Rel: July 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-1177

State of Alabama

v.

K.E.L.

Appeal from Mobile Circuit Court
(CC-19-2085)

KELLUM, Judge.

The State of Alabama appeals the trial court's granting of K.E.L.'s motion to dismiss the indictment charging her with vehicular homicide under § 32-5A-190.1, Ala. Code 1975, on the ground that § 32-5A-190.1 is unconstitutionally vague.

Section 32-5A-190.1(a) provides:

> "A person who causes the death of another person while knowingly engaged in the violation of Title 32, Chapter 5A, excluding Section 32-5A-191 [driving under the influence], applying to the operation or use of a vehicle, as defined in Section 32-1-1.1(81),[1] may be guilty of homicide by vehicle when the violation is the proximate cause of the death."

In April 2019, K.E.L. was indicted as follows:

> "The Grand Jury of said county charge that, before the finding of this indictment, [K.E.L.], whose name is to the Grand Jury otherwise unknown, did cause the death of Roberta Daman by causing a vehicle operated by the said [K.E.L.] to collide with a vehicle occupied by Roberta Daman, while the said [K.E.L.] was knowingly engaged in the violation of a State law applying to the operation or use of a vehicle, to-wit: speeding and/or running a stop sign and such violation was the proximate cause of death of Roberta Daman, in violation of § 32-5A-190.1 of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 4.)

After being granted youthful-offender status, K.E.L. filed a motion to dismiss the indictment on the ground that §

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[1]Section 32-5A-190.1 became effective August 1, 2017. At that time, § 32-1-1.1(81) defined the term "vehicle," in relevant part, as "[e]very device in, upon, or by which any person or property is or may be transported or drawn upon a highway." Section 32-1-1.1 was subsequently amended, and the definition of "vehicle," although remaining the same, is now found in § 32-1-1.1(86).

32-5A-190.1, Ala. Code 1975, was unconstitutionally vague, on two grounds. First, K.E.L. argued that § 32-5A-190.1 fails to define the mental state of "knowingly" and fails to identify the conduct to which that mental state applies. Second, K.E.L. argued that § 32-5A-190.1 provides only that a person "may be guilty" of vehicular homicide if the person knowingly engages in a violation of Title 32, Chapter 5A, the Alabama Rules of the Road Act ("the ARRA"), and that violation is the proximate cause of another's death, without identifying the other conduct or circumstances "which transform the possibility of guilt (may be guilty) into the certainty of guilt (is guilty)." (C. 23.) Therefore, K.E.L. asserted, § 32-5A-190.1 "does not provide [her] with an ascertainable standard by which her conduct in the automobile accident can be judged." (C. 23.) The State filed a response to the motion, arguing that § 32-5A-190.1 clearly provides that the mental state of knowingly applies to an accused's violation of the ARRA, and that the phrase "may be guilty" does not relate to other circumstances not delineated by the statute to establish guilt but to the requirement of proximate cause.

After a hearing, the trial court granted K.E.L.'s motion and dismissed the indictment against her on the ground that § 32-5A-190.1 is unconstitutionally vague. The court noted that it "would be inclined to reject [K.E.L.'s] first argument based on the use of the element 'knowingly,'" but it declined to specifically address that argument because it found "that the statute is unconstitutionally vague due to the use of the phrase 'may be guilty.'" (C. 59.) The court stated, in relevant part:

> "It may be that § 32-5A-190.1 uses the term 'may be guilty of homicide by vehicle' rather than 'is guilty,' to signal that the fact finder may consider the situation confronting the actor at the time of the accident in determining culpability. The auxiliary verb 'may' in § 32-5A-190.1 indicates that there 'may be' a possible state of guilt. The statute gives no linguistic cue that 'may be guilty' must be read to mean 'is guilty' rather than the natural reading 'might be guilty.' Swindle v. Remington, [291] So. 3d [439, 451] ([Ala.] 2019) ('Ordinarily, the use of the word "may" indicates a discretionary or permissive act, rather than a mandatory act.'). 'Absent any indication to the contrary, the words [in a penal statute] must be given their ordinary and normal meaning.' Walker v. State, 428 So. 2d 139, 141 (Ala. Crim. App. 1982). The term 'may be guilty' cannot be stretched to mean 'shall be guilty' because '[p]enal statutes are to reach no further in meaning than their words,' Ex parte Bertram, 884 So. 2d 889, 891 (Ala. 2003) and 'should not be extended by construction.' Ex parte Evers, 434 So. 2d 813, 817 (Ala. 1983).

