OA 4-2-87

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

PATRICK WELLER,

Respondent.

CASE NO. 69,304

RESPONDENT'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(305) 820-2150

JEFFREY L. ANDERSON
Assistant Public Defender

Counsel for Respondent

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AUTHORITIES CITED

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the Appellant in the court below and the defendant in the trial court. Petitioner was the Appellee in the court below and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal. A copy of the district court opinion is attached in the appendix.

The following symbols will be used:

"R"	Record on appeal
"A"	Appendix

STATEMENT OF THE CASE

Respondent would make the following additions and clarifications to Petitioner's Statement of the Case.

On March 24, 1984, Respondent, Patrick Weller, was charged by information with the offenses of trafficking in cocaine by delivery and conspiracy to traffic in cocaine by delivery (R372). At the close of the state's case, Respondent moved for a judgment of acquittal on the trafficking by delivery charge on the ground that Respondent was not involved in the delivery of the cocaine (R187). The trial court denied Respondent's motion (R189).

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts as being generally accurate with the exception of the following additions and clarifications.

John Bordas had made approximately $10,000 for his activity as a confidential informant (R129). John Bordas did testify that he observed Respondent sell drugs out of the Sea Shanty Restaurant (R133). Respondent testified that he never sold any drugs out of the Sea Shanty and had worked every day under the constant scrutiny of his employer (R225).

Bordas testified that he met Respondent by chance a year-and-a-half later (R138). Bordas testified that Respondent talked of breaking his brother, Robert Weller, out of jail by "hitting" the prison bus while his brother was being transported (R139). Bordas testified that he might be able to help, but not in that way (R139). Respondent testified that his meeting with Bordas at the convenience store had been suggested by Bordas the previous night (R225-226). Bordas told Respondent that he knew that his brother had been arrested (R227). Bordas said that he knew someone who could help Respondent's brother (R229). Bordas told Respondent to talk to his brother (R229).

Respondent contacted his brother in jail and told him that Bordas might be able to help him out (R231-232). Robert Weller told Respondent to find out what Bordas wanted (R233). Respondent met with Bordas, Bordas told Respondent that he had talked to people about his brother and they wanted to help if his brother cooperated with them (R233).

A meeting at the International House of Pancakes on Federal Highway and Hallandale Beach Boulevard was arranged by John Bordas. Respondent was introduced to undercover officers Wilfredo Hernandez and Scott Israel (R241). Respondent testified that Bordas had told them about his brother (R243). Respondent asked the men to talk to his brother (R244). They refused because they said they were not sure that his brother wouldn't turn them in (R244). Israel told Respondent that maybe something could be done for his brother, but that it would cost a lot of money (R244). Israel told Respondent to inform his brother that for $20,000.00 they could get him out (R245). Scott Israel testified that Respondent had asked him about breaking his brother out of jail (R185). Israel replied that he was only a drug dealer, but would try to contact people who do that type of work, and then would get back to him (R185).

John Bordas went to the Dade County Jail to meet with Robert Weller. Bordas testified that Weller had known that Bordas might be able to help him get out of jail (R143). Bordas told Weller that anything was possible, but he could make no promises (R143). Weller offered to give Bordas his drug suppliers if Bordas helped him out of jail (R143). Bordas testified that he said he would have to get back to him, and he would do what he could do and that things looked good (R143).

Robert Weller testified that John Bordas stated if he could sell three kilos of cocaine that venue would be changed to Broward County and the case would be thrown out (R196). John Bordas testified that he told Detective Tom Tiderington of the

results of the meeting (R143). Tiderington was not sure whether if they wanted to move for a case involving a conspiracy to get the brother out of jail or whether they wanted to go for narcotics (R144). Bordas testified that at one time Tiderington called Respondent and discussed "buying" a judge off in order to get Respondent's brother out of jail (R141). Bordas testified that Tiderington had spoken with Respondent over the phone using a disguise that he was either a judge or judge's aide (R158). Bordas also testified that there were discussions with Respondent that a change of venue was needed because the people Bordas was dealing with had connections in Broward County (R163). Respondent testified that Robert Weller gave him names to pass along to John Bordas (R253). Bordas testified that there were quite a few meetings between Respondent and himself with discussions ranging from the brother's situation to talk of drug deals (R141). Respondent would tell Bordas about people that either he or his brother wanted Bordas to meet (R146). Bordas testified that he relayed this information to the Ft. Lauderdale Police Department (R146).

