IN THE SUPREME COURT OF FLORIDA

AIDA HERNANDEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 74,210

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. The State of Florida was the appellee in the Fourth District Court of Appeal and the prosecution at trial. The parties will be referred to by name.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. The symbol "SR" refers to the Supplemental Record.

STATEMENT OF THE CASE

Ms. Hernandez, together with several codefendants, was charged by information with possession or delivery of more than 400 grams of cocaine (Count I) and with conspiracy to traffic in more than 400 grams of cocaine (Count V) (R358-359,360).[1] Ms. Hernandez's motion to suppress the fruits of a wiretap order (R403-405) was denied (R417-422) after hearing. Ms. Hernandez's renewed objections to this evidence at trial were overruled (R156-157,160,241), and the evidence was admitted.

The jury returned its verdicts finding Ms. Hernandez guilty of trafficking in more than 400 grams of cocaine (R425) and conspiracy to traffic in cocaine (R209). Ms. Hernandez's motion for a new trial (R427-430) were denied (R341). On August 14, 1987, Ms. Hernandez was adjudged guilty of each offense for which the jury found her guilty (R441-442) and sentenced to serve concurrent terms of twenty-five years in prison on each count (R443-445). A mandatory minimum fifteen year sentence and $250,000 fine were imposed on Count I. This sentence was in excess of the guidelines sentence of five-and-a-half to seven years (R344), and the trial court entered a written order giving as reasons for its departure the professional manner in which the crime was committed and the amount of drugs involved, about a kilogram (R439). The court stated in its order that the second reason alone would be enough to convince it to depart.

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[1] The remaining six counts of the information did not involve Ms. Hernandez.

Ms. Hernandez's appeal was heard by the Fourth District Court of Appeal, which upheld her convictions but remanded for resentencing. The appeals court rejected Ms. Hernandez's arguments that the trial court erred in denying her motion to suppress the evidence seized as a result of the wiretap order, as well as her attack on the validity of all of the trial court's reasons for departing from the guidelines sentence. This Court accepted jurisdiction of this cause in an order dated September 29, 1989.

STATEMENT OF THE FACTS

On March 2, 1987, Detective Peter Lenz of the Indian River County Sheriff's Office obtained a wiretap order for a phone number registered to Tanya Killings, the wife of Jimmy Killings (R8-9). Two days later, Lenz sought an amended order, since the Killings phone number had been changed (R10). No written authorization for the amended application was obtained from the state attorney (R12),[2] nor did the new application incorporate the original application by reference: it merely referred to the first phone number (R22).

Overheard via the wiretap were several telephone calls made from the Killings residence on March 7, 1987 (R167,175-176). In one, Philip Thomas told Jimmy Killings that "I have five for you." (R188). The next day, a phone call was made to Ms. Hernandez's residence in Pompano. Jimmy Killings to Ms. Hernandez he wanted to see her that afternoon (R177). Ms. Hernandez asked, "How many," and Killings replied, "A whole not a half," and that 5:00 or 6:00 p.m. would be good (R178). At 12:19 p.m. the same day, Killings was overheard telling Philip Thomas, who lived in Orlando, to "Come by now" (R180-181).

The police monitoring these conversations thereupon set up a surveillance of Killings' house in anticipation of a possible drug delivery (R184). Deputy Brown saw Ms. Hernandez arrive at the house about 2:20 p.m., but there was no one home (R204-205).

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[2] The parties agreed that an assistant state attorney orally approved the second operation (R27,28).

Shortly thereafter, Philip Thomas also came by, but he left after talking with Ms. Hernandez (R207). The Killings returned home in separate cars at about 3:00 p.m. (R212). Ms. Hernandez then drove her car into the garage (R213). At 3:13 p.m., Killings called a neighbor, Ralph Page, and said he had something. Page responded that he was coming (R242). He was seen walking to Killings' house and then returning home with a book-sized package (R45-47). Ms. Hernandez left Killings' house at 3:21 p.m., following Jimmy Killings (R214). Killings returned alone shortly before 4:00. At 4:00, Killings left again and did not return for almost an hour. Then he left the house at 5:11, returning at 5:34 p.m. when he met Thomas, who left a minute later (R217-218). Brown saw nothing exchanged between Killings and Thomas before the latter left (R240).

