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 REPLY BRIEF

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PRELIMINARY STATEMENT

The opinion of the Court of Appeal, First District, in this cause is now reported as follows:

State v. Holliday et. al, 431 So.2d 309

(Fla. 1st DCA 1983)

Statement of the Case

There are two specific items which should be considered in conjunction with the initial statement of facts:

1. Since the filing of the State's brief on the merits, Respondents moved to consolidate the instant appeal with the pending case of Cruz v. State, No. 63,451. In Cruz, jurisdiction on the basis of conflict was sought on March 28, 1983, and accepted on July 12, 1983. Respondents' motion to consolidate was denied by this Court's Order of July 19, 1983. Respondents' merit brief was filed on July 28, 1983.

2. Respondents, in their Statement of the Case and Facts and in argument, take issue with "Petitioner's statement of the 'Point on Appeal';" however it was the Court of Appeal, First District, who noted direct conflict between decisions and certified this cause pursuant to Article V, Section 3(6)(4), of the Florida Constitution. Direct conflict was noted between this cause and the earlier opinion of State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) cert. denied 418 So.2d 1280 (Fla. 1982) and 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). See State v. Holliday et.al, 431 So.2d 309, 311 (Fla. 1st DCA 1983). Respondents do not address the direct conflict with State v. Sokos.

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 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

The State of Florida has several comments concerning the brief submitted by Respondents:

First Respondents' argument and reliance upon State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) still does not address the fact that the State failed to argue the propriety of raising intent to a pretrial motion to dismiss the information. State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1982); State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1982); State v. J.T.S., 373 So.2d 418, 419 (Fla. 2d DCA 1979). Such an argument was advanced in the instant cases. In addition, we submit the facts here and in Casper may be similar but are not virtually identical as alleged by Respondents.

Second, contrary to Respondents' assertion, the question is not whether Respondents had the predisposition to commit the crime before viewing the "drunken wino". (See, Respondents' brief, p.5). The key is the willingness of Respondents to commit the offense upon seeing the decoy and the surrounding circumstances. (See argument infra, pp. 4,5). Despite counsel's argument, nothing in the record establishes entrapment of the poor and hungry or of the innocent.

Third, in arguing that there are no material facts in issue, Respondents ignore the State's position that even after adoption of the previously "disputed" facts, there were still sufficient facts concerning intent/state of mind/predisposition in controversy to warrant submitting the case to the trier of fact. The jury should be the final arbitrator concerning credibility between conflicting witnesses or positions. Lashley v. State at 650. Here, entrapment was not so clearly established to constitute a "matter of law" finding. Assuming arguendo that Respondents are correct in submitting there were no material facts in dispute, the interpretation of those facts, especially in the context of intent or predisposition, was in dispute and was properly decided by the jury panel following submission of evidence at trial.

Fourth, the cases cited by Respondents involve evidence of entrapment raised during trial, not pursuant to a Rule 3.190(c)(4) motion.

Five, Respondents repeatedly argue the State's alleged failure to make a prima facie showing of predisposition pursuant to the criteria enumerated in Story v. State, 355 So.2d 1213 (Fla. 4th DCA 1978). We disagree and submit the following is of utmost importance when applied to the instant cases:

> However, proof of prior criminal activities or reasonable suspicion of a defendants' involvement in such activities is not essential to proof of the defendants' predisposition to commit the offense. Numerous cases have held or suggested that the predisposition of the defendant to commit a crime can be inferred from the defendants' readiness or willingness to commit it. State v. Gurule, 194 Neb. 618, 234 N.W.2d 603(1975); Eisenhardt v, United States, 406 F.2d 449 (5th Cir. 1969). This willingness to commit the offense can be evinced from the defendants' ready acquiescence

> in the criminal scheme suggested by the law enforcement officer. United States v. Williams, 487 F.2d 210 (9th Cir.1973); Trice v. United States, 211 F.2d 513 (9th Cir.) cert. denied 348 U.S. 900, 75 S.Ct. 222, 99 L.Ed. 707 (1954).

Story at 1215; See also State v. Whitney, 157 Conn. 133, 249 A.2d 238, 240-241 (1968) and Berry v. United States, 116 U.S.App.D.C. 375, 324 F.2d 407 (1963).

Respondents would have this Court believe that they had no readiness or willingness to commit the instant thefts, but the criminal design originated with the authorities. However, the record contains ample evidence of the existence of ready acquiescence. Respondents willingly committed the thefts and from its "willingness", predisposition can be inferred. The police merely furnished the opportunity to do so. Story; Lashley v. State, 67 So.2d 648, 649 (I19 1953).

Respondents contend the conduct of the law enforcement officers was in "reprehensible" and "unacceptable". This argument ignores the recent case of Unites States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1973), rehearing denied. ____ F.2d ____ (1983):

> Abscam was indeed an elaborate hoax, created by the FBI with the assistance of a convicted confidence man to ferret out corrupt public officials. Nevertheless, we conclude that the government's conduction in Abscam did not reach that 'demonstratable level of outrageousness' wich would bar prosecution of the corrupt officials that were uncovered, particularly given the difficulties inherent in their delection.

Slip Op. at p.3, quoting Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J. concurring). The district court continued in its analysis of outrageousness and concluded that in Hampton and United States v. Russell, 411 U.S. 423, 424 (1973), the govenment not only provided an opportunity to commit a crime, but also provided

the means to commit it. Evenso the United States Supreme Court determined in both Hampton and Russell, that the conduct of the government did not violate due process safeguards. Here, as in Abscam, the police merely provided the opportunity to commit the crime.

Lastly, Respondents argue that State v. Cruz was erroneously decided. They do not discuss State v. Sokos which, although decided by the same district court, was decided by a separate panel. In Sokos, the Second District states that predisposition is an improper issue for a (C)(4) motion. As stated, this issue was not timely raised in Casper. Had the issue been asserted, it is unlikely Casper would have been decided as it was. The First District acknowledged "some doubt as to the propriety of disposing of this issue on a Rule 3.190(C)(4) motion." State v. Holliday at 311. Respondents have not addressed the misgivings of the First District Court.

Based on the foregoing we urge this court to resolve the direct conflict presented herein in an expeditions manner. Law enforcement authorities throughout the State rely upon decoy operations to ferret out criminal conduct which is often difficult to detect by other means. We submit the reasoning and authority cited by the Court of Appeal, Second District, is sound and urge this Court to affirm the decisions in Cruz and Sokos.

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 of 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 22nd day of August, 1983.

Barbara Ann Butler
Assistant Attorney General

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