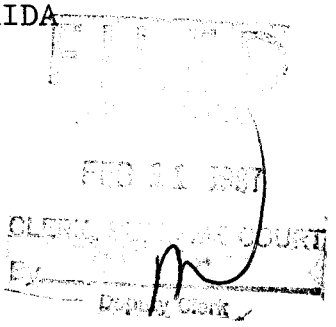
OA 4-2-87

IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,
Petitioner,
vs.
PATRICK WELLER,
Respondent.

CASE NO. 69,304

REPLY BRIEF OF PETITIONER ON THE MERITS

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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 included 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.

POINT III

The evidence is clear Appellant had sold illegal drugs in the past; Appellant was a willing participant in the transaction; Appellant at no time objected to the planned criminal activities. This evidence supports the theory that Appellant aided and abetted Carlos Gomez in selling the cocaine. A person who successfully brokers an illegal drug transaction by actively procuring the purchasers to the transaction is subject to prosecution as he agrees with others to cause trafficking to be committed. The trial court did not err in denying Appellant's Motion for Judgment of Acquittal.

ARGUMENT

POINT I

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

Petitioner re-asserts the arguments made in the Initial Brief on the merits, but in response and rebuttal to Respondent's arguments in his Answer Brief states as follows:

In footnote 6, p.13, of Respondent's Brief, he recites from p.257a of the Florida Standard Jury Instructions (Crim. 1981 ed.) the comment made by the Committee that "Some statutes provide that the penalty for certain crimes is enhanced if certain events occur during their commission . . . 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." Respondent from this argues, "Conspiracy may fall within the purview of this note." The fallacy of this statement is recognized on a reading of §893.135 (4) which provides:

> Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1) is guilty of a felony of the first degree and is punishable as if he had actually committed such prohibited act. Nothing in this subsection shall be constructed to prohibit separate convictions and sentences for a violation of this subsection and any violation of subsection(1).
> [Emphasis added.]

The plain language of this subsection clearly shows the legislative intent that conspiracy to traffic "by any act prohibited by subsection(1)" was to be separate crime for which separate convictions and sentences were to be imposed, and thus was not merely "couched in terms of enhancement."

Petitioner re-asserts that conspiracy to traffic in cocaine is a separate offense, and that its elements are 1) an agreement and 2) an intent to traffic in cocaine in an amount of 28 grams or more. The intent is the operative word here whether it was by delivery or not does not matter. As this Court stated in State v. Benitez, 395 So.2d 514 (Fla. 1981):

> Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida.
>
> * * *
>
> Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. Id. at 516-517.

Further this Court in State v. Leicht, 402 So.2d 1153 (Fla 1981) cert denied 455 U.S. 989 (1982) recognized that the Legislature by enacting §893.135 was singling out four controlled substances - - marijuana, cocaine, morphine, and opium - - proscribed by § 893.03 as an area of special concern due to the widesparead use and abuse of those four substances. The purpose of §893.135 was to provide escalating mandatory minimum sentences regarding

the four substances in order to treat drug traffickers with severity in a effort to curtail the use and abuse of these drugs.

Additionally, §893.135 (1) specifically provides this statute will apply to these four substances "notwithstanding the provisions of §893.13." Thus, §893.135 supersedes §893.13 as it refers to cocaine, marijuana, morphine and opium. Under the principle of statutory construction that the mention of one thing implies the exclusion of another - - expressio unius est exclusio alterius, and the Supreme Court's interpretation of §893.135 in Leicht, conspiracy to deliver cocaine under §893.13 is not a crime, thus it cannot be a lesser included offense of conspiracy to traffic in cocaine by delivery.

In Brown v. State, 206 So.2d 377 (Fla. 1968) this Court stated that for an offense to be a necessarily included offense, the lesser offense must be an essential aspect of the major offense. Trafficking in cocaine under §893.135 (1)(b) can be accomplished by either the sale, manufacture, delivery, bringing into the state, or possessing 28 grams or more of cocaine. Thus conspiracy to traffic in cocaine is not concerned with how or whether the act was accomplished, but whether the agreement and intent to traffic in 28 grams or more of cocaine was proven. The crime of conspiracy to deliver cocaine under §893.13 being non-existent, it cannot be a necessarily lesser included offense of conspiracy to traffic in cocaine.

