THE SUPREME COURT OF FLORIDA

RICHARD A. DOWNING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 71,629

REPLY BRIEF OF PETITIONER DOWNING

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

PRELIMINARY STATEMENT

References to the record on appeal will be made by the designation "RN" followed by the appropriate page number. References to the State's Brief will be made by the designation "SB" followed by the appropriate page number.

References to the Appendix submitted with the Brief will be made by the designation "APP".

REPLY TO THE STATE'S POSITION ON THE FACTS

The State seems to take issue with Petitioner's Statement of the Facts and states that in essence the facts of the matter are more objective set out in the lower Court's written decision in Downing v. State and in Munroe v. State, 511 So.2d 415 (Fla. 1st DCA 1987) (SB-3).

The Statement of Facts in the Brief before this Court is essentially the exact same facts in the Briefs before the First District Court of Appeals. Respondent agreed with those facts. The First District Court of Appeals in their resitation of the facts, particularly in Munroe v. State, supra has misstated the facts in certain aspects and Respondent knows it and now does a disservice to this Court to state that that is an "accurate statement of the facts" (SB-3).

The facts in the Munroe decision that are wrong is that the Court stated that "...On April 3, 1985, Munroe, accompanied by DOWNING, met with Evans who was acting on behalf of the police officers as the go between in their dealings with her. The meeting occurred in a motel room as soon as Munroe and DOWNING arrived,..." Those facts are totally inaccurate and there was never any evidence to suggest that and the State knows it. On the morning of April 3, Evans met Munroe at Shoney's and discussed the cocaine transaction at that time. DOWNING was not present.

Munroe and Evans then went to the hotel room where Munroe had earlier left the money (R-828-833, 1906, 938). The hotel room was the Red Roof Inn that DOWNING had checked into on the afternoon of April 2, after DOWNING and Munroe had returned from two days at Panama City Beach. There is no testimony anywhere to contradict this and for the State to now suggest that those facts are accurate is an absolute distortion of the proper facts in this record (R-1648-1649). See: Exhibit 12, receipt from Red Roof Inn of April 2, 1985 (R-1591).

The State also says this case was tried before a Gadsden County jury (SB-16). That is not true as the case was in Leon County, Florida.

Finally, counsel takes extreme exception to the State's continuous and satirical statements and innuendos that Munroe's testimony that DOWNING was not involved was nothing more than purjured and contrived trial strategy. The undersigned was trial counsel and counsel on appeal, and counsel personally resents this unprofessional accusation. What the State's counsel has failed to point out to this Court is that from the moment of Martha Munroe's arrest, she told the officers that DOWNING was not involved. The testimony at trial was exactly as she had told the officers from the moment of her arrest. Therefore, this notion that this was somehow contrived strategy for trial purposes only is an absolute sham and is a disservice to this Court and is repugnant and offensive. See: Complete testimony of Agent, Cornelius concerning Munroe's statements at the time of her arrest (R-1698-1760).

I.

THE STATE'S DISCOVERY VIOLATION IN REFUSING TO PRODUCE THE REPORTS AND STATEMENTS OF ALL OF THE POLICE OFFICERS IN THIS CASE PREJUDICED THE DEFENDANT'S ABILITY TO PREPARE FOR TRIAL, AND WHEN THE TRIAL COURT FAILED TO EVEN CONDUCT AN IN CAMERA INSPECTION OF REPORTS, REVERSIBLE ERROR OCCURRED

The State's position on the police reports is curious. The State starts out but by suggesting that "the question is all but moot" (SB-7). There is no explanation as to how it is moot other than they seem to suggest that it doesn't matter that there was a conscious and deliberate violation of Rule 3.220, the error was harmless.

At no times does the State respond to the argument that counsel still has not seen these reports. Even at this late date, the State still refuses to produce the reports and at the same time argues that Petitioner is unable to demonstrate any resulting prejudice from the State's discovery violation. This is analogous to pouring skunk scent all over one and then cussing them because they stink. The very essence of due process is the right to be heard. Where the argument centers on prejudice from non-disclosure, basic fundamental fairness dictates that if the State still won't produce the reports, then this Court ought to reverse and not permit the State to attempt to take advantage of their continual, deliberate discovery violation.

