IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
     Petitioner,
vs.
JEWEL MAE DAOPHIN,
     Respondent.

CASE NO. 70,995

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the trial court, and she was the appellant in the District Court of Appeal. She will be referred to in this Court as respondent.

The record on appeal is consecutively numbered. References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The respondent has reviewed the Statement of the Case and Facts in petitioner's brief and finds it to be accurate but incomplete. The petitioner's statement of the facts does not contain a factual recitation that is complete enough for review of the issue raised in this Court. Therefore, the following statement of the case, and statement of the facts, is set forth herein. The issue presented for this Court to resolve was certified by the District Court of Appeal as follows:

> 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?

The petitioner filed a notice to invoke the jurisdiction of this Court on grounds of express and direct conflict. Respondent has a motion to dismiss for lack of jurisdiction pending in this Court.

Respondent, JEWEL MAE DAOPHIN, was charged by information with trafficking in cocaine by delivery in excess of 400 grams or more contrary to Section 893.135(1)(b)(3) and Section 893.03(2)(a)(4), Florida Statutes, and with conspiracy to traffic in cocaine contrary to Section 893.1354, Section 893.135(1)(b)(3) and Section 893.03(2)(a)(4), Florida Statutes (R-598). In addition, Gary Steffey, Ralph Pennington, Peter Voto and Samuel

Swiney (respondent's brother) were also charged with the above-cited offenses (R-598). Swiney was further charged with possession of cocaine (R-598) and his case was severed from that of the other co-defendants.

The state's case against respondent and her co-defendants was as follows:

Detective Nickmeyer of the Hollywood Police Department's Vice Intelligence and Narcotics Unit (R-205) made contact with a confidential informant that advised Nickmeyer of a person who could sell him large quantities of cocaine (R-206). The confidential informant arranged a meeting between Detective Nickmeyer and co-defendant Steffey (R-206) on April 7, 1985 (R-207). The confidential informant had informed Steffey that Detective Nickmeyer wanted to purchase four kilos of cocaine (R-208). During the discussion, Steffey handed Detective Nickmeyer a piece of paper with the figures "$34,000" times four and a total of "$136,000" (R-209), and explained that the "$34,000" was the price of one kilo of cocaine (R-211) and "$136,000" was the total for four kilos (R-212).

Detective Nickmeyer and the confidential informant met again with Steffey on April 16, 1985, at which time the conversation was audio taped by means of a unitel listening device and videotaped (R-214-215). After a lengthy conversation (R-215), they went out to the parking lot and Detective Nickmeyer showed Steffey a briefcase in the trunk of his car which contained $102,000 (R-219). Detective Nickmeyer testified that he did this in order to "show him [Steffey] I was for real" (R-219).

On April 19, 1985, Detective Nickmeyer and the confidential informant met with Steffey to further discuss the details of the deal (R-220-221).

On May 2, 1985, Detective Nickmeyer went to Steffey's bird shop to formulate a plan (R-225), however, Steffey informed him that he had "just missed the people, that the people with the cocaine were there and they had gone" (R-226). Steffey never mentioned the names of the "people with the cocaine" (R-227).

During the course of Detective Nickmeyer's dealings with Steffey, they had 20 phone conversations, some of which were recorded (R-229), in which discussions centered around the mechanics of the deal as well as the amount of cocaine Detective Nickmeyer would purchase (R-223), which fluctuated between four and seven kilos (R-223,235). At one point Steffey told Nickmeyer, "It's going to be you and I and just one girl" (R-277). When questioned about his statement, Steffey admitted that the reference to "one girl" was not to respondent (R-411), but rather to whether or not "[he] had a girl. If not, Rubin [confidential informant] could produce us one" (R-412).

The deal was set for May 15, 1985, at Bennigan's Restaurant, 5181 Sheridan Street in Hollywood, however, Steffey failed to show due to the fact that "the people that had the cocaine --were bringing the cocaine, were involved in some kind of accident" (R-239). The meeting was rescheduled for the following day at the same location (R-66-67,72).

On May 16, 1985, Detective Nickmeyer arrived in the parking lot of Bennigan's at approximately 5:00 p.m. (R-241). Shortly thereafter, co-defendant Steffey pulled up in a blue Chevy truck and told Detective Nickmeyer that the cocaine was in another vehicle that was "close by" (R-241-242). Detective Nickmeyer testified:

> I [Detective Nickmeyer] said, "I thought you [Steffey] were coming by yourself." And he [Steffey] said, "Well, don't worry about it." I said, "I'm not meeting anyone else." And he said, "That's no problem."

