IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 69,318

ANTONIO DOMINGUEZ, JR.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

On February 25, 1985, the respondent, ANTONIO DOMINGUEZ, JR., (hereinafter Dominguez), was charged by information with a violation of section 893.135(1)(b)1, Florida Statutes (1983), trafficking in cocaine (R 256-257). The substance of the allegation stated

> that in Seminole County, Florida, ANTONIO DOMINGUEZ, JR. AND JO[E] M. BROOKS, on the 10th day of December, 1984, did then and there knowingly sell, manufacture, deliver, or bring into the State of Florida, or knowingly be in actual or constructive possession of, 28 grams or more of COCAINE or a mixture containing cocaine. . . to-wit: MORE than 28 grams but LESS than 200 grams, contrary to Section 893.135(1)(b)1, Florida Stautues . . .(R 256). [emphasis supplied].

On July 29-30, 1985, Dominguez was tried before a jury on the aforementioned charge (R 1-211, 275-276). Following the presentation of evidence, the trial court conducted a charge conference (R 127-162). Regarding the crime charged, Dominguez submitted the following requested instruction:

> The State must prove beyond and to the exclusion of every reasonable doubt that at the time of the transaction that the defendant knew the substance was cocaine (R 128-139, 150, 277).

After a lengthy discussion, the trial court denied the request (R 128-139, 150, 277). The trial court read the standard jury instruction for trafficking in cocaine (R 191-193). Fla. Std. Jury Instr. (Crim.), p.230-231. Dominguez was found guilty as

charged (R 208, 278). Dominguez was adjudicated guilty of the offense and was later sentenced (R 210, 233-247, 280-281, 288, 289-290, 292-294). Dominguez appealled (R 295).

On appeal, Dominguez argued, inter alia, that the trial court erred in failing to give the jury the instruction requested by the defense. With one dissent, the district court agreed, reversed Dominguez's conviction and remanded the case for a new trial; the district court also certified the following question to this Court as one of great public importance:

> DOES THE CURRENT STANDARD JURY INSTRUCTION ON TRAFFICKING IN COCAINE SUFFICIENTLY INSTRUCT THE JURY THAT TO CONVICT A DEFENDANT UNDER THE STATUTE ONE OF THE ELEMENTS THAT THE STATE MUST PROVE IS THAT THE DEFENDANT KNEW THE SUBSTANCE IN WHICH HE TRAFFICKED WAS COCAINE? (See Appendix 1).

The petitioner, the STATE OF FLORIDA (hereinafter petitioner or the state), timely filed its notice to invoke this Court's discretionary jurisdiction. This brief follows.

STATEMENT OF THE FACTS

George Proechel III, formerly a Casselberry Police Officer assigned to the Seminole County Drug Task Force, testified for the state about how he met Dominguez and his co-perpetrator, Brooks, pursuant to a transaction previously scheduled by Brooks (R 23-70). When Brooks and Dominguez drove up in Brooks' car, Proechel went up to them and introduced himself to Dominguez and Dominguez reciprocated (R 29). Brooks and Proechel got back into Proechel's car where Proechel showed Brooks that he had money (R 48-49). After Proechel learned that Brooks did not have the cocaine with him, Brooks leaned forward, looked at Dominguez and nodded his head (R 49-50). Dominguez thereupon exited the vehicle and delivered to Proechel two plastic bags containing white chunky material that later proved to be 55.9 grams of cocaine (R 51, 88). Dominguez said, "Oh, yeah, yeah, yeah," in response to Proechel's statement thanking Dominguez for being careful (R 55). Neither Proechel nor Brooks referred to drugs or cocaine in Dominguez's presence; Dominguez never mentioned drugs either (R 63, 67-68).

Dominguez testified he did receive a signal and did deliver the bags to Proechel (R 114). Dominguez testified that the bags were transparent and that he looked at them but that he did not notice the contents thereof (R 119-121). Dominguez denied any recollection of Proechel thanking him for being careful or making a response thereto (R 120).

