SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. THADDEUS TYRONE HOLLIDAY, ALVIN L. TOWNSEND, JAMES W. JACKSON, Respondents	)	CASE NO.: 63, 832

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties in this brief will be referred to as follows: The State of Florida, the prosecution in the trial court and the Appellant in the Court of Appeal, First District, is now referred to as the Petitioner; THADDEUS TYRONE HOLLIDAY, ALVIN L. TOWNSEND, and JAMES W. JACKSON, defendants in the trial court and Appellees in the appellate court, are now Respondents and will be referred to individually by name or collectively as Respondents.

The consolidated record on appeal consists of three individually bound record volumes marked Volume I; one for each named Respondent. Therefore reference to the record volume for Respondent T. HOLLIDAY will be by the symbol "HR" followed by the appropriate page number(s). The record for Respondent J. JACKSON will be designated by "JR" followed by the appropriate paganation. The record reference for Respondent A. TOWNSEND will be noted by the symbol "TR" followed by the appropriate page number(s). Volume II consists of a consolidated transcript of the September 2, 1982 hearing on Respondents' Motion to Dismiss held before the Honorable Thomas

Oakley, Circuit Judge, and will be referred to by the symbol "T" followed by the appropriate page numbers(s).

The opinion of the Court of Appeal, First District, is appendixed hereto; however, the case is reported as follows:

State v. Holliday, et. al, No. A0-294 et seq. (Fla. 1st DCA May 17, 1983) [8 FLW 1386.]

STATEMENT OF THE CASE AND FACTS

The facts of these cases were set out in the per curiam opinion of the Court of Appeal, First District, as follows:

> The State appeals from orders in three consolidated cases, entered on motions filed pursuant to Rule 3.190(c)(4), Fla.R.Crim.P., dismissing informations against defendants on a finding of entrapment as a matter of law.
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> . . .
>
> Each case involved use of a decoy operation, and the undisputed facts in all are substantially similar.
>
> Holliday (Case No.AO-294): On April 28, 1981, the Jacksonville sheriff's office, pursuant to a Special Investigation Section operation, deployed a decoy on North Main Street in Jacksonville for the purpose of investigating criminal activity involving potential robberies and thefts. Several robberies and purse snatchings had occurred in this general area. The decoy wore old clothes, doused himself with alcohol to appear intoxicated, and lay in a semi-prone position on the sidewalk. As directed by his superiors, the decoy had placed $150 in bills in his rear pants pocket so as to be clearly visible to passersby and pretended to be unconscious. As directed, he was unresponsive to any physical or verbal acts toward him. Holliday walked by the decoy and observed him. He then walked back and forth by the decoy several times more, and finally reached down and took the exposed money. Holliday then ran away, but was apprehended by police a short distance down the street. As the police approached, he threw the money on the ground and admitted having taken it because he was broke. After Holliday's arrest, several other persons took the 'bait' offered by the decoy and were arrested. The police had no knowledge that Holliday had previously engaged in similar theft-related crimes and were not specifically looking to arrest Holliday for any suspected thefts. Several robberies and thefts had occurred in this area, however, involving suspects matching Holliday's

> general description and involving similar victims and modus operandi. Statistics on the decoy operation kept by the sheriff's office indicated that more than 50% of passerby contact with the decoys did not result in theft or robbery, but that most persons attempted to assist the decoy and help him retain his money.
>
> Townsend (Case No.AO-325): The decoy operation resulting in Townsend's arrest occurred on October 16, 1981, near the same area, and involved a factual situation similar to Holliday, with the following slight differences. This time, the decoy did not douse himself with alcohol or appear to be intoxicated, and the money was not stapled together. Townsend nevertheless took all of the bills and walked away. He admitted to taking the money when arrested, but did not say why. Townsend had been arrested in August 1979 for burglary, but the State dropped the case on September 6, 1979, and Townsend was not suspected of thefts involving this modus operandi.
>
> Jackson (Case No.AO-326): This decoy operation also occurred on October 16, 1981, in the same general location. The factual situation was similar to that involving Holliday, with the differences noted in the Townsend case. Jackson, however, had no prior arrests.
>
> The three cases were carried on the trial court's calendar awaiting decision in State v. Casper, [417 So.2d 263 (Fla. 1st DCA 1982) cert denied 418 So.2d 1280 (Fla. 1980).] The trial court granted the motions to dismiss on the authority of that decision.

State v. Holliday, et. al, No. AO-294 et seq (Fla. 1st DCA May 17, 1983) [8 FLW 1386.]

