IN THE SUPREME COURT OF FLORIDA

JAMES RAY ROTENBERRY,

Petitioner,

v. CASE NO. 63,719

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PETITIONER'S BRIEF ON THE MERITS

I 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 this Court.

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

II STATEMENT OF THE CASE AND FACTS

Petitioner, James Ray Rotenberry, was charged in a three count information with trafficking in cocaine, sale of cocaine, and possession of cocaine (R 211). At trial, petitioner relied on the defense of entrapment as to all the counts alleged against him.

On August 10, 1981, Officer Snow of the Pensacola Police Department met with Van Price in a scheme to purchase marijuana from Marvin Hurst (R 18; 137). Price had been arrested that day for grand theft (R 135). Price contacted Hurst several times over a four day period to arrange the drug deal (R 111; 138-139). Hurst, in turn, contacted petitioner about obtaining the drugs for Price (R 100). When first approached about the sale of drugs, petitioner said that he had none to sell (R 115). Petitioner later agreed to supply Hurst with cocaine. Price testified that he had never purchased drugs from petitioner and would not have purchased the cocaine from Hurst but for the police asking him to do it (R 143-144). Hurst testified that he contacted petitioner about acquiring the drugs because Price was pressuring him and petitioner was the only person Hurst could trust (R 112, 116). Petitioner was not known to Hurst as a dealer in drugs (R 115-116).

The transaction took place in the parking lot of Sacred Heart Hospital. Petitioner sat in his truck while Hurst made contact with Price and Snow (R 103-104). Following the delivery

of the cocaine and transfer of money, petitioner was arrested (R 76).

During the charge conference, petitioner requested a special instruction on the defense of entrapment. He requested that the court give the Florida Standard Jury Instruction (criminal) 3.04(c) (entrapment) but delete the last sentence:

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

Petitioner requested the court substitute this sentence with the following instruction from the former standard jury instructions:

> The state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officers, and unless it has done so you should find the defendant not guilty.

(R 157; 229). The court refused to give the requested instruction but instead gave the standard jury instruction on entrapment (R 166-167).

The jury found petitioner guilty as charged on all three counts (R 230). He was sentenced to serve five years on each of the counts to run concurrently, and pay a fine of $50,000 (R 241-245). The trial court denied petitioner's motion to vacate the sentence or set aside the adjudication of guilt as to the sale and possession charges on the ground that Section 775.021(4), Florida Statutes (1981), precludes multiple sentencing on lesser included offenses committed during the same

criminal episode (R 237, 239).

On March 29, 1982, petitioner filed a timely notice of appeal (R 247). On June 4, 1982, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

Petitioner raised three issues on appeal. First, petitioner argued that the trial court erred in denying his motion for judgment of acquittal as the state failed to show that he had a predisposition to commit the offenses. Petitioner next sought review of the trial court's denial of his requested instruction on entrapment. Finally, petitioner sought reversal of the trial court's denial of his motion to vacate the sentences on the two lesser included offenses, the sale of cocaine and the possession of cocaine, committed during the same criminal episode.

On March 18, 1983, the First District Court of Appeal issued an opinion affirming petitioner's conviction and sentence for trafficking in cocaine and vacating the sentences for sale and possession of cocaine. Rotenberry v. State, 429 So.2d 378 (Fla. 1st DCA 1983). With respect to the requested jury instruction, the court noted that the former instruction 2.11(e) as rewritten in 1981 to the current instruction 3.04(c), standing alone, may be inadequate in light of the state's burden of proof. The court concluded, however, that the present standard instruction on entrapment, when considered in conjunction with the instructions given on reasonable doubt and the state's burden of proof, was sufficient and that the failure

to give the specially requested instruction was not error. The court then 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?

429 So.2d at 380.

On May 23, 1983, petitioner filed a notice to invoke the discretionary jurisdiction of this Court, on the ground that the decision of the First District Court of Appeal passes upon a question certified to be of great public importance.

III ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUESTED INSTRUCTION ON ENTRAPMENT.

The established law in Florida regarding the defense of entrapment requires the state to prove the absence of entrapment beyond a reasonable doubt after the defendant has established evidence of entrapment. Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1982), pending on certified question (Case No. 63,346); Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978). In the case sub judice, petitioner met his initial burden of adducing evidence of entrapment through his cross examination of Marvin Hurst and his direct examination of Van Price so as to warrant a jury instruction on his defense. See Weaver v. State, 370 So.2d 1189 (Fla. 4th DCA 1979); Kwasniewski v. State, 303 So.2d 373 (Fla. 1st DCA 1974); Stiglitz v. State, 270 So.2d 410 (Fla. 4th DCA 1972). It was then incumbent upon the trial court to properly instruct the jury concerning the rules of law applicable to the defense. Koptyra v. State, 172 So.2d 628, 632 (Fla. 2d DCA 1965).

This Court has previously recognized that standard jury instructions are not to be administered automatically or blindly regardless of the circumstances, but are to be used to such an extent as may be applicable in the judgment of the trial court. State v. Bryan, 287 So.2d 73 (Fla. 1973). The court

should use the standard instructions,

> but without prejudice to the rights of any litigant objecting to the use of one or more of such approved form of instruction.

