due 1-14-86

IN THE SUPREME COURT OF FLORIDA

0A 5-8-86

TIMOTHY MICHAEL JOYCE,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 67,330
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the appellant in the District Court of Appeal, Fourth District, and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida; the respondent was the appellee and prosecution, respectively, in the aforementioned courts. In this brief the parties will be referred to as the State and the defendant.

The symbol "R" will be used to denote the record on appeal. All emphasis in this brief is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The state accepts the defendant's statement of the case and facts.

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT PROPERLY DECLINED TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S ALLEGED DISCOVERY VIOLATION FOR THE STATE'S FAILURE TO INFORM THE DEFENSE THAT THE TAPE RECORDING DID NOT CONTAIN THE ENTIRE TRANSACTION? (Restated).

POINT II

WHETHER THE TRIAL COURT PROPERLY REFUSED TO ADMIT THE TWO TAPE RECORDINGS IDENTIFIED AS DEFENDANT'S EXHIBITS B AND C INTO EVIDENCE TO BE PLAYED TO THE JURY TO IMPEACH THE "ORIGINAL" TAPE RECORDING ADMITTED AS STATE'S EXHIBIT 15 AND TO IMPEACH THE TESTIMONY OF DETECTIVE ISRAEL AND SERGEANT SMITH, THUS DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW?

POINT III

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE CONSPIRACY COUNT?

POINT IV

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF ENTRAPMENT?

POINT V

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED ON COMMENTS OF THE TRIAL COURT AND PROSECUTOR? (Restated).

SUMMARY OF ARGUMENT

POINT I

The trial court did not err in declining to hold a Richardson hearing on an alleged discovery violation where the defendant claimed the state failed to notify him that the tape recording of the transaction was incomplete; that is that the entire transaction had not been recorded. As the state had given the defense everything that it had, including a copy of the tape and notice that the defendant had made incriminating statements, the state was not obligated to do work for the defense. Further where the state notified the defense of the existence of statements by the defendants, and where the statements were testified to without discovery objection, no error occurred.

POINT II

This Court should not exercise its discretion to consider the other four issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. Further, the trial court properly declined to admit needless cumulative material into evidence.

POINT III

This Court should not exercise its discretion to consider the other four issues raised by the defendant because

they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. The trial court properly denied the motion to dismiss the conspiracy count where there was no confusion with respect to the information in this case as all conspirators were clearly named and the elements of the crime with which the defendants were charged were clearly set out.

POINT IV

This Court should not exercise its discretion to consider the other four issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. The trial court properly denied the defendant's motion to dismiss based upon entrapment as a matter of law where the defendant, having had no contact with the police (or the C.I.) until the time he was arrested, can not complain with respect to the police conduct towards him; and where the police conduct in furnishing drugs for sale, in and of itself does not constitute police misconduct.

POINT V

This Court should not exercise its discretion to consider the other four issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal.

The trial court properly denied the defendant's motions for mistrial predicated on comments by the trial court where the defendant's failure to request curative instructions at the time the comments were made precludes him from asserting the error now. Further the trial court properly denied the defendant's motions for mistrial predicated on comments by the prosecutor where the comments were invited by defense counsel or were comments upon the uncontradicted evidence before the jury; even should this Court find the comments objectionable, they were not so prejudicial as to vitiate the entire trial.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DECLINED TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S ALLEGED DISCOVERY VIOLATION FOR THE STATE'S FAILURE TO INFORM THE DEFENSE THAT THE TAPE RECORDING DID NOT CONTAIN THE ENTIRE TRANSACTION. (Restated).

Defendant asserts the trial court erred in denying his motion for a Richardson[1] hearing predicated on an alleged discovery violation by the state. The defendant asserts (in this Court) the discovery violation was the state's failure to produce for the defense incriminating statements made to Detective Israel; in the Fourth District as well as in the trial court, the defendant asserted the discovery violation was that the state failed to inform the defense that the tape recording of the transaction was incomplete, that is that the recording ceased before the transaction was complete.

The state asserts that it was proper for the trial court to deny the Richardson hearing as no discovery violation occurred. As determined by the Fourth District, the state fully complied with its discovery obligation by disclosing the existence of electronic surveillance, providing the defense with a duplicate copy of the tape and by making the original available for inspection and copying by the defense. Matheson v. State, 468 So.2d 1011, 1013 (Fla. 4th DCA 1985).

