IN THE SUPREME COURT, STATE OF FLORIDA

CASE NO. 65,188

MICHAEL WILBER SNEERINGER,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

_____/

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
DOCKET NO. AR-123

REPLY BRIEF OF APPELLANT/PETITIONER

William N. Avera
AVERA, BERNSTEIN & PERRY
Post Office Drawer G
Gainesville, Florida 32602
904 372-9999
Attorneys for Petitioner

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CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

The Appellant/Petitioner, Michael Wilber Sneeringer, will be referred to in this brief as Petitioner or by proper name (Sneeringer). The Respondent, the State of Florida, will be referred to in this brief as the Respondent.

References to the Record on Appeal will be made with the symbol "R- ", followed by the appropriate page number.

References to the Transcript of Trial Proceedings will be made by the symbol "T- ", followed by the appropriate page number.

References to the Respondent's brief on the merits will be made by the symbol "RB- ", followed by the appropriate page number.

ARGUMENT

I. FLORIDA STANDARD JURY INSTRUCTION 3.04(C) DOES NOT ACCURATELY AND ADEQUATELY STATE THE LAW AND BURDEN OF PROOF REGARDING THE DEFENSE OF ENTRAPMENT.

Respondent contends that the State does not have the burden of disproving entrapment beyond a reasonable doubt, citing essentially three cases; State v. Kahler, 232 So.2d 166 (Fla. 1970); Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); and United States v. Vadino, 680 Fed.2d 1329 11th Cir. (1982). Although the first two cases cited do not address an entrapment issue, Petitioner will address each of these cases in their respective order.

State v. Kahler, supra, involved a prosecution for possession of certain drugs which were not properly labeled to indicate that possession was by a valid prescription. Florida Statute 500.151 (1969) provided a statutory presumption to the effect that possession of a drug not properly labeled shall be prima facie evidence that such possession is unlawful. It was contended that this statutory presumption created a burden on the part of a defendant to come forward and prove lawful possession. This

Court held Florida Statute 500.151 (1969) to be constitutional. The statute did not improperly shift the burden of proof regarding an element of the crime, but merely offered a defendant a chance to come forward with evidence of an affirmative defense, i.e. lawful possession. In this very limited situation, the legislature had seen fit to relieve the State of the impossible burden of affirmatively proving a negative; to-wit: the nonexistence of a prescription. 232 So.2d at 168.

State v. Kahler, supra did not address what burden the State may have had once an accused did come forward with sufficient evidence of the affirmative defense. The certified question in the case at bar presumes that the State does have the burden of disproving entrapment once sufficient evidence has been raised; the issue involved is whether the instruction adequately informs the jury of that burden. The decision in State v. Kahler, supra is factually and legally divergent from the case at bar.

Respondent cites Patterson v. New York, supra for the proposition that a State need not disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. However, an examination of Patterson reveals that

the statute under review merely mitigated the crime of second degree murder to manslaughter should a defendant prove by a preponderance of the evidence the affirmative defense of extreme emotional disorder. As such, the State of New York chose to statutorily recognize a factor that mitigates the degree of criminality or punishment, but does not shift the burden of proof regarding the essential elements of the crime. This remains with the State and proof is required beyond every reasonable doubt. A state is certainly at liberty to mitigate a crime or sentence upon proof by an individual of a statutorily mitigating factor such as extreme emotional disturbance.

The case at bar is entirely different. The affirmative defense of entrapment goes to the essence of the conviction, not merely a mitigation of sentence or crime. If a citizen of the State of Florida has been lured or induced into committing a crime by law enforcement which he otherwise had no predisposition to commit, he may not be convicted of the criminal offense. As such, to sustain a conviction of any crime, once sufficient evidence has been produced to reasonably and legally rely upon the defense of entrapment, the State must disprove this bar to prosecution beyond every reasonable doubt. Moody v. State, 359 So.2d

557, (4th DCA, 1978).

Petitioner does not construe either of the above cases or the quotes taken from them by Respondent to be determinative of the issue raised in the case at bar. Kahler and Patterson both stand for the proposition that the State need not anticipate and engage in mindreading to present proof in opposition to every potential affirmative defense. The law of entrapment in the State of Florida does not require such a procedure. The current status of the law in Florida, as reflected in Moody, supra, requires the defendant to come forward with sufficient evidence of this affirmative defense before the State is required to rebut the defense beyond a reasonable doubt. Petitioner merely argues that the jury should be clearly informed that the defense having been duly raised, it is the burden of the State to disprove the defense beyond every reasonable doubt.