287 So.2d at 75. Here, petitioner objected to the use of the standard entrapment instruction, 3.04(c), because it did not clearly inform the jury of the state's burden of proof when the defense of entrapment was raised. Petitioner contended that the former instruction 2.11(e) stated the law with regard to the state's burden in clearer terms.

Former standard jury instruction 2.11(e) instructed the jury in pertinent part:

> The state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officers, and unless it has done so you should find the defendant not guilty.

Similar language was approved in Pratti v. United States, 389 F.2d 660 (9th Cir. 1968), which held that when entrapment is an issue, the jury must be charged that the burden of showing that there is no entrapment is on the prosecution. This must be made explicit even though the jury is properly informed in a general instruction as to the burden of proof which rests on the state. Moody v. State, supra; Notaro v. United States, 363 F.2d 169 (9th Cir. 1966). See also Government of Virgin Islands v. Cruz, 478 F.2d 712 (3d Cir. 1973).

The court in Moody v. State, supra, adopting the federal view, stated the law on entrapment as follows:

> (1) [t]he defendant has the burden of adducing any evidence of entrapment; (2) The trial court determines the sufficiency of the evidence of entrapment; (3) if the evidence of entrapment is sufficient the jury must be instructed that the state has the burden of disproving entrapment beyond a reasonable doubt; and (4) the jury should never be instructed on the defendant's burden of adducing evidence.

359 So.2d at 560. Accord, United States v. Braver, 450 F.2d 799 (2d Cir. 1971), cert. den., 405 U.S. 1064 (1972), where the court recommended a simplification of the entrapment instruction that did not give the jury two ultimate factual issues to decide on the two different burdens of persuasion imposed upon the defendant and the prosecution. The court suggested that the jury should not be told that the defendant has any burden, but that it would be enough to tell the jury that if it found some evidence of government initiation or inducement, then the government had to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime.

Clearly, once the defendant has adduced evidence of entrapment and the issue is submitted to the jury, the ultimate question for the jury to decide is whether the state has established beyond a reasonable doubt that the accused was not entrapped. It is reversible error for the trial court to fail to instruct the jury on the state's burden of proof with respect to the entrapment issue. Moody v. State, supra. In Moody, the trial court instructed the jury on the defense of entrapment but

omitted the last paragraph of instruction 2.11(e) regarding the state's burden of proof. In lieu of this paragraph, the court instructed:

> If you find the State did entrap the Defendant into committing the crime, then you should find him not guilty.

In reversing the appellant's conviction, the Moody court held:

> The giving of this instruction without also instructing on the State's burden could well have left the jury with the impression that it was incumbent upon the appellant to prove his innocence. . . . In effect, the jury was told that the state must prove the essential elements of the crime beyond a reasonable doubt but the appellant must prove entrapment. Such is not the law.

359 So.2d at 561. The present standard jury instruction suffers from the same infirmities as the instruction given in Moody.

Florida Standard Jury Instruction (criminal) 3.04(c) (entrapment) reads:

> The defense of entrapment has been raised. This means that (defendant) claims he had no prior intention to commit the offense and that he committed it only because he was persuaded or caused to commit the offense by law enforcement officers.
>
> (Defendant) was entrapped if:
>
> 1. he had no prior intention to commit (crime charged), but
>
> 2. he was persuaded, induced or lured into committing the offense and
>
> 3. the person who persuaded, induced or lured him into committing the offense was a law enforcement officer, or someone acting for the officer.
>
> However, it is not entrapment, merely because

a law enforcement officer in a good faith attempt to detect crime:

a. [provided the defendant the opportunity, means and facilities to commit the offense, which the defendant intended to commit, and would have committed otherwise.]

b. [used tricks, decoys or subterfuge to expose the defendant's criminal acts.]

c. [was present and pretending to aid or assist in the commission of the offense.]

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

The rewritting of the former entrapment instruction 2.11(e) eliminated that portion of the charge to the jury that "The the state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment . . . " In Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1982), the court noted that no significance should be attached to the change in the standard jury instructions as the intent of the deletion was not to change the law "but was to merely avoid undue emphasis as to the state's burden of proof." 425 So.2d at 111.

However, the deletion has resulted in a misleading and confusing charge which wholly fails to inform the jury that the burden of disproving entrapment still lies with the state. While setting forth the correct standard proof, the language, "If the evidence raises a reasonable doubt about the defendant's guilt," absent a clear statement as to who bears the burden of proof, creates the impression that the defendant

carried the burden as to the positive elements of his defense. The instruction begins, "The defense of entrapment has been raised," suggesting that since the accused raised the defense, the accused had the burden of raising the doubt about his guilt.

As aptly stated by one federal court:

> When a party has the burden of proof as to a factual issue, it cannot be proper that instructions pertaining to the issue are so vague or ambiguous as to permit of misinterpretation by the jury of the standard which is to be applied. The desire of a careful judge to avoid language which to him may seem unnecessarily repetitive should yield to the paramount requirement that the jury in a criminal case be guided by instructions framed in language which is unmistakably clear. (Emphasis added).