"The parties have not cited any other criminal provisions of the traffic code, § 32-5A-1 et. seq., or the criminal code, § 13A-[1]-1 et seq., in which the phrase 'may be guilty' appears, suggesting the Legislature may have intended a unique application.[1] It could be that the Legislature deliberately used the expression 'may be guilty' in § 32-5A-190.1, rather than used the phrase "shall be guilty" as was used in the prior vehicular homicide statute, § 32-5A-192 (repealed). 'It is a familiar principle of statutory interpretation that the Legislature, in enacting new legislation, is presumed to know the existing law.' State v. Worley, 102 So. 3d 435, 444 (Ala. Crim. App. 2011).

"The statute's use of 'may be guilty' rather than 'shall be guilty' makes 'being guilty' a contingency, allowing the possibility that other factors besides the knowing violation of a rule of the road should be considered to determine guilt, for example the driving conditions at the time of the accident and the experience of the driver. While the Court could speculate as to what the Legislature intended when it enacted § 32-5A-190.1, a Defendant cannot be required to do so. See Ex parte Hyde, 778 So. 2d 237, 239 (Ala. 2000) (noting 'the fundamental rule that criminal statutes are construed strictly against the State'). [Section] 32-5A-190.1 is unconstitutionally vague because it does not specify the considerations which elevate 'may be guilty' to 'is guilty.'

"This Circuit Court also notes the very significant practical problem presented by the phrase 'may be guilty' relative to the preparation and giving of an appropriate jury charge. Is the jury to be charged that if the Defendant knowingly violated a statute in Title 32, Chapter 5A, and a death proximately results, then the Defendant 'may be guilty'?

> "It is hereby ORDERED that the Motion to Dismiss is GRANTED. It is further ORDERED that the Indictment herein is DISMISSED.
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> "_____
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> "[1]The generally used language in criminal statutes is definitive, for example § 32-5A-58.3: 'A person who violates this section shall be guilty of a traffic violation....'; § 32-5A-60: '... any person violating the provisions of this section shall be guilty...'; § 32-5A-8: 'It is a misdemeanor for any person to violate any of the provisions...'; § 13A-6-2: 'A person commits the crime of murder if...'; § 13A-8-2: 'A person commits the crime of theft of property if...'; and § 13A-6-20: 'A person commits the crime of assault in the first degree if... .'"

(C. 59-60.)

On appeal, the State argues: (1) that K.E.L. lacked standing to challenge the constitutionality of § 32-5A-190.1, and (2) that the trial court erred in finding that the phrase "may be guilty" rendered § 32-5A-190.1 unconstitutionally vague. We address each argument in turn.

Standing

The State did not assert in the trial court that K.E.L. lacked standing to challenge the constitutionality of § 32-5A-190.1; it raises this issue for the first time on appeal. However, the State argues that standing is a jurisdictional issue that cannot be waived. K.E.L. argues, on the other

hand, that the State waived its argument regarding her alleged lack of standing by failing to raise it in the trial court.

