IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,331

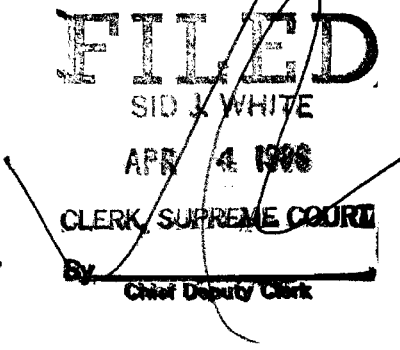
RONALD MATHESON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



On Petition to Invoke Discretionary Jusrisdiction to Review Decision of the District Court of Appeal of Florida, Fourth District

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REPLY BRIEF OF PETITIONER ON THE MERITS

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TOPICAL INDEX

TOPICAL INDEX (Cont'd.)

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd.)

TABLE OF CITATIONS (Cont'd.)

OTHER AUTHORITY

ARGUMENT

POINT I.

THE DISCOVERY VIOLATION

The State seeks to avoid its blatant discovery violation in failing to provide the defense with highly incriminating statements purportedly made by the defendant by the simple expedient of ignoring the violation. Instead, the State chooses to argue there was no discovery violation since the State provided the defense with the entire tape recording it had in its possession. See Answer Brief (hereinafter A.B.) at page 7. The State actually asserts that the defendant's complaint in the Fourth District and in the trial court 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." (A.B. at 7). The record, however, clearly belies the State's effort to avoid this issue.

As is more fully set forth in the defendant's Initial Brief at pages 15-18, immediately prior to the testimony of the chief prosecution witness, Detective Scott Israel, when the defense learned for the first time that the tape recording did not contain all of the conversation in the motel room as the prosecution had led the defense to believe, defense counsel moved for a mistrial (R. 1325-31), and expressly predicated his argument on the ground that Detective Israel was about to testify to incriminating statements never before provided to the defense. The trial court responded that

Detective Israel was "going to be here in a minute. We'll find out." (R. 1329). Part and parcel to that argument was the assertion that the State failed to advise the defense that the tape recording of the transaction in the motel room was incomplete; however, it was clear to all participants in the courtroom that the mistrial motion was based upon the fact that Detective Israel was going to testify to incriminating statements not recorded on the tape and never before provided to the defense. See R. 1329. Moreover, the State's unfounded argument that "never does defendant assert that Detective Israel is testifying to incriminating statements made by him, which had not previously been disclosed to him. . ." (State's emphasis, A.B. at 8), is totally belied by the defense objection made during Detective Israel's direct examination as follows:

> Detective Israel stated on his direct testimony that the tape stopped when he first went down to make the telephone call at the pay phone. So, he knew at that point there were more things to be recorded after the tape had stopped. And no one notified defense counsel. . .. (R. 1447-8).

The trial court, as it had previously done with regard to the mistrial motion (R. 1331), overruled this objection (R. 1448).

Thus, the State's repeated argument at page 10 of its brief that Dectective Israel's testimony concerning the incriminating statements made by the defendant "were not objected to", is clearly refuted by the record. Moreover, the State's argument ignores the settled principles concerning preservation of error that no objection or "magic words" are required so long as the trial court is placed on notice as to

the substance of the claimed error. The defendant's vociferous mistrial motion (R. 1326-31), more than put the trial judge on notice about the discovery violation issue.

In Thomas v. State, 419 So.2d 634, 636 (Fla. 1982), Spurlock v. State, 420 So.2d 875, 876-7 (Fla. 1982), State v. Heathcoat, 442 So.2d 955, 956 (Fla. 1983), and Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), this Court expressly held that the objectives of the contemporaneous objection rule are to "apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Thomas, supra at 636. This rule was clearly satisfied here.

