IN THE SUPREME COURT OF FLORIDA

PEDRO A. CRUZ, Petitioner,	)	
v.	)	Case No. 63,451
STATE OF FLORIDA, Respondent.	)	

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the defendant in the Hillsborough County Circuit Court and Appellee in the Second District Court of Appeal and will be referred to as "Petitioner" in this brief. Respondent was the plaintiff in the trial court and the Appellant in the Second District Court of Appeal and will be referred to as "State" or "Respondent" in this brief. Respondent will use the Symbol "R" followed by the appropriate page number in reference to the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The facts of this case were set forth in the opinion of the Second District Court of Appeal, as follows.

> "The state filed an information charging Pedro A. Cruz with grand theft. Cruz moved to dismiss the charges under Florida Rule of Criminal Procedure 3.190(c)(4) on the ground that the undisputed facts showed he was entrapped as a matter of law. The trial court granted Cruz's motion on the authority of State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982).
>
> * * *
>
> In Cruz's motion to dismiss, he contended that the following facts were undisputed and did not establish a prima facie case of guilt.
>
> 1. On March 1, 1982, certain members of the Tampa Police Department, specifically, Officer Tommy Ellis, Officer John L. Counsman, Officer George L. Lease, Officer P. Saladino, and Officer M.D. Johnson, were conducting a decoy operation in the area of West Kennedy Boulevard and Brevard Street.
>
> 2. As part of said operation, Officer Tommy Ellis was dressed as a low income individual wearing blue slacks, a torn checked coat and a golf hat and was the decoy in the operation.
>
> 3. Officer Ellis was simulating a state of intoxication, to wit: he was doused with alcohol, pretending to be drinking wine from a bottle, and was coughing and belching.

4. Officer Ellis was stationed near an alleyway, leaning against a building with his face to the building, and displaying currency in the amount of $150.00, the bills being paperclipped together, from his right rear pants pocket.

5. The other officers involved in the operation were stationed in surrounding locations and were to provide back up assistance in apprehending anyone who may lift the money from the decoy's pocket.

6. At some time after 10:00 p.m., Officer Saladino, who was stationed in an alleyway by the decoy, observed the Defendant and a white female walking west on Kennedy Boulevard.

7. ...it appeared that the Defendant approached the decoy and perhaps attempted to speak to him and then walked away from the decoy.

8. Approximately ten to fifteen minutes after that time, ... the Defendant and the while female return to the location of the decoy, the Defendant paused a short time and then lifted the money from the decoy's pocket without physically harming the decoy in any way.

. . . .

12. . . . none of the unsolved crimes occuring (sic) near this location involved the same modus operandi as the simulated situation created by the officers.

13. ...the decoy operation was not set up to catch any particular individual.

14. Said officers ... had not observed the defendant being engaged

> in any criminal activity prior to the time the money was taken from the decoy, and had no knowledge that the Defendant had previously engaged in similar theft related crimes, had no knowledge of any criminal record for the Defendant and had no knowledge of any reputation of the Defendant for criminal activities.
>
> After hearing arguments of counsel and determing there was no dispute as to any material facts, the trial court granted Cruz's motion on the authority of Casper." (Footnotes omitted) State v. Cruz, 426 So.2d 1308, 1309 (Fla. 2d DCA 1983)

The Second District,holding that a defendant's predisposition to commit an offense was a jury question, reversed the trial court's order of dismissal, noting conflict with State v. Casper, supra.

Petitioner filed a timely notice to invoke discretionary jurisdiction and this Court accepted jurisdiction on July 12, 1983. Respondent's answer brief on the merits follows.

QUESTION ON APPEAL

WHETHER ENTRAPMENT IS A JURY QUESTION AS DECIDED BY THE SECOND DISTRICT COURT OF APPEAL IN THIS CAUSE OR WHETHER INTENT AND STATE OF MIND AS TO PREDISPOSITION IS PROPERLY RAISED AS A MATTER OF LAW PURSUANT TO A PRETRIAL MOTION TO DISMISS AS DECIDED BY THE FIRST DISTRICT COURT OF APPEAL IN STATE V. CASPER, 417 So.2d 263 (Fla. 1st DCA 1982), CERT. DEN. 418 So.2d 1280 (Fla. 1982).

