IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 66-271

DOUGLAS DRANE WAY

Petitoner,

vs.

STATE OF FLORIDA

Respondent.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON MERITS

ROBERT J. BUONAURO, P.A.

TOPICAL INDEX

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

This is the Appeal of Douglas Drane Way, the Petitioner. He will be referred to as the Petitioner, Mr. Way or Doug.

The State of Florida is the Respondent.

The symbol (TR followed by the appropriate page numbers will refer to the Transcript of Record filed in this cause.

The symbol (ST) will refer to the Supplemental Transcript also filed in this cause.

STATEMENT OF THE CASE

The Petitioner was the Defendant in the Circuit Court, Eighteenth Judicial Circuit, in and for Seminole County, Florida, Case Number L-82-837-CFC. The Petitioner was charged with Trafficking in Cocaine, a violation of Florida Statute 893.135(1)(b).

The Respondent is the State of Florida.

The jury trial commenced on April 19, 1983 and resulted in a verdict of guilty to the charge of Trafficking on April 20, 1983. (TR 598)

The Petitioner was sentenced on May 12, 1983 to a term of three years with credit for time served and fine of $50,000.00. (TR 617)

The Petitioner filed a Notice of Appeal on June 10, 1983 and the conviction was affirmed on November 15, 1984 in Way v. State, 9 FLW 2401 (Fla. 5th DCA 1984).

In its affirmance of the Petitioner's conviction, the Fifth District Court of Appeal certified to this Honorable Court pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(V), the following question:

> IS PROOF THAT A DEFENDANT KNOWS THAT THE WEIGHT OF THE SUBSTANCE POSSESSED EQUALS 28 GRAMS OR MORE ESSENTIAL IN OBTAINING A CONVICTION UNDER SECTION 893.135(1)(b)? (APP 1.

STATEMENT OF THE FACTS

Agent Gibson of the Seminole County Sheriff's Office met with the co-defendant, Wisenberg at a Woolco Store Parking lot located in Orange County, Florida. This meeting was set up through an informant who had contacted another co-defendant, Tim Carter, who set up the drug transaction. (TR 5-7)

Mr. Wisenberg spoke first and he asked Gibson what he wanted to do. Gibson told him he wanted to buy their cocaine if was good. He advised Gibson that the cocaine was about 90% pure. (TR 8-9) The Court should note Wisenberg handled and held all the negotiations with the undercover police officers. (TR 8-9)

Gibson indicated that there was a dicussion as to the price of the cocaine going at $2,000.00 an ounce. After Gibson advised them that he would purchase it, Mr. Carter told him to go ahead and follow them and they would pick up the cocaine. Gibson told them he wasn't following them anywhere to pick up the cocaine, that he had money in the trunk of his car and it was located up at Krystal's across from the Circus Circus, a bar on 17-92. Wisenberg told Gibson that his man was waiting at a bar located at Edgewater and Parr and this man was expecting him to show up there with the money and if he didn't show up with the money his reputation would be ruined. Gibson again told him that he was going to Krystal's to grab something to eat, after he was done eating, he was leaving with or without the dope. (TR 17-19).

Carter told Wisenberg that they would go talk to the

guy. If nothing else, Carter stated he would drive the guy up to the Krystal's. Wisenberg told Gibson to hand around for 45 minutes or an hour. Gibson then went and met with Sgt. Bare and Lt. Hogan. He put on a listening device. This was about 10:00 o'clock. At about 10:45 Wisenberg his sister, Tim Carter and Larry O'Shaughnessy arrived at the Krystal's in one vehicle. Mr. Wisenberg went to the informant's vehicle where Gibson was sitting. Wisenberg stated that the guy was going to be about 10 minutes late and he'd be there in about 10-15 minutes. (TR 20-25)

Gibson's listening device was running from the time they pulled up. He turned it off when he went into the Krystal's. They remained in Krystal's about 10-15 minutes. (TR 26-29)

Wisenberg spoke first and Gibson turned on his body bug. He observed Petitioner as he parked in the Krystal's parking lot. Wisenberg walked over to Petitioner's vehicle it was about 15-20 yards away. There was a conversation, and it lasted about 1-1 1/2 minutes. (TR 30-31)

Wisenberg advised Gibson that the cocaine he was getting from the guy was not quite as rocky as the cocaine he had gotten before. Wisenberg told Gibson that if it is as good as the coke he had gotten from the guy before, he would be pleased with it. Gibson's listening device was on at that time. Gibson observed Petitioner get out of the vehicle he arrived in. Petitioner removed the brown paper bag from his vehicle, placed it under his shirt and walked over to Gibson's

car. Gibson asked if he could see the dope. Gibson received one of the packets from Petitioner and started to drive out of the parking lot. (TR 37-41)

Gibson drove to where Sgt. Bare and Lt. Hogan were located in the K-Mart parking lot. Bare and Hogan got out of their vehicle and assisted Gibson in arresting Petitioner and Mr. Wisenberg. At that time Gibson had one packet of cocaine. At the time of the arrest, Petitioner had thrown the other packet on Gibson's lap. (TR 42-48).