(R-244).

A maroon over white Dodge Aspen (R-245) driven by co-defendant Pennington and occupied by co-defendant Voto (R-160-161) parked one aisle away from Nickmeyer's car (R-242). Steffey went over to the Dodge, and leaned into the passenger side (R-245). The Dodge left and Steffey told Detective Nickmeyer that "he thought the product, meaning the cocaine, was in that car, but apparently it had been put into another car" (R-246). Steffey told Detective Nickmeyer that he had put the cocaine in the pink pillowcase in the Dodge (R-363) and did not know why the cocaine was switched to another car (R-364). Steffey said, "I don't know why he got him involved" (R-364). Detective Nickmeyer again told Steffey that "it was supposed to only be him [Steffey] and I [Det. Nickmeyer] do the deal, and now there were two other people and himself, so there were three people. . ." (R-247).

The Dodge returned to the Bennigan's parking lot, Steffey once again spoke to the people inside, and the Dodge left (R-247-248).

Swiney drove up in a white Buick Regal [in which respondent was a passenger], put down the driver's window, Voto leaned inside and spoke with Swiney for approximately two minutes (R-160,185-186). Pennington drove up in the Dodge, Voto got inside and the Buick followed them to the Publix's parking lot (R-160-161).

Pennington approached Nickmeyer and told him "it's in the white car over there" (R-254), referring to the car occupied by Swiney and respondent (R-255). Detective Nickmeyer and Steffey walked over to the passenger side of the Buick (R-255), whereupon respondent picked up a pink pillowcase from the floor of her seat, opened it and handed it to Detective Nickmeyer (R-256). At that point, Detective Nickmeyer gave the signal for the take-down teams to move in (R-257). Swiney attempted to leave but was blocked in by the undercover surveillance van driven by Detective Martell of the Hollywood Police Department (R-139).

Randy Hilliard, a forensic chemist with the Broward County Sheriff's Office, testified that the substance contained cocaine and weighed 1,008.2 grams (R-113).

The state rested (R-387).

Respondent moved for a judgment of acquittal (R-384) adopting the specific grounds argued by co-defendant Steffey and Voto (R-376-383) as requested by the court, which was denied (R-384). She then renewed her prior motion for mistrial (R-301) due to Detective Nickmeyer's comments referring to "Mr. Steffey's organization," which was again denied (R-384-385).

Co-defendant Steffey took the stand admitting that he was involved in this drug transaction (R-400) and was to receive $1,500 compensation (R-401). Steffey testified that he had spoken to Pennington some four to five days prior to the arrest and Pennington agreed that he would produce the cocaine (R-409). Steffey met with Pennington and Swiney on the morning of the arrests to discuss the cocaine that was to be used in the deal with Detective Nickmeyer (R-408). Later that day, the cocaine was produced and Voto "sampled it" (R-412). Steffey further stated that, "I really never seen Ms. Daophin until the window was cranked down in the car" (R-406).

When asked if respondent said anything to him about the cocaine, co-defendant Voto stated "absolutely not" (R-422).

Co-defendant Pennington testified that the meeting on the morning of the arrest between himself, Swiney and Steffey concerned a jewelry transaction.

> Q Did he [Steffey] tell you where he was going to be getting the jewels from?
>
> A He did say they were coming up from Miami.
>
> Q Did he say who was going to bringing them?
>
> A He said that Sam was going to bring them up, Mr. Swiney.

(R-443).

Respondent testified on her own behalf. She went to her mother's house on the morning of May 16, 1985, and her brother, Sam Swiney, was there (R-456). Swiney wanted to borrow respondent's car for the day because he had something to do, however,

he did not tell her what it was (R-457). She told him no "because he takes your car and don't bring it back" (R-456) and because she had errands to do before her husband came home from work that day (R-456). She agreed, however, to let him have the car only if she went with him (R-456).

