IN THE SUPREME COURT OF FLORIDA

GEORGE WARREN McCRAY,	)	
	)	
Petitioner,	)	CASE NO. 64,058
	)	
v.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the district court of appeal, Fourth District, and the Defendant in the Circuit Court In and For Palm Beach County, Florida. Respondent was the Appellee and the Prosecution respectively. The parties will be referred to as they appear before this Honorable Court.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as presented in Petitioner's initial brief.

POINTS ON APPEAL

POINT I

WHETHER THE DISTRICT COURT ERRED IN REFUSING TO REVERSE FOR FAILURE TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN TO PROVE PETITIONER WAS NOT ENTRAPPED BEYOND A REASONABLE DOUBT?

POINT II

WHETHER THE DISTRICT COURT CORRECTLY AFFIRMED A CONVICTION WHERE THE TRIAL JUDGE ALLOWED TESTIMONY ABOUT PHYSICAL EVIDENCE WHICH WAS NOT INTRODUCED AT TRIAL?

POINT III

WHETHER THE DISTRICT COURT ERRED IN REFUSING TO REVERSE ON PETITIONER'S ALLEGATION THAT THE EVIDENCE FOUND IN HIS CAR WAS PURSUANT TO A PRETEXTUAL INVENTORY SEARCH?

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN REFUSING TO REVERSE FOR FAILURE TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN TO PROVE PETITIONER WAS NOT ENTRAPPED BEYOND A REASONABLE DOUBT.

The trial court sub judice instructed the jury on entrapment pursuant to the standard instruction as set forth in Florida Standard Jury Instructions In Criminal Cases (1981 Edition) (R. 1202-1203). The instruction as given was neutral and fully informed the jury that if a reasonable doubt was raised as to whether the defendant was entrapped, the jury should find him not guilty. Thus the instructions as given permitted the jury to consider the Petitioner's defense and placed the burden of proof on the State. Consequently, the Fourth District Court of Appeal was correct in holding no error in instructing the jury on entrapment pursuant to the Florida Standard Jury Instruction.

Nonetheless, Petitioner maintains that the jury should have been instructed that the State had the burden to prove Petitioner was not entrapped beyond a reasonable doubt. Initially, Respondent would point out that it is an almost impossible task to prove a negative--ie. that Petitioner was not entrapped. However, the new Standard Jury Instructions on entrapment clearly place the burden of proof on the State where it properly belongs and then informs the jury that if the defendant's assertion of entrapment raises any reasonable doubt in their mind, then the jury should find the defendant not guilty. This is clearly a

correct application of the law.

It is clear that there is no constitutional requirement for the prosecution to disapprove an affirmative defense beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). The same principle has been long recognized in this State. See State v. Kahler, 232 So. 2d 166, 168 (Fla. 1970), where 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.

Because it would be a nearly impossible task to ask the State to negative the affirmative defense of entrapment, Respondent maintains that the modern jury instruction on entrapment is a better statement of law. It maintains that the burden of proof beyond a reasonable doubt is on the State and that if the evidence raises a reasonable doubt about entrapment, then the defendant must be found not guilty.

Petitioner relies on the case of Moody v. State, 359 So. 2d 557 (Fla. 4th DCA 1978), decided under the old standard jury instruction (Rule 2.11(e) Florida Standard Jury Instructions In Criminal Cases (1975 Edition) however, it is important to note that while Moody says that the jury must be instructed that the burden was on the State to prove beyond a reasonable doubt that the defendant was not entrapped, Moody was reversed because the the court therein did not comply with the Standard Jury Instructions

and did not read to the jury the standard entrapment instruction. The Moody court held that the failure to give the standard entrapment instruction in conjunction with the failure to instruct on the State's burden could well have left the jury with the impression that it was incumbent upon the defendant to prove his innocence.

