IN THE SUPREME COURT OF FLORIDA

VICTOR K. GOLDSTEIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 64,168

BRIEF OF PETITIONER ON THE MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

VICTOR K. GOLDSTEIN, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	Case No. 64,168

PRELIMINARY STATEMENT

In this brief references to the record on appeal that was before the Second District Court of Appeal will be designated by the symbol "R," followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner, Victor K. Goldstein, was charged with grand theft in the second degree by an information filed in circuit court in Hillsborough County on September 28, 1982 (R 3-4).

On November 30, 1982 Goldstein filed a motion to dismiss, pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure (R 17-19). The motion alleged the following facts (R 19):

> 1. That on the date listed in the Information, the Defendant was in the vacinity [sic] of the Greyhound Bus Station on the Corner of Morgan and Polk Street.
> 2. That Det. Hogue of the Tampa Police Department was in this same vacinity [sic] dressed as a wino with money hanging out of his pocket.
> 3. That Det. Hogue did not have any suspect in mind as a possible pickpocket.
> 4. That the Defendant was not a suspect as a pickpocket.
> 5. That the Defendant is alleged to have taken the money from the pocket of Det. Hogue.
> 6. That this is entrapment as a mtter [sic] of law according to State v. Casper.

The State did not file a traverse or otherwise dispute the facts set forth in Goldstein's motion (R 1-42).

The motion to dismiss was heard by the Honorable J. Rogers Padgett on December 1, 1982 (R 37-42). At the hearing Goldstein's counsel mentioned as additional facts that Detective Hogue smelled of alcohol, and the amount of money protruding from his pocket was $150.00 (R 38).

The court denied the motion, and Goldstein entered a plea of no contest, specifically reserving his right to appeal the denial of his motion to dismiss (R 39-41).

The court adjudicated Goldstein guilty and sentenced him to six months in the county jail (R 20-23, 42).

Goldstein appealed to the Second District Court of Appeal. The court initially affirmed Goldstein's conviction on May 27, 1983. However, after Goldstein filed a motion for clarification, the court withdrew its original opinion on July 27, 1983, and substituted the decision which is the subject of this proceeding. In the clarified opinion the court rejected Goldstein's argument that the facts asserted in his motion to dismiss constituted entrapment as a matter of law and affirmed his conviction, but acknowledged that this holding was in direct conflict with State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) (Appendix, pp. 1-4).

Petitioner, Victor K. Goldstein, filed his notice in the Second District Court of Appeal to invoke the discretionary jurisdiction of this Court on August 24, 1983. This Court accepted jurisdiction on February 2, 1984, and dispensed with oral argument.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING VICTOR K. GOLDSTEIN'S MOTION TO DISMISS THE INFORMATION BECAUSE THE MATERIAL FACTS WERE UNDISPUTED AND ESTABLISHED THE DEFENSE OF ENTRAPMENT AS A MATTER OF LAW.

This case involves the question of whether Victor Goldstein was entrapped as a matter of law when he succumbed to the temptation placed in his path by the decoy stratagem employed by the Tampa Police Department, and whether this issue is one which may appropriately be resolved by a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4).

Section 812.028 of the Florida Statutes permits law enforcement officers to use undercover operatives in prosecutions for theft, robbery and related crimes. However, this Court made clear in State v. Dickinson, 370 So.2d 762 (Fla. 1979) that this section does not eliminate the defense of entrapment in Florida; rather entrapment is codified in section 812.028(4). This section provides that it shall not constitute a defense to a prosecution for any violation of the provisions of sections 812.012 through 812.037[1] that:

> (4) A law enforcement officer solicited a person predisposed to engage in conduct in violation of any provision of ss. 812.012-812.037 in order to gain evidence against that person, provided such solicitation would not induce an ordinary law-abiding person to violate any provision of ss. 812.012-812.037.

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1) Grand theft, the crime with which Victor Goldstein was charged, is proscribed by section 812.014.

This portion of the statute saves section 812.028 from being unconstitutional because it "preserves the line between the predisposed criminal and the unwary innocent... ." Dickinson, 370 So.2d at 763.

The Dickinson Court recognized, as have other courts, that predisposition is the essential consideration in an entrapment defense. See also United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); State v. Brider, 386 So.2d 818 (Fla. 2d DCA 1980), pet. for review den., 392 So.2d 1372 (Fla. 1980). That is, whether the defendant was already of a mind to commit the crime before law enforcement officers became involved is determinative of whether those officers entrapped the defendant.

