OA7
Reg. App.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. :

DALE WHEELER, :

Respondent. :

CASE NO. 63,346

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL

The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

TOPICAL INDEX

AUTHORITIES CITED

AUTHORITIES CONTINUED

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	CASE NO. 63,346
vs.	:	
DALE WHEELER,	:	
Respondent.	:	

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, State of Florida was the Appellee in the First District Court of Appeal and the prosecuting authority below. Respondent was the Appellant and defendant below. References to the transcript of testimony will be by the symbol "T" in parentheses followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent was arrested on April 16, 1981, and charged in a five-count information filed on May 11, 1981, with one count of trafficking in methaqualone, one count of possession of a firearm during the commission of a felony, and three counts of sale or delivery of cannabis (R-1-13). At trial, Okaloosa County part-time Deputy Sheriff Chuck Stacy testified that he had gone to Respondent's house on April 14, 1981, to arrange a drug buy (T-59). The arrangements were made in an automobile parked outside Respondent's dwelling. Jim Brown, a confidential informant, was also in the automobile (T-59). Stacy testified that Respondent told them "he could get the stuff that we were asking for." (T-60). They had asked for 50 pounds of Columbian Gold (marijuana), about 400 quaaludes, and several thousand hits of speed (T-60). Stacy then identified a tape which had been marked for identification as the tape which had recorded the conversation in front of the house (T-61).

The next day Stacy and Brown returned to Respondent's house where they bought a plastic bag which contained four clear plastic bags of alleged marijuana for $1400 (T-62). Respondent also gave them samples of other drugs. These drugs were eventually turned over to Investigator Brewer. Stacy further testified that on that same day they discussed

with Respondent a future sale of marijuana which was to take place the next day (T-65). Brown and Stacy returned to Respondent's house the next day and after Respondent had seen the $23,000 which was in a briefcase in the trunk of their car, they all traveled to a rest stop on I-10 (T-66,67). Stacy had given Brown $1400 for two more pounds of marijuana which had been brought out of Respondent's house as Respondent was getting into the car to go to the pickup point for the larger marijuana deal (T-67).

The person who was to deliver the drugs was not in the right place, and Respondent and Brown left Stacy at the rest stop to go look for the person (T-69). Stacy refused to go with them because the surveillance officers were at the first rest stop. After about 45 minutes, Respondent and Brown returned and they were followed by a vehicle driven by a white female (T-70). Brown got out of the vehicle and checked to see if the marijuana had in fact been delivered. Once he was satisfied, he gave a signal and the officers moved in and arrested everybody (T-70). Respondent ran to the woods, but he was apprehended by another deputy sheriff (T-71).

James Brown testified and corroborated Stacy's previous testimony. On cross-examination, Brown testified that he was operating as a confidential informant, and that he was not employed by and had received no money from the

sheriff's office other than expense money (T-94). On redirect examination, Brown testified that Respondent had never told him that he would not sell drugs (T-102), and that his offer to pay Respondent's bail had been made after Respondent had been arrested (T-103). On recross examination, Brown testified that Respondent had told him that he needed money and Brown thought that was why Respondent had agreed to arrange the drug transactions (T-104).

Sam Brewer, an Okaloosa County Deputy Sheriff, testified that he had coordinated the undercover activities and their surveillance operation in Respondent's case (T-107). His testimony corroborated Stacy's previous testimony. Jerry Alford, the Undersheriff of Okaloosa County, testified that when he apprehended Respondent at the rest stop on I-10, and he identified the gun that Respondent had had with him at that time (T-123,124).

After the State rested, Respondent's Motion for Judgment of Acquittal based upon the grounds that Respondent had been entrapped was denied (T-129). The court stated that the reason the Motion was denied was that the question of entrapment was one for the jury to decide (T-129).

Respondent testified in his own behalf and stated that Brown had approached him and wanted him to supply drugs

and names for Brown's alleged drug business (T-133). Respondent claimed that Brown had offered him $500 per week as salary in exchange for Respondent's assistance. Respondent also testified that Brown had come to his house several times and had offered to pay for a lawyer and bail bonds and generally to take care of Respondent (T-134). Respondent claimed that he had never dealt with drugs before.

Respondent admitted committing all the offenses for which he had been charged (T-146). On cross-examination, Respondent claimed that he never messed with drugs (T-148), but he then admitted regular personal use of marijuana (T-149).

