IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DAVID WILLIAM HUNTER and
KELLY CONKLIN,

Respondents.

CASE NO. 73,230

REPLY BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOHN TIEDEMANN
Florida Bar No. 319422
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority and appellee in the appended Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), review granted, Case No. 73,230 (Fla. 1988). Respondents, David Hunter and Kelly Conklin, were the criminal defendants and appellants below.

References to the six volumes of the record on appeal containing transcripts will be designated "(R:);" to the one volume containing respondent Hunter's legal documents, "(HR:);" and to the one volume containing respondent Conklin's legal documents, "(CR:)."

All emphasis, unless otherwise indicated, will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State stands by the accurate "statement of the case and facts" provided in its initial brief, see State v. Davis, 243 So.2d 587, 591 (Fla. 1971), and rejects both respondent's rejections thereof.

In particular, the State strenuously disputes respondents' baseless insinuations that it conceded their alleged lack of predisposition to commit drug offenses before Judge Coker ("Respondent Conklin's Brief Upon The Merits," p. 11); that it confessed error on their voir dire issue at oral argument before the Fourth District ("Respondent Conklin's Brief Upon The Merits," p. 1; and that its informant Ronald Diamond, rather than respondent Conklin, was the initiator and prime mover of respondent Hunter's involvement in the instant drug deal ("Respondent Hunter's Brief Upon The Merits," pages 24-25). An objective review of the record reveals that the State specifically traversed respondents' claimed lack of predisposition (CR: 1166; 1170); that the Fourth District did not find that the State had conceded error on respondent's nonconstitutional voir dire claim, Hunter v. State, 531 So.2d 239, 243, which it would have been required to do had there been such a concession, see Johnson v. Feder, 485 So.2d 409, 412 (Fla. 1986); and that respondent Conklin brought respondent Hunter into the instant drug transaction (R: 657-658).

SUMMARY OF ARGUMENTS

The State relies upon the summary provided in its initial brief.

ISSUE I

DOES AN AGREEMENT WHEREBY A CONVICTED DRUG TRAFFICKER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE VIOLATE THE HOLDING IN STATE V. GLOSSON?

ARGUMENT

The State still respectfully contends that this Honorable Court should answer the above first-certified question in the negative, for the reasons expressed in its initial brief. When the facts of this case as heretofore recounted are properly viewed in the light most favorable to the trial judge's rulings for the State, State v. Davis, 243 So.2d 587, 591, it becomes abundantly clear that no State v. Glosson, 462 So.2d 1082 (Fla. 1985) violation occurred here.

ISSUE II

ASSUMING THE EXISTENCE OF A DUE PROCESS VIOLATION UNDER GLOSSON, DOES GLOSSON'S HOLDING EXTEND TO A CODEFENDANT WHO WAS NOT THE DIRECT TARGET OF THE GOVERNMENT'S AGENT?

ARGUMENT

The State stands upon the discussion of this point provided in its initial brief.

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that this Honorable Court should REVERSE the decision under review and APPROVE the judgments and sentences entered against respondents by the trial judge.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

John Tiedemann

JOHN TIEDEMANN
Florida Bar No. 319422
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(407) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Reply Brief of Petitioner on the Merits" has been forwarded by United States Mail to: CHRISTOPHER A. GRILLO, ESQUIRE, Counsel for Respondent HUNTER, Courthouse Law Plaza, 750 Southeast Third Avenue, Suite 300, Fort Lauderdale, Florida 33316, and FRED HADDAD, ESQUIRE, Counsel for Respondent CONKLIN, 429 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 2 day of March, 1989.

John Tiedemann
Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. DAVID WILLIAM HUNTER and KELLY CONKLIN, Respondents.	)	**CASE NO. 73,230**

A P P E N D I X

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOHN TIEDEMANN
Florida Bar No. 319422
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Petitioner

Court for Broward County, Thomas M. Coker, Jr., J., and defendants appealed. The District Court of Appeal, Anstead, J., held that where informant's criminal sentence would be reduced if he made new cases involving a certain amount of cocaine within a certain time frame, defendant's due process rights were violated when informant convinced defendants, who had no prior criminal history, to sell cocaine to undercover police officers.

