IN THE FLORIDA SUPREME COURT

CASE NO. 70,327

PAUL L. MADSEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION TO REVIEW DECISION OF
DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF ON MERITS WITH ATTACHED APPENDIX

SUBMITTED BY:

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PRELIMINARY STATEMENT

In this brief, the Petitioner, PAUL L. MADSEN, will be referred to as "Mr. Madsen", and the Respondent, the STATE OF FLORIDA, will be referred to as the "State".

All references to Mr. Madsen's initial brief on the merits will be by the letters "MB", followed by a slash, followed by the appropriate page number. All references to the State's answer brief on the merits will be by the letters "SB", followed by a slash, followed by the appropriate page number. All references to the attached appendix to this reply brief will be by the letters "App.", followed by the appropriate page number. All references to the Appendix To Petitioner's Brief On Jurisdiction, Tab G, will be by the letters "App. G", followed by the appropriate page number.

INTRODUCTION

The State's answer brief is not "prepared in the same manner as the initial brief" as required by Rule 9.210(c), Fla.R.App.P., but instead recasts the four issues discussed and interjects a new fifth issue (SB/13-14, 22). This fifth issue questions the scope of review which the law authorizes this Court to exercise over the issues raised in this case by virtue of the June 25, 1987, order accepting jurisdiction (App. 18).

The State's answer brief suggests that this Court's scope of review is limited to Point III (SB/13-14). There is no scope of review limit specified in the June

25, 1987, order. Further, this order does not specify any particular issue or issues as the basis for its acceptance of jurisdiction (App. 18).

The State's argument concludes on this point.

> [T]his Court must refrain from exercising its authority to entertain issues ancillary to the issue vesting jurisdiction as said jurisdiction is reserved solely for the instance where the ancillary issues affect the outcome of the Petition, Lee v. State, 501 So.2d 591, 592 (Fla. 1987) n.1; Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983). (SB/14).

This assertion is not supported by the cases cited in the State's brief or the general law. To the contrary, once this Court determines to accept jurisdiction over a case, it has the authority to consider and decide all legal issues properly preserved and presented. In Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982), this Court clearly stated that:

> [O]nce an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. See Whitted; Miami Gardens, Inc. v. Conway, 102 So.2d 622 (Fla. 1958); Vance v. Bliss Properties, Inc., 109 Fla. 388, 149 So. 370 (1933).

Two and one-half years later, this Court again clearly stated its position in Tillman v. State, 471 So.2d 32, 34 (Fla. 1985), in these words:

> The district court's certification that its decision passed upon a question of great public importance gives this Court jurisdiction, in its discretion, to review the district court's "decision." Art. V, § 3(b)(4), Fla. Const. Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented. See e.g., Trushin v. State, 425 So.2d 1126 (Fla. 1983).

At the same time, in a per curiam opinion this Court stated in Reed v. State, 470 So.2d 1382, 1383 (Fla. 1985):

> We first address the issue of our scope of review. Respondent urges that we limit our review to the certified question and not reach the issue of whether the United States Constitution grants petitioner the right to a jury trial. We decline to do so. First, our scope of review encompasses the decision of the court below, not merely the certified question. Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976); Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

Finally, within the last seven months in Lee v. State, 501 So.2d 591, 592 note 1 (Fla. 1987), Justice Ehrlich wrote:

> Although we have jurisdiction to consider issues ancillary to those directly before this Court in a certified case, we decline to entertain Lee's Glosson claim, as we have determined the claim would not affect the outcome of the petition. See Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983).

The further point made in Lee is that this Court does not have to consider ancillary issues where the issue directly before the Court has been decided in favor of the petitioner. In Lee, this Court decided the issue directly before it in the favor of Mr. Lee by allowing him to withdraw his plea of guilty, and thereby nullifying his conviction and sentence. Consequently, it was unnecessary for this Court to decide the other issues since they "would not affect the outcome of the petition".

If this Court decides the "jury instruction" issues (Point I; MB/13-23) in Mr. Madsen's favor, a reversal will occur and a new trial will be ordered. This decision will "affect the case". Trushin, 425 So.2d at 1130.

If this Court decides the "Glosson/Cruz" issues (Point II; MB/23-37) in Mr. Madsen's favor, his conviction and sentence will be reversed and the case will be dismissed. This decision will "affect the case". Trushin, 425 So.2d at 1130.

If this Court decides the "electronic surveillance" issue (Point III) in Mr. Madsen's favor, his conviction and sentence will be reversed and the case will be remanded for a new trial. This decision will "affect the case". Trushin, 425 So.2d at 1130).

