IN THE SUPREME COURT OF FLORIDA

DOUGLAS DRANE WAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,271

RESPONDENT'S BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent generally accepts petitioner's statement of the case and facts, but would call attention to those facts listed in the body of respondent's argument at page eighteen (18) as being pertinent to the issue on appeal.

SUMMARY OF ARGUMENT

The word "knowingly" in section 893.135(b)(1), Florida Statutes (1981), modifies "possession," and merely conforms the statutory language to normal judicial interpretation of possession crimes. It does not add an additional element of specific intent.

Further, even if lack of knowledge of amount could be a defense to a trafficking charge, it is not necessary that a defendant know he possesses "28 grams" when he admits knowledge that he possesses two (2) ounces. Lack of knowledge of the metric system is not a defense.

QUESTION CERTIFIED

IS PROOF THAT A DEFENDANT KNOWS THAT THE WEIGHT OF THE SUBSTANCE POSSESSED EQUALS TWENTY-EIGHT (28) GRAMS OR MORE ESSENTIAL IN OBTAINING A CONVICTION UNDER SECTION 89.135(1)(b)?

ARGUMENT

Section 893.135(1)(b), Florida Statutes (1981), [trafficking in cocaine] provides:

> Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine . . . is guilty of . . . trafficking in cocaine.

Petitioner, Way, claims that trafficking in cocaine is a "specific intent" crime; he suggests that the state must prove, as an element of the offense, that the defendant knew the weight of the cocaine he possessed was twenty-eight (28) grams or more. Respondent, the State of Florida, denies any element of specific intent in the aforesaid statute, and seeks to have the certified question answered in the negative.

In general, drug possession offenses are not specific intent crimes. State v. Medlin, 273 So.2d 394 (Fla. 1973); Link v. State, 429 So.2d 836 (Fla. 3d DCA 1983). The legislature has the power to eliminate an intent requirement in drug offenses. United States v. Balint, 58 U.S. 250; 42 S.Ct. 301; 66 L.Ed. 604 (1922). "The legislature may also dispense with a requirement that the actor be aware of the facts making his conduct criminal." State v. Gray, 435 So.2d 816, 819 (Fla. 1983). In light of the

strong public policy behind this and other drug statutes, respondent would suggest there is no reason to expand the current judicial interpretation of drug possession offenses to require specific intent to violate the trafficking statute, rather rather than general knowledge by an accused that he possesses the designated contraband.

The trafficking statute prohibits "knowing possession" of twenty-eight (28) grams or more of cocaine. Petitioner relies on the rationale of State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982) to maintain that the inclusion of the word "knowing" adds an additional element to the trafficking offense, as opposed to a possession offense under section 893.13. However, a review of the cases interpreting possession offenses indicates that the addition of the term "knowing," by the legislature merely conforms the statutory language to previous judicial interpretation. Section 893.13, Florida Statutes (1981), and its predecessors, have always been judicially interpreted to require "knowing" possession. Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1981); Daudt v. State, 368 So.2d 52 (Fla. 2d DCA), cert. den. 376 So.2d 76 (Fla. 1979); Dixon v. State, 343 So.2d 1345 (Fla. 2d DCA 1977); Willis v. State, 320 So.2d 823 (Fla. 4th DCA 1975); Griffin v. State, 276, So.2d 191 (Fla. 4th DCA 1973). "A similar construction has been placed on other criminal possession statutes." State v. Oxx, 417 So.2d 287, 290 (Fla. 5th DCA 1982). Consequently, the legislative addition of "knowingly" to a possession statute does not add an additional element. Bartee v. State, 401 So.2d

890 (Fla. 5th DCA 1981) (charge of "knowing possession" of a fictitious license constitutes double jeopardy where defendant previously convicted of "possession" of fictitious license). Likewise, an information which fails to include "knowingly" in a section 893.135 charge does not fail to charge the crime. Asmer v. State, 416 So.2d 485 (Fla. 4th DCA 1982).

The expressed rationale in State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982) does lend support to petitioner's contention that an additional element has been added to a trafficking offense. Basically, Ryan holds that a defendant cannot be convicted of trafficking in cocaine if she thought the substance she possessed was marijuana. This is not a radical departure from prior law, wherein an accused must have knowledge that the substance he possesses is illegal. Lack of knowledge of the nature of the substance has generally been accepted as a defense. State v. Medlin, supra. Since the subsection is specifically known as "trafficking in cocaine," Ryan concluded knowledge of the nature of the substance is necessary. This reasoning does not require the further conclusion that an accused must also know the quantity of cocaine, in addition. Similar to other drug statutes or the theft statute, section 893.135(1)(b) graduates the penalties for various quantities:

1. 28 to 200 grams;
2. 200 to 400 grams;
3. 400 grams or more.

There is no penalty for less than twenty-eight (28) grams, and the statute does not deal with such lesser quantities.