During closing argument, the assistant state attorney argued that the officers had been aware that drugs were prevalent "all over the place" and that the officers knew that the only way to stop drugs was to go after the dealer. He then referred to Respondent as one of the dealers who supplied the drugs that eventually get to school yards and homes (T-189). He was interrupted by defense counsel who claimed that the assistant stated attorney had commented about matters which were not in evidence and, "for the record" moved for a mistrial (T-189). The objection was overruled and the Motion for Mistrial was denied, however the court cautioned the state attorney that Respondent was charged with particular crimes (T-190).

During defense counsel's closing argument, he claimed that the state had to prove that Respondent was not entrapped (T-198). However, the judge agreed with the state attorney and sustained the state attorney's objection on the ground that that was not the correct status of the law (T-199). The judge gave the standard jury instructions on entrapment (T-212,213), and defense counsel did not object to those instructions or any other instructions (T-219). The jury convicted Respondent on all five counts as charged (T-220).

ARGUMENT

I.

THE JURY WAS CORRECTLY INSTRUCTED ON THE STATE'S BURDEN OF PROOF.

The First District reversed on this issue because that court believed that the trial court "misled the jury to believe the state has no burden of proof in relation to an entrapment defense." Wheeler v. State, 425 So.2d 109, 111 (Fla.1st DCA 1982). The First District made this conclusion despite the fact that Respondent did not object to the standard jury instructions as given and the fact that Respondent did not request any special jury instructions. The issue arose in the context of the trial court's sustaining an objection by the assistant state attorney during defense counsel's closing argument when defense counsel argued that the State had to prove beyond a reasonable doubt that the defendant was not entrapped.

The United States Supreme Court has clearly and decisively stated that the Constitution does not require the prosecution to disprove beyond a reasonable doubt an affirmative defense. In Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct.

2319, 53 L.Ed.2d 281, 292 (1977), the court stated:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. (Emphasis added)

In other words, there is no constitutional requirement that the State must disprove Respondent's affirmative defense beyond a reasonable doubt. All that is required under Patterson, supra, and the cases cited therein is that the State "must prove guilt beyond a reasonable doubt." Id. This Court has long recognized this principle--in State v. Kahler, 232 So.2d 166, 168 (Fla. 1970), Justice Boyd wrote that:

> The law requires that the State prove each element of a criminal offense charged. The State is not required, however, to anticipate defensive matters or exceptions and negative them. The obvious result of such a requirement would render prosecution under our criminal laws unfeasible, if not impossible. (Emphasis added)

There is simply no doubt in Respondent's case that the State met the correct burden of proof--the jury was specifically instructed that the defendant had a presumption of innocence "until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt." (T-213) The jury was further instructed that "the defendant is not required to prove anything." (T-213). The definition of "reasonable doubt" was fully explained to the jury (T-214) and the jury was instructed that if it had a reasonable doubt, "you should find the defendant not guilty." (T-214). Finally, the record reveals that trial counsel made absolutely no objections to the instructions as given and that he had no additional requested instructions (T-219).

The First District based its reversal upon the Fourth District's prior case of Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978). However, Moody is distinguishable from the facts and circumstances of Respondent's case for several reasons. First, in Moody, the trial court failed to give the old standard jury instruction, and he compounded his error by failing to state on the record his reasons for not giving the instructions. Second, as was explained to the First District by the State, the standard jury instruction, as approved by this Court, is completely different from the instructions found in the Standard Jury Instructions in 1978 when Moody was decided. The First District inexplicably recognized that the new Standard Jury

Instructions do not contain any reference to the state's having to disprove a defendant's entrapment defense beyond a reasonable doubt, yet, the court accepted Respondent's counsel's argument that the reason for the omission in the new instructions was that the State's burden of proof should not be emphasized. This distinction makes no sense--what the First District has done has been to determine that the State's burden of proof should not be emphasized yet this is precisely what the First District has done by reversing based upon law which does not exist. The undersigned Assistant Attorney General, as well as the trial court and the Assistant State Attorney who tried Respondent's case, would find it more likely that the court did not include the State's burden of proof in the entrapment defense instruction because it was no longer a correct status of the law. Moreover, the four-pronged test announced in Moody is inconsistent on its face. How can a trial court logically instruct a jury that under part 1 of the test the defendant has the burden of adducing any evidence of entrapment, while under part 4 of the test the trial court is never allowed to instruct the jury "on the defendant's burden of adducing evidence." Id.

