O/C 1-9-90

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,210

AIDA HERNANDEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, CRIMINAL DIVISION

****

RESPONDENT'S BRIEF ON THE MERITS

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CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Aida Hernandez was the defendant below and shall be referred to as "petitioner," in this brief. The State of Florida shall be referred to as "respondent." References to the record will be preceded by "R." References to the supplemental record will be preceded by "SR."

STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts with the following additions, corrections, or clarifications:

At the hearing on the motion to suppress, Detective Peter Lenz testified that he prepared the application for the wiretap (R 5). He prepared a draft that was shown to the State Attorney (R 5). Authorization for the wiretap was issued by Judge Vocelle on March 2, 1987 (R 6, 10). Lenz submitted an amended application because the number was to be changed (R 10). It was common for Killings to change his phone number (R 16). Nothing was physically different when Killings changed his number. The original tap could still receive the conversations on Killings' line (R 20, 23).

Detective Garfield learned that drugs were delivered to Killings' residence in two ways (R 34, 35). One was for a car pull into the driveway. The garage door would open and the car would pull in (R 34). The door would then close and the transfer would be made (R 34). The other method involved throwing a package over the fence in the backyard (R 34-35).

On March 7, 1987, Phillip Thomas told Jimmy Killings that, "I have five for you." (R 188). Detective Lenz believed Thomas was referring to $5000, which would buy about three ounces of cocaine (R 53, 56-57). The next day at 9:49 a.m., Killings called petitioner (R 56). Killings asked for "Connie." Petitioner identified herself as "Connie" (R 56, 177). Killings said that he really needed to see her (R

187). Petitioner asked, "How many. . .. Half?," (R 187) and Killings replied, "Whole." (R 187). Killings then called Thomas at 12:19 p.m. and asked when he was leaving (R 59). Thomas said he would be there in two hours (R 59). Petitioner arrived at 2:20 p.m. (R 204). Thomas arrived at 2:21 p.m. (R 206). The two talked briefly and returned to their cars (R 207). Killings arrived at 3:00 p.m. (R 212). "The minute" Killings arrived, the garage door was opened. Petitioner drove her car into the garage and the door was closed (R 213). No one else drove into the garage (R 213).

At 3:13 p.m., Killings called Ralph Page and told him to pick up the cocaine (R 242, SR 94). Detective Fafeita conducted surveillance of Jimmy Killings' residence on March 8, 1987 (SR 44). At 3:16 p.m., he observed Ralph Page walk to the rear of Killings' residence (SR 47). At 3:20 p.m., Page returned to his residence with a paper bag under his arm (SR 47). At 3:21 p.m., petitioner left the residence (R 214).

Ralph page testified that he lived a block and one-half from Jimmy Killings on March 8, 1987 (SR 77). Killings told Page that this deal involved a kilo of cocaine (SR 86). Killings wore rubber gloves when handling cocaine (SR 103). When Page entered Killings' residence, petitioner was sitting at the table (SR 95, 108). Killings was standing by the counter (SR 108). Page retrieved a packet of cocaine from Killings and took it back to his residence (SR 77). Page hid the cocaine underneath the floor in his residence (SR 78).

Killings later came to Page's house, weighed a portion of the cocaine, and left with it (SR 101-02).

When Page was arrested that evening, the police found two small bags of cocaine in the residence (SR 78). Page met Phillip Thomas in jail that night (SR 81). The next morning they called Tanja Killings and told her that the police had not found the large portion of the cocaine (SR 83).

Page testified that he had stored drugs for Killings for two and one-half years (SR 83). Page learned of this cocaine deal the night before he picked it up (SR 109).

Tommy Bridges testified that he rented a car for Phillip Thomas on the day Thomas was arrested with the cocaine (SR 27). Thomas had told Bridges earlier that he wished to rent a car (SR 27). When Thomas' car was stopped that evening, the police recovered three ounces of cocaine (R 32).

Babu Thomas, a forensic chemist, testified that three exhibits of cocaine in this case totalled 1001 grams (SR 117). Detective Tom White conducted a search of Page's residence (SR 120). He found the cocaine in the false bottom of a kitchen cabinet (SR 121).

The original intercept order was entered March 2, 1987 (appendix A). The amended order was entered March 4, 1987 (appendix B). That order changed the telephone number and stated, "In all other respects the original order remains in full force and effect." (appendix B).

