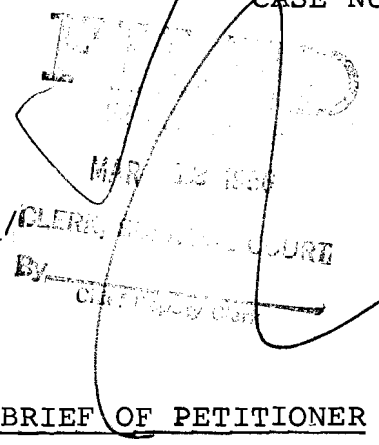
IN THE SUPREME COURT OF FLORIDA

JOE EDWARD LEE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO: 68,306



INITIAL BRIEF OF PETITIONER
ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Joe Edward Lee, the Appellant, Defendant below, will be referred to as Lee or Petitioner. Respondent, State of Florida, the prosecuting authority below, will be referred to as the State.

References to the one volume of the record of appeal containing the legal documents filed in this cause will be made by the symbol "R" followed by the appropriate page number in parenthesis (R-). References to the one volume of the record of appeal containing the transcript of the hearing on the motion to dismiss for improper governmental conduct will be made by the symbol "MD" followed by the appropriate page number in parenthesis (MD-). References to the one volume of the record of appeal containing the transcript of the hearing on the motion to withdraw plea of nolo contendere will be made by the symbol "WP" followed by the appropriate page number (WP-). References to the supplemental record containing the presentence investigation will be made by the symbol "SR" followed by the appropriate page number in parenthesis (SR-).

STATEMENT OF THE CASE AND FACTS

On November 19, 1984, Joe Edward Lee was charged in Bradford County with two counts of possession and two counts of sale of cocaine (R-34). Lee filed a motion to dismiss the charges alleging improper governmental conduct (R-19-21). Lee claimed he was denied due process because the confidential informant was paid a contingent fee for his services by law enforcement. At the February 20, 1985 hearing on the motion to dismiss, the State stipulated to the following facts:

> (1) In January, 1984, the Florida Department of Law Enforcement (FDLE) agreed to pay the informant, Ronald Carn, $25.00 for each purchase of controlled substances made by him in Bradford County.
>
> (2) Lee was targeted as a defendant by the FDLE before the commission of the offenses charged in the Information.
>
> (3) The FDLE agents did not know how the informant arranged the purchases of cocaine from Lee. After both purchases the informant was paid $25.00 by the FDLE.
>
> (4) Carn was paid $25.00 on January 20, 1984, after purchasing drugs from another individual in Bradford County pursuant to the informant's agreement with the FDLE.

Testimony adduced from FDLE Agent Jimmie Collins disclosed that the contingent fee agreement with Carn was terminated after the January 20th purchases because "... -- that this buy -- individual purchase and individual payments may, you know, cause us some problems..." (MD-17). Collins further testified that he was aware of the informant's

extensive criminal record including a perjury conviction (MD-22,23). Ronald Carn testified that he had at least four aliases (MD-25) and that his only sources of income were payments from the FDLE and money received from the sale of items he had stolen (MD-31,32).

The trial court denied the motion at the close of the hearing (MD-52) and by written order rendered March 5, 1985 (R-31).

After the motion to dismiss was denied, Lee entered a negotiated plea of nolo contendere to one count of possession of cocaine. The written plea agreement provided that:

> (1) The Defendant reserves his right to appeal the denial of defendant's motion to dismiss for improper governmental conduct.
>
> (2) The State will recommend probation.
>
> (3) The State will remain silent as to the withholding of adjudication of guilt.
>
> (4) The State will enter a nolle prosequi to Counts II, III and IV of the Information (R-26).

On March 14, 1985, Lee filed a motion to withdraw the plea of nolo contendere asserting that the FDLE case agent acting for the State had violated Paragraph 2 of the negotiated plea (R-33,34). In the court official's statement portion of the PSI, FDLE Agent Collins claimed that: 1) Lee was a bigger cocaine dealer than realized by this court appearance; 2) probation was not appropriate; and 3) Mr. Lee deserved a period of incarceration (SR-11).