It is also significant to note that the Fourth District in Moody itself recognized that the United States Supreme Court had clearly stated in Patterson, supra, that

the Constitution did not require a state to disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to a defendant's culpability. Moody, supra, at 359 So.2d 560. The Fourth District then concluded, however, that because the Florida Supreme Court had approved the so-called "federal view" in the old Florida Standard Jury Instruction 2.11(e), that the Florida Supreme Court had construed the law in Florida to require the State to disprove beyond a reasonable doubt the affirmative defense of entrapment. Now, however, despite the fact that this Court has expressly omitted any mention of the State having to disprove beyond a reasonable doubt a defendant's defense of entrapment, the First District has seen fit to place such a burden upon the State.

Also, as was pointed out in the State's Motion for Rehearing, the issue in Moody was whether a jury instruction should have been given--in Respondent's case, however, the defense did not request the special jury instruction and did not object to the standard jury instruction as given. Trial counsel never cited Moody or any other case but instead he argued only that the State had to prove its case beyond a reasonable doubt--a burden which the State willingly assumed and a burden which was fully explained to the jury when it was charged by the trial court.

In summary, the United States Supreme Court has clearly held that the Constitution does not require the State to disprove affirmative defenses beyond a reasonable doubt. While a state is free to impose this burden upon the prosecution should it so desire, the First District should not have presumed that this Court desired to place such a burden upon the prosecution by expressly omitting any reference to the State's burden of proof in the new entrapment instruction. Whatever the law was at the time of Moody, the new instruction's express omission of the State's burden must be given credence--and the only logical explanation is that the court desired that the State prove its entire case beyond a reasonable doubt but not that the State had to disprove an affirmative defense. Accordingly, this Court should reverse the First District on this issue and find that the jury was properly instructed on the defense of entrapment.

II.

THE TRIAL COURT CORRECTLY OVERRULED RESPONDENT'S OBJECTION AND DENIED RESPONDENT'S MOTION FOR MISTRIAL DURING THE PROSECUTOR'S CLOSING ARGUMENT.

The First District also found that the trial court committed reversible error when it denied Respondent's Motion for Mistrial during the prosecutor's closing argument. The State submits that the First District was incorrect in reaching this conclusion, and this Court should reverse on this issue should the State prevail on Issue I.

During his closing argument, the prosecutor stated that undercover officers knew that drugs were "all over the place" including school yards, playgrounds, and homes. He argued that the officers knew that the only way to stop drugs was to go after the dealers, and he specifically referred to Respondent as "one of these dealers." (T-189). Respondent had just taken the stand and admitted he was a dealer by admitting that he had committed the trafficking offenses for which he was charged (T-145,146).

The sole ground upon which defense counsel objected was defense counsel's contention that the prosecutor was commenting about matters which were not in evidence:

> MR. LINDSEY [Defense counsel]: Your Honor, if it please the court, I hate to interrupt another lawyer when he is arguing a case and I hate to be interrupted, but he has commented on things not in evidence and I specifically request that the jury be admonished to disregard those comments about Mr. Wheeler being a dealer because there is no evidence of that. And the comments he went on with about where these drugs wind up and, for the record, I also move for a mistrial.
>
> T-189

In Spencer v. State, 133 So.2d 729,731 (Fla. 1961), this Court explained that "[t]he rule is that considerable latitude is allowed in arguments on the merits of the case. Logical inferences from the evidence are permissible." Moreover, in Paramore v. State, 229 So.2d 855 (Fla. 1969), the court specifically stated that it was well settled that counsel's comments during the progress of a trial before a jury are controlled by the trial court's exercise of discretion which an appellate court shall not disturb unless a clear abuse of discretion is shown. There was no abuse of discretion in Respondent's case--Respondent had just admitted he was a drug dealer in order to utilize the entrapment defense.

The First District recognized that the prosecutor's comment could be considered a matter of common knowledge, yet the court somehow concluded that the "specificity" of the remarks went beyond general comment. The State disagrees. The prosecutor was merely arguing that illegal drugs were

prevalent in the community and that those drugs got to the school grounds and homes because drug dealers sold those drugs. If that is not a logical inference, then what is?