In the Second Judicial Circuit of Florida, defense lawyers are not permitted to issue a subpoena duces tecum without

Court approval. The Court in this case would not let counsel make a record of the reports and other items of tangible, physical evidence and counsel was not permitted to subpoena any of the physical documents or evidence in this case (R-1240-1259). However, every officer who testified in this trial testified at depositions that they witnessed and/or participated in the events and they all compiled reports.

Likewise, the State fails to respond to Petitioner's argument that the trial Court made a finding of fact which should not be disturbed on appeal, that in denying the request for production of the reports the trial Court ruled that for purposes of appellate review, the reports contained testimony and/or information that would be of helpful assistance to counsel in the preparation of the case and that clearly counsel would be prejudiced without them (R-1297-1301) (R-1212-1236).

Additionally, although it is true the witnesses did not refer to their reports while they were actually testifying at trial or deposition, everyone of them indicated they used their reports to refresh their recollection prior to their testimony.

The State even argues that the assertion that the Defendant might have prepared for trial in a different manner if he had had these agents' reports he was entitled to is "nonsense" (SB-11). Apparently, the State's counsel has never tried a case to make that suggestion. Counsel made it very clear to the trial Court that sound trial practice and preparation involves first

reviewing written reports or statements of witnesses before you take their deposition (R-1297-1301) (R-1212-1237).

Respondent suggests that DOWNING has not urged in his Brief that the trial Court erroneously refused to make a proper inquiry concerning the refusal to produce the police reports. It is and has always been DOWNING'S position that the Court should have conducted an in camera inspection of the reports to determine if they were "statements" and there should be no question at this date that that was the proper procedure to follow. At the hearings before the trial Court, counsel argued that the reports were discoverable because they were statements of eyewitnesses and participants. The State refused to stipulate to that fact (R-1239). The Court refused to conduct an in camera inspection. Counsel continued to bring this to the Court's attention and asked the Court to inspect the documents but the Court refused to do so. Now the First District states that the reports were discoverable as a matter of right, but suggests that after comparing the reports, DOWNING has been unable to convince the Court that the result at trial would have been different. This ignores the reasoning and analysis from this Court's directions in Richardson v. State, 246 So.2d 771 (Fla. 1971) and Smith v. State, 500 So.2d 125 (Fla. 1986). DOWNING has been consistently denied the opportunity to speak to the question of the prejudice because the State still will not produce the reports. The trial Court would not review them,

Defendant's counsel has never seen them, and therefore, a reviewing Court simply cannot determine whether the error was harmless. Smith, supra.

Reviewing the record in the manner the First District did in this case is not a sufficient or adequate substitute for the trial Court's inquiry into all aspects of an alleged discovery violation, including an in camera inspection. Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977).

One must ask, if there is nothing in these reports then why has the State continuously, at trial and on appeal, refused to produce the reports? This Court cannot permit the State to not produce the reports and then continually argue that Petitioner cannot demonstrate prejudice. This was not an inadvertent discovery violation in this case. It was a conscious and deliberate discovery violation. The State should be held to an extremely high standard on appeal when the Court is trying to determine if the case should be reversed due to that violation. On appeal it is the State's burden, not the Defendant's to demonstrate that no prejudice resulted. Lavigne v. State, 349 So.2d 178 (Fla. 1st DCA 1977). That should particularly be the holding in this case where the State chooses to continue to refuse to produce the reports. It is suggested the State has not and cannot meet it's burden to demonstrate that no prejudice resulted in the Defendant's ability to prepare for trial. Morever, this was an extremely close case at trial. The State even concedes that the

charge was proved by circumstantial evidence only (SB-8). This Court should hold as a matter of law that it cannot be harmless error in a case where the conviction is based only on circumstantial evidence. This Court should order production of the reports and reverse and remand for a new trial. Smith, supra; Miller v. State, 360 So.2d 46 (Fla. 2d DCA 1978).