Lastly, Respondent contends that United States v. Vadino, supra stands as authority that the instruction given in the case at bar is sufficient even when the "federal view" espoused in Moody, supra is employed. The instruction given in Vadino is reprinted at footnote 5, 680 Fed.2d at 1337. As noted by the Eleventh Circuit Court of Appeal, in giving this instruction, the trial court twice referred to

the reasonable quantum of proof of predisposition but did not, within the entrapment instruction, refer to the party having the burden. The court noted, however, that it would have been better to include within the entrapment instructon itself an instruction on the burden of proof. 680 Fed.2d at 1329.

A comparison of Florida Standard Jury Instruction 3.04(C) with the instruction given in Vadino yields substantial differences. The instruction in Vadino charges that if the jury has a reasonable doubt about the elements of entrapment, then it is the jury's duty to find the defendant not guilty. Instruction 3.04(c) merely states that if the evidence raises a reasonable doubt about the defendant's guilt, the jury should find him not guilty. As such, the Vadino instruction directs itself specifically to the defense of entrapment, whereas the Florida Instruction is merely the general instruction regarding reasonable doubt which is already contained in Florida Standard Jury Instruction 2.03.

As noted by the Eleventh Circuit Court of Appeal, the instruction given in Vadino, supra, was conspicuously silent as to who bears the burden of proof on the entrapment issue. Standard Instruction 3.04(c) is also silent as to

who bears this burden, the State or a defendant. It is clear under the prevailing case law in both this State and the federal judiciary that the State bears this burden once the defense has been properly and legitimately raised. As such, the jury should be explicitly instructed as to the burden of proof and who must satisfy this burden. Moody v. State, supra.

As in Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1982) and Rotenberry v. State, 429 So.2d 378 (Fla. 1st DCA 1983), the court in United States v. Vadino, supra, approved the entrapment instruction given on the basis of a review of the jury instructions as a whole. The case at bar was decided by the First District Court of Appeal on the same basis. The court held that when viewed as a whole, the instructions adequately informed the jury of the State's burden of proof of every material issue. However, in each of the above cases, quite distinct from the case at bar, the instructions given were complete and accurate. Even when the jury instructions utilized in Petitioner's case are viewed as a whole, they are fatally deficient for the following reason: the trial court inadvertantly substituted the word "weren't" for the word "were" in reading Standard Instruction 3.04(c). Aside from alleging fundamental error,

Petitioner submits that this mistake removes this case from the authority of Wheeler, supra, Rotenberry, supra, and Vadino, supra. Clearly, Petitioner did not have the benefit of adequate jury instructions as a whole, in that the jury was in effect instructed that despite the elements of entrapment being present, the defendants were not entrapped.

For the above reasons, Petitioner respectfully submits that Florida Standard Jury Instruction 3.04(c) does not accurately and adequately state the law in the State of Florida with respect to the defense of entrapment. It does not precisely define the burden of proof on this issue and is totally silent as to who bears the burden. Even if this instruction is held to be sufficient when given in conjunction with the properly read instructions regarding burden of proof and reasonable doubt, Petitioner did not have the benefit of a properly read entrapment instruction in conjunction with these additional instructions. As such, Petitioner respectfully requests a reversal of this cause for a new trial under properly read instructions.

II. THE MISREADING OF FLORIDA STANDARD JURY INSTRUCTION 3.04(c) BY THE TRIAL COURT CONSTITUTES FUNDAMENTAL ERROR REQUIRING REVERSAL.

With respect to Petitioner's request that this court invoke its discretionary jurisdiction to review the misreading of Florida Standard Jury Instruction 3.04(c), Respondent seeks to distinguish this Court's decisions in Ray v. State, 403 So.2d 956, (Fla. 1981); Motley v. State, 20 So.2d 798 (Fla. 1945); and Henderson v. State, 20 So.2d 649, (Fla. 1945). Petitioner argues that the requisite conflict does not arise in that these decisions do not explicitly involve a misreading of Florida Standard Jury Instruction 3.04(c) with particular reference to the substitution of the word "weren't" for the word "were". As such, Respondent reasons that these decisions have not passed upon the same question of law as that ruled upon in the case at bar.

Respondent's interpretation of the conflict jurisdiction of this Court is unduly restrictive. Should this Court only accept jurisdiction where the issue of fact and law are absolutely identical, this Court's authority to review conflicts of law would be a nullity. The issues

presented in the above-cited cases bear a substantial similarity to the case at bar and require this Court's review to avoid confusion and future conflicts of law.