Moreover, in the precise context of a discovery violation such as occurred in the case at bar, the courts have held that a mistrial motion, as opposed to an "objection" based on a discovery violation is sufficient to preserve the issue for appeal. Thus, Raffone v. State, 11 FLW 342 (Fla. 4th DCA Feb. 5, 1986), rejected the State's claim that the defendants failed to preserve the discovery issue for appeal where they "moved for a mistrial instead of objecting because of a discovery violation. This argument is without merit. While the defendants did not recite particular magic words, the manner in which they brought the matter to the trial court's attention was more than sufficient to apprise the court of the nature of their complaint." 11 FLW at 343. See also, Torres v. State, 474 So.2d 335 (Fla. 3d DCA 1985) (motion for mistrial based on discovery violation sufficiently preserved issue for appeal).

The State, at page 9 of its brief, argues that the defendants were aware that "Detective Kridos was going to testify to incriminating statements made by them. . .". (Emphasis added.) The defendant must point out that Detective Kridos testified only to incriminating statements made by co-defendants at another location miles away from the motel room where Detective Israel was conducting the purported transaction with the defendant. See R. 877-81, 904. Thus, whether or not the defendant was aware that Detective Kridos was going to testify to incriminating statements made by co-defendants is totally irrelevant to the discovery violation concerning incriminating statements attributed to the defendant at another location by Detective Israel.

Content to rely upon its lack of preservation claim, the State ignores the merits of the discovery violation and the trial court's admitted failure to conduct any Richardson inquiry. See defendant's Initial Brief at 18-22. Subsequent to the filing of that brief, numerous decisions reversing for nearly identical Richardson violations have occurred. In addition to Raffone and Torres, cited above, see Hall v. State, 477 So.2d 572 (Fla. 4th DCA 1985); Hickey v. State, 11 FLW 431 (Fla. 5th DCA Feb. 13, 1986); Waters v. State, 11 FLW 580 (Fla. 5th DCA Mar. 6, 1986). Reversal is required.

POINT II.

ENTRAPMENT AS A MATTER OF LAW

The State initially requests this Court not to exercise its discretion to consider this issue. However, since this

issue, if successfully resolved in the defendant's favor, would result in his complete discharge, as opposed to a new trial, the defendant submits it is most appropriate for this Court to address the issue. Moreover, the issue of the propriety of the "reverse sting" is one of statewide importance and is "ripe" for resolution by this Court.

Of course, the State understates the implications of conducting "reverse stings" and ignores the factual predicate by which law enforcement officers create crime by first disseminating felony quantities of marijuana into the community, and then ensnaring previously untargeted and criminally uninvolved citizens by the use of uncontrolled informants. See defendant's Initial Brief at 23-24.

The State's first argument is that the defendant here "never came into contact with the police (or the C.I.) until his arrest. . ., nor did he raise an entrapment or duress defense." (A.B. at 12). First, the defendant most certainly did raise the entrapment as a matter of law defense repeatedly at a pretrial hearing and throughout the trial. See R. 2868-71, para. 20; R. 2939-43, 2221-24, 2236-50; and see defendant's Initial Brief at 31 n. 18. Secondly, the record clearly refutes the claim that the defendant "never came into contact with the police. . .until his arrest." The defendant was clearly in "contact" with Detective Israel in the latter's undercover capacity throughout the period in the Howard Johnson's motel room prior to his arrest.

More importantly, the State's apparent argument that

the defendant may not vicariously assert the entrapment as a matter of law defense was expressly rejected by the Third Circuit in United States v. Twigg, 588 F.2d 373, 381-82 (3d Cir. 1978), a decision expressly cited with approval by this Court in Cruz v. State, 465 So.2d 516, 519 n. 1 (Fla. 1985), a decision noticeably absent from the face of the State's brief.

In Twigg, supra, the court applied the entrapment as a matter of law defense not only to the co-defendant most involved with the undercover police operatives, but also to defendant Twigg himself who had minimal contact with the undercover agent. The Court explained:

> The traditional entrapment defense is only available to those defendants brought into the criminal enterpirse directly by government agents. If a defendant is induced by a third party not connected with a law enforcement official to commit a crime, then the defendant cannot raise the defense. [Citations omitted.] However, no case has been found that considers this issue when overreaching by the Government is the basis of the defense. The fundamental fairness defense compels us to resolve this question in light of all the circumstances. We are reluctant to establish a per se rule barring the use of this defense to anyone who was not directly induced by a government agent. [Emphasis added.] 588 F.2d at 381-382.

