IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 69,304
	)	
PATRICK WELLER,	)	
	)	
Respondent.	)	
	)	

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellee in the court below and the prosecution in the trial court. Respondent was the appellant in the court below and the defendant in the trial court.

In this brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by Petitioner unless otherwise indicated. A copy of the district court's opinion is attached to this brief and designated Appendix A.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

By information filed March 23, 1984 (R 372) Respondent was charged with trafficking in cocaine and conspiracy to traffic in cocaine. Before trial, Respondent moved for a continuance in order to ascertain whether co-defendant, Carlos Gomez, would be willing to testify at trial (R 4). The trial court denied the motion (R 8), and the trial began Monday, April 1, 1985.

During the charge conference, Respondent requested instructions on conspiracy to deliver cocaine and conspiracy to traffic in cocaine in amounts less than 400 grams as lesser included offenses of conspiracy to traffic in cocaine (R 289, 292). The trial court denied Respondent's requests (R 293). Respondent also requested an entrapment instruction (R 289-290), and the trial court complied by giving the general entrapment instruction found in the Florida Standard Jury Instructions in Criminal Cases (1981 Edition), Instruction 3.04(c) (R 290, 350-352).

The jury returned a verdict finding Respondent guilty of trafficking in cocaine in an amount of 400 grams or more as charged in Count I of the information (R 374), and guilty of conspiracy to traffic in cocaine in an amount of 400 grams or more as charged in Count II of the information (R 375). The trial court adjudicated Respondent guilty, but deferred sentence pending a pre-sentence investigation (R 377). On May 3, 1985, Respondent was sentenced to fifteen (15) years imprisonment on count II to be served concurrent

with the fifteen years imprisonment given to Appellant under Count I (R 382).

On appeal, the Fourth District Court of Appeal, by opinion issued August 13, 1986, affirmed the judgment and sentence of the trial court with respect to the charge of trafficking in cocaine. The Fourth District, however, reversed and remanded the case for a new trial as to the conviction of conspiracy, finding reversible error in the trial court's denial of Respondent's requested jury instructions on the allegedly lesser included offenses of conspiracy to traffic (A 4).

The State of Florida invoked the discretionary jurisdiction of this Honorable Court to review the Fourth District's opinion. This Court accepted jurisdiction by Order of December 8, 1986.

STATEMENT OF THE FACTS

John Bordas became a confidential informant for the Federal Drug Enforcement Agency approximately three years prior to 1984 (R 126) as a result of a friend of his having been badly hurt when he unknowingly walked in on the middle of a drug deal (R 128). In order to help D.E.A. find out who hurt his friend, Mr. Bordas started working as a confidential informant (R 128).

John Bordas worked for New England Seafood, selling seafood to area restaurants; Respondent worked at the Sea Shanty Restaurant; Respondent and Mr. Bordas met through work-related dealings (R 131, 220). At one point Mr. Bordas was attempting to start his own seafood selling business, and tried to see if the Sea Shanty Restaurant would buy fish from his newly-formed company (R 132, 221). Because of this, Mr. Bordas began to see Respondent more regularly, and they became friends (R 132, 222).

Mr. Bordas testified that on three or four occasions while he was at the Sea Shanty Restaurant he saw Respondent selling drugs out of the Sea Shanty (R 133). Mr. Bordas testified that on one occasion he was talking to Respondent at the Restaurant, someone came to the door, rang the bell, and asked for Respondent. Respondent went to the door talked to the person, came back in, went back out, and when he finished he went over to Mr. Bordas and in their conversation Respondent revealed he was selling

drugs (R 133-4). Mr. Bordas testified he informed the D.E.A. of these activities since he was acting as a confidential informant at that time, and the D.E.A. directed Mr. Bordas to arrange to buy one ounce of cocaine (R 135); and if that worked out, then D.E.A. through Mr. Bordas would arrange for the purchase of a kilo (R 136). These plans did not come to fruition because the person who was to bring the ounce of cocaine to the shopping center did not show up because he did not feel comfortable (R 136). Mr. Bordas contacted Respondent to see what had occurred, and Respondent responded that if they were going to deal "it would be where [Bordas] came down with the money, [Bordas] would take a look at the product....[and] pay for the product and take the product out." (R 136) The D.E.A. did not allow Mr. Bordas to proceed with this purchase because they would have no control over the circumstances (R 137-138). Shortly after that Mr. Borgas stopped acting as a confidential informant for the D.E.A. (R 138).

