IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,784

THE STATE OF FLORIDA,

Petitioner,

vs.

BATRAVILLE VINCENT DELVA,

Respondent.

ON DISCRETIONARY REVIEW
CERTIFIED QUESTION

RESPONDENT'S ANSWER BRIEF

ORIGINAL

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STATEMENT OF THE FACTS

On January 21 and 22, 1987, a jury trial was held on this matter before the Honorable Stephen Robinson (TR II and III). The State called two witnesses to the stand, Officer Daniel Artesani, (TR II - 55) and Officer Edward Pijuan, (TR II - 92).

Officer Artesani testified that while on routine patrol on February 7, 1986, he stopped Appellant after observing him running a red light (TR II - 57). While Officer Artesani was writing the citation, he ran a check on Appellant's driver's license and found it had been suspended (TR II - 58). Officer Artesani placed Appellant under arrest for driving while his license was suspended and informed Appellant that he could have somebody pick up his vehicle if he wished (TR II-59). Officer Artesani testified that Appellant did not seem nervous during the initial stop (TR II - 68) and declined the officer's offer to have his vehicle picked up by someone he knew (TR II - 59).

Officer Artesani conducted an inventory search on the vehicle and discovered an unopened package under the passenger's seat (TR II - 60). Officer Artesani testified that this package was not visible to Appellant (TR II - 71). The State offered no fingerprint, fiber analysis or any other direct evidence to link the package or its contents with Appellant. In fact, certain plastic bags containing cocaine were processed for fingerprints and Appellant's fingerprints were not on those bags, (TR II - 126).

Also testifying for the State at trial was Officer Edward Pijuan (TR II-92). Officer Pijuan testified that he came into possession of Appellant's wallet

after Officer Artesani had made the stop and placed Appellant in custody (TR II-95). Among the contents of Appellant's wallet, Officer Pijuan found a list (R -27).

Officer Pijuan testified that, in his opinion, this list represented a cocaine pricing list (TR II - 106). Also found in Appellant's wallet with the "pricing list" was an identification card from Miami Beach Senior High School (R - 31). Officer Pijuan testified that the picture on this identification was not that of the Appellant (TR II - 124) and he made no attempt whatsoever to determine the identity of this unknown person (TR II - 126). Furthermore, the State failed to conduct any fingerprint analysis or handwriting exemplar analysis to determine if, in fact, Appellant was the author of the subject list (TR II - 120). Officer Pijuan testified at trial that he had no knowledge of who wrote the list (TR II - 121).

In his defense, Appellant called three witnesses to the stand. Cecelia Jackson testified the subject automobile was jointly owned by her and the Appellant (TR II - 153). Ms. Jackson testified that besides herself, Appellant and his brother, John Delva, had access to and used the vehicle in which the cocaine was ultimately found (TR II - 154). Ms. Jackson testified that, on the date in question, February 7, 1986, Appellant did not drive the subject vehicle to work; instead, he was picked up and driven to work by Vanessa Brown (TR II - 154). Ms. Jackson testified Appellant's brother, John Delva, had the use of the subject vehicle on the date in question after he dropped her off at work (TR II - 154).

Also testifying for the Appellant at trial was Lois Puize (TR II - 164). Ms. Puize testified that she, like the Appellant, was an employee at Chrysler Plymouth of North Miami (TR II - 165). One of Ms. Puize's jobs at Chrysler Plymouth was to

collect and distribute time cards which employees punch in and out on a daily basis (TR II - 166). The Appellant's time card, produced at trial and entered into evidence as Defense Exhibit "A" and "B" (R - 32, 33) indicate Appellant punched in on the date in question at 7:55 a.m. and punched out at 5:00 p.m. The initial traffic stop occurred several miles from Appellant's place of employment at 5:30 p.m. There was no evidence produced at trial that Appellant drove the subject vehicle prior to going home after work on the date in question. Furthermore, Ms. Jackson testified that Appellant's brother had possession of the vehicle during the day in question (TR II - 154).

The Appellant's final witness was Vanessa Brown (TR II - 177). Ms. Brown testified that she worked at Chrysler Plymouth in the office as a clerk (TR II-177). Ms. Brown testified it was the policy of Chrysler Plymouth to locate an employee if they were missing from the job for more than 5 or 10 minutes (TR II-188). She further testified she had driven Appellant to work on February 7, 1986 and at 4:00 p.m., when she left the job site, Appellant's 1984 Cadillac was there (TR II - 181).

