IN THE SUPREME COURT OF FLORIDA

GEORGE W. McCRAY,

Petitioner,

vs. CASE No. 64,058

STATE OF FLORIDA,

Respondent.
_____/

CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'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 Court.

The symbol (R) followed by a number will refer to the record on appeal in the District Court. The symbol (A) will be used to designate the appendix to this brief.

STATEMENT OF THE CASE

By amended information filed September 21, 1981 (R1386-9), Petitioner was charged with trafficking in and possession of cocaine on February 8, 1980, and sale of cocaine on February 1, 1980. Motions to dismiss (R1342-5) and to suppress (R1347-8), 1352-3) were denied (R1244-5, 1325). Trial by jury began on September 21, 1981 (R3).

Despite Petitioner's repeated requests (R10-11, 19-20, 1187-8), the jury was not instructed that the State had the burden to prove he was not entrapped beyond a reasonable doubt. Rather, it was instructed as follows:

> "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." (R1203, A6).

The jury returned to ask whether entrapment as to trafficking would apply to all counts (R1217-20). At 4:35 p.m. a refused request for a readback of testimony as to the February 1 meeting ended with the jurors being sent home for the day (R1221-9). After another hour and forty-six minutes of deliberation (R1236), the jury found Petitioner guilty as charged on all counts (R1237-8, 1374).

During trial, the State sought to introduce a test kit taken from the trunk of Petitioner's vehicle (R531-7), even though it was not listed on the discovery response. After extensive argument (R570-610), the Court suppressed the physical evidence for the discovery violation (R577-8, 607), but allowed

testimony about the evidence (R585, 610).

On January 21, 1982, Petitioner was sentenced to concurrent sentences of seven years on Count 1, subject to the three-year minimum mandatory, five years on Count 2, and seven years on Count 3 (R1384-94). Notice of Appeal was filed that same date (R1395).

On appeal, the District Court of Appeal affirmed (433 So.2d 5,A1-3). The Court found error in allowing testimony about evidence which had been excluded, but deemed the error harmless because the evidence sustained Petitioner's convictions (433 So.2d at 6-7,A2-3).

The Court also certified the following question:

> "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?" (433 So.2d at 6,A2)

Rehearing was denied July 6, 1983, and on August 1, Petitioner timely invoked this Court's discretionary jurisdiction.

STATEMENT OF THE FACTS

On February 8, 1980, Petitioner was arrested for delivering cocaine to an undercover police officer, Tony Lutz, in Mister G's parking lot (R1276-7). Though police were expecting to deal for a kilo, they knew he was only bringing five ounces with him (R1255-79). His car was legally parked (R1246, 1262, 1287-8), and police had no legal process authorizing its search or seizure (R1251, 1278-9).

Federal officials seized the car, allegedly on the theory that a Federal offense might be involved (R1254, 1256, 1257, 1283-4). However, no Federal prosecution is maintained when less than a pound is found (R748, 1258-9). No forfeiture was instituted, allegedly because the vehicle had a large lien (R1285), although, in fact, liens make no difference in Federal forfeitures (R1287). Petitioner was never booked anywhere on Federal charges or required to post a Federal bond (R1286, 1298, 1301). The case was begun earlier through local investigation, and the Federal DEA was brought in only when they needed money (R561-2, 681-2, 740, 1295-6). The Federal agent did not even tell him he was under arrest (R743), and no Federal surveillance was maintained because it was basically a West Palm Beach case (R715, 748).

When the car arrived at the compound, the contents were inventoried (R643, 1284, 1289, 1292). Ten grams of cocaine were found in a sealed bag in the front seat, a weapon was found in the glove box, and a narcotics test kit was found in a bag in

the trunk (R1258). A tinfoil packet found under the seat was suspected as hashish (R1293) but tested negative (R1265). Nothing was in plain view (R1265).