According to John Bordas, Respondent stated that he knew somebody that wanted some cocaine and they wanted a sample (R146-147). A meeting was arranged whereby Tom Tiderington and Wilfredo Hernandez gave Respondent a sample (R147). However, the final deal did not materialize (R147).

Wilfredo Hernandez testified that Respondent arranged another meeting at the Holiday Inn where Tom Tiderington and Wilfredo Hernandez met a female who wanted to buy cocaine

(R1116-117). Tiderington testified that the woman, unbeknownst to Respondent, was actually an informant for another police department who came to Respondent and told him that she wanted to buy cocaine (R94).

Respondent testified that Tiderington later told him, "You set us up with an undercover agent" (R265). Respondent was also told by John Bordas that he had better come up with something or they were not going to do anything for his brother (R266). Respondent relayed this message to his brother (R267). Later, Robert Weller contacted Respondent and told him that a man named Carlos would be contacting him (R267). Respondent was instructed to set up a meeting between Carlos and Tom Tiderington (R267).

On March 12, 1984, Respondent introduced Tom Tiderington to Carlos Gomez in front of an Albertson's store in Hallendale Beach (R31). 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 (R32,47). Tiderington then took Carlos Gomez inside an undercover vehicle (R33). Respondent was left in front of the Albertson's store (R34). Inside the vehicle, Gomez produced a two gram sample of cocaine which was handed to Tiderington (R34). 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 (R34).

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 (R34). Gomez was shown $30,000 in

hundred dollar bills (R34). 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 (R34). During this time, Mr. Weller was still seated in front of the Albertson's store where Tiderington had left him a few minutes earlier (R34).

Tiderington testified that he and Gomez returned to speak with Respondent (R35). Mr. Gomez spoke very broken English (R35). Tiderington advised Respondent that he had a hard time understanding Gomez, and that he didn't really know how the transaction was to take place (R35). The conversation between Gomez, Tiderington, and Respondent was recorded and was as follows:

> THE WITNESS [Tom Tiderington]: Gomez and myself are going back to talk to Patrick at this time.
>
> TIDERINGTON: "I didn't think you'd leave the shit in that bus stop, though, with a package like that. That's what I was worried about. You know what I mean?"
>
> GOMEZ: "Uh-huh. (Unintelligible) My wife."
>
> TIDERINGTON: "Right".
>
> GOMEZ: "So (unintelligible) coming back in ten minutes."
>
> TIDERINGTON: "Right."
>
> GOMEZ: "So, okay. You see me here."
>
> TIDERINGTON: "Right."
>
> GOMEZ: (Unintelligible) "Park the car from your car." (Unintelligible)
>
> TIDERINGTON: "Right."

GOMEZ: "You check, give me the money. Bye-bye. Here's your package."

TIDERINGTON: "That's good. But I'm saying your wife's got the package or you've got to go get the package?"

GOMEZ: "No, no. Rosa has the package."

TIDERINGTON: "Okay. Good. That's what I thought. Okay. All right. You tell her to go down to the bus stop --"

GOMEZ: "No, no, no. Going to (unintelligible). My wife is in a house, downstairs, you know. Buildings."

WELLER: "Do you understand?"

TIDERINGTON: You explain it to me. I think that I understand. I think that he's going to call his house --"

WELLER: "He's going to call his house."

MR. GALLAGHER: Who is that talking?

THE WITNESS: That's Mr. Weller explaining to me what is going to happen.

TIDERINGTON: "No, wait."

WELLER: "She's going to come down to the stop."

TIDERINGTON: "And he's going to pick her up."

WELLER: "Right."

TIDERINGTON: "And then you are going to come back here?"

WELLER: "Yeah." (Unintelligible).

TIDERINGTON: "Okay, yeah, that's good."

GOMEZ: "Coming back (unintelligible). Stay here."

WELLER: "Okay. I'll be sitting right here."

(R60-61).

Mr. Gomez then made a phone call and said that he would be back in ten minutes (R35). Later, Mr. Gomez returned with a female named Corrine Benadi (R36). 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." (R36).

Tiderington went to Mr. Gomez's car, sat in the back seat, and was shown a kilogram of cocaine (R36). Tiderington inspected the cocaine, and advised Gomez and Benadi that he would be purchasing it (R37). Tiderington told Gomez to go to Tiderington's car and that he would give Gomez the money for the cocaine (R37). 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 (R37). Tiderington testified that Respondent was still seated in front of the Albertson's store when he was arrested (R38).