Clearly, there is a distinction between the "traditional entrapment defense" and the entrapment as a matter of law defense recognized by Twigg and Cruz. Aside from the fact that the defendant here did indeed come into "contact" with the police in their undercover capacity prior to his arrest, it would be most egregious if the due process defense were available only to those initially contacted by undercover agents. The very fact that persons removed from direct

contact with an agent are nonetheless drawn into the crime created by the government all the more justifies application of the due process defense to those very persons. The objection of this Court in Cruz to police tactics which "create a substantial risk that. . .an offense will be committed by persons other than those who are ready to commit it. . .", 465 So.2d at 522, was "the manufacture of new hostilities", i.e., crime. Id. Accordingly, even were the defendant not to have "come into contact" with the police prior to his arrest, the due process defense raised in this case would be available to him.

The State's reliance on decisions where the police did not provide illegal contraband per se to the defendants is likewise misplaced. See, e.g., United States v. Russell, 411 U.S. 423 (1973); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981).

Similarly, the State's reliance on State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983), is unwarranted. There, as the court itself noted, it did not have to "wrestle" with the due process-governmental misconduct issue raised in the case at bar because it found nothing in the record before it to indicate such misconduct. This was so, no doubt, because the cigarettes at issue in Sokos are not per se contraband such as the marijuana in the case at bar.

Similarly, State v. Brider, 386 So.2d 818 (Fla. 2d DCA 1980), is distinguishable since the premise upon which the trial court's dismissal order was entered in that case was

that the defendant never had possession of the marijuana, an argument not germane to the due process defense raised here. However, the Brider court went further and recognized the overreaching defense, but simply found it inapplicable to the facts before the court. In Brider, there was clear evidence of the defendant's predisposition, whereas in the case at bar, the police conceded lack of any proof as to the defendant's prior involvement in drug transactions or predisposition to commit the offense. (R. 1008, 1029, 1048, 1633-4, 1641). Moreover, in Brider there was no evidence such as exists in the case at bar that the police distributed felony samples of marijuana into the community never to be retrieved and offered to "front" large quantities of marijuana in order to effectuate the "sale".[1] (R. 221-24, 236-50, 898, 899, 1030, 1036-50).

Moreover, it is doubtful that the Second District would still follow its previous decisions. In the post-Cruz decision in Jones v. State, 11 FLW 425 (Fla. 2d DCA Feb. 14, 1986), the Second District relied upon Cruz to reverse a grand theft conviction where police utilized the "drunken bum decoy operation", observing that police there had not received any

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[1]Whether or not the record supports the State's argument (see A.B. at 15) that it was the co-defendants who first proposed the "fronting" of the marijuana, clearly the police utilized this device as a means to induce the defendants into the deal. This created a substantial risk that an offense would be committed by persons other than those ready to commit. See Cruz v. State, 465 So.2d at 522. See also, defendant's Initial Brief at 31 n. 17, for the "wholesale" value of the 300 pounds of marijuana which the police offered to "front" as an inducement in this case.

information indicating the defendant's involvement in criminal activity prior to the time he "succumbed to temptation" presented by the police. More recently in State v. Eichel, 11 FLW 660 (Fla. 2d DCA Mar. 12, 1986), the Second District applied Cruz to affirm dismissal of a cocaine and marijuana possession conviction where police utilized means that fell below the Cruz standards in ensnaring the defendant into committing the offenses. There, a female police officer's "false representation that Eichel would not be arrested induced him to believe that she either would not or could not arrest him if he used drugs while in her presence." 11 FLW at 662.

Finally, this Court recently ratified its Cruz decision in Morris v. State, 11 FLW 83 (Fla. Mar. 6, 1986), without having occasion to apply the Cruz standard to the facts before the Court.