If this Court decides the "compulsory process" issue (Point IV; MB/44-49) in Mr. Madsen's favor, his conviction and sentence will be reversed and the case remanded for a new trial. This decision will "affect the case". Trushin, 425 So.2d at 1130.

As is clearly demonstrated above, a favorable decision on any of these four issues will affect the outcome of the petition and the case. Therefore, the scope of review encompasses these four issues.

ARGUMENT

I. ERRONEOUS INSTRUCTION AND INCOMPLETE AND INACCURATE REINSTRUCTION ON ENTRAPMENT DENIED MR. MADSEN HIS RIGHT TO A FAIR TRIAL. (SB/23-24).

The right to a fair trial is guaranteed by both state and federal constitutions. Art. I, §9, Fla. Const.; Sixth and Fourteenth Amendments, United States Constitution. Encompassed within the concepts of "fair trial" and "due process" is the principle that the trial judge must accurately and completely instruct the jury on all applicable law.

A. Initial Entrapment Instruction (SB/23-24)

Concerning the state due process ground, the State -- while relying on Rotenberry v. State, 468 So.2d 971 (Fla. 1985), and McCray v. State, 473 So.2d 203 (Fla. 1985) -- does not explain how the opinions in Rotenberry, supra, and State v. Wheeler, 468 So.2d 978 (Fla. 1985), can be logically read together. In Wheeler, at 468 So.2d 980, the Court stated:

> [a]s we held in our recent examination of entrapment, "[t]he essential element of the defense of entrapment is the absence of a predisposition of the defendant to commit the offense." State v. Dickinson, 370 So.2d 762, 763 (Fla. 1979). The burden with respect to predisposition lies with the state. "Once the evidence is introduced which suggests the possibility of entrapment, the State must prove that the defendant was predisposed to commit the offense charged." Story v. State, 355 So.2d 1213, 1215 (Fla. 4th DCA 1978).

Despite the critical "absence of a predisposition of the defendant to commit the offense", Rotenberry does not require that the jury be specifically instructed that this essential must be proved by the State beyond all reasonable doubt. The general instruction on the State's burden of proof, which is given at an earlier and unrelated point in the entire jury instructions, will suffice. Rotenberry, supra.

The State's answer brief does not reply to the arguments raised in Mr. Madsen's initial brief (MB/14-18) based on the subsequent decision of Yohn v. State, 476 So.2d 123 (Fla. 1985), and the May 28, 1987, amendment to the 1981 Florida Standard Jury Instruction 3.04(c). Both of these cited authorities support the conclusion urged by Mr. Madsen on this point.

Since the State's reply brief does not challenge Mr. Madsen's federal due process analysis and argument (MB/18-19), no reply is necessary.

B. Reinstruction (SB/24)

The three cases cited in the State's brief are all distinguishable because in each the jury request for further instruction was satisfied by a full, complete, and accurate statement of the requested law. This is not the situation in the instant case. The jury requested in writing "What is Entrapment?" (R/VI/1064;

VII/1079). This was followed with the broader oral request: ". . . an explanation of entrapment" (R/VI/1065).

The legal concept of entrapment includes this point: the State must prove beyond all reasonable doubt lack of predisposition.

> "[O]nce the evidence is introduced which suggests the possibility of entrapment, the State must prove that the defendant was predisposed to commit the offense charged."

Wheeler, 468 So.2d at 980, quoting Story v. State, 355 So.2d 1213, 1215 (Fla. 4th DCA 1978). The jury must receive an instruction on this burden of proof. Rotenberry, supra. By analogy, if the jury question is "What is Insanity?", the trial court's reinstruction must advise the jury that the State has the burden of proving sanity beyond all reasonable doubt. Yohn, supra.

> [O]n the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped.

The Florida Bar re Standard Jury Instructions -- Criminal, 12 FLW 259 (Fla. May 28, 1987).

To argue in terms of "elements" (SB/24) is to cut the cheese too fine. The Madsen jury requested the legal definition of a theory of defense, not the legal definition of a specific crime. Cf. Henry v. State, 359 So.2d 864 (Fla. 1978); Cheatham v. State, 346 So.2d

1218, 1219 (Fla. 3d DCA 1977). This theory of defense includes the State's burden of proof, which is triggered by the requisite evidentiary showing on behalf of the defendant supporting his asserted defense (". . . evidence . . . which suggests the possibility of entrapment"). This legal situation is closely analogous to Reynolds v. State, 332 So.2d 27 (Fla. 1st DCA 1976), where the jury requested a reinstruction on "reasonable doubt". In giving this reinstruction, the trial court failed to include the presumption of innocence. Arguably, a strict definition of "reasonable doubt" does not include the presumption of innocence. However, the Reynolds court found it to be within, and a necessary part of, the broader concept of reasonable doubt. See also, Cole v. State, 353 So.2d 952 (Fla. 2d DCA 1978).