SUMMARY OF THE ARGUMENT

POINT I

Respondent requested an instruction on Conspiracy to Deliver Cocaine as a lesser included offense of Conspiracy to Traffic in Cocaine by Delivery as charged in Count II of the information. Since there was evidence of the lesser included offense of conspiracy to deliver cocaine, the trial court erred in failing to give the requested instruction. The instruction would also have to be given because Conspiracy to Deliver Cocaine is a necessarily lesser included offense of Conspiracy to Traffic in Cocaine by Delivery.

Respondent also requested instructions on conspiracy to traffic in cocaine in amounts less than 400 grams. Respondent was convicted of trafficking in cocaine in an amount greater than 400 grams. Instructions on the lesser amounts were required as enhancement options. Also, since it is manifestly impossible to conspire in trafficking cocaine in an amount greater than 400 grams without necessarily conspiring to traffic in an amount which is less than, but part of, the 400 grams, the requested jury instruction should have been given as a necessarily included offense or a lesser included offense supported by the evidence.

POINT II

The trial court failed to give Respondent's requested entrapment instruction for the offense of Conspiracy to Traffic in Cocaine. Since there was some evidence in the record to support Respondent's theory of entrapment, it was reversible error not to give the requested instruction.

POINT III

Respondent was charged with Trafficking in Cocaine by Delivery. The prosecution theorized that Respondent was guilty of delivery under the theory of principals. However, the evidence only showed that Respondent was present nearby the delivery, and there was no evidence that Respondent aided in the delivery. Consequently, the trial court erred in denying Respondent's motion for judgment of acquittal.

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT RESPONDENT'S REQUESTED INSTRUCTIONS SHOULD HAVE BEEN GIVEN.

At the charge conference, Respondent requested that the jury be instructed on Conspiracy to Deliver,[1] Conspiracy to Traffic in an amount of 28 grams or more but less than 200 grams,[2] Conspiracy to Traffic in an a mount of 200 grams or more but less than 400 grams[3] as lesser included offenses of Conspiracy to Traffic Cocaine by Delivery in an amount greater than 400 grams.[4]

Florida Rules of Criminal Procedure 3.510 reads in pertinent part as follows:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> * * *
>
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser offense as to which there is no evidence.

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1 §§ 893.13(1)(a), 777.04(3), Florida Statutes (1983).

2 §§ 893.135(1)(b)(1), 893.135(4), Florida Statutes (1983).

3 §§ 893.135(1)(b)(2), 893.135(4), Florida Statutes (1983).

4 §§ 893.135(1)(b)(3), 893.135(4), Florida Statutes (1983).

Consequently, upon request of defense counsel, instructions must be given as to all necessarily included offenses and all lessers which are supported by the evidence. The instructions requested by Respondent qualify as necessarily lesser included offenses and as lesser included offenses supported by the evidence. Consequently, the trial court should have granted Respondent's requests. The requested instructions will be discussed below.

A. Conspiracy to Deliver Cocaine

Petitioner claims that the failure to instruction on Conspiracy to Deliver Cocaine was not reversible error because Trafficking in Cocaine is not a necessarily or permissive lesser included offense of conspiracy (Petitioner's Brief 13-15). However, the comparison of the elements of a conspiracy and trafficking in cocaine is irrelevant to whether the requested instruction on conspiracy to deliver cocaine was required.[5]

The schedule of lesser included offenses in the Florida Standard Jury Instructions does not appear to list or discuss conspiracy.[6] However, the list of lesser included offenses

[5] Respondent does not challenge Petitioner's reasoning that trafficking in cocaine is not a lesser offense of conspiracy to traffic in cocaine by delivery.

[6] However, Comment On Lesser Included Offenses, Florida Standard Jury Instructions (Crim. 1981 ed.) at 257a indicates that "Some statutes provide that the penalty for certain crimes is enhanced if certain events occur during their commission" and that the jury should be permitted to return a verdict on the crime without enhancement. It was also noted that "where the statutes are couched in terms of enhancement, the schedule does not carry the lower degrees of the offenses proscribed by those statutes as lesser included offenses." Conspiracy may fall within the purview of this note. Conspiracy always involves an agreement to commit a crime. The type of crime agreed to merely determines the degree of the offense and acts as a type of enhancement.

were never meant to rigidly bind the trial courts. Smith v. Mogelvange, 432 So.2d 119 (Fla. 2d DCA 1983); Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983). This is particularly true where offenses are absent from the list since the list is not deemed to be exhaustive. Bragg v. State, 433 So.2d 1375 (Fla. 2d DCA 1983).