The State has failed to demonstrate the propriety of the reverse sting when weighed against the due process standards enunciated by this Court in Cruz v. State, supra. Accordingly, this Court is requested to reverse the defendant's conviction with directions that he be discharged therefrom.

POINT III.

JUDICIAL AND PROSECUTORIAL COMMENTS

The Trial Court's Comments

Significantly, the State makes no effort to argue that the trial judge's comments were proper; indeed, the State

concedes that, with respect to the judge's statement that he could tell the difference between the voices on the tape, contrary to the defense expert (R. 1864), this comment, "may have been objectionable" and was "error". (A.B. at 18). Instead, the State's entire response to these comments is that because the defense did not request a curative instruction, it did not properly preserve this issue for appeal.

In support of its curative instruction-preservation rule, the State cites this Court's decision in Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982). In Ferguson, however, the defense merely raised a general objection and mistrial motion. It was this lack of specificity in the objection that failed to adequately preserve the issue: "It is well settled that objections must be made with sufficient specificity to apprise the trial court of the potential error and to preserve the point for appellate review. [Citations omitted.] The desirability and need for specified grounds also apply to motions for mistrials." 417 So.2d at 641 (emphasis added). In sharp contrast, in the case at bar, the defense expressly stated its grounds, namely, the court's comments on the evidence (R. 1864-5), in addition to moving for a mistrial.

It is significant that the Ferguson Court did indeed reach the merits and found no error in the comment there at issue. Id. at 642. Moreover, in the post-Ferguson decision of Thomas v. State, 419 So.2d 634 (Fla. 1982), this Court held that an objection and request to make a mistrial motion alone properly preserved the prejudicial comment issue for appeal.

No requirement for a curative instruction was imposed.

Finally, the First District, in Millett v. State, 460 So.2d 489, 492 (Fla. 1st DCA 1984), rev. dismissed, 466 So.2d 218 (Fla. 1985), expressly rejected the identical argument presented by the State in the case at bar and held that Ferguson v. State, supra, did not impose a duty to request a curative instruction as a prequisite to preserving a judicial comment issue for appeal. There, as here, the trial judge commented on the veracity of defense evidence, and the defense moved for a mistrial without requesting a curative instruction. See also, Finklea v. State, 471 So.2d 596 (Fla. 1st DCA 1985) (failure of defendant to ask for a cautionary instruction does not preclude review).

As appears to be the case throughout the State's brief, the merits are ignored. Thus, the defendant will simply rely upon the decisional law set forth in his brief on this issue. In addition, the defendant would call to this Court's attention the recent decision of the First District in Millett v. State, supra, finding error in the trial court's comments on the credibility of defense testimony, and the recent decision of the Second District in Blanks v. State, 11 FLW 378 (Fla. 2d DCA Feb. 5, 1986), reversing where the trial judge, in front of the jury, admonished defense counsel not to engage in any "further. . .improper conduct." This last cited case directly relates to the trial judge's "charade" remark in the presence of the jury. (R. 1942-3). The trial court's denial of the defense mistrial motions predicated upon these judicial

comments requires a reversal.

The Prosecutor's Comments In Closing Argument

Not unexpectedly, see defendant's Initial Brief at 38 n. 19, the State argues that defense counsel invited the prosecutor's comment in closing argument asking the jury if they wanted their "children to grow up in a country overrun by drugs and drug dealers. . .". (R. 2425). The State points to defense counsel's earlier argument asking the jury if they wanted their "children to grow up like -- 'Hey, you want a joint?' 'Sure, I'll take a joint.' Bust that kid." (R. 2439). The defendant submits that his argument to the jury was entirely proper and based upon the testimony presented, namely a reverse sting whereby the police offer to sell marijuana and then immediately turn and arrest the defendants for buying it. The defendant does not "invite" error where his argument to the jury is entirely proper and based upon the record. Williamson v. State, 459 So.2d 1125 (Fla. 3d DCA 1984).