Although the issue of entrapment ordinarily is a question for the trier of fact, entrapment can exist as a matter of law. State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983); Smith v. State, 320 So.2d 420 (Fla. 2d DCA 1975), cert. den., 334 So.2d 608 (Fla. 1976); State v. Rouse, 239 So.2d 79 (Fla. 4th DCA 1970). See also State v. Liptak, 277 So.2d 19 (Fla. 1973). The Second District Court of Appeal recognized this fact in State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983), review granted, Case No. 63,451 (Fla. 1983), one of the cases used to support its decision in Goldstein, but, incongruously, held that entrapment may not be decided pursuant to a motion to dismiss under Florida Rule of Criminal Procedure 3.190(c)(4) where the defendant's intent or state of mind (i.e. predisposition) is at issue. The problem with this approach is that predisposition is the key issue whenever an entrapment defense is asserted.

Cruz involved facts very similar to those of the instant case. The Second District found that a question of fact as to whether Cruz was predisposed to commit the grand theft arose because there was no showing the police approached or encouraged him to commit the offense. This conclusion was not warranted. The police encouraged Cruz, just as they encouraged Victor Goldstein, by placing a tempting decoy bearing exposed money in his path. They approached him in the sense that they positioned the decoy so that he could be seen by anyone passing by. The Court's comments go more to the nature of the lure used to ensnare Cruz (and Goldstein) than to whether he might have been predisposed to commit the crime.

Cruz implies that one must have been predisposed to commit the crime because he did commit it. If adopted by this Court as the law of Florida, this reasoning would eliminate the defense of entrapment in this state.

The Cruz court appears to have equated "intent" with "predisposition." However, the two concepts are not identical, and the distinction is important to resolving this case.

"Intent" involves the state of mind of the defendant at the time he committed the criminal act. There can be little doubt that Petitioner, Victor Goldstein, intended to deprive the police decoy of the $150.00 when Goldstein removed it from his pocket. But the issue is whether Goldstein was predisposed to commit the theft before he formed the intent to take the money.

The question of intent is not susceptible of direct proof, but must be decided on the basis of all the facts and circumstances of the case. See, for example, State v. Evans, 394 So.2d 1068 (Fla. 4th DCA 1981); Williams v. State, 239 So.2d 127 (Fla. 4th DCA 1970); Edwards v. State, 213 So.2d 274 (Fla. 3d DCA 1968), cert. den., 221 So.2d 746 (Fla. 1968). Predisposition, on the other hand, is susceptible to direct proof. We know this because in Story v. State, 355 So.2d 1213 (Fla. 4th DCA 1978), cert. den., 364 So.2d 893 (Fla. 1978), the court set forth four specific ways to prove predisposition.[2]

Thus, because predisposition, unlike intent, may be proven directly, there is no reason why the issue of predisposition may not be resolved by way of a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). The State may defeat such a motion by alleging facts which would tend to prove predisposition in accordance with one of the four methods of proof listed in Story. The State did not allege any such facts in the instant case, and so the circuit court should have granted Goldstein's motion to dismiss.

The nature and purpose of a proceeding pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) was examined in Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977), cert. den., 352 So.2d 175 (Fla. 1977). The initial burden is on the defendant to demonstrate that

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2) According to Story, the State may establish predisposition through proof of the defendant's prior record, his ready acquiescence in the criminal scheme, his reputation for engaging in certain illicit activities, or a police officer's reasonable suspicion that the defendant was engaged in such activities.

the material facts are undisputed and fail to establish a prima facie case or that they establish a valid defense to the charge. If the allegations meet this test, the burden shifts to the State. The State must then place a material issue of fact in dispute by traverse; otherwise, the motion must be granted. Id.; Camp v. State, 293 So.2d 114 (Fla. 4th DCA 1974), cert. den., 302 So.2d 413 (Fla. 1974).

The trial judge determines whether the undisputed facts raise a jury question much as the judge evaluates a motion for judgment of acquittal made at trial. Ellis, supra; State v. Smith, 376 So.2d 261 (Fla. 3d DCA 1979), cert. den., 388 So.2d 1118 (Fla. 1980). If a jury of reasonable men could find guilt, a jury question exists, and denial of the motion to dismiss is mandated. State v. Hudson, 397 So.2d 426 (Fla. 2d DCA 1981). But when no evidence legally sufficient for a jury verdict of guilty could be submitted, the motion to dismiss is properly granted. Smith, supra.