The failure to give the requested instruction on conspiracy to deliver cocaine was reversible error on two separate grounds. First, conspiracy to deliver cocaine is a permissive lesser of conspiracy to traffic cocaine by delivery. It is axiomatic that jury instructions are required on all offenses which may be included in the offense charged by virtue of their presence in the accusatory pleadings and where the evidence at trial would support a jury finding of guilt. See, Brown v. State, 206 So.2d 377 (Fla. 1968); State v. Terry, 336 So.2d 65 (Fla. 1976). One can be found guilty of conspiracy to deliver cocaine pursuant to §§ 893.13(1)(a)(1), 777.04(3), Florida Statutes (1983) by: 1) agreeing; 2) to knowingly deliver; 3) cocaine. All of these elements were present in the information (R372). In fact, § 893.13(1)(a)(1) was specifically cited as one of the statutes that Respondent was accused of violating:

> ... CARLOS GIRADO GOMEZ and PATRICK DAVID WELLER ... did then and there conspire, combine, agree or confederate with one another to commit a criminal offense, to-wit: Trafficking in Cocaine ... 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).

(R372) (emphasis added).

Although Respondent has yet to determine what constituted the actual conspiracy, it is clear that if there was evidence of the offense of conspiracy to traffic cocaine by delivery there would be evidence of the offense of conspiracy to deliver cocaine.[7]

At bar, because the allegata and probata were present for conspiracy to deliver cocaine, it was error not to give such an instruction as permissive lesser included offense (Category II). See, Brown v. State, 266 So.2d 377 (Fla. 1968).

An instruction on conspiracy to deliver cocaine was required because it was a Category I necessarily included offense.[8] The key issue is how to determine what constitutes a necessarily lesser included offense for the purpose of jury instruction. This is where the jurisdictional conflict apparently arose in this case. In Brown v. State, 483 So.2d 743 (Fla. 5th DCA 1986),

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7 § 893.13(1)(a)(1) does not require any specific amount of cocaine to be delivered for conviction. Whether it be 10 grams or 1000 grams that was delivered, one would still be guilty. Consequently, if there was evidence of conspiracy to traffic in cocaine by delivery there must necessarily be evidence of conspiracy to deliver cocaine. Also Petitioner implies that the amount conspired to be delivered was one kilogram (Petitioner's Brief at 16). However, the kilogram referred to was merely the amount of cocaine delivered by Gomez. As Petitioner notes, the crime of conspiracy is separate and distinct from the substantive offense. Thus, the proof of the amount delivered is not dispositive evidence of the amount agreed upon by the alleged conspirators. Neither is the conversation between Tom Tiderington and Carlos Gomez prior to the delivery. Respondent was not present at that discussion (R34).

8 It is interesting to note that where trafficking in cocaine by delivery is charged (§ 893.135(1)(b)), delivery of cocaine (§ 893.13(1)(a)) would be a category one necessarily included offense. Fla.Std. Jury Inst. (Crim. 1981 ed.) at 274.

the Fifth District apparently used the "Blockburger"[9] analysis to determine whether a certain offense qualified as a necessarily included lesser offense for the purpose of jury instruction. In the present case the Fourth District implicitly held that double jeopardy analysis was inappropriate in determining what constituted a necessarily lesser included offense for purposes of jury instruction (A2-4). Although in this particular case it does not matter what method is used to determine whether conspiracy to deliver qualifies as a necessary included offense (see page 21 infra), Respondent maintains the Blockburger test is not a proper analysis for determining necessarily lesser included offenses for the purpose of instructing a jury. The purpose of jury instructions on lesser included offenses is to give the jury alternatives in reaching a verdict, whereas the Blockburger analysis is used merely to interpret legislative intent to determine whether offenses are separate so that separate punishments can be imposed. See, § 775.021(4), Fla. Stat. (1985). This Court recognized the difference in lesser included offenses in regard to double jeopardy and jury instruction in State v. Baker, 465 So.2d 419, 422 (Fla. 1984) as follows:

> 'Lesser included offense' in regard to jury alternatives is different from what that term means in regard to double jeopardy. The former implements the nonconstitutional right of an accused to an instruction which gives the jury the opportunity to convict of an offense with less severe punishment than the crime charged.

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9 Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

Double jeopardy analysis is not relevant to instructing a jury. If lesser included offenses were instructed on solely due to their relationship to double jeopardy, the rationale for instructing on Category II lesser included offenses would cease to exist.

Category I necessarily included offenses are defined as:

> Offenses necessarily included in the offense charged, which will include some lesser degrees of offenses.
>
> Fla.Std. Jury Instr. (Crim. 1981 ed.) at 257; (emphasis added). In re Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 596 (Fla. 1981).