Questions certified.

1. Constitutional Law ⇐257.5
Criminal Law ⇐36.5

Defendants' due process rights were violated where informant, whose sentence would be reduced if he informed police of new cases involving a certain amount of cocaine within a certain time frame, convinced defendants, who had no prior history of drug dealings, to sell cocaine to undercover police officers. F.S.1985, § 893.135(3); U.S.C.A. Const.Amends. 5, 14.

2. Constitutional Law ⇐272.5
Criminal Law ⇐36.5

Although agreement to reduce a defendant-turned-informant's sentence is not per se violative of due process, right of those informed on, due process rights are violated where informant is authorized to create new criminal activity in order to secure his freedom, rather than merely assisting in apprehending those who have already participated in crime. F.S.1985, § 893.135(3); U.S.C.A. Const.Amends. 5, 14.

3. Criminal Law ⇐996(1.1)

Reduction of defendant's sentence upon making new cases involving a certain amount of cocaine within a certain time frame was illegal since only statute that authorized defendant's release was conditioned upon defendant's assistance in prosecution of codefendants, and not in making new cases. F.S.1985, § 893.135(3).

Fred Haddad of Sandstrom & Haddad, Fort Lauderdale, for appellants.

Robert A. Butterworth, Atty. Gen., Tallahassee, Lee Rosenthal and Alfonso M. Saldana, Asst. Attys. Gen., West Palm Beach, for appellee.

ANSTEAD, Judge.

Appellants were convicted of trafficking in cocaine and conspiracy after the trial court and a jury rejected their defense of entrapment. They were sentenced to the mandatory minimum term of fifteen years in prison and ordered to pay fines of $250,000.00 each. We hold that appellants are entitled to be discharged under the Florida Supreme Court's holding in *State v. Glosson*, 462 So.2d 1082 (Fla.1985), affirming dismissal of criminal charges stemming from a drug transaction instigated by an informant paid by the state to initiate drug transactions and testify for the state in the subsequent prosecutions.

FACTS

The drug transaction charged against the appellants came about as a result of the activities of a convicted drug trafficker and police informant, Ron Diamond, who later was the chief prosecution witness against appellants. Diamond had been convicted of trafficking in cocaine and sentenced to the same term now facing appellants: fifteen years minimum mandatory imprisonment and a $250,000.00 fine. Under section 893.135(3), Florida Statutes (1985), a prosecutor may move the sentencing court to reduce or suspend the sentence of a defendant convicted under the drug trafficking statute if the defendant "provides substantial assistance in the identification, arrest, or conviction *of any of his accomplices, accessories, coconspirators, or principals.*" (Emphasis supplied.) Diamond obtained an agreement with the state for the substantial reduction of his own sentence by entering into a section 893.135(3) agreement with the state. However, Diamond's agreement with the state and the trial court did not involve the prosecution of others involved with him, as authorized by section 893.135(3), but rather, according to the undisputed testimony of Diamond and a deputy sheriff, provided that Diamond

must make new cases involving a certain amount of cocaine within a certain time frame in order to receive a reduced sentence. Diamond was actually released from prison immediately after conviction by order of a circuit judge under this arrangement with the state. Diamond testified that it was his understanding he would receive a reduction of his sentence at least down to three years and possibly less. Diamond assisted the police in making several cases, but was still one kilogram short of meeting his required quota as the time originally agreed upon was running out. The circuit judge then authorized a sixty-day extension during which Diamond was given a final opportunity to bring in one more kilo of cocaine in order to secure his reduction of sentence. If he failed in doing so, he would be required to surrender and serve the full term of his sentence. After appellants' arrests, Diamond's fifteen-year minimum mandatory sentence and $250,000.00 fine were vacated and the sentence was reduced to one year in prison and five years probation. Diamond actually served only 4–5 months before he was released from prison and his probation terminated.