Although lack of standing to raise a Fourth Amendment challenge is waivable if the issue is not timely asserted by the State in the trial court, see State v. Compton, 711 So. 2d 1114, 1115 (Ala. Crim. App. 1997), lack of standing to challenge the constitutionality of a statute is jurisdictional, see J.L.N. v. State, 894 So. 2d 751, 753 (Ala. 2004). We recognize that in Snavely v. City of Huntsville, 785 So. 2d 1162, 1166 n.1 (Ala. Crim. App. 2000), this Court held that the State had waived any claim that the defendant lacked standing to challenge the constitutionality of a statute by failing to raise the issue in the trial court. However, in Snavely, this Court relied on State v. Ivey, 709 So. 2d 502, 507 (Ala. Crim. App. 2000), a case that involved a Fourth Amendment challenge, not a challenge to the constitutionality of a statute, and, in any event, Snavely was decided before the Alabama Supreme Court's opinion in J.L.N., supra, which made clear that lack of standing deprives a trial court of subject-matter jurisdiction to hear a challenge to the constitutionality of a statute. Therefore, the State did

not waive its standing argument by failing to raise it in the trial court.

The State argues that K.E.L. lacked standing to challenge § 32-5A-190.1 because, it says,

> "her conduct fell squarely within the scope of the conduct prohibited by the statute. Even if the word 'may' in § 32-5A-190.1 could be read permissively rather than manditorily with respect to whether the traffic violation must be the proximate cause of the death, the indictment alleged that the specific traffic violations she committed were, in fact, the proximate cause of [the victim's] death. ... There is absolutely no ambiguity in the conduct for which K.E.L. was charged, nor any plausible argument that the statute was vague as to whether her conduct was prohibited."

(State's brief, p. 13.) The State's argument appears to be based on its belief that K.E.L.'s challenge to the statute is that the term "may" suggests that proximate cause may not always be an element of the offense of vehicular homicide. Because it alleged in the indictment that K.E.L.'s violation of the ARRA was, in fact, the proximate cause of the victim's death, the State asserts, K.E.L. cannot complain that the term "may" is vague as to other parties whose violations of the ARRA may not be the proximate cause of the victim's death.

However, the State's interpretation of K.E.L.'s argument is incorrect. K.E.L. does not argue that the use of the term

"may" suggests that proximate cause may not be an element of the offense of vehicular homicide. Rather, her argument is that the use of the phrase "may be guilty" suggests that a knowing violation of the ARRA and proximate cause, both of which K.E.L. concedes are elements of the offense, are not the only elements of the offense of vehicular homicide and that, therefore, the statute failed to give her sufficient notice of what conduct was prohibited. K.E.L. argues that she has standing to challenge the constitutionality of the statute as applied to her because, she says, she "has a specific due process right to adequate notice of the charged criminal conduct in order to prepare a defense." (K.E.L.'s brief, pp. 5-6.) We agree with K.E.L.

> "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations."

County Court of Ulster Cty., N.Y. v. Allen, 442 U.S. 140, 154-55 (1979).

> "'As a general rule, in criminal prosecution, accused has the right to assert the invalidity of the law,

> regulation, or rule under which he is being prosecuted, but he must show that his rights are adversely affected by the statute or ordinance, and, more particularly, that his rights are thus affected by the particular feature of the statute alleged to be in conflict with the constitution. It is not sufficient that the statute may impair the rights of others. An accused affected by one portion of a statute may not plead the invalidity of another portion of the same statute not applicable to his case, where the invalidity of the portion questioned will not render void the entire act or at least some provision that does affect him adversely; but, conversely, he may do so where the invalidity of the portion questioned would render the entire act, or some provision affecting him, void....'"

State v. Wilkerson, 54 Ala. App. 104, 105, 305 So. 2d 378, 380 (Ala. Crim. App. 1974) (quoting 16 C.J.S. Constitutional Law § 84)). "Appellate courts will not pass upon a constitutional question unless some specific right of the appellant is directly involved; the appellant must belong to that class affected by the statute's provisions." State v. Woodruff, 460 So. 2d 325, 328 (Ala. Crim. App. 1984).

"[I]n order to challenge a statute for vagueness, the challenger must fall within the group of persons affected or possibly affected by the statute. At a minimum, the challenger must have a concern that the statute might be

unconstitutionally applied to him or her." Board of Water & Sewer Com'rs of City of Mobile v. Hunter, 956 So. 2d 403, 419 (Ala. 2006), superseded by statute as to other grounds as recognized in Arthur v. Bolen, 41 So. 3d 745, 748 (Ala. 2010).

