

IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK OF THE SUPREME COURT
TALLAHASSEE, FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 ANTONIO DOMINGUEZ,)
)
 Respondent.)
 _____)

CASE NO. 69,318

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented in the Petitioner's Brief on the Merits.

SUMMARY OF THE ARGUMENT

The Florida Standard Jury Instruction on trafficking in cocaine fails to make it clear that knowledge that the substance trafficked in is cocaine is an essential element of the crime. The fact that this knowledge is an essential element has been shown by recent Court of Appeal cases, and by at least one decision of this Court. The insufficiency of the standard instruction is likely to lead to improper convictions such as the one in the case at bar. Respondent therefore argues that this Court should answer the certified question in the negative, hold that the standard instruction is insufficient, and affirm the decision of the Fifth District Court of Appeal.

ISSUE

THE TRIAL COURT ERRED BY CHARGING
THE JURY WITH THE STANDARD JURY
INSTRUCTION ON TRAFFICKING IN
COCAINE AND DENYING A REQUESTED
JURY INSTRUCTION REGARDING SPECI-
FIC KNOWLEDGE OF THE SUBSTANCE
BEING TRAFFICKED IN.

ARGUMENT

The question certified by the Fifth District Court of Appeal in this case is:

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?

The question presupposes, and current case law indicates that knowledge of the nature of the substance trafficked in is an essential element of the crime of trafficking in cocaine. The Petitioner calls this Court's attention to the "Note to Judge" on page 231 of the Florida Standard Jury Instructions, which cites State v. Medlin, 273 So.2d 394 (Fla. 1973). The Petitioner suggests the note means a special instruction on knowledge of the substance is necessary when the State alleges trafficking by possession, but not when trafficking by delivery or sale is at issue. There are several problems with this reasoning.

The first of these is the distinction pointed out in

State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982), and other cases that support Respondent's position. Medlin involved the crime of delivering a barbituate or stimulant, Florida Statutes, Section 404.02(1) (1971), a crime that does not specifically require criminal intent. The equivalent crime under the current statutes, 893.13(1)(a),(e) (1985), does not require knowledge for either delivery or possession. The only clear distinction here is not between trafficking by delivery and trafficking by possession, but rather between simple delivery or possession and trafficking.

A second distinction between Medlin and the case at bar is a factual one. In Medlin according to this Court's opinion, there was good evidence, in the form of statements made by the defendant at the time of the crime, that he was well aware of what the pills he possessed and was delivering contained. Respondent recognizes that the certified question in this case will not be answered on factual grounds, since the Standard Jury Instructions are either sufficient or not without regard to the facts of a case. The facts of Medlin, however may help explain the "Note to the Judge". It is possible that the use of the word "may" in the note indicates that evidence of knowledge of the substance should be evaluated in determining the need for a special instruction.

A last point on Medlin is that this language in Medlin itself supports Respondent's position:

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 knowledge" may become pertinent in the State's case.

In the case at bar "guilty knowledge" is an element of the crime, and is not only pertinent, but is essential to the State's case.

The ultimate issue in this case is the sufficiency of the trafficking instruction. This Court, in Way v. State, 475 So.2d 239 (Fla. 1985), held as follows:

We agree that knowledge of the nature of the substance possessed is an essential element of the crime of trafficking in cocaine under section 893.135(1)(b)1. The statute requires knowing possession of cocaine and, therefore, lack of knowledge that the substance is cocaine would be a defense.

See also Weisenberg v. State, 455 So.2d 633 (Fla. 5th DCA 1984), and Kresbach v. State, 462 So.2d 62 (Fla. 1st DCA 1984).

Keeping in mind the language in Way, examine the relevant standard jury instruction:

Before you can find the defendant guilty of Trafficking in Cocaine, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) knowingly

[sold]
[manufactured]
[delivered]
[brought into Florida]
[possessed]

a certain substance.

2. The substance was [cocaine] [a mixture containing cocaine].

3. The quantity of the cocaine involved was 28 grams or more.

The insufficiency of this instruction is pointed out by the facts in the case at bar. The Respondent knowingly possessed and knowingly delivered a substance to an undercover law enforcement officer. That substance was later shown to be cocaine or a mixture thereof. The quantity was 28 grams or more. It is not only possible, but it is likely that given those facts a jury would convict a defendant using the Standard Jury Instructions, which of course is what happened in this case. This is because "knowingly" modifies sold, manufactured, delivered, brought into Florida, or possessed. It does not indicate the defendant must have knowledge of the substance. The standard instruction allows a conviction if a defendant knew he possessed, or knew he delivered, a substance, even if, as happened in the case at bar, the defendant had no idea what that substance was. This of course ignores the essential element of knowledge of the nature of the substance.

This dangerous aspect of the standard instruction could be easily done away with by addition of a simple instruction like the one given in Way, which this Court found "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". That instruction read in relevant part

"Element number two, the Defendant knew the substance was cocaine or a mixture containing cocaine". This simple sentence would do away with the likelihood of a wrongful conviction that is caused by the standard instruction.

The fact that this Court did not revise the relevant aspect of the standard trafficking instruction is not, as Petitioner argues, "implicit authority for determining that the trafficking instruction is correct". This Court has, in the past, acknowledged that the Standard Jury Instructions have been in error, Higdon v. State, 11 FLW 215 (Fla. May 15, 1986); Yohn v. State, 476 So.2d 123 (Fla. 1985).

The standard trafficking instruction invites improper convictions like the one in the case at bar. For this reason this Court must affirm the Fifth District Court of Appeal's decision and answer the certified question in the negative.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, Respondent asks this Honorable Court to answer the certified question in the negative and affirm the Fifth District Court of Appeal's decision.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Antonio Dominguez, Inmate No.099238, Kissimmee Community Correctional Center, 2925 Michigan Avenue, Kissimmee, Florida 32743, on this 3rd day of November, 1986.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER