IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,784

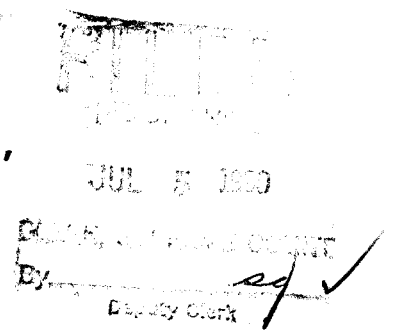
THE STATE OF FLORIDA,

Petitioner,

vs.

BARTRAVILLE VICENTE DELVA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

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PETITIONER'S REPLY BRIEF

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INTRODUCTION

This is an appeal by the State of Florida from an order certifying a question as one of great public importance. The defendant was found guilty of an sentenced for trafficking in cocaine; the Third District Court of Appeal reversed the conviction and remanded for a new trial. The Petitioner, THE STATE OF FLORIDA, is referred to as "STATE," while the Respondent, Bartraville Vicente Delva, is referred to as "DEFENDANT." [1]

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[1] All references to the record on appeal, transcript of proceedings and appendix are are designated by the symbols "R," "TR," and "App." respectivly.

SUMMARY OF THE ARGUMENT

The record does not support the defendant's contention that knowledge of the substance was at issue. The entire defense hinged on the proposed "reasonable" hypothesis of innocence, that since other people were in possession of the car, on the date in question and since the cocaine was underneath the passenger seat, out of site, the defendant did not know of the presence of the cocaine. Since, the element of "substance" was not at issue, the omission of that element in the jury instructions cannot be reviewed without an objection. The opinion of the Third District Court of Appeal should be quashed and the conviction affirmed.

ARGUMENT

ON A CASE TRIED PRIOR TO THE DECISION IN DOMINGUEZ V. STATE, 509 So.2d 917 (Fla. 1987), IT IS NOT FUNDAMENTAL ERROR TO FAIL TO INSTRUCT THE JURY THAT IN ORDER TO CONVICT, THE STATE MUST PROVE THAT THE DEFENDANT KNEW THE SUBSTANCE CONTAINED IN THE PACKAGE IN DEFENDANT'S CAR WAS COCAINE, WHERE THE INSTRUCTIONS WERE SUSCEPTBLE 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.

The defendant contends that he "consistently argued at trial that he lacked knowledge that the package was under the passenger's seat and that he knew it contained cocaine." However, a review of the record reveals that the defendant never put knowledge of the substance at issue; in fact he argued that the only issue was "knowledge that it (the cocaine) was there."

In opening argument to the jury, the defense counsel stated:

> And when Mr. Daniel read you the charge, trafficking in cocaine, he read you what the State must prove.
>
> There are several elements to that charge.

There is really only one element in issue. That is that the State must show that Batraville [sic] Delva was knowingly in actual or constructive possession of 400 grams or more of cocaine.

The State has to show that he had knowledge that it was there.

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Ladies and gentlemen, knowledge is the element that they won't prove.

Knowledge is the element that they can't prove.

And if they can't prove an element, it's your sworn duty to acquit the Defendant.

(TR. 72, 73)

During trial, outside the presence of the jury there was argument on a motion in limine. (TR. 131 -137). [2] During the argument by counsel, the defense stated:

THE COURT: Mr. Daniel, the test on the vial and so forth----

DEFENSE COUNSEL: Right.

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[2] The motion in limine was directed at a vial found in plain view in the passanger compartment of the car and which contained a mixing agent. The vial was not tested until after the trial had begun. (TR. 133-137)

THE COURT: If the testimony comes out during the trial ----

Are you listening, Mr. Weisman? (Assistant State Attorney)

ASSISTANT STATE ATTORNEY: I'm sorry.

THE COURT: I have been thinking about my ruling relating to that. If any testimony comes out in the trial---

ASSISTANT STATE ATTORNEY: I'm not going to elicit it.

THE COURT: Well, the State can't elicit it.

I'm telling the State that they can't elicit it.

It could be testimony that would be of such that the existence of the vial on the seat could come out as impeachment.

ASSISTANT STATE ATTORNEY: Your Honor, with the---

DEFENSE COUNSEL: I think now, upon reflection, you understand what I'm saying.

I can't stand by ---and I don't the Court would stand by, for someone to ---

THE COURT: For someone to say there's no knowledge that somebody stuck it in his car and then to have a --- that he made a comment to the police about---

DEFENSE COUNSEL: As to that vial.

So, you're looking for ---

THE COURT: If we hear testimony that there's no knowledge about anything at all, "I just picked up the car," and ---

I don't know what the theory of the Defense is.

DEFENSE COUNSEL: It's obvious there is some defense as to lack of knowledge, Your Honor.

Now, if the basic fear of lack of knowledge, that wouldn't come in for impeachment.

It would only come in as lack of knowledge for the vial.

It was found in a separate area.

ASSISTANT STATE ATTORNEY: It was in the passenger compartment of the car.

DEFENSE COUNSEL: Not with the kilo.

ASSISTANT STATE ATTORNEY: It was in plain view.

I think you have put him on notice.

THE COURT: I'm putting him on notice.

I think on cross examination you have the right to ask the following:

I think you have the right to ask the predicate question on cross examination.

Namely, "You saw absolutely nothing relating to drugs in the car?"

ASSISTANT STATE ATTORNEY: Something like that.

THE COURT: Something like that.

And depending upon the answer, I think you would have the right to bring it up under impeachment.