> "It is well settled that, in order to pass constitutional muster, a penal statute must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (citations omitted)
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> > "'Due process requires that all "be informed as to what the State commands or forbids," Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939), and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).'
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> "Smith v. Goguen, 415 U.S. 566, 574, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974). However, because '[t]he essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct,' Jordan v. De George, 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95 L.Ed. 886 (1951), '[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness,' Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974), 'even though the statute may well be vague as applied to others,' Aiello v. City of Wilmington, 623 F.2d 845, 850 (3d Cir. 1980). Therefore, a defendant who challenges a statute on the grounds of vagueness

> 'must demonstrate that the statute under attack is vague as applied to his own conduct, regardless of the potentially vague applications to others.' Aiello, 623 F.2d at 850 (emphasis added). Accord Rode v. Dellarciprete, 845 F.2d 1195, 1199-1200 (3d Cir. 1988)."

Senf v. State, 622 So. 2d 435, 436-37 (Ala. Crim. App. 1993) (footnote omitted).

In this case, K.E.L. falls "within the group of persons affected or possibly affected by the statute," Hunter, 956 So. 2d at 419, and is "affected by the particular feature of the statute alleged to be in conflict with the constitution." Wilkerson, 54 Ala. App. at 105, 305 So. 2d at 380 (quoting 16 C.J.S. Constitutional Law § 84). Her challenge is based on her due-process right to notice of what conduct is prohibited and the very basis of her argument is that § 32-5A-190.1 is so vague that she could not have known that her own conduct was proscribed. Therefore, K.E.L. has standing to challenge the constitutionality of § 32-5A-190.1.

Vagueness

"'Our review of constitutional challenges to legislative enactments is de novo' ... [and] acts of the legislature are presumed constitutional." State ex rel. King v. Morton, 955 So. 2d 1012, 1017 (Ala. 2012) (quoting Richards v. Izzi, 819

So. 2d 25, 29 n.3 (Ala. 2001)). See also Pruitt v. State, 272 So. 3d 732, 735 (Ala. Crim. App. 2018) ("Statutes are presumed to be constitutional.").

> "This Court '"should be very reluctant to hold any act unconstitutional."' Ex parte D.W., 835 So. 2d 186, 189 (Ala. 2002) (quoting Ex parte Boyd, 796 So. 2d 1092, 1094 (Ala. 2001)). '[I]n passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government.' Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944) (emphasis added). This is so, because 'it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law.' 246 Ala. at 9, 18 So.2d at 815 (emphasis added)."

McInnish v. Riley, 925 So. 2d 174, 178 (Ala. 2005).

> "'"The doctrine of vagueness ... originates in the due process clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see United States v. National Dairy Products Corporation, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).
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> > "'"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United

States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989, 996 (1954). A vague statute does not give adequate 'notice of the required conduct to one who would avoid its penalties,' Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (195[2]), is not 'sufficiently focused to forewarn of both its reach and coverage,' United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S.Ct. at 598, 9 L.Ed.2d at 566, and 'may trap the innocent by not providing fair warning,' Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227-28 (1972).

"'"As the United States Supreme Court observed in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948):

> "'"'There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt.'

> "'"333 U.S. at 515–16, 68 S.Ct. at 670, 92 [L.Ed. at] 849–50 [citations omitted]."
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> "'McCrary v. State, 429 So. 2d 1121, 1123–24 (Ala. Cr. App.1982), cert. denied, 464 U.S. 913, 104 S.Ct. 273, 78 L.Ed.2d 254 (1983).'

"McCall v. State, 565 So. 2d 1163, 1165 (Ala. Crim. App. 1990).