Mr. Bordas further testified that one year and a half later, after not seeing Respondent all that time, Mr. Bordas by chance met Respondent at a Little General convenience store as he was coming out (R 138). They talked and Respondent told Bordas that Resondent's brother was in jail charged with "manslaughter or homicide...through a drug deal that went sour." (R 139). Respondent was looking for a way to help his brother escape and asked Mr. Bordas if he knew anybody that might be able to help

him escape from jail (R 139). Mr. Bordas then called the Fort Lauderdale Police Department and explained the situation to them; Mr. Bordas arranged for Respondent to meet Fort Lauderdale Police Department undercover officers; and the events that lead to Respondent's arrest began to happen (R 140).

According to Detective Thomas J. Tiderington, the undercover police officer who conducted the transaction, the arrangement was to buy one kilo of cocaine. The Respondent's brother's name and his precurious situation only came up one or two times during numerous conversations between Tiderington and Respondent (R 95, 99), and according to Detective Tiderington helping Respondent's brother was not the purpose behind this operation (R 95). Detective Wilfredo Hernandez' testimony reaffirmed Detective Tiderington's statements (R 112-117).

Detective Tiderington testified that Resondent stated he would only negotiate with Tom, not with John Bordas (R 89). Further that Respondent contacted him directly through a beeper (R 92) rather than Bordas calling Respondent all the time.

On March 12, 1984, Detective Tiderington met Respondent at the designated place - - an Albertson's on Hallandale Beach (R 31). Respondent was at the location waiting; and upon the Detective's arrival, Respondent introduced the Detective to Carlos Gomez (R 31).

Respondent advised Tiderington that Gomez had a sample of cocaine for Tiderington to test and that Gomez would go to Tiderington's vehicle and count the money (R 32,47). Tiderington then took Carlos Gomez inside an undercover vehicle (R 33). Respondent remained in front of the Albertson's store (R 34). Inside the vehicle, Gomez produced a two gram sample of cocaine which was handed to Tiderington (R 34). After simulating a test of the sample, Tiderington advised Gomez that it was good quality and that he was interested in purchasing the entire kilogram (R 34).

Tiderington testified that Gomez then advised him that he would have to see the money before he would make arrangements for the cocaine to be delivered (R 34). Gomez was shown $30,000 in hundred dollar bills (R 34). After inspecting the money, Gomez stated that he would make a call to his wife and then would proceed to pick up his wife and bring back the cocaine (R 34).

Tiderington testified that he and Gomez returned to speak with Respondent (R 35). The State introduced a tape recording of the transaction at trial (R 46-79). Mr. Gomez then made a phone call and said that he would be back in ten minutes (R 35). Later, Mr. Gomez returned with a female named Corrine Benadi (R 36). Tiderington asked Respondent, "Are you going to stay here and let me take care of business, or are you going to come with me?" Respondent replied, "I will stay here" and "If either you

or Carlos needs me, just whistle." (R 36).

Tiderington went to Mr. Gomez's car, sat in the back seat, and was shown a kilogram of cocaine (R 36). Tiderington inspected the cocaine, and advised Gomez and Benadi that he would be purchasing it (R 37). Tiderington told Gomez to go to Tiderington's car and that he would give Gomez the money for the cocaine (R 37). As Tiderington and Gomez were walking toward the undercover vehicle, Tiderington gave a prearranged signal to back-up officers and Gomez, Benadi, and Respondent were placed under arrest (R 37).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING RESPONDENT'S REQUESTED INSTRUCTIONS ON THE ALLEGEDLY NECESSARILY LESSER INCLUDED OFFENSES OF CONSPIRACY?

POINT II

WHETHER REVERSIBLE ERROR APPEARS ON THE ENTRAPMENT DEFENSE INSTRUCTIONS AS READ?

SUMMARY OF ARGUMENT

POINT I

Criminal conspiracy is a substantive offense that is separate and distinct from the offense which underlies it. A comparison of the statutory elements of conspiracy and of trafficking in cocaine reveals that these offenses have no common elements. In other words, each can be committed without committing the other. Trafficking in cocaine is, therefore, not a necessarily lesser included offense of the offense of conspiracy. The schedule of lesser inlcuded offenses in the standard jury instructions does not list conspiracy as having any lesser included offenses. Once the trial court determined trafficking in cocaine was not a necessarily lesser included offense, no reversible error occurred in the denial of the requested jury instruction, since no duty to so instruct the jury existed. State v. Abreau, 363 So.2d 1063 (Fla. 1978).