SUMMARY OF THE ARGUMENT

I

The professional manner in which a crime is committed can be a valid reason for departure. There was ample evidence that petitioner committed this crime in a professional manner. Her actions were done in the course of committing the crime and do not constitute inherent components of the crime. These actions evinced a familiarity with drug trafficking and were done solely to reduce the chances of detection.

II

The amended application and order are valid. The amended application referenced the original order, which fully complied with the requirements of Section 943.09 Florida Statutes (1987). When a change in a wiretap order involves only a change in the telephone number involved, it is not necessary that the application restate the requirements of Section 943.09. See United States v. Bascaro, infra. Assuming that the amended order is not valid, the original order continued in full force and effect.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM THE GUIDELINES BASED ON THE PROFESSIONAL MANNER IN WHICH THE CRIME WAS COMMITTED.

Petitioner's contention that there was no evidence of professionalism on her part is without merit. When she was called by Killings, she used an alias (R 56, 177). She spoke in "code" to prevent detection, never mentioning drugs (R 178). When Killings indicated that he needed to see her, she knew exactly what he meant, asking whether Killings wanted a "half" or a "whole" (R 178). She was able to provide Killings with a kilo of cocaine with only a few hours' notice (R 176, 204), indicating she was not merely a "mule." When petitioner arrived at Killings' residence the garage door was opened for her. She drove into the garage and closed the door to prevent anyone from viewing her with the cocaine (R 213). Given the above, there was ample evidence that petitioner committed the crime in a professional manner.

Petitioner next argues that the professional manner in which a crime is committed is not a valid reason for departure, citing State v. Fletcher, 530 So.2d 296 (Fla. 1988). Fletcher is distinguishable. In that case, this Court held that "planning and premeditation" is not a valid reason for departure in a trafficking and conspiracy to traffic case. Id. at 297. This Court reasoned that planning and premeditation were "inherent component[s] of the crime[s]," because that phrase includes factors that

necessarily precede or follow the criminal act itself.

Unlike Fletcher, the professional actions taken by petitioner were not inherent in the crime. They were not factors that necessarily precede or follow the crime. They were taken during the course of the crime and were not necessary to commit the crime. These actions reflect a familiarity with the practice of drug trafficking and were taken solely to reduce the chances of detection.

The district courts have recognized this distinction. Since Fletcher was decided, three of the five districts have found the professional manner in which the crime was committed a valid reason for departure. See Rodrigue v. State, 533 So.2d 931 (Fla. 1st DCA 1988); Krebs v. State, 534 So.2d 1236, 1237 (Fla. 5th DCA 1988), rev. denied, 542 So.2d 1333 (Fla. 1989); D'Angelo v. State, 541 So.2d 706 (Fla. 4th DCA), jurisdiction accepted, 548 So.2d 662 (Fla. 1989) and Hernandez v. State, 540 So.2d 881 (Fla. 4th DCA), jurisdiction accepted, 550 So.2d 467 (Fla. 1989). The second district has not issued a decision on the subject since Fletcher was decided. However, before Fletcher was issued, the second district consistently found that this can be a valid reason for departure. See Hoyte v. State, 518 So.2d 975 (Fla. 2d DCA 1988) and Young v. State, 502 So.2d 1347 (Fla. 2d DCA 1987).

No court has relied on Fletcher in finding that the professional manner in which a crime is committed is not a valid reason for departure. Additionally, there are many

cases decided before Fletcher, finding the professional manner in which a crime is committed a valid reason for departure. See, e.g. Brown v. State, 480 So.2d 225 (Fla. 5th DCA 1985); Gray v. State, 522 So.2d 91 (Fla. 1st DCA 1988); and Martin v. State, 523 So.2d 1226 (Fla. 1st DCA), rev. denied 529 So.2d 694 (Fla. 1988).

More important, in Downing v. State, 536 So.2d 189, 193 (Fla. 1988), decided after Fletcher, this Court said that it had not ruled out the possibility that "professional manner" may be a valid reason for departure, citing Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984). Even Collins v. State, 535 So.2d 661 (Fla. 3d DCA 1988), did not hold that this can never be a valid reason for departure. In Collins, the trial court gave the following reason for departure:

> 2. Executing the crimes in a professional manner. See Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984). The packaging, use of small envelopes, locked trunk support a conclusion of professional execution.

