IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL FLOURNOY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,713

FIRST DISTRICT COURT
OF APPEAL NO. BI-269

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Deputy

ON APPEAL FROM THE FIRST DISTRICT
COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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POINT I

THE TRIAL COURT ERRED IN EXCEEDING THE SENTENCING GUIDELINES

The Respondent, in his brief, in response to the certified question as to whether a quantity of drugs involved in a crime is a proper reason to support departure from the sentencing guidelines has ignored the fact that the Petitioner was not convicted of trafficking but attempted trafficking. The Respondent attempts to distinguish Banzo vs. State, 464 So. 2d 620 (Fla. 2DCA 1985) as a case where charges were never filed. The Petitioner would submit that the acquittal by the jury of the charge of trafficking should be even more persuasive as after having heard all the facts the triers of fact determined that the Petitioner did not possess the heroin and returned a verdict of guilty of attempted trafficking. The argument that Scurry vs. State, 472 So. 2d 779 (Fla. 1DCA 1985) which involved a conviction of second degree murder after an indictment for first degree murder, was vastly different from the offense charged is also inappropriate. The Petitioner was convicted of attempted trafficking and not trafficking. To exceed the guidelines based upon the fact that the defendant possessed 12.5 grams of heroin is inappropriate and contrary to Florida Rule of Criminal Procedure 3.701(d)(11) which states the reasons for deviating from the guidelines shall not include factors relating to the instant offense for which convictions have not been obtained. The respondent makes reference to the committee note and its consistency with rule 3.701(b)(3), "The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding

the offenses". The respondent is ignoring the language "convicted offense" in that the convicted offense was attempted trafficking which is not tantamount to possession as opposed to trafficking which is tantamount to possession. This Court in Tyner vs. State, 506 So. 2d 405 (Fla. 1987), reversed a departure sentence where the trial judge's reasons for departure was based upon tow murder charges that had been dismissed pursuant to stipulated facts. This Court in referring to Rule 3.701(d)(11) noted, "This language is plain. Judges may conisder only that conduct of the defendant relating to an element of an offense for which he has been convicted. To hold otherwise would effectively circumvent the basis requirement of obtaining a conviction before meting out punishment. Id. 406 The Petitioner was convicted of attempted trafficking and not of trafficking or possession of the heroin.The Respondent's argument also fails to take into consideration the fact that the quantity of heroin possessed has already elevated the offense from a felony of the third degree to a felony of a first degree based upon possession greater than a threshold amount of four grams. This in essence would result in a higher guidelines scoresheet. The Respondent also in page 21 of his brief makes a comment that each quantity of drugs departure must be viewed individually. To view each case on quantity of drugs separately to determine whether it can serve as a basis for departure would allow departure based on inherent components of an offense, and would sanction an arbitrary case - by - case - sentencing based on identical acts and thus frustrate the guidelines' purpose. This is precisely the point that the Petitioner would make and that is that if departure is allowed based on the quantity each case would be subject to review

by the appellate courts as to whether there had been an abuse of discretion and would be the antithesis of the stated purpose which is to obtain uniformity in sentencing 3.701(b). This would create one more point of confusion in a set of guidelines whose purpose was to promulgate uniformity yet have often promulgated confusion. One judge may feel that a quantity of 7.5 grams of heroin would justify departure where another one may figure that it necessitated 13.9 grams. The appellate courts would then be called upon to try to determine at what level departure was warranted as opposed to what level it would be unwarranted. In essence the courts would then circumvent the legislative intent by setting forth criteria involving in essence departure sentences or greater sentences than those contemplated by the legislature based upon the possession of a certain amount of a controlled substance. This is an untenable and impractical result.