Police later stopped Philip Thomas' car as it was driving northbound on the interstate (SR67). Inside were about three ounces of cocaine (SR70), worth approximately $5000 (R250). When Page's house was searched pursuant to a warrant, two small bags of cocaine were found in a closet (SR50,78). Later, a second search resulted in the recovery of a large amount of cocaine hidden beneath the floor (SR121). About a thousand grams of cocaine were found in all (SR117).

Ralph Page, who pled guilty to possession of cocaine and hoped for a break in his own case, for which he had not yet been sentenced (SR111), testified for the state at Ms. Hernandez's trial. Page's job was to store cocaine shipments at his house for Jimmy Killings. In exchange, Killings paid Page's rent (SR83-84).

On March 8, Page picked up a package from Killings (SR78). At the Killings' house, he saw Ms. Hernandez and another woman sitting in the kitchen (SR95,105). Later, Killings came over to Page's house, weighed out some of the cocaine and left with it (SR101-102).

When Ms. Hernandez was arrested in Pompano a few days later, she agreed that she had visited the Killings, who were friends of hers. She explained she had had a fight with her boyfriend and stayed with the Killings for about an hour (R254).

Ms. Hernandez, testifying in her own behalf, explained that she and Jimmy Killings were having an affair without Tanya Killings' knowledge (R275). On March 8, Jimmy Killings called and told her he needed to see her. He wanted her to come the "whole" way to his house, rather than meet "halfway" in West Palm Beach (R276). Ms. Hernandez took a friend named Sharon Hills, who used to live in the same town as Killings, because Ms. Hernandez didn't like to drive all the way by herself. But Ms. Hills had to be back by 7:00 p.m., so the pair left early (R277-278). When they arrived, Ms. Hills saw someone with whom she had had a dispute. She ducked down in the car to the other person wouldn't see her and remained that way until Ms. Hernandez drove into the garage when Killings arrived (R279).

After a while, Killings signaled Ms. Hernandez that they should leave. They stopped three blocks away, where Killings told Ms. Hernandez she was too early, he was busy. Ms. Hernandez told him she would wait in Gifford for about an hour for him, but he never came, so she drove home with Ms. Hills (R284-285).

SUMMARY OF ARGUMENT

1. That the drug trafficking in the present case was committed in a professional manner did not apply to Petitioner, who was a mere cog in the system rather than the major player. Because any drug trafficking offense is necessarily committed in a professional manner, this reason is an invalid basis for a guideline departure sentence. The invalidity of this reason for departure, together with the trial court's reliance on the amount of drugs involved, as to which the legislature has already determined the appropriate sanction, requires that this cause be remanded for resentencing.

2. An amended wiretap application must meet the same statutory standards as any application. Failure of state officials to comply with this requirement renders the intercept order in the present case illegal, and the evidence seized pursuant thereto must be suppressed.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE BASED ON THE "PROFESSIONAL" MANNER IN WHICH THE CRIME WAS COMMITTED.

Ms. Hernandez's guidelines sentence was five-and-a-half to seven years in prison (R344). The mandatory minimum sentence applicable to the trafficking offense for which she was convicted was fifteen years in prison. Section 893.135(b), Fla.Stat. The trial court's appropriate sentencing option was therefore a fifteen year prison sentence. Instead, the court chose to impose on Ms. Hernandez, virtually a first offender, concurrent sentences of twenty-five years in prison, almost twice the term required by law (R443-445). The court's written reasons[3] for doing so were that the crime was committed in a "professional" manner and that the amount of cocaine involved exceeded the statutory jurisdictional amount (R439).