The First District Court of Appeal expressed some doubt as to the propriety of disposing of entrapment pursuant to a Rule 3.190 (c)(4) motion, but felt "constrained" to follow the earlier opinion of the court in State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) cert denied 418 So.2d 1280 (Fla. 1982). Nevertheless, the appellate court acknowledge direct conflict with the decisions of the Court of Appeal,

Second District, in State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983) and State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983). The latter case is currently pending in this Court awaiting a determination on jurisdiction. Cruz v. State, No. 63,451.

Notice invoking the discretionary jurisdiction of this Court, pursuant to Article V, Section 3(b)(4), Florida Constitution, was filed on June 15, 1983. This initial brief on merit follows.

POINT ON APPEAL

WHETHER ENTRAPMENT IS A JURY QUESTION AS DECIDED BY THE COURT OF APPEAL, SECOND DISTRICT, IN STATE V. SOKOS, 426 So.2d 1044 (Fla. 2d DCA 1983) AND STATE V. CRUZ, 426 So.2d 1308 (Fla. 2d DCA 1983) 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 COURT OF APPEAL, FIRST DISTRICT, IN THIS CAUSE AND IN STATE V. CASPER, 417 So.2d 263 (Fla. 1st DCA 1982) cert. denied 418 So.2d 1280 (Fla. 1982).

ARGUMENT

A motion to dismiss the information pursuant to Rule 3.190(c)(4), Florida Rule of Criminal Procedure was filed in each of these cases. In order to overcome such a motion, the State is required only to show a prima facie case and assert that material facts are in issue pursuant to Rule 3.190(d), Fla.R.Crim.P.; State v. Cramer, 383 So.2d 254 (Fla. 2d DCA 1980); State v. Savarino, 381 So.2d 734 (Fla. 2d DCA 1980).

Rule 3.190(d) provides in pertinent part:

> The State may traverse or demur to a motion to dismiss which alleges factual matters. Factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the State in such traverse. The court may receive evidence on any issue of fact necessary to the decision on the motion. A motion to dismiss under (c)(4) of this rule shall be denied if the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss. Such demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.

The State filed a traverse and demurrer in each of these cases. Each asserted that material facts were in dispute. (HR 8-11; TR 8-11; JR 8-11). Counsel for Respondents later adopted the additional facts thereby incorporating those facts into the motions to dismiss. However, the State's traverse specifically set forth facts sufficient to establish a prima facie case of grand theft and to conclusively demonstrate that entrapment as a matter of law did not exist. Respondents' motions to dismiss should have been denied. State v. Cramer; State v. Savarino.

In State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979), the District Court of Appeal, Second District, stated:

> In the first place, inasmuch as the state filed a traverse specifically denying under oath a material fact alleged in the motion to dismiss, automatic denial of the motion was required. . . .

Id. at 419 (emphasis added). See also, State v. Huggins, 368 So.2d 119 (Fla. 1st DCA 1979); State v. Power, 369 So.2d 96 (Fla. 2d DCA 1979); State v. Fort, 380 So.2d 534 (Fla. 5th DCA 1980). The Fourth District Court of Appeal advanced the same logic when addressing a similarly phrased traverse:

> We reverse the order granting the motion to dismiss. Rule 3.190(d) of the Florida Rules of Criminal Procedure requires only that the traverse deny, with specificity, the material facts alleged in the motion to dismiss. Here the material facts stated in the motion to dismiss are specifically denied. If material factual allegations of a (c)(4) motion are denied or disputed in the traverse, denial of the motion to dismiss is mandatory.

State v. Wright, 386 So.2d 583, 584 (Fla. 4th DCA 1980); State v. Fort. See also, State v. Cook, 354 So.2d 909 (Fla. 2d DCA 1978); Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977); and State v. Hamlin, 306 So.2d 150 (Fla. 4th DCA 1975).

In a more recent opinion, the Court of Appeal, Fourth District, opined:

> Appellee was indicted for the first degree murder of his wife. Pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), appellee filed a motion to dismiss the charge against him. To this motion, the State traversed. Fla.R.Crim. P. 3.190(d). The lower court found that the traverse was insufficient to place material facts in controversy and therefore granted appellee's motion. The State contends that the lower court's order was erroneous. We agree and reverse.
>
> The only issue presented for our determination is whether the State's traverse to appellee's motion to dismiss was sufficient to require the lower court's denial of that motion. Florida Rule of Criminal Procedure 3.190(d) provides that such a motion 'shall be denied if the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss.' We hold that the State's traverse placed material facts in issue.
>
> It is unnecessary to delve into the circumstances of this case in reaching our conclusion. Once the State files a traverse as required by the aforementioned rule, a trial court has no alternative but to deny a motion to dismiss. The State is under no obligation to present additional facts consistent to guilt. Its only burden is to specifically deny the material facts as set forth in the motion to dismiss. Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977).