Although petitioner does not agree with the holding of Collins, it did not hold that "professional manner" can never be a valid reason for departure. The third district held that the reason, as stated (the locked trunk and packaging), was not a valid basis for departure. The third district did not overrule its earlier decision finding "professional manner" a valid reason for departure. See McCullum v. State, 498 So.2d 1374, 1376 (Fla. 3d DCA 1986).

The present situation is analogous to a kidnapping case. If in the course of committing a felony, a defendant moves

his victim, even a short distance, to reduce the chance of detection, he is also guilty of kidnapping. See, e.g. Faison v. State, 426 So.2d 963 (Fla. 1983). Here, the defendant took extraordinary steps to avoid detection. These actions were not inherent in the crime and do not constitute a separate crime for which a conviction was not obtained. This is a valid reason for departure.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO SUPPRESS THE RESULTS OF THE WIRETAP ORDER.

Petitioner contends that the trial court erred in failing to grant her motion to suppress. In support of that argument, she relies on Bagley v. State, 397 So.2d 1036 (Fla. 5th DCA 1981) and Wilson v. State, 377 So.2d 237 (Fla. 2d DCA 1979). Those cases are distinguishable from the present case. In both Bagley and Wilson, the subjects changed residences and phone numbers, forcing the State to return to court with applications to amend the existing orders. In neither amendment application did the State reassert that other investigative techniques were unlikely to succeed or too dangerous.

Where an original application is amended because of a change in a phone number, it is not necessary to reassert the requirements of Section 934.09 Florida Statutes (1987). United States v. Bascaro, 742 F.2d 1335, 1346-48 (11th Cir. 1984), cert. denied sub nom., Hobson v. United States, 472 U.S. 1017, 105 S.Ct. 3746, 87 L.Ed.2d 613 (1985) and United States v. Domme, 753 F.2d 950, 955-56 (11th Cir. 1985).

The rationale for the decisions in Bagley and Wilson is that when a suspect changes his residence, the circumstances that previously made other investigative techniques dangerous or unlikely to succeed may no longer exist. Unlike those cases, the suspect here changed only his phone number, which could not have affected the efficacy of other investigative techniques or the continued existence of probable cause.

Furthermore, the amended application did incorporate the original application by reference (R 22-23, appendix A). The application for the amended order is entitled, "In re: Application for Wire Intercept Order on Telephone Number Area Code (305) 778-1916." The original application is identically entitled. The second application states that is an application for an amended order. Additionally, the amended order makes specific reference to the original order.

Assuming arguedo that the amended order is somehow invalid, the result would not change. It is undisputed that the original order complies with the requirements of Chapter 934. If the amended order were not valid, that would not prevent the original order from remaining in effect. See also appendix B (amended order stating that except the change in the telephone number, the original order remains in full force and effect). When Killings changed his phone number, there were no physical changes to the original wiretap (R 15). The conversations continued to be intercepted. Section 934.09 does not require that a specific phone number be stated. It does not require a new application when the only change is a phone number. The amended application was made solely to placate the telephone company (R 15). Accordingly, the trial court did not err in refusing to suppress the results of the wire intercept.

CONCLUSION

Based on the foregoing argument and authorities, this Court should approve the Fourth District's opinion.

Respectfully submitted,

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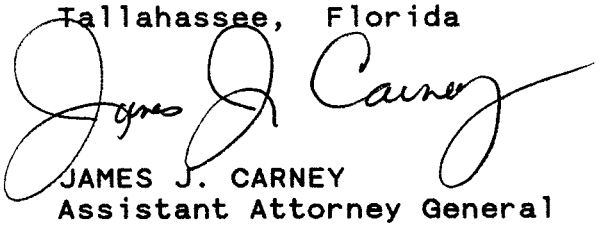

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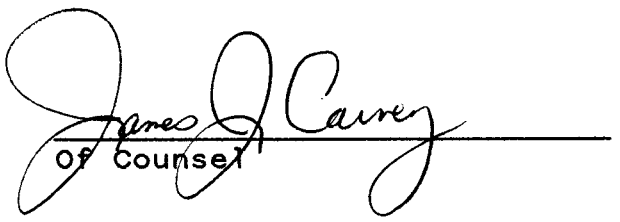
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to Tanja Ostapoff, Esquire, 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach FL, 33401, this 1ST day of December, 1989.



Of Counsel

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