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971).

The defendant now appears to assert the discovery violation was that the state never informed the defense that the defendant made incriminating statements to Officer Israel, which statements were not recorded on the tape and to which Detective Israel was going to (and was allowed to) testify to at trial. A review of the record below clearly reveals this assertion by the defense is not an accurate account of the trial court proceedings; indeed defendant was well aware of the statements before trial.

Below, defendant moved for a mistrial after Sergeant Smith [the officer who made the recording] testified that, at his pre-trial deposition he stated the tape was complete, but later discovered the tape was incomplete and defense counsel was never informed. Matheson at 1012. A review of defendant's motion for mistrial clearly reveals his complaint was that tape was incomplete and he was never so informed; never does defendant assert that Detective Israel is testifying to incriminating statements made by him, which had not previously been disclosed to him (R. 1325-1331). Rather his complaint appears to have been that had he known the tape was incomplete, that it did not contain his inculpatory statements, he would have changed his opening argument (R. 1326-1327).

During argument as to whether the tape should be admitted into or not, counsel for Defendant Matheson argued it should be excluded because there was no chain of custody

(R. 1440-1441) and that there was a question as to the integrity of the tape (R. 1441-1443), while counsel for Defendant Joyce argued that the tape should be admitted into evidence because the tape contained none of the incriminating statements purportedly made by the defendants according to the arrest report and sworn statements of Detective Israel (R. 1444-1445). Clearly defendants were aware that Detective Kridos was going to testify to incriminating statements made by them; this is evidenced not only by the state's answer to demand for discovery (R. 2872-2873, 2876-2877) but also by their arguments in the trial court.

The basis of the defendant's motion for mistrial was that the defense was never informed that the tape was an incomplete record of the transaction (R. 1325-1331). The state asserts that once it fulfilled its obligation under Rule 3.220 Fla.R.Crim.P. by disclosing the fact of electronic surveillance, permitting inspection and copying of the tape, and by disclosing the existence of and substance of statements by the accused, it was no longer required to do anything more. As the Fourth District quoted from State v. Counce, 392 So.2d 1029, 1031 (Fla. 4th DCA 1981): "The State has no duty to do for the defense work which the defense can do for itself." Matheson at 1013.

That the defense below never complained that they had not been informed of their incriminating statements prior

to trial is further evidenced by the fact that Detective Israel's testimony regarding statements by the defendant were not objected to (R. 1373-1375, 1379-1381, 1393-1397, 1403-1408). Surely counsel would have made such an objection if they had had one.

Thus the finding of the Fourth District that no discovery objection to any portion of Detective Israel's testimony is clearly correct. As defendant has cited no cases holding that the state is obligated to inform the defense of the absence of evidence, the state asserts the decision of the Fourth District in the instant case should be affirmed.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO ADMIT THE TWO TAPE RECORDINGS IDENTIFIED AS DEFENDANT'S EXHIBITS B AND C INTO EVIDENCE TO BE PLAYED TO THE JURY TO IMPEACH THE "ORIGINAL" TAPE RECORDING ADMITTED AS STATE'S EXHIBIT 15 AND TO IMPEACH THE TESTIMONY OF DETECTIVE ISRAEL AND SERGEANT SMITH, THUS DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

The defendant asserts the trial court erred when it refused to admit into evidence duplicate copies of the tape recording already in evidence, thus he asserts he was prevented from impeaching two of the state's witnesses.

Initially, the state would submit that this Court should not exercise its discretion to consider this issue on appeal, where it was raised and rejected by the Fourth District. As this Court stated in State v. Hegstrom, 407 So.2d 1343, 1344 (Fla. 1981), this Court will not accept a case for review on one basis and then reweigh the evidence once reviewed by the district court, in order to provide a second record review of cases already resolved by the district courts of appeal. See also Sobel v. State, 437 So.2d 144, 148 (Fla. 1983). This Court should thus accept the Fourth District's determination that on the basis of this Court's opinion in Tillman v. State, 471 So.2d 32 (Fla. 1985), the flawed jury instruction was not fundamental error.