When an entrapment defense is asserted, once the accused presents a valid claim, the State bears the burden of disproving entrapment beyond a reasonable doubt. State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982), pet. for review den., 418 So.2d 1280 (Fla. 1982);[3] Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978); Dupuy v. State, 141 So.2d 825 (Fla. 3d DCA 1962), cert. den., 147 So.2d 531 (Fla. 1962). The Dupuy court noted:

> ... [W]here the defense of entrapment is raised it is incumbent upon the state to make a showing amounting to more than mere

3) The First District Court of Appeal followed Casper in State v. Holliday, 431 So.2d 309 (Fla. 1st DCA 1983), review granted, Case No. 63,832 (Fla. 1983).

> surmise and speculation that the intent to commit crime originated in the mind of the accused and not in the minds of the officers of the government.

141 So.2d at 827. Thus the State must at some point produce evidence of the accused's predisposition to commit the crime. In the context of a motion to dismiss, however, the State would need merely to allege facts which would tend to show predisposition. This is a minimal burden. If the State cannot meet it, there is no reason why the entrapment question may not be resolved pretrial. After all, if the State remains unable to present evidence of predisposition during the trial, the case would be subject to a motion for judgment of acquittal. Thus, judicial labor and the time of all concerned may be saved by considering this issue on a motion to dismiss.

The Casper court correctly ruled that the issue of predisposition may be resolved pursuant to a motion to dismiss. Where the State cannot establish a prima facie case for predisposition under any reasonable construction of the facts, there is no issue for the trier of fact to decide. Casper.

In State v. Snipes, 433 So.2d 653 (Fla. 1st DCA 1983) the State appealed a trial court order which granted the defendant's motion to dismiss a perjury charge. The appellate court rejected the State's argument that the defense of recantation which Snipes asserted was not cognizable on a motion to dismiss, but involved factual questions which should have been submitted to a jury:

> ... [T]he state did not controvert the material facts relied on by appellant, so there was no issue for the jury to try. The court,

> not the jury, should decide whether the undisputed facts establish a valid defense of recantation.

433 So.2d at 655 (emphasis supplied).

Here, the only facts before the court showed a scenario established by the police to trap anyone who was not strong enough to resist the temptation raised by a seemingly incapacitated vagrant lying on the sidewalk with a large amount of money protruding from his pocket. There is no indication in the record that the police placed the decoy in order to arrest Goldstein or any other particular individual. Nor is there any evidence that similar crimes had occurred in the area where the decoy was positioned. Most importantly, as noted previously, the State made no allegations that Goldstein readily acquiesced in the crime, or had been involved in prior criminal activity, or had a reputation for such activities, or that the police had a reasonable suspicion of his involvement in such activities. See Story, supra. Under these circumstances, there was no evidence from which the trier of fact could have inferred predisposition. Goldstein's motion to dismiss thus established entrapment as a matter of law, and should have been granted. Casper, supra.[4]

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4) Goldstein suggests that if predisposition, and hence entrapment, may not be resolved by a motion to dismiss, then a defendant who pursued such a motion prior to Cruz in reliance on Casper (in which the issue was resolved by way of a motion to dismiss) might be entitled to withdraw a nolo plea he entered reserving his right to appeal the denial of his motion to dismiss. Cf. Brown v. State, 376 So.2d 382 (Fla. 1979).

CONCLUSION

Petitioner, Victor K. Goldstein, respectfully prays this Honorable Court to reverse the decision of the Second District Court of Appeal and remand this cause with directions to the appellate court to return this cause to the trial court for the granting of Goldstein's motion to dismiss and ordering him discharged.

Goldstein would note that Cruz v. State, Case No. 63,451, was orally argued before this Court on November 10, 1983. Cruz involved issues very similar to those involved herein, and is probably dispositive of this appeal. (Please see Goldstein's Motion to Expedite and Contingent Motion to Consolidate, which was served on October 6, 1983.)

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Defendant, Victor K. Goldstein, #090274, P. O. Box 1449, Homestead, FL, this 22nd day of February, 1984.

Robert F. Moeller

Robert F. Moeller