OA 11-7-84
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner

vs.

BOYCE E. GLOSSON, ET AL.,
Respondents

Case No. 64,688

BRIEF OF AMICUS CURIAE FLORIDA SHERIFFS ASSOCIATION

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INTEREST OF AMICUS CURIAE

Amicus curiae, Florida Sheriffs Association is an organization comprised of all the duly constituted sheriffs of the state. The effectiveness of the sheriffs as the chief law enforcement officers of their respective counties would be substantially reduced if they were unable to utilize informants paid on a contingent fee basis in their efforts to combat drug trafficking in Florida.

ISSUE

THE FIRST DISTRICT AS A MATTER OF LAW ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DISMISSING THE INFORMATION ON THE BASIS OF PROSECUTORIAL MISCONDUCT RESULTING IN THE DENIAL OF RESPONDENTS' RIGHTS TO CONSTITUTIONAL DUE PROCESS OF LAW.

ARGUMENT

The majority below erred in applying Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) to hold that a contingency fee arrangement between a law enforcement agency and a confidential informant violated the constitutional due process rights of a criminal defendant. While the court in Williamson did reverse the defendant's conviction based on testimony from an informer paid on a contingency fee basis, the case properly controlling the instant case is not Williamson, but Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646 48 L. Ed. 2d 113 (1976).

In Hampton, the Court upheld the conviction of a defendant who sold heroin to government agents supplied to him by other government agents. In rejecting Hampton's due process claims, Justice Rehnquist wrote that:

> The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant. Here, as we have noted, the police, the Government informant, and the defendant acted in concert with one another. If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission,' the defendant is protected by the defense of entrapment. (Citations deleted)

In the instant case, the facts make it clear that informant Wilson was acting in concert with the defendants (and supplying drugs for sale) just as was the case in Hampton. As the Court concluded in that case, where such concerted action was present, there can be no due process violation. As the dissent noted

below, State v. Glosson, 441 So.2d 1178, 1180 (1st DCA 1983) (Nimmons, J., dissenting), to find otherwise would be to create a "super entrapment" defense available even to those "up to their ears in predisposition." Id at 1180. Such a conclusion could hardly be harmonized with that in Hampton, in which it was held that the defense of entrapment would never be available based on government misconduct in a case where the predisposition of the defendant to commit the crime was established. Hampton v. United States, 425 U.S. 484, 488 (1976). The Court noted that even if some government misconduct were present, "the remedy lies not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." Id at 490.

While it is not clear whether the defendants have the entrapment defense available to them in the instant case because the trial court granted a motion to dismiss before the issue of predisposition could be determined, it is clear in light of Hampton, that the motion to dismiss should not have been granted on due process grounds, even where an informant paid on a contingency fee basis was crucial to the prosecution. As the Fifth Circuit noted in a post-Hampton case:

> Although high informant fees are and must be suspect, an informant's testimony will not be rejected unless there is evidence that he was promised payment contingent upon convictions of a particular person (e.s.).

United States v. Gray, 626 F.2d 492, 499 (5th Cir. 1980), cert. denied, 449 U.S. 1038 (1980), citing United States v. Garcia, 528 F.2d 580 (5th Cr. 1976), cert. denied 426 U.S. 952, 96 S. Ct. 3177, 50 L. Ed. 2d 1190, 429 U.S. 898, 97 S. Ct. 262, 50 L. Ed. 2d 182. While the facts in the opinion below are not conclusive there is no implication that Wilson's payment was contingent on the successful prosecution of these particular defendants. In fact, just the opposite is true. Among the stipulations between the parties below was Stipulation 4, in which Wilson

was to be paid from the proceeds of civil forfeiture proceedings "filed as a result of the Investigations (plural) which he initiated and in which he participated. State v. Glosson, 441 So.2d 1178, 1179 (1st DCA 1983). Stipulation 7 states that "This case is one of the aforementioned cases. Id at 1180 (e.s.). The inference to be drawn from these stipulations is that Wilson's payment was not contingent on the successful prosecution of these or any other particular individuals, as would be prohibited by the holding in Gray.

Even if this Court finds that the holding of Williamson survives Hampton, a motion to dismiss based on allegations of government misconduct would be clearly improper. In Williamson v. United States, 311 F.2d 441 (5th Circuit 1962) the court held that "Without some justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants." Id at 444. As has already been noted, there appears to be nothing to indicate that Wilson would only be paid if he secured the convictions of these particular defendants. What should be noted, however, is that under Williamson even a contingent fee arrangement based on the conviction of pre-selected defendants might be permissible were there adequate "justification or explanation" for such an arrangement. In Williamson the court noted "It may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis, $200.00 for Williamson and $100.00 for Lowrey, to produce the legally admissible evidence against each of them." Id at 444. Thus, Williamson does not reject contingent fee arrangements with informers. It merely condemns these arrangements when the targets are particular defendants (as is not the case apparently in Glosson) and then only in the absence of sufficient justification. Even had the trial court below found that the defendants in the instant case

had been "pre-selected" in violation of Williamson, the State was entitled to its "day in court" to explain its conduct. An order to dismiss was clearly inappropriate.