II.

THE CIRCUMSTANTIAL EVIDENCE AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT PETITIONER RICHARD A. DOWNING CONSPIRED WITH MARTHA MUNROE

The common theme throughout the State's Brief is that sufficiency of the evidence in a circumstantial evidence case is solely a jury question (SB-25). The trial Judge, not the jury, as a threshold matter must pass upon the sufficiency of the evidence and whether it excludes every reasonable hypothesis of innocence. Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with the Defendant's hypothesis of innocence is not legally sufficient to make a case for the jury and it is the trial Court's duty to grant a judgment of acquittal. Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986); McArthur v. State, 351 So.2d 972 (Fla. 1977); Mayo v. State, 71 So.2d 899 (Fla. 1954).

The State repeatedly argues that the jury was entitled to infer or free to infer that there had been a conspiracy and that the State's case was proven by inferences (SB-21-22, 24). The State feels the jury could "infer" that (1) Munroe was a cocaine broker; (2) DOWNING must have been her customer; (3) Even if he was not her customer, but merely someone else, for example, a purchasing agent that his mere presence and knowledge leads to the only conclusion that he planned, discussed, combined, and confederated with Munroe; and (4) That DOWNING intended for the crime of trafficing in cocaine to be completed

(SB-21-22). The State chooses to simply ignore the long line of cases that hold that where two or more inferences in regard to the existence of criminal intent and criminal act must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks a conclusive nature to support the conviction. Collins v. State, 438 So.2d 1036, 1038 (Fla. 2nd DCA 1983); Chaudion v. State, 362 So.2d 398, 402 (Fla. 2nd DCA 1978); Weeks v. State, 492 So.2d 719 (Fla. 1st DCA 1986); Torres v. State, 13 F.L.W. 381, 382 (Fla. 3rd DCA 1988); Gustine v. State, 86 Fla. 24, 97 So. 207 (Fla. 1923)

The State even goes to such incredible lengths as to suggest that even if there was no direct proof of a conspiracy nor any discussion at any time about cocaine where DOWNING participated, that even if DOWNING and Munroe spoke not to each other, maybe they read each others mind or perhaps they used body language or winked at each other (SB-22). There is not one scintilla of evdience anywhere in the record to support this imagined and distorted construction of the facts.

The State acknowledges that mere presence nor knowledge alone are sufficient to support the conviction. But they suggest much more is involved as far as DOWNING. However, at this late date, the State still cannot characterize DOWNING'S role in the alleged conspiracy. For example, compare the State's description of DOWNING'S involvement, "...The evidence strongly suggests that DOWNING was in fact Munroe's principal..."; (SB-18) "...his role, whatever it was..." (SB-23); "Even if DOWNING was not the ultimate buyer..."

The satirical, unprofessional arguments (EC 7-37, Code Prof. Resp.) perhaps is illustrative of the State's frustration in not being able to distinguish the numerous conspiracy cases cited by Petitioner DOWNING. Conspiracy is not the equivalent of aiding and abetting which seems to be the theme of the State's Brief on appeal. Conspiracy is a separate and distinct crime from the object of the conspiracy and the State must offer some proof other than commission of or the attempt of the substantive offense. Conspiracy may not and cannot be inferred from conduct that would establish aiding and abetting alone. Ashenhoff v. State, 391 So.2d 289, 291 (Fla. 3rd DCA 1980); Saylor v. State, 491 So.2d 340 (Fla. 3rd DCA 1986); Ramirez v. State, 371 So.2d 1063, 1065 (Fla. 3rd DCA 1979), cert denied, 383 So.2d 1201 (Fla. 1980); Beke v. State, 423 So.2d 417, 419 (Fla. 2d DCA 1982); Velunza v. State, 12 F.L.W. 788, 789 (Fla. 3d DCA 1987).

