IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

JEWEL MAE DAOPHIN,
Respondent.

CASE NO. 70,995

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's statement of the case and facts as a generally accurate account of the proceeding below with the following additions and clarifications:*

This cause proceeded to trial by jury on April 22, 1986. Honorable M. Daniel Futchs, Jr., presiding (R.12).

At the intermediate appellate level the Fourth District Court of Appeals reversed the decision of the trial court and remanded the case finding that the trial court erred in not instructing the jury as to simple possession of cocaine pursuant to Florida Statutes Section 893.13(1)(e) (1985) on the authority of its earlier decision in Butler v. State, 497 So.2d 1327 (Fla. 4th DCA 1986). The state moved for a stay of mandate and the Fourth District Court of Appeals denied this motion. The appellate court certified the following question to this Honorable Court as being one of great public importance:

> Must a jury be instructed on simple possession of cocaine pursuant to Section 893.13(1)(e), Florida Statutes, where the information charges trafficking by delivery [and only by delivery] in an amount greater than 400 grams pursuant to Section 893.135(1)(b)(3), Florida Statutes?

(copies of the opinion and order denying a Stay of Mandate are included in the Appendix to this brief.)

During the charge to the jury, the trial court gave the following instructions:

> Therefore, if you decide that the main

accusation has not been proven beyond a reasonable doubt you will next need to decide if the defendant's guilty of any lesser included crime.

Now, as to these lesser charges the lesser included crimes are as to Count I, they are charged with trafficking by delivering over 400 gram of cocaine as charged in the information.

The lesser included crimes include trafficking in cocaine by delivering over 200 grams but less than 400 grams.

The lesser included offense of delivering over 28 grams but less than 200 grams, and the lesser included offense of delivering 28 grams or less. That's the lesser included offenses as to Count I (R.556).

SUMMARY OF THE ARGUMENT

Simple possession of cocaine pursuant to Section 893.13(1)(e) Florida Statutes (1985) was not a Category I offense at the time of the Respondent's trial where Respondent had been charged by information with trafficking in cocaine in excess of 400 grams by delivery [and only by delivery] pursuant to Florida Statute Section 893.135(1)(b)(3) (1985).

Assuming, arguendo that the standard jury instructions at the time of trial did list simple possession as a Category I offense, the standard jury instructions had been incorrect since 1983 and have been implicitedly overruled and corrected by this Honorable Court in its recent amendments to these instructions. Any reliance on the prior jury instructions was misplaced since the standard jury instructions do not necessarily state accurately the law of Florida. Simple possession of cocaine was not intended to be a Category I offense of trafficking in cocaine by delivery.

At most, simple possession of cocaine would be a Category 2 offense of trafficking in cocaine by delivery. However, it is not a Category 2 in the present case because simple possession of cocaine does not conform to the pleadings because the accusatory pleadings charged Respondent with trafficking in cocaine by delivery thus the permissible lesser offense would be limited to simple delivery of cocaine and not simple possession.

If error did occur below by not giving the jury instruction on simple possession such error was harmless. The jury was instructed as to the lesser included offense of delivery in cocaine which is a second degree felony but still convicted Respodent of trafficking in cocaine by delivery which is a first degree felony. The jury had an opportunity to exercise its pardon power and rejected it thus failure to instruct on a third degree felony offense which is what simple possession is was harmless error.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON SIMPLE POSSESSION OF COCAINE PURSUANT TO FLORIDA STATUTES SECTION 893.13(1)(e) WHERE THE INFORMATION CHARGED TRAFFICKING BY DELIVERY [AND ONLY BY DELIVERY] IN AN AMOUNT GREATER THAN 400 GRAMS PURSUANT TO FLORIDA STATUTES SECTION 893.135(1)(b)(3).

The Respondent has argued at the intermediate appellate level that possession of cocaine pursuant to Florida Statutes 893.13(1)(e) (1985) is the next immediate lesser offense of trafficking in cocaine pursuant to Florida Statutes 893.135(1)(b)(3) (1985) (AB. 11,13). Possession of cocaine pursuant to Section 893.13(1)(e) is as follows:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practioner or pursuant to a valid prescription or order of a practioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substances except as otherwise authorized by this chapter. Any person who violates this provision is guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

Trafficking in cocaine pursuant to Section 893.135(1)(b)(3) states as follows:

> Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or contructive possession of 28 grams or more of cocaine as described in s.893.03 (2)(a)(4) or of any mixture 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 three calendar years and to pay a fine of $50,000.00.
>
> 2. is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years and to pay a fine of $100,000.00.
>
> 3. is 400 grams of more, such persons shall be sentenced to a mandatory minimum term of imprisonment of fifteen calendar years and to pay a fine of $250,000.00.