This definition indicates that the offense charged, as opposed to all of the alternative elements provided for by statutes, must be analyzed in determining whether a necessarily lesser included offense exists. At bar, the offense charged is conspiracy to traffic cocaine by delivery (R372). Thus, the elements which were required to be proven were that Respondent was: 1) conspiring to; 2) knowingly delivering; 3) cocaine; 4) in an amount of 28 grams or more. Fla.Std. Jury Instr. (Crim. 1981 ed.) at 230.

In deciding what constitutes a necessarily included offense this Court, in Growden v. State, 372 So.2d 930, 931 (Fla. 1979), approved of a Second District Court of Appeal opinion which noted:

> In Brown v. State, 206 So.2d 377, 382 (Fla. 1968), the Florida Supreme Court defined a necessarily included offense as "an essential aspect of the major offense...." Under this definition it is clear that robbery with a weapon is a necessarily lesser included offense of robbery with a deadly weapon. It would be manifestly impossible to prove robbery with a

> deadly weapon without proving robbery with a weapon since obviously a deadly weapon is a weapon.
>
> 372 So.2d at 931 (emphasis added).

Conspiracy to deliver cocaine (§ 777.04 and § 893.13(1)(a)) certainly is an essential aspect of the charged offense. Except for the amount of cocaine agreed upon to be delivered,[10] the charged offense and the requested lesser offense are identical. The only difference is that conspiracy to traffic in cocaine by delivery (§§ 893.135(4) and 893.135(1)(b), Florida Statutes (1983)) is a first degree felony while conspiracy to deliver cocaine (§ 893.13(1)(a)1) is a second degree felony.

Also, an analysis of the schedule of Category I offenses indicates that a double jeopardy analysis in not used to determine what constitutes a necessarily lesser included offense. For example, to determine if delivery of cocaine is a necessarily lesser included offense the schedule indicates that one must look at the accusatory pleading to determine how the trafficking was charged:

CHARGED OFFENSES	CATEGORY 1	CATEGORY 2
***	***	***
Trafficking in Cocaine 893.135(1)(b)	893.13(1)(a) if sale, manufacture or delivery is charged	Attempt, except when delivery is charged
***	***	***

10 One offense requires proof of 28 grams or more, while the other can be proved by any amount.

Fla.Std. Jury Instr. (Crim. 1981 ed.) at 274 (emphasis added).[11]

In addition, many of the present Category I offenses would be defined as separate offenses under a Blockburger analysis.[12] For example, § 790.01 prohibits carrying of a concealed weapon or electric device. Section 790.23(1) prohibits a felon from having in his care, custody, possession, or control any firearm or electric device or from carrying a concealed weapon. Under the present method of applying the Blockburger test each offense is separate. Section 790.23 requires a prior felony conviction while § 790.01(1) does not. Section 790.01(1) requires that the weapon or electric device be carried on one's person while § 790.23 does not because it is possible to be convicted of merely having control, custody, or care of the weapon or electric device. Consequently, the schedule of Category I offenses includes offenses which would be separate offenses under Blockburger. See also, Linehan v. State, 476 So.2d 1262 (Fla. 1985) (this court states that schedule should be amended to include murder in the second degree as a necessarily lesser included

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11 Another example, § 790.01(1) is a necessarily lesser included offense if in charging § 790.23 a concealed weapon is alleged. Fla.Std. Jury Instr. (Crim. 1981 ed.) at 262. See also, Sexual Battery, Fla. Std. Jury Instr. (Crim. 1981 ed.) at 262-263 for necessarily lesser included offenses of sexual battery.

12 However, see pages 20-22 infra.

offense of first degree felony murder). Consequently, a Blockburger analysis should not be used to determine if an offense qualifies as a Category I necessarily lesser included offense for purposes of jury instruction.

Assuming arguendo that a Blockburger analysis should be used to determine what constitutes a Category I offense, a proper Blockburger analysis reveals that the two offenses in the present case are not separate. Section 775.021(4), Fla. Stat. (1985) and the Blockburger test provide that "offenses are separate if each requires proof of an element that the other does not" (emphasis added).

