IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 73,779

VERNON MESSIER, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

ANDREA STEFFEN
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, VERNON MESSIER, was the Defendant and Appellee in the matter of Evans v. State, 537 So.2d 639 (Fla. 2d DCA 1988), wherein certain questions were certified as a result of the Second District's affirmance of the trial court's granting of Respondent's Motion to Dismiss. The Second District certified the identical question certified by the Fourth District in Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988) Case No. 73,320 (Fla., Oral Argument Scheduled June 8, 1989). Respondent Messier would supply the following additional facts to those supplied by Petitioner:

STATEMENT OF THE CASE

Vernon Messier, Mark Evans, and Rebecca Peacock were charged by an Information with one count of conspiracy to traffic in cocaine and one count of trafficking in cocaine (R22-24). Respondent Messier was charged with an additional count of possession of cocaine (R23-24).

On January 21, 1988, Respondent Messier filed a Motion to Dismiss under Florida Rules of Criminal Procedure 3.190(c)(4) (R47-49). The State filed a Traverse to said motion on January 22, 1988 (R50-57). On January 22, 1988, the trial court denied Respondent Messier's motion (R49).

Respondent Evans filed a motion to dismiss pursuant to 3.190(b) and (c)(4) on February 5, 1988 (R52-60). No Traverse was filed by the State with regard to this motion. On February 9, 1988, Judge Pendino granted Respondent Evans' motion to dismiss (R209-249). Respondent Messier then filed a second motion to dismiss pursuant to Florida Rules of Criminal Procedure 3.190(b) (R191-196). The State did not traverse this second motion. On February 19, 1988, Judge Pendino granted Respondent Messier's motion to dismiss (R265). The trial court further granted an unopposed motion to dismiss filed by Peacock (R237-244).

An appeal to the Second District followed. The Second District affirmed the trial court's ruling, and by reference to Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), certified the following two questions to this court, to wit:

(1) 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. Glossen, 462 So.2d 1082, 1085 (Fla. 1985)?

(2) Assuming the existence of a due process violation under Glossen, does Glossen's holding extend to a co-defendant who was not the direct target of the government's agent?

STATEMENT OF THE FACTS

While Marcia Kennedy was in jail on five felony charges arising from possession and conspiracy to traffic in cocaine she was approached by Detective Ronald J. Lamb. Detective Lamb was the case agent in Kennedy's case (R66-67). Lamb told Kennedy if she cooperated with him, he would assist her in receiving a lighter sentence. If she did not cooperate by providing substantial assistance, she would remain in prison for at least the three-year minimum/mandatory period required under the trafficking statute (R109-110).

As a direct result of her contacts with Lamb, Kennedy signed a substantial assistance agreement with the State Attorney's Office (R116-117, 156). Kennedy testified at her deposition that it was her understanding that the substantial assistance agreement she had entered into required her to testify against those she made deals with, including the Respondents (R116-117). Kennedy understood that if she failed to testify she would go to jail (R117-118). Kennedy testified she felt pressured to set up the transaction on which the instant prosecution was based (R109-110). Kennedy had assisted on two previous cases, but this was still not enough (R142-143). Lamb told Kennedy she would need to make another case involving at least an ounce of cocaine before he would help her (R120, 143, 149, 162, 180). If she failed to bring in a third case, Lamb would not help her (R120-121, 162).

Kennedy testified that because of the three-year minimum/mandatory sentence she faced, she was scared (R110-111). But for the pressure applied by law enforcement, she would not have contacted Respondent Evans (R94, 96, 108, 110-111, 116, 118). Had it not been for Detective Lamb and the pressure of law enforcement the drug transaction would not have occurred (R94, 110).

Following Kennedy's assistance in the instant case, Detective Lamb did intercede on her behalf and recommend she be credited with having provided substantial assistance (R109-110).

On the date in question, Respondent Evans and Peacock arrived at Kennedy's house at around 5:55 p.m. Evans and Peacock went to Kennedy's apartment. There was no contact between Peacock, Respondent Evans or Respondent Messier before Peacock and Respondent Evans went to Kennedy's apartment (R165-166). Respondent Messier's name was not mentioned during the transaction (R169). Kennedy did not know Respondent Messier and did not know that he was outside (R78, 133, 169). After the sale, as the police were moving in for the arrest, Respondent Evans threw the money gained from the sale into Respondent Messier's car (R49, 50). Following his arrest, Respondent Evans stated to Sergeant McAllister that Respondent Messier was present because they were on their way to play darts (R49-50). Respondent Messier was unknown to Detective Lamb or any law enforcement (R171).