Notaro v. United States, 363 F.2d 169, 175 (9th Cir. 1966).

Notaro v. United States, supra, is the leading federal case on entrapment instructions. The court in Notaro held that the trial court committed reversible error by failing to adequately instruct the jury that it was the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped. The court condemned the following portion of the entrapment charge:

> On the other hand, if the jury should find from the evidence in the case that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a good defense and a jury should acquit the defendant.

The court found that the wording "should find from the evidence"

improperly required "a definite, conclusive determination of disputed factual issues . . . as a condition to acquittal." 363 F.2d at 176. The language of the instant instruction, "If you find from the evidence that the defendant was entrapped, . . . , you should find him not guilty," likewise requires a definitive finding as a condition to acquittal. To further complicate the instant instruction, the reasonable doubt language is employed in the disjunctive - - "or if the evidence raises a reasonable doubt about the defendant's guilt" - - but is not included in the foregoing portion of the charge.

Clearly, the standard instruction here is misleading and confusing: misleading because it fails to inform the jury which party bears the burden of proof; confusing because the standard of proof is employed in the disjunctive. Even if the language is not an incorrect statement of the law, it is at the very least ambiguous. It is suggested that the First District Court of Appeal in Wheeler was correct in observing that the 1981 revision of the entrapment instruction was not intended to change the law but was intended to avoid undue emphasis as to the state's burden of proof. However worthy that intention, it must yield to the paramount consideration that the jury be properly informed about the rules of law applicable to the entrapment defense.

In its opinion, the district court below observed that "Instruction 3.04(c), standing alone, may be inadequate in light of the Moody requirements of proof," but noted that the

trial court "also instructed the jury on the general reasonable doubt subject and told them that 'the defendant is not required to prove anything.'" 429 So.2d at 380. (See R 168). The court concluded:

> Considering the totality of the instructions given relating to entrapment, reasonable doubt, and the state's burden of proof, it is our conclusion that the requirements of Moody were adequately met.

Id. Petitioner submits that the general instructions on reasonable doubt and the state's burden of proof do not sufficiently apprise the jury of the ultimate burden in an entrapment defense so as to overcome the infirmities of the instant instruction. The Ninth Circuit Court of Appeals addressed the "totality of the instructions" argument in Notaro v. United States, 363 F.2d at 176, reasoning:

> [W]e have been mindful of the obligation to consider the instructions in their entirety. The jury was properly informed, in a general instruction, as to the burden of proof which rested upon the prosecution; however, we cannot assume that it carried the advice of the general instruction into application to the instruction emphasizing the specific elements of the defense. The possibility that there was confusion or misunderstanding is strengthened, not eliminated, by view of the instructions as a whole.

Similarly, in Moody v. State, supra, the court rejected the state's contention that the failure to instruct the jury that the burden of proof was on the state was justified when considering all the instructions in their entirety. 359 So.2d at 561. Here, as in Moody and Notaro, the entrapment instruction,

absent an instruction on the state's burden of proof, "could well have left the jury with the impression that it was incumbent upon the appellant to prove his innocence." Moody v. State, supra, at 561. The giving of the general instructions on presumption of innocence and reasonable doubt do not remove this erroneous impression.

The entrapment offense focuses on the intent or predisposition of the defendant to commit a crime. State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982). Just as the state must prove the intent to commit the substantive offense beyond a reasonable doubt, so, too, the state must prove predisposition beyond a reasonable doubt when the entrapment defense is raised. The state may demonstrate predisposition in a variety of ways, see Story v. State, 355 So.2d 1213 (Fla. 4th DCA 1978), as long as the state meets its standard of proof. It must be made clear to the jury that the state bears the burden and that the defendant has no burden of proof. The standard jury instruction fails to make that clear. To the jury, the final paragraph of the instruction would not mean that the state was required to disprove entrapment beyond a reasonable doubt, but would mean that the defendant had to prove he was in fact entrapped. In effect, the instruction seems to indicate that even though the defendant had adduced sufficient evidence of entrapment to warrant a jury instruction on his defense, the state was required to present nothing to contravene such evidence.

In sum, the instant instruction is not a clear statement of the established law in Florida. Even if the language is not an incorrect statement of the law, it is at the very least ambiguous, confusing and misleading to the jury. The infirmities of the entrapment instruction are not cured by the giving of the general reasonable doubt instruction. Petitioner's requested instruction on entrapment, following the language of the former standard jury instruction, presented a clear statement of the law with regard to the state's burden of proof. The trial court committed reversible error in denying petitioner's requested instruction and in failing to instruct the jury that the burden was on the state to prove beyond a reasonable doubt that petitioner was not entrapped. In light of the foregoing, it is respectfully submitted that the certified question should be answered in the negative.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests that this Court reverse the decision of the First District Court of Appeal, and remand this case to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Mr. Richard Patterson, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy mailed to Mr. James Ray Rotenberry, #083886, Post Office Box 699, Sneads, Florida, 32460, this 15th day of June, 1983.

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