IN THE SUPREME COURT OF FLORIDA

CALVIN WILSON,

Petitioner,

v. CASE NO. 75,012

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This case is before the court on a question on the defense of entrapment certified by the First District Court of Appeal in its opinion below, Wilson v. State, 549 So.2d 702 (Fla. 1st DCA 1989).

The district court also certified three other questions having to do with double jeopardy, which petitioner will not address in this brief. The district court ruled in favor of petitioner on the double jeopardy issue, and previously certified the same three questions in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), on which its decision on the double jeopardy issue in the instant case is based. Further, due to the date of the offense herein, the holding of Carawan applies, and this court has previously held that the purported overruling of Carawan by statutory amendment cannot be applied retroactively. State v. Smith, 547 So.2d 613 (Fla. 1989); Carawan v. State, 515 So.2d 161 (Fla. 1987). Petitioner, therefore, relies for argument on this issue on the district court

opinions in Wilson and Wheeler and this court's opinion in Smith.

Petitioner was the defendant and the appellant in the lower courts, and will generally be referred to by name. The state was the prosecutor and appellee below.

The record on appeal will be referred to as "R," the trial transcript of October 7, 1987, as "T," and the transcript of the sentencing and hearing on the motion for new trial as "S."

II STATEMENT OF THE CASE

Petitioner was charged by information filed July 1, 1987, with the offenses of sale of a controlled substance, one rock of crack cocaine, and possession of the same crack rock with intent to sell or deliver (R-1).

At trial October 7, at close of the state's case, petitioner moved for judgment of acquittal on a theory of entrapment, arguing that the state's agent, Officer Wilson, went looking for petitioner and provided him with money and transportation to procure drugs for her. Petitioner further argued there was no evidence of possession with intent to sell. The motion was denied (T-97-100). At close of all the evidence, petitioner renewed his motion for judgment of acquittal; it was denied (T-120).

Petitioner requested an instruction on entrapment and was denied, with instructions that the defense could refer to the factual elements, but could not tell the jury petitioner was relying on the defense of entrapment (T-121-24).

The jury found him guilty as charged of both counts. November 4, petitioner was sentenced to 30 months imprisonment (R-8).

October 15, petitioner moved for a new trial (R-3). The motion was heard and denied December 15 (S-7-8).

Notice of appeal was timely filed November 13, 1987 (R-12).

September 6, 1989, the First District Court of Appeal decided the case. As to the double jeopardy issue, the

district court reversed one of the two convictions; as to the entrapment issue, the court held petitioner was not entitled to a jury instruction on entrapment because he denied committing the offense. The court, however, certified a question on the entrapment defense, and this appeal follows.

III STATEMENT OF THE FACTS

The night of May 14, 1987, Sandra Wilson, an undercover police officer, was given $350 to make drug purchases. She made several drug buys that night. She worked alone and wore a body bug. She saw petitioner, Calvin Wilson, three times that night. The first time was at the Squeeze Inn, a bar in Jasper. He was wearing a baseball uniform and talked to her about his baseball game. She asked him if he knew anyone doing anything, which is street language for drug transactions, but they did not have a specific conversation about drugs. She did not try to purchase drugs from him, and had to leave briefly, but told him she would be right back. She left to take Bonnie Jean Raiford home and to meet with Investigator Daniels and a confidential source. Petitioner's name came up in her conversation with Daniels, and "someone" suggested purchasing drugs from him. She went back to the Squeeze Inn to find him. When he was not there, she went to Saul's Place, another bar, looking for him (T-5-12, 22-26)

She found Calvin at Saul's Place. She told him she had been looking for him and asked him to get her some crack. He told her they could get some at the Squeeze Inn, so she drove him there in her car. She gave him $20 to buy the crack. Calvin returned to the car with the crack and said it was his man's last piece. He did not say who he got it from. During the ride back to Saul's Place, Calvin kept asking her to give him a "hit" of the crack. He had a stem for smoking crack, but did not smoke any. During the drive back, Calvin tried to get

Officer Wilson to come back the next day, because that's when he got paid; he showed her where he lived, and told her he worked at the Ford place (T-9-18).

When they got back to Saul's Place, Officer Wilson gave Calvin another $20 to buy more crack, but he did not return and she was not able to locate him that night. She saw him again on May 21. Of the four times she saw him, he delivered crack to her only once. Calvin initiated their conversation at Saul's Place, but Officer Wilson could not recall who first brought up the subject of drugs. She did not see any crack in his possession before he obtained some at the Squeeze Inn (T-16,31-42, 49).

