IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 70,995

JEWEL MAE DAOPHIN,

Respondent.

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 did the Petitioner's Initial Brief.

The following symbol will be used:

"RB" Respondent's Brief on the merits.

STATEMENT OF THE CASE AND FACTS

Petitioner will adopt the statement of the case and facts presented in petitioner's initial brief on the merits to this Honorable Court.

SUMMARY OF THE ARGUMENT

The issue in this case is whether the trial court erred in not instructing the jury as to a Category I necessarily included lesser offense.

In order for a person to commit the offense of trafficking in cocaine by delivery it is not necessary that the person be in possession of the cocaine.

The trial court acted properly in refusing to instruct on simple possession of cocaine as the necessarily included lesser offense of trafficking in cocaine by delivery.

The judgment and sentence of the trial court must be reinstated and affirmed.

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.

In the present case, question that was certified to this Honorable Court was as follows:

> Must (emphasis added) 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?

The use of the word "must" in the question demonstrates that what is at issue in this case is whether simple possession of cocaine is a Category I lesser included offense, not whether it is a Category II permissive lesser offense. Only the failure to instruct on Category I lesser offense is per se reversible error. State v. Abreau, 363 So.2d 1063 (Fla. 1978).

At the intermediate appellate level Respondent argued that the requested jury instruction was a Category I lesser included offense. The thrust of Respondent's brief is that the facts supported the requested jury instruction. However, the facts are only relevant as far as a Category II lesser offense is concerned. We are not concerned with a Category II lesser, we are concerned with a Category I lesser. Petitioner only

discussed Category II's for the sake of completeness of the argument, not because they were at issue. Petitioner will only respond to what he believes are Respondent's Category I arguments and will rely on his initial brief for any discussion of the Category II offenses.

Respondent argues that one can not deliver that which one does not possess thus possession is a necessary (Category I) component of the crime of delivery and of trafficking by delivery (RB 16).

Respondent errs on this point because in order for a person to commit the offense of trafficking it is not necessary that he be in actual or constructive possession of a controlled substance. Munroe v. State, 511 So.2d 415, 419 (Fla. 1st DCA 1987). As an example it is clear that one could deliver thru a third party without even having been in actual control of the delivered goods. Therefore, it is clear that the trial court did in no way err in refusing to instruct the jury on possession of cocaine as a Category I lesser of trafficking. This result was also reached by the Fifth District Court of Appeal in Brown v. State, 483 So.2d 743 (Fla. 5th DCA 1986).

The actions of the trial court were correct and the decision of the Fourth District Court of Appeal is clearly erroneous.

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 judgment and sentence entered by the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded to Mr. Louis G. Carres, Esquire, Assistant Public Defender, The Governmental Center, 9th Floor, 301 N. Olive Avenue, West Palm Beach, FL 33401 this 20 day of November, 1987.

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