SUMMARY OF THE ARGUMENT

The first certified question should be answered in the affirmative. The ruling of Glossen applies to the instant case; however, two other bases exist for affirmance of the trial court's dismissal of the charges against Respondent Messier. The State has failed to meet the two-part objective test of entrapment under Cruz, and entrapment as a matter of law exists. Secondly, Respondent Messier's mere presence at the transaction is insufficient to support continued prosecution.

The second certified question must also be answered in the affirmative. Both this court's prior rulings in Cruz and Glossen support such a result.

ARGUMENT

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. Glossen, 462 So.2d 1082, 1084 (Fla. 1985)?

The court has already recognized that improper motivations on the part of law enforcement or their agents because of the possibility of great benefits may deeply affect the due process rights of those facing criminal prosecutions. In State v. Glossen, 462 So.2d 1082, 1085 (Fla. 1985), this court held that constitutional due process standards warrant dismissal by the trial court of those cases in which the confidential informant stands to "gain the benefit of reduced punishment conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution." The overwhelming danger is the almost certain potential for abuse by the informant, not only to make cases, but to color testify, even to commit perjury, to make the case.

It flies in the face of reality to argue that the confidential informant in this case, Marsha Kennedy, had any less incentive to make cases or testify falsely than that of the confidential informant in Glossen. When the Glossen test is applied to the facts at hand, the probability for abuse is even more chilling. Glossen first set out to address the problem of

the informant making new cases. The use of the illegal substantial assistance agreement and Detective Lamb's specific instructions to Kennedy that she must effectuate three new criminal prosecutions involving at least an ounce of cocaine, that provision of Glossen was unequivocally violated.

As borne out by the facts, Kennedy clearly stood to gain the benefit of reduced punishment because of her cooperation. Kennedy was facing a three-year minimum/mandatory incarcerative sentence unless she cooperated. After her activities, which resulted in the bringing of charges in three cases, she was credited with substantial assistance and received a sentence of two years house arrest and probation. This irresistible enticement, a "contingency fee of cases" method of payment for freedom, undeniably creates within Kennedy the potential for abuse which so concerned this court in Glossen.

The testimony of Marsha Kennedy is a crucial component in the State's case at trial, contrary to the assertion by Petitioner that it is not. The testimony of Kennedy is the only testimony regarding the alleged predisposition of any of the parties and the only way for the State to attempt to establish that the police activity had as its end the interruption of ongoing criminal activity. Kennedy is a crucial part of a successful prosecution; her testimony is critical should the case proceed to trial. Kennedy's incentive to continue to cooperate is far from concluded. Petitioner contends that Kennedy has no incentive to continue to co-operate because she has already received her reward

prior to trial testimony. This proposition does not withstand analysis. Kennedy testified that it was her belief that she would be required to testify at trial as part of her agreement with the State. Her failure to do so would result in a violation of the substantial assistance agreement and could thus result in a violation of her community control or probation. It is equally ridiculous to assume that should Kennedy testify in a manner which exonerated Respondents the State would not pursue a violation against Kennedy's community control. Kennedy has testified at deposition under oath, during which time she was on community control. Failure to testify in a manner consistent with prosecution would subject her to a violation of community control and lengthy sentence. At trial, Kennedy is committed to her prior testimony or she faces a charge of perjury. A charge of perjury would also result in a violation of her community control--exposing her to the penalty she faced prior to her employment as a confidential informant, in addition to the penalties of perjury.

The Hillsborough County State Attorney's Office permitted informant Kennedy to violate the due process rights of Respondents Messier and Evans by sanctioning Kennedy's non-compliance with section 893.135(3), Florida Statutes (1988). The holding in Glossen coupled with the State's clear violation of Florida law gives this Court ample basis for sustaining the holding of the Second District. However, Respondent Messier feels that it is appropriate to discuss two alternative bases for affirmance of the order granting Respondent Messier's motion to dismiss.

