IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 66-271

DOUGLAS DRANE WAY

Petitioner,

vs.

STATE OF FLORIDA

Respondent.
_____/

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

PETITIONER'S REPLY BRIEF

ROBERT J. BUONAURO, P.A.
18 Wall Street
Orlando, Florida 32801
(305) 841-1940

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CITATION OF AUTHORITIES

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 State conceeds in his brief that the case of 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 the traffic offense, that being the element of "knowledge", Ryan holding that the Defendant cannot be convicted of trafficking in cocaine if she thought the substance possessed was marijuana. The State refuses however, to concede that the knowledge requirement extends to knowledge of the quanity of the substance possessed.

The rational of the Ryan, case tends to support Petitioner's proposition in view of the fact that the Ryan Court points out that because of the severe penalties for trafficking it is reasonable to assume that the lawmakers wanted to limit the crime to those who consciously violate the law. If the State does not want to be held to a stricter burden of proof as F.S. 893.135 seems to require, it can elect to prosecute an individual under 893.13, which provides for either sale or possession of a controlled substance without regards to knowledge of the amount of the drugs.

The Respondent argues on page 6 of his brief that the entrapment defense would lie in a reverse buy situation. If the prosecution is able to prove that such a defendant is previously disposed to commit the crime then it would not

make any difference what the quanity of cocaine a defendant agreed to purchase. The mere fact of buying a controlled substance is a felony and law enforcement could at that point determine what mandatory minimum sentence they wish to place on the drug purchaser. Without the requirement that a defendant must have knowledge of the amount of the controlled substance to be trafficked in there simply would be no entrapment defense.

Respondent argues that the Petitioner was the target of legislative intent in formulating the drug trafficking statute in view of the fact that "28 grams" is set out as one of the mandatory minimums. Petitioner pointed out in his appendix, legislative hearings to support his contention that it was the intent of the legislature to target higher echelon of the drug trafficking trade and not someone of the Petitioner's caliber who was virtually an inexperienced drug user. The Fifth District Court of Appeal in arriving at its decision in Way v. State, acknowledges that many people in this state do not know the metric system or that one ounce of cocaine equals 28 plus grams. This is the point the Petitioner is trying to make and this is the point that apparently the Fifth District Court and the Respondent have overlooked. It is obvious that an inexperienced drug user seller or possesser may not have the requisite knowledge that experienced drug dealers have in dealing in amounts of cocaine, in grams, kilograms, hectograms, etc.. but an experienced drug dealer would have this requisite knowledge and that's why proof that a drug dealer knowingly negotiated for a specific amount of cocaine is a

requirement under the drug trafficking statute. Petitioner maintains that this was the intention of the Florida Legislature in formulating this law.

The argument urged by the Respondent is set forth by the Fifth District Court of Appeal that the statute could never be enforced if it depended upon the Defendant's certainty of the accuracy of his scales is in actual fact not true. Take the situation where a defendant negotiates to buy in excess of 28 grams of cocaine, no knowledge problem there. If the defendant negotiated to sell in excess of 28 grams and in actuality sold to the undercover police officers 27 and one half grams represents again, no knowledge problem. Simply stated, the accuracy of the defendant's scales could not possibly cause a proof problem for the prosecution.

It is urged by the Respondent that if the Court wishes to interpret Section 893.135 to include some knowledge requirement regarding quanity, still the greater weight of the evidence in the case sub judice supports the proposition that the defendant did know how much cocaine he was trafficking in. This issue is not presently before this Honorable Court nor was it ever presented before the Fifth District Court of Appeal. This Honorable Court is not asked to determine of the evidence in support of the conviction was legally sufficient because the Petitioner was never allowed to present this defense. Petitioner was never permitted to argue to the jury that the evidence did not support the state's position that he knew he was trafficking in excess of 28 grams. The jury was never given the opportunity to determine beyond and to the exclusion

of a reasonable doubt whether the defendant knowingly trafficked in excess of the statutory amount. It would certainly be unfair for this Court to make that determination at this present time.

Respondent's argument is primarily directed at the Petitioner's proof offered in behalf of his defense of lack of knowledge. It was previously stated Petitioner was never given the opportunity to present a valid defense of knowledge. Furthermore, the Petitioner has never urged upon any court the proposition that the State must prove that a defendant is able to convert ounces to grams or that he knew the specific amount of drugs possessed. Petitioner has maintained that the prosecution must prove that a defendant knowingly possessed over the statutory amount of 28 grams, 200 grams, or 400 grams.

A number of times the Appellate Courts in this state have reversed convictions where a defendant has been denied the opportunity to present a defense, i.e., the defense of self-defense, where there was the slightest bit of evidence to support that jury instruction, are too numerous to count. In the case of Layth v. State, 330 So.2d 113 (Fla. 3rd DCA 1976), the defendant's conviction for second degree murder was reversed for new trial where there existed evidence to support the defense of withdrawal from the crime and the trial judge committed reversible error by refusing to so instruct the jury. Although the Court did not rule on sufficiency of the evidence to support the jury instruction on withdrawal from the conspiracy in actuality a close

study of the facts of the case would show that the Defendant could probably not satisfy the requirements of common law withdrawal from a conspiracy. The Court simply ruled on the fact that a defendant is entitled to have the jury instructed on the law applicable to their theory of defense if there is any evidence to support it.

There is evidence in the case sub judice to support the Petitioner's theory of his defense of lack of knowledge regardless of how slight the evidence may be.

If the Court takes the position that the prosecution is required to prove knowledge of the statutory minimum amounts, then the Petitioner should be entitled to present that defense to the jury.

CONCLUSION

Petitioner reiterates the conclusion argued in his initial brief, that the authorities cited therein, and the legislative intent requires the prosecution to prove that a defendant knowingly possessed in excess of 28 grams or more in order to obtain a conviction under 893.135(1)(b). Furthermore, Petitioner maintains that if the Court finds that knowledge is a requirement, then the Petitioner is entitled to present his theory of his defense and should be entitled to a new trial.

RESPECTFULLY SUBMITTED, this 1st day of February, 1985.

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, ELLEN D. PHILLIPS, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, this date by U. S. Mail.

ROBERT J. BUONAURO
FOR PETITIONER