IN THE SUPREME COURT OF FLORIDA

GEORGE W. McCRAY,

Petitioner,

v. CASE No. 64,058

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The statement of the case and statement of the facts are adequately set out in prior briefs.

POINTS INVOLVED

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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.

Respondent argues that the instruction as given properly places the burden of proof on the State. However, it does not require the State to prove the absence of entrapment beyond a reasonable doubt. Therefore, the instruction is defective.

Respondent also argues that it should not have the burden to prove lack of entrapment beyond a reasonable doubt, claiming it is an almost impossible burden. It cites Patterson v. New York (1977) 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319, and State v. Kahler (Fla. 1970) 232 So.2d 166, but those decisions are not in point. Patterson v. New York, supra, approved a state law placing the burden of showing extreme mental disturbance on the accused. State v. Kahler, supra, excused the state from proving that there is no valid prescription anywhere in the world on a charge of possession of unlabelled drugs. Thus, neither case involved any essential element of the offense. On the other hand, entrapment goes to intent and whether it originates with the state or the accused. It is an essential element which the state must prove beyond a reasonable doubt.

It must be remembered that the instruction does not come into play unless the evidence indicates entrapment. It

is the State which offers the inducement, so it is not unreasonable to expect the State to prove beyond a reasonable doubt that its inducement did not create the crime. It would be unreasonable not to impose that burden on the State.

Respondent says Moody v. State (Fla. 4 DCA 1978) 359 So.2d 557 was reversed because failure to give the standard jury instruction combined with failure to instruct on the State's burden risked giving the jury an erroneous impression. It overlooks that the Moody jury was instructed substantially the same as our jury, and thus the risk was the same. Compare Footnote 1 of Moody v. State, supra, with A5-6. The Moody decision discusses standard jury instructions only because the instruction on the State's burden was part of the standard instructions then.

What does the change in standard instructions mean? Respondent says it signals a substantive change in the law as to burden of proof, but that is hardly the proper way to change substance. As this Court said in promulgating the standard instructions:

> "The Court recognizes that the initial determination of the applicable substantive law in each individual case should be made by the trial judge and that it would be inappropriate for the Court at this time to consider the recommended instructions with a view to adjudging that the legal principles in the recommended instructions correctly state the law of Florida."
> (In the Matter of STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES (Fla. 1976) 327 So.2d 6)

Petitioner submits that the omission of the critical instruction on burden was an unfortunate oversight which this Court should correct now before it does any more harm.

ARGUMENT POINT II

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

Rather than address the harmless error question which Petitioner raises, Respondent argues that there was no error. It wants that part stricken from the opinion, but it has not conferred jurisdiction on this Court to grant it any affirmative relief. It has not filed a cross-petition for review. See Wenshaw v. Smith (Fla. 1963) 151 So.2d 3 at 5.

Respondent says excluding evidence for discovery violation is not the same as suppressing evidence. On that basis, it would distinguish Foster v. State (Fla. 1 DCA 1971) 255 So.2d 533. The distinction is elusive since both are exclusionary rules. To the extent that there is a difference, it favors Petitioner.

Clearly, evidence suppressed for illegal search and seizure does not cease to exist. It can be used on rebuttal, Walder v. United States (1953) 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 354. The same is not true on a discovery violation, Poe v. State (Fla. 5 DCA 1983) 431 So.2d 266.

If the victim sees a gun during the armed robbery, he could still testify that he was robbed at gunpoint, even if the gun and all evidence of how it was found had to be suppressed under Foster v. State, supra. If the same gun

is not integral to the crime charged, and the State omits it from the evidence list, the defense is entitled to assume it will not be introduced. That necessarily includes testimony as well. Any other rule permits trial by ambush, which is exactly what happened here, and one of the reasons why the error is not harmless.

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.

How can the State continue to claim this was ever a possible Federal prosecution when everyone knew throughout the arrest that the quantity was too small? It was a pretext, purely and simply. Otherwise, why was there no arrest, no forfeiture, not even booking in the Federal system? This failure to follow through is one of the surer signs of a pretext, and the pretext is the reason why the results must be suppressed.

CONCLUSION

This cause is now before this Court for review as though on direct appeal. Petitioner should be awarded a new trial, with a jury properly instructed on the State's burden to disprove entrapment beyond a reasonable doubt, and without the use of illegally obtained evidence and testimony about evidence excluded from the trial.

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 14th day of October, 1983.

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