Prior to June 1, 1982, Gibson had never heard of Petitioner. Gibson had no knowledge of Petitioner being a "trafficker" suspected trafficker in drugs or anything of that nature. The confidential informant solicited the drugs for Gibson. The confidential informant was the one that went out to find Gibson an ounce of cocaine. He specifically went out to find an ounce of cocaine. Gibson talked to him after he had already set the drug deal. Gibson was aware of the fact that the confidential informant was the one that told Mr. Carter to get him an ounce of cocaine. The confidential informant is an individual known as McDowell. (TR 60-62)

Gibson stated that on the night the boys were arrested he didn't find any weapons. He didn't have any knowledge that the boys were violent, nor had a history of being violent. (TR 64)

Gibson indicated that the confidential informant, McDowell, contacted a fellow by the name of Tim Carter. Mr. Wisenberg and Mr. Carter contacted Petitioner. Mr. Gibson indicated that he could not tell who contacted Larry O'Shaugnessy.

(TR 82)

Gibson indicated that he did control the activities of Mr. McDowell. (TR 84)

Gibson was familiar with the fact the Mr. Carter was in fact permitted to plead to Conspiracy to Traffick in Cocaine. That offense carries a 15 year maximum potential jail sentence. It is a second degree felony. There is no mandatory minimum sentence for Conspiracy to Traffick in Cocaine. Mr. O'Shaugnessy was not arrested on June 1, 1982. (TR 98-101)

Debra Steger, a forensic chemist with the Florida Department of Law Enforcement testified that she examined State's Exhibit 3 and found it to contain 27.8 grams of cocaine. She also examined State Exhibit 4, and found that to contain 27.6 grams of cocaine. (TR 120,125,133,134 and 142)

Timothy Carter, stated that he knew David Wisenberg for approximately 4 or 5 years. He stated he was contacted by an individual known as McDowell, who asked him to see if he could get some cocaine. He gave McDowell, David Wisenberg phone number. (TR 144-147)

They all went to the Woolco Plaza and met with McDowell and Agent Gibson. This meeting lasted about 10-15 minutes. (TR 148-150)

Carter left the area with David and Amy and went to the Dubsdread Golf Course on Edgewater in Winter Park, and there they met a guy named Larry O'Shaugnessy, who in turn contacted the Petitioner. (TR 151-152)

Carter did not see Doug Way anywhere on the premises

of Dubsdread. Wisenberg was with Carter the entire time. When they left, Carter believed they were going to Krystal's over in Fern Park, because that is where the undercover agent told them to meet him after they had made contact. Carter drove a blue 1979 Nova. (TR 153)

David and Amy Wisenberg drive with him, and it took approximately 20 minutes to get there. When Carter got there he recognized Mike McDowell and Gibson; they were together. Once they got there, they walked inside the Krystal and got something to eat. Gibson and McDowell went with them. (TR 154)

Carter remained in the Krystal and could not see anything with regards to the drug transaction outside. Approximately 10 minutes later, the police came into the Krystal, arrested Carter and he was later charged with conspiracy. (TR 157)

Carter made an agreement that if he pled guilty to conspiracy that they would drop the charges of conspiracy to traffick. He was also suppose to testify truthfully. (TR 158)

Carter said that David Wisenberg was a good friend of his. He had dated his sister. He said that McDowell was not a good friend of his. Prior to the date of June 1, 1982, David Wisenberg had never delivered cocaine to Carter or for Carter. Carter did not know Petitioner. (TR 159-160)

Carter stated that he never saw Doug Way at Brannon's Country Club. Drawing his attention back to his first or second conversation with McDowell, Carter said it was a fact that in one of those two conversations, he had asked for an ounce of cocaine. Carter said he did not know how much an ounce of

cocaine was. Carter said McDowell had stated the fact that he would give them 2 grams and Carter said that was not up to him. Carter recalled a conversation regarding the price of the cocaine. Carter said he did not know who set that price. The price of $1,850.00 to $2,000.00. Carter denied the fact that in the first conversation that he had with McDowell, that McDowell asked him for 2 ounces of cocaine. (TR 165-166)

