's sole rebuttal to the trial court's ruling on the issue is: "No matter." *See* Appellee's Brief at 11. Indeed, it does matter. The issue was properly raised and the State's faulty argument to the contrary is meritless.

B. Fulgham Did Not Waive Right To Challenge Unconstitutional Vagueness of Statute

The State claims that Fulgham, by pleading guilty on the advice of counsel, cannot now challenge the unconstitutional vagueness of the criminal statute. The State does not cite a single case that holds a defendant cannot challenge the unconstitutional vagueness of a statute on post-conviction review.[1] In contrast, courts elsewhere have upheld such a challenge. *See State of Ohio v. Holycross*, 1980 WL 354919 (Ohio App. 8 Dist., July 10, 1980).

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[1] The State chiefly relies on *Colburn v. State*, 431 So.2d 1111 (Miss. 1983) to support its waiver theory. *Colburn* is a direct appeal matter in which the issue raised on direct appeal was never raised to the trial court. The *Colburn* analysis is wholly inapplicable to Fulgham's post-conviction appeal. Fulgham properly raised the unconstitutional vagueness of the statute to the trial court, which ruled on the issue.

In *United States v. Mason*, 60 M.J. 15 (Ct. App. Armed Forces, 2004), a defendant "admitted" to a military judge that the images in his possession were child pornography, and he pleaded guilty to possession of child pornography as defined under "clause 3" of Article 134. However, after his conviction, the U.S. Supreme Court concluded that the child-pornography statute was unconstitutionally vague. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). As a result, on appeal, the Military Court of Appeals concluded that the defendant's guilty plea was improvident because the defendant could not knowingly plead guilty to an unconstitutionally vague statute. *Mason*, 60 M.J. at 18.

Moreover, it did not matter that the determination of the unconstitutional vagueness of the statute was made after the guilty plea, or that the defendant "admitted" the conduct. Once the statute was declared unconstitutional, then the defendant's guilty plea could not stand. Consequently, if this Court determines that § 47-5-193 was unconstitutionally vague at the time of Fulgham's guilty plea, then that alone necessitates vacating her guilty plea and rendering an acquittal as to Count II.

III. UNCONSTITUTIONAL STATUTE CANNOT BE "CONSTITUTIONAL AS APPLIED"

Remarkably, the State argues that even if § 47-5-193 is unconstitutional on its face, then it can still be constitutional as applied to Fulgham. *See* Brief of

Appellee at 3 ("We argue that even if the statute was unconstitutionally vague on its face, it was not unconstitutional as applied to Fulgham.").

The State fails to cite a single case that holds – or even hints – that a defendant may knowingly and voluntarily plead guilty to an unconstitutionally vague statute. There is no authority for this "as applied" position. It is unquestionably not the law.

Subsequent amendments to § 47-5-193, coupled with the Order from the Sunflower County Circuit Court, make clear that § 47-5-193 was unconstitutionally vague at the time Fulgham entered her plea on the advice of counsel. Notwithstanding the State's suggestion that the Legislature's addition of "cell phone" was to "make more certain that which was already certain," see Appellee's Brief at 15, the additions to the statute demonstrate that the Legislature was adding on, not clarifying. In fact, "unauthorized electronic device" is still included in the statutory language, while "cell phone" has been separately added – subsequent to Fulgham's plea – as a distinct violation. The only certainty about § 47-5-193 at the time of Fulgham's plea is the uncertainty and unconstitutional vagueness of the statute's scope.

Given the statute's unconstitutional vagueness, Fulgham could not knowingly and voluntarily enter a guilty plea. As noted in *Mason*, even if Fulgham acknowledged the conduct, that does not somehow allow an

unconstitutional statute to be "constitutional as applied" to her. Such an approach to criminal law would eviscerate the fundamental principle – both as a matter of due process and state law – of giving notice to a defendant of the nature of the crime for which she is charged. *See State v. Roderick*, 704 So. 2d 49, 53 (Miss. 1997). *See also State v. Hoffman*, 508 So. 2d 669 (Miss. 1987).

IV. ADVICE TO PLEAD GUILTY TO UNCONSTITUTIONALLY VAGUE STATUTE IS NOT PERMISSIBLE STRATEGY

As set out more fully in Fulgham's Appellant's Brief, the trial court wholly failed to consider her ineffective assistance of counsel claim. This omission alone warrants reversal and remand to the trial court.

The State argues that if this Court addresses the issue, then it should conclude it was litigation "strategy" for Fulgham's attorney to advise Fulgham to plead guilty to an unconstitutionally vague statute. Fulgham's attorney never informed Fulgham of the possibility of the void-for-vagueness defense. *See* CP at 2-7; RE 4. Fulgham's attorney told the trial court she saw no reason for the court not to accept Fulgham's guilty plea. *See* CP at 35; RE at 9.

Advising a client to plead guilty to an unconstitutionally vague criminal statute cannot fall within the range of permissible strategic decisions. Notwithstanding the deference afforded to a lawyer's performance, Miss. Code Ann. § 47-5-193 is unconstitutional on its face. As a result, it was ineffective assistance of counsel to advise Fulgham to plead guilty to the statute.

CONCLUSION

For the reasons set forth above, and as set forth in Fulgham's Appellant's Brief, Fulgham's conviction to Count II must be vacated.

RESPECTFULLY SUBMITTED, this the 8 day of February, 2010.

KRISTI FULGHAM

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CERTIFICATE OF SERVICE

I hereby certify that I have on this, the 8th day of February, 2010, caused to be mailed, United States Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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