If this Court should decide to exercise its discretion and review this issue, then the state submits that it is without merit. In his brief defendant lists 14 alleged points where the tapes played at the pre-trial hearing differs from the one played before the jury at trial. See: R. 95-117 and compare with R. 1455-1483. However, defendant's application of the "laws of logic" leaves the most reasonable explanation unaccounted for.

The court reporter at the pre-trial hearing on the motion to suppress stated the following prior to attempting to take down the contents of the tape:

> The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content (R. 95).

Similarly prior to endeavoring to transcribe the tape played before the jury the court reporter stated:

> The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content due to poor audibility and inability to identify speakers. (R. 1455-1456).

The alleged differences between the tape played at the pre-trial hearing and the tape played before the jury consists of nothing more than differences in deciphering what had previously been thought to be inaudible. The court reporter at trial was apparently able to comprehend more of the conversation recorded on the tape than the court reporter at the pre-trial hearing. Compare, e.g., R. 95-96 with R. 1456-1457.

Defendant's own expert, Dr. Harry Hollien, a professor of linguistics, speech and criminal justice at the University of Florida, an expert on phonetic sciences (R. 1777-1778), testified as to the purported differences between the original (State Exhibit No. 15) and the copies gratuitously provided to the defense. Dr. Hollien stated that the purported differences were as follows:

> [T]he first two or three minutes was played, and then immediately repeated itself [in the copies].
>
> And then, after hearing the original, I discovered that there was a great deal more noise on those tapes. But not having been able to compare the tapes point for point, those were the only two very obvious differences between these and the -- I guess it's Number 15 [the original] (R. 1829-1830).

Since the proffered differences between the original and the copies provided to the defense were so minimal as to be of no significance the state objected that the copies were not relevant to any issue (R. 1831) and the court agreed. But the tapes were marked for identification purposes so that this court could listen to the tape that came into evidence (State Exhibit 15) and the defense exhibit of a tape recording marked for identification (R. 1831).

The trial court properly refused to admit needless cumulative evidence. See §90.403 Fla. Stats. which states in relevant part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Clearly the trial court did not abuse its discretion when it refused to admit cumulative evidence, (additional copies of State Exhibit No. 15 which differed from the original only in that a small portion at the beginning, 2 or 3 minutes, was repeated and additional noise was on the tape). See, generally, Dale v. Ford Motor Co., 409 So.2d 232 (Fla. 1st DCA 1982).

POINT III

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE CONSPIRACY COUNT.

As with the issue in Point II of this brief, the state submits that this Court should not exercise its discretion to consider this issue on appeal. It is nothing more than an attempt to have a second review of a case already resolved by the district court of appeal. State v. Hegstrom, supra.

Defendant contends Count II of the Information (Vol. XVI, p. 2864) charging him with conspiracy to traffick in cannabis is defective in that it is vague and overbroad.

Respondent disagrees.

Defendant's reliance upon Goldberg v. State, 351 So.2d 332 (Fla. 1977), Battle v. State, 365 So.2d 1035 (Fla. 3rd DCA 1979) and State v. Giardino, 363 So.2d 201 (Fla. 3rd DCA 1978) is misplaced.

Defendant correctly cites State v. Smith, 240 So.2d 807 (Fla. 1970) as setting forth the requirements of an indictment or information for conspiracy. The Florida Supreme Court held that an information charging conspiracy should be sufficiently specific as to inform the accused of the charges against him and sufficiently precise as to protect the accused from future charges arising from the same facts. The court went on to say "[t]he indictment or

information should state the object or purpose of the conspiracy, but it is unnecessary to set forth the elements of the contemplated offense with the particularity and technical precision required in drawing an indictment or information charging the commission of such offense." Smith at 809.

The Smith standard is cited with approval repeatedly in similar cases including Goldberg upon which defendant so heavily relies.

Goldberg differs from the instant case in a variety of aspects, most importantly that the charging section of the Goldberg information is not specific: "[B]eginning on the 1st day of March, 1973 and continuing until the 30th day of November, 1974...Joyce...Stephenson...Graham and Stanley...did conspire with Rostein or...MacLean, or both, to commit..." Goldberg at 333 [emphasis added]. The Florida Supreme Court found this language fatally flawed in that it was unclear who conspired with whom. The language of the Information in the present case is not so flawed: "... charges that...SCHOLES,...GIBBS,...DIETRICH,...LOOS,... LABODA,...ADAMS,...MATHESON and...JOYCE on the 7th day of May, A.D. 1982,...did then and there conspire, combine, agree or confederate with one another...." (Vol. XVI, p. 2864) (emphasis added). The language of this information is clear, no "ors" are present these eight accused formed a group, conspired together, to traffick in cannabis.