The first contact between Petitioner and the agent Lutz was January 9, 1980 (R172) at the apartment of Jack Kelly (R137). The officer arranged to buy a gram of cocaine, which Petitioner did not have on him but allegedly promised to bring back by 5:00 p.m. (R175). Petitioner said he knew people (R181). He was loaned $20.00 (R182). On January 10, the officer gave him another $60.00 allegedly to pay for the gram (R190). He allegedly agreed to sell another on January 12 (R191), but no further contact was had until February 1 (R192), when Lutz bought an ounce (R193-195) and discussed a bigger deal (R196-7). When Lutz asked where the "stuff" was, Petitioner nodded toward the kitchen (R340-41) and Kelly pointed to the cabinet (R345-50).

They met again February 2 in Mister G's, ostensibly to meet Petitioner's source, but the source did not show (R201). Lutz testified that Petitioner offered to sell an ounce and a half he was holding (R202-3) and repeated the offer on February 5 (R210-11). At that time, Petitioner said he could get a kilo for $57,800, but would have to make five trips and expected to get $100 for each trip (R212). He also fixed a price of $2,700 for the ounce and a half (R222). He bragged about the quality (R224).

A planned phone call that evening failed (R225), and the next call came from Jack Kelly's house on February 7 (R226).

Kelly allegedly had not been involved in setting it up (R226-28). They made arrangements to do the kilo deal the next afternoon (R230).

The officer called on schedule at 5:00 p.m. the next day from DEA headquarters where he was getting $60,000 in recorded money (R231). They met at Mr. G's parking lot at 7:15 p.m. to exchange for the first "nickle" (R235-6). Petitioner had to return to his car to get it (R237). A field test was positive for cocaine (R238), and the prearranged arrest signal was given (R239).

The officer had met Kelly before January 9 (R262). Objection to questions about Kelly's drug involvement and whether it was checked were sustained (R263-73). The bulk of the discussion of drugs on January 9 was from the officer (R279). He initiated the talk (R283, 300, 304), and said he didn't want to get beat up over on Georgia Avenue again (R293-4, 447-448). Petitioner said he's call someone and let him know (R294). Petitioner had to borrow $20.00 for gas (R295-6). He said he wanted nothing to do with it personally (R298). He told Kelly the same thing (R311). Kelly, a police agent (R319-20), told him that Lutz was okay (R313) and participated in the drug discussions. He even went out with Petitioner for a private conference (R319). Even so, Petitioner did not personally offer to sell any drugs (R320).

The next day, Kelly was present when Lutz gave Petitioner the $60.00 (R322-3). The officer claimed he specifically mentioned that it was for the cocaine, but ultimately

admitted that he wasn't sure whether it was express or just "understood" (R323-5). Defense motion to strike was denied (R326-31). On redirect, Lutz again asserted his impression that a gram of cocaine was dropped off the night before and he was paying for it (R462, 471). Defense objection and motion for mistrial were denied (R462-471). Ultimately, the jury was instructed that any references to the nature of the substance allegedly delivered on January 9 were stricken (R1090-1).

Lutz did not know how the next meeting, on February 1, came about. He had not talked to Petitioner (R372-3). In all of Petitioner's conversations, it was always somebody who Petitioner knew who had the stuff, and that was who Lutz hoped to meet on February 2 (R374-5). Once again, it was Lutz who brought up the drug deal (R381). Petitioner wanted $500.00 for his expenses (R388-91). Lutz later initiated a request for qualudes and heroin (R395-7). As always, Petitioner thought he could get some from somebody (R397). At the end, Lutz brought up the cocaine deal again and asked Petitioner to set a price (R400).

The call on February 8 was taped (R412). Lutz offered another thousand if he could get the whole kilo then (R412-13). He said he'd try (R413).

Petitioner said he had never done anything like this before and hoped he wasn't getting in trouble (R417). The officer does not know where the package came from (R422), but it was the only time he saw Petitioner with drugs in his possession (R279-423). He admitted that, in all his contacts

with Petitioner before, he had always been put off with some excuse about Petitioner's friend (R424).