SUMMARY OF ARGUMENT

The certified question which provides the basis for this appeal presents the issue of whether the standard jury instruction for trafficking in cocaine is sufficient regarding the essential element of knowledge. The petitioner asserts that the standard trafficking instruction sufficiently informs the jury of the state's burden of proof regarding a defendant's knowledge of the drug being trafficked. The sufficiency of the standard trafficking instruction is plainly demonstrated by comparing it with the standard instruction regarding simple sale or delivery; its correctness is implicitly indicated by this Court's decision not to amend this instruction last year. Furthermore, a close reading of all of the relevant case law provides authority for the petitioner's position that the instruction in question was previously found sufficient on the issue of specific knowledge. Based upon the relevant law, this Court should find that the trial court was correct and that its ruling deserves deference. The certified question should be answered in the affirmative, the decision of the district court should be quashed and the judgment and sentence of the trial court reinstated and affirmed.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN CHARGING THE JURY WITH THE STANDARD JURY INSTRUCTION FOR TRAFFICKING IN COCAINE AND DENYING A REQUESTED JURY INSTRUCTION REGARDING SPECIFIC KNOWLEDGE OF THE SUBSTANCE BEING TRAFFICKED?

The alleged error which is the focus of the case sub judice is whether the trial court erred in reading only the standard jury instruction or whether it should have granted the instruction requested by the defense. Dominguez had requested that the jury be instructed that the state must prove as an essential element of the crime of trafficking in cocaine that he specifically knew that he sold, delivered, possessed, etc., the drug cocaine. Since it is not error to deny a requested instruction when the standard instruction adequately covers that area of the law, State v. Freeman, 380 So.2d 1288 (Fla. 1980), the precise legal question which must be addressed in this appeal is correctly summarized by the question certified to this Court:

> Does the current standard jury instruction on trafficking in cocaine sufficiently instruct the jury that to convict a defendant under the statute one of the elements that the state must prove is that the defendant knew the substance in which he trafficked was cocaine?

Before addressing this question, however, the petitioner suggests

that a review of the relevant statutory and decisional law is required.

The crime with which Dominguez was charged, trafficking in cocaine, is codified at section 893.135(1)(b)1, Florida Statutes (1983). That statute reads

> 893.135 Trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.--
> (1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13: . . .
>
> (b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine as described in s. 893.03(2)(a)4. or of any mixture containing cocaine is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:
> 1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000. . . .

This statute was enacted in 1979, becoming effective that same year. Ch. 79-1, §1, Laws of Fla. Although the general trafficking statute has been amended numerous times since then, the essential elements of the crime of trafficking in cocaine have never been altered. Ch. 80-70, §1, Laws of Fla.;Ch. 80-353, §2, Laws of Fla.; Ch. 81-259, §491, Laws of Fla.;Ch. 82-2, §1, Laws of Fla.; Ch. 82-16, §3, Laws of Fla.; Ch. 83-215, §53, Laws of Fla.

In 1981, this Court promulgated an updated edition of standard jury instructions, which included the new instruction,

for the crime of trafficking in cocaine. Fla. Std. Jury Instr. (Crim.), p. 230-231. (See Appendix 2). There are two portions of this instruction which are of critical importance to the question before this Court. First, as it pertains to the enumerated elements of the offense, this Court should note that the trial court charged the jury substantially in standard form (R 193). Second, as it pertains to the special instruction requested by Dominguez, this court should recognize that the standard jury instruction contemplates such a request. On page 231, there appears a "Note to Judge":

> If the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. See State v. Medlin, 273 So.2d 394 (Fla. 1973). [emphasis supplied].

This "Note to Judge", however, is not self-expanatory; therefore, a review of the Medlin case is necessary.

In Medlin, supra, this Court reviewed the issue of whether the state was required to prove a defendant's specific knowledge of the drug involved in a delivery of a controlled substance case. This Court distinguished cases involving delivery from possession cases on the basis that the delivery statute did not require "knowing delivery".

> The Florida cases set out the rule that where a statute denounces the doing of an act as criminal without specifically requiring criminal intent, it is not necessary for the State to prove that the commission of such act was accompanied by criminal intent. It is only when criminal intent is required

> as an element of the offense that the question of "guilty [specific] knowledge" may become pertinent to the State's case.

Medlin, supra, at 396. This court went on to hold that

> the State was not required to prove knowledge or intent since both were presumed from the doing of the prohibited act.

Medlin did not, however, discuss the issue of an instruction regarding specific knowledge. As Medlin relates to the judge's note in the trafficking instruction, the petitioner suggests that the correct interpretation, and the interpretation given to that note by the trial court, is that a special instruction may be required in cases involving trafficking by possession, but not in cases of trafficking by delivery or sale (R 132-144). The petitioner asserts this is correct based on the Medlin holding that knowledge of the drug involved was presumed by the delivery itself.

