IN THE SUPREME COURT OF FLORIDA

FILED
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MAY 3 1989
CLERK, SUPREME COURT
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STATE OF FLORIDA,
Petitioner,

v.

MARK D. EVANS, and
VERNON MESSIER,
Respondents

Case. No. 73,779

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CERTIFIED QUESTIONS

BRIEF OF THE PETITIONER

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STATEMENT OF THE CASE AND FACTS

Marcia Kennedy was arrested May 29, 1987, R109, on five counts (R107-08) arising from possession and conspiracy to traffic in cocaine (R65). Although she faced at least a three year minimum mandatory sentence, she was ultimately sentenced to two years of house arrest and five years probation. R65. She had one prior conviction, a three-year-old felony shoplifting conviction. R106.

Shortly after her arrest, in early in June 1987, Detective Lamb approached Kennedy while she was in jail and offered to help her with her own charges if she would assist the police regarding drug trafficking. R68. While Kennedy initially said she didn't know if she could help, Lamb contacted her again after her release form jail and she agreed to cooperate. R68. She had no particular parties in mind when she agreed to cooperate. Id.

Jack Duerk, Kennedy's boyfriend, had also been jailed with Kennedy on charges arising from the same drug case she had been arrested for in May 1987. R71. Duerk suggested Kennedy go to Evans to purchase some cocaine as part of the cooperation with police. R71. Kennedy knew Evans ever since she first met him while he was with Duerk two years before. R122. She later met Evans on two other occasions, the last time when Evans sold Duerk a dog. R123. She first learned Evans sold cocaine when Duerk told her after she agreed to cooperate with police. R125.

Duerk drove with Kennedy to Evans' house the day Kennedy went to set up the deal. 84. Duerk got out of Kennedy's car at the end of the road on which Evans lived and waited at the end of the road while Kennedy drove to Evans' house. Id. Kennedy honked her horn and Evans came out of his house, along with a woman, Peacock. R75-76. Kennedy spoke with Evans about getting an ounce of cocaine while she sat in her car in front of his house. Id. Evans said he would see what he could do, and gave Kennedy his telephone number and instructed her to call him the next day at 3:00 p.m. R80-81, R128. Evans was not nervous or reluctant to sell Kennedy the cocaine when he told Kennedy to call him the next day to finalize the deal. R127.

Kennedy then called Detective Lamb and informed him of the deal with Evans. R71. She told Detective Lamb Evans used to deal and that she had bought cocaine from Evans in the past. R154, R173. On the day of Evans' arrest, Kennedy called Evans at 3:00 p.m. as he had instructed her. R128. She asked Evans to bring the cocaine to her house. Evans agreed but said he had to do some laundry and it would be a while. R128. Evans also mentioned that he could sell Kennedy a second ounce of cocaine. R133. Evans called Lamb and told him Evans had suggested buying two ounces, one for personal use and one to sell up north, as Kennedy had told Evans she and Lamb wanted to buy some cocaine before a trip up north. R159-60. Lamb told Kennedy to go for two ounces if she could. R120, R161. Kennedy called Evans back, and he told her the price of one ounce uncut cocaine was $1400, the price for a cut ounce was $1200. R160.

When Kennedy called Evans back to set up the buy for two ounces, Evans told her his supplier would only front him one ounce at a time, and that he would have to bring the one ounce, get the money, and go back for the other ounce. R163. When Kennedy called Lamb with this information, Lamb told Kennedy to just set up the deal for one ounce, as he didn't have the time to wait for the second ounce. R163. Kennedy called Evans back, and Evans said he would call her back in 15 minutes. When he did, he said he would bring both ounces, and asked whether she wanted two uncut ounces or one uncut and one cut. Lamb had already said to buy one of each, so that is what Kennedy finally agreed to with Evans. R163. Kennedy testified in deposition she called Evans three times the day of Evans' arrest, the first time to set up the deal and two subsequent times because Evans was late. R88. Kennedy also testified that on one of the subsequent calls she "beeped" Evans and left a girlfriend's telephone number for a return call. R128. Lamb said that while he was at Kennedy's house waiting for Evans to arrive around 4:30 p.m., Kennedy called Evans back and inquired why he was late, and Evans told her he would be leaving in about five minutes. R165. The cover story was that Lamb was Kennedy's brother. R170.

Evans ultimately arrived at Kennedy's house at 5:55 p.m. Evans drove, and Ms. Peacock, the woman who had come out with Evans when Kennedy had first gone to Evans' house to arrange the deal, was in the passenger seat. Messier arrived at the same time and pulled up one car away from where Evans parked. R166.

Evans came up to Kennedy's second floor apartment carrying a blue pouch, accompanied by Peacock. R166. Evans said he had the cocaine, put the pouch on a counter and opened it, pulling out two plastic bags of cocaine. R166-67. After Lamb examined the cocaine, Peacock picked it up and looked at it, saying she hadn't seen so much cocaine before. R167. Lamb gave Evans $2600 for the cocaine, and Evans put the money inside the blue pouch. Evans then tried to talk Lamb into snorting some of the cocaine with him, but Lamb declined. R167. Lamb then asked Evans if he could buy more ounces of cocaine in the future, and Evans told him there was no problem, just give him a two-hour notice and he could get Lamb anything he wanted. R167-68. Evans and Peacock then left. R168. They were arrested downstairs by other officers, along with Messier. R170. Inside Evans' car, police found a container known as a snow blower, used to ingest cocaine, containing cocaine residue, and a glass bottle containing cocaine residue, on the center console of the car. R189.