The State next addresses the defendant's argument concerning the prosecutor's comment on his failure to testify. The State, desiring to present the "entire context" of the comments (see A.B. at 23-4), omits the prosecutor's continued comment that "[w]e haven't heard why Mr. Matheson [and] Mr. Joyce. . .were in Room 318 with that [$]125,000. . .". (R. 2654). The State's reliance upon the rule of White v. State, 377 So.2d 1149 (Fla. 1980), that general comments on the lack of defense evidence are permissible, is misplaced. Here, the comment was not directed to the failure of the defense to

present evidence, but to the failure of the defendant individually to explain his presence in the motel room. This Court recently recognized the distinction between comments on the failure of the defense to present evidence as opposed to the defendant individually, State v. Sheperd, 479 So.2d 106, 107 (Fla. 1985), a distinction lost on the State here.

The State's harmless error argument with regard to the above comment (A.B. at 24-26), is based entirely on Detective Israel's uncorroborated testimony attributing various incriminating statements to various defendants in the motel room. The State ignores the fact that Detective Israel's credibility was severely impeached on cross-examination as to his memory of events and which defendant made which statements.[2] It is to be recalled that the tape recording failed to contain the incriminating statements about which Detective Israel testified. See Point I, supra. Thus, the State has failed in its burden of establishing beyond a reasonable doubt that the prosecutor's impermissible and direct comment on defendant's failure to testify was harmless error. State v. Marshall, 476 So.2d 150, 153 (Fla. 1985).

No meaningful attempt is made to deal with any of the prosecutor's other comments including his totally unsupported statements about police officers risking their lives (R. 2527,

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[2]Israel was unable to recall which defendant made what statement without listening to the voices on the tape recording (R. 1558-9, 1591-3), and admitted to changing his testimony regarding the sequence of events in the motel room only after listening to the tape. Id.

2659)[3], drugs on the streets (R. 2524, 2656)[4], or the prosecutor's comment that the defendant would "walk out of this courtroom if [he was] able to and laugh about how [he had] about how [he had] beaten the system. . .". (R. 2658).[5] Instead, the State seems content with its ipse dixit that while these comments are "not favored", they were "clearly insufficient to sway the jury." (A.B. at 21).

The State seeks to justify the prosecutor's rampant improper comments in this case on the strong arguments presented by all counsel. See A.B. at 22-23. That defense counsel may have followed the dictates of the Code of Professional Responsibility, Canon 7, by zealously representing his client, is no justification for the prosecutor's unsupported, inflammatory, and universally condemned comments which appear throughout his closing argument. Even if individual comments are not deemed to have constituted reversible error, surely the cumulative effect of all of the comments warrant reversal. See Lipman v. State, 428 So.2d 733 (Fla. 1st DCA 1983); Collins v. State, 423 So.2d 516 (Fla. 5th DCA 1982); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979). The defendant

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[3]Such comments have been held reversible in Peterson v. State, 376 So.2d 1230, 1233 (Fla. 4th DCA 1979), and Washington v. State, 343 So.2d 908, 909 (Fla. 3d DCA 1977).

[4]This Court held such comments to be reversible error in State v. Wheeler, 468 So.2d 978, 981 (Fla. 1985); see also, Hines v. State, 425 So.2d 589, 591 (Fla. 3d DCA 1982).

[5]This comment is reversible pursuant to Salazar-Rodriguez v. State, 436 So.2d 269, 270 (Fla. 3d DCA 1983), and cases cited at page 43 of defendant's Initial Brief.

is entitled to a new trial predicated upon the prosecutor's comments to the jury in closing argument. [6]

CONCLUSION

Based upon the foregoing argument and citation of law, as well as the arguments contained in defendant's Initial Brief, the defendant respectfully requests this Court to reverse his judgment of conviction and sentence and remand with directions that he be discharged (Point II), or alternatively, that he be granted a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was served by mail upon the Honorable SARAH B. MAYER, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 31st day of March, 1986.

Respectfully submitted,

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[6] The defendant relies upon the Reply Brief submitted by co-petitioner JOYCE for his reply to Points IV and V.