IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: **10-AP-05**
LOWER COURT CASE NO: 48-2009-MM-9058

SONIA MARIA LOPEZ,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.
_____/

Appeal from the County Court for Orange County, Florida, Faye L. Allen, County Court Judge

Steven J. Guardiano, Esquire, for Appellant.

No appearance for Appellee.

Before Rodriguez, Lubet, and O'Kane, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Sonia Lopez (herein "Appellant") appeals the lower court's Order denying her Motion to Dismiss, issued on January 12, 2010, and the Final Order of Judgment and Sentence, rendered on January 20, 2010. The State did not file an Answer brief. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1).

History

On July 27, 2009, Appellant was charged with two counts of contributing to the delinquency of a minor regarding her two sons, in violation of section 827.04, Florida Statutes: "not ensuring school attendance or habitual truancy" in Count 1 and "failing to enroll and not ensuring full attendance" in Count 2.

Through counsel, she filed a Motion to Dismiss, arguing that section 827.04 is "a broad statute" encompassing delinquency and dependence, whereas her "alleged acts are specifically proscribed by a statute, Florida Statute section 1003.27," which relates to compulsory school attendance and carries a less severe penalty. The trial court conducted a hearing, heard argument, and issued a written order denying the motion to dismiss without explanation.

The trial was conducted on January 19-20, 2010. Numerous State witnesses testified regarding the truancy of Appellant's sons. Appellant told some of these witnesses that she tried to get the children to attend school, but the children refused. Through counsel, Appellant moved for a judgment of acquittal, raising the following four arguments: the State only showed the children were truant, whereas Appellant showed full cooperation with the various school officials; the State never filed a child-in-need-of-services petition or referred the children to truancy court; testimony showed Appellant tried different disciplinary actions and sought outside agency assistance; and failure to stop truant behavior is proscribed by section 1003.27. The State argued it could charge whatever it would like to charge, i.e., whatever was appropriate. The trial court denied the motion for judgment of acquittal, finding the State had presented a prima facie case.

Appellant testified about her attempts to make the children attend school, her participation in counseling, their problems with drugs, and her attempts to discipline them. One son ended up in a juvenile detention facility in Tampa and she denied fault for the other son's truancy because she escorted him to school. She asserted that she never kept them from school and tried her best to ensure they attended.

Appellant was convicted on both counts. She was sentenced to 108 days in jail "for the 26 days she didn't make Luis go to school and the 82 days she didn't make Hermen go to school" followed by 257 days of probation for Count 1 and 365 days of probation for Count 2, to run consecutively. Her Motion to Modify Sentence was granted when the trial court suspended the remainder of the incarcerative portion of the sentence (108 days with 28 days credit) and imposed the two consecutive years of probation.

Issues on Appeal

Point One: The State's prosecution for contributing to the delinquency of a minor, a violation of section 827.04 and a first-degree misdemeanor, was barred because the same conduct is prohibited by a more specific statute dealing with habitual truancy cases under section 1003.27 and a second-degree misdemeanor.

Point Two: The State failed to follow the requirements of the applicable statutes to support the legal conclusion that the children's habitual truancy showed they were in need of services; alternately, there was insufficient evidence to show Appellant encouraged, either directly or indirectly, their habitual truancy.

The interpretation of a statute is a purely legal matter, which is subject to the *de novo* standard of review. *Kasischke v. State*, 991 So. 2d 803, 807 (Fla. 2008).

Two criminal statutes may overlap in a narrow area and, where different proof is required for each offense, the violator may be prosecuted under either statute. *Adams v. Culver*, 111 So. 2d 665, 667 (Fla. 1959). As Appellant argues, "a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." *Id*. "This rule is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provision." *Id*. Also, when two statutes conflict, the later one should prevail as the last expression of legislative intent. *McKendry v. State*, 641 So. 2d 45 (Fla. 1994). Section 827.04 was introduced in 1974, and section 1003.27, in 2002. *See* ch. 74.383, §50, and chapter 02-387, §122 (Laws of Florida).

Appellant also cites *Burnett v. State*, 737 So. 2d 1106, 1107 (Fla. 1st DCA 1998), where the defendant was convicted of lewd and lascivious conduct under section 800.04, Florida Statutes, for showing two adult videos to minors. The First District Court of Appeal held the State could not legally convict him of violating section 800.04 based on that evidence alone because his actions were more specifically prohibited by section 847.0133, Florida Statutes, which prohibits showing obscene material to minors. Appellant argues her conviction cannot stand because there was a more specific offense

that carried a smaller penalty. She also argues that because the State did not charge her with the lesser offense or present the proof necessary to support it, her conviction may not be reduced to that lesser offense.