From Carter's knowledge of David Wisenberg and his association with him from the past, he did not know him to be a supplier of drugs. Carter stated that he did not know the Petitioner. He had never had any conversations with him about where he could get any drugs or anything of that nature. He did not know a guy named Ben Parker. (TR 180-183)

The Court ruled that State's Exhibit E and F, tape recordings for identification, would be received in evidence. (TR 238)

Det. Bare stated that he assisted in the arrest. He stated he recieved no trouble from Petitioner during the course of the arrest. He had no knowledge of Petitioner being any type of drug dealer or being involved in drugs prior to this transaction. (TR 257-258)

Det. Bare stated they had a pretty good intelligence network, and he had never had any information linked into his agency regarding Petitioner being a drug trafficker or dealing in drugs. Petitioner voluntarily came down to his agency and submitted to an interview. (TR 259)

He further stated that under the statute that Petitioner

was charged with the drug trafficking statute, sub section 3, if he rendered substantial assistance and he felt that Petitioner did, he could recommend to the State Attorney to petition the court to reduce the sentence. (TR 260)

Det. Bare admitted he had told Petitioner's attorney, that unless Petitioner was able to produce more cocaine or a body, being another person to deliver cocaine, that that would be substantial compliance as for as he was concerned.
He admitted it was a fact that a lot of times in big drug deals when he was dealing with drug traffickers, people that deal in cocaine and other controlled substances, are known to carry weapons. He stated none of that happened in this case. (TR 261)

Det. Bare wouldn't consider it substantial compliance under the provisions of the drug trafficking statute unless the Petitioner was able to make a buy from Ben Parker. Ben Parker was the individual who supplied the drugs to the Petitioner and the name was supplied to the police by the Petitioner in an attempt to cooperate during the negotiations prior to trial. (TR 265)

He said the decision to charge Tim Carter with just conspiracy was made out there that evening with the aid of Officer Gibson. (TR 278-280)

After the state rested its case, Carter was presented as a witness for the Petitioner. He reiterated what he had said on cross-examination, that he had never performed a drug deal with Wisenberg. (TR 314-319)

Gibson stated that Carter advised Mr. Wisenberg in his presence that it would not hurt to ask the guy that had the drugs

to go to Krystal's. He also stated that Mr. Carter along with Mr. Wisenberg advised him to go ahead and please wait at Krystal's for 45 minutes until they got there. Then later on that night the drug was delivered; a controlled substance, cocaine, and Mr. Carter was arrested for conspiracy. (TR 334)

The next witness to testify was Larry O'Shaugnessy. He stated he was a paramedic with Rescue Company in Clermont, that he had no prior criminal convictions for felony nor for dishonesty or false statements. He stated he went to high school with Petitioner, and he had known him about 7-8 years. He said he considered himself a good friend with Petitioner. On June 1, 1982, he called Petitioner and asked if he could get some cocaine, and that he told Petitioner who he wanted it for. He told him he needed it for Mr. Wisenberg. Larry said it was a fact that Petitioner was doing it for him as a favor. (TR 341-342)

Regarding the transaction, Larry stated that neither he nor Petitioner were going to make any money on it. Neither he nor Petitioner were going to get any of the cocaine, any of the grams to use. He stated prior to the transaction on June 1, 1982, he and Petitioner had never done any other type of drug deals, nor had Petitioner ever delivered any drugs for him before. He had no knowledge of Petitioner being a drug trafficker or dealer. (TR 343)

Larry mentioned that he had called Petitioner planning to go out with him that night. He had mentioned to him in passing about the cocaine. Larry stated that there was some confrontation about getting Petitioner to go to the Krystal with the cocaine. He went to the Krystal with Mr. Wisenberg, Mr.