Petitioner allegedly gave Kelly $150.00 of the money he got for the ounce (R517). Kelly, who overcame his agoraphobia long enough to appear at trial (R785), affirmed that he was being paid by both parties (R808). He claimed he had discussed drugs with Petitioner prior to introducing him to Lutz (R789-90) and that Petitioner tried to get he and his wife to try cocaine at his office (R794), but later he contradicted that story (R839-40). He testified that Petitioner delivered the first gram to him at midnight January 9 (R803-4), and that Petitioner brought in the ounce (R810). He also claimed he saw Petitioner with drugs prior to setting up the Lutz meeting (R843), but testified to the contrary on deposition (R843-4). He was on tranquillizers at trial (R813-14) and throughout the transactions (R859).

Petitioner's version was somewhat different. He testified that Kelly had the drug connections, and Petitioner had refused repeated efforts to get him involved (R938-40). He testified that the $20.00 and $60.00 he received in January were to place bets at the dog track (R927-9, 937-8). The cocaine on February 1 was Kelly's, not his (R943), and he refused the money until Kelly insisted he did not want his wife to know it was his. Even then, Petitioner gave it back to Kelly on the way to the car (R946-50).

With all the people he knew, Petitioner still could not arrange the deal for a kilo that Lutz wanted (R973-4), so

arranged that too. They were both on their way to meet Lutz when Kelly backed out and said he would drive separately (R977-81), thus leaving Petitioner to be arrested alone.

POINTS INVOLVED

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?

II

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING A CONVICTION WHERE THE TRIAL JUDGE ALLOWED TESTIMONY ABOUT PHYSICAL EVIDENCE WHICH IT SUPPRESSED?

III

WHETHER THE DISTRICT COURT ERRED IN REFUSING TO REVERSE WHERE EVIDENCE FOUND IN PETITIONER'S CAR ON A PRETEXTUAL INVENTORY SEARCH WAS ADMITTED AT TRIAL?

ARGUMENT POINT I

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.

It must be remembered that Lutz never saw Petitioner with drugs in his possession until the night he was arrested, and by then he had been subjected to extensive pressure, appeals to friendship, and even an appeal to sympathy for Lutz's problems buying on the street. Though Petitioner believes a compelling argument was made to the jury that he was entrapped, he does not rely on it here, in view of Story v. State (Fla. 4 DCA 1978) 355 So.2d 1213, cert. disch., 364 So.2d 892. Rather, he relies on the failure to fully instruct the jury on his defense.

In Moody v. State 359 So.2d 557 (Fla. 4 DCA 1978), the Fourth District ordered a new trial for failure to instruct that:

> "The state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officers, and unless it had done so you should find the defendant not guilty." (Footnote 1, 359 So.2d at 558).

Petitioner's request for the same instruction was denied, apparently on grounds that the instruction was no longer part of the standard jury instructions in criminal cases (R19-21).

The trial Judge's ruling misconceived the purpose of standard instructions. They neither excuse the giving of erroneous standard instructions nor the omission of the appropriate instructions, just as the Fourth District recognized in

Moody, supra. See also Willcox v. State 258 So.2d 298 (Fla. 2 DCA 1972).

The District Court avoided that trap, but went astray in finding the instructions as given adequate to delineate the State's burden of proof. The trouble with the instruction given is that if the jury found the evidence neutral on entrapment, it received no direction on what verdict to return and might well have convicted. Since there was evidence strongly suggesting entrapment, the jury should have been required to acquit unless it was convinced of the absence of entrapment beyond a reasonable doubt, Moody v. State, supra. Though this jury was told that a reasonable doubt could arise "from the evidence, conflict in the evidence or lack of evidence" (R1202, A5), the critical entrapment instruction directed it to acquit "if the evidence raises a reasonable doubt" and made no mention of lack of evidence. At least by implication, the jury was told it had to find evidence of entrapment to acquit on that grounds. Ever since McNish v. State (1903) 45 Fla. 83, 34 So. 219 at 220, the faulty implication of the first part of the entrapment instruction has been known.