In 1982, the Fourth District Court of Appeal ruled in the first of a line of cases which purportedly supports the decision of the district court below. In State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982), pet. for rev. denied, 421 So.2d 518 (Fla. 1982), the district court denied the state's pre-trial petition for writ of certiorari from the trial court's denial of the state's motion in limine. The state's motion was in response to the defendant's intended defense that she had no knowledge of the substance involved being cocaine, but rather that she had believed she was trafficking in marijuana. The district court held that the cocaine trafficking statute required proof of

specific knowledge that the drug being trafficked in was cocaine. The Ryan court distinguished State v. Medlin, supra; it held that Medlin did not apply because the trafficking statute proscribed knowing delivery whereas the statute involved in Medlin did not.

The next case which is relevant to the question before this Court is Wiesenberg v. State, 455 So.2d 633 (Fla. 5th DCA 1984). In Wiesenberg, the Fifth District Court of Appeal ruled that Ryan did not stand for the proposition that the state was required to prove that a defendant had specific knowledge of the weight of the cocaine being trafficked. It should be noted that after having discussed Ryan, the Wiesenberg court approved the lower court's use of the standard jury instruction for trafficking in cocaine.

The Fifth District Court of Appeal also ruled in a second related case, Way v. State, 458 So.2d 881 (Fla. 5th DCA 1984), approved, 475 So.2d 239 (Fla. 1985). In Way, the Fifth District Court cited Wiesenberg, supra, in holding that since specific knowledge of the weight of the cocaine being trafficked is not an element of the offense proscribed in section 893.135(1)(b)1, Florida Statutes (1981), it was not error for the trial court to deny an instruction requested on that point. In dicta, the Fifth District Court noted that the trial court gave an instruction regarding specific knowledge of the nature of the drug being trafficked. Way, 458 So.2d at 882. What confuses the issue presented in this case, however, is the Fifth District Court's erroneous recollection in Way that it had approved just such an instruction in Wiesenberg, supra; clearly this was not a part of the Wiesenberg decision. Later, after the trial in the case sub judice, this

Court approved the Way decision. Way, supra. This Court's approval directly related to a certified question on the weight issue. This Court also stated

> We conclude that the jury instruction given by the trial court in the instant cause properly set forth the elements of the offense of trafficking in cocaine under section 893.135(1)(b)1, in accordance with the intent and purpose of that statute. We fully approve of the decision of the district court of appeal.

This Court did not, however, rule that the standard jury instruction for trafficking in cocaine was insufficient or incorrect. The facts of the case at bar and the question certified to this Court now present that very question.

Before addressing that certified question, however, the petitioner would like to make one further observation on the current state of the law. Even after the decisions in Ryan, supra, Wiesenberg, supra, and Way, supra, the standard jury instruction for trafficking in cocaine was not amended as it related to the specific knowledge issue. This court had recently amended this instruction "for purposes of consistency", but it chose not to amend it in any other regard. The Florida Bar re: Standard Jury Instructions Criminal Cases, 477 So.2d 985, 986 (Fla. 1985). (See Appendix 3).

Returning to the issue in this case as framed by the certified question, the petitioner asserts that the standard instruction for trafficking in cocaine does sufficiently charge the jury as to the state's burden of proof regarding knowledge. In support of that position, the petitioner advances several arguments.

The first basis for sustaining the sufficiency of the trafficking instruction is apparent from the face of the instruction itself. As noted in Ryan, supra, the trafficking statute does use the word "knowingly", thereby establishing knowledge as an element of the offense. The standard jury instruction for trafficking does contain this statutory language; element 1 reads

> 1. (Defendant) knowingly [sold] [manufactured] [delivered] [brought into Florida] [possessed] a certain substance.

Fla. Std. Jury Instr. (Crim.), p.230. By comparison, however, the standard instruction for sale or delivery of a controlled substance does not use the word "knowingly" in enumerating the essential elements of that offense. Fla. Std. Jury Instr. (Crim.), p.219. The difference between these two standard instructions demonstrates that the trafficking instruction does sufficiently charge the jury on the element of knowledge. Inasmuch as the standard jury instruction is "a nearly verbatim quotation of the statute", this Court should not deem it insufficient. Lacy v. State, 387 So.2d 561 (Fla. 4th DCA 1980).

The thrust of Dominguez's argument and the substance of the decision of the district court below is that the current trafficking instruction should read

> 1. (Defendant) knowingly [sold] [manufactured] [delivered] [brought into Florida] [possessed] [cocaine] [a mixture containing cocaine].
>
> 2. The quantity of cocaine involved was 28 grams or more.

The petitioner posits that there is little, if any, difference between this and the standard instruction. Slight discrepancies should not constitute grounds for reversal when the trial court relies on a standard instruction which mirrors the text of the statute. Lacy, supra.

