IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

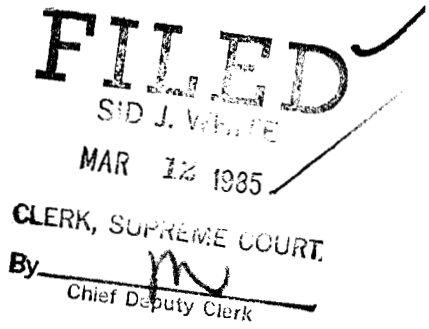
Petitioner,

vs. CASE NO. 66,691

ROBERT WILLIAM HUME,

Respondent.

_____/



PETITIONER'S BRIEF ON JURISDICTION

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TOPICAL INDEX

AUTHORITIES CITED

CASES

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PRELIMINARY STATEMENT

Robert William Hume, the criminal defendant and appellee below in State v. Hume, 10 F.L.W. 357 (Fla. 1st DCA Feb. 11, 1985) (A 1-6), will be referred to herein as Respondent. The State of Florida, the prosecution and appellant below will be referred to herein as Petitioner.

An Appendix containing the opinion of the court below and pertinent pleadings has been attached hereto. Citations to the Appendix will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's discretionary review of the decision below pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla. R.App.P. 9.030(a)(2)(A)(iv) on the ground that the portion of said decision affirming the suppression of evidence seized from Respondent's apartment is in express and direct conflict

with a decision of this Court and with decisions of the Second, Third, and Fourth District Courts of Appeal on the same question of law.

STATEMENT OF THE CASE AND FACTS

Respondent was charged, in Alachua County, Florida, by information dated January 24, 1983, with unlawful sale/delivery of a controlled substance, to-wit: cocaine; trafficking in cocaine; and unlawful possession with intent to distribute a controlled substance, to-wit: cannabis (A 8-10).

On November 23, 1983, the trial court entered its order supressing evidence seized from Respondent's apartment predicated upon the law enforcement officers' noncompliance with the "knock and announce" statute and the failure of the State to show that there was any exception authorizing the warrantless seizure of contraband from Respondent's bedroom closet. The order also provided for suppression of certain intercepted oral communications (A 11-16).

In its opinion filed February 11, 1985, the First District reversed the trial court's suppression order as to the intercepted oral communications, but, affirmed that portion of the order suppressing the evidence seized from Respondent's apartment holding that since the officers' noncompliance with Florida Statutes §901.19(1) rendered Respondent's arrest unlawful, the seizure subsequent to the arrest was unlawful (A 6). In so ruling, the court noted that but for the unlawful arrest, the seizure would have been lawful because Respondent's Fourth Amendment expectation of privacy was waived by his actions in

granting the undercover officer access to the area and displaying the contraband to him (A 6, note 5).

On March 7, 1985, Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction on the ground that the portion of the lower court's decision affirming the suppression of evidence seized from Respondent's apartment was in express and direct conflict with a decision of this Court and decisions of other District Courts of Appeal on the same question of law (A 7).

The pertinent facts relied upon by the trial court in suppressing the evidence seized from Respondent's apartment are as follows:

As a result of a narcotics investigation, a warrant for Respondent's arrest was issued on January 10, 1983. On or about January 17, 1983, it was determined that undercover agent Acevedo accompanied by other members of the Narcotics and Organized Crime Unit (NOCU) would go to Respondent's residence and that Acevedo would enter the residence and attempt to make a drug purchase. Acevedo was to be wired with a "body bug" enabling transmission of his conversation to officers outside the residence. He was to verify the presence of cocaine in Respondent's apartment and communicate this fact to the other NOCU officers by use of a code word transmittal through his "body bug". Acevedo was then to proceed to the front door of the apartment, on the pretext of getting money from his car, open the door, and allow the officers waiting outside to enter.