ARGUMENT

Petitioner filed a sworn motion to dismiss pursuant to Rule 3.190(c)(4), Florida Rules of Criminal Procedure alleging that the undisputed material facts established as a matter of law that he had been entrapped (R. 4-6). Petitioner's legal basis for this motion was that the use of a policeman masquerading as a drunken bum with cash protruding from his pants pocket was sufficient to establish entrapment as a matter of law. The Motion did not allege that Petitioner was not predisposed to commit the crime.[1] Since the Motion failed to allege lack of predisposition, any traverse of same would have been superfluous. Ellis v. State, 346 So.2d 1044(Fla. 1st DCA 1977).

Intent, motive or predisposition are not proper grounds upon which to grant a (c)(4) motion to dismiss. State v. Sokos,426 So.2d

1/ The motion alleged that the police officers had no information about Petitioner's predisposition but not that Petitioner, in fact, lacked predisposition.

1044 (Fla. 2d DCA 1983); State v. Evans, 394 So.2d 1068 (Fla. 4th DCA 1981); State v. Rodgers, 386 So.2d 278 (Fla. 2d DCA 1980), cert. denied 392 So.2d 1378 (Fla. 1980); Cummings v. State, 378 So.2d 879 (Fla. 1st DCA 1979) cert.denied 386 So.2d 635 (Fla. 1980); State v. West, 262 So.2d 457 (Fla. 4th DCA 1972). In State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979), the Second District Court of Appeal held:

> Even if the state had not traversed Appellees' motion to dismiss, it would have been error for the trial court to grant the motion. The sole basis for the motion was that appellees lacked intent to damage the automobile in question. Intent is not an issue to be decided on a motion to dismiss under Rule 3.190(c)(4), Florida Rules of Criminal Procedure , since intent is usually inferred from the acts of the parties and the surrounding circumstances; being a state of mind, intent is a question of fact to be determined by the trier of fact, who has the opportunity to observe all the witnesses. State v. West, 262 So.2d 457 (Fla. 4th DCA 1972).
>
> A proceeding under Rule 3.190(c)(4) is the equivalent of the civil summary judgment proceeding, and as stated in State v. West, supra. at 458:
>
> The trial court may not try or determine factual issues in a summary judgment proceeding; nor consider either the weight of the conflicting evidence or the credibility of the witnesses in determining whether there exists a genuine issue of material facts; nor substitute itself for the trier of the fact and determine controverted issues of fact. Id. at 419 (emphasis supplied).

It is well settled that there is no constitutional prohibition against a law enforcement officer providing an opportunity

for a ready and willing individual to commit a crime. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973); Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed. 2d 113 (1976); State v. Dickinson, 370 So.2d 762 (Fla. 1979).

> "Decoys are not permissible to ensnare innocent and law abiding persons into the commission of a crime but they may be used to entrap criminals and to present the opportunity to one intending or willing to commit a crime. Koptyra v. State, Fla. App. 1965, 172 So.2d 628." State v. Rouse, 239 So.2d 79, 80 (Fla. 4th DCA 1970).

Florida Statute 812.028 declares:

> "It shall not constitute a defense to a prosecution for any violation of the provisions of §812.02-812.037 that:
>
> (1) Any stratagem or deception, including the use of an undercover operative or law enforcement officer was employed.
>
> (2) A facility or an opportunity to engage in conduct in violation of any provision of this act was provided.
>
> (4) A law enforcement officer solicited a person predisposed to engage in conduct in violation of any provision of §812.012-812.037 in order to gain evidence against that person, provided such solicitation would not induce an ordinary law abiding person to violate any provision of §812.012-812.037."

Thus, the Florida legislature has determined that for Chapter 812 offenses that the use of stratagems or deception (such as police decoys) will not constitute a defense to prosecution and

soliciting a predisposed person to violate Sections 812.012-037 to gain evidence is proper provided such solicitation would not induce an ordinary law abiding person to violate the law. A determination of what would suffice to induce the law abiding person to break the law is a factual determination to be made by the trier of fact (the jury). §812.028 Florida Statutes 1979) codified the entrapment defense as it had previously been established by Florida case law. State v. Dickinson, supra.

The essence of the argument in the amicus brief filed herein was that by placing a tempting decoy on the street, law enforcement did more than merely furnish an opportunity to commit the offense,and in fact created the entire crime scenario. It is well established, however, that the authorities are not precluded from acting in good faith for the purpose of detecting a crime and merely furnishing an opportunity for the commission of the crime by one who had the required criminal intent. Lashley v. State, 67 So.2d 648 (Fla. 1953). A high degree of involvement by law enforcement in the crime scenario is not necessarily impermissible. United States v. Russell; State v. Dickinson. It is well settled that deception and artifice may, under certain circumstances, properly be employed to catch those engaging in criminal activity. State v. Smail, 337 So.2d 421, 423 (Fla. 2d DCA 1976).