At the April 1, 1985 hearing, Lee informed the court that at the time the negotiated plea was entered both the Defendant and the State anticipated a recommendation of probation from law enforcement (WD-3,4). The State did not deny the representations by Lee regarding the expected recommendation, but objected to the motion on the grounds that the plea was entered freely by the Petitioner. Although not clear from reading the transcript, the prosecutor claimed he would disavow at sentencing Agent Collins' statements "as being something that's not based on anything that I know" (WD-8).

The trial court denied the motion to withdraw the plea of nolo contendere (R-35) and proceeded to sentencing. Lee was ajudicated guilty of possession of cocaine, placed on three (3) years probation and ordered to serve sixty (60) days in a Department of Corrections institution (R-36-38).

An appeal to the First District was taken alleging the trial court had erred in denying the motion to dismiss for improper governmental conduct and in denying the motion to withdraw plea of nolo contendere. The First District affirmed the trial court's rulings on January 15, 1986. In its opinion, a copy of which is attached as an appendix, the appellate court certified as in direct conflict with the Fourth District the following question:

WHEN A LAW ENFORCEMENT OFFICER MAKES AN INDEPENDENT RECOMMENDATION TO THE TRIAL COURT THAT RUNS COUNTER TO THE RECOMMENDATION IN A PLEA AGREEMENT ENTERED INTO BY THE STATE ATTORNEY'S OFFICE FOR THE "STATE", MUST THE TRIAL COURT PERMIT A WITHDRAWAL OF THE PLEA?

A timely notice to invoke the discretionary jurisdiction of this court under Rule 9.030(2)(A)(iv) was filed on February 11, 1986.

SUMMARY OF ARGUMENT

ISSUE I

The prosecuting attorney as part of a plea bargain with Petitioner agreed that the "State" would recommend a sentence of probation. In consideration of that promise, the Petitioner withdrew his plea of not guilty and entered a plea of nolo contendere. A state law enforcement officer in the presentence investigation stated that probation was not appropriate and recommended incarceration for Lee. The recommendation of incarceration by an agent of the "State" was in clear violation of one of the terms of plea agreement. Lee did rely, and was entitled to rely, upon the prosecuting attorney's authority as the representative for the "State" in the plea negotiations. These facts presented to the trial court clearly demonstrated good cause for withdrawal of the nolo contendere plea before sentence was imposed. The First District erred in affirming the trial court's denial of the Petitioner's motion to withdraw plea.

ISSUE II

The State's involvement and method of obtaining evidence of a crime violated the Petitioner's right to constitutional due process of law. Lee was targeted as a defendant by the State before the commission of the offenses. The informant, who was the State's chief witness, was paid a fee by the

police contingent upon the informant's actual purchase of controlled substances from Lee. In affirming the trial court the majority opinion and concurring opinion in the First District do not address the crucial policy consideration -- should the courts sanction contingent fee arrangements and, thereby, encourage this police practice that is subject to abuse?

ISSUE I

I. THE FIRST DISTRICT ERRED AS A MATTER OF LAW IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO WITHDRAW PLEA OF NOLO CONTENDERE BECAUSE THE PLEA AGREEMENT WAS BREACHED BY THE STATE.

ARGUMENT

The First District (Ervin, J., dissenting) certified the following question:

> WHEN A LAW ENFORCEMENT OFFICER MAKES AN INDEPENDENT RECOMMENDATION TO THE TRIAL COURT THAT RUNS COUNTER TO THE RECOMMENDATION IN A PLEA AGREEMENT ENTERED INTO BY THE STATE ATTORNEY'S OFFICE FOR THE "STATE", MUST THE TRIAL COURT PERMIT A WITHDRAWAL OF THE PLEA?

The Petitioner submits that the answer to the certified question should be in the affirmative, particularly considering the facts surrounding the case at bar. In the presentence investigation prepared by Probation and Parole Services, the following recommendation was attributed to the State's lead agent:

> According to Jimmy Collins, Florida Department of Law Enforcement Agent, in reference to Starke area, Mr. Lee is a bigger cocaine dealer than was realized by this court appearance. He feels this should be taken into consideration at sentencing. According to Mr. Collins, Lee was making a substantial living selling drugs and since this arrest their agency has quite a bit of feedback and there are indications of continued drug dealings in reference to Mr. Lee.