Carter and Miss Wisenberg. They all went up there and met the undercover agent. (TR 344)

Larry didn't know who the undercover agent was. He said that there was another person there, a confidential informant. Larry stated that he was let go that night but that three people were arrested. Subsequent to that arrest, he had appeared in the State Attorney's Office and gave a statement about his involvement. Larry had been given complete immunity from prosecution. He said that immunity meant regardless of what he said, what his involvement was in the transaction, the State of Florida could not prosecute him. (TR 345)

Petitioner was also at Brannon's and Larry saw him there. He saw him inside and in Mr. Wisenberg's presence. Both Wisenberg and Petitioner were present when there was talk about jacking the price to $2,000.00 to make more money. (TR 349)

Larry stated that when he got to the Krystal, Mr. Wisenberg came out and said he wanted to up the price to $2,000.00. He saw Petitioner arrive at the Krystal. (TR 361)

Petitioner testified next on his own behalf. He stated that on June 1, 1982, he was 21, lived in Orlando with his parents and he went to the University of Central Florida. On June 1, 1982, he was employed as a surveyor for CM Construction. Before court, he had a 3.8 average on a 4 point scale. (TR 363-365)

Petitioner stated that prior to June 1, 1982, he had never delivered any drugs for Larry O'Shaugnessy or Mr. Wisenberg or Mr. Carter. That was the first occasion he had to do that. He said he received a phone call from Larry O'Shaugnessy on

June 1, about dinner time. He said he had made plans to go out with Larry and have a couple of drinks at Brannon's. (TR 366)

Petitioner said Larry asked him over the phone if he wanted to go out and have some drinks. He said he asked if he knew David Wisenberg. Petitioner said he knew who he was. Larry said he wanted to get some coke. Did Petitioner think he could get some coke. Petitioner answered, "I don't know if I can or not." Petitioner mentioned that he told Larry he was going to meet him at Brannon's anyway. Petitioner said they were going to discuss the cocaine further there. (TR 357)

At Brannon's they sat down and had a couple of beers. Petitioner had plans to go meet a girlfriend or possibly bring her up there with him. He left to go after he and Larry had had a couple of beers to pick her up. His girlfriend decided that she didn't want to go. So he went back to Brannon's to have some more beers with Larry. (TR 368)

Petitioner said he met Larry back at Brannon's about 8:30. At that time David Wisenberg, Tim Carter, Amy Wisenberg and Larry were there. There was discussion regarding the cocaine. Daivd told Petitioner that they needed to go out to Krystal's to do this cocaine thing, and could Petitioner definitely get it. Petitioner said, "Well, I'll give him another call and give my friend a call and see if he is out there and you know, I'll give it a whirl." (TR 369)

The guy he said he would give a call to, was Ben Parker. As a result of the conversation with Ben Parker, Petitioner brought back some information to the table where everyone was seated. He said he would try to do it out there, he would go

get it and being it to him at the parking lot at Krystal's. (TR 370)

David Wisenberg told Petitioner why he had to go out to Krystal's. He told him that he was suppose to take an ounce to his friend. Petitioner did not know who that friend was. Larry had called Petitioner and told him that David wanted cocaine. (TR 371)

Petitioner stated he was not going to make any money for getting this cocaine. He had not discussed making any money with Larry. He did go to Mr. Parker's house, which was 434 in the Sheola apartments. He walked in and talked to Ben. He told him that somebody needed an ounce of cocaine. He just pulled out two bags and said to take them with him. (TR 372)

He told him to sell it for $1,850.00 He did not give him any money for that. Petitioner was to bring the money back to Parker. Parker was not to give Petitioner any money for doing that for him. Ben Parker was the full contact middle weight karate fighter in Central Florida. He knew where Petitioner lived. Petitioner knew if he took off with anything he would get his block knocked off. (TR 373)

Petitioner got to the Krystal at 10:45. Before he got there he did not deliver any drugs anywhere else. Larry O'Shaugnessy came out of the Krystal all by himself. (TR 374)

Larry said he was upset with David Wisenberg, because he was going to make money on the deal and they they were doing it for nothing. Petitioner said that he told him that they were selling it for $1,850.00 and that Wisenberg said he wanted to sell it for $2,000.00 so he could make $150.00. Petitioner

did not know about the conversation that McDowell had with Carter regarding the price of the cocaine. (TR 3740375)

Petitioner got in the car with Officer Gibson and Gibson started up the car. He said could he see the cocaine. Petitioner pulled it out and told him to take his pick of the bags. He pulled around the corner and pulled right next to another car and two other officers jumped out of the car and banged their guns against Petitioner's window, and he held his gun at David. Gibson took one of the bags of cocaine from Petitioner. Petitioner did not know how much cocaine he had with him that night. He did not know the purity of the cocaine. Petitioner was arrested out there. He voluntarily, after discussing it with his lawyer, relayed whatever information he had regarding the transaction to the investigating officers. (TR 376)

He went down to the Sheriff's Office in Seminole County three times. He submitted himself to an interview and told them everything he knew about Mr. Parker. He recalled that the interview was before Christmas. Following that interview, he identified Mr. Parker as the person that he got the cocaine from. Petitioner told them where Mr. Parker worked. (TR 377)