In the past this Court has concluded that if each offense can possibly be committed without necessarily committing the other that the offenses are separate. See, State v. Boivin, 487 So.2d 1057 (Fla. 1986). However, the Blockburger rule necessitates that if each offense "requires," as opposed to "possibly requires" because of alternative proof, proof of an element that the other does not the offenses are separate. In Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) the Supreme Court realized that the offenses of "robbery" and "armed criminal action" constituted the same offense but held that the Blockburger rule was merely a statutory construction device.[13] The two offenses would be the same if each required proof that the other did not and "... the theoretical possibility that the underlying felony could be some felony other than first-degree

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[13] Section 775.021(4) makes the test dispositive of legislative intent in Florida.

robbery is irrelevant ..." 103 S.Ct at 680 n.2 [Justice Marshall dissenting] (emphasis added); see also, Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (offense of rape and offense of killing in course of a rape [which provided for alternative proof that killing could be during an attempt to rape] were the same offense under Blockburger despite the possibility that each has element that the other does not).

A comparison, with alternative elements indicated by the word "or", of the statutory elements of conspiracy to traffic and conspiracy to deliver demonstrate that they are not separate offenses.

Conspiracy to traffic cocaine [§ 893.135(4), § 893.135(1)(b)]	Conspiracy to deliver cocaine [§ 777.04(3), § 893.13(1)(a)]
A. Conspiring to	A. Conspiracy to
B. sell, manufacture, or deliver	B. sell, manufacture, or deliver
-or-	-or-
C. bring into state	C. possess with intent
-or-	D. cocaine
D. possess	-or-
E. cocaine	E. other controlled substance
F. 28 grams or more	

As can be readily observed, conspiracy to deliver does not "require" an element which conspiracy to traffic does not. In the example, elements A, B, and D of conspiracy to deliver match with elements A, B, and E of conspiracy to traffic. This leaves elements C and E of conspiracy to deliver the only elements unmatched. Proof of element C is not required because element B will serve in its place. Proof of element E is not required

because element D may serve in its place. Thus, since Conspiracy to deliver does not "require" proof of either C or E, and all the other elements match with the elements of the other offense, conspiracy to deliver is not a separate offense. The possibility of an unmatched element is not sufficient to make the offenses separate because each must require proof that the other does not making an unmatched element a necessary, not sufficient, condition for finding separate offenses to exist. Since conspiracy to deliver cocaine does not require proof of an element which conspiracy to traffic in cocaine does not, the requested jury instruction would have to be given even under a Blockburger analysis.

B. Conspiracy to Traffic Cocaine in Amounts less than 400 grams

The jury found Respondent guilty of conspiracy to traffic in cocaine in an amount of 400 grams or more (R375). Respondent's counsel requested additional instructions, but his request was denied:

> MR. BARON: Just so the record is clear, I am requesting as to the conspiracy 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.
>
> THE COURT: Your motion is denied.
>
> (R292-293).

The requested instructions on amounts less than 400 grams in the instant case should have been given as either enhancement instruction or instructions on lesser included offenses.

Respondent was given a mandatory minimum sentence of fifteen (15) years in prison because the jury found him guilty of conspiring to traffic in an amount of 400 grams or more (R382). The jury should have been given alternatives in deciding the enhancement to impose. The Comment on Schedule of Lesser Included Offenses indicates that the various enhancements should be instructed upon:

> 5. Some statutes provide that the penalty for certain crimes is enhanced if certain events occur during their commission. For example, under F.S. 810.02 burglary is a felony of the first degree if the burglar makes an assault or is armed with explosives or dangerous weapons. If these events do not occur but burglary is committed in a dwelling occupied by human beings, the offense is a felony of the second degree. Thus, if a defendant is charged with first degree burglary by virtue of having made an assault during the course of the burglary, the jury should be permitted to return a verdict for simple third degree burglary without the enhancement of the assault. In practice, this is similar to the concept of lesser included offenses, but since statutes of this type are couched in terms of enhancement, the schedule does not carry the lower degrees of the offenses proscribed by those statutes as lesser included offenses.
>
> Fla.Std. Jury Instr. (Crim. 1981 ed.) at 257a. (emphasis added).

The jury instructions on trafficking in cocaine even provides that the lesser amounts should be instructed on up to the extent of the charge:

Enhanced penalty; give if applicable up to extent of charge

The punishment provided by law for the crime of Trafficking in Cocaine is greater depending upon the amount of the substance involved. Therefore, if you find a defendant guilt of trafficking in cocaine, you must determine by your verdict whether:

a. [The quantity of the substance involved was in excess of 28 grams but less than 200 grams.]

b. [The quantity of the substance was 200 grams or more but less than 400 grams.]

c. [The quantity of the substance involved was 400 grams or more.]

Fla.Std. Jury Instr. (Crim. 1981 ed.) at 231.