Basing a guidelines departure sentence on the amount of drugs involved is patently improper, as this Court has unambiguously

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[3] Orally, the trial judge complained that "philosophically I don't like all this sentencing guidelines business. It ties the court's hands." (R344). The court further observed "Bringing that into this community or any other community, this cocaine business, is devastating. You're -- you're in the process of aiding and abeting [sic] the destruction of families, numerous families and lives and you're part of that. And that's what makes this crime so devastating to a community." (R349). Both of these musings by the judge were, of course, invalid considerations for the departure sentences given. E.g., Safford v. State, 488 So.2d 141 (Fla. 5th DCA 1986) [trial court's dissatisfaction with guidelines invalid reason to depart]; Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986) [harmful effects of cocaine on society improper basis for departure.]

held. Atwaters v. State, 519 So.2d 611 (Fla. 1988). This leaves as the sole arguable justification for Ms. Hernandez's departure sentence the trial court's characterization of the crime as committed in a "professional" manor.

But the evidence in the present case indicated, at most, that Ms. Hernandez was a "mule," that is, that she merely delivered drugs for the supplier to the dealer. This was the state's theory at trial[4], and there was nothing to imply any greater involvement on her part. The trial court's characterization of the drug transaction as a "professional" one may thus have some applicability to Killings, the apparent kingpin of the operation. But it cannot be attached to Ms. Hernandez, who simply drove the delivery vehicle, without participating in the planning of the scheme. Thus, in Widner v. State, 520 So.2d 676 (Fla. 1st DCA 1988), the appellate court held that although the circumstances of the case exhibited an extreme example of manslaughter and robbery, the reason it was so extreme was because of what the codefendant did, not the defendant.

Similarly, in the instant case, any professionalism in the way in which this offense was committed was the responsibility of the principals, not of Ms. Hernandez, who merely followed orders. Under the Widner rationale, then, the acts of the superiors could not be imputed to Ms. Hernandez in arriving at a bases for departing from her guidelines sentence - to hold otherwise would strip

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[4] The state suggested, without ever proving, that Ms. Hernandez's former boyfriend, Raul Quintera, was the actual source of the drugs (SR187-188).

from the guidelines the concern for individualized sentencing which is at the core of their function. See, State v. Mischler, 488 So.2d 523 (Fla. 1986). Precisely this point was made by the Fourth District Court of Appeal itself in Fletcher v. State, 508 So.2d 506 (Fla. 4th DCA 1987), approved State v. Fletcher, 530 So.2d 296 (Fla. 1988), which recognized that the fact that the defendant in that case was "Mr. Big" in the drug trafficking operation was a valid reason to depart from the guidelines sentence. The instant case presents the obverse situation: A defendant who was a mere cog in the wheel, not the driver of the bus. Holding Ms. Hernandez responsible for "Mr. Big's" " professionalism" ignores the difference in culpability which Fletcher found compelling.

In addition, the Third District Court of Appeal has held that even where a drug offense was justly described as executed in a "professional manner," this was an invalid basis for departure from a guidelines sentence, because the stated reason is an inherent component of the crime of trafficking in cocaine. Collins v. State, 535 So.2d 661,663 (Fla. 3d DCA 1988). Indeed, the state conceded as much in that case, perhaps based on its reading of this Court's own decision in State v. Fletcher, supra, wherein it agreed that a finding that the defendant "planned and calculated the crime with sophistication and well-organized premeditation including 'months of plotting and scheming'" was an insufficient basis for departing from the sentencing guidelines. This Court determined that, because all large drug trafficking cases inherently involve

calculated planning and premeditation, reliance on this factor as a reason for departure would render virtually every drug trafficker the subject of a departure sentence.

Surely there is no reasonable distinction which can be drawn between the "sophistication and well-organized premeditation" condemned as a reason for departure by this Court in Fletcher and the professional manner" which the district court of appeal approved in the present case. Consequently, neither of the reasons given by the trial court for departing from the sentencing guidelines was valid, and Ms. Hernandez's departure sentence must be reversed and this cause remanded for resentencing within the guidelines.

POINT II

THE TRIAL COURT ERRED IN DENYING MS. HERNANDEZ'S MOTION TO SUPPRESS THE FRUITS OF AN ILLEGAL WIRETAP ORDER.