Pursuant to the plan, Acevedo went to Respondent's apartment and was afforded entry. Thereafter, he proceeded with Respondent to the bedroom where Respondent displayed to him plastic bags containing approximately one-half pound of sensemilla buds along with a bag containing approximately 114 grams of suspected cocaine. Acevedo signaled the other officers that the cocaine was present and proceeded with Respondent to the front door of the apartment. Acevedo opened the door and the other officers came through the open door and placed Respondent under arrest. Subsequent to Respondent's being arrested and given Miranda warnings, Acevedo returned to the bedroom and seized the cocaine, sensemilla, and other drug paraphrenalia (A 12-13).

SUMMARY OF ARGUMENT

The lower tribunal affirmed the trial court's order suppressing evidence seized from Respondent's apartment predicated upon alleged noncompliance with the "knock and announce" law, Florida Statutes §901.19(1) (1981). Petitioner argues that said affirmance was erroneous and that the decision is in express and direct conflict with decisions of this Court and the Second, Third, and Fourth District Courts of Appeal, which involved police conduct similar to that complained of sub judice, and which either upheld the admission of evidence seized or reversed orders suppressing same. Consequently, Petitioner submits that the requisite conflict has been established pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv).

ISSUE ON APPEAL

THE FIRST DISTRICT'S DECISION HEREIN AFFIRMING SUPPRESSION OF EVIDENCE SEIZED FROM RESPONDENT'S APARTMENT EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND DECISIONS OF THE SECOND, THIRD, AND FOURTH DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

The lower court's affirmance of the trial court's suppression of evidence seized from Respondent's apartment predicated upon the officers' noncompliance with Florida Statutes §901.19(1) (1981) expressly and directly conflicts with this Court's decision in Griffin v. State, 419 So.2d 320 (Fla. 1982), with the Second District's decisions in Koptyra v. State, 172 So.2d 628 (Fla. 2d DCA 1965) and State v. Cantrell, 426 So.2d 1035 (Fla. 2d DCA 1983), pet. for rev. den., 434 So.2d 886 (Fla. 1983), U.S. cert. den., 79 L.Ed.2d 182 (1984), U.S. reh. den., 80 L.Ed.2d 191 (1984), with the Third District's decision in State v. Steffani, 398 So.2d 475 (Fla. 3d DCA 1981), approved, 419 So.2d 323 (Fla. 1982), and with the Fourth District's decisions in State v. Schwartz, 398 So.2d 460 (Fla. 4th DCA 1981), and State v. Perry, 398 So.2d 959 (Fla. 4th DCA 1981). Each of the foregoing cases involved police conduct similar to that complained of sub judice. In each case the reviewing courts either affirmed the admission of the evidence seized or reversed orders of the trial courts suppressing such evidence notwithstanding the police officers' noncompliance with the "knock and announce" law, Florida Statutes §901.19(1).

In Griffin, two undercover agents met with several men, including the defendants, at the home of one of the defendants to complete a previously arranged cocaine purchase. During

the transaction one of the agents left the home under a pretext and returned accompanied by several other officers. The agent and policemen did not knock or in any other way announce their presence before entering the house and arresting those involved in the sale, nor did they have arrest or search warrants. This Court approved the decision of the district court upholding the trial court's denial of the defendants' motion to suppress physical evidence.

In Koptyra, a consensually present undercover agent temporarily excused himself from the defendant's residence after viewing contraband. Upon his return with other officers, the agent was admitted to the residence by one of the defendants who did not notice the presence of the other officers until they walked through the open door. None of the officers announced their purpose before entering. The district court held that the method of entry did not involve a breaking within the meaning of Florida Statutes §901.19, and that the evidence seized was properly admitted. Id at 631, 632.

Similarly, in State v. Cantrell, the defendant invited an undercover agent and confidential informant into her apartment, for purposes of consummating a cocaine sale, and displayed two bags of cocaine. The informant left the apartment on a pretext. While making an inspection of the apartment, with the defendant's consent, the agent, out of sight of the defendant, pressed a hidden beeper which by pre-arrangement with other officers outside, signaled that he had observed the commission of a felony. Subsequently, the informant returned to the apartment but did not lock the door as he was

requested to do. The informant then gave money to the agent who began to count out the sum for the purchase. At this point, the outside officers, without announcing their purpose, opened the door, entered the apartment, placed the defendant under arrest, and seized the contraband as well as a loaded handgun located on the floor near where the defendant was sitting. The district court reversed the trial court's suppression order which had been based upon a violation of the "knock and announce" law.