A similarly confusing instruction which implied that the jury could reject hypotheses of innocence unless equal to those of guilt in a circumstantial case was condemned in Willcox v. State, supra. Here, unlike Willcox, other instructions did dissipate the confusion. For example, this jury was told:

> "To overcome the Defendant's presumption of innocence, the State has the burden of

> proving the following two elements: One, the crime with which the Defendant is charged was committed; two, the Defendant is the person who committed the crime." (R1201, A4)

thus further implicating that the State had no burden to disprove entrapment.

If, as the First District suggested in Wheeler v. State (Fla. 1 DCA 1983) 425 So.2d 109, the purpose of eliminating 2.11(e) from the standard jury instructions was to avoid giving it undue attention, then this Court has overlooked that argument of counsel cannot be a substitute for a proper instruction. This jury was told to take this law only from the Judge's instructions (R1205, 1211). See Mellins v. State (Fla. 4 DCA 1981) 395 So.2d 1207 at 1209. The instant instructions, as a whole, were flawed and require a new trial.

The United States Supreme Court has made it clear that an erroneous instruction on burden of proof as to state of mind requires reversal. In Sandstrom v. Montana (1979) 442 U.S. 510 at 512, 61 L.Ed.2d 39 at 43, 99 S.Ct. 2450, an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was condemned because it could have mislead the jury on burden of proof. The risk of misleading the jury in this case was at least as great, and compels the same result.

Further, Petitioner submits that criminal intent is a critical element here and entrapment negates it by showing that it arose with the State, not with the accused, Dupuy v. State (Fla. 3 DCA 1962) 141 So.2d 825 at 827. Where, as here, the

defense places intent in issue, failure to properly instruct is not just error, but fundamental error, Jackson v. State (Fla. 3 DCA 1982) 412 So.2d 381. It is the trial Judge's obligation to give full instructions necessary to a fair trial of the issues, Franklin v. State (Fla. 1981) 403 So.2d 975. Petitioner's jury was not so instructed, and no jury will be in an entrapment case until this Court answers the certified question in the negative.

ARGUMENT POINT II

THE DISTRICT COURT ERRED IN AFFIRMING A CONVICTION WHERE THE TRIAL JUDGE ALLOWED TESTIMONY ABOUT PHYSICAL EVIDENCE WHICH IT SUPPRESSED.

Having obtained jurisdiction of this cause through the certified question addressed in Point I, this Court has jurisdiction to determine all questions properly before the District Court, Lawson v. State (Fla. 1970) 231 So.2d 205 at 207. One arose because the Judge suppressed the test kit, but inexplicably allowed testimony about the suppressed evidence.

When physical evidence is suppressed, testimony about the evidence must also be suppressed, Foster v. State (Fla. 1 DCA 1971) 255 So.2d 533 at 535. Though that case involved an illegal search and seizure, there is even less reason to allow the testimony on a discovery violation. The surprise which causes the physical evidence to be excluded applies to the testimony as well.

The Judge properly wondered what good it did to suppress the evidence but not the testimony (R581-4). The District Court perceived the error, but thought it harmless on grounds the evidence sustained the convictions. The District Court thus overlooked that sufficiency of the evidence was extraneous. Petitioner was not charged with possession of the test kit.

What matters here is that testimony that the test kit was found in Petitioner's trunk was highly prejudicial to his entrapment defense. Entrapment was an important issue to the

jury here (R1217-20), and this evidence was obviously very important to the prosecutor to have consumed so much argument (R570-610). Even the trial Judge said:

> "THE COURT: The Court has reviewed the Richardson case and there's no doubt in the Court's mind that the items omitted from the list are extremely important pieces of evidence." (R602, A7).

For the District Court to find harmless error on this record contradicts this Court's pronouncement in Cumbie v. State (Fla. 1977) 345 So.2d 1061 at 1062:

> "It is clear that the trial court's investigation of the question of prejudice was not the full inquiry Richardson requires. No appellate court can be certain that errors of this type are harmless. A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules, as Richardson indicates." (Emphasis added)

See also Poe v. State (Fla. 5 DCA 1983) 431 So.2d 266, where reversal resulted when evidence initially excluded for discovery violation was later admitted on rebuttal.