At the close of the trial, the judge instructed the jury, pursuant to the charge of trafficking, as follows:

> "Before you can find the Defendant guilty of trafficking in cocaine, the State must prove the following three elements beyond a reasonable doubt.
>
> One, that Mr. Delva knowingly possessed a certain substance.
>
> Two, the substance was cocaine or a mixture containing cocaine.
>
> Three, the quantity of the substance involved was 28 grams or more." (TR III - 47).

SUMMARY OF THE ARGUMENT

Appellant submits that the trial court created a fundamental reversible error by failing to completely and adequately inform the jury of the State's burden to prove beyond a reasonable doubt that Appellant knew the substance allegedly possessed was, in fact, cocaine. Appellant consistently argued at trial that he lacked knowledge that the package was under the passenger's seat and that he knew it contained cocaine. Since "knowledge" is an essential element to the crime of trafficking and was also the foundation of Appellant's defense, the inadequate jury instructions created fundamental error despite the fact that trial counsel did not request the proper instruction or object to the instructions given.

POINT ON APPEAL

WHETHER ON A CASE TRIED PRIOR TO THE DECISION IN *STATE OF FLORIDA VS. DOMINGUEZ*, 509 So.2d 917 (Fla. 1987), IS IT FUNDAMENTAL ERROR TO FAIL TO INSTRUCT THE JURY THAT IN ORDER TO CONVICT, THE STATE MUST PROVE THAT DEFENDANT KNEW THE SUBSTANCE CONTAINED IN THE PACKAGE IN DEFENDANT'S CAR WAS COCAINE, WHERE THE INSTRUCTIONS WERE SUSCEPTIBLE OF THE READING THAT KNOWING POSSESSION OF THE PACKAGE CONTAINING THE SUBSTANCE WAS SUFFICIENT TO CONVICT AND WHERE THE ERROR IS URGED ON DIRECT APPEAL FROM THE CONVICTION, NOT ON COLLATERAL ATTACK?

ARGUMENT

THE TRIAL COURT COMMITTED A FUNDAMENTAL REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY AS TO AN ESSENTIAL ELEMENT OF THE CRIME OF TRAFFICKING DESPITE A CONTEMPORANEOUS OBJECTION TO THE INSTRUCTIONS GIVEN.

The State breaks down its argument into two distinct attacks upon the District Court of Appeal's decision. The State first argues, through a line of cases culminating with ***Smith vs. State***, 521 So.2d 106 (Fla. 1988) that:

> "If there is no fundamental error in the giving of an instruction that impermissibly places the burden of proof on the Defendant, there is no constitutional infirmity herein." ***State's Brief***, page 16.

The State argues for an error to be so fundamental that it may be urged on Appeal though not properly preserved below the asserted error must amount to a denial of due process. However, the cases the State relies upon, ***Smith vs. State***, supra. and ***Yohn vs. State***, 476 So.2d 123 (Fla. 1985), fail to support this argument for the simple reason that:

> "There is no constitutional infirmity in the old standard jury instruction because there is no denial of due process to place the burden of proof of insanity on the Defendant."

Leland vs. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). *Smith* at 107.

This Court, in *Smith*, despite its awareness that the old jury instruction was flawed, recognized that the flaw did not rise to a denial of due process.

> "We cannot say that it was so flawed as to deprive defendants, claiming the defense of insanity, of a fair trial. Despite any shortcomings, the standard jury instruction, as a whole, made it quite clear that the burden of proof was on the State to prove all the elements of the crime beyond a reasonable doubt." *Smith*, supra at 108.

The present case is unlike *Smith*, because the old jury instruction in the present case did not put the burden of proof upon the State to prove all the elements of the crime beyond a reasonable doubt. This Court, in *Way v. State*, 475 So.2d 339 (Fla. 1985), clearly stated the nature of the substance possessed is an essential element to the crime of trafficking in cocaine under Section 893.35(1)(b)1. Because the old jury instruction in the present case failed in this respect, the Respondent was not afforded due process of law and fundamental error occurred.

The second part of the State's argument infers that one of the post *State of Florida v. Dominguez*, 509 So.2d 917 (Fla. 1987), cases held that the failure to give the added instruction is not fundamental error. The State relies upon *Lawson v. State*, 552 So.2d 257 (Fla. 4th DCA 1989) to support the conclusion that all post *Dominguez* cases should be decided the same despite crucial factual dissimilarities.

Any discussion of the post *Dominguez* cases involving the question of fundamental error must begin and end with a factual analysis of each case. In ***Lawson,*** police made a routine stop of the defendant's car, travelling at night without any lights, whereupon the defendant immediately exited the vehicle and fled carrying a brown satchel. During a 400 yard foot race, the pursuing officer saw the defendant attempt to throw the satchel over a 15 foot wall. Recovering the satchel, the officer looked inside to see plastic bags full of 430 grams of white powder. Also, in the satchel was a triple beam weighing scale. Furthermore, the defendant had a large amount of cash on his person.