This legal question is correctly answered by a careful reading of Justice Sundberg's statement in Henry v. State, 359 So.2d at 866:

> . . . this Court established the principle that it is proper for a judge to limit the repetition of the charges to those specially requested as any additional instruction might needlessly protract the proceedings. We echoed this principle in Hedges v. State, 172 So.2d 824 (Fla. 1965), but added the caveat that the repeated charges should be complete on the subject involved. (Emphasis added).

The Madsen trial court, over specific objection, refused to heed this caveat and consequently failed to follow the law. For another example, see Hunter v. State, 378 So.2d 845, 846-47 (Fla. 1st DCA 1979).

II. CONTINGENT AGREEMENT AND OUTRAGEOUS MISCONDUCT ON PART OF STATE AGENTS REQUIRES REVERSAL AND DISMISSAL. (SB/25-30).

A. Contingent Agreement

The written agreement between the police and informant testified about at trial by the deputy (R/I/164-74) and the informant (R/II/306-09) does exist (MB/App. 64). Actually, it is a written agreement between the informant and the State Attorney for Broward County, Florida. It is signed and dated February 13, 1984 (MB/App. 65).

The State's assertion, "[D]efendant raised the issue of the substantial assistance agreement entered into between David Ball and the state as constituting an illegal contingency fee agreement . . . for the first time on appeal." (SB/25), is another step in a long and sordid story of Florida executive deceit and deception concerning this written agreement. At the trial level, it took the defense attorney months to obtain from the State the identity of David Ball and have him produced for deposition (SR/III-392-93, 398-99 ¶2(d), 400, 405, 414, 417; SR/I/26-28). Defense counsel was never provided by the State with the pre-existing February 13, 1984 written agreement (MB/App. 64).

At the trial level, defense counsel filed a demand for Brady material (SR/III/393) and the State Attorney

filed this written response on July 19, 1984 (SR/III/399 ¶4):

> AT THIS TIME THE STATE IS UNAWARE OF ANY EVIDENCE WHICH FALLS WITHIN THE PURVIEW OF BRADY V. MARYLAND, OR FL.R.CR.P. 3220(a)(2).

At trial, David Ball under oath testified falsely before the judge and jury concerning the "testimony" details of his agreement with the state attorney (MB/25-26). While the appeal was pending in the Fourth District, the existence of this February 13, 1984, written agreement was first discovered by Mr. Madsen's counsel and filed with the court (MB/App. 57-58). When its authenticity was then challenged by the State, it required two lawsuits by Mr. Madsen's legal counsel (which lawsuits were vigorously resisted by the Florida Attorney General) seeking the production of a certified copy of this February 13, 1984, written agreement, before it was finally produced from the public records of Broward County, Florida (MB/App. 61-65). For almost three years (February, 1984 to January, 1987), the Florida prosecuting officials deliberately, intentionally, and illegally secreted and hid this important legal document.

This is now in clearer focus as the State attempts to distinguish the instant case from the teachings of Glosson by asserting

> . . . Ball [the police informant] was not required as part of the agreement to have to testify in order to perform the substantial assistance (SB/26) (emphasis added).

A reading of the written agreement, which was presumably authored by lawyers for the State of Florida, refutes this assertion (MB/App. 64-65).

> [I] [DAVID MICHAEL BALL] shall thereafter provide "substantial assistance" to the Office of the State Attorney and any and all law enforcement agencies in the identification, arrest or conviction of any accomplices, co-conspirators or principals as required by Florida Statute 893.135(3), or any other "substantial assistance" that the Office of the State Attorney deems appropriate (MB/App. 64; emphasis added).

The State also attempts to distinguish the instant case from the teachings of Glosson by asserting that there is a legal significance between a contingent agreement which provides a financial incentive contrasted with a contingent agreement which provides a sentencing incentive (SB/25). While the Glosson opinion used the word "financial" because that was the specific fact of that case, the Glosson legal principle was certainly much broader and does cover other types of incentives which effect the basic integrity of the Florida criminal justice system. The claimed distinction is plain sophistry. The instant case falls squarely within the holding of Glosson.

> The informant here had a enormous [sentencing] incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent [three year sentence]. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a [sentencing] stake in criminal convictions.

Id. at 1085.

