OA 11-7-84
12

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS- CASE NO. 64,688

BOYCE E. GLOSSON, et al.,

RESPONDENTS.

REPLY BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

JOHN W. TIEDEMANN
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

TOPICAL INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
ISSUE	3
ARGUMENT	3
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

	Page
Barfield v. State, 402 So.2d 377 (Fla.1981)	4
Downs v. State, 386 So.2d 789 (Fla.1980), cert.den., 449 U.S. 976 (1980)	4
Dupuy v. State, 141 So.2d 825 (Fla.3rd DCA 1962)	6
Hall v. Florida Board of Pharmacy, 177 So.2d 833 (Fla.1965)	6
Hampton v. United States, 425 U.S. 484 (1976)	7
Mitchell v. Gillespie, 172 So.2d 819 (Fla.1965)	6
Peters v. Brown, 55 So.2d 334 (Fla.1951)	6

TABLE OF CITATIONS (Cont'd)

	Page
Petersen v. State, 117 So. 227 (Fla.1928)	4
Reed v. State, 333 So.2d 524 (Fla.1st DCA 1976)	6
State v. Giesy, 243 So.2d 635 (Fla.4th DCA 1971)	5
State v. Glosson, 441 So.2d 1178 (Fla.1st DCA 1983)	4
State v. West, 262 So.2d 457 (Fla.4th DCA 1972)	4
Tibbs v. State, 397 So.2d 1120 (Fla.1981), aff'd, 457 U.S. 31 (1982)	4
United States v. Lane, 693 F.2d 385 (5th Cir.1982)	7
United States v. Gamble, ___ F.2d ___ (10th Cir.1984), 35 Crim.L.Rptr. 2275	8
United States v. Gianni, 678 F.2d 956 (11th Cir.1982), cert.den., ___ U.S. ___, 103 S.Ct. 491 (1983)	7,8
United States v. Jannotti, 729 F.2d 213 (3rd Cir.1984)	8
Wilson v. State, 371 So.2d 126 (Fla.1st DCA 1978)	6

OTHER AUTHORITIES

	Page
Fla.R.Crim.P. 3.190(c)(4)	4,5
5 Wigmore, Evidence §1367 (3rd Ed. 1940)	5

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS- CASE NO. 64,688

BOYCE E. GLOSSON, et al.,

RESPONDENTS.
---/

REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

The parties and the record will be referred to as in the State's initial brief.

STATEMENT OF THE CASE AND FACTS

The State stands by the statement of the case and facts provided in its initial brief, but will briefly comment upon two factual matters which respondents misunderstand.

First, contrary to the baseless allegations sprinkled throughout respondents' brief (Brief of Respondents, pp. 1-2, 8-10), the State has never claimed that it traversed those defense motions to dismiss the information, upon the dual grounds of entrapment and prosecutorial misconduct, which were in effect when the trial judge granted relief upon the latter ground.

Second, if the parties did not intend to stipulate before the trial judge that the defense of due process had been asserted by each of the respondents, as they now claim (Brief of Respondents, p. 5), why did both the trial judge and the First District dispose of the case solely upon this basis?

ISSUE

THE FIRST DISTRICT ERRED AS A MATTER OF LAW 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

In concluding its initial brief in this cause, the State noted that, because the law was on its side, the nature of its challenge to the trial court's dismissal of the information had been and would continue to be wholly legal, while the nature of the respondents' defense of this dismissal had been and would probably continue to be wholly rhetorical (Brief of Petitioner on the Merits, p. 27). Instead of seeking to prove the State wrong by answering with an elevated discourse on the law, respondents, by indulging almost solely in mudslinging, have unwittingly proved the State right. The State stands upon the discussion of the case law provided in its initial brief, but will briefly respond here to several of respondents' baseless barbs and legal misconceptions.