Petitioner told them where Mr. Parker lived, and what apartment. There came a time when he went out to Parker's house in order to come within the substantial compliance provisions of the drug trafficking statute. He went out there three times, and he went out there with Robert Daly. Robert Daly was the person who introduced Parker to Petitioner in the first place and he trusted Robert Daly more than Petitioner. Petitioner was not able to get Parker to give him anymore cocaine

or make any kind of deal with him. (TR 378)

Petitioner was not able to make any kind of deal with Parker after his arrest, and Parker was aware of the fact that Petitioner had been arrested. Parker offered to assist Petitioner with his problems. He told him he would try to get him some passports to get out of the country. Petitioner relayed that information to the police department. Petitioner did not know anyone else that dealt in drugs. (TR 379)

Petitioner was not aware of the severe penalties that could be imposed upon him if he were convicted of drug trafficking. He was not aware of the drug trafficking statute. He was aware of the fact that it was against the law to possess cocaine. Petitioner stated that approximately one year before the episode, he knew Parker through Robert Daly. He had had a dinner with him and the conversation became drugs or the supplying of drugs. Robert Daly and Ben Parker discussed going and doing some coke. No cocaine was done that night in the presence of Petitioner. (TR 380-387)

Petitioner stated it was three months after the first contact that the second contact took place. He went by himself, and drove up there. (TR 390) Parker's wife was there. There was discussion that night about narcotics or drugs. Petitioner got a gram of coke from him. It was for himself and three others. (TR 391) He paid $80.00 for it, and remained there maybe an hour. Petitioner said it was a social type use. He said that he had no idea of the size of the lot that he got it from. He saw nothing but the gram he brought him. (TR 392)

On a social basis, Larry O'Shaugnessy and Petitioner's twin brother utilized the substance with Petitioner. About two months after that was the next time he got with Ben Parker. Petitioner initiated the contact. He was talking about a gram. He was not in a position to see his stash. He did not make any statement or comments to Doug as to what amounts he could do or if he wished to do larger amounts. There were no other times that Petitioner went over and bought a social amount from him. On June 1st, he called Ben Parker and asked if he could get some cocaine. (TR 393-399)

Petitioner called him from Brannon's and Parker was at home. Petitioner did not mention an amount. The price Parker quoted Petitioner was $1,850.00. (TR 403)

When Petitioner got to Parker's house, he already had the two packets separated. He did not tell Petitioner why he was going to supply him with an additional amount, when Petitioner only wanted an ounce. Petitioner stated that Mr. Wisenberg's statement on the tape to Mr. Gibson, that it had been testified that he was making other deliveries that night and that Petitioner had been the area 20 minutes, was false. (TR 404-405)

Petitioner further stated Parker called him the next day and told him that he had read about his arrest in the newspaper and asked was there anything he could do to help. (TR 407)

Petitioner, in an attempt to cooperate with the police went back to see Parker in order to attempt to set up a drug deal. (TR 409)

Larry O'Shaugnessy came up to Petitioner and said that

David Wisenberg wanted to make or wanted to sell it for $2,000.00 Then David walked up to Petitionr and told him not to say anything, as he was going to sell it for $2,000.00. (TR 411)

After Way delivered the drug he remembered two guns being pointed at his head. He dropped the drug, closed his eyes and bent his head down. The remaining packet probably fell between Petitioner's legs. (TR 413)

Petitioner stated that when he went down to the Sheriff's Office with his lawyer, he was told that he had to get back into the confidence of Parker before they could do any type of drug deal. Petitioner said he discussed going back there with Robert Daly with his attorney. They agreed Parker would feel more comfortable with Daly around because he knew Daly a lot better than he knew Petitioner. (TR 415)

Petitioner stated that he had never been convicted of a felony nor a crime involving dishonesty or false statements. He also stated that he did not know how many grams constituted an ounce. (TR 419-420)

Wisenberg was the co-defendant, and he testified on his own behalf. He stated that he worked for Central Lithograph in Orlando, and he had never been convicted of a crime. Tim Carter asked if he knew where he could purchase an ounce of cocaine. David told Carter he didn't know but would check into it. He found out and got back with him. David stated he spoke with a fellow by the name of O'Shaugnessy. Larry called him up looking for his fiancee, and David just happened to bring the matter up. He said there was a possibility he might know somebody who could get the ounce. (TR 423)