The Moody situation is completely inapposite to the case at bar, where the jury was read the standard jury instruction on entrapment (R. 1202) along with the general reasonable doubt instruction (R. 1203). The Fourth District Court of Appeal sub judice along with the court in Rotenberry v. State, 429 So. 2d 378 (Fla. 1st DCA 1983), reached the conclusion that when considering the totality of the instructions given relating to entrapment, reasonable doubt, and the State's burden of proof, the requirements of Moody were adequately met.

Respondent maintains that the jury must be instructed that the State must prove the defendant committed the offense beyond any reasonable doubt. If the affirmative defense asserted by the defendant raises a reasonable doubt, then he must be acquitted. However, there is no requirement that the State disprove the affirmative defense beyond a reasonable doubt. Respondent maintains that by making the change in the standard jury instructions, the intent was to clarify the law in this regard in conformity with the law as Respondent has afore stated. The court in Wheeler v. State, 425 So. 2d 109 (Fla. 1st DCA 1982), reaches the illogical conclusion that no significance should be attached to the change in the instruction

and that the change was made merely to avoid undue emphasis as to the State's burden of proof. However, Respondent maintains that the Wheeler court misread the effect of the change in instruction which clarifies the posture of the law. It removes from the State the onus of disproving an affirmative defense and correctly states that if the evidence shows the defendant was entrapped, or raises a reasonable doubt about entrapment, then the defendant should be found not guilty.

POINT II

THE DISTRICT COURT CORRECTLY AFFIRMED A CONVICTION WHERE THE TRIAL JUDGE ALLOWED TESTIMONY ABOUT PHYSICAL EVIDENCE WHICH WAS NOT INTRODUCED AT TRIAL.

Initially, Respondent feels constrained to set the facts straight with regard to this point. The cocaine testing kit which was not introduced into evidence, was not suppressed as Petitioner seems to assert. The circumstances were that the State was prevented from introducing the cocaine testing kit itself into evidence because of the failure to list the kit on its reciprocal discovery. This is very different from having the item suppressed which is a point of law which apparently even the Fourth District Court of Appeal misunderstood. Respondent would like it to be made clear that the kit itself was not permitted into evidence by the trial judge because the State inadvertently neglected to include the cocaine testing kit in its reciprocal discovery. Nonetheless, the record is clear that Petitioner was very much aware of its existance, as it was included in the police reports furnished to defense counsel, and in fact, was one of the items included in the defense motion to suppress evidence. Therefore, Respondent is mystified as to how Petitioner would have been prejudiced had the kit itself been introduced into evidence since he was well aware of its existance.

In light of the facts set forth above, Respondent would apprise the court that it is likewise of the view that

the Fourth District Court of Appeal misapprehended the law relevant to this point, but based upon altogether different reasoning from that of Petitioner. Respondent adamantly asserts that the Fourth District misconstrued the law in finding error, harmless or otherwise, in the admission of testimony concerning evidence lawfully found in the trunk of Petitioner's car.

On the facts of this case, even though the trial judge precluded the State from introducing the kit into evidence, the judge could not have correctly precluded the officer from testifying as to its discovery. There is simply no basis in law for asserting a police officer cannot testify to what he lawfully observed. In the instant case, the police had a right to be where they were and were conducting a legal search. It is not necessary in every instance to produce the physical evidence in order to produce testimony about it.

In its opinion, the Fourth District said, "We see no difference between evidence suppressed because of an illegal search and seizure and that excluded because of a discovery violation" however, there is clearly a difference and Respondent is hopeful that this Court will discern the difference and correct the opinion of the Fourth District Court of Appeal in this regard.

When evidence is suppressed because of a Fourth or Fifth Amendment violation, the posture of the case at the time of trial is as though the evidence never existed.