> Agent Collins does not think that probation in this case is appropriate and that Mr. Lee deserves a period of incarceration. (SR-11)

Pursuant to Rule 3.170(f), Florida Rules of Criminal Procedure, before imposition of sentence Lee filed a motion to withdraw the nolo contendere plea alleging Agent Collins' statement in the PSI violated the plea agreement. At the hearing on the motion, Lee's counsel advised the trial court that:

> ...I'm sure Mr. Elwell [the prosecutor] will correct me if I'm wrong on this. Our thinking, Your Honor...I took Jimmy Collins, who was the lead agent...when I took his deposition a year later from when this transaction supposedly occurred ...Mr. Collins basically said that he didn't know who Mr. Lee was; Mr. Lee was not part of Operation Clean-Up; that he was not a major dealer; that as far as he knew, he knew nothing about Mr. Lee; but for Ronald Carnes (sic), Mr. Lee would not have been swept up into this dragnet that was going on here in Bradford County, that no one else in FDLE was aware of Mr. Lee and that basically he wasn't of interest and certainly wasn't any sort of major cocaine dealer at all.
>
> With that in mind, our thinking was -- and I believe Mr. Elwell thought -- that a recommendation of probation would be appropriate in Mr. Lee's case and we anticipated a presentence investigation that would come forward from law enforcement to say, "Yes, he was a good candidate for probation and was not a major dealer and, in fact, was not part of Operation Clean-Up".
>
> After we changed the plea and pursuant to the negotiated plea where the State, as part of the plea negotiation, says they'll come forward and recommend probation on what we know that the State knows about...Mr. Lee, Jimmy Collins makes a statement a hundred and eighty degrees different from what he's said in his deposition a mere two months before the change of plea... (WD-3,4).

The prosecutor did not dispute Lee's representations but objected to the motion claiming that the plea of nolo contendere was freely entered by the Petitioner. Lee agrees that the plea was freely entered, but it was entered in consideration of the promises made by the State through its representative, the prosecuting attorney. As noted in the dissenting opinion, the prosecutor is the sole party representing the State in plea agreements. Rule 3.171(b)(2)(i), RCrP, further provides that the prosecuting attorney shall "apprise the trial judge of all material facts known to him regarding the offense and the defendant's background prior to acceptance of a plea by the trial judge."

Accordingly, Lee relied on the prosecutor's recommendation of probation under the assumption that the prosecutor was apprised of all material facts relating to the change of plea. Agent Collins had been deposed and questioned about Lee's drug involvement only two months before the change of plea (and one year after the offenses). Based on that testimony, the prosecutor anticipated, as well as the Petitioner, a recommendation of probation from the FDLE. Both sides were surprised by Collins' recommendation because it contradicted his previous statements.

Since the law favors a trial on the merits, a motion to withdraw should be liberally granted before imposition of sentence. It should not be refused where the ends of justice will not be subserved. Fortini v. State, 472 So. 2d 1383

(Fla. 4th DCA 1985). (Citations omitted.) As Judge Ervin wrote in his dissent below:

> ...A defendant or his attorney should be under no obligation to seek out all governmental agents who, directly or remotely, were involved in the investigation of the case in order to determine whether they concur in the bargain struck. It would be helpful for the state attorney to consult such persons before he enters into any such agreement, but once the agreement is achieved, fairness should dictate that no officer of the government will make any utterance that would tend to compromise its effectiveness. If such persons feel they cannot in good conscience respect the parties' compact, with the result that their reservations are conveyed to the trial judge, affecting any decision not to abide by the agreement, the contract in its entirety upon request should be vacated, including the defendant's plea. The basis for the vacation -- no less than if the prosecution itself breaches the agreement -- rests upon 'an outraged sense of fairness...'.

In the case at bar, sentence had not been imposed and the State would not have been prejudiced in its prosecution of the Petitioner. The trial court merely had to grant the motion and place the case back on the trial docket. This court should reverse the order denying the motion to withdraw plea of nolo contendere and remand for trial.

ISSUE II

II. THE FIRST DISTRICT AS A MATTER OF LAW ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DENYING THE MOTION TO DISMISS FOR IMPROPER GOVERNMENTAL CONDUCT THAT VIOLATED PETITIONER'S RIGHT TO CONSTITUTIONAL DUE PROCESS OF LAW.

