IN THE SUPREME COURT OF FLORIDA

VICTOR K. GOLDSTEIN,

Petitioner,

v. Case No. 64,168

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT

JIM SMITH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

/jaf

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts reported at pages 2 and 3 of the brief.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE INFORMATION ON THE ALLEGED GROUND THAT ENTRAPMENT WAS ESTABLISHED AS A MATTER OF LAW.

The appellate courts of this state have consistently held that issues relating to the intent of the accused, his motive, state of mind or predisposition are not to be resolved on a motion to dismiss pursuant to Rule 3.190(c)(4). State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983); State v. Evans, 394 So.2d 1068 (Fla. 4th DCA 1981); State v. Rogers, 386 So.2d 278 (Fla. 2d DCA 1980), cert. den., 392 So.2d 1378 (Fla. 1980); Cummings v. State, 378 So.2d 879 (Fla. 1st DCA 1979), cert. den., 386 So.2d 635 (Fla. 1980); State v. West, 262 So.2d 457 (Fla. 4th DCA 1972); State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979). As stated in the latter case:

> "Intent is not an issue to be decided on a motion to dismiss under Rule 3.190(c)(4), Florida Rules of Criminal Procedure, 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. . ."
>
> (Text at 449)

Petitioner argues that the state should have filed a traverse in the circuit court asserting that Goldstein was predisposed to commit the crime. This was unnecessary because petitioner in his motion did not even allege in his motion to dismiss that he was not predisposed to take the victim's wallet and money (R. 17 - 19). Thus, it would have been superfluous and unnecessary for the state to address the issue. Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977).

It is well-settled that there is no constitutional prohibition against a law enforcement officer providing an opportunity for a ready and willing individual to commit a crime. United States v. Russell, 411 U.S. 423, 36 L.Ed.2d 366 (1973); Hampton v. United States, 425 U.S. 484, 48 L.Ed.2d 113 (1976); State v. Dickinson, 370 So.2d 726 (Fla. 1979).

Moreover, the legislature has specifically commanded that it shall not constitute a defense to a prosecution for violation of the provisions of Florida Statute 812.02 - 812.037 that deceptions such as the use of undercover operations are employed, or that an opportunity was provided to commit the crime or even that the officer solicited a person predisposed to engage in proscribed conduct in order to obtain evidence. Florida Statute 812.028(1), (2), and (4). Acceptance of petitioner's view then would require not only an abandonment of this court's prior decisions but a repudiation of the specific legislative mandate mentioned. The legislature thus has enunciated that entrapment can be an affirmative dissent where the solicitation

would not induce an ordinary law abiding person to violate the theft statute. What the quantity of such an inducement might be, of course, would be a fact question to be resolved in a jury trial. But petitioner's nolo contendere plea does not preserve such a factual question. Gissendanner v. State, 373 So.2d 898 (Fla. 1979). It has been held that a corrupt official's willingness to accept thousands of dollars illegally does not call for a holding that entrapment is established as a matter of law. See United States v. Jannotti, 673 F.2d 578 (3rd Cir. 1981); United States v. Myers, 527 F.Supp. 1206 (E.D. N.Y. 1981), affirmed, 692 F.2d 823 (2nd Cir. 1982); United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983).

Petitioner urges the Court to adopt State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) and to reject cases such as State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983) and State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983). Essentially, Casper constitutes an anomoly, a departure from the established case law permitting the law enforcement authorities use of undercover operatives and strategems to uncover lawless behavior of the criminals. In Story v. State, 355 So.2d 1213 (Fla. 4th DCA 1978) - which the Casper court paid lip service to then misapplied - the court noted that a criminal's predisposition could be shown in a number of alternative ways: by his prior criminal activity, by reasonable suspicion of his involvement in such activity, or by his ready acquiescence in the commission of the crime. While petitioner's motion avers that he was not a suspect as a

pickpocket (R. 19), he makes no allegation suggesting that he did not readily acquiesce in the commission of the offense. In essence, Goldstein conceded that he simply availed himself of the opportunity to commit a crime -- and that is not entrapment. State v. Rouse, 239 So.2d 79 (Fla. 4th DCA 1980); Koptyra v. State, 172 So.2d 628 (Fla. 2d DCA 1965); Lashley v. State, 67 So.2d 648 (Fla. 1953).

Petitioner attempts to have this Court add as a new requirement in entrapment cases that law enforcement agencies initially must have reason to believe that the specific defendant had earlier been involved in criminal activity. That has never been required, in either the state or federal courts. See Sokos, supra; Jannotti, supra, 673 F.2d at 609; United States v. Silver, 457 F.2d 1217 (3rd Cir. 1972).

This court has declared that ordinarily entrapment is a question for the jury. State v. Liptak, 277 So.2d 19 (Fla. 1973). Casper's misapplication of the law, if accepted by this Honorable Court, would result in the effective elimination of most police decoy operations to ferret out drug offenses, prostitution, theft and fencing operations, and assaults committed on street people. The United States Supreme Court has declared that law enforcement's affirmative efforts to solve crimes should not be negated by application to the courts for prior approval of the methodology:

> "But the defense of entrapment enunciated in those opinions was not intended to give the federal

judiciary a 'chancellor's foot'
veto over law enforcement practices
of which it did not approve."

United States v. Russell,
411 U.S. 423, at 435;
36 L.Ed.2d 366, at 375

CONCLUSION

The decision of the Second District Court of Appeals should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: Robert F. Moeller, Assistant Public Defender, Courthouse Annex, Tampa, Florida 33602 this 12th day of March, 1984.

Of Counsel for Respondent