POINT II

A review of the record reveals the trial court granted Respondent's request for jury instructions on the entrapment defense. The entrapment instruction as given by the trial court covered the defense as to both counts. Thus the Fourth District's finding that the trial court failed to instruct the jury on entrapment as to count II

is erroneous.

Further, if any omission is found in this record, the error is harmless. The jury obviously rejected the entrapment defense as to the trafficking count. It is clear the jury rejected the entrapment defense as to the conspiracy charge as well. Thus, the "accidental omission" did not affect the jury verdict in this case.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENT'S REQUESTED INSTRUCTIONS ON THE ALLEGEDLY NECESSARILY LESSER INCLUDED OFFENSES OF CONSPIRACY.

Count II of the information charging Respondent with conspiracy to traffic reads as follows:

> MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that CARLOS GIRADO GOMEZ and PATRICK DAVID WELLER on the 12th day of March, A.D. 1984 in the County and State aforesaid, did then and there conspire, combine, agree or confederate with one another to commit a criminal offense, to-wit: Trafficking in Cocaine, a controlled substance, in that the said Carlos Girado Gomez and Patrick David Weller did conspire, combine, agree, or confederate to deliver Cocaine or a mixture containing Cocaine, in an amount of four hundred (400) grams or more to Thomas Tiderington, and as a part of this conspiracy Carlos Girado Gomez and Patrick David Weller, jointly or severally met in the parking lot of Albertsons located on the 1400 block of East Hallandale Beach Boulevard, Hallandale, Florida, where money to be used to acquire possession of the Cocaine was displayed, contrary to F.S. 893.135(4), F.S. 893.135(1)(b)(3), F.S. 893.03(2)(a)(4) and F.S. 893.13(1)(a)(1),
>
> (R 372)

During the charge conference, Respondent requested "the lessers of conspiracy to traffic in an amount of 28 grams or more but less than 200, and in an amount of 200 grams or more but less than 400 as lessers, plus also conspiracy to deliver -- to possess as a lesser" (R 292).

The State recognizes that if requested, the trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense is a necesarily lesser included offense, an instruction must be given. State v. Wimberly, 11 F.L.W. 633, 634 (Fla. Case No. 67,847, December 11, 1986). The trial court sub judice did not err since delivery, possession, nor the different amounts of trafficking are "necessarily lesser included" offenses of conspiracy.

Section 777.04(3) Florida Statutes (1985) provides as follows:

> (3) Whoever agrees, conspires, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection (4).

The elements of conspiracy require an agreement and an intent to commit the offense charged. Orantes v. State, 452 So.2d 68 (Fla. 1st DCA 1984); State v. Brandon, 399 So.2d 459 (Fla. 2d DCA 1981); Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979), cert. denied 383 So.2d 1201 (Fla. 1980). See also United States v. Franklin, 586 F.2d 560, 566 (5th Cir. 1978).

The offense of trafficking in cocaine requires proof that the offender (1) knowingly (2) sold, manufactured, delivered, brought into this state, or possessed, actually or constructively, (3) twenty-eight grams or more of cocaine, Rotenberry v. State, 468 So.2d 971, 976 (Fla. 1985). A comparison of the statutory elements of these crimes reveals

that they have no common elements. In other words, each can be committed without committing the other. Trafficking in cocaine is, therefore, not a necessarily (nor a category two) lesser included offense of the offense of conspiracy.

The offense of trafficking in cocaine can be committed by one or more of the several acts delineated in the statute. In charging a conspiracy to traffic, it is unnecessary to allege how the trafficking was accomplished. The fact that an overt act is indeed alleged and, as in this case, such overt act constitutes the underlying offense itself, is of no consequence. State v. Mena, 471 So.2d 1297 (Fla. 3d DCA 1985); see also State v. Rodriquez-Jimenez, 439 So.2d 919, 922 (Fla. 3d DCA 1983). It is well-settled that conspiracy is a substantive offense that is separate and distinct from the offense which underlies it. Blackburn v. State, 83 So.2d 694 (Fla. 1956), cert. denied 350 U.S. 987, 76 S.Ct. 473, 100 L.Ed. 854 (1956); see also State ex rel. Ridenour v. Bryson, 380 So.2d 468 (Fla. 2d DCA 1980); Ramirez v. State, supra.