With reference to Respondent's argument as to the request to instruct the jury "in amounts less than 400 grams," Petitioner would once again cite and quote from State v. Paffy, 369 So.2d 340, 342 (Fla. 1979) where this Court held:

> Under Brown, all elements of the necessarily included offense must be proved in proving the offense charged. In cases where two crimes are distinguished by the value of the property involved, and the value is not disputed, proof of the greater amount does not constitute proof of the lesser. Proof of the greater amount is not simply an additional element. It is an entirely different element unrelated to proof of the lesser offense. It is possible to steal a $100 bill or a $1,000 bill without stealing a $1 bill. Proof of the lesser offense requires evidence of an amount lower than $100. If the only evidence offered shows a value to be greater than $100, the lesser offense has not been proved. When the evidence as to value is in dispute, a defendant is entitled to an instruction on the lesser offense under Brown category (4).
>
> We hold that where value is not in dispute, a trial court need not instruct the jury on lesser offenses based on values other than the value proved.

Lastly, Petitioner points out that in its opinion approving the new schedule of lesser included offenses, In the Matter of the Use by the Trial Courts of the Standard Jury Instructions, 431 So.2d 594, at 597 (Fla. 1981) this court stated:

> The attached schedule of lesser included offenses is designed to be as complete a

> list as possible . . . After its effective date of July 1, 1981, this schedule will be an authoritative compilation upon which a trial judge should be able to confidently rely.

Thus, the fact that conspiracy does not appear in the schedule is supportive of the argument that the underlying act of the conspiracy is not a lesser included offense of the crime of conspiracy.

POINT II

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

Petitioner reiterates the arguments made with reference to this issue in its initial brief on the merits.

Whether the instructions as given constituted reversible error is subject to be reviewed under the harmless error rule. State v. Abreau, 363 So.2d 1063 (Fla. 1978); Brown v. State, 12 F.L.W. 299 (Fla. 3d DCA Jan. 20, 1987). As the Fourth District stated in its opinion here under review:

> [T]he same facts . . . that supported giving off the charge of entrapment as to trafficking were applicable to the charge of conspiracy.

Thus, the failure of the trial court to name "conspiracy to traffic" when the entrapment instruction was read is harmless beyond a reasonable doubt in view of the fact that the jury rejected this defense as to the charge of trafficking in cocaine. Contrary to Respondent's assertions (RB 29), it is not reasonable to believe that the jury did not think he was

conspiracy. If anything, the opposite would be true.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL FOR TRAFFICKING IN COCAINE.

Respondent in his answer brief on the merits added as a third issue to be reviewed in this case the sufficiency of the evidence to convict him at the trial level. The Fourth District Court in its opinion sub judice specifically held "the trial court did not err in denying appellant's motion for judgment of acquittal." Weller v. State, 11 F.L.W. 1779, 1780 (Fla. 4th DCA 1986). In 1980, Article V was amended to limit this Court's mandatory review of district court of appeal decisions, and to provide for discretionary review jurisdiction. This amendment was necessary due to the staggering number of cases reaching this Court. The amendment thus turned the district courts of appeal into courts with final appellate jurisdiction in most cases. See, Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983). Although this Court does have jurisdiction to consider issues ancillary to those directly before this Court on conflict jurisdiction, Petitioner urges this Court to decline to entertain Respondent's sufficiency of the evidence issue as that issue has already been resolved by the Fourth District and would not affect the outcome of the petition. See, Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983); State v. Hill, 492 So2d 1072 (Fla. 1986); Lee v. State, 12 F.L.W. 80 (Fla. January 29, 1987).

