

IN THE SUPREME COURT OF FLORIDA

JAMES RAY ROTENBERRY,

Petitioner,

vs.

CASE NO. 63,719

STATE OF FLORIDA,

Respondent.

FILED

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RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, JAMES RAY ROTENBERRY, was the defendant in the trial court, and the appellant in the District Court of Appeal, First District. The State of Florida was the prosecution and appellee in the courts below. Reference to the parties will be as they appear before the Court.

The record on appeal will be referred to by use of the symbol "R."

STATEMENT OF THE CASE AND FACTS

Petitioner, James Ray Rotenberry, was tried by a jury and convicted of trafficking in cocaine, sale of cocaine, and possession of cocaine. Petitioner was separately sentenced for the three offenses. On appeal, the convictions of Petitioner were affirmed, however, the District Court reversed the sentences imposed on the sale and possession convictions. Also, the District Court certified the following question as one of great public importance:

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS NOT ENTRAPPED WHEN THAT DEFENSE HAS BEEN RAISED, IS THE GIVING OF THE PRESENT ENTRAPMENT INSTRUCTION AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04(c) ALONG WITH THE GENERAL REASONABLE DOUBT INSTRUCTION SUFFICIENT, NOTWITHSTANDING THE DEFENDANT HAVING SPECIFICALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS NOT THE VICTIM OF ENTRAPMENT BY LAW ENFORCEMENT OFFICERS?

Rotenberry v. State, ___ So.2d ___ (Fla. 1st DCA Case No. AL-41, opinion filed March 18, 1983) [8 FLW 808, 809].

Respondent accepts the sequence of events as related in the opinion of the First District Court of Appeal. See 8 FLW at 808-809.

ARGUMENT

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

The District Court's certified question in the present case presupposes that the State has the burden to prove beyond a reasonable doubt that a defendant was not entrapped when that defense has been raised. Respondent would submit that the First District Court's opinion in Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1982), pending on certified question (Case No. 63,346), is incorrect because the State does not have the burden of disproving affirmative defenses beyond a reasonable doubt.

Petitioner has premised his argument on his belief that the jury was misled concerning the State's burden of proof in this case. However, the record reveals that the jury was properly instructed that the State had to prove Petitioner's guilt beyond a reasonable doubt and that Petitioner was not required to prove anything (R 166-168).

The State has the burden to prove all elements of a crime beyond a reasonable doubt -- this burden remains with the State throughout an entire trial, regardless of whatever affirmative defense is raised by the defendant. The Constitution permits the government to allow the burden of persuasion to shift to a defendant, but the burden of proof to prove the entire case beyond a reasonable doubt stays with the State throughout an entire trial. The record reveals that the jury was so instructed in this case.

The defense of entrapment is affirmative in the sense it requires a defendant to bear the risk of nonpersuasion. See Barnes v. United States, 412 U.S. 837, 846, n.11 (1973). In other words, if a jury finds a defendant guilty beyond a reasonable doubt, then the jury has of necessity found that the defendant intended to commit the crime and that he was not induced or 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 (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.

432 U.S. at 292 (emphasis added).

In other words, there is no constitutional requirement that the State must disprove Petitioner's affirmative

defense beyond a reasonable doubt. All that is required under Patterson and the cases cited therein is that the State "must prove guilt beyond a reasonable doubt." 432 U.S. at 292.

This Court has long recognized this principle -- in State v. Kahler, 232 So.2d 166 (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.

232 So.2d at 168 (emphasis added). There is no doubt in Petitioner'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" (R 167). The jury was further instructed that "the defendant is not required to prove anything" (R 168). Also, the definition of "reasonable doubt" was fully explained to the jury and the jury was instructed that if it had a reasonable doubt, "then you should find the defendant not guilty" (R 168).

Petitioner states that the jury instructions given in the present case, i.e., Fla.Std.Jury Instr. (Crim.) 3.04(c) (Entrapment), and the general instructions on the defendant's presumption of innocence, on reasonable doubt and on the State's burden of proof, leave an erroneous impression on the jury that the defendant must prove his innocence. However, in an Eleventh Circuit case similar to the present

case, United States v. Vadino, 608 F.2d 1329 (11th Cir. 1982), cert. denied sub nom., Natale v. United States, ___ U.S. ___, 33 Cr.L. 4019 (1983), the defendants specifically requested the Court to instruct the jury that the government had the burden of proving that the defendants were not entrapped. The federal court of appeals rejected that argument and stated that the jury instructions were constitutionally sufficient because the jury had been instructed on the government's general burden of proving its entire case beyond a reasonable doubt and that the jury had been specifically instructed (like Petitioner's jury was) that the defendant did not have to prove anything.

What Petitioner is really asking for is a special instruction that the State must disprove beyond a reasonable doubt whatever affirmative defense a defendant might raise, for e.g., self-defense or insanity. This would mean that if a defendant presents any evidence at all concerning his affirmative defense, the State's proof must fail. That is not the law, and the Court should not make it the law. Florida's standard jury instructions clearly place the burden of proof upon the State, and the jury was not misled in this case.

Even if the State is required to disprove affirmative defenses beyond a reasonable doubt, the facts of the instant case demonstrate that the State's burden of proof was met. In its opinion in the present case, the District Court stated that the trial court's instructions to the jury complied with the requirements of Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978). The trial court not only instructed the jury as to

entrapment, Instruction 3.04(c), which states:

If you find from the evidence
that the defendant was entrapped,
or if the evidence raises a reason-
able doubt about the defendant's guilt,
you should find him not guilty.

(emphasis added), but "also instructed the jury on the general reasonable doubt subject and told them that ' the defendant is not required to prove anything'." 8 FLW at 809. See also McCray v. State, ___ So.2d ___ (Fla. 4th DCA Case No. 82-167, opinion filed May 18, 1983)[8 FLW 1389]. These instructions tell the jury that if after all the evidence is considered, there remains a reasonable doubt as to whether the defendant was entrapped (in other words, the State did not sufficiently overcome the evidence of entrapment raised by defendant), then the jury should find the defendant not guilty. Thus, the jury was charged as to the State's burden of proof. (Also noteworthy is that the Fourth District in Moody itself recognized that the United States Supreme Court had clearly stated in Patterson that the Constitution does not require a state to disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to a defendant's culpability. 359 So.2d at 560.)

Moreover, The District Court found:

Appellant was unpersuasive with the jury, the trial court and now this Court that he was a victim of "undue pressure" which constituted the entrapment. It clearly appears from the evidence that Rotenberry has possessed illegal drugs in the past; that he was a willing participant in the drug transaction; that at no time did he object to the planned criminal activities; and that it was his friend, not law enforcement officers, who lured him into the "deal." Appellant's predisposition and promptness were sufficiently

demonstrated and sufficiently proven
in fact and law such to defeat the
defense of entrapment.

8 FLW at 808-809.

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, it cannot be 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. However, should this Court impose the Moody requirement that the State disprove affirmative defenses beyond a reasonable doubt, Respondent would submit that the facts and circumstances of the instant case demonstrate that the State's burden was sustained. Accordingly, Respondent respectfully submits that the certified question should be answered, if at all, in the affirmative.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities, Respondent would respectfully request that this Honorable Court affirm the decision of the First District

Court of Appeal on the entrapment issues.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to PAULA S. SAUNDERS, Assistant Public Defender, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida 32302, by hand this 6th day of July, 1983.


RICHARD A. PATTERSON
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