Respndent's argument at the intermediate appellate level is faulty because Respondent has relied on erroneous case law in formulating said arguments.

Respondent has relied on Butler v. State 497 So.2d 1327 (Fla. 4th DCA 1986) in arguing that possession of cocaine is a Category 1 lesser offense to trafficking in cocaine by delivery in excess of 400 grams. Butler was erroneously decided by the Fourth District Court of Appeals. In holding that possession of cocaine is a Category 1 lesser included offense of trafficking in cocaine, the Fourth District Court of Appeals relied upon Weller v. State, 501 So.2d 1291 (Fla. 4th DCA 1986), review pending in Florida Supreme Court, State v. Weller, Case No. 69,304 and DiPaola v. State, 461 So.2d 284 (Fla. 4th DCA 1985).

Butler was charged by information with delivery of cocaine in an amount greater than 28 grams but less than 200

grams by delivery. In making its decision, the court relied on Weller and DiPaola However, Weller and DiPaola does not show in what manner defendant was charged with trafficking in cocaine. This is of crucial importance because there are five ways under the Statute to be charged with trafficking in cocaine. The different ways are as follows:

1. Sale;
2. Manufacturing;
3. Delivery;
4. Bringing
5. Knowingly in actual or constructed; possession.

In the case at bar, Respondent was charged by information of trafficking by delivery in an amount of 400 grams or more (R.598). The jury instructions in effect at the time of the Respondent's trial does not list possession of cocaine as a Category 1 offense when the offense charged is trafficking in cocaine by delivery. Florida Standard Jury Instructions Criminal Cases 12 Ed. 1981, page 274 is as follows:

CHARGED OFFENSES
Trafficking in cocaine
893.135(1)(b)

CATEGORY I
893.13(1)(a), if sale, manufacture, or delivery (emphasis added) is charged
Bringing cocaine into state
893.13(1)(d)
Possession of cocaine
893.13(1)(e)

This jury instruction clearly lists Florida Statutes Section 893.13(1)(a)(1985) as the Category I offense. Section

893.13(1)(a)(1985) is as follows:

> Except as authorized by this chapter and Chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to 1. a controlled substance named or described s. 893.03(1)(a),(1)(b),(1)(d),(2)(a) (emphasis added) or (2)(b) is guilty of a felony of a second degree, punishable as provided in s.s.775.082, 775.083, 775.084.
>
> Florida Statutes Section 893.03(2)(a)(4) (1985) is as follows: cocaine (emphasis added) or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine.

Thus, cocaine is the offense named in subsection (2)(a) of section 893.13. This offense is the Category I offense of trafficking in cocaine by delivery. Even in the present case, the Fourth District Court of Appeals conceded that the schedule of lesser included offenses adjacent to trafficking in cocaine by delivery (emphasis added) which is found in the Standard Jury Instructions in Criminal Cases would not appear under Category I to require an instruction on simple possession if the charging document only alleges delivery (emphasis added). Daophin v. State, 12 F.L.W. 1877 (Fla. 4th DCA August 5, 1987). Thus, the standard jury instruction language is clear that Section 893.13(1)(a) is the Category I offense for trafficking in cocaine by delivery and not simple possession under Section 893.13(1)(e). Recent evolving case law points in this direction.

A significant difference exists between Section 893.135(1)(b) and Section 893.13(1)(e). In order for a person to commit the offense of trafficking it is not necessary that he be in actual or contructive possession of a controlled substance. Munroe v. State, 12 F.L.W. 1935 (Fla. 1st DCA August 11, 1987).

However, assuming arguendo that this Honorable Court reads the standard jury instructions at the time of Respondent's trial as having simple possession as a Category I lesser included offense, Petitioner would point out that the Standard Jury Instructions in Criminal Cases were amended on June 5, 1987. The Florida Bar re Standard Jury Instructions - Criminal, 508 So.2d 1221 (Fla. 1987).

CHARGED OFFENSES

Trafficking in cocaine
893.135(1)(b)

CATEGORY I
none

CATEGORY 2

Attempt, except when delivery is charged
893.13(1)(a) if sale, manufacture or delivery (emphasis added) is charged.
Bringing cocaine into state - 893.13(1)(d).
Possession of cocaine 893.13(1)(e).

Id., at 1234.