At the time of the sixty-day extension Diamond was living in the apartment complex where appellant Kelly Conklin lived with his pregnant girlfriend. Conklin had no prior criminal record, was twenty-one years old, recently graduated from art school and worked for David Hunter's advertising firm. Diamond initiated contacts with Conklin and his girlfriend for the purpose of setting up a drug deal. It is undisputed that Diamond instigated the subsequent drug transaction with Conklin and Hunter that led to the convictions herein. Diamond denied threatening Conklin in any way. According to Diamond, he saw Conklin smoking marijuana and, when asked by Diamond about his ability to obtain large quantities of drugs, Conklin showed no reluctance to participate in a drug transaction. A few weeks after Diamond and Conklin met each other, Diamond set up a meeting at their apartment building with undercover agents posing as drug buyers from Detroit. Diamond told Conklin that the "buyers" were members of the Mafia. They showed Conklin a suitcase full of cash in the amount of $116,000.00. They also showed up several times at Conklin's place of employment. On at least two occasions, Conklin indicated he had a connection. Several meetings were set up, but no drugs materialized. Eventually Conklin confided in his boss, Hunter, about Diamond's efforts to obtain drugs. Hunter agreed to help Conklin set up a deal and contacted a former employee about procuring some cocaine. Approximately two months after Conklin and Diamond became acquainted, Diamond engineered the transaction whereby Conklin and his boss David Hunter attempted to sell one kilogram of cocaine to undercover agents working with Diamond. Hunter was taped during the transaction with the undercover agents telling the agents that he had purchased cocaine from this particular supplier for a year.

According to Conklin, Diamond's attitude was friendly when he first approached Conklin about obtaining drugs. Diamond suggested they could both make some easy money. Conklin repeatedly refused to participate, telling Diamond that he did not know anyone from whom he could obtain drugs. Diamond soon became more persistent and aggressive, telephoning Conklin and coming by his apartment and workplace every day, sometimes twice a day. Diamond was "in constant pursuit" of consummating a drug transaction. He became more "insistent" and "aggravated" with Conklin as time passed, and his attitude became threatening. Conklin's girlfriend testified that Conklin repeatedly refused to participate in any drug transaction and that Diamond physically threatened Conklin. Conklin's father testified that after the arrests, Diamond telephoned him and told him that he "had to go back numerous times" to Kelly before Kelly agreed to participate, and that Diamond knew Kelly was broke and needed money because his girlfriend was pregnant.

GLOSSON

In *State v. Glosson* the Supreme Court held that an agreement to pay an informant a contingency fee for his cooperation

in setting up drug transactions and then aiding the subsequent criminal prosecutions violates a defendant's due process rights regardless of the existence of evidence of that defendant's willingness to participate in the offense. The court rejected the state's claim that such defenses should be restricted to instances of physical or psychological coercion:

> We reject the narrow application of the due process defense found in the federal cases. Based upon the due process provision of article I, section 9 of the Florida Constitution, we agree with *Hohensee* and *Isaacson* that governmental misconduct which violates the constitutional due process right of a defendant, *regardless of that defendant's predisposition*, requires the dismissal of criminal charges.
>
> Our examination of this case convinces us that the contingent fee agreement with the informant and vital state witness, Wilson, violated the respondents' due process right under our state constitution. According to the stipulated facts, the state attorney's office knew about Wilson's contingent fee agreement and supervised his criminal investigations. Wilson had to testify and cooperate in criminal prosecutions in order to receive his contingent fee from the connected civil forfeitures, and criminal convictions could not be obtained in this case without his testimony. We can imagine few situations with more potential for abuse of a defendant's due process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. *The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions.*

Id. at 1085 (emphasis added). In *Glosson*, the informant received a percentage of all civil forfeitures arising out of successful criminal investigations initiated by him. The court found that such an agreement violates a defendant's due process rights due to the "enormous incentive" for the informant "to color his testimony or even commit perjury." *Id.*

[1] We believe the facts of this case are at least as compelling as those relied upon by the supreme court in *Glosson* and the agreement with Diamond is closely akin to the conduct condemned by the supreme court in *Glosson* as an abuse of governmental power. As in *Glosson*, the informant here had an invaluable stake in making new cases: his own freedom. In our view such freedom constituted much more of an "enormous incentive" to "color his testimony" than the strictly monetary arrangement in *Glosson*.[1] It is undisputed that the informant originated the criminal plan in his own mind, and instigated the commission of the crime solely to obtain his own freedom and relief from the mandatory $250,000.00 fine. As in *Glosson*, the informant, acting under judicial, prosecutorial, and law enforcement authorization, was given free reign to instigate and create criminal activity where none before existed.[2] Subsequently he was the key witness for the state in appellants' prosecution. The state concedes, for example, that Diamond's testimony is the only evidence the state presented to rebut the appellant Conklin's defense of entrapment. Diamond actually received his agreed payoff when he was released from a fifteen-year mandatory minimum sentence and quarter-million dollar fine. In essence, a convicted cocaine trafficker was allowed to secure his own