The Respondent cites Vanover vs. State, 498 So. 2d 899 (Fla. 1986) in support of his position that quantity should serve as a basis for departure. A closer reading of Vanover indicates that one of the reasons for departure was that the defendant had intended to murder the victim. This Court referring to Florida Rule of Criminal Procedure 3.701(d)(11) stated that "reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convicitons have not been obtained". The Court further stated that "we must hold that the presence of that comment within the stated [grounds for departure] more than supports our view that the trial court, at the very least, found the higher crime, for which there was no conviction, a significant element in the determination

to depart from the presumptive sentence". Id. 901 The Court found this to be an invalid basis for departure. This is precisely the situation we have in the instant case in that the Defendant was not convicted of the higher crime of trafficking but of a lesser included offense of attempted trafficking. As in Vanover where it was an improper reason for departure for an offense for which the jury did not return a conviction the same premise holds true in the instant case and Vanover could be cited for the proposition that the quantity of drugs in the instant case would be an inappropriate basis for departure. Lerma vs. State, 497 So. 2d 736 (Fla. 1986), did not involve a situation where a jury had returned a verdict of acquittal and in fact this Court alluded to that fact in finding support for premeditation as a basis for departure in a sexual battery case. This Court noted that "our holding in Scurry was premised upon the fact that the jury explicitly rejected a finding of premeditation or planning by convicting Scurry of second degree murder rather than first. Unlike Scurry, Lerma was never acquitted of a crime involving premeditation. In the instant case the Petitioner was acquitted of a crime involving possession of 12.5 grams of heroin. In Casteel vs. State, 498 So. 2d 1249 (Fla. 1986) at 1253 this court noted that "since there is sufficient record support for finding both the victim and her son suffered emotional trauma as a result of this truly unfortunate and most atypical experience, the trial court did not abuse its discretion in considering psychological trauma to the victim and her son as a reason for departure" [emphasis added]. This Court expressly found the Casteel case to be an atypical case whereas the Petitioner would submit that the instant case is not an atypical drug case.

POINT II

WHETHER THE TRIAL COURT ERRED IN THE JURY INSTRUCTIONS TO THE JURY

The respondent devotes 53 pages to his brief yet not one word to address this court's recent decision State v. Antonio Dominguez, 12 F.L.W. 299 (June 19, 1987) which found the standard jury instructions on trafficking, to which the respondent alludes at page 26 of his brief, to be inadequate. The issue was precisely the one before the Court on which the respondent now stands mute. The Petitioner would submit that the reason for the lack of a reponse is obvious. The argument espoused by the Respondent as to the adequacy of the standard instructions has been rejected by this Court in Dominguez.

The Respondent argues that the Petitioner stated that when the heroin was discovered inside the suitcase and the discovery announced that the Petitioner stated, "It's mine." The Petitioner was never asked if the heroin was his but was told, "We have found a tan suitcase, a gray briefcase, and a airline ticket". The Petitioner allegedly replied, "It's mine". In fact, Detective Bean did not consider the Petitioner's ambiguous statement to be that significant even omitting it from the arrest and booking report (T. 249, 250). The Petitioner's knowledge of the nature of the substance or acknowledgment of it was far from clear, in fact, just the opposite is true. The trial court alluded to the circumstantial nature of much of the State's case in giving the circumstantial evidence instruction over their objection. (T. 456)

The omission of any response to the Court's recent decision in Dominguez by the respondent is clearly an admission and reversal is mandated.

POINT III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PETITIONER'S STATEMENT TO DETECTIVE BEAN IN EVIDENCE ABSENT MIRANDA WARNINGS

The Respondent argues that the arresting officers questioning of the Petitioner was in an attempt to comply with the procedural requirements for executing a search warrant. This was the erroneous basis upon which the trial court relied in denying the motion to suppress the oral statement of the Petitioner. The question of whether the search warrant had been properly executed was an issue that was not raised by the Petitioner nor argued to the Court at the time of the hearing. In any event, it is a question of law to be decided by the Court and not a question of fact to be decided by the jury. The execution of a search warrant and its propriety and impropriety is clearly a Fourth Amendment question which would be decided by the Court. The further statement that the Petitioner should have sought a limiting instruction is again inappropriate. A limiting instruction under the circumstances of the instant case would have been totally meaningless in that once the jury had heard that the Petitioner admitted living at the residence the damage was done. This argument would be analogous to allowing a confession to come before the jury and then instructing that they weren't to consider the confession as substantive evidence and were to disregard what they had heard. It would appear that the Respondent at page 32 of his brief is attempting to argue that the Petitioner was not in custody at the time of the statement. This argument is not borne out by the facts and, in fact, the assistant state attorney at trial stated, "Your honor, I don't have any quarrel with the fact that he

was in custody." (T. 176) This would preclude the Respondent from now arguing to the contrary. Respondent further argues that the trial court ruled that the question was not intended to elicit a confession and did not rise to the level of interrogation. (RB 32, 33) The Petitioner submits that the trial court's ruling was predicated upon the requirement that the officers had to determine who the occupants were prior to reading the search warrant to them and the question was admissable for that purpose (T. 177,178). This ruling was erroneous.