They drove to some rummage sales where she purchased two bicycles, a stereo, an ice chest and some clothes (R-457), which were found by the police in the search of the Buick after her arrest (R-129-130). They then proceeded to drive to Pennington's house where Swiney met with Steffey and Pennington and were later joined by Voto (R-458). Respondent remained in another room during this meeting (R-458). Swiney told respondent that he had to follow Pennington (R-459). Respondent "felt something was happening, but didn't know at the time what was happening" (R-460). When she asked, her brother told her he was going to sell drugs with Steffey (R-460).

> . . .I told him I was scared, I don't want no part of this, let's go. So he said it wasn't going to take long, it gonna be over fast. I said, "No." So I know that my brother was in a lot of financial problems and I said, "You hurry up and get this over so we can go because my husband want me to come home and I gotta go home to my kids."

(R-461).

After driving around for some time, Swiney parked in the Publix's parking lot where he met up with Pennington, Steffey and Voto (R-461-462). Respondent testified:

> Okay, the policemen were coming to the car so my brother was telling them, trying to say, you know, come around to his side of the car. So they came around to my side of the car my brother said, "show him the bag," like that.

> And I said "What?" And he said, "Look inside the bag and show him what inside the bag." And so I picked the bag up and I opened it up and I showed it to him.

(R-462).

Respondent again told her brother, "I'm scared, let's go. I don't want to have nothing to do with this." (R-463). At that point, Detective Martell blocked the car as Swiney was attempting to leave (R-463). She never wanted to, nor intended to participate in the transaction (R-463). She admitted that she handed the pillowcase to Detective Nickmeyer and knew that it contained cocaine or some substance that appeared to be cocaine (R-464).

Respondent rested (R-468) and renewed her motion for judgment of acquittal, motion for mistrial and all previous motions (R-470) which were again denied (R-471).

During the state's closing, respondent moved for mistrial on the basis of the state's use of a fake accent when referring to her testimony, which was again denied (R-523).

Respondent joined in co-defendants Voto's and Pennington's request that the jury be instructed on the lesser-included offense of possession.

> THE COURT: I don't think the lesser-included of possession is given in conjunction with delivery.
>
> MR. FINKELSTEIN [Counsel for co-defendant Voto]: I would need to make the request, but there really isn't delivery of cocaine of less than 28 grams.
>
> MR. SLATER [State's Attorney]: Sure, that's what simple possession is.
>
> MR. FINKELSTEIN: Isn't that called delivery of cocaine?

THE COURT: In the instruction of trafficking I tell them all the penalties which is less severe.

MR. SLATER: That's why it's that way.

MR. FINKELSTEIN: I will withdraw the objection. It's fair enough.

MR. WRUBEL [Counsel for co-defendant Pennington]: I joined in Mr. Finkelstein's objections, however, I really strongly believe that the lesser-included offense of possession of cocaine should be there. At this point what we have is somebody being present supposedly opening the bag and showing it. I think there is a question of fact as to whether or not there is delivery and you may not have realized it before, but you did grant it originally.

THE COURT: Overruled.

MR. JULIAN: I would probably ask for it for Miss Daophin. She opened the bag, he looked in and touched it to make sure it was cocaine and then he made the signal.

MR. FINKELSTEIN: Adopted by Voto, the same.

(R-549-550). The court denied giving the simple possession instruction (R-550).

The jury returned its verdict finding respondent guilty as charged as to Count I, trafficking in cocaine by delivery of 400 grams or more, but not guilty as to Count II, conspiracy to traffic in cocaine (R-580,599). A Presentence Investigation was ordered (R-583-584).

On May 23, 1986, the trial court sentenced her to the mandatory minimum 15 years and a $250,000 fine was imposed (R-594,601).

Notice of appeal (R-603) and statements of judicial acts to be reviewed (R-604-605) were timely filed. The Fourth District

Court of Appeal reversed respondent's conviction for a new trial due to the refusal of the trial court to instruct on possession as a lesser-included offense. The question was certified as one of great public importance. The petitioner filed for review on the ground of expressed and direct conflict of decisions. No conflict has been asserted in the petitioner's brief. Respondent doubts this Court's jurisdiction and has filed a motion to dismiss.

SUMMARY OF ARGUMENT

The question certified is whether possession is included within delivery under the drug trafficking act.

Respondent urges that the question is to be answered in the affirmative.

Factually, delivery cannot occur as it is defined in Chapter 893 without some dominion and control over the item that is delivered. This is to be contrasted to sale, when one can be a middleman or broker to a sale. One must "transfer" to deliver, thus marking the distinction that necessitates possession for there to be a delivery.