> "'"'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 461 U.S. 352 [357], 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (citations omitted). A statute challenged for vagueness must therefore be scrutinized to determine whether it provides both fair notice to the public that certain conduct is proscribed and minimal guidelines to aid officials in the enforcement of that proscription. See Kolender, supra; Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)."'

"Timmons v. City of Montgomery, 641 So. 2d 1263, 1264 (Ala. Crim. App. 1993), quoting McCorkle v. State, 446 So. 2d 684, 685 (Ala. Crim. App. 1983). However,

> "'"'[t]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater

> precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." Robinson v. United States, 324 U.S. 282, 286, 65 S.Ct. 666, 668, 89 L.Ed. 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.'"'

"Sterling v. State, 701 So. 2d 71, 73 (Ala. Crim. App. 1997), quoting Culbreath v. State, 667 So. 2d 156, 158 (Ala. Crim. App. 1995), abrogated on other grounds by Hayes v. State, 717 So. 2d 30 (Ala. Crim. App. 1997), quoting in turn, Rose v. Locke, 423 U.S. 48, 49–50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975).

"'"Mere difficulty of ascertaining its meaning or the fact that it is susceptible of different interpretations will not render a statute or ordinance too vague or uncertain to be enforced."' Scott & Scott, Inc. v. City of Mountain Brook, 844 So. 2d 577, 589 (Ala. 2002), quoting City of Birmingham v. Samford, 274 Ala. 367, 372, 149 So. 2d 271, 275 (1963). The judicial power to declare a statute void for vagueness 'should be exercised only when a statute is so incomplete, so irreconcilably conflicting, or so vague or indefinite, that it cannot be executed, and the court is unable, by the application of known and accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended.' Jansen v. State ex rel. Downing, 273 Ala. 166, 170, 137 So. 2d 47, 50 (1962)."

Vaughn v. State, 880 So. 2d 1178, 1194-96 (Ala. Crim. App. 2003).

The State argues that the trial court erred in concluding that § 32-5A-190.1 was unconstitutionally vague because, it says, § 32-5A-190.1 can be reasonably construed to be enforceable using well settled rules of statutory construction. Specifically, the State argues that, when read in context, the phrase "may be guilty of homicide by vehicle when the violation is the proximate cause of the death" indicates the legislative intent "that, even where a defendant knowingly violates a traffic law and causes the death of another person while doing so, he or she will not be found guilty unless the jury also concludes that the violation was the proximate cause of death." (State's brief, p. 23.) Thus, the State concludes, to effectuate legislative intent, the term "may," although generally considered permissive or directory only, should be construed as mandatory in the context of § 32-5A-190.1. K.E.L. argues, on the other hand, as she did at the trial level, that the phrase "may be guilty," suggests that a knowing violation of the ARRA and proximate cause are not the only elements of the offense of

vehicular homicide and that "may be guilty" cannot be rewritten or construed to mean "shall be guilty" because "[t]he judiciary cannot undertake to aid the legislature in its task by treating the [statute] as if it uses some different terms.'" (K.E.L.'s brief, p. 13) (quoting Slagle v. Ross, 125 So. 3d 117, 123 (Ala. 2012)). We agree with the State.

"'"The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute."'" Ex parte Moore, 880 So. 2d 1131, 1140 (Ala. 2003) (quoting Ex parte Weaver, 871 So. 2d 820, 823 (Ala. 2003), quoting in turn Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996)).

> "'Where, as here, this Court is called upon to construe a statute, the fundamental rule is that the court has a duty to ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained.' Ex parte Holladay, 466 So. 2d 956, 960 (Ala. 1985). '[T]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute.... In construing the statute, this Court should gather the intent of the legislature from the language of the statute itself, if possible.... We may also look to the reason and necessity for the statute and the purpose sought to be obtained by enacting the statute.' Pace v.

> Armstrong World Industries, Inc., 578 So. 2d 281, 283 (Ala. 1991). 'If possible, the intent of the legislature should be gathered from the language of the statute itself. However, if the statute is ambiguous or uncertain, the Court may consider conditions that might arise under the provisions of the statute and examine the results that will flow from giving the language in question one particular meaning rather than another.' Volkswagen of America, Inc. v. Dillard, 579 So. 2d 1301, 1305 (Ala. 1991)."