It is clear the trial court did not err sub judice. The offense of trafficking in cocaine being a separate and distinct offense from the crime of conspiracy; the two crimes having no common elements between them; trafficking is not a necessarily lesser included offense of conspiracy. Respondent could have been convicted of conspiracy even had he been acquitted of the trafficking charge. See State v. Munro, 462 So.2d 484 (Fla. 5th DCA 1984). Thus, trafficking

not being a necessarily included offense of conspiracy, the trial court did not err in denying the requested instructions.

Moreover, conspiracy is one step removed from an attempt to commit the offense which is the object of the conspiracy, and, thus, is two steps removed from the actual commission of the substantive offense. Hutchinson v. State, 315 So.2d 546, 549 (Fla. 2d DCA 1975); Ramirez v. State, supra at 1065. In the case at bar, the trial court properly instructed the jury on the elements of conspiracy to engage in trafficking pursuant to §893.135(4) Fla. Stat. (R 346-347), and thus was correct and did not err in denying Appellant's requested instructions because the omission of the elements of the underlying offense had no effect on the charge of conspiracy to traffic in cocaine.

Parenthetically, the state will point out that the schedule of lesser included offense adopted by this Court in 1981, 1/ does not list conspiracy. The Standard Jury Instruction on Criminal Conspiracy as it appears at page 57 is the instruction as read by the trial court. It is thus clear, that there are no lesser included offenses within conspiracy, and that the trial court was not required to instruct on non-existing crimes. As this Court has stated,

> The modification of the schedule of lesser included offenses and of rules 3.510 and 3.490 was a major

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1/ In the Matter of Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

> change because it substantially reduced the number of lesser offenses on which the trial judge must instruct the jury. It broadened the trial judge's authority to determine the appropriateness of instructing on attempts and degrees of offenses.

State v. Wimberly, supra at 632.

With reference to Respondent's requested instructions on the lesser amounts, the state respectfully points out that trafficking in cocaine under §893.135(1)(b) is a felony of the first degree whether the quantity is 28 grams or 400 grams or more. See also §893.135(4) Fla. Stat. (1985). The statute only differentiates by providing escalating mandatory minimum sentences in accordance with the quantities, Rotenberry v. State, supra at 976. Thus, the evidence herein was clear that the agreement was to sell one kilo of cocaine to the undercover agents; it was not a conspiracy for the sale of four 100-grams. Since the evidence in the instant case showed the sale of one kilo of cocaine, the trafficking in the lesser amounts has not been proved. See State v. Paffy, 369 So.2d 340, 342 (Fla. 1979). See also United States v. Hirst, 668 F.2d 1180, 1184 (11th Cir. 1982); United States v. Henley, 502 F.2d 585 (5th Cir. 1974).

The denial of the requested jury instructions was correct in that the offenses were not necessarily lesser included in the conspiracy charge. Should this Court, however, find error, the error was harmless. State v. Abreau, 363 So.2d 1063 (Fla. 1978). Whether the trafficking was accomplished by delivery, or possession was irrelevant to the charge

of conspiracy, and the trial court properly denied the requested instructions.

POINT II

NO REVERSIBLE ERROR APPEARS ON THE ENTRAPMENT DEFENSE INSTRUCTIONS AS READ.

During the charge conference Respondnet requested "an entrapment instruction" (R 289), and the trial court stated he would read the standard instruction on entrapment as it appears on page 39 (R 290). The trial court instructed the jury on entrapment as follows:

> One of the defenses put forward in this case is called entrapment. I will read you the law of entrapment.
>
> The defense of entrapment has been raised. This means that the defendant claims he had no prior intention to commit the offense and that he committed it only because he was persuaded or caused to commit the offense by law enforcement officers.
>
> The defendnat was entrapped if:
>
> 1. He had no prior intention to commit trafficking in cocaine, but
>
> 2. He was persuaded induced or lured into committing the offense.
>
> 3. The person who persuaded, induced or lured him into committing the offense was a law enforcement officer, or someone acting for the officer.
>
> However, it is not entrapment merely because a law enforcement officer in a good faith attempt to detect crime:
>
> A. Provided the defendant the opportunity, means and facilities to commit the offense, which the defendant intended to commit, and would have committed otherwise,
>
> B. Used tricks, decoys or subterfuge to expose the defendant's criminal acts,
>
> C. Was present and pretending to aid or assist in the commission of the offense.