Respondent Messier is entitled to dismissal when there is insufficient evidence contained in the record to establish more than his presence at the site of the transaction. Respondent Messier arrived in a separate vehicle from that of Respondent Evans and Peacock. He did not leave his automobile during the transaction involving Respondent Evans, Peacock, and Lamb. His name was never mentioned during the course of the negotiations. He was unknown to the informant Kennedy and to law enforcement. In fact, his presence on August 27 was unexpected (R78, 133, 165-169). Further, Respondent Evans made a post arrest statement that Respondent Messier was present because the group was on its way to play darts. The record does contain some reference to Respondent Evans tossing a bag containing money into Respondent Messier's car as he (Evans) was about to be arrested, and an alleged assertion by Respondent Messier that some money was his; however, but the record is vague and unclear as to what money ownership was claimed or if Respondent Messier knew what the object was that Respondent Evans threw in his car.

The mere presence of a person where a crime is being committed, even coupled with knowledge by the accused that a crime is being committed, or the mere acquiescence by the accused in the criminal activity of others is not sufficient to establish guilt. In State v. Pennington, 526 So.2d 87, 88 (Fla. 4th DCA 1987) approved, 534 So.2d 393, 394 (Fla. 1988), the Fourth District held that the defendant's convictions for trafficking in cocaine and conspiracy to traffic in cocaine were unsupported by the evidence

that the defendant was present at the scene of the drug transaction, directed the undercover officer's attention toward a car, and said, "It's in the white car...over there." The only contact between the detective and the defendant occurred at the supermarket just prior to the deal. The district court held that the trial court should have granted a judgment of acquittal due to an absence of any evidence that the defendant had participated in the discussions regarding the purchase. This court, while addressing another issue presented in a certified question, approved the result reached by the Fourth District. Clearly presence coupled with knowledge that a crime is occurring is insufficient to support a conviction. In the instant case there is no more evidence linking Respondent Messier to the sale of cocaine which occurred between Kennedy, Lamb, and Respondent Evans than that in Pennington. The sole reference in the record to any involvement of Respondent Messier is an alleged statement by Respondent Messier claiming ownership of a bag Evans tossed in his car. It is unclear if Messier was aware of the contents.

In Corson v. State, 527 So.2d 928 (Fla. 5th DCA 1988), the evidence presented was that the defendant drove to a spot where a passenger sitting in the back seat purchased cocaine. The district court held that the trial court should have granted the defendant's motion to dismiss as the evidence was insufficient to support a conviction for possession of cocaine. Consistently, the district courts have held that mere presence or proximity to a drug transaction is insufficient to support a conviction for trafficking

in cocaine. Bayne v. State, 536 So.2d 369 (Fla. 5th DCA 1988) (proximity to drug transaction is insufficient to support a conviction for trafficking in cocaine); Harris v. State, 501 So.2d 735 (Fla. 3d DCA 1987) (dismissal required where the defendant was a passenger in a truck which contained, and ultimately delivered, cocaine and defendant arguably had knowledge that cocaine was in the truck); Pena v. State, 465 So.2d 1386 (Fla. 2d DCA 1985) (where Spanish-speaking defendant was in a house reading a paper when a drug transaction was scheduled to occur and defendant accompanied the co-defendants to Clearwater. At the site of the transaction defendant was seated in the back seat and nodded affirmatively in response to the detectives' inquiry if the cocaine was all there. Cocaine was recovered near the defendant); DiSango v. State, 422 So.2d 14 (Fla. 4th DCA 1982) rev. denied, 434 So.2d 887 (Fla. 1983), (where the defendant was present during the actual sale discussions, counted the money, and participated in discussions for a future sale).

An equally consistent result is reached when the district courts have addressed whether proximity is sufficient to sustain a conviction for conspiracy to traffic in cocaine. Illustrating this point is the case of Velunza v. State, 504 So.2d 780 (Fla. 3d DCA 1987), where undercover officers and a confidential informant met with several co-defendants, police, and an informant. Later they all went to a house to get drugs where the defendant was present. The defendant pointed to the bag containing the drugs and provided the officers with materials to

test the drugs. The district court found this evidence insufficient to support a conviction for conspiracy.

In Voto v. State, 509 So.2d 1291 (Fla. 4th DCA 1987), the defendant initially was present at the site for a prearranged sale to undercover officers, left, and returned in a white Buick. The defendant spoke to the occupants of the Buick. A second car then picked the defendant up. Cocaine was subsequently found in the Buick. The district court held that the evidence was insufficient to support a conviction of conspiracy.

In the instant case, Respondent Messier did not participate in any of the pre-sale negotiations. He did not participate in the transaction. His identity was unknown to Kennedy and Lamb. There is no evidence on the record which tends to show that Respondent Messier participated, agreed, conspired, or combined with Respondent Evans and Peacock to traffic in cocaine.