Cases relied upon herein support respondent's position, and the facts involved in this case at trial show the appropriateness of the requested possession instruction.

Possession is either always included or permissively included in every delivery allegation due to the transfer component of the offense. The decision below should be approved.

ARGUMENT

POINT INVOLVED

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE REQUEST FOR A JURY INSTRUCTION ON POSSESSION OF COCAINE, THE NEXT IMMEDIATE LESSER-INCLUDED OFFENSE OF TRAFFICKING IN COCAINE BY DELIVERY?

The facts of this case upon which this issue is based are that the respondent loaned her car to her brother (R-456-457). She did not trust her brother to bring the car back at the time he promised because her brother had taken their mother's car and had kept it for several days (R-457-458). Respondent did not know the nature of her brother's need for the car although she did know that he had been in some financial difficulties (R-456-458). After driving with her brother for a while it became clear that he was involved in something, but she did not know what (R-460). When she did ask her brother what was going on her response to him was "no" (R-461). After being cajoled by her brother she did tell him to hurry up and get it over with (R-461). At the place where her brother was to deliver the cocaine, the agent came to her side of the car and she acceded to her brother's request to show the contents of the bag to him and to give him the bag (R-462-463).

These facts show an unwilling passenger being led involuntarily into momentarily handling the bag containing the cocaine. The unwilling nature of her presence during the transaction which her brother had engineered, and about which she knew nothing

until moments before it took place, is insufficient to overwhelmingly establish delivery or the intent to participate in the delivery of the cocaine. Therefore, the instruction that respondent requested, on possession of cocaine as a lesser offense included within the charge, was factually appropriate in this case and was legally the only next lesser offense that would have come under trafficking by delivery. The trial court instructed on several categories of trafficking by delivery, each of which involved lower amounts than that actually involved. Thus these were not actual lesser-included offenses because there was no evidence whatsoever to support any theory that the bag contained less than 400 grams of cocaine. Since the jury was instructed only upon trafficking by delivery, in varying amounts, the next immediate lesser-included offense was possession.

The allegation in this case was specifically laid as trafficking by delivery, and there was no proof at trial that respondent had any part in any transaction other than having been directed by her brother to pick up the bag and look at it to show it to the officer and to hand it to him. This involuntary and momentary possession may be sufficient to convict her of possession, because she knew what was in the bag at the moment she picked it up and looked at it, but it leaves considerable room for doubt that she was a willing and knowing participant to the delivery. She could have either handed it to the left to her brother or handed it to the right outside the car window to the agent. She could have done little else than drop the bag in front of her and tell her brother to pick it up. But this case

was tried with the jury having no alternative than to convict of trafficking, and the jury had no basis upon which to convict of anything lower than trafficking in an amount exceeding 400 grams because there was no evidence of any lesser quantity. Thus, a jury instruction on possession was of utmost importance to a fair trial of respondent's claim of innocence to the delivery charge.

Respondent submits that a person charged with trafficking by delivery must necessarily possess what it is alleged he or she has delivered. Delivery is contained as one of a list of the trafficking statute of various methods by which the crime may be committed. Sale, or possession, of specified quantities are also in the list. The difference between sale and delivery is shown by the decision of this Court in State v. Dent, 322 So.2d 543 (Fla. 1975), which held that one can be convicted of sale without ever having been in possession. In Dent, this Court held that when a sale would not have occurred but for the actions of the defendant, the defendant who acted as a broker or a middle man can be convicted of sale.

Delivery is defined in Section 893.02, Florida Statutes (1985) as follows:

> (5) 'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship.

The word "transfer" is the key active word in the definition of deliver or delivery. The transfer may be actual, constructive or attempted, but it must be from one person to another. One may be convicted of delivery whether or not there is an agency

relationship involved. The above definition of delivery distinguishes delivery from sale as interpreted in Dent. One cannot deliver that which one does not possess. Thus possession is a necessary component of the crime of delivery. As such, it is a category one lesser-included offense and must be instructed upon when requested by the accused who is on trial for delivery.

The Fourth District Court of Appeal had previously held in DiPaola v. State, 461 So.2d 284 (Fla. 4th DCA 1985), and in Butler v. State, 497 So.2d 1327 (Fla. 4th DCA 1976), that possession is a category one, lesser-included offense of trafficking. Butler expressly dealt with trafficking by delivery. The district court correctly applied its prior decisions in reversing the present case for a new trial. There is no conflict asserted by the petitioner among the districts, or with decisions of this Court, on this question of law.