> If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty.

(R 350-352). Before allowing the jury to retire to deliberate, the trial judge asked whether there were objections to the instructions as given (R 356), and defense counsel stated:

> Judge, in the entrapment charge, number one states, there is a parentheses, crime charged, and the Court only gave the trafficking and denied to indicate the conspiracy in that particular fill-in; and I don't want the jury to be dissuaded that it's only a difference as to one count and not as to both counts.

(R 356-357).

The Florida Standard Jury Instruction on entrapment reads in pertinent part as follows:

> 3.04(c) ENTRAPMENT
>
> The defense of entrapment has been raised. This means that (defendant) claims he had no prior intention to commit the offense and that he committed it only because he was persuaded or caused to commit the offense by law enforcement officers.
>
> (Defendant) was entrapped if:
>
> 1. he had no prior intention to commit (crime charged), but
>
> 2. he was persuaded, induced or lured into committing the offense and
>
> 3. the person who persuaded, induced or lured him into committing the offense was a law enforcement officer, or someone acting for the officer.

Florida Standard Jury Instructions in criminal Cases, p.39 (2d Ed.).

The evidence in this case reveals Respondent had sold illegal drugs in the past (R 133-136). The evidence

also shows that John Bordas had never met Carlos Gomez before trial. That Respondent's brother, Robert Weller, called Respondent advising him that a man by the name of Carlos would be calling, and Respondent was to set up a meeting between Carlos and Tom (the undercover police officer) (R 267). Respondent put Carlos and Tom in contact, was well-aware of the transaction that was to take place, and agreed with Carlos to sell cocaine to Tom (R 266-271). Respondent was a willing participant in the drug transaction; at no time did he object to the planned activities; and if anyone "persuaded, induced or lured" Respondent into conspiring with Carlos to sell cocaine to Tom, it was Robert Weller; not law enforcement officers, or John Bordas, who lured him into the conspiracy. Respondent's predisposition and desire to help his brother were sufficiently demonstrated and sufficiently proven in fact and law to establish conspiracy to traffic in cocaine such to defeat the defense of entrapment.

The law in Florida is clear that it is not reversible error for the trial judge to refuse to give a "theory of defense" instructions when there is no evidence on the record to support such theory. See Hooper v. State, 476 So. 2d 1253 (Fla. 1985); Green v. State, 475 So.2d 235 (Fla. 1985); Smith v. State, 424 So.2d 726 (Fla. 1982) cert. denied, 103 S.Ct. 3129 (1983). The evidence in this case does not support Respondent's claim that he was lured into conspiring with Carlos by a "law enforcement officer, or someone acting for the officer." The evidence is clear if anyone lured him,

it was Respondent's own brother.

The Fourth District stated the record is not clear "whether the court's failure to charge the jury on this defense as to the conspiracy count was intentional or accidental" (A 4). Petitioner submits that the trial court properly complied with Respondent's request for the instruction on entrapment as his defense, and that therefore no error appears in this record.

In the event this Honorable Court agrees with the District Court that there was an omission on the part of the trial court, Petitioner asserts this accidental error was harmless. The jury was properly informed of the defense of entrapment, and rejected same, finding Respondent guilty of trafficking in cocaine as charged in Count I. Since the entrapment instruction as given by the trial court, was general and covering both counts, it is reasonable to believe that since the jury rejected the entrapment defense as to Count I, that it rejected the entrapment defense as to Count II, as well. See generally, Battles v. State, 11 F.L.W. 2617 (Fla. 1st DCA December 12, 1986). Thus the accidental omission by the trial court did not affect the jury verdict as to the conspiracy conviction, State v. Diguilio, 491 So.2d 1129 (Fla. 1986), and thus, the conviction on Count II must be affirmed.

CONCLUSION

WHEREFORE based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests this Honorable Court disapprove the Fourth District Court of Appeal's decision on the instructions issue, and affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Petitioner on the Merits has been furnished, by courier, to JEFFREY ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue - 9th Floor, West Palm Beach, Florida 33401, this 30th day of December, 1986.

Georgina Jimenez-Orosa
Of Counsel