Lastly, the Respondent argues that the trial court's ruling comes to this Court with a presumption of correctness and will not be overturned showing an abuse of discretion. It is inconceivable that under the circumstances of the case at bar where a non-Mirandized statement is allowed into evidence that this could be viewed as anything but an abuse of discretion. The Respondent would submit that this was a poor excuse to parade inadmissible evidence before the jury under the guise of a procedural requirement and the Respondent's present argument is an effort to bolster a bad ruling by the trial court which should not be upheld.

POINT IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR DIRECTED JUDGMENT OF ACQUITTAL

The Respondent would rely on Brown vs. State, 412 So. 2d 420 (Fla. 1983), which sets forth literally a laundry list of drugs found throughout the home. The facts in Brown also are different in that the residence had been under surveillance for approximately one year during which period of time the Appellant had been seen entering and leaving the house on numerous occasions. In the instant case, other than at the time of the arrest, the Petitioner was never seen inside the residence by law enforcement officials. Also in Brown it was uncontroverted that he owned and lived in the house and had possessory rights. He received mail there, paid the household bills and was residing there immediately prior to the events in question. The Respondent would also note that the heroin in question was not in plain view but was concealed in an attache case inside a suitcase. This case is easily distinguished factually from Brown. Respondent also argues that Dixon vs. State, 343 So. 2d 1345 (Fla. 2DCA 1977), supports his position that the State had proven a case of constructive possession against the Petitioner. Dixon did not involve constructive possession and, in fact, dealt with probable cause for an arrest. Respondent's brief indicates on page 37 that Petitioner was staying at the apartment where the drugs were found. A string of cites to the record indicate merely that the structure was a duplex and no where referred to the Petitioner as having been residing there. In fact, the testimony is to the contrary that the Petitioner was living

with Mrs. Lewis next door and with her husband on April 23, 1985 (T. 355-357).

POINT V

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION TO COMPEL IDENTITY OF THE CONFIDENTIAL INFORMANT, OR IN THE ALTERNATIVE REQUEST FOR AN IN CAMERA HEARING

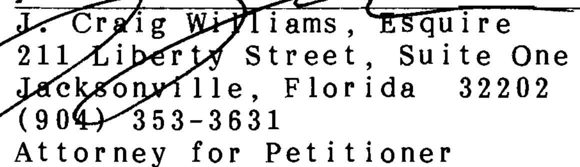
The Respondent argues in page 40 of his brief that "what the informant observed at a prior time was of no moment to the State's case against Petitioner". The search warrant was served on April 23, 1985, at approximately 2:45 on the same date that the informant had been in the residence (R. 27). This is clearly not a case where the informant's presence in the residence is far removed from the time of the arrest. Clearly at issue is whether the person who had made representations to the informant earlier is Harry Lewis or the Petitioner. Had the informant's identity been revealed and had they identified Harry Lewis as the person who had earlier made reference to selling heroin and placed him in possession of the drugs inside the suitcase then clearly this would have been important and material and relevant to the Petitioner's defense. It is interesting to note the State argues that with a constructive possession theory it didn't matter whether another individual had contact because under this theory it is irrelevant. If that were so then the two black females who were seen exiting the room at the time of the execution of the warrant would also have been charged with constructive possession. It is undisputed that Cassandra Guillespie lived at the residence and was sharing the bedroom where the drugs were found with someone.

CONCLUSION

The certified queston should be answered in the negative and the Petitioner's conviciton should be vacated and set aside and remanded for a new trial based upon the numerous trial errors that were overlooked by the First District Court of Appeals.

Respectfully submitted

WILLIAMS AND STAPP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Royall T. Terry, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, by mail this 19th day of August, 1987.

Attorney