Unlike Glosson, the cited federal cases (SB/26, 27) are not construing Section 9 of the Florida Declaration of Rights. Art. I, §9, Fla. Const. (1968). Since federal courts do not have the authority to overrule the Florida Supreme Court's interpretation of the Florida Constitution, these cited federal cases are irrelevant to this discussion. For an amazing example of federal executive and judicial contempt for the concept of "due process", the reader is invited to the recent decision of United States v. Ofshe, 817 F.2d 1508 (11th Cir. 1987).

B. Entrapment As A Matter Of Law

The factual recitations in the State's brief which relate to this point are inaccurate, incomplete, and taken out of context (SB/2-4, 27-28). Mr. Madsen reasserts the factual recitations contained within his initial brief (MB/4-8, 29-32).

Cruz v. State (SB/28-29)

This Court in Cruz for the first time specifically discussed and defined the objective test for entrapment, i.e., "a matter of law for the trial court to decide". 465 So.2d at 521. Paraphrasing the Cruz objective test, entrapment occurs as a matter of law where the police activity (1) does not have as its end the interruption of a specific ongoing criminal activity; and (2) does

not utilize means reasonably tailored to apprehend those involved in the specific ongoing criminal activity. 465 So.2d at 522.

Concerning the first prong, the State argues that an assertion of "ongoing drug trafficking in South Florida" standing alone is sufficient. If true, then Marrero (MB/34) was erroneously reversed since that case was developed by the police aimed at the drug industry in Miami. The Marrero opinion did specifically focus upon the total lack of police information ". . . about any prior involvement of Marrero in such criminal activity". 493 So.2d at 466. Although drunken bums have been rolled in Tampa throughout the long history of that city, the courts in Cruz and Jones (MB/34) did not find this to be "specific ongoing criminal activity" under the Cruz test. Even if the phrase "specific ongoing criminal activity" is given an interpretation which extends beyond the activities of the specific defendant, it must be focused upon activity which is more specific than the generic "drug trafficking", "fencing stolen goods", "racketeering", "rolling drunken bums", etc. In the instant case -- which does not involve "specific ongoing criminal activity" in Broward County, South Florida, or even one of the United States -- the police simply turned informant Ball loose, without any supervision and minimal guidelines, on the

unsuspecting world (with the guillotine hanging over his head that he either procure convictions in drug cases involving at least ten kilograms of cocaine or be imprisoned for a mandatory minimum period of fifteen (15) years). There was absolutely no police focus on "a specific ongoing criminal activity".

The second prong of Cruz, involving inappropriate police techniques, was fully developed in Mr. Madsen's initial brief (MB/4-6, 29-32), and will not be repeated.

Vicarious Liability (SB/29-30)

First, unlike Perez, both Ball and Holden, according to their own sworn trial testimony, were knowing and cooperating agents of the police (MB/31-32). Both were personally attempting to entrap Mr. Madsen so Ball would have the benefit of his "substantial assistance" agreement with the Broward County State Attorney. This case is not like Acosta where the defendant was "three steps removed from the government's misconduct . . . ." 477 So.2d at 10.

III. ADMISSION OF TAPE RECORDING OF CONVERSATION IN DEFENDANT'S HOME VIOLATED MR. MADSEN'S RIGHT OF PRIVACY. (SB/15-21).

A. Introduction (SB/15)

With absolutely no support from this Court's June 25, 1987, order accepting jurisdiction (App. 18), the State with clairvoyance asserts that "[I]t is certain that discretionary jurisdiction was conferred by this

issue alone." (SB/15). This assertion is rejected as being without support from the record.

Further, Mr. Madsen objects to the attempted adoption of the State's brief on the merits in Hume, Case No. 66,704, on the ground that the State has totally failed to provide Mr. Madsen and his undersigned legal counsel with a copy of this brief (SB/15 note 1).

B. Merits (SB/15-20)

The responses to the State's arguments are found in App. G., pages 12-15, and herein incorporated.

C. Cumulative And Harmless (SB/20-21)

The responses to the State's arguments are found in App. G., pages 15-16, and herein incorporated.

IV. EXCLUSION OF DEFENSE WITNESS DENIED MR. MADSEN HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS. (SB/31-36).

A. Adequacy Of Richardson Hearing (SB/33)

Mr. Madsen does not contend that the inquiry by the trial court was inadequate. However, he does contend that it was clearly established at this hearing that no prejudice was incurred by the State as a result of the alleged defense discovery violation (MB/45-47).

B. Inappropriate Sanction (SB/33-35)

The responses to the State's arguments are found in App. G., pages 17-19, and herein incorporated.

C. Cumulative And Harmless (SB/35-36)

The responses to the State's arguments are found in App. G., pages 19-21, and herein incorporated.