Investigator Mallory Daniels heard the transmission over the body bug, but did not see what happened between Officer Wilson and Calvin. He showed Officer Wilson a list of people who were potential targets as crack sellers. He got Calvin's name from a confidential informant (T-51-64).

Robin McDaniel, an FDLE agent, recorded the transmissions from the body bug. He typically turned off the recorder between contacts. Part of the tape concerning petitioner is audible, but the tapes pick up background noises, and he could not hear anything when Officer Wilson went inside the bar because of the loud noise (T-69-80).

Sandra Wilson was recalled to identify the tape recording. The tape was played for the jury but is not transcribed in the record. On the tape, she apparently asked Jimmy Vaughn about Calvin and said she was looking for a rock (crack). She

offered to give Jimmy some beer because she could not give him any of the crack, which was evidence (T-87-97).

After the state rested, Calvin testified that when he first met Officer Wilson at the Squeeze Inn, she talked like she had met him somewhere before. Later at Saul's Place, she was the first one to bring up the subject of buying drugs. When she drove him to the Squeeze Inn, a man he knew as Mike sold Officer Wilson the crack as she sat in the car and he and Mike stood outside the car. Calvin did not get any money from Officer Wilson. If he had gotten money from her, he would have ripped her off, as he did later that evening, because he did not know her. After Officer Wilson dropped him off at Saul's, he went to a nearby convenience store, where he saw a sheriff's car pull up beside Wilson's. Officer Wilson gave him another $20 later that evening, but he did not buy drugs with it or return it to her (T-101-09).

On rebuttal, Officer Wilson testified that Calvin personally brought her the crack (T-117-18).

During closing argument, the state attorney made the following remarks, inter alia:

> Now, Ms. Alsobrook is going to get back up here in a moment and have a chance to speak to you again, to have a chance to answer some of these things I have raised. I won't get to come back again. I would ask you put yourself in my shoes and think of what my responses may be (T-143).
>
> * * *
>
> Bear in mind Mr. Wilson didn't have any obligation to produce any evidence today as the Judge already told you, and you can't hold it against him should he not have testified, you couldn't have held that

against him. That is his right. But he chose to give up that right. He did testify. And he didn't want to be silent in this cause. Well, my question is this. Where is Mike [whom defendant identified as the seller] at and where is this other guy? (T-146)

* * *

Each time I have had to get up here to speak to you, if you notice my table has been vacant. Every time Ms. Alsobrook gets up, she's got another lawyer sitting over there helping her plus her client. Sometimes people say, well, it is a lonely job being a prosecutor. But it's not because I don't have a client, Ladies and Gentlemen. My client is the people of the State of Florida. Although you can't see them, they're there, and the people are going to speak in this case through you ---
DEFENSE COUNSEL: Your Honor, I object. he is appealing now to the sympathies of the jury... [objection overruled] (T-147)

* * *

I ask you to send Ms. Wilson [the undercover police officer] a very clear message. We appreciate what you have done. Keep up the good work. Find the Defendant guilty. Show her [Ms. Wilson] that persons such as this Defendant here in your community where crack cocaine --
[objection][sustained] (T-149)

* * *

I will say in Closing, Ladies and Gentlemen, the State has done what it could do in this case, and it's provided what I think to be overwhelming evidence of guilt. And my comment is if we can't convict someone for selling and possessing drugs in this case with this good evidence, then we may as well throw our hands up and quit. I'm sure you will reach a just and fair decision in this case (T-149-50).

IV SUMMARY OF ARGUMENT

In the instant case, a female undercover police officer approached men and/or made herself available socially to men in bars and asked them to procure drugs for her. Petitioner had no contraband in his possession but had to go another location to obtain it from someone else. The police officer drove him there in her car and gave him the money to purchase the contraband. At trial, petitioner denied committing this act, and due to his denial, was denied a jury instruction on entrapment.

Citing Mathews v. United States, infra, the First District Court certified the question whether the defense of entrapment was available to a defendant who denies committing the act. Mathews answers the question unequivocably "yes," thus petitioner was entitled to an instruction on the defense of entrapment, and the trial court erred in denying his requested instruction.