A second basis for finding the trafficking instruction sufficient lies in the "Note to Judge" which refers to the Medlin case. That note directly refers to those instances, as herein, where the defense requests a specific knowledge instruction. While the decision below presupposes that the discussion of the Medlin case in Ryan, supra, is correct, i.e., that Medlin does not apply because of the differences between the language of the trafficking statute and the simple delivery statute, the petitioner urges this Court to give its own note its fullest effect. As discussed earlier, the petitioner asserts that no additional instruction regarding knowledge is required in delivery or sale cases; this position is founded on the logical and legal conclusion that delivery or sale of a substance implies knowledge of the nature of that substance. State v. Medlin, supra. This is especially true in cases such as this where the suspect is in exclusive, physical possession of a visibly apparent item during the delivery or sale.

As it relates to the issue of whether the trial court erred in reading only the standard jury instruction, the petitioner maintains that there was direct case authority supporting that ruling and that there is currently no direct authority, save the decision below, holding the standard instruction insufficient. As noted earlier herein, the Fifth District Court's decision

in Wiesenberg, supra, specifically approved of the standard instruction for trafficking in cocaine even after it reviewed the holding in Ryan. This point was also made by Judge Orfinger in his dissent from the decision now being reviewed. Furthermore, neither of the opinions in Way, supra, directly rule that the standard instruction for trafficking in cocaine is deficient.

Moreover, there is implicit authority for determining that the trafficking instruction is correct. When this Court promulgated several revisions to the standard jury instructions, this Court had before it the district court decisions in Ryan, supra, Wiesenberg, supra, and Way, supra, as well as its own decision in Way. This Court, however, chose not to amend the standard trafficking instruction regarding the knowledge element; it instead found it was only necessary to amend element 3 "for purposes of consistency." The Florida Bar Re: Standard Jury Instructions Criminal Cases, 477 So.2d 985, 986 (1985).

Finally, the petitioner suggests that since there was a complete absence of authority to the contrary, the trial court's decision to rely upon the standard jury instruction is due a certain degree of deference. The petitioner is not suggesting that the trial court is relieved of its duty to properly instruct the jury because standard instructions are established; the law does not support such a position. State v. Bryan, 287 So.2d 73 (Fla. 1973). Rather, the petitioner maintains that a trial court is "encouraged" and should generally adhere to the standard instructions. Bryan, supra; Davis v. State, 373 So.2d 382 (Fla. 4th DCA 1979), cert. denied, 385 So.2d 756 (Fla. 1980); Edwards v. State, 351 So.2d 358 (Fla. 4th DCA 1977). When the standard jury

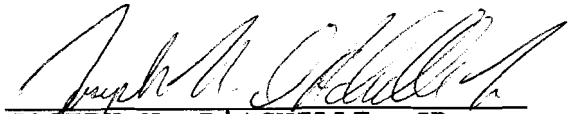
instructions are correct, they should be given in the absence of extraordinary circumstances. Davis, supra. If the trial court deviates from the standard jury instruction, it should state for the record the error in the standard instruction and the legal basis for that conclusion; deviations from the standard instructions are discouraged if they are "without good reason." Edwards, supra; Davis, supra; Appell v. State, 250 So.2d 318 (Fla. 4th DCA 1971), cert. denied, 257 So.2d 257 (Fla. 1971); Leverette v. State, 295 So.2d 372 (Fla. 1st DCA 1974). Fla. R. Crim. P. 3.985. In the case at bar, the trial court thoroughly examined the question presented here. There was authority supporting its decision, i.e. Wiesenberg,supra, and no direct authority stating that the standard jury instruction for trafficking in cocaine was insufficient or incorrect. The instruction itself comports with the langauge of the statute. The petitioner suggests that the ruling of the trial court should be deemed correct and given proper deference. The petitioner urges this Court to uphold the sufficiency of the instruction under review and answer the certified question in the affirmative.

CONCLUSION

Based upon the argument and authority herein, the petitioner prays for this court to uphold the sufficiency of the standard jury instruction for trafficking in cocaine and answer the certified question in the affirmative. The petitioner further prays that the decision of the district court be quashed and the judgment and sentence of the trial court reinstated and affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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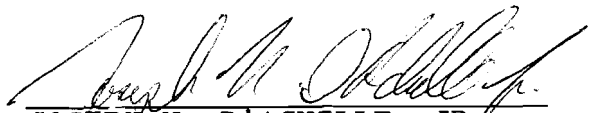
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's initial brief on the merits has been furnished by mail to: Kenneth Witts, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, on this 13th day of October, 1986.



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