At the inception of the case, Rebecca Peacock was also charged in Count I and II (R23-25). The record reflects that Peacock was present with Respondent Evans while Kennedy and Evans initially spoke about procuring one ounce of cocaine (R75-76). Peacock arrived at Kennedy's apartment with Evans and accompanied Evans into Kennedy's apartment when the transaction was conducted (R166). After the cocaine was unwrapped, Peacock picked up the cocaine and looked at it, saying she had never seen so much cocaine before (R167). Peacock sought dismissal of the charges against her, arguing that her mere presence was not sufficient for the

State to proceed against her (R237-244). The State did not oppose the motion and the trial court granted the motion to dismiss (R244). The conduct of Respondent Messier was far less than that of Peacock. The charges against Respondent Messier are clearly subject to dismissal and Respondent Messier is clearly entitled to such dismissal when compared to Peacock. The activities of Peacock far exceeded those of Respondent Messier.

Although Petitioner seeks to narrow review of this case to only the Glossen question, the brief filed by the State in State v. Hunter, Case No. 73,230 (Fla. Oral Argument Scheduled June 8, 1989), and adopted by Petitioner does not so limit the issues before this court. See Brief of Petitioner pp. 7 and Appendix 2 pp. 13-15. Thus, Respondent feels that it is necessary to address entrapment under Cruz v. State, 465 So.2d 516 (Fla. 1985) as an additional ground supporting dismissal. In Cruz, this court recognized that, at times, police activity will induce others who would not ordinarily do so to violate the law. A threshold test was established to determine the parameters of an entrapment defense. The court must first decide a two-part objective test to determine whether or not a defendant was entrapped as a matter of law. In order to defeat this objective test of entrapment, the police activity in question must be shown to (1) have as its end the interruption of a specific ongoing criminal activity and (2) use means reasonably tailored to apprehend those involved in criminal activity. The State cannot show the above test has been met in the instant case.

As to the first prong there is no conflict. Respondents Messier and Evans were completely unknown to law enforcement. Kennedy had no direct knowledge of Respondent Evans ever being involved in using drugs. Kennedy was completely unaware of Respondent Messier. Further, Detective Lamb knew Kennedy would not be going after her co-defendants, but would be making new deals. Absolutely no evidence points to Respondent Messier being involved in any ongoing criminal activity. The policy behind the first prong of Cruz is clearly that the police may only seek to arrest those persons about whom they have some objective basis upon which to form a belief that the individual is already engaged in criminal activity. Absent that belief, the policy considerations of Cruz require that criminal prosecutions cease as entrapment has occurred. Because law enforcement had no such knowledge, it is ludicrous that Respondent Messier should be swept up in the net cast out by law enforcement's scheme.

The district courts have consistently held that dismissal under Cruz is appropriate when the State fails to meet the first prong. See Marrero v. State, 493 So.2d 463, 466 (Fla. 3d DCA 1983) (the activity of the police constituted entrapment of Cruz because, among other reasons, the police had no information of prior involvement of the defendant in illegal drug activity); Pezzella v. State, 573 So.2d 1328, 1330 (Fla. 3d DCA 1987) (even though the State traversed, dismissal was required under Cruz because, among other reasons, the police had no prior information that the defendant had been involved in any illicit drug activity); Rounsley

v. State, 520 So.2d 333, 334 (Fla. 4th DCA 1988) (conviction for trafficking in cocaine reversed because the first prong of Cruz was not met where the defendant had not been "under articulable suspicion "for any narcotics violation); Myers v. State, 494 So.2d 517 (Fla. 4th DCA 1986) (neither the informant nor police had any evidence that the defendant had engaged in prior unlawful drug transactions). Thus, dismissal is appropriate upon the untraversed motion to dismiss filed by Respondent Messier under the first prong of Cruz.