The certified question, however, does not get to the heart of the error here. Florida recognizes defenses of both objective and subjective entrapment. Objective entrapment focuses on the police conduct and is decided as a matter of law; subjective entrapment focuses on the defendant's predisposition and is decided by the finder of fact. In the instant case, the police conduct clearly fell within the objective entrapment criterion of police conduct which creates a substantial risk that an offense will be committed by persons other than those who are ready to commit it, and thus the trial court erred in denying his motion for judgment of acquittal.

In the alternative, assuming this court found the police activity herein acceptable, then the evidence was legally insufficient to sustain conviction due to the insufficiency of evidence on predisposition. While the state offered evidence on which petitioner could be found predisposed to use drugs, there was virtually no evidence of a predisposition to sell drugs.

V ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN NOT GRANTING JUDGMENT OF ACQUITTAL ON THE ISSUE OF ENTRAPMENT, AND EVEN IF THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY, PETITIONER WAS ENTITLED TO A JURY INSTRUCTION ON THE DEFENSE OF ENTRAPMENT.

In its opinion below, Wilson v. State, 549 So.2d 702 (Fla. 1st DCA 1989), the First District Court of Appeal certified the following question:

> Whether a defendant who denies having done the act which constitutes the offense charged is entitled to a jury instruction on the defense of entrapment?

Pursuant to the opinion of the United States Supreme Court in Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), the answer to the certified question is unequivocably "yes."

Florida has never afforded defendants less protection in the assertion of the defense of entrapment than the federal courts. Cruz v. State, 465 So. 2d 516, 518 (Fla. 1985) ("We adopted this view...."), cert. den. 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). Furthermore, Florida recognizes defenses of both objective and subjective entrapment, while a majority of the United States Supreme Court has, thus far, expressly approved only subjective entrapment. See Cruz, generally.

In the instant case, the First District acknowledged the authority of Mathews, but distinguished its facts from the instant case. As to the holding of Mathews, the First District said:

> In Mathews, [supra], the Court held that the defendant, who denied the intent element of the offense with which he was charged, was nevertheless entitled to an instruction on the defense of entrapment if the lower court concluded that he had presented sufficient evidence of entrapment, and remanded for that determination.

Wilson, 549 So.2d at 704. Comparing Mathews to the instant case, the court said:

> We find Mathews distinguishable from the instant case on its facts: Mathews did not deny the act, but only the intent element of the offense, whereas Wilson denied that he had sold the officer the cocaine. However, because of our uncertainty regarding the scope of the applicability of principles upon which Mathews was decided, we certify [the question] (emphasis in original)

Wilson at 704.

From the First District's distinction of Mathews, one might think its holding was narrow and limited to its facts. It was nothing of the sort. Rather, the United States Supreme Court began by recognizing the general principle that a defendant is entitled to an instruction "as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews, 99 L.Ed.2d at 61; see also Stripling v. State, 349 So.2d 187 (Fla. 3d DCA 1977), cert. den. 359 So.2d 1220 (Fla. 1987). Applying this principle to the defense of entrapment, in clear and unmistakable language, the United States Supreme Court said:

> We hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.

Mathews, 99 L.Ed.2d at 60.

The First District's interpretation to the contrary, Mathews does not distinguish between an intent element and any type of overt act. The decision in Mathews is clear that a defendant may deny one or more elements, or even all the elements, of a crime, and as long as there is yet evidence on which a reasonable jury could find entrapment, he is entitled to the instruction. This rule is very similar to the one adopted by the Eleventh Circuit in United States v. Smith, 757 F.2d 1161, 1169 (11th Cir. 1985), that a defendant denying the elements of the crime may rely on the defense of entrapment if the issue is raised by the government's evidence. See Mathews, 99 L.Ed.2d at 59, n.1.

The United States Supreme Court went on to acknowledge that instructions on other defenses are not precluded because the defenses are inconsistent with each other, especially noting the express provision for inconsistent defenses in the federal civil rules. Mathews, 99 L.Ed.2d at 61-62. Rule 8(e)(2), Federal Rules of Civil Procedure, provides in part:

> A party may also state as many separate claims of defenses as he has regardless of consistency and whether based on legal, equitable or maritime grounds.

Mathews, 99 L.Ed.2d at 62. The court said the absence of a cognate in the criminal rules was not intended to more severely restrict criminal defendants, but merely reflected the much less elaborate system of pleadings in the criminal system. Id.