However, in *Fayerweather v. State*, 332 So. 2d 21, 22 (Fla. 1976), the Florida Supreme Court addressed the issue of "whether conduct which violates both the State Credit Card Crime Act, section 817.60(1), (3), Florida Statutes (1973), and the provision making it unlawful to receive stolen property, section 811.16, Florida Statutes (1973), may be punished under the latter, even though the former, a newer law, sets a less severe punishment." The Florida Supreme Court held:

> It is not unusual for a course of criminal conduct to violate laws that overlap yet vary in their penalties.... Traditionally, the legislature has left to the prosecutor's discretion which violations to prosecute and hence which range of penalties to visit upon the offender. Section 817.68 of the State Credit Card Crime Act suggests no legislative retreat from this practice. We do not read the section to require exclusive prosecution under this act when the elements of other criminal laws are also present. We hold the petitioner was properly convicted and sentenced for knowingly receiving stolen property under Section 811.16, Florida Statutes 1973.

In *State v. Weir*, 488 So. 2d 557, 558 (Fla. 5th DCA 1986), Weir was accused of forging a credit card invoice. He was charged with forgery but the trial court ruled the forgery statute was superseded by a statute that prohibits obtaining property with a counterfeit or otherwise invalid credit card. The Fifth District Court of Appeal held the State could charge Weir under the forgery statute even if the credit card statute was also applicable:

> There is nothing wrong with the state choosing one statute over the other to prosecute under. Here the state chose the felony rather than the misdemeanor, not unexpectedly.

In *State v. Cogswell*, 521 So. 2s 1081, 1082 (Fla. 1988), Cogswell was charged with bookmaking for receiving football betting cards along with money. He argued the bookmaking statute, a felony, was indistinguishable from the statute which makes it unlawful to bet on the result of a contest of skill, a misdemeanor. The trial judge granted his motion to dismiss and the district court affirmed, but the Florida Supreme Court reversed, citing *Fayerweather* and *United States v. Batchelder*, 442 U.S. 114 (1979):

> There is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements.

In *Freeman v. State*, 969 So. 2d 473, 477 (Fla. 5th DCA 2007), the Fifth District Court of Appeal addressed the issue of whether the State had the discretion to charge Freeman with manslaughter rather than a violation of the Dangerous Dog Act. The Fifth District acknowledged the cases on which Appellant relies, *Adams v. Culver* and *Burnett v. State*, but held: "There first must be a hopeless inconsistency between the two statutes before rules of construction are applied to defeat the express language of one of those statutes." *Id., citing State v. Parsons*, 569 So. 2d 437, 438 (Fla. 1990). The manslaughter statute is more narrowly focused on reckless conduct affecting human life, human safety, or the safety and welfare of the public, whereas the dangerous dog statute is more broadly focused on reckless disregard of a dog's behavior to people and animals. *Id.* at 479.

Freeman also relied on *McCreary v. State*, 371 So. 2d 1024 (Fla. 1979), and *State v. Young*, 371 So. 2d 1029 (Fla. 1979), in concluding that the Legislature intended to

punish different levels of conduct and therefore, the State did have the discretion to charge Freeman with manslaughter.

In the instant case, Chapter 1003 is part of Florida's K-20 Education Code. Section 1003.26 sets forth the legislative intent that "school districts must take an active role in promoting and enforcing attendance as a means of improving school performance." Sub-section (1) dictates actions to be taken by the school principal, teacher, and child study team where there is a pattern of non-attendance, which does include contacting the parent to identify potential remedies. Section 1003.27 sets forth the court procedure for the enforcement of the provisions dealing with compulsory school attendance and again, it is focused on action to be taken by the superintendent and principal of the school.

Chapter 827 is focused on the abuse of children. Section 827.04 prohibits, in relevant part, committing any act or living in a manner that tends to cause a child to become a child in need of services. Pursuant to section 984.03(9)(b), Florida Statues, a child found to have been habitually truant is deemed to be a child in need of services, and pursuant to section 827.04(2), Florida Statutes, it is not necessary for a court to make an adjudication that the child is in need of services in order to prosecute a violation.

There is no "hopeless inconsistency" between the two statutes, and there appears to be no reason to require the State to proceed exclusively under Chapter 1003. On the contrary, it appears to have been within the State's discretion to prosecute Appellant under section 827.04, which carried the more severe penalty and accordingly, this Court concludes that the trial court did not err in denying her Motion to Dismiss.

Based on this controlling authority, it is hereby ORDERED AND ADJUDGED that the ruling of the lower court is hereby AFFIRMED.

DONE AND ORDERED on this __12th_____ day of March 2012.

__/S/_____
JOSE R. RODRIGUEZ
Circuit Court Judge

__/S/_____
MARC L. LUBET
Circuit Court Judge

_/S/_____
JULIE H. O'KANE
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Final Order Affirming Trial Court has been provided this ___12th____ day of March 2012 to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; and Steven J. Guardiano, Esquire, 412 North Wild Olive Avenue, Daytona Beach, Florida 32118.

_/S/_____
Judicial Assistant