However, in the instant case the motion to suppress was denied. The reason the State was precluded from presenting the physical evidence was because of its failure to list the cocaine testing kit in its reciprocal discovery and not because the evidence itself was suppressed. Indeed, the appropriate sanction for a discovery violation is to prohibit the entry of the specific item from evidence, as was done in the case at bar. Respondent would mention that even the discovery violation itself was questionable, since Petitioner was obviously aware of the existance of the cocaine testing kit since Petitioner himself had made a motion to suppress the kit which was in fact denied.

The fact that the kit was not introduced into evidence does not correctly preclude the officer from testifying as to the lawful discovery of the kit. The sanction for the violation (if in fact there was one), is that the State can present no evidence to corroborate the officer's testimony (i.e. the kit). Defense counsel may then attack the credibility of the officer and point out the fact that no evidence to corroborate the officer's testimony was presented by the State.

If there were an armed robbery case and the State had neglected to include the gun in reciprocal discovery, there too, the sanction might very well be that the State would not be able to enter the gun into evidence. Nonetheless, the victim would surely be allowed to testify that the defendant pointed

a gun at him. (The posture of the case would be the same if the gun were never found--i.e., the victim would still testify that the defendant threatened him with a gun.)

Should this Court concur with the Fourth District Court of Appeal in its finding of error, then certainly Respondent would agree with that court that the admission of the testimony related to the testing kit constituted harmless error because the State presented sufficient other evidence to sustain Petitioner's conviction.

POINT III

THE DISTRICT COURT DID NOT ERR IN REFUSING TO REVERSE ON PETITIONER'S ALLEGATION THAT THE EVIDENCE FOUND IN HIS CAR WAS PURSUANT TO A PRETEXTUAL INVENTORY SEARCH

Petitioner challenges the legality of the search. However it is indisputable that Petitioner used the vehicle to transport the five ounces of cocaine delivered to Officer Lutz. And despite Petitioner's assertion to the contrary, it is clear that the arrest and seizure of the automobile was done jointly by federal and State authorities, as it was not clear at the time whether State or Federal prosecution would be pursued (R. 15, 16, 17, 22, 32, 36, 42, 50).

It is very clear that the seizure of the vehicle was proper whether the authorities proceeded under Federal or State law. 49 U.S.C. 782 (Contraband Seizure Act); Section 932.703 Florida Statutes (1981). The fact that authorities chose not to proceed with the forfeiture does not denigrate the validity of the seizure itself, as there was lawful authority for it. The record reflects that Petitioner's automobile was used as the delivery vehicle for a large quantity of cocaine. Use of a vehicle to deliver contraband for sale is clearly sufficient to bring into play the forfeiture provisions of both Federal and State statutes.

Federal authorities were present and participated in Petitioner's arrest and the seizure of the automobile. There was a kilo of cocaine involved in the case, and under the

circumstances the authorities were properly authorized to seize the car. Federal authorities chose not to pursue the prosecution in this case because of the amount of drugs actually seized. Nevertheless, at the time of the seizure Federal authorities were properly present and the determination of which prosecution would be pursued was to be made later on. Consequently, the fact that the Federal government chose not to pursue the prosecution surely does not justify Petitioner's assertion that this was a pretextual inventory search.

Once the car was properly seized, unquestionably the police were justified in executing a standard inventory search. Consequently, Respondent maintains that Petitioner has not demonstrated that any illegality occurred by the police executing an inventory search of his automobile.

CONCLUSION

THIS certified question should be answered in the affirmative. Additionally, Respondent would ask this Court to correct the opinion of the Fourth District Court of Appeal finding it harmless error to admit testimony concerning the cocaine testing kit which was not allowed into evidence. Respondent maintains that in this regard there was no error whatsoever in allowing the police officer to testify as to evidence lawfully discovered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief On The Merits has been furnished to CHARLES W. MUSGROVE, ESQUIRE, Attorney for Petitioner, Congress Park, Suite 1-D, 2328 South Congress Avenue, West Palm Beach, Florida 33406 by U.S. Mail delivery this 20th day of September, 1983.

OF COUNSEL