To the government's argument that entrapment should be an exception to the general rule permitting inconsistent defenses, the Supreme Court said:

> We are simply not persuaded by the Government's arguments that we should make the availability of an instruction on entrapment where the evidence justifies it subject to a requirement of consistency to which no other such defense is subject.

Mathews, 99 L.Ed.2d at 63. To the government's argument that allowing entrapment as an inconsistent defense would encourage perjury, the court said this was not true in all cases, including the case then before the court, and even in cases where the defendant might commit perjury, there are "practical consequences" which make the assertion of inconsistent defenses a poor strategic choice. Quoting the Ninth Circuit, the Supreme Court said:

> Of course, it is very unlikely that the defendant will be able to prove entrapment without testifying and, in the course of testifying, without admitting that he did the acts charged... When he takes the stand, the defendant forfeits his right to remain silent, subjects himself to all the rigors of cross-examination, including impeachment, and exposes himself to prosecution for perjury. Inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility. While we hold that a defendant may both deny the acts and other elements necessary to constitute the crime charged and at the same time claim entrapment, the high risks to him make it unlikely as a strategic matter that he will choose to do so.

Mathews, 99 L.Ed.2d at 62-63, quoting United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc).

While Mathews does not expressly claim to overrule prior caselaw, it nevertheless clearly and unambiguously recedes from any requirement that a defendant admit any or all of the elements of a charged offense before he can claim entrapment.

Under Mathews, petitioner is entitled to a jury instruction on the defense of entrapment. While this resolves the certified question, it does not resolve the more basic problem in the case, which is that petitioner did not merely establish subjective entrapment sufficiently to merit a jury instruction on the defense, but rather he established objective entrapment sufficiently that his motion for judgment of acquittal should have been granted.

Florida recognizes defenses of both objective and subjective entrapment. Morris v. State, 487 So.2d 291 (Fla. 1986); Cruz v. State, supra; see also Marrero v. State, 493 So. 2d 463 (Fla. 3d DCA 1985), review den. 488 So.2d 831 (Fla. 1986). Subjective entrapment focuses on the predisposition of the accused and is a fact issue to be decided by the trier of fact. Objective entrapment focuses on the propriety of police activity and is decided as a matter of law.

The purpose of the objective entrapment defense is to prevent police conduct which:

> ...falls below standards, to which common feelings respond, for the proper use of governmental power ...
> ...[A] test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated in an advanced society... Permissible police activity does not vary according to the particular defendant concerned... No more does it vary according to the suspicion, reasonable or unreasonable, of the police concerning the defendant's activities. Appeals to

> sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender then against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes...

Cruz, supra, at 520, citing Sherman v. United States, 356 U.S. 369, 382-83, 78 S.Ct. 819, 825-26, 2 L.Ed.2d 848 (1958) (Frankfurter, J., concurring in result).

In Cruz, the Florida Supreme Court propounded the following negative threshold test of an objective entrapment defense:

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

The court went on to say:

> The second prong of the threshold test addresses the problem of inappropriate techniques. Considerations in deciding whether police activity is permissible under this prong include whether a government agent "induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that an offense will be committed by persons other than those who are ready to commit it."

Id. at 522.

The evidence in the instant case fails both prongs of the Cruz threshold test for objective entrapment. The state offered no evidence that the police activity had "as its end the interruption of a specific ongoing criminal activity" in which petitioner was involved. It was not sufficient that drug-dealing was

going on, without proof that petitioner was involved in a specific, ongoing scheme of drug-dealing. Petitioner's name came up in a conversation between Officer Wilson, Investigator Daniels and an unnamed informer. Officer Wilson did not recall who brought up petitioner's name; Investigator Daniels said he got Calvin's name from an informer (T-63). The state offered no detail beyond this into how petitioner was chosen as a target. The state provided, therefore, no basis on which the it could be determined that petitioner was involved in "specific ongoing criminal activity." The state's proof, therefore, fails the first prong of the Cruz test.

The second prong of the Cruz test is whether the police utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity. The police activity in the instant case also fails the second prong because of "inappropriate technique," in that the police employed "methods of persuasion or inducement which create a substantial risk that an offense will be committed by persons other than those who are ready to commit it." Cruz.