The court's recent case of Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982), is directly on point. In that case, a defendant under sentence of death challenged his conviction on the ground that the prosecutor had made improper arguments to the jury, thereby allegedly violating the defendant's right to a fair trial. This court rejected these contentions and specifically considered whether the prosecutor had commented about other criminal acts, a "vituperative" characterization of the defendant as an animal, and an appeal to community prejudice. In a footnote, the court rejected an argument nearly identical to that accepted by the First District in this case:

> 11. The prosecutor said: 'When we walk the streets we take our chances.' In response to an objection the court said: 'Stay on the evidence in this case. The prosecutor then said: 'One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home.' The court overruled an objection to this remark. These comments appear to reflect common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place. (Emphasis added)

Breedlove, supra, at 413 So.2d 8, n.11.

Also relevant is the Court's recent opinion in Blair

v. State, 406 So.2d 1103,1107 (Fla. 1981). In that case, the Court reiterated that before reversible error could be found in the context of a prosecutor's closing argument, the jurors' minds must be so poisoned that they could not render a fair and impartial verdict. The remarks must also materially contribute to the conviction, and more importantly, the Court specifically stated that it would not presume that jurors would be "led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel." Blair, supra, at 406 So.2d 1107, quoting from Paramore v. State, 229 So.2d 855, 860 (Fla. 1969).

Moreover, in addition to the capital cases previously discussed, (Breedlove and Blair) the First District on rehearing refused to address Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). In that case, the prosecutor had referred to the defendant as an "animal," and he had argued that the imposition of the death penalty was the only way that the public could be protected, and he even commented that he wished the victim had had a shotgun so that he could have blown the defendant's face off. As was argued to the First District, it is very doubtful that there was any evidence introduced in the Darden case which would have shown that Darden was literally an "animal." Rather, this Court allowed the prosecutor to make logical inferences from the

record--the same type of inferences which should be allowed in this case. It must be remembered that Respondent had admitted he was a drug dealer, yet the court prevented the State from commenting about the fact that drugs sold by dealers end up in the homes of jurors. In light of the above cases, the Court should find, as the dissent did in Respondent's case, that the prosecutor's closing argument was not improper.

Finally, it should be remembered that the jury was instructed prior to the presentation of evidence or testimony that what the lawyers would say was not evidence and could not be considered (T-8) and that the "case must be tried solely on the evidence that is presented during the trial and from the witness stand...." (T-9). Also, during his closing charge to the jury, the trial court reiterated that the jury could look only to the evidence adduced at trial (T-213) and that the case "must be decided only upon the evidence that you have heard, from the answer of the witnesses and have seen in the form of evidence being introduced into this courtroom...." (T-216).

In Donnelly v. DeChristoforo, 416 U.S. 637, 644, 94 S.Ct. 1868, 40 L.Ed.2d 431, 437 (1974), the United States Supreme Court stated that when evaluating a defendant's claim of a prosecutor's prejudicial argument, a reviewing court

should look to whether the jury had been instructed by the court and the prosecutor that a lawyer's argument could not be considered evidence. In Respondent's case, in addition to the charge made by the judge, the prosecutor himself had cautioned the jury at the beginning of the trial that his arguments could not be considered evidence (T-14). Also during closing argument, the prosecutor again reminded the jury that his argument could not be considered as evidence and that his comments represented how he regarded the evidence (T-182). Under the controlling rationale of Donnelly, the jury was well informed that the prosecutor's remarks could not be considered evidence, and the First District should not have reversed on this ground. Not only did the prosecutor's arguments not constitute reversible error, the arguments were not improper at all. This Court should reverse on this issue.

III.

SINCE RESPONDENT'S OTHER CONVICTIONS ARE VALID, THE FIRST DISTRICT'S REVERSAL OF THE USE OF A FIREARM DURING THE COMMISSION OF A FELONY CONVICTION SHOULD BE REINSTATED.

Respondent's use of a firearm during the commission of a felony conviction was reversed solely because the other felony convictions were overturned. If the State prevails on

Issues I and II, there would be no impediment to convicting Respondent of possessing a firearm in the commission of a felony. Accordingly, should the State prevail on the first two issues Respondent's conviction on this issue should be reinstated.

CONCLUSION

Based on the facts and foregoing arguments the decision of the First District Court of Appeal should be quashed and Respondent's judgments and sentences should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Lawrence A. Kaden
LAWRENCE A. KADEN
Assistant Attorney General

The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished to William K. Jennings, P. O. Box 2706, Fort Walton Beach, Florida 32549 this 29th day of March, 1983.

Lawrence A. Kaden
Of Counsel