In State v. Steffani, two undercover agents were invited by the defendant to his home for the purpose of consummating an illegal drug sale. The defendant escorted the agents to a bedroom where he displayed various controlled substances. After agreeing upon a price, one of the agents went outside, ostensibly to obtain money for payment. When the agent returned, he was followed, on a pre-arranged signal, by various back-up teams of officers with guns drawn. None of these officers knocked, or announced their presence, or performed the requirements of the "knock and announce" law. The back-up officers arrested the defendant and seized the contraband. The district court reversed the trial court's suppression order.

In State v. Schwartz, an undercover agent and a confidential informant entered the defendant's home at the latter's invitation to arrange a purchase of illegal drugs. After setting the terms, the agent and the informant went to the agent's automobile to get the money for the purchase. The door to the residence was left ajar. Utilizing a pre-arranged signal,

the agent and two other officers returned to the residence to arrest the defendant and a co-defendant, whereupon the defendant attempted to stop their entry. The defendants were arrested and the contraband was seized. The trial court found that this conduct violated the Florida "knock and announce" statute. The district court reversed.

Lastly, in State v. Perry, a consensually present undercover agent, after verifying the presence of marijuana, exited the residence purportedly to obtain money from his car for the purchase. By pre-arrangement this was a signal, to a number of back-up officers staked out in the neighborhood, that the agent had seen the marijuana and that it was time to move in and make the arrest. The other officers moved in, arrested all the individuals involved, including the agent, and seized the contraband. Both the arrests and the seizure occurred inside the residence, without either arrest or search warrants. The district court reversed the trial court's suppression order holding that both the arrests and the seizure were proper.

The lower tribunal, in an effort to remove the instant case from the ambit of the foregoing authority, created a questionable distinction. Essentially, the lower court ruled that had Acevedo, upon opening the apartment door, stepped across the threshold, turned, and re-entered the apartment with the back-up officers, the arrest, as well as the seizure, would have been lawful.

The unsoundness of such reasoning had been previously addressed by other district courts and their analysis is particularly apposite here. "To admit that Dial [the undercover

agent] could have arrested the defendant on the spot, and yet if he did so, to deny him the ability to obtain back-up support, flies in the face of logic." State v. Cantrell, supra, at 1038. "The fact that one officer left and returned on a ruse may have benefited the officers by allowing them the added protection of other armed officers to assist in the arrest, but such conduct did not constitute an additional intrusion into the defendant's premises sinch such intrusion had already been lawfully accomplished by the undercover officers." State v. Schwartz, supra, at 462. "In sum, we think, with the fourth district, that the consensual relinquishment of the defendant's privacy involved in inviting the undercover officers into his home extends not only to their own contemplated reentry but also to the causally and temporally closely-related actions of other officers who act at their direction and must therefore be deemed to stand in their shoes." State v. Steffani, supra, at 478.

Accordingly, the distinction employed by the lower tribunal is indeed a "distinction without a difference" (A 5), and is therefore insufficient to preclude a finding of express and direct conflict between the instant decision and the decisions in Griffin v. State, supra, Koptyra v. State, supra, State v. Cantrell, supra, State v. Steffani, supra, State v. Schwartz, supra, and State v. Perry, supra.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, Petitioner submits that the requisite conflict between the instant decision and decisions of this Court and the Second, Third, and Fourth District Courts of Appeal has been established. Moreover, Petitioner contends that the lower court's disposition of the issue sought to be reviewed represents such an extreme departure from established legal principles of this Court and other district courts that an authoritative determination thereof by this Court is absolutely essential and would be of great benefit to the interests of the bench and bar.

WHEREFORE, Petitioner respectfully moves this Honorable Court to grant conflict certiorari review over the decision below, set the cause for oral argument, and following briefing on the merits, quash that portion of the decision sought to be reviewed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Thomas W. Kurrus and Larry G. Turner, Post Office Box 508, Gainesville, Florida 32602, this 12th day of March, 1985.

GREGORY G. COSTAS