State v. Oberholtzer, 411 So.2d 376, 377 (Fla. 4th DCA 1982)

In each of these cases, the State's traverse specifically denied certain of the recitation of facts contained in the motions to dismiss. The State further asserted that the material facts did not support an entrapment defense, that each Respondent had a predisposition to commit the crime, and that each Respondent was presenting a legal argument, which was not properly a subject addressed via a motion to dismiss. The State argued that the cases cited did not support

Respondents' contention, and that entrapment is an issue to be resolved by the trier of fact. Thus, the (c)(4) motions should have been denied as material facts as to predisposition were in controversy. These facts were specifically pointed out to the trial court in the traverse and again at the hearing on the motions.

In its per curiam opinion, the Court of Appeal, First District, rejected the foregoing argument specifically stating.

> In this case, however, the State stipulated to the defendants' adoption, as part of their motions to dismiss, of all evidentiary facts alleged in the State's traverse and denial. As a result, no evidentiary facts remained in dispute, and the issue left for decision was whether predisposition to commit the crime was sufficiently shown by the evidence to raise a jury question or should be decided against the State as a matter of law under Capser. We see nothing improper in this procedure. A traverse by the State, in order to be effective, must constitute a good faith dispute of material facts. Cf., Fox v. State, 384 So.2d 266 (Fla. 3d DCA 1980); Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977); State v. Kemp, 305 So.2d 833 (Fla. 3d DCA 1975). In stipulating to the amendment of defendant's motions, the State agreed it had no good faith dispute with the facts as so amended.

Id. at 1387. This logic overlooks the State's position that even after adoption of the previously "disputed" facts, there were still sufficient facts concerning intent and/or state of mind in "dispute" which properly should have been decided by the trier of fact, not by the trial judge preliminary. Under Florida law and the governing rule of criminal procedure, the trial judge erred in granting Respondents' motions to dismiss.

In considering the merit of a (c)(4) motion, it is improper for the trial judge to determine factual issues or to consider the weight of conflicting evidence or the credibility of witnesses in determining

whether a genuine issue of material fact exists. State v. Fort at 536. See also, State v. West, 262 So.3d 457 (Fla. 4th DCA 1972). The Fifth District Court of Appeal held in Fort that if material factual allegations of a (c)(4) motion are denied or disputed in the traverse, denial of the motion to dismiss is mandatory. Id. at 536 citing F.R.Crim.P. 3.190(d); State v. Cook, 354 So.2d 909 (Fla. 2d DCA 1978); Ellis v. State. Here such a dispute existed.

Intent, motive or predisposition are not proper grounds upon which to grant a (c)(4) motion to dismiss. State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983); Stave v. Cruz, 426 So.2d 1308 (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. In State v. J.T.S., 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 Procedures, 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 determing 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. Similarly in Jones v. State, 392 So.2d 18 (Fla. 1st DCA 1980) the First District Court of Appeal relied on the same authority in concluding that the trier of fact, not the trial judge, must resolve "seemingly undisputed facts." Id. at 19.

In each of these cases, Respondents assert the techniques utilized by law enforcement authorities in investigating robberies and thefts actually entrapped innocent individuals into taking the money from the pocket of the seemingly unconscious decoy. Entrapment is normally a question for the jury unless the evidence is so clear and convincing that the trial judge can pass on the issue as a matter of law. State v. Rouse, 239 So.2d 79 (Fla. 4th DCA 1970); State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) cert. denied 418 So.2d 1280 (Fla. 1982). Under the instant circumstances, the trial judge could not make such a determination as the State's traverse and argument clearly dispelled any contention that entrapment existed as a matter of law.

Respondents argued below that the authorities formulated the idea of the theft by deliberately placing the money and the decoy in a vulnerable position. Thus, they submit, the "theft was the product of the creative activities of the Sheriff's Office and not the Defendant." (HR 6) Respondents argue that the sight of protruding money was improper inducement. Id. Since the State disputed this argument and offered facts in support thereof, the question was of fact and properly reviewable by the jury.