Carroll v. State, 599 So. 2d 1253, 1264 (Ala. Crim. App. 1992), aff'd, 627 So. 2d 874 (Ala. 1993).

"[I]t is well established that criminal statutes should not be 'extended by construction,'" Ex parte Evers, 434 So. 2d 813, 817 (Ala. 1983) (quoting Locklear v. State, 50 Ala. App. 679, 681, 282 So. 2d 116, 118 (1973)), and that "'penal statutes are to be strictly construed in favor of the persons sought to be subject to their operation.'" Johnson v. Brunswick Riverview Club, Inc., 39 So. 3d 132, 138 (Ala. 2009) (quoting State ex rel. Graddick v. Jebson S. (U.K.) Ltd., 377 So. 2d 940, 942 (Ala. 1979)).

> "However, even penal laws are not to be construed so strictly as to defeat the obvious intent of the legislature. Walton v. State, 62 Ala. 197; Preist v. State, 5 Ala. App. 171, 59 So. 318. A literal interpretation which would defeat the purpose of a statute will not be adopted, if any other reasonable construction can be given to it -- Thompson v. State, 20 Ala. 54 -- and the meaning of the

> legislature may be extended beyond the precise words used if such was the intent of the legislature. Graham v. City of Mobile, 17 Ala. App. 19, 81 So. 355."

McDonald v. State, 32 Ala. App. 606, 608-09, 28 So. 2d 805, 807 (1947). As the Alabama Supreme Court has recognized:

> "'The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law giver.'"

Alabama State Bd. of Health ex rel. Baxley v. Chambers Cty., 335 So. 2d 653, 656 (Ala. 1976) (quoting Thompson v. State, 20 Ala. 54, 62 (1852)). "[I]t is ... understood that the law favors rational and sensible construction, ... [that, i]n construing statutes, courts are not required to abandon common sense," Hankins v. State, 989 So. 2d 610, 618 (Ala. Crim. App. 2007), and that "where possible, statutes should be construed to be constitutional." Decatur Lab., Inc. v. Sizemore, 564 So. 2d 976, 977 (Ala. Civ. App. 1990). Indeed, "[a] statute should not be declared void for vagueness if it can be given a reasonable construction so as to be

enforceable." Johnson v. State, 120 So. 3d 1130, 1183 (Ala. Crim. App. 2009).

"Ordinarily, the use of the word 'may' indicates a discretionary or permissive act, rather than a mandatory act." Ex parte Mobile Cty. Bd. of School Com'rs, 61 So. 3d 292, 294 (Ala. Civ. App. 2010). "This Court, however, cannot view the word 'may' in isolation." Swindle v. Remington, 291 So. 3d 439, 451 (Ala. 2019). "'[T]he prime object [of statutory construction] is to ascertain the legislative intent, as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished.'" Ex parte Brasher, 555 So. 2d 192, 195 (Ala. 1989) (quoting Alabama Pine Co. v. Merchants' & Farmers' Bank of Aliceville, 215 Ala. 66, 67, 109 So. 358 (1926) (emphasis added)). "'[W]here other words are used in connection with "shall," "must," "may," or "might," which clearly indicate mandatory or directory construction, as the case may be, we have never ignored the force of the descriptive or qualifying language.'" Stringer v. Realty Unlimited, Inc., 97 S.W.3d 446, 448 (Ky. 2002) (quoting Clark v. Reihl, 313 Ky. 142, 230 S.W.2d 626, 627 (1950)). In

determining whether a statute is mandatory or directory, "it is the legislative intent, rather than supposed words [of] art such as 'shall,' 'may,' or 'must,' that ultimately controls." Mobile Cty. Republican Executive Comm. v. Mandeville, 363 So. 2d 754, 757 (Ala. 1978). See also Robertson v. State, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981) ("[W]hen the question arises whether 'may' is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling."); and Branaum v. Patrick, 643 S.W.2d 745, 749 (Tex. Ct. App. 1982) ("Words of permissive character may be given a mandatory significance to effect the legislative intent.")

