

PETITIONER'S BRIEF ON JURISDICTION

JERRY HILL PUBLIC DEFENDER TENTH JUDICIAL CIRCUIT

By: Robert F. Moeller Assistant Public Defender Courthouse Annex Tampa, Florida 33602-4197

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IN THE SUPREME COURT OF FLORIDA

RAYMOND LEE SMITH,) Petitioner,) vs.) STATE OF FLORIDA,) Respondent.)

Case No.

STATEMENT OF THE CASE

Petitioner, Raymond Lee Smith, was charged with grand theft in the second degree by an information filed in circuit court in Hillsborough County on February 9, 1982.

On May 25, 1982 Smith filed a motion to dismiss, alleging that he was entrapped as a matter of law. The State did not traverse the motion. The court denied the motion on June 16, 1982.

Smith then entered a plea of no contest, specifically reserving his right to appeal the denial of his motion to dismiss. He was placed on three years probation, with adjudication of guilt withheld.

Smith appealed to the Second District Court of Appeal. On November 23, 1983 that court upheld the denial of Smith's motion to dismiss. The court cited <u>State v. Cruz</u>, 426 So.2d 1308 (Fla. 2d DCA 1983), <u>petition for review granted</u>, No. 63,451 (Fla. 1983) and <u>State v. Goldstein</u>, 435 So.2d 352 (Fla. 2d DCA 1983) in support of its decision. As

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"but see" citations the court cited <u>State v. Casper</u>, 417 So.2d 263 (Fla. 1st DCA 1982) and <u>State v. Holliday</u>, 431 So.2d 309 (Fla. 1st DCA 1983), <u>petition for review granted</u>, No. 63,832 (Fla. 1983).

STATEMENT OF THE FACTS

The opinion of the Second District Court of Appeal stated the facts of this case as follows (Appendix, p. 2):

On January 13, 1982, the Tampa Police Department deployed a decoy at Kennedy Boulevard and Bernard Avenue in Tampa. The policy [sic] decoy was dressed in old clothes and acted sick or drunk. He had \$150 protruding from a pocket. Defendant was not a suspect or a target of the decoy. However, at 9:20 p.m., he approached the decoy and removed the money from the decoy's pocket. Defendant was immediately arrested.

(The offense actually occurred on January 12, as alleged in the information and established by Smith's motion to dismiss. This discrepancy is not relevant to the issues involved herein.)

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN RAYMOND LEE SMITH V. STATE OF FLORIDA, CASE NO. 82-2155, WHICH EX-PRESSLY AND DIRECTLY CONFLICTS WITH STATE V. CASPER, 417 So.2d 263 (FLA. 1st DCA 1982) ON THE SAME QUESTION OF LAW.

The facts of this case are virtually indistinguishable from those of <u>State v. Casper</u>, 417 So.2d 263 (Fla. 1st DCA 1982). In each case the defendant was arrested after removing \$150.00 in currency which was protruding from the pocket of a police decoy who was posing as an incapacitated vagrant. In neither case was the defendant a particular target of the decoy stratagem employed by the police. In <u>Casper</u> the First District Court of Appeal concluded that these facts constituted entrapment as a matter of law. The court held that to defeat Casper's motion to dismiss, the State would have had to allege some facts tending to show a predisposition on his part to commit a crime. (The First District followed <u>Casper</u> in <u>State v. Holliday</u>, 431 So.2d 309 (Fla. 1st DCA 1983), <u>petition for review granted</u>, No. 63,832 (Fla. 1983)).

In the instant case the Second District Court of Appeal reached a conclusion opposite to that of the <u>Casper</u> court. The Second District acknowledged conflict with <u>Casper</u> (and <u>Holliday</u>) by citing it as a "but see" citation in the opinion.

Thus, the decision of the Second District Court of Appeal in <u>Smith</u> expressly and directly conflicts with the decision of the First District Court of Appeal in Casper on the same question of law, to-wit:

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whether the police decoy tactic employed herein constitutes entrapment as a matter of law.

Smith would point out that this Court recently has agreed to review at least two cases in addition to <u>Holliday</u> which involve almost identical police decoy operations. They are <u>State v. Cruz</u>, 426 So.2d 1308 (Fla. 2d DCA 1983), <u>petition for review granted</u>, No. 63,451 (Fla. 1983), which was cited by the Second District Court of Appeal in support of its decision in <u>Smith</u>, and <u>Drumm v. State</u>, 432 So.2d 765 (Fla. 2d DCA 1983), <u>petition for review granted</u>, No. 63,948 (Fla. 1983). Cruz was argued orally before the Court on November 10, 1983.

CONCLUSION

Based upon the foregoing argument, reasoning, and citations of authority, this Court has jurisdiction to review the decision of the Second District Court of Appeal in <u>Raymond Lee Smith v. State of</u> <u>Florida</u>, Case Number 82-2155, pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

Smith respectfully suggests that this Court should accept jurisdiction and decide this case to maintain uniformity within appellate decisions in Florida. Resolution of the conflict involved herein is particularly important because police use of the decoy tactic at issue continues to be a common practice not only in the City of Tampa, but in other parts of Florida as well. See <u>State v. Holliday</u>, 431 So.2d 309 (Fla. 1st DCA 1983), <u>petition for review granted</u>, No. 63,832 (Fla. 1983).

Respectfully submitted,

JERRY HILL PUBLIC DEFENDER TENTH JUDICIAL CIRCUIT

By: ()

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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, Tampa, FL, 33602, this 3rd day of January, 1984.

Robert F. Moeller