The district court cases, State v. Perez, 438 So.2d 436 (Fla. 3d DCA 1983) and Garcia v. State, 528 So.2d 76, 77 (Fla. 2d DCA 1988), which have failed to recognize the viability of the vicarious entrapment defense are distinguishable, and therefore not applicable to the instant case. Perez was decided prior to the Cruz decision and did not address the question of the two-prong test for objective entrapment under Cruz. Perez could not and did not address it. Garcia addressed the second prong of Cruz, not the first. In Garcia one Figueredo was entrapped because of police misconduct and Figueredo was granted a dismissal. Garcia was unaware of the police misconduct when he accompanied Figueredo to the drug transaction. Garcia did not address the defense of vicarious entrapment under Cruz when the State fails to meet the first prong of Cruz. Further the defense of vicarious entrapment has been recognized by the second circuit in United States v. Valencia, 645 F.2d 1158 (2d Cir. 1980), opinion amended by United States v. Valencia, 669 F.2d 37 (2d Cir. N.Y. 1980).

The second prong of Cruz cannot be met by the State. The substantial assistance agreement signed by Kennedy was in flagrant violation of section 893.135(3), Florida Statutes (1986). The blatant disregard for the law by the State constituted an inappropriate police technique which "fell below standards to which common feelings respond for the proper use of government power." Cruz, 465 So.2d at 521-522. To sanction a conviction or prosecution on intentional, blatant violations of the law by the State flies in the face of the spirit of the decision in Cruz.

Respondent urges this court to uphold the dismissal of charges against him as mandated by a unanimous court in the Second District. Certified question number one should be answered affirmatively by this Court.

ISSUE II

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

Respondent Messier respectfully submits that the above certified question should be answered in the affirmative. Those cases cited by Petitioner are distinguishable from the instant case.

Petitioner relies upon Perez, supra for the proposition that the defense of entrapment is inapplicable where the inducement comes from a non-agent private citizen. Perez was not decided under a Cruz analysis and did not turn on a due process analysis. Cruz was decided after Perez. Thus, the ruling in Perez is inapplicable to those cases arising after Cruz. No decision of this court has held that a defense of "vicarious entrapment" does not exist under Cruz. As Respondent has argued earlier in his brief, vicarious entrapment should apply to the instant set of facts. Perez further did not address the doctrine of due process. Petitioner's sought-after extension of an outdated and inapplicable ruling to a due process violation is inappropriate.

In the instant case, the inappropriate and illegal activity forms the very foundation upon which prosecution is based. In those decisions where the district courts have not allowed vicarious entrapment, the improper activity was that solely of the confidential informant, not sanctioned by law enforcement, not conducted at the insistence of law enforcement, and not promulgated

by law enforcement. In the instant case the State engaged in flagrant violations of the law; the illegal activity which caused this transaction to occur was instituted, sanctioned, and promulgated by law enforcement. The plan itself is under attack, not the method the informant independently chose to carry out an otherwise acceptable plan. Thus, the defense of entrapment must also be available to Respondent Messier.

This court in Cruz acknowledged that the objective view of entrapment, as adopted by this court, parallels a due process analysis. See Cruz, at 520 footnote 2. As this court then stated "The objective view requires that all so ensnared be released." Cruz, at 520. Cruz does not preclude the application of the due process considerations of Glossen to those situated as Respondent Messier, but rather supports the application of Glossen even when the informant does not have direct contact with a co-defendant. Since Respondent Messier was one of those "so ensnared," his charges were properly dismissed.

The Glossen court cites with approval People v. Isaacson, 44 N.Y. 2d 511, 40 6 N.Y.S. 2d 714, 378 N.E. 2d 78 (1978), where police brutalized a confidential informant who in turn procured a drug sale. The Isaacson court found the police action was a violation of due process:

> "While this harm was visited upon a third party, it cannot be overlooked, for to do so would be to accept police brutality as long as it was not pointed directly at the defendant himself. Not only does the end not justify the means, but one should not be permitted to accomplish by indirection that which is

prohibited by direction."

Isaacson, 406 N.Y.S. 2d at 719, 378 N.E. 2d at 84 (emphasis added). Since Respondent was like Isaacson, a third party, his case is also correctly subject to dismissal on due process grounds. Respondent Messier respectfully urges this court to answer the second certified question in the affirmative.

CONCLUSION

For all of the foregoing reasons the decision of the Second District Court of Appeals, based upon this Court's holding in Glossen, affirming the trial court's order dismissing the charges against Respondent Messier should be upheld and the certified questions answered in the affirmative.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
FLORIDA BAR NUMBER 0143265

ANDREA STEFFEN
Assistant Public Defender

Public Defender's Office
Tenth Judicial Circuit
Polk County Courthouse
P. O. Box 9000
Drawer PD
Bartow, FL 33830
(813) 534-4200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 19th day of May, 1989.

ANDREA STEFFEN

AS/tll