Petitioner raises two arguments in support of a "28 gram"

knowledge requirement. First, he posits the situation where a law enforcement officer intentionally plants twenty-eight (28) plus grams on an unsuspecting purchaser who intends to purchase less than twenty-eight (28) grams. While it is difficult to rouse any sympathy for the plight of such a defendant, assuming, arguendo, he is entitled to a defense and that such bad faith activity by law enforcement would take place, the defendant would have the normal legal defense of entrapment. See, Koptyra v. State, 172 So.2d 628 (2d DCA 1965). This "problem" is not peculiar to the trafficking statute, and many defendants presently claim that drugs are "planted" on them when charged under other statutes.

Second, petitioner presents an appendix of legislative hearings to support his contention that this trafficking statute was directed at "big" dealers, not the "small-fry" petitioner. However, petitioner here was in possession of (approximately) two (2) ounces of cocaine. The intention of the legislature to include a one (1) ounce dealer is made patently clear by their choice of a "28 gram" limit; one (1) ounce is just over twenty-eight (28) grams.[1] Accordingly, there is no reason to protect the petitioner from the legal consequences of his drug peddling activities.

Assuming that this Court wishes to interpret section 893.135 to require some knowledge requirement regarding quantity, any reasonable interpretation will not assist petitioner here. In the instant case, the following facts are admitted by petitioner:

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[1] See Appendix "A," attached.

(1) He was contacted about securing one (1) ounce of cocaine for a friend. (R 371)

(2) He tried to "score" an ounce from his supplier. (R 397; R 399)

(3) He told his supplier he wanted an ounce of cocaine. (R 372; R 403).

(4) His supplier told petitioner one (1) ounce would cost $1,850.00. (R 372; R 403).

(5) Petitioner knew his supplier gave him two (2) one ounce packets of cocaine, costing $1,850.00 each. (R 372-3; R 404-5).

(6) He intended to sell one (1) packet to the undercover agent as one (1) ounce for $1,850.00 or $2,000.00. (R 413).

Petitioner stated, however, that he didn't "know" how much cocaine he had (R 376); that he didn't know how many grams are in an ounce, (R 419); and that, although he knew it was illegal to possess cocaine, he didn't know of the enhanced penalties for trafficking (R 380).

Respondent respectfully suggests none of the aforesaid constitutes a defense of lack of knowledge under any reasonable legal definition of the term. Petitioner admits he knew he was arranging a one (1) ounce cocaine deal for $1,850.00, and he knew he was given two (2) one ounce packets, worth $3,700.00. Certainly the legal definition of "knowledge" does not require that petitioner actually test the substance and weigh it himself. As the Fifth District Court of Appeal opinion points out, this statute could never be enforced if it depended on the defendant's certainty of the accuracy of his scales. The law does not intend an episte-

mological study to determine when we can "truly know" something. The facts admitted by petitioner, it is submitted, constitute "knowing" in the legal sense of the term. There was no evidence whatever that petitioner didn't "know" he had two (2) ounces under any reasonable legal definition of "knowledge." Consequently, he was not entitled to an instruction in this regard, even if lack of knowledge of amount could be a defense. Dreisch v. State, 436 So.2d 1051 (Fla. 3d DCA 1983).

Petitioner's assertion that he didn't know there were twenty-eight (28) plus grams in an ounce is equally unavailing as a legal defense. All spanish-speaking people are not exempt from enforcement of this law because they don't know what "cocaine" means, although they know the spanish word. If a defendant knows he possesses "1/3 hectogram" of cocaine, he is not exempt from prosecution because he doesn't know he has thirty-three and one/third (33 1/3) grams.[2] Even if a defendant must have knowledge of a specified amount, it is enough that he knows that he possesses that amount, not that he know how much it weighs, nor, certainly, that he weigh it in grams rather than ounces. Assuming that it is required that petitioner have knowledge of the quantity of cocaine he possessed, it is not a legal defense that, although he knows he has two (2) ounces, he doesn't know he has more than twenty-eight (28) grams. Petitioner was not entitled to a jury instruction where his theory does not constitute a legal defense. Palmes v. State, 397 So.2d 648 (Fla. 1981).

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2 See Appendix "A."

CONCLUSION

Whether or not section 893.135(b)(1) requires knowledge of the quantity of cocaine possessed, or whether lack of knowledge constitutes a defense, the decision of the district court in this particular case is correct. The certified question, as framed, must be answered in the negative, or the trafficking statute becomes a mullity; requiring the specific knowledge suggested by petitioner would render the statute unenforcable for the reasons expressed by the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Merits has been furnished, by mail, to Robert J. Buonauro, P.A. counsel for Petitioner at 318 Bradshaw Building, 14 E. Washington Street, Orlando, Florida 32801, this 17th day of January, 1985.

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