In the present case, the Respondent was stopped for a routine traffic stop after he was observed running a red light. (TR II - 57). A normal check by the arresting officer revealed that the Respondent's driver's license was suspended (TR II - 58) and Mr. Delva was taken into custody.

Officer Artesani testified that the Respondent did not seem nervous during the initial stop and furthermore declined to officer's offer to have the vehicle picked up by someone known by the Respondent (TR II 59 and 68). In short, the Respondent's behavior was completely indicative of a person innocent of the fact that there was a sealed package containing cocaine hidden out of view of the Respondent under the driver's seat. On the other hand, the defendant's behavior in ***Lawson,*** clearly indicated that the defendant knew the substance in the bag was cocaine. It was on this *factual distinction* the Fourth District Court of Appeals based their opinion. The Court held:

> "Our version of common sense tells us that the jury would find it inconceivable to suppose that a suspect would flee

> the police and attempt to throw his satchel over a 15 foot wall if he did not know that it contained contraband. Whether failure to include, in a jury instruction an element of the crime that must be proved is reversible, depends on whether there was a genuine dispute as to that element." ***Lawson,*** at 259.

The Respondents defense was lack of knowledge of the package and its contents and would agree with the statement set forth in the State's brief that:

> "It is also undisputed that the defendant sole defense at trial was that he did not have knowing possession of the cocaine." *State's Brief* at 14.

Furthermore, the Third District Court of Appeal in their opinion at page 53, clearly set forth that:

> "In the present case the defense was lack of knowledge, the package was in the car and a fortiori, lack of knowledge of the contents." ***Delva vs. State,*** 557 So.2d 52 (Fla.App. 3 Dist. 1989) at 53.

Using the ***Lawson,*** supra. analysis that fundamental error depends upon whether there was a genuine dispute as to the knowledge element and applying that to the Respondent's case, it is clear that fundamental error occurred in that there was a genuine dispute raised at trial as to the defendant's knowledge that the package existed under the seat of his car and furthermore, that the package did, in fact, contain cocaine.

Another post *Dominguez*, supra. case involving this issue, ***State vs. Austin,*** 532 So.2d 19 (Fla. 5 DCA 1988), further supports the Respondent's position that if the defendant's knowledge of the nature of the substance was in genuine dispute at trial then the lack of the jury instruction to that essential element is fundamental error. In ***State vs. Austin,*** supra., the Court held that there was no fundamental error in the lack of giving the added jury instruction set forth in ***Dominguez*** for the logical reason that:

> "Knowledge of the nature of the substance was not an issue in ***Austin's*** trial and his defense was based upon entrapment." ***Austin at 22.***

The present case is the factual opposite of ***Austin*** in that the Respondent's defense was lack of knowledge of the package and the cocaine. ***Delva v. State,*** supra. at 53.

Again, the proper analysis with these cases hinges upon the facts of the cases. The Respondent respectfully asserts the facts in his case show there was a genuine dispute as to the element of knowledge of the package as well as the substance contained in that package and therefore, fundamental error did occur. This Court, in ***Clark vs. State,*** 363 So.2d 331 (Fla. 1987) focused on this issue and held that "fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action". ***Clark*** at 333. The Respondent asserts that not only does his defense of lack of knowledge of the contents of the package go to the very foundation of his case, but this knowledge is an essential element that the

State must prove beyond a reasonable doubt. Absent a jury instruction clearly setting forth the State's burden in requiring proof of this element, the Respondent's fundamental right to due process of law embodied in Article 1, Section 9 of the Florida Constitution was usurped.

CONCLUSION

For the foregoing reasons, the Respondent asserts that the jury instructions given in the present case failed to completely and adequately inform the jury of the State's burden of proof concerning an essential element of the crime of trafficking thereby committing fundamental reversible error which severely prejudiced the Respondent's case.

For the foregoing argument and authority, the Respondent respectfully requests this honorable Court to affirm the ruling of the Third District Court of Appeals in ***Delva vs. State,*** 557 So.2d 52 (Fla.App. 3 Dist. 1989) and remand this case to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Initial Brief of Appellant, Batraville Vincent Delva, has been forwarded by U.S. Mail to Assistant Attorney General, Jacqueline M. Valdespino, 401 Northwest Second Avenue, Suite N921, Miami, Florida 33128 on this 21 day of May, 1990.

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