There were other problems in Goldberg as well; the case involved bribery and solicitation charges and the language of the information left it unclear as to who bribed whom, who solicited whom, in concert or separately, etc. The instant case involves no such issues; granted a variety of acts are alleged, but each of those acts (possession, sale, delivery, etc.) is an element of the crime of trafficking unlike the separate offenses of bribery and solicitation.

The Third District Court was faced with a situation identical to Goldberg in State v. Giardino, 363 So.2d 201 (Fla. 3rd DCA 1978), another bribery and solicitation case. The information lists the accused and states that they conspired with each other and with (unnamed) other persons. Giardino at 203. The information goes on to use the "or" language objected to in Goldberg and results in the same ambiguity as to, not only who all the participants were, but also what crime each was accused of conspiring to perform and with whom.

Again the instant case differs; the participants are all named, the criminal act they conspired to perform is clearly stated: Trafficking in Cannabis.

The defendant also cites Battle v. State, 365 So.2d 1035 (Fla. 3rd DCA 1979) as similar to the present case. The charge portion of the information in Battle

contains the ambiguous language "or both, or other persons unknown..." Battle at 1037. There is no such ambiguous language in this case. Defendant and his co-conspirators are all named, there are no unnamed co-conspirators, there are no "ors." The information is clear, all eight accused are charged with conspiracy together to traffick in cannabis.

The instant case is similar, if not identical, to State v. Casesa, 392 So.2d 1022 (Fla. 5th DCA 1981). In Casesa the accused were charged with conspiracy to traffick in cannabis and challenged the information charging them as fatally vague for failing to state who performed which acts in furtherance of the conspiracy. This is precisely the situation in the instant case; the information states that the acts in furtherance of the conspiracy (arrangements for delivery, possession, purchase, etc.) were performed "jointly and severally" and not by any one defendant in particular. The Fifth District in Casesa stated that the test for the sufficiency of an information is found in Rule 3.140(o), Florida Rules of Criminal Procedure which provides:

> No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of defenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Applying that test the court found the information sufficient as it was not so vague as to mislead the accused or to subject them to subsequent jeopardy. The court noted that the information did not "contain the flaws of alternative type or shotgun pleading condemned in Goldberg." Casesa at 1023. The court further stated that the information satisfied the Smith test, supra, in that it was "sufficiently precise to enable a person of common understanding to know what is intended. It supplies the whys, hows and wherefores of the charge." Casesa at 1023. The state asserts that the information in this case not only clearly names all the accused, but also supplies all the whys, hows and wherefores of the charge.

The state asserts that there are also similarities between this case and State v. Segura, 378 So.2d 1240 (Fla. 3rd DCA 1980). There the defendants were charged with conspiracy to traffick and the alleged acts in furtherance of the conspiracy were the operation of two cannabis laden boats. The accused challenged the information charging them because the occupants of one boat were unable to determine whether or not they were charged with conspiring to possess the cannabis in the boat they were not occupying. The court pointed out that the information stated that the boats were observed to be acting in concert and that the "alternative pleading" objectionable in Goldberg was not

present. The court held that the information made it clear that all of the accused conspired with each other to possess all the cannabis and that the trial court erred in dismissing the conspiracy information.

The state asserts that there is no confusion with respect to the information in this case; all conspirators are clearly named and the elements of the crime with which they are charged are clearly set out.

POINT IV

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF ENTRAPMENT.

The state respectfully adopts its argument in Point II of its Answer Brief to co-defendant Ronald Matheson's Initial Brief.

POINT V

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED ON COMMENTS OF THE TRIAL COURT AND PROSECUTOR. (Restated).

The state respectfully adopts its argument in Point III of its Answer Brief to co-defendant Ronald Matheson's Initial Brief.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, appellee respectfully requests this Honorable Court to affirm the decision of the Fourth District in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent has been furnished this 12th day of March, 1986, by United States Mail to MILTON M. FERRELL, JR., ESQUIRE, 7th Floor Concord Building, 66 West Flagler Street, Miami, Florida 33130.

Of Counsel