Chapter 934, Florida Statutes, the Security of Communications Act, sets forth the requirements which must be met in each application for an electronic intercept as follows:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such an application. Each application shall include the following information:
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> (a) The identity of the investigative or law enforcement officer making the application and the officer authorizing the application;
>
> (b) A full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including details as to the particular offense that has been, is being, or is about to be committed, a particular description of the nature and location of the facilities from which, or the place where, the communications are to be intercepted, sought to be intercepted, and the identity of the person, if known, committing the offense and whose communications are to be intercepted;
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> (c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.
>
> (d) A statement of the period of time for which the interception is required to be maintained and, if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular descrip-

> tion of facts establishing probable cause to believe that additional communications of the same type will occur thereafter.
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> (e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application; and
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> (f) When the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception or a reasonable explanation of the failure to obtain such results.

Section 934.09, Florida Statutes.

No exceptions for amended or supplemental applications are recognized or provided for in the statute. In Bagley v. State, 397 So.2d 1036 (Fla. 5th DCA 1981), the Fifth District Court of Appeal strictly interpreted the requirements of this statute as applied to amendments to wiretap applications. Thus, in Bagley, an amended application which specifically incorporated by reference the allegations of the previous application nevertheless was held invalid where it did not include an explanation of why traditional methods of surveillance would be inadequate at the new location and contained an averment by the state attorney that he had no knowledge of any previous wiretaps against the persons in the amendment, when in fact the original wiretap had been ordered against them. This defect necessitated the suppression of the illegally acquired recorded conversations. Bagley; see also, Wilson v. State, 377 So.2d 237 (Fla. 2d DCA 1979).

In the present case, the police sought an amended application for a wiretap which had been ordered a few days earlier at the home of Jimmy and Tanya Killings. The amended application did not, however, incorporate the original application by reference (R22), was not authorized by the state attorney (R12), and did not, in short, comply with the statutory requirements made mandatory in Ch. 934. The only distinction between the instant case and Bagley and Wilson, supra, is that the amended wiretap order in the present case was necessary because of a change in the telephone number of the targeted party, rather than a change in his address, as in Bagley and Wilson. It was on this basis that the Fourth District Court of Appeal hung its hat when it refused to apply the Bagley rationale to the instant case. No statutory support for such a distinction exists, however. And the lower appellate court's reliance on United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), is misplaced. Although Bascaro did find sufficient an application for an amended wiretap order which was based on a change of telephone number. But in so holding, the federal court of appeals was careful to point out that the application for an amended wiretap order was accompanied by an attached copy of the original wiretap order which was also incorporated into the amended application by specific reference, and which itself satisfied the statutory requirements.

In the present case, in contrast, the application for the amended wiretap order made no such reference to the prior order. This absence of either an attachment or an incorporation by reference of the prior order dispositively distinguishes the

instant case from Bascaro. An affidavit in support of a search warrant which is sufficiently detailed cannot cure a defect in the warrant, such as a failure to sufficiently describe the items to be seized, unless the affidavit is physically incorporated by reference. West v. State, 439 So.2d 907 (Fla. 2d DCA 1983); see also, Suarez v. State, 400 So.2d 1048 (Fla. 3d DCA 1981); State v. Stolpen, 386 So.2d 581 (Fla. 4th DCA 1980). Thus, the failure to attach the prior wiretap order or incorporate it by reference into the application for an amended wiretap order precludes any attempt to correct the deficiency in the amended wiretap application by reference to the information contained in the initial application, as was undertaken in Boscaro.

Consequently, the amended wiretap application in the present case failed to comply with the statutory requirements set forth in Ch. 934, Florida Statutes. This defect required suppression of any evidence seized as a result of the illegal wiretap order. Ms. Hernandez as a person aggrieved by the intercept order[5] correctly moved to suppress the illegally obtained intercept evidence and the trial court reversibly erred when it denied that motion.

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[5] "Aggrieved person means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." Section 934.02(9), Fla.Stat.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, petitioner respectfully requests this Court to quash the decision of the Fourth District and remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JAMES CARNEY, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 24th day of October, 1989.

Of Counsel