The State's whole argument essentially is that they don't have to offer any proof other than aiding and abetting the substantive offense. It is their position that the conspiracy conviction may be established solely on inferences and from proof of aiding and abetting. This is not now nor has it ever been the law in Florida. The only way to affirm this conviction on the sufficiency of the evidence is to change the law that has been well settled for sometime. This Court in Goldberg v. State, 351 So.2d 332 (Fla. 1977), graphically detailed the danger in

conspiracy charges. There is no reason for this Court to now hold that evidence that would establish aiding and abetting is sufficient to convict for conspiracy charges. The only way to support the conviction in this case is to permit inferences to be pyramided upon inferences based solely on circumstantial evidence.

The State fails to cite any State Court cases in support of that proposition. Instead, they have chosen to cite Federal case law concerning conspiracy and the sufficiency of the evidence in conspiracy cases in Federal Court. Our standard of review is different, and there is no reason for this Court to recede and adopt the less stringent federal standard. The State urged the First District Court of Appeal to adopt the lesser standard as enunciated in United States v. Bell, 678 F.2d 547 (5th Cir. 1982). However, the Court in Fox v. State, declined to accept that standard which would be inconsistent with a long line of Florida decisions imposing a stricter time-tested standard. Fox v. State, 469 So.2d 800, 803 (Fla. 1st DCA 1985).

Incredibly, the State has attempted to influence this Court by the fact that DOWNING "elected not to favor the jury with a firsthand account... and the jury "heard nothing from Appellant". It should go without saying that no Defendant in a criminal case has to prove anything and has an absolute right to remain silent. For the State to urge this Court to place significance on that fact is improper. See: Malcomb v. State, 415 So.2d 891, 892 (n. 2) (Fla. 3rd DCA 1982).

The State agrees that mere presence and knowledge is not sufficient. However, they suggest more was involved as far as DOWNING (SB-26). The State goes on to say though that DOWNING checks into the Tallahassee Hilton and after communication with Martha Munroe ends up on the second floor of the Red Roof Inn (SB-26). The State has chosen to distort these facts. DOWNING arrived in Tallahassee, on March 30, 1985. See: Exhibit 15, "airplane ticket". Downing checked into the Hilton on March 30, and checked out on March 31. (See Exhibit 15, Hilton receipt). DOWNING traveled to Panama City to go to the beach. He stayed at Panama City Beach and returned to Tallahasse on April 2, 1985, and then checked into the Red Roof Inn. See: Exhibit 15, note pad from Holidy Inn, Panama City Beach and matches from Angelos in Panama City Beach (R-1646-1649) (R-1838-1840). Munroe testified that DOWNING came to Florida to go on a vacation to the beach and that is exactly what he did. On the afternoon of April 2, 1985, when DOWNING checked into the Red Roof Inn, he was under the impression that Munroe was going to call Evans and call off or cancel any cocaine transaction (R-1854, 1904-1905). Munroe actually made that phone call to Evans. However, unknown to DOWNING, the next morning Munroe called Evans to go forward with the transaction. DOWNING never plays a role in any discussions, negotiations, or anything about a cocaine transaction. He simply made the poor mistake and judgment of agreeing to hold the money for Munroe.

Mere knowledge and presence is insufficient even if coupled with holding the money for Munroe. DiSangro v. State, 422 So.2d 14 (Fla. 4th DCA 1982), cert. denied, 434 So.2d 887 (Fla. 1983). It may have been sufficient to support a charge of aiding and abetting, but the bottom line is that there was no evidence of a conspiracy, and this Court cannot permit convictions to be based on inferences piled upon inferences based on circumstantial evidence. The decision on the sufficiency of the evidence directly conflicts with Saylor, supra; Ashenhoff, supra; Ramierez, supra; Velunza, supra; Cockett v. State, 12 F.L.W. 1402 (Fla. 4th DCA 1987); Voto v. State, 12 F.L.W. 1708, 1709 (Fla. 4th DCA 1987); Gonzalez v. State, 455 So.2d 1131 (Fla. 2nd DCA 1984); McArthur, supra; Mayo, supra.

