SUPREME COURT OF FLORIDA

CASE NO. 75,012

CALVIN WILSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY JURISDICTION FROM
THE FIRST DISTRICT COURT OF APPEAL

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RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

Florida Statutes:

Other Authority:

PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner the defendant in the Criminal Division of the Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"T" Transcript

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is acceptable to Respondent for purposes of a proper disposition of this case on certiorari review.

Respondent would, however, note that Petitioner did not challenge in the First District Court of Appeal the propriety of the trial court's denial of his motions for judgment of acquittal which were based on his assertions that he was entrapped.

SUMMARY OF ARGUMENT

The First District's decision holding that Petitioner was properly denied jury instructions on the defense of entrapment should be approved. The Supreme Court case of Mathews is significantly distinguishable since Mathews did not deny the act, but only the intent element of the offense, whereas Petitioner denied that he had sold the officer the cocaine. Moreover, Petitioner failed to present sufficient evidence of entrapment to warrant an instruction thereon. Nevertheless, the decision in Mathews is not binding on the courts of Florida.

The lower court's holding that the single transaction rule precluded the convictions for sale and possession with intent to sell cocaine is in error as such conflicts with this Court's decision in State v. Smith, infra.

ARGUMENT

ISSUE I

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

As in the lower court, Petitioner here contends that he was entitled to his requested jury instruction on the defense of entrapment because the female undercover police officer allegedly approached men or appeared available socially to men in bars and asked them to procure drugs for her. The First District Court of Appeal disagreed and held that because Petitioner denied committing the act of selling cocaine, he was not entitled to a jury instruction on entrapment. Wilson v. State, 549 So.2d 702, 704 (Fla. 1st DCA 1989). In so doing, the Court acknowledged uncertainty regarding the scope of the application of the principles upon which the United States Supreme Court decided Mathews v. United States, 485 U.S. 58, 99 L.Ed. 2d 54, 108 S.Ct. 883 (1988), and certified to this Court the following question as a matter of great public importance:

> 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?
>
> Wilson at 704.

In keeping with the decisions in Florida specifically addressing the foregoing issue, the State would urge this Honorable Court to answer the question in the negative.

In Mathews, the defendant, a federal government employee, was charged with accepting a gratuity (loan) in exchange for an official act. Petitioner testified in his own behalf that although he admitted he had accepted the loan, he believed it was a personal loan unrelated to his duties at the Small Business Administration. 99 L.Ed. 2d at 60. In other words, he did not intend to commit the crime but wished to have his attorney argue to the jury that if it concluded otherwise, then it should consider whether that intent was the result of government inducement. The Supreme Court held that whenever there is sufficient evidence from which a reasonable jury could find entrapment, a defendant is entitled to an entrapment instruction even if he denies one or more elements of the crime. 99.L.Ed. 2d at 60. Respondent agrees with the First District's holding that Mathews is inapplicable as it is 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 sold the officer the cocaine." Wilson at 704. Contrary to Petitioner's assertion, this distinction is quite significant. Mathews admitted accepting the loan but denied that he intended for such to be a gratuity in exchange for an official act. Here, Wilson emphatically denied ever possessing or purchasing cocaine

or selling it to the undercover officer. He testified that it was someone else altogether! (T 104-105, 108-109, 111-115). As such, Petitioner was not entitled to an entrapment instruction since entrapment is not a plausible alternate legal theory of the case; rather, it is a proper defense only if the accused is lying. Mathews, 99 L.Ed. 2d at 66 (Justice White's dissenting opinion). This has been the law in Florida for more than half a century. Neumann v. State, 156 So. 237, 240 (Fla. 1934). See also Mellins v. State, 395 So.2d 1207, 1209 (Fla. 4th DCA 1981), petition denied, 402 So.2d 613 (Fla. 1981); Stripling v. State, 349 So.2d 187 (Fla. 3rd DCA 1977); Pearson v. State, 221 So.2d 760 (Fla. 2d DCA 1969); Ivory v. State, 173 So.2d 759 (Fla. 3rd DCA 1965). This Court should rule in harmony therewith.

Notwithstanding the foregoing distinction, Respondent would submit that Petitioner did not present sufficient evidence of entrapment to warrant an instruction thereon. In Florida, the defendant has the initial burden of establishing a prima facie case of entrapment which is then submitted to the jury with appropriate instructions. State v. Wheeler, 468 So.2d 978, 981 (Fla. 1985). As noted above, Petitioner offered no evidence whatsoever that he was entrapped by the government but, rather, testified that he did not commit the act. Consequently, there was insufficient evidence from which a reasonably jury could find entrapment. Mathews, 99 L.Ed. 2d at 60.

ISSUE II

THE FIRST DISTRICT ERRED IN REVERSING ONE OF PETITIONER'S CONVICTIONS AND SENTENCES FOR SALE OF COCAINE AND POSSESSION WITH INTENT TO SELL COCAINE

On the authority of Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), the district court below held that the single transaction rule precluded convictions for both sale of cocaine and possession of cocaine with intent to sell or deliver. The reasoning of Wheeler conflicts with State v. Smith, 547 So.2d 613 (Fla. 1989), Carawan v. State, 515 So.2d 161 (Fla. 1987), State v. Gibson, 452 So.2d 553 (Fla. 1984). State v. Getz, 435 So.2d 789 (Fla. 1983), Dukes v. State, 464 So.2d 582 (Fla. 2d DCA 1985); section 775.021(4), Florida Statutes (1987) and, as subsequently amended by Ch. 88-131, §7,Laws of Florida, section 775.021(4), Florida Statutes, (1989). See Judge Nimmons special concurrence to Wheeler. Although the state continues to maintain that Carawan was wrongly decided, the result here is the same whether Smith, Carawan, or Wheeler is followed. Consequently, the state will reserve argument until it matters, as in Pollard v. State, 553 So.2d 770 (Fla. 1st DCA 1989) now pending before this Court. Pollard v. State, Case No. 75,223.

CONCLUSION

WHEREFORE, in light of the foregoing arguments and cogent citations of authority, Respondent respectfully requests this Honorable Court answer the certified questions in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on the Merits" has been furnished by United States Mail to: KATHLEEN STOVER. ESQUIRE, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 13th day of February, 1990.

Of Counsel

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