In State v. Hires, 372 So.2d 183 (Fla. 2d DCA 1979), the Second District Court of Appeal held:

> We note that a motion to dismiss by a criminal defendant should be granted only where the most favorable construction to the state would not establish a prima facie case of guilt. State v. Smith, 348 So.2d 637 (Fla.2d DCA 1977). If there is any evidence upon which a jury of reasonable men could find guilt, a jury question results and the motion to dismiss must be denied. State v. DeJerinett, 283 So.2d 126 (Fla. 2d DCA 1973)

Id. at 184; See also, State v. Fort, State v. West. We respectfully submit that when the evidence presented to the trial judge via motion, traverse and argument, is taken in a light most favorable to the State, a prima facie case of grand theft was presented. It is well established in both federal and Florida law that a high degree of involvement by law enforcement is not necessarily impermissible. United States v. Russell, 411 U.S. 423, 93 S.Ct 1637, 36 L.Ed.2d 366 (1973); State v. Dickinson, 370 So.2d 762 (Fla. 1979); Lashley v. State, 67 So.2d 648 (Fla. 1953). Entrapment, in these cases, does not exist as a matter of law, but is instead a defense to be argued to the jury panel.

One who is instigated, induced or lured by an officer of the law, for the purposes of prosecution, into the commission of a crime, which he otherwise has no intention of committing, may utilize the defense of entrapment. However, unless the evidence is so clear and convincing that it can be passed on by the trial judge, entrapment is a question for the jury. State v. Rouse at 80. Bell v. State, 369 So.2d 932, 934 (Fla.1979). Unless the facts are so overwhelming as to create a reasonable doubt in the minds of the jury, the burden of adducing evidence of entrapment is on the accused. Koptyra v. State, 172 So.2d 628, 632 (Fla. 2d DCA 1965).

To make a case of entrapment, a defendant must first present evidence of a prima facie case by showing that government conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it. United States v. Goodwin, 625 F.2d 693, 698 (5th Cir.1980). Here Respondents advance such an allegation, however it was refuted by the State's traverse which stated:

> Statistics of this decoy operation kept by the Jacksonville Sheriff's Office clearly show that more than 50% of passerby contact with the decoys did not result in a theft or robbery. Instead, most persons attempted to assist the decoy and help the decoy retain the money.

(HR 9; TR 9; JR 9) If the criminal intent originates in the mind of the defendant, the fact that law enforcement authorities furnished the opportunity for him to carry out the crime does not amount to entrapment. United States v. Puma, 548 F.2d 508, 510 (5th Cir.1977). The crux of the issue then becomes whether the criminal design originated in the authorities who then induce the defendant to commit the crime. Bell v. State at 934.

The essence of Respondents' argument below was that the Jacksonville Sheriff's Office did more than merely furnish an opportunity to commit the offense. Respondents contend that intent to commit the crime originated with the law enforcement officers and not within their own mind. However it is well established 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. 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 defendants' prior convictions or of reputation 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 Respondents were 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.]

What the trial court has done is to preliminarily determine that under the instant facts entrapment exists as a matter of law. In reaching such a conclusion, the trial and ultimately the appellate

courts relied upon the opinion in State v. Casper. Casper is inapposite as here there was a specific traverse presenting evidence of predisposition to commit the theft. Such a traverse was not present in Casper.

In Hampton v. United States, 425 U.S. 484 (1976), the United States Supreme Court stated:

> In Russell we held that the statutory defense of entrapment was not available where it was conceded that a Government agent supplied a necessary ingredient in the manufacture of an illicit drug. We reaffirmed the principle of Sorrells v. United States, 287 U.S. 435, 77 L Ed 413, 53 S Ct 210, 86 ALR 249 (1932), and Sherman v. United States, 356 US 369, 2 L ED 2d 848, 78 S Ct 819 (1958), that the entrapment defense focus[es] on the intent or predisposition of the defendant to commit the crime, Russell, supra, at 429, 36 L Ed 2d 366, 93 S Ct 1637, rather than upon the conduct of the Government's agents. We ruled out the possibility that the defense of entrapment could ever be based upon a governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.
>
> In holding that '[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play, 411 US, at 436, 36 L Ed 2d 366, 93 S Ct 1637, we, of course, rejected the contrary view of the dissents in that case and the concurrences in Sorrells and Sherman. In view of these holdings, petitioner correctly recognizes that his case does not qualify as one involving 'entrapment' at all. He instead relies on language in Russell that 'we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165, [95 L Ed. . . .' 411 U.S., at 431-432, 36 L Ed 2d 366, 93 S Ct 1637.
>
> In urging that this case involves a violation of his due process rights, petitioner misapprehends the meaning of the quoted language in Russell, supra. . . .
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> * * *

> To sustain petitioner's contention here would run directly contrary to our statement in Russell that the defense of entrapment is not intended 'to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.' 411 U.S., at 435, 36 L Ed 2d 366, 93 S Ct 1637.
>
> The limitations of the Due Process Clause of the Fifth Amendment comes into play only when the Government activity in question violates some protected right of the defendant. Here, as we have noted, the police, the Government informer, and the defendant acted in concert with one another. If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . .,' Sorrells, supra, at 442, [citation omitted], the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. [Citations omitted.] But the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in Russell deprive Russell of any rights.