Peacock, Evans, and Messier were charged with conspiracy to traffic in cocaine and trafficking in cocaine, and Messier was also charged with felony possession of cocaine. R23-24. Evans and Messier moved to dismiss the charges. R52-60, R191-96. At a hearing February 9, 1988, Judge Pendino granted Evans' motion to dismiss. R209-249. Judge Pendino expressly rejected Evans' argument that pressure brought to bear on Kennedy, resulting in an alleged illegal cooperation agreement between police and Kennedy, was the basis for his ruling. R245. The sole basis stated for the ruling regarding Evans was "that there was entrapment as a matter of law." When Messier then sought dismissal based on the ruling on Evans, Judge Pendino stated:

> THE COURT: Well, let me say this: There's an objective test under the Cruz case, there's a two-prong test which was not met in regard to the defendant Evans.
>
> The Evans motion was not granted based on the fact that it was an illegal contract,

> okay? And I think to that extent I agree with the Lusby case, okay?
>
> I think the facts are different in the Lusby case, and evidently the Court in that case found that it met the Cruz test, two-prong test, but because the contract was illegal it doesn't automatically follow that everything that transpired after that should be dismissed.
>
> I need to know what the facts are that are applicable to this defendant to see if in fact the Cruz test has been followed or not.
>
> So just based on the fact I granted it as to Evans doesn't necessarily mean I'm going to grant it as to any other defendant. This is not a fruit of the poisonous tree type doctrine.

R245. At a hearing February 19, 1988, on Messier's motion to dismiss, Judge Pendino granted the motion, his sole reason being: "Based on the Cruz case, and following the Cruz case the Motion to Dismiss is granted." R265.

The second district affirmed, relying on the decision from the fourth district in Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988) and certifying the same questions certified in Hunter, towit:

> 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[, 462 So.2d 1082 (Fla. 1985)]?
>
> 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?

Hunter, 531 So.2d at 243. The decision below in this case, State v. Evans, 537 So.2d 639 (Fla. 2d DCA 1988), does not include the certified questions, but incorporates them by reference to Hunter.

SUMMARY OF THE ARGUMENT

The state adopts the argument of the state in Hunter, incorporating the brief from that case by reference. The state further urges that the facts in this case are parallel to those in Hunter: the CI had already received the benefit of the substantial assistance bargain before the trial of the respondents and her testimony was not essential to successful prosecution. Further, issues of entrapment are not before this Court, since the sole basis for affirming below was the Hunter/Glosson due process rationale.

ARGUMENT

GLOSSON SHOULD NOT BE EXTENDED TO PREVENT SUBSTANTIAL ASSISTANCE AGREEMENTS

The state adopts the initial brief filed by the state in State v. Hunter, No. 73,230 (Fla., Oral Argument Scheduled June 8, 1989). The brief is attached as an appendix hereto.

The state emphasizes that the same situation exists in this case as exists in Hunter. The confidential informant had already received the benefit of the bargain, i.e. a reduced sentence, prior to the trial of the respondents. State v. Glosson, 462 So.2d 1082 (Fla. 1985), involves a very narrow situation, wherein the paid agent's benefit is contingent upon his testimony at trial:

> Wilson [the paid agent] 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. . . .
>
> Accordingly, we hold that a trial court may properly dismiss criminal charges for constitutional due process violations in cases where **an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution.**

Glosson, 462 So.2d at 1085 (emphasis added). For Glosson to even apply in this case, or in Hunter, to paraphrase Glosson, the facts would have to show that 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 benefit of reduced punishment was simply not contingent on successful prosecution. The CI in this case had already been sentenced. Nor was her testimony critical to make out a prima facie case against the respondents. A detective was present throughout all aspects of the transaction except for the initial contact. His testimony, alone, would be enough to convict. If the state did wish to call the CI, the CI would have no incentive to lie to convict respondents. The only compulsion available at the time of respondents' trials would have been the prohibition against perjury. Thus, the CI would have been in the same position as any other witness, and the danger of perjured testimony, which appears to be one of the primary concerns of Glosson, is not an issue in cases such as the one sub judice.

Further, Glosson exists as a protection against egregious police conduct, regardless of the predisposition, vel non, of the defendant, 462 So.2d at 1085, and, therefore, regardless of any actual entrapping behavior. In any police investigation, a defendant is protected from entrapping behavior by the traditional entrapment defense and the procedural protections of section 777.201, Florida Statutes (1987). In the instant case, any question of entrapment is wholly irrelevant to the Glosson rationale.

Entrapment looks to the relationship between the defendant and the police agent; due process protection under Glosson looks to the relationship between the agent and the police. Thus, the question of whether Evans was entrapped is not before this Court, as the only matter decided below was that the arrangement between the confidential informant and police violated due process. Just as the trial judge below showed confusion about the basis of his decision, opposing counsel in this case appear to likewise confuse entrapment with due process. Hopefully, the narrowing of the issue to the single Glosson question will assist in narrowing the scope of argument.

CONCLUSION

Based on the argument and citations herein, and incorporated by reference from the argument in Hunter, this Court should quash the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Stuart Markman, WINKLES, TROMBLEY, KYNES & MARKMAN, P.A., 707 N. Franklin Street, Tenth Floor, P.O. Box 3356, Tampa, Florida 33601, and to Andrea Steffen, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this 1st day of May 1989.

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OF COUNSEL FOR APPELLEE