Since the amount Respondent was charged with was 400 grams, the lower amounts should have been instructed on even though the trial court believed that the evidence of more than 400 grams was overwhelming:

> The same presentment could be made against the basic rule that gives to the accused the right to have the jury consider the evidence and, if it desires, find him not guilty of any crime, even though the trial judge might be fully convinced that the evidence overwhelmingly establishes his guilt. Pure logic would suggest that the accused has no right to go to the jury because the accusation has been proved beyond all doubt. However, the law gives him the right to have a jury verdict on the charge and we feel constrained to follow the law.

Brown v. State, 206 So.2d 377 (Fla. 1968).

Furthermore, instruction on the lesser amounts would be justified under the theory that they are lesser included offenses. In analogous situations involving enhancement statutes, it has been recognized that the lower classes of enhancement must be instructed on. See, Growden v. State, 372 So.2d 390 (Fla. 1979) (enhancement instruction on robbery with a weapon

must be given as lesser included on robbery with a deadly weapon); Reddick v. State, 394 So.2d 417 (Fla. 1981). Likewise, in this case it would be manifestly impossible to conspire to deliver 400 grams of cocaine without necessarily conspiring to deliver an amount which is less than, but part of, the 400 grams.[14] The District Court's holdings on this Point should be affirmed.

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14 It should be noted that since the conspiracy is separate and distinct from the commission of the object of the conspiracy, the amount of contraband actually delivered is not dispositive of the amount of contraband which was agreed to be delivered. At bar, there was no actual evidence as to the amount which was the subject of the conspiracy.

POINT II

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT ON ENTRAPMENT FOR THE CHARGED OFFENSE OF CONSPIRACY TO TRAFFIC IN COCAINE BY DELIVERY.

Although this issue which Petitioner raises is not related to the "conflict" which permitted jurisdiction to review the instant case, due to the fact that this Court, in acquiring jurisdiction, has authority to dispose of all contested issues Respondent will respond to the argument on this point. Respondent requested the jury be instructed on entrapment (R290). 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.

Fla.Std. Jury Instr. (Crim. 1981 ed.) at 39.

The trial court did not instruct the jury on entrapment for the offense of conspiracy to traffic in cocaine. The trial court limited its entrapment instructions to the offense of trafficking in cocaine (R351). Respondent objected to the failure to

instruct on entrapment for the offense of conspiracy to traffic in cocaine (R356-357). Failure to give the instructions was reversible error.

Petitioner claims that there was sufficient evidence to "establish conspiracy to traffic in cocaine such to defeat the defense of entrapment." (Petitioner's Brief at 20). This may be true,[15] but it is not the test for determining whether the requested instruction should have been given. The test is if whether there is any evidence in the record to support a defendant's theory of defense. See, Palmes v. State, 397 So.2d 648 (Fla. 1981), cert. denied 102 S.Ct. 369 (1981); Holley v. State, 423 So.2d 562 (Fla. 1st DCA 1982). A defendant is entitled to this instruction if there is evidence to support it, regardless of how weak or improbable it may be. Holley; Taylor v. State, 410 So.2d 1358 (Fla. 1st DCA 1982); Dudley v. State, 405 So.2d 304 (Fla. 4th DCA 1981). The test is not whether the state's evidence is more substantial or more credible than the defendant's.

The only reason Respondent testified at trial was to explain how he was entrapped. Petitioner asserts that there was no evidence showing: lack of predisposition, objections by Petitioner to planned activities, or inducement by the police or

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[15] This is a decision for the jury, however, the jury was not given the requested instruction to decide this issue.

someone acting for them. However, Respondent's testimony amply provides all the elements of entrapment. A small sampling follows.[16]

Respondent testified that he never was involved in any drug deals previously and did not know anything about drugs (R279). John Bordas had initiated the idea of the deal (R224). Respondent testified that he never wanted to get involved in any deal or illegal activity to get his brother out of jail (R278). At various times Respondent had expressed his unwillingness to become involved (R234,238,240,249,257).

Respondent testified that he had expressed to everyone involved that he did not want to become involved (R275). John Bordas told Respondent that his men, the undercover officers, wanted Respondent actively involved in the deal (R258-259). At various other times John Bordas persuaded Respondent to become further involved in the deal (R237,240,242,258).

Respondent testified that he was also persuaded by Officer Tiderington to become involved (R272). Respondent testified that he only became involved because John Bordas and the undercover officers said they could help get his brother out of jail (R254).