Id. at 488-490 (emphasis in original). See also, State v. Eshuk, 427 So.2d 704 (Fla. 3d DCA 1977) and State v. Brider, 386 So.2d 818 (Fla.2d DCA 1980).

Under Florida law, a defendant is not entitled to discharge as a matter of law simply because he testifies or submits without contradiction to facts that constitute entrapment. Absent clear and convincing evidence, the question is for the trier of fact. Richert v. State, 338 So.2d 40, 44 (Fla.4th DCA 1976). See, Thomas v. State, 185 So.2d 745 (Fla.3d DCA 1966) (facts requiring a judgment of

acquittal entrapment found as a matter of law). Respondents' predisposition was sufficiently shown by the State's evidence to warrant denial of the motions to dismiss.

In State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983), decided during the pendency of this appeal before the appellate court, the Second District Court of Appeal recognized existing case law which permits entrapment to exist as a matter of law.[1] Nevertheless, the appellate 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 determined that an entrapment defense focuses on intent or predisposition to commit a crime. Id. at 1045 quoting State v. Brider at 820. 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 State v. Cruz,[2] 426 So.2d 1308 (Fla. 2d DCA 1983). Under facts almost identical to those of

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

2 Cruz v. State, No. 63,451 is currently awaiting a decision on whether this Court will accept jurisdiction. Defendant Cruz maintains a conflict exists between the opinion of the Court of Appeal, Second District in his cause and State v. Casper. The State maintained that the facts were nearly identical and thus the appearance of conflict existed. However the State also explained that in Casper, it had not argued the impropriety of addressing intent or state of mind pursuant to a (c)(4) motion to dismiss. This same argument was presented to the First District Court of Appeal in Respondents' cases. The appellate panel in these cases expressed "some doubt as to the propriety of disposing of this issue on a Rule 3.190(c)(4) motion..." Nevertheless the panel was "constrained to follow Casper." State v. Holliday at 1387.

Respondents' cases, the court again acknowledged the law relating to entrapment was correctly set out by the First District Court of Appeal in State v. Casper. However, the Second District refused to argree that the facts presented could constitute entrapment as a matter of law. State v. Cruz at 1309.

The First District Court of Appeal acknowledged conflict in existing caselaw and expressed "some doubt" as to the legal reasoning of the earlier panel. However the court felt "constrained" to follow the opinion of its earlier panel in Casper. State v. Holliday at 1387. The State emphasizes the propriety of raising state of mind or predisposition to commit a crime pursuant to a motion to dismiss was not advanced by the State in Casper until rehearing. The opinion of the court of appeal chastises the State for it's untimely argument and the issue was given only cursory consideration by the Court. Casper at 265, 266. The State argued in brief and before the court that Casper could be distinguished from the instant case for this reason above. Obviously the court of appeal did not agree. State v. Holliday at 1386.

Given the widespread reliance upon undercover decoy operations by law enforcement officers throughout the state, the State 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. Cruz at 1310; State v. Rouse; Koptyra v. State. We further urge this Court to hold that while entrapment may exist as a matter of law,[3] intent or

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

state of mind is not properly decided pursuant to a Rule 3.190(c)(4) motion to dismiss. State v. Cruz at 1310; State v. Evans; State v. Rogers; Cummings v. State; State v. J.T.S.; State v. West.

CONCLUSION

Based upon the foregoing argument supported by the circumstances and authorities cited therein, Petitioner respectfully maintains that the Honorable Thomas Oakley, Circuit Judge of the Fourth Judicial Circuit, erred by granting Respondents' motions to dismiss and concluding that the State's traverse was insufficient; predisposition, intent and motive was a proper issue for a (c)(4) motion to dismiss; and entrapment existed as a matter of law. We further submit that the Court of Appeal, First District, erred in failing to distinguish State v. Casper from the instant cases. Petitioner requests that this Court reverse both the trial court's orders granting the motions to dismiss and the subsequent affirmance by the court of appeal thereby remanding these cases for trial.

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 mail to Jim Miller, Esquire, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida 32202, this 8th day of July, 1983.

Barbara Ann Butler
Assistant Attorney General

BAB/rsb
"#3A&B"