Predisposition to commit a crime is intent or motive to commit the crime. Evidence of predisposition can be established through evidence of the defendant's prior convictions or of re-

putation to commit certain illicit activities as well as through evidence that the defendant had a readiness or willingness to commit the crime. Story v. State, 355 So.2d 1213, 1215 (Fla. 4th DCA 1978); State v. Casper at 265. This willingness to commit the offense can be evidenced from a ready acquiescence in the criminal scheme suggested by the law enforcement officer. Id. The instant record does not indicate that Petitioner was pressured into committing the grand theft.

In United States v. Russell, the United States Supreme Court noted:

> [T]he entrapment defense prohibits law enforcement officers from instigating a criminal act by persons otherwise innocent in order to lure them to its commission and to punish them. Thus, the thrust of the entrapment defense was held to focus on the intent of predisposition of the defendant to commit the crime. '[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue . . .'

Id at 428, 429 [Citations omitted].

In State v. Sokos, supra., the Second District Court of Appeal recognized existing case law which permits entrapment to exist as a matter of law.[2] Nevertheless, that court held that "intent or state of mind (i.e. pre-disposition) is not an issue to be decided on a motion to dismiss under Rule 3.190(c)(4)." Id. at 1045. State v. Evans; State v. Rogers; Cummings v. State; State v. J.T.S.; State v. West. In Sokos, the court

2. Smith v. State, 320 So.2d 420 (Fla. 2d DCA 1975); Spencer v. State, 263 So.2d 282 (Fla. 1st DCA 1972).

determined that an entrapment defense focuses on intent or predisposition to commit a crime. Thus, the court concluded the defendant's ready acquiescence and intent to participate in a criminal act was a jury question. Subsequently, the Second District Court of Appeal addressed the same issue in the instant case.

Under facts almost identical to those in State v. Casper[3] the Second District again acknowledged the law relating to entrapment was correctly set out by the First District in Casper. Relying on Sokos, the Second District went on to hold:

> "that predisposition could be shown by establishing (1) prior criminal activity by the defendant; or (2) reasonable suspicion of his involvement in such activity; or (3) his ready acquiescence in the commission of the crime. See Story v. State, 355 So.2d 1213, 1215 (Fla. 4th DCA), cert. denied, 364 So.2d 893 (Fla. 1978).
>
> There is no prohibition against the police using decoys to present the opportunity to those intending or willing to commit a crime. See State v. Rouse, 239 So.2d 79 (Fla. 4th DCA 1970); Koptyra v. State, 172 So.2d 628 (Fla. 2d DCA 1965). Here, the police provided an opportunity for Cruz to commit a crime, but there is no showing that he was approached or encouraged by the police to do so. Thus, there is a question of fact as to whether Cruz was predisposed to commit the offense." State v. Cruz at 426 So.2d 1309, 1310.

In the last analysis the crux of the conflict between the instant case and State v. Casper becomes crystal clear. The Second District Court of Appeal believed the facts set forth in

3. Respondent would note that State v. Holliday, Case No. 63,832 now pending before this Court presents a factual scenario remarkably similar to both Casper and the instant case.

Petitioner's (c)(4) motion were sufficient to raise a jury question on the issue of predisposition. The Casper Court held, on nearly identical facts, that the record was devoid of any evidence of predisposition and that, therefore, the motion to dismiss was properly granted. Casper, supra. at 417 So.2d 265.

Given the widespread reliance upon undercover decoy operations by law enforcement officers throughout the state, Respondent urges this Court to address the issue in a straightforward manner removing any prohibition against the use of decoys to present the opportunity to those intending or willing to commit a crime. State v. Rouse; Koptyra v. State. Respondent further urges this Court to hold that while entrapment may exist as a matter of law,[4] intent or state of mind is not properly decided pursuant to a Rule 3.190(c)(4) motion to dismiss. State v. Sokos; State v. Evans; State v. Rogers; Cummings v. State; State v. J.T.S.; State v. West.

4/ Smith v. State, 320 So.2d 420 (Fla. 2d DCA 1975) cert. denied 334 So.2d 608 (Fla. 1976)

CONCLUSION

Based on the foregoing arguments and authorities Respondent respectfully requests that this Court affirm the decision of the Second District Court of Appeal in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Douglas S. Connor, Assistant Public Defender, Court House Annex, Tampa, Florida 33602 and James T. Miller, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida 32202, this 23nd day of August, 1983.

M. Ann Garrison
Of Counsel for Respondent