Respondents claim that "[W]hen the State calls a witness it vouches for the witnesses' integrity . . . [but] the State will not and cannot vouch for the integrity of its principal witness, Norwood Lee Wilson" because he acted "without supervision" (Brief of Respondents, pp. 6,20). All the State vouches for is that its witnesses will tell the truth concerning those matters

upon which they are called to testify, which the State can obviously do here regarding Wilson since most of his transactions with the respondents have been preserved on tape. The State cannot vouch that its witnesses are of sterling character, and is not required to do so. Most criminals are prudent enough not to commit their crimes in the presence of upstanding citizens, so in order to ensure public safety, the State is entitled to take its witnesses as it finds them. See Petersen v. State, 117 So. 227 (Fla.1928); Downs v. State, 386 So.2d 789 (Fla.1980), cert. den., 449 U.S. 976 (1980); and Barfield v. State, 402 So.2d 377 (Fla.1981).

More important than respondents' misunderstanding of the voucher rule is that, by arguing that the State cannot establish Wilson's credibility as a witness, they have tacitly conceded that the majority below was wrong in holding that this case does not turn upon the credibility of this witness, State v. Glosson, 441 So.2d 1178, 1179 (Fla.1st DCA 1983). The State thoroughly agrees with respondents that Wilson's credibility is what this case is all about. But respondents are simply wrong as a matter of law in arguing that the credibility of a witness may be assessed by a trial judge upon a Fla.R.Crim.P. 3.190(c)(4) motion prior to trial, rather than by a jury during trial, see, e.g., State v. West, 262 So.2d 457 (Fla.4th DCA 1972), cf. Tibbs v. State, 397 So.2d 1120 (Fla.1981), aff'd, 457 U.S. 31 (1982), as the State has consistently urged. The State would welcome the opportunity to vouch for the credibility of all its witnesses before the legally proper body, to-wit: a jury. The jury could

then determine the credibility of all the witnesses, including any offered by the defense, after they had been subjected to the rigors of cross-examination, "the greatest legal engine ever invented for the discovery of truth", 5 Wigmore, Evidence §1367 (3rd Ed. 1940). Even the infamous John Z. De Lorean had to face a jury of his peers, and respondents believe that they should not have to do likewise only because they thoroughly misunderstand the purpose of Rule 3.190(c)(4). As Judge William C. Owen of the Fourth District explained long ago:

> The purpose of the rule, according to both the Committee Note and Authors' Comment as found in 33 F.S.A. 165, et seq., is to permit a pretrial determination of the law of the case where the facts are not in dispute, in a sense somewhat similar to summary judgment proceedings in civil cases (except that a dismissal under the rule is not a bar to a subsequent prosecution). It is not intended to be a trial by affidavit, nor a dry run of a trial on the merits. Neither is it intended as some type of "fishing expedition" to force the prosecution to come forward with enough evidence to establish a prima facie case, because for the purpose of this motion the sworn information itself, so long as its material allegations are not disputed by the sworn motion, is sufficient for that purpose. The defendant who expects to obtain relief under this rule simply brings to the attention of the court by the sworn motion (and by other evidence if permitted by the court) all of the material facts relevant to the charge against him which he conceives to be undisputed. Of necessity the factual matters must be of such a nature that, if true, they would exonerate the defendant of the charge laid in the information, as otherwise consideration of the motion would be an exercise in futility for the court. The effect of the state's failure to specifically deny by traverse under oath some material fact alleged in the motion to dismiss is simply that the fact is considered admitted by the state and nothing more. If those undisputed facts then establish a valid defense, whether it be an affirmative defense or whether it be by negating an essential element of the charge, the motion should be sustained. If the admitted facts do not have this legal effect, or if the court finds that a material fact is in dispute, the motion should be denied.

State v. Giesy, 243 So.2d 635, 636 (Fla.4th DCA 1971).