In response to Respondent's allegations, Petitioner submits as follows:

Respondent's contention of insufficiency of the evidence to show his participation in the delivery of the drugs is without merit. First, Petitioner points out that at trial Respondent raised the affirmative defense of entrapment. Second, the record clearly shows the trial court was correct in denying the motion for judgment of acquittal and submitting the case for decision by the jury. The record further reveals the verdict arrived at by the jury was supported by the evidence.

Under Florida Law, a motion for a directed verdict of acquittal should be denied unless thee is no legally sufficient evidence on which to base a verdict of guilty. McGahee v. Massey, 667 F.2d 1357 (11th Cir. 1982). The accepted standard to be applied on review of denial of the motion is not whether the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude. Maisler v. State, 425 So.2d 107 (Fla. 1st DCA 1982),rev denied, 434 So.2d 888 (Fla. 1983);Tsavaris v. State, 414 So.2d 1087 (Fla. 2d DCA 1982) Pet. for rev. denied, 424 So.2d 763 (Fla. 1983);Muwwakil v. State, 435 So.2d 304 (Fla. 3d DCA 1983) rev. denied, 444 So.2d 417 (Fla. 1984); Green v. State, 408 So.2d 1086 (Fla. 4th DCA 1982).

This Court in Lynch v. State 293 So.2d 44, 45 (Fla. 1974) said:

> A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the advers party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their findings, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

Petitioner maintains that the State presented sufficient evidence during its case in chief to allow the trial court to submit the case to the jury for their finding.

As stated earlier Respondent raised the affirmative defense of entrapment, thereby asserting his participation in the offense of trafficking, but questioning whether he was predisposed to commit the offense. Respondent was unpersuasive with the trial court and the jury that he ws a victim of "undue pressure" which constituted the entrapment.

The evidence was conflicting as to whether Respondent approached John Bordas, or whether it was vice versa. Both sides presented their case and it was up to the jury to make the

presented their case and it was up to the jury to make the decision.

The evidence is clear Respondent had sold illegal drugs in the past (R 133-135). If Respondent's story is to be believed, he entered into the sale with the purpose of helping his brother "beat the wrap." Thus, it is clear Respondent was a willing participant in the drug transaction. Respondent at no time objected to the planned criminal activities, but rather tried desperately to set up sales "to help his brother." Under these facts, although Respondent did not actually "transfer" the cocaine from his hands to that of the police, he "constructively" transferred it by setting up the transaction, and expecting compensation by raising money to obtain the release of his brother. See: Rotenberry v. State,429 So.2d 378 (Fla. 1st DCA 1983); Williams v. State, 376 So.2d 420 (Fla. 3d DCA 1979). The evidence is clear that Respondent aided and abetted Carlos Gomez in selling the cocaine. Respondent was not merely present at the scene. A person who successfully brokers an illegal drug transaction by actively procuring the purchasers to the transaction is subject to prosecution as he agrees with others "to cause trafficking to be committed." See Harris v. State, 450 So.2d 512, 514 (Fla. 4th DCA 1984).

In considering a motion for judgment of acquittal, the court must draw every conclusion favorable to the State, and the motion should not be granted unless there is no legal sufficient

evidence on which to base a verdict of guilt. Knight v. State, 392 So.2d 337 (Fla. 3d DCA 1981) Pet. for rev. denied, 399 So..2d 1143 (Fla. 1981). Based on the Knight standard, Petitioner maintains that the facts, drawing all reasonable inferences therefrom favorable to the verdict returned against Respondent, presented substantial competent evidence to support the verdict. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). The evidence presented at trial was totally inconsistent with any reasonable hypothesis of innocence and clearly established Appellant's guilt, Jaramillo v. State, 417 So.2d 257 (Fla. 1982), therefore an affirmance of the judgment based upon the wholly proper guilty verdict returned by the jury is required. Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981); Rose v. State, 425 So.2d 521, 523 (Fla. 1982), cert. den., 460 U.S. 1049, 103 S.Ct. 1496, 75 L.Ed.2d 928 (1983)

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 Reply Brief of Petitioner on the Merits has been furnished, by courier, to JEFFREY ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 9th day of February, 1987.

OF COUNSEL