Under the new standard jury instructions there is no more Category I offenses. The prior Category I offenses have been moved over to Category 2. Justice Shaw's special concurring

opinion stated that:

> The schedule of lesser included offenses has not been reviewed and revised to conform it to Section 775.021(4) Florida Statutes (1976), as amended thereafter by Chapter 83-156, Section 1, Laws of Florida. Section 775.021(4), Florida Statutes, (1983) (emphasis added) abrogates the single transaction rule by mandating that there be separate convictions and sentences for all separate offenses occurring in the course of one criminal transaction or episode. This statute, as amended in 1983, also mandates that offenses are separate if each offense requires proof of an element not present in the other and that this determination will be based exclusively on the statutory elements of the offenses, not the accusatory pleadings or the proof adduced at trial. The effect of the 1983 change was to define and limit lesser included offenses to those offenses whose statutory elements are completely subsumed within the greater charged offense, i.e., those which are not separate offenses (emphasis added). This requires that two basic changes be made to the schedule of lesser included offenses. First, because permissive lesser included offenses (Category 2) are based on the accusatory pleadings and proof at trial and their statutory elements are, by this court's definition, not subsumed within the charged greater offense, they are, by legislative definition, separate offenses. Consequently, Category 2 offenses, if truly permissive, cannot be instructed on as lesser included offenses and the entire category must be deleted from the schedule of lesser included offenses.
>
> Id., at 1235-1236.

Florida Statutes Section 775.021(4)(1983) states as follows:

> Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon convictions and adjudication of guilt, shall be sentenced separatly for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleadings or the proved adduced at trial.

The present amendments are intended to make the Standard Jury Instructions in Criminal Cases conform to Section 775.021(4)(1983).

In essence, this Court is stating that the standard jury instructions in criminal cases have been incorrect since 1983 and is now implicitedly overruling those jury instructions.

Any reliance on the prior jury instructions was misplaced since the standard jury instructions do not necessarily state accurately the law of the State of Florida. Thompson v. State, 378 So.2d 859 (Fla. 1st DCA 1979). It is clear that simple possession of cocaine was not and is not intended to be a Category I lesser offense of trafficking in cocaine by delivery.

At most, simple possession of cocaine would be a Category 2 offense of trafficking in cocaine by delivery. However, a Category 2 permissive lesser included offense is based on the accusatory pleadings and proof at trial. Florida Bar re Standard Jury Instructions - Criminal 508 So2d. 1221, 1235-1236

(Fla. 1987) (Shaw, J., specially concurring).

In the case at bar, the information alleged that Respondent trafficked in cocaine in excess of 400 grams by delivery (R. 598). Thus, the permissible lesser offense (Category 2) would be limited to simple delivery of cocaine under Section 893.13(1)(a) and not simple possession of cocaine. The offense must conform to the pleadings and the pleadings explicidly alleged that Respondent trafficked in cocaineby delivery. Simple possession could be a Category 2 offense if trafficking by possession was the charge. Since trafficking in cocaine by possession was not the charge simple possession cannot be a lesser included offense.

Since that most, simple possession of cocaine could be a Category 2 offense, Petitoner submits that any error that may have occurred below, if at all in not giving the requested jury instruction was harmless.

At bar, the jury was instructed as to trafficking in cocaine by delivery and the lesser included offense of delivery of cocaine pursuant to Section 893.13(1)(a), a second degree felony (R.554, 556). The jury came back with a verdict of guilty of trafficking of cocaine by delivery (R.579, 599). Simple possession under Section 893.13(1)(e) is a third degree felony. Hence, the judge refused to instruct in a lesser included offense that was two steps removed from the offense for which Respondent was convicted. State v. Abreau, 363 So.2d 1063 (Fla. 1978).

In the instant case, it is clear that the jury was given a full opportunity to exercise its pardon power and rejected a pardon, as in this instance where despite being given an instruction on the lesser included offense of delivery, one step below the crime charged, the jury convicted Respondent of the greater offense. Therefore, the court's failure to instruct on simple possession, two steps removed, was harmless.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the State respectfully requests that the decision of the Fourth District Court of Appeal be reversed and remanded with directions that the judgement and sentence entered by the trial court be affirmed.

Respectfully submitted,

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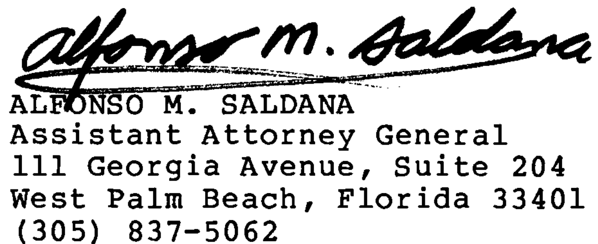

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnshied by courier to LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401 this 5th day of October, 1987.

OF COUNSEL