Respondent submits that the decision below is correct because delivery necessarily includes some dominion and control over the object delivered. Whether the person knowingly delivers contraband is a separate issue addressed by the specific terms of Section 893.135, Florida Statutes, which includes the requirement of "knowingly." Nevertheless, one may not knowingly deliver without being in some actual dominion and control of that which is delivered. This is what distinguishes delivery from sale. One may sell, or be a party to the sale, without ever having actual possession of the item being sold. But one may not deliver the item without having it in one's actual or constructive dominion and control, and thus delivery is different in this

very real sense that is crucial to a fair trial of respondent's case. Thus the refusal of the trial court to instruct on possession in this case was a reversible error because it prejudiced the right of the respondent to try her defense before the jury, which was that she momentarily may have possessed the item but that she was not a party to the transaction itself since she was merely a fleeting possessor as her brother consumated his planned delivery to the undercover agent. He was the one who planned to transfer, but she merely held it to the window, or at least that is the jury question that should have been tried in this case.

Respondent respectfully submits that the drug trafficking statute is not designed to ensnare sisters of brothers who are drug dealers. But that is what it did in this case because she was an unwilling participant in the first place, as is shown by unrefuted testimony at trial. Secondly, she had no knowledge of what the actual transaction was. She only knew at the last moment that it involved the cocaine and that her brother was going to give it to someone else. If she had been sitting in the back seat and her brother had reached across and handed it out of the passenger side window, she would not have been charged with delivery because she never delivered it, she never handled it or possessed it. She could not have been a party to the delivery without having been a prior knowing aider and abettor. Thus the

delivery on her part necessarily involved her momentary possession, and the trial court erred, and the district court was correct, and this Court should approve the decision of the district court.

A recent decision of this Court which underscores respondent's position in this case is the decision in Carawan v. State, 12 F.L.W. 445 (Fla. September 3, 1987), involving when multiple convictions and sentences may be entered for commission of a single act that violates several criminal statutes. This Court receded in part from its holding in Rotenberry v. State, 468 So.2d 971 (Fla. 1985), and this Court stated:

> While we agree that sale of drugs can constitute a separate crime from possession, our analysis in this opinion compels us to conclude that a defendant cannot simultaneously be convicted of both sale and possession in addition to trafficking. Logic dictates that trafficking in illegal drugs as defined in the statute necessarily encompasses either or both of the evils addressed by the statutes outlawing sale and possession, since the manifest purpose of the trafficking statute was to penalize those who distribute large quantities of drugs.

Respondent's position here is consistent with Dent, with the decision of Carawan, and with logic because the respondent could not have, and factually did not, deliver any contraband without her momentary possession. It is submitted that delivery always encompasses some possession, by constructive or actual dominion and control, and that possession must be instructed upon when requested as a lesser-included offense that is necessarily encompassed by delivery. If there are cases, which respondent does not believe exist, where one may deliver without having some

dominion and control, then this case is one where the dominion and control are essential to the delivery. Under the permissive included lesser offense category, one must look to the charge and the evidence. In doing that in this case possession is equally involved since there was no delivery without her fleeting possession since she was not a party, according to the evidence, to any of the prior arrangements concerning the delivery. Respondent believes that possession properly belongs under category one as a necessarily concluded lesser offense, but if this Court should disagree and believe that it is only sometimes involved, it was still correct for the District Court of Appeal to reverse and remand for a new trial in this case because it was a permissive lesser offense under the facts. Since delivery by its terms includes the transfer, it necessarily provides the allegata of possession in an information or indictment charging delivery. Thus, the foundation for finding a category two, or permissive lesser offense, exists in this case. However, respondent maintains that possession is always involved and is a necessarily included offense when delivery is charged. Under either view, the district court decision was correct, and should be approved.

CONCLUSION

Wherefore, based upon the facts and authorities set forth above respondent respectfully requests that this Court either discharge jurisdiction or approve the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to ALFONSO SALDANA, Assistant Attorney General, Counsel for Petitioner, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 27th day of October, 1987.

Louis G. Carres

LOUIS G. CARRES
Assistant Public Defender