Larry did call David back and told him it was possible. David said he believed Larry did say they would need to meet at Dubsdread Country Club. At the time David didn't know who he was referring to when he said we. Daivd called Carter back. David told him it was probable, and he said okay, I'll get back with you and he came down to Wisenberg's house shortly after that. Carter had given McDowell, the confidential informant, Wisenberg's phone number and McDowell got in touch with Wisenberg in order to work out the deal. McDowell called Wisenberg at least eight times. It took about an hour and a half. McDowell said he was willing to pay $2,000.00 for the cocaine and if it would be cheaper for Wisenberg it would have been okay. He also promised Wisenberg and Tim Carter 2 grams of cocaine for doing the deal. During the course of one of the phone calls, Wisenberg made arrangements to meet with McDowell and his friend at the Woolco Plaza in Orlando. (TR 425-427)

David said he was not dealing in drugs, he was just trying to get two people together. His purpose was a combination of a favor for Mr. Carter and for 2 grams of cocaine. (TR 428) David said he had never done anything like this before where Petitioner or anybody else was involved. He knew O'Shaugnessy. (TR 429) David said he did not know at the time what constituted an ounce of cocaine. At the time of the testimony they said it was 28 grams, but he had heard one of the officers say it was 28 3/4. (TR 430)

When David got to Dubsdread he spoke to Larry O'Shaugnessy who said Petitioner would be along in a few minutes. At that point in time, he had not had a conversation with Petitioner that

night. Petitioner then showed up at Dubsdread. David recalled himself saying his friend was at Seminole County Krystal's and he wanted to do it there because he was paranoid about getting ripped off. (TR 431)

David said he told Petitioner that he knew the price of the coke would be between $1,800.00 and $1,900.00. He told him not to reveal the exact amount because the agents offered to pay David $2,000.00 or pay Petitioner, whoever had the dope. They offered to pay $2,000.00. They then got into Mr. Gibson's car. (TR 433)

David said he told the police officer that night that Doug was out, that he had to make a couple more deliveries before he got there, because he just wanted to make himself look bigger or better. He said it was a lie and he was trying to impress them. (TR 435)

At the conclusion of his testimony a motion for Judgment of Acquittal was made and denied. (TR 446)

During the charge conference, which took place following all the testimony, the Petitioner, requested an instruction that the jury should be told that one of the elements of the offense of trafficking in cocaine was that the State must prove that Petitioner had knowledge that he possessed in excess of 28 grams of cocaine.

This instruction was requested initially when the trial judge gave the jury preliminary instructions before the testimony began. The instruction was denied by the trial judge. (TR 458-459) (ST 3-13)

ISSUE ONE

IS PROOF THAT A DEFENDANT KNOWS THAT THE WEIGHT OF THE SUBSTANCE POSSESSED EQUALS 28 GRAMS OR MORE ESSENTIAL IN OBTAINING A CONVICTION UNDER SECTION 893.135(1)(b)?

ARGUMENT

The Petitioner maintains that the trial judge erred in failing to instruct the jury that the Respondent must prove that the Petitioner must have knowingly possessed in excess of 28 grams in order to violate Florida Statute 893.135(1((b). The Petitioner specifically requested the trial judge that he instruct the jury that the Respondent was required to present this in their proof, absence of the fact that Petitioner knew he possessed in excess of 28 grams of cocaine would be a defense. (TR 458-459/ ST 1-8)

Florida Statute 893.135(1)(b) in its language provides:

> " Any person who knowingly sells, 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..."

The knowledge or specific intent is certainly an element of proof of the above cited statute.

In State v. Ryan, 413, So.2d 411 (Fla. 4th DCA 1982), the Court established that in the prosecution for trafficking in cocaine, the state was required to prove that the defendant knew she was trafficking in cocaine, and a showing that she believed she was trafficking in marijuana would be a defense.

In Patricia Ryan's case, she was charged under the

identical statute the Petitioner was charged with. The State asserted that the lack of intent or knowledge that the defendant was trafficking in cocaine and that lack of such intention or knowledge may not be a defense.

The facts showed that the evidence would tend to prove that it was the defendant's intention to traffick in marijuana and her belief was that the contraband would be marijuana instead of cocaine.

The Court points out that if this was a case of simple delivery or possession of a controlled substance, under section 893.13 Florida Statutes, State v. Medlin, 273 So.2d 394 (Fla. 1973), would apply and the State would not be required to prove intent or knowledge, although absence of either would appear to be a defense for the jury to consider. The Court notes that this ruling comes from the absence in the statute of the requirement of a specific intent or guilty knowledge.