Counsel for respondents yet claims that undersigned counsel's argument for the State that the credibility of a witness is for the jury is "not worthy of an ethical law enforcement officer" (Brief of Respondents, p. 21). Counsel's personal opinion of the undersigned's ethics is irrelevant to this litigation, cf. Wilson v. State, 371 So.2d 126 (Fla.1st DCA 1978) and Reed v. State, 333 So.2d 524 (Fla.1st DCA 1976), and his attempt to bring the matter before this Court is a telling commentary upon the weakness of his legal position. This Court will decide for itself whether counsel's comment that "[t]he State cites many cases, too numerous for a busy attorney or Court to review" (Brief of Respondents, p. 18) is a legitimate reason for his failure to respond to 90% of the points made in the State's initial brief. This Court will decide for itself whether it is impressed by such language as "[W]ho is the Sheriff's Bureau trying to kid?" (Brief of Respondents, p. 20). This Court will decide for itself whether it will be persuaded by a counsel who relies upon its decisions of Peters v. Brown, 55 So.2d 334 (Fla.1951) for the proposition that paid State witnesses may be disqualified from testifying, and Dupuy v. State, 141 So.2d 825 (Fla.3rd DCA 1962) for some general entrapment law (Brief of Respondents, pp. 7, 13), without acknowledging that it materially modified these decisions in Mitchell v. Gillespie, 172 So.2d 819 (Fla.1965) and Hall v. Florida Board of Pharmacy, 177 So.2d 833 (Fla.1965) respectively, as the State clearly noted in its initial brief (Brief of Petitioner on the Merits, pp. 13-14). The members of this Court will

decide for themselves whether they will be influenced by counsel's style in addressing them as though they are members of the Legislature free to enact their personal views on the due process defense into law, rather than members of the judiciary duty-bound to interpret the existing law on the defense, see e.g., Hampton v. United States, 425 U.S. 484 (1976), while laying aside their personal views.

The final point in respondents' brief which merits rebuttal is the claim that, since there is apparently no single case in which a court has specifically held that the government may employ an agent on a contingent fee basis, supply the agent with drugs, and then successfully prosecute those to whom the agent sells these drugs, the decision of the trial court and the First District here must stand (Brief of Respondents, p. 19). The respondents are actually arguing only that the arrangement adopted here, or for that matter any other innovative approach to the enforcement of our narcotics laws, should be condemned solely on the basis of its novelty, which of course is scarcely logical. For the record, the State would note that the federal courts have held that the government may employ an agent on a contingent fee basis, supply the agent with money, and then successfully prosecute those randomly selected individuals from whom the agent bought drugs, see e.g., United States v. Lane, 693 F.2d 385 (5th Cir.1982); and have also held that the government may supply an agent with drugs and then successfully prosecute those to whom the agent sells the drugs, see, e.g., United

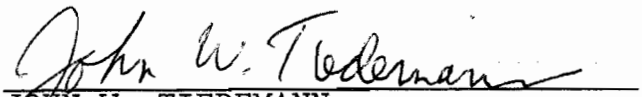
States v. Gianni, 678 F.2d 956 (11th Cir.1982), cert.den., ___ U.S. ___, 103 S.Ct. 491 (1983). That which is proper in each of its elements cannot be improper in its entirety. See also United States v. Gamble, ___ F.2d ___ (10th Cir.1984), synopsized at 35 Crim.L.Rptr. 2275, in which the Tenth Circuit upheld the physician defendant's convictions for mail fraud even though the evidence against him had been obtained by United States Postal Inspectors who secured driver's licenses, automobile registrations, and insurance under false names; who obtained accident reports for collisions that never occurred; and who then approached the defendant and enlisted his help in defrauding the insurers. Cf. United States v. Jannotti, 729 F.2d 213 (3rd Cir.1984).

CONCLUSION

WHEREFORE, the State again respectfully submits that the decision of the First District affirming the dismissal of the information by the trial court must be REVERSED and this cause REMANDED for trial.

Respectfully submitted,

JIM SMITH
Attorney General



JOHN W. TIEDEMANN
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits has been forwarded to Harvie S. Duval, 1680 Northwest 135th Street, North Miami, FL 33161; Robert G. Duval, 12230 Northwest 7th Avenue, Miami FL 32602; Harvey Robbins, 1100 Northeast 125th St., Suite 109, North Miami, FL 33161; James P. Ryan, Buckeye Building, 208 S.E. 6th Street, Ft. Lauderdale, FL 33301; Gary W. Pollack, Suite 202, 436 S.W. 8th St., Miami FL 33130; Peter Langley III, Post Office Box 124, Yankeetown, FL 32598; James R. Murray, Assistant State Attorney, Post Office Box 1437, Gainesville, FL 32602; and Everett Jones, Florida Sheriff's Association, Post Office Box 1437, Tallahassee, FL 32302, via U. S. Mail, this 13th day of August 1984.

John W. Tiedemann

John W. Tiedemann
Assistant Attorney General