In Henderson v. State, supra, the jury was improperly instucted that the only issue for jury consideration was the Defendant's intent to commit a felony. Despite the lack of an objection, this court held that this instruction invaded the province of the jury to the extent of taking from it the determination of every element of the offense charged except that of the intent of the accused. 20 So.2d 651. Such error was not held to have been waived by failure to timely object, in that the due process clause of both the state and federal constitutions contemplates trial in a criminal case by a fair jury and with correct charges or instructions to the jury as to the law. 20 So.2d at 651. Similarly, the Petitioner below was deprived of fair jury consideration on the correct charges of law in that the court misread a standard jury instruction. With far worse results than Henderson, this mis-instruction had the effect of directing a verdict against Petitioner on the only issue necessitating consideration by the jury, i.e. entrapment.

Motley v. State, supra, stands for the proposition that a defendant is entitled to have the jury instructed on

the law applicable to his theory of the defense where there is evidence introduced in support thereof. When the jury instructions made no reference to the legal defenses raised, it was held that the accused was deprived of a lawful trial and the error was not harmless. The Petitioner was likewise deprived of a lawful trial in that the instructions given did not inform the jury of the validly raised defense of entrapment. Regardless of the circumstances surrounding how this instruction came to be misread, it certainly cannot be considered harmless.

Respondent contends that the district court cited Ray v. State, supra, for a proposition of law and not the specific holding on the facts of this case (RB-19). A literal reading of the opinion shows Respondent's assertion to be groundless. In addressing whether the misreading of Standard Jury Instruction 3.04(c) constituted a fundamental error, the district court cited Ray for the proposition that such error is not fundamental unless it goes to the foundation of the case, or goes to the merits of the cause of action. The only interpretation possible from the district court's opinion is that they did not deem the misreading of this instruction to be error which goes to the foundation of the case or the merits of the cause of action.

In so holding, Petitioner respectfully submits that the district court was in error and that this opinion creates a conflict of law with the above-cited decisions. The error complained of clearly goes to foundation of the case and the very merits of the cause of action, in that entrapment was the only issue requiring jury determination when the Petitioner in fact admitted the crime and relied exclusively upon this defense.

When Respondent finally turns his attention to the merits of Petitioner's argument, Respondent prefers to chastise Petitioner's trial counsel rather than reach the legal issue involved. Respondent reasons that no error could be fundamental if trial counsel did not deem it to be important enough to object at trial (PB-23). Such an argument lacks merit and completely misses the point, but deserves one brief rebuttal. Would not the state attorney, as an officer of the court, also be required to object and inform the court of a blatant error in the misreading of a Standard Jury Instruction? Or, may the State sit back when such an error is made and hope that defense counsel does not catch the error? This is not a situation involving the strategic decision of whether to request a particular instruction. When the chastising is over, we are left with

a defendant who has undergone trial by jury without the jury having been properly instructed on the law applicable to his case.

Having alleged fundamental error, regardless of where or when raised, the issue for determination is whether the error goes to the foundation of the case, or goes to the merits of the cause of action. Ray v. State, supra at 960. As stated above, Petitioner testified at his trial that he had in fact attempted to possess cannabis, the crime with which he was ultimately charged. Throughout voir dire, opening statement and closing argument, Petitioner asked the jury to consider the defense of entrapment and to weigh the evidence in the light of the elements thereof. It is easy to predict how a jury may react when having been told by defense counsel that Petitioner is not guilty if certain elements of entrapments are present, and then the trial court tells the jury exactly the opposite, i.e. that even if the elements are present, they were not entrapped. Having admitted participation in the crime charged, the only issue of any concern to the jury was that of entrapment. To deprive Petitioner of this important legal charge was to take from the jury the only issue requiring their determination. In effect, by misreading Standard Jury

Instruction 3.04(c), a verdict was directed against Petitioner.

This case differs greatly in degree and harm from the numerous decisions wherein trial counsel does not request or object to the lack of an applicable instruction. An entrapment instruction was requested by Petitioner and the trial court obviously intended to give one. An important mistake was made in reading the instruction which was not corrected by Petitioner, Respondent, or the Court. The effect was to deny Petitioner his lawful trial by jury. Petitioner respectfully requests that this court exercise its discretionary jurisdiction to right this injustice and remand this cause for a new trial under proper jury instructions.

CONCLUSION

For the reasons expressed in Points I and II of this brief, Petitioner respectfully requests that this cause be remanded for a new trial under proper instructions defining the State's burden of proof on the defense of entrapment.

Respectfully submitted,

W. N. Avera
AVERA, BERNSTEIN & PERRY
Post Office Drawer G
Gainesville, Florida 32602
904 372-9999
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Greg Costas, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, by United States Mail, this 13th day of July, 1984.

W. N. Avera

W.N. Avera
AVERA, BERNSTEIN & PERRY
Post Office Drawer G
Gainesville, Florida 32602
(904) 372-9999

Attorneys for Petitioner