The Court points out in the Trafficking Statute, 893.135(1)(b), the word knowingly, is used twice, and the information in Ryan, used it twice in tracking the statute. The Court went on to state that intent and knowledge are elements that the state must prove and the absence of which can be a defense.

In the case sub judice, the information in fact tracked the language of Florida Statute 893.135(1)(b), and thereby used the word knowingly, twice in its charge. (TR 496)

In Ryran, the state argued that only intent and knowledge are required to traffick in a controlled substance and the specific contraband is immaterial except to said punishment.

Again, the Fourth District points out, that if 893.13 were involved, the State's argument could better be made because the offense is described in each sub section as being in the actual constructive possession of a controlled substance. However, section 893.135 has five sub sections each of which names a specific drug which must be possessed to constitute the offense.

The Court went on to state as follows:

> " Had the legislature intended for there to be just one crime with varying penalties according to the drug involved, it could easily have followed the format of §893.13. Instead the legislature chose to create five different offenses, giving each a separate name, e.g. "trafficking in cannabis" or trafficking in cocaine," and in addition required that the offense be done knowingly." Because the penalties for trafficking are much more severe than for simple possession or delivery, it is reasonable to assume that the lawmakers wanted to limit the crime to those persons who consciously violate the law. To say that an intent and knowledge to commit trafficking in marijuana will suffice to prove trafficking in cocaine also flies in face of the fact that a person may believe that marijuana is harmless and no moral wrong is committed in dealing with it although the same person may not be willing to deal in cocaine or morphine or opium or

phencyclidine or methaqualone because of a moral belief that these drugs are harmful."

The State of Florida in State v. Ryan, sought to invoke the discretionary jurisduction of the Florida Supreme Court in State v. Ryan, 421 So.2d 518 (Fla. 1982), and the application was denied.

There is no question that the current case law establishes that in a specific intent crime, knowledge or the intent to violate the criminal statute are essential elements which the state must prove. See Edward v. State, 302 So.2d 479 (Fla. 3rd DCA 1974) involving premeditated first degree murder; Graham v. State, 406 So. 2d 502 (Fla. 3rd DCA 1981); robbery, Rozier v. State, 402 So.2d 539 (Fla. 5th DCA 1983), burglary, Louis v. State, 318 So.2d 529 (Fla. 2nd DCA 1975) escape; Sykes v. State, 351 So.2d 87 (Fla. 2nd DCA 1977), aggravated battery; State v. White, 324 So.2d 630 (Fla. 1975), aggravated assault, Walters v. State, 245 So.2d 907 (Fla. 1st DCA 1971), forgery.

The Petitioner testified at trial of this cause, that he had no knowledge of the amount of the substance he delivered to the undercover agent. As a matter of fact, he was not aware that there were 28 grams to an ounce until he was told so after being arrested for the trafficking offense. The Petitioner attempted to assert the defense of lack of knowledge of the amount of substance involved and in view of the fact that the trial judge refused to instruct the jury that this was an essential element, the Petitioner was denied the right to present a defense on his behalf, thus denied due process of law.

It has recently become fashionable for police officers

to disguise themselves in an undercover capacity as drug dealers. They offer for sale controlled substances in large amounts. This has become to be known as a reverse sting operation. If the rolls had been reversed in the case sub judice, and the undercover agents had offered to sell to the Petitioner, any amount of cocaine he wished to purchase, and the Petitioner decided he would purchase 27 grams of cocaine, the deal being consumated and the drug agents unbeknowing to the Petitioner, sold him 29 grams, it could not possibly be said that he knowingly violated the drug trafficking statute by knowingly purchasing in excess of 28 grams of cocaine. If he requested to purchase only 27 grams of cocaine, and he in fact was sole 29 thinking all along he was purchasing 27, how could he be held to have violated the drug trafficking statute.

The statute explicitly dictates that the element of knowledge is a specific prerequisite to a conviction for drug trafficking, and that knowledge must be the intent to knowingly possess a specific controlled substance, to-wit, cocaine, and the knowledge as to the specific amount of that substance. Absent proof of these elements, a conviction cannot be obtained.

Although the Petitioner's position was rejected in Way v. State, 9 FLW 2401 (Fla. 5th DCA 1984) and Wisenberg v. State, 9 FLW 1949 (5th DCA 1984), it is interesting to note that Judge Upchurch in the Wisenberg case, supra analyzed the situation to that of involving grand theft wherein the State need only show that the defendant had the requisite intent to obtain the property, not that he knew the value was $100.00 or more.