In the instant case, a female undercover police officer went to at least two bars and solicited various patrons of the bar, most of them male, to procure drugs for her. Officer Wilson and Calvin met for the first time that evening. While it is not clear who started it, they struck up a conversation with each other. While she asked if he knew "anybody doing anything," a reference to drug transactions, he said he did not and, according to Officer Wilson, they did not have a specific conversation

about drugs at this point. Calvin, who was still in his baseball uniform, talked about the game he played earlier (T-9,13).

Later, after someone suggested Calvin as a target, Officer Wilson went back to the Squeeze Inn to find him. When he was not there, she went to Saul's Place, looking for him. She found him there. She told him she had been looking for him and asked him to get her some crack (T-25-27). It should be noted that this is Officer Wilson's own account of her activities that evening.

What is Calvin to think when a woman he has just met in a bar follows him to another bar and says she has been looking for him? It might be reasonable for him to think that she is personally interested in him. And, she only wants him to do her this little favor of getting her some crack....

Calvin's conversations with Officer Wilson can hardly be said to be exclusively drug related. He talked to her about his baseball game, told her where he worked and when he got paid, and showed her where he lived. These topics of conversation have nothing to do with the drug trade and are distinctly social in nature. Calvin spoke to Officer Wilson socially, in the kind of terms which people use when they are in a social environment and meeting persons of the opposite sex. A situation where a female police officer leaves the impression that she is available socially to men, and asks that they procure drugs for her[1] is

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[1]In the instant case, appellant testified that Officer Wilson first brought up the subject of drugs (T-103), while
(Footnote Continued)

precisely the kind of police conduct that gives rise to a high probability that it will ensnare innocent victims. The police activity here, thus, meets the Cruz test for objective entrapment. Since objective entrapment is found as a matter of law, the trial court erred in denying petitioner's motion for judgment of acquittal.

If the court finds proof of objective entrapment sufficient, then the trial court erred in denying the motion for judgment of acquittal, and the court's inquiry is at an end. Assuming arguendo the court is not convinced the evidence of objective entrapment was sufficient, it must then consider the issue of subjective entrapment.

The gravamen of subjective entrapment is predisposition. Cruz, 465 So.2d at 518. In the instant case, the state failed, again, to offer evidence of predisposition. There was none. When Officer Wilson asked Calvin to get her some crack, he did not have any, but had to go to another location to obtain it from someone else. The police officer drove him there and gave him the money so he could obtain the drug for her. Cf. State v. Eichel, 495 So.2d 787 (Fla. 2d DCA 1985), a case involving only possession, not sale, of drugs, in which conduct by a female police officer was so questionable that the trial court dismissed the information. The district court reversed because of strong

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(Footnote Continued)
Officer Wilson could not recall who brought up the subject (T-42).

evidence that the defendant used drugs without any encouragement from the police officer. Given the actual solicitation by the police officer in the instant case, however, a different result is warranted.

On the way back to the bar from which they had started, Calvin asked repeatedly for a "hit" of the crack the undercover officer had just bought. While this might be probative of drug use, it is simply not probative of sale, the offense of which petitioner was convicted. Any evidence of predisposition to sell drugs, as opposed to use them, was virtually nonexistent. Without proof of predisposition, conviction cannot be sustained on a subjective entrapment theory and, on this separate ground, the trial court erred in denying petitioner's motion for judgment of acquittal.

This case involved very questionable police activity, and no proof of predisposition to sell. The state's case-in-chief supports a finding of objective entrapment as a matter of law. Therefore, the trial court erred in denying petitioner's motion for judgment of acquittal, and his conviction should be discharged. Even if this court found the police conduct acceptable, without evidence of predisposition, petitioner's conviction cannot be sustained even on a subjective entrapment theory, so on this separate ground, the trial court erred in denying petitioner's motion for judgment of acquittal. Finally, should this court find reason for having permitted the case to go to the jury, then the trial court erred in refusing to give the requested instruction on entrapment. The certified question

should be answered affirmatively, but petitioner's conviction must be discharged.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the affirmative, and reverse the district court decision on the entrapment instruction; and also, to discharge his conviction on an objective entrapment theory for improper police conduct, discharge on a subjective entrapment theory for the state's failure to prove predisposition, or remand for new trial with a jury instruction on entrapment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to John Koenig, Assistant Attorney General, Room 204, 111 Georgia Avenue, Palm County Regional Service Center, West Palm Beach, Florida, 33401, and a copy has been mailed to Mr. Calvin Wilson, Route 2, Jasper, Florida 32052, this 11 day of December, 1989.

KATHLEEN STOVER