As the dissent aptly noted below, the majority opinion also does serious harm to the efforts of law enforcement agencies in Florida. As the dissent declared in Williamson:

> In the majority's view, the very fact of hiring an informer on a contingency is ignoble. Such a holding would rob the Government of one of its most effective weapons in detecting crime and bringing to the bar of justice those who commit it.
>
> For decades the use of informers has been accepted as a proper means of enforcement of the criminal law. It is recognized by all as one of the most important means. And, in practically all instances, the informer is in reality on a contingent basis.
>
> The method chiefly used in apprehending sellers of narcotics, for instance, is the employment of addicts to make the purchases from suspects in the presence of federal officers who are secreted or in disguise. Every such informer knows that his day-to-day arrangement will continue only if he delivers the goods. The addict is given barely enough money to live on and supply his needs for narcotics for a few days. In most cases, the Government agents are after one or more individuals to whom the informer is sent. If the addict succedds in landing some of the criminals the Government is after, he is well-paid and his services will continue. If he does not, he is dropped. As far as I know, the courts have accepted such practices as permissible. The same attitude has prevailed in connection with informers in the apprehension of liquor law violators.
>
> Those who represent persons charged with crime have for ages made impassioned pleas - mostly to juries - that the hiring of informers, in many cases friends of the victims being sought, is dirty business. Crime itself is a dirty business, and the universal experience of law enforcement officers is that the use of informers is necessary to the enforcement of law.

Id at 446. (Cameron, J. dissenting). The opinion goes on to hold that Congress has explicitly approved such arrangements for the enforcement of the Internal Revenue Code.

While there is no indication in the instant case that the informant is an addict, the strong Government policy so fluently articulated by Judge Cameron

is fully applicable to Glosson. It goes without saying that drug trafficking has reached epidemic proportions in our state which Judge Nimmons in his dissent below described as "an erosive influence on the very fabric of our society." State v. Glossn, 441 So.2d 1178, 1180 (1st DCA 1983) (Nimmons, J. dissenting). Neither Hampton nor Williamson (even if it survives) require a order to dismiss where an informant is paid a contingent fee. It is clear that sound public policy overwhelmingly militates the opposite conclusion. As the dissent noted below, an affirmance of the court below would:

> pave the way for even more pre-trial evidentiary sideshows in which the beleaguered trial judge will be called upon to determine whether, during the investigation, the law enforcement officials, prosecutors, and their agents engaged in conduct which might be regarded as unconscionable - and this, even though the defendant was not entrapped into committing the crime. Resourceful counsel will undoubtedly find new and imaginative ways of attempting to demonstrate how their clients have been victims of misconduct in the investigative stage, and substantial time will have to be spent by trial judges in disposing of these new pretrial proceedings, an exercise which has nothing to do with guilt or innocence.

Id at 1180 (Nimmons, J. dissenting)

Neither do the facts in the instant case so shock the conscience as to require establishing greater due process protections than those enunciated in Hampton or Williamson, as would be the case were the Court to affirm the court below. In Sarno v. State, 424 So.2d 829 (3rd DCA 1982) (petition for review denied 7/13/83), the court held that police behavior during a sting was not so shocking as to violate the defendant's due process rights, even where the informant was permitted to retain profits from some illegal drug sales and to use some of the drugs himself.

That this kind of informant activity would not be found to violate the defendant's due process of law rights would seem to preclude a finding that a mere contingency fee arrangement would do so.

Finally, it is well to note Justice Rehnquist's closing statement in Hampton that "the defense of entrapment is not intended" to give the federal judiciary a'chancellor's foot veto'over law enforcement practices of which it did not approve." Hampton v. U.S. 425 U.S. 484, 490 (1976), quoting U.S. v. Russell, 411 U.S. 423 (1973). That judicial deference should be applicable to the state judiciary as well, where the Legislature has stated its policy of tough reaction to crime by encouraging judges to set substantial bail relative to the street value of the involved drugs in narcotics cases (Chapter 84-103, Florida Statutes), and has explicitly exempted from the provisions of the state's criminal statute on possession and sale of controlled substances (Section 893.13, Florida Statutes), possession by a law enforcement officer for purposes of letting a drug "walk" in order to snare would-be sellers (Chapter 84-77, Florida Statutes).

The needs of the State of Florida require that law enforcement be given sufficient tools with which to perform a nearly impossible task - to control drug trafficking. One of these necessary tools is the ability to pay a contingent fee in certain cases, as Judge Cameron pointed out in his Williamson dissent. The Constitution as interpreted by Hampton and Williamson clearly does not require that law enforcement be further restricted in this area, and public policy demands it even less. Therefore, amicus curiae Florida Sheriffs Association urges this honourable Court to reverse the holding of the Court below and remand the cause back to the trial court for trial.

CONCLUSION

For the reasons given above, the holding of the First District should be reversed, and the case remanded to the trial court for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to James R. Murray, Assistant State Attorney, Post Office Box 1437, Gainesville, FL 32602; Robert G. Duval, 12230 Northwest 7th Avenue, Miami, FL 32602; James P. Ryan, Buckeye Building, 208 S.E. 6th Street, Ft. Lauderdale, FL 33301; Harvey Robbins, 1100 Northeast 125th St., Suite 109, North Miami, FL 33161; Gary W. Pollack, Suite 202, 436 S.W. 8th Street, Miami, FL 33130; Peter Langley III, Post Office Box 124, Yankeetown, FL 32598; Harvie S. Duval, 1680 Northwest 135th Street, North Miami, FL 33161; and John W. Tiedmann, Assistant Attorney General, The Capitol, Tallahassee, FL 32301, this 9th day of July, 1984.

Everett F. Jones
General Counsel
Florida Sheriffs Association