The Petitioner argues that this analogy is erroneous in view of the fact that the crime of grand theft is divided into degrees and the monetary amount is an element only as to the type of punishment imposed.

Nowhere in the Grand Theft Statute is there any language that the State be required to prove that a defendant knowingly stole property valued over $100.00. The Drug Trafficking Statute on the other hand specifically states that a defendant must knowingly deliver and knowingly possess 28 grams or more. In view of the stricter penalties imposed under the Drug Trafficking Statute, it is arguable that the State should be held to a stricter burden of proof as the statute indicates.

Petitioner would reiterate the language of the Fourth District Court of Appeal in State v. Ryan, supra wherein the Court stated:

> " ... That the lawmakers wanted to limit the crime to those who consciously violated the law."

There is a rational basis for this argument especially if you consider the facts of the case present before this Court and why the statute was instituted. The statute was passed in order to eliminate drug smuggling business in the state of Florida and to get to the higher echelon figures of the elicit drug trafficking industry.

In the case sub judice, we have a 21 year old college student as the facts showed with absolutely no criminal record or history of drug dealing in the past, who was not known to the investigating undercover police officers. All the parties

involved in the drug transaction were basically young adults between the ages of 18 and 21 all who knew each other and were basically doing another friend a favor.

The Petitioner in this case could not even take advantage of the escape provisions of the drug trafficking statute, better known as substantial assistance provision of said statute because of the fact that the Petitioner was inexperienced in the drug trafficking trade and was not able to infiltrate the higher echelon as the statute anticipated.

The Court's opinion in Way v. State, supra, rejected Petitioner's argument as being contrary to the legislative intent. That is not the case. When the statute was passed through the House of Representatives on April 6, 1979, Representative Crawford stated as follows: (App. 5)

> " Today we have an opportunity, I think, to drop a bombshell in the middle of the drug smuggling business in Florida and the United States today. One of the main problems we have had in trying to tackle the drug smuggling problem in this state is being able to get the higher echelon figures, where the financiers, the main bankrollers of the illicit drug trafficking in this state. This bill, I think, gets to that problem and I think we'll be successful in doing it. ..."

Representative Nuckolls (App 6) stated:

> " I sit back today and really say, you know,

"Amen, brother," because I know that Dr. Dave Lehman, wherever God bless his soul is, and I tried about two years ago to get a minimum mandatory and everybody yells, "it's going to cost too much money." We kept saying the only way you're going to get to the big pushers, the people that are really the money people behind this thing, is do that."

These simple passages from the passing of Florida Statute 893.135 illustrates the main purpose behind the passage of the drug trafficking statutes in the state of Florida. As previously argued by the Petitioner the statute was not designed for prosecution and imposition of such severe penalties as in the case sub judice.

The opinion of the Fifth District Court of Appeal in the Way, supra case, paves the way for severe enforcement of abuses and selective prosecutions. By limiting the prosecutions burden of proof to simply showing that a suspected drug trafficker possessed or delivered in excess of 28 grams without knowledge, creates the carter blanc situation for the police in the nature of reverse sting operations. The police can target an individual who they may dislike for some irresponsible reason and contract with that individual to sell him 27 grams of cocaine and in actuality actually deliver 28 grams or more to the defendant. Under the theory of the Fifth District Court of Appeal's decision in the Way, case, those facts would therefore constitute a conviction for trafficking thereby imposing the severe penalties provided by said statute. This definitely is not the intent nor

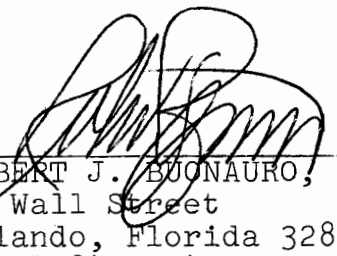
the purpose of Florida Statute 893.135 and this Honorable Court should hold the state of Florida to a stricter burden of proof in requiring the prosecution to prove that a defendant knowingly trafficked in 28 grams or more of cocaine in order to be convicted and subjected to such severe penalties.

CONCLUSION

It is the Petitioner's position that in view of the foregoing authorities and legislative intent, the trial judge committed reversible error in failing to grant his requested jury instruction on the element of knowledge and this Court should hold that the Petitioner is entitled to a new trial finding that the prosecution is required to prove that a defendant knows the weight of the substance possessed equals 28 grams or more in order to obtain a conviction under 893.135(1)(b).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished to the Office of Assistant Attorney General, MARK MENSER, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, this 27th day of December, 1984.



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