This Court should reverse and remand with directions to discharge DOWNING.

III.

TRIAL COURT'S FAILURE TO GIVE THE COMPLETE INSTRUCTION ON TRAFFICING IN COCAINE AND THE FAILURE TO INSTRUCT THE JURY ON THE NECESSARY LESSER INCLUDED OFFENSE CONSTITUTES PER SE REVERSIBLE ERROR

The State seems to ask this Court to ignore this Court's holding in State v. Wimberly, 498 So.2d 929, 932 (Fla. 1986), where this Court held that the trial Court has no discretion in whether to instruct the jury on necessary lesser included offenses. At the time of this trial, everyone concedes that possession of cocaine was a category 1 necessary lesser included offense of trafficing in cocaine (SB-31); Butler v. State, 497 So.2d 1327 (Fla. 4th DCA 1986). Therefore, to rule as the State wishes and affirm the First District Court of Appeal, this Court would have to hold that a defendant charged with trafficing in cocaine, in excess of 400 grams, is entitled, to have the jury instructed on the necessary lesser included offense of possession of cocaine. However, a defendant charged with conspiracy to traffic in excess of 400 grams of cocaine would not be entitled to have the jury instructed on any lesser included offenses. This makes absolutely no sense and is not now nor has it been the law.

In Carvalho v. State, 12 F.L.W. 2338 (Fla. 3d DCA 1987), the Court held that even when a defendant stipulates he possessed over 400 grams of cocaine at trial, the failure to instruct the jury on possession as a category 1 necessary lesser included offense is reversible error.

Contrary to the State's suggestion, the Fourth District in Weller v. State, 501 So.2d 1291 (Fla. 4th DCA 1986) held that

the trial Court must instruct on the necessary lesser included offense of conspiracy to possess cocaine as a lesser included offense of conspiracy to traffic in cocaine. The amount involved does not matter. It was not discussed in the Weller case and the Court there specifically was following this Court's directions in Wimberly because the jury is to be afford the opportunity to find the Defendant guilty of a lesser included offense and to exercise their "pardon power". See also: Dipaola v. State, 461 So.2d 284 (Fla. 4th DCA 1985).

The Munroe panel decision which was expressly adopted by DOWNING'S panel apparently misapprehended the fact that the State, in this case, only charged conspiracy to traffic by possession alone. That was the only thing the jury was instructed on, it was the only thing charged in the information. Judge Ervin in his dissent in Munroe v. State, was imminently correct and the result in this case, as enunciated in the Munroe panel decision, directly conflicts with Wimberly, supra; Weller, supra; Robinson v. State, 12 F.L.W. 1391 (Fla. 4th DCA 1987); Reebe v. State, 12 F.L.W. 1391 (Fla. 4th DCA 1987); Daophin v. State, 12 F.L.W. 1877 (Fla. 4th DCA 1987); and this Court's decision In the Matter In the Use By the Trial Courts of the Standard Jury Instructions In Criminal Cases, 431 So.2d 594 (Fla. 1981).

This Court should reverse and remand for a new trial with instructions that the Court must instruct on the complete trafficing instruction and not just the provision of over 400 grams, and on the necessary lesser included offense of conspiracy to possess cocaine.

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF ALLEGED CRIMES NOT CHARGED IN THE INFORMATION

Petitioner relies on this Court's decision in State v. Norris, 168 So.2d 541, 543 (Fla. 1964), as the correct statement that there must be clear and convincing proof of a connection between a Defendant and collateral acts the State intends to introduce at trial. In this case, if one reviews the record, no reasonable person would suggest that there was clear and convincing evidence of DOWNING'S involvement in the alleged collateral crimes acts. If one merely reviews the prosecutor's closing argument, there can be no question that the evidence was admitted solely to attempt to portray DOWNING as a "drug dealer" and propensity to commit drug crimes (R-1382-1438). The Court even permitted the prosecutor, over objection, to repeatedly argue that if Munroe is guilty DOWNING must be guilty (R-1387-1389). The Court even stated in the presence of the jury that that was a fair comment of the prosecutor. The prosecutor repeatedly referred to irrelevant evidence such as the fact that DOWNING'S wallet indicated he had been to Lake Tahoe and to Ceaser's Palace and Miami. Repeated references were made to the fact that the Defendants were nothing but drug dealers. In the prosecutor's own words he wanted to paint DOWNING has a "fast mover" (R-1590, R-1385-1407). The collateral crimes evidence should have been presumptively inadmissible. Malcomb v. State, 415 So.2d 891 (Fla. 3rd DCA 1982).