As this Court said:

> "Where....error is clearly made to appear, injury is presumed to follow." Chimarakis v. Evans (Fla. 1969) 221 So.2d 735 at 736.

Where, as here, important evidence is erroneously admitted, prejudice is presumed, Stafford v. Southern Bell Tel. & Tel. Co. (Fla. 2 DCA 1965) 179 So.2d 232 at 235. See also, Cunningham v. State (Fla. 1 DCA 1971) 254 So.2d 391, which involved a similar discovery violation on important evidence.

If this Court did not otherwise have jurisdiction of

this cause and this point, it would have it because the District Court ruling on harmless error conflicts directly with these other pronouncements. This Court can and should restore harmony to the law in this area by quashing the erroneous decision of the Fourth District Court of Appeal and directing that a new trial be awarded.

ARGUMENT POINT III

THE DISTRICT COURT ERRED IN REFUSING TO REVERSE WHERE EVIDENCE FOUND IN PETITIONER'S CAR ON A PRETEXTUAL INVENTORY SEARCH WAS ADMITTED AT TRIAL.

Petitioner complains here of the attempt to justify a warrantless, pretextual inventory search under Federal authority. The Federal authorities did nothing more than provide money when the ante exceeded the local budget, and had good reason to know the quantity of cocaine was below their self-imposed minimum for prosecution.

It is clear why the State wanted the search and seizure determined under Federal law. Article I, Section 12 of the Florida Constitution prohibits use of any evidence obtained by unreasonable search and seizure, and Florida law requires necessity to impound and the opportunity to be given the owner to get the car moved before it can be impounded validly, Sanders v. State, 403 So.2d 973 (Fla. 1981). Florida law also considers the opening of a bag inside the trunk without a warrant to be unreasonable, Haugland v. State 374 So.2d 1026 (Fla. 3 DCA 1979).

Even so, the Federal law embodied in 49 USC 781 and 782 does not automatically provide an exemption from the warrant requirement. See United States v. McCormick 502 F.2d 281 (9th Cir. 1974). State law seems to require a warrant, too, even after the seizure. See Brown v. State 377 So.2d 819 (Fla. 1 DCA 1979). Where were the exigent circumstances to justify the

instant search? Absent such circumstances, the evidence should have been excluded as prima facie unreasonable for the absence of a warrant, Hornblower v. State 351 So.2d 716 (Fla. 1977).

However, the most compelling reason to suppress the evidence is the obvious pretext in asserting an intention of Federal authorities to forfeit the vehicle. The first step to follow through on any forfeiture was never taken. This case was clearly not the type for Federal prosecution because the quantity was too small, and everybody knew it. Florida has steadfastly refused to admit the fruits of such pretextual seizures. See Hornblower v. State, supra, 351 So.2d at 718, where this Court condemned self-created exigencies which condemned a pretextual and inventory search.

All of the evidence supporting Count II was obtained in this search, so conviction on that count should have been reversed with instructions to discharge Petitioner. Further, that evidence and the test kit found in the trunk adversely affected Petitioner's entrapment defense, for which a new trial on the other counts is required. This Court can and should undo the error of the Fourth District in condoning the pretextual seizure by quashing its decision and ordering that Court to reverse and remand with instructions to suppress the evidence.

CONCLUSION

The certified question should be answered in the negative, because the instructions as given in this cause do not adequately address the State's burden of proof and run too great a risk of an unwarranted conviction. In a case such as this where evidence of entrapment was so strong, this Court should order a new trial. It should also disapprove the District Court's erroneous application of the harmless error rule. Finally, it should order the suppression of evidence illegally seized on a pretextual inventory for a nonexistent Federal forfeiture.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail to Marlyn J. Altman, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 29th day of August, 1983.

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