Black's Law Dictionary 1127 (10th ed. 2014), defines the word "may" as "[t]o be permitted to" and "[t]o be a possibility" but also as "required to; shall; must" and notes that "[i]n dozens of cases, courts have held may to be synonymous with shall or must, usu[ally] in an effort to effectuate what is said to be legislative intent." "'The interchangeability of "may" and "shall" to effect legislative intent is a sound rule; but it can be given a field of operation only where the overall expression of the legislative

enactment evidences an intent and purpose contrary to the term employed.'" Alabama State Bd. of Health ex rel. Baxley, 335 So. 2d at 657 (quoting Miles v. Bank of Heflin, 295 Ala. 286, 290, 328 So. 2d 281, 296 (1975)).

Section 32-5A-190.1(a) is, to say the least, inartfully worded. However, we agree with the State that the statute can be reasonably and sensibly construed to be constitutional and to effectuate legislative intent, as we are required to do, by construing the phrase "may be guilty" as mandatory, i.e., "is guilty," rather than as permissive. As noted above, § 32-5A-190.1 provides that a person who causes the death of another person while knowingly engaged in a violation of the ARRA, excluding driving under the influence, "may be guilty of homicide by vehicle when the violation is the proximate cause of the death." (Emphasis added.) The use of the phrase "may be guilty," when read in isolation and without regard to legislative intent, does suggest that guilt is permissible but is not required when a person causes the death of another while engaged in a violation of the ARRA and the violation is the proximate cause of death. However, the phrase "may be guilty" is immediately qualified by the word "when," which

indicates a legislative intent that the offense of vehicular homicide is, in fact, committed when a person causes the death of another while engaged in a violation of the ARRA and the violation of the ARRA is the proximate cause of death. To hold otherwise would defeat the obvious intent of the legislature in creating the offense of vehicular homicide and would defy common sense. Although penal statutes must be strictly construed, they "'should not be subjected to strained or unnatural construction in order to work exemption from their penalties.'" Hankins, 989 So. 2d at 618 (quoting Garrison v. Summers, 223 Ala. 17, 18, 134 So. 675, 676 (1931)).[2]

[2]In finding § 32-5A-190.1 to be unconstitutional, the trial court noted that the previous vehicular-homicide statute, § 32-5A-192, Ala. Code 1975 (repealed), used the phrase "shall be guilty" and that, because the legislature is presumed to be aware of existing law, it was possible that the legislature deliberately used the phrase "may be guilty" in § 32-5A-190.1 to signal its intent that guilt was contingent on factors not specifically set forth in the statute. However, at the time the legislature enacted § 32-5A-190.1 in 2017, there was no existing offense of vehicular homicide. The previous vehicular-homicide statute had been repealed three years earlier, in 2014. Although the trial court is correct that "[t]he Legislature is presumed to be aware of existing law and judicial interpretation when it adopts a statute," Carson v. City of Prichard, 709 So. 2d 1199, 1206 (Ala. 1998), we cannot say that the legislature is presumed to be aware of all repealed statutes.

The phrase "may be guilty" does not render § 32-5A-190.1 "'so incomplete, so irreconcilably conflicting, or so vague or indefinite, that it cannot be executed, and the court is unable, by the application of known and accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended.'" Vaughn, 880 So. 2d at 1195-96 (quoting Jansen v. State ex rel. Downing, 273 Ala. 166, 170, 137 So. 2d 47, 50 (1962)). Therefore, § 32-5A-190.1 is not unconstitutionally vague, and the trial court erred in granting K.E.L.'s motion to dismiss her indictment, on this ground.

Based on the foregoing, the judgment of the trial court is reversed and this cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., concurs in the result.