The evidence was admitted allegedly on the issue of intent, knowledge and motive. However, Munroe admitted intent, knowledge, and motive in opening statement and when the issue came up before the trial Court, Munroe's counsel offered to stipulate to intent, motive and knowledge. However, the trial Court still permitted the evidence to be introduced and to become a feature of the trial.

To summarize the State's notice, served after all of the discovery was complete, was incomplete and insufficient as a matter of law (R-41). There was insufficient evidence to connect DOWNING to the similar fact evidence by clear and convincing proof. State v. Norris, supra; Chapman v. State, 417 So.2d 1028 (Fla. 3d DCA 1982). The evidence was utilized to show bad character and propensity and became a feature of the trial (R-1384-1438). Therefore, this Court should reverse and remand for a new trial with directions that the alleged similar fact evidence is inadmissible as to DOWNING.

V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DEPARTING FROM THE SENTENCING GUIDELINES

There should be no question but the primary reason the trial Court departed from the guidelines was the amount of drugs involved in this case. This Court though has now held that is improper. Atwaters v. State, 13 F.L.W. 53 (Fla. 1988).

The State now argues that the "professional manner" through the use of an alias is a sufficient reason for a ten year departure. The authorities have been uniform that use of an alias is not sufficient as a basis for departure. Pastor v. State, 11 F.L.W. 2133 (Fla. 4th DCA 1986); Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984); Millinger v. State, 13 F.L.W. 118 (Fla. 2nd DCA 1988).

It is submitted that there were no valid reasons for departure. The Courts have held that use of an alias is not a sufficient basis. It doesn't matter if you call use of an alias "professional manner" they're still the same thing.

The state directs the Court's attention to the trial Court's statement in his reasons for departure that he would have departed regardless of how many reasons might pass muster as being clear and convincing. The State has failed to note this Court's decision in Griffis v. State, 509 So.2d 1104, 1105 (Fla. 1987), where this Court held that such a statement by the trial Court is not enough to satisfy the State's burden. See also: Hester v. State, 13 F.L.W. 155 (Fla. 1988).

Appellant was charged, tried and convicted and his case was on appeal when the law was clearly established that he had a right to have an appellate Court review the extent of departures from a guideline sentence. The law was changed, Chapter 87-110, effective July 1, 1987 as pointed out in the State's Brief (SB-40). However, those changes cannot be applied retroactively. Miller v. Florida, ____ U. S. _____, 107 S.CT. 2446, 96 L. ed. 2d 351 (1987); Young v. State, 13 F.L.W. 325, 326 (Fla. 5th DCA 1988).

There were no valid reasons for departure other than the minimum mandatory 15 years. The departure was unauthorized, the extent of departure was excessive and contrary to the letter and the spirit of the sentencing guidelines and this Court should reverse and remand with directions to sentence DOWNING to the 15 year minimum mandatory term and nothing more.

CONCLUSION

Pursuant to the authorities, principals and reasoning, Petitioner requests the Court to reverse the conviction based on insufficiency of the evidence and remand with instructions to discharge Petitioner. In the alternative, Petitioner requests the Court to reverse and remand for a new trial. Likewise, at a minimum, Petitioner requests the Court to reverse the departure sentence and remand to the trial Court for resentencing with directions to the trial Court that the only appropriate sentence is the 15 year minimum mandatory.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furished by U. S. Mail to Royall P. Terry, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, on this 7th day of March, 1988.

JOHN F. TIERNEY, III