1. We have not overlooked the forgiving or deletion of the $250,000.00 debt to the state also provided to the informant. We assume that was a minor consideration compared to the reduced prison term.

2. There is no evidence in the record that Conklin was ever involved in a prior drug transaction. Whether he would have ever participated in a transaction without the inducement of an informant is subject to speculation. Because we have concluded that this case is controlled by Glosson we do not decide the additional issue raised by appellants that the state failed to sustain its burden of proving they were not entrapped by the police into committing this offense.

freedom by convincing someone else to traffic in cocaine.

[2, 3] An agreement to reduce a defendant-turned-informant's sentence is not *per se* violative of due process, and is in fact legislatively authorized to assist in the prosecution of codefendants. However, we believe the action of the law enforcement officials here, where the informant was authorized to create *new* criminal activity in order to secure his freedom, rather than merely assist in apprehending those who had already participated in a crime, crossed the line drawn by *Glosson* wherein the informant was paid "to manufacture, rather than detect, crime." *Id.* at 1084. We also do not believe the legislature intended such use of the then prevailing version of the substantial assistance statute:

> The statutory language is clear. The court may mitigate the ... sentence only when the ... defendant has rendered substantial assistance in the apprehension of others involved in the *very* crime for which defendant is charged (his *accomplices, accessories, co-conspirators,* or *principals*).

Campbell v. State, 453 So.2d 525, 526 (Fla. 5th DCA 1984) (emphasis added).[3] In this case it appears that Diamond was actually out of jail illegally at the time he induced Conklin to traffic in cocaine, and Diamond's subsequent sentence reduction and release was also illegal, since the only statute that authorized Diamond's release was conditioned upon a defendant's assistance *in the prosecution of* codefendants, and not in making new cases.

There are other substantial issues raised on appeal which we do not address because of our resolution of the *Glosson* issue. Because we believe the issues we have decided are both difficult and of importance statewide, we certify the following questions as ones of great public importance:

> DOES AN AGREEMENT WHEREBY A CONVICTED DRUG TRAFFICKER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE VIOLATE THE HOLDING IN *STATE v. GLOSSON*?
>
> ASSUMING THE EXISTENCE OF A DUE PROCESS VIOLATION UNDER *GLOSSON*, DOES *GLOSSON'S* HOLDING EXTEND TO A CODEFENDANT WHO WAS NOT THE DIRECT TARGET OF THE GOVERNMENT'S AGENT?

GUNTHER, J., and OWEN, WILLIAM C., Jr., (Retired), Associate Judge, concur.

3. The key distinction between this case and *State v. McQueen*, 501 So.2d 631 (Fla. 5th DCA), *rev. denied*, 513 So.2d 1062 (Fla.1987) is that the substantial assistance agreement there specifically provided that the informant would assist in arranging drug deals with persons *already known to him and who were already in the drug business and predisposed* to buy or sell drugs. 501 So.2d at 633. This, of course, is a major and most significant distinction between McQueen and this case, as the agreement with Diamond had no such limitation—it merely required him to "bring in" a certain quantity of drugs. The identity of the actors was unimportant; the amount of drugs was the key. Inherent in the agreement with Diamond was implied authorization for him to make new cases. That is a critical factor in the case at bar and was not even an issue in McQueen. Nevertheless, to the extent it is in conflict we disagree with McQueen.

BEST TOWING & RECOVERY, INC., Appellant,

v.

William J. BEGGS, Sr., Don Saroka, and Bill Beggs Company, Inc., Appellees.

Nos. 87-387, 87-3534.

District Court of Appeal of Florida, Second District.

Sept. 21, 1988.

Buyer of assets of wrecker company brought action against seller for breach of