ARGUMENT

The First District's opinion pertaining to the violation of Lee's due process rights is in direct conflict with this Court's ruling in State v. Glosson, 462 So. 2d 1082 (Fla. 1985). While acknowledging that the cirucmstances in the instant case are "somewhat similar" to Glosson, the First District claimed "significant differences" in reaching its decision that Glosson was not controlling. Lee submits that the differences in the facts between Lee and Glosson do not justify the lower appellate court's failure to follow the holding in Glosson. In the case at bar, the State stipulated in the trial court that:

> 1. Lee was targeted by law enforcement as a defendant before the commission of the offenses.
>
> 2. The informant was the State's chief witness and he was paid by law enforcement a fee contingent upon him purchasing controlled substances.
>
> 3. The law enforcement officers did not know what the informant had done to set up the purchases of cocaine from Lee.
>
> 4. The informant was paid $25.00 after each purchase from Lee.

In spite of the fact that the State stipulated that Lee was targeted by law enforcement before the crimes, the First District held that Lee was targeted by the informant. Although Lee may have initially been mentioned by the informant, there is not doubt that the police targeted Lee

and agreed to pay Carn a fee if Carn was successful in purchasing controlled substances from Petitioner. Recognizing the potential for abuse by law enforcement using these police practices, the Fifth Circuit Court of Appeals in the case of Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), stated:

> Without some such justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to the crimes not yet committed. Such an arrangement might tend to a 'frame-up', or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.

311 F.2d 441, 444. In this case, the FDLE agents candidly admitted that they did not know if the informant had contacted Lee one time or one hundred times in his attempts to set up the Petitioner. The agents did not know and, apparently did not care, how the purchases were arranged by Mr. Carn. They exercised no supervision or control over the informant. This failure to supervise or control is particularly troubling considering Mr. Carn's unsavory background. The informant had a record of numerous convictions, including a conviction for perjury. The informant had at least four aliases, and his only sources of income were the payments from FDLE and money received from the sale of items he had stolen. Considering his financial plight, incentive for Carn to persuade, induce and cajole people to sell drugs to him was great.

Judge Ervin, in his concurring opinion on the due process issue, interprets the holding in State v. Glosson to be primarily concerned with the effect the fee arrangement might have on the informant's testimony. Concluding that the State's prosecution in the case at bar could have been secured without the informant's testimony, he found no violation of Lee's right to due process. First, the Petitioner respectfully disputes the assumption that the State could have prosecuted the case without Mr. Carn's testimony. The State at the trial court stipulated that Carn was its chief witness. Carn set up the buys, made the purchases, handled the evidence, and would be a necessary witness in the chain of custody of the physical evidence. Carn would also be a necessary witness to rebut the defense of entrapment if interposed by Lee at trial.

However, the Petitioner submits that the majority opinion and concurring opinion avoid the most crucial aspect of the issue. Should the courts condone contingent fee arrangements? Should the court's determination of due process violations turn on whether the informant's payment was contingent upon securing evidence or contingent upon his testimony? Aren't the opportunities for abuse that concerned the Fifth Circuit in Williamson present in both situations? The Petitioner submits that there are other investigative methods available to law enforcement and that the police will not be unduly hampered in their apprehension of criminals if they cannot use contingent fees.

In the case at bar, the informant was paid based on the successful performance of his duties. Lee was targeted as a defendant by the police before the offenses were committed. The informant set up the purchases, made the buys, and was paid for his catch. This situation clearly falls under the rulings in Glosson, id, Williamson, supra, and United States v. Joseph, 533 F.2d 282 (5th Cir. 1976), cert. denied, 431 U.S. 905, 95 S. Ct. 1698, 52 L. Ed.2d 389 (1977). The First District erred in affirming the trial court's denial of the motion to dismiss for improper governmental conduct.

CONCLUSION

For the reasons given above, the holding of the First District as to Issue II should be reversed and remanded with directions to dismiss the charges against the Petitioner. Failing that, the holding of the First District should be reversed as to Issue I and remanded to the trial court with directions to permit the Petitioner to withdraw his plea of nolo contendere.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John M. Koenig, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, this 10 day of March, 1986.

Terry N. Silverman