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16 See, Respondent's Statement of the Facts. Petitioner's Statement of the Facts does not make reference to the testimony of Respondent. Petitioner's argument infers that the trial court need only look to the prosecution's case to determine whether there is sufficient evidence to support a defense theory. It basically follows that since the prosecution never produces witnesses to establish evidence for a theory of defense, the theory of defense never needs to be instructed on.

Respondent's testimony shows that he was not predisposed to become involved, but was lured or persuaded by police officers and informant John Bordas into participating. Based on this testimony alone the trial court was required to give the requested instruction. The jury should have had the opportunity to decide whether Respondent's testimony had sufficient credibility in the face of any conflicting evidence.

Petitioner also argues that the failure to give the instruction on entrapment as to the conspiracy charge was harmless because the jury rejected the entrapment defense as to the trafficking charge. However, as Petitioner argues at length in Point I, the conspiracy and the trafficking are separate and distinct offenses. The jury may have believed that Respondent had been entrapped into locating and conspiring to traffic with another person, but that after the conspiracy was complete he acted on his own and was not entrapped in becoming involved in the substantive offense. However, we will never know what the jury believed. Whether the evidence supported entrapment was an issue for the jury. Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. den. ___U.S.___, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). The District Court holding that it was reversible error to fail to instruct on entrapment as a defense to the conspiracy charge must be affirmed.

POINT III

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION FOR JUDGMENT OF ACQUITTAL FOR TRAFFICKING IN COCAINE.

To convict someone with an offense defined by statute, the facts must plainly and unmistakably place the accused within the offense charged. See, Nell v. State, 277 So.2d 1 (Fla. 1973).

Respondent was charged in the information with Trafficking in Cocaine by Delivery in relevant part as follows:

> *** did then and there unlawfully and knowingly deliver to Thomas Tiderington a controlled substance, to-wit: Cocaine ***
>
> (R372).

Respondent moved for a judgment of acquittal based on lack of proof that Respondent was guilty of delivery as was alleged in the trafficking count charged in the information (R188). The prosecution theorized that Respondent was guilty of delivery under the theory of principals (R188).

Section 893.02(4), Fla. Stat. (1983), defines delivery as follows:

> the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

Thus, delivery relates to the transfer of a controlled substance as distinguished from solicitation of others to sell a controlled substance.

At bar, there was no evidence that Respondent, actually or constructively, delivered cocaine. Viewing the evidence in a light most favorable to the state, it was shown that Respondent

had arranged for Carlos Gomez to meet the undercover officer (R31), Gomez and the undercover officer negotiated the cocaine transaction (R34), Gomez arranged with Corrine Benadi to deliver the cocaine (R35-36). Gomez delivered the cocaine to the undercover officer (R36-37). There was no evidence that Respondent aided in this delivery. It was only Corrine Benadi who aided in the delivery. As Tom Tiderington testified:

> Mr. Gomez advised that he would have to see the money before he would make arrangements for the cocaine to be delivered.
>
> (R34).

At best, what the state may have proven is solicitation by bringing a buyer and seller together. A separate criminal charge could have been instituted for that offense. See, § 777.04(2), Fla. Stat. (1983). However, there was no evidence showing that Respondent had the ability to possess the cocaine so as to aid Gomez in delivering it. Thus, there was no evidence of even a constructive transfer. It was solely Carols Gomez who arranged for the delivery. The delivery was later executed by Gomez with the aid of Corrine Benadi. There was no evidence that Respondent tried to aid in the delivery itself.[17]

Though Respondent was present while Gomez explained to Tiderington how the delivery was to be performed, his mere presence near the scene of the delivery is insufficient for

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17 In addition, assuming arguendo that Respondent was aiding and abetting anyone, he was aiding and abetting the police in purchasing the cocaine by soliciting a buyer for them. Such would not constitute trafficking by delivery. See, Sobrino v. State, 471 So.2d 1333 (Fla. 3d DCA 1985).

conviction under a theory of aiding or abetting. See, Chaudoin v. State, 362 So.2d 398 (Fla. 1978). Consequently, Respondent's conviction and sentence for trafficking in cocaine must be reversed.

Finally, while Respondent did present an entrapment defense, such does not relieve the prosecution's burden of proving that the evidence presented, which Respondent admits to, falls within the prohibition of the statute. Here the prosecution only presented evidence that Respondent solicited a supplier of cocaine. The act of solicitation, to which Respondent admits, is insufficient to prove delivery of cocaine. Based on the foregoing argument, Respondent requests this court to reverse his conviction for trafficking in cocaine by delivery.