DEFENSE COUNSEL: Your Honor, I feel I'm entirely prejudice by that for several reasons.

Originally, I was told before I started the trial that it wasn't tested.

Based on that, I began --- I did a Motion in Limine and I geared my case around that, Your Honor.

Granted, if we were before trial, I would say the error--- there would be no prejudice.

But here I am. I have started the trial. You have granted the Motion in Limine.

And now you're telling me, "Well, what happens is his defense is lack of knowledge, it's going to open the door."

This was something that you were told was never even tested.

(TR. 133-136)(Emphasis supplied).

During argument on the motion for judgment of acquittal the defendant argued as follows:

DEFENSE COUNSEL: Your Honor, I would move for a JOA right now under the argument of reasonable hypothesis of innocence, Your Honor.

What we have heard, Your Honor, is basically, there is cocaine. There is cocaine underneath the passenger seat of the car.

We haven't heard anything to dispel that.

We haven't heard anything to dispel it was cocaine. That leaves us with one area, Your Honor.

That is, knowledge, knowingly.

I don't think that the State has proved that he knowingly---

The reasonable hypothesis of innocence is this:

The State's witness testified he doesn't know whose price list it is.

He doesn't know what the things in the wallet are.

You can't even make an inference here.

My point is that there's reasonable hypothesis of innocence, that the Defendant did not know about the cocaine.

And the State has done nothing to refute that reasonable hypothesis. The State has not met the burden of knowledge.

Knowledge is not inferred. That's constructive.

ASSISTANT STATE ATTORNEY: We're showing that it came out of a wallet that was in his possession. And the things that were in the wallet would lead to that it was his wallet.

> I think the case if now due to be presented to the jury for its consideration.
>
> THE COURT: You feel that the Defendant has exclusive, constructive possession or does he have not exclusive constructive possession?
>
> ASSISTANT STATE ATTORNEY: At that time, it was exclusive.
>
> THE COURT: So, knowledge of its presence may be inferred or assumed.
>
> I think there's also circumstantial evidence. Motion will be denied.

(TR. 166-168)(Emphasis supplied).

After the defense rested, they renewed their motion for judgment of acquittal, and argued as follows:

> DEFENSE COUNSEL: Your Honor, at this time I would move for a Judgement of Acquittal.
>
> I would state that the standard is different, Your Honor, at this point.
>
> And it's beyond a reasonable doubt versus the prima facie case as before.
>
> I would argue that the State did not show, beyond a reasonable doubt, that the Defendant knowingly sold, manufacture, delivered, brought into Florida or possessed a

certain substance with --- particularly, I would focus on knowledge, Your Honor.

I would also state that the State failed to prove, beyond a reasonable doubt, that the substance involved was 28 grams or more.

Your Honor, the testimony was that the Defendant was taken to work. He didn't have the car that day.

The testimony also stated that the car was brought back to work later that day.

The State did nothing to rebut the fact that he was not in possession of the car that day.

There is a reasonable hypothesis of inference, Your Honor, that he did not have the car that day.

He did not have an ability to know what would have been in the car.

There has been testimony that the car was in several people's hands that day, other than the Defendants. [sic]

There was testimony that there was a phone installed.

There was testimony that John took the car and had the phone installed.

We have a reasonable hypothesis of innocence to which the State did nothing to rebut.

The State has offered, based on the fact --- the State did not rebut the fact that the was not acknowledged at the time to possess the cocaine underneath the seat.

THE COURT: Do you think it's a reasonable hypothesis that John or somebody else left a kilogram of cocaine in the car without letting everybody who has access to the car have knowledge of it, so that they would safeguard it?

DEFENSE COUNSEL: I'm not going to focus on John Delva or what happened that day.

Nor am I going to offer anything.

Nor does that have to do with this case.

The State didn't rebut the fact that Batraville [sic] Delva did not know that the cocaine was under the seat.

ASSISTANT STATE ATTORNEY: Your Honor, there is plenty of areas to allude in times that are unaccounted for.

There's no showing that he was completely outside the possession of the car immediately before the arrest.

There's testimony to show that, in fact, he was at work until 5:00.

And he was arrested at 5:30.

There was a 30 minute gap.

We don't know where he was during lunch.

It really doesn't change the focus that much differently than it has at the conclusion of the State's case.

We have offered ample testimony.

We have shown possession, exclusive possession at the time of the arrest.

We have shown a document, which if believed by the jury, would show that he had knowledge about cocaine and its pricing, which would decry the lack of knowledge.

What you do with knowledge, you show by all of the circumstances involved.

And there's just been no disestablishment of his possession to negate the case from going to the jury.

THE COURT: Any rebuttal?

DEFENSE COUNSEL: Yes, Your Honor.

Your Honor, as to what Mr. Daniel (Defense Counsel) was saying, he was pulled over at approximately 5:30.

The testimony is consistent with checking out of work at 5:00 and to be pulled over at 5:30.

That doesn't mean he probably went and picked up the packages.

The State would like to show that it's exclusive possession. It's constructive possession.

THE COURT: It can be constructive exclusive possession.

DEFENSE COUNSEL: I don't think it's exclusive possession.

I see a lot of different people using the car that day.

Perhaps, after one time, when he was pulled over, there was no one in the car. That doesn't go to exclusive possession for everybody using the car that day.

It's not the Defendant's burden to disestablish anything, Your Honor.

It's the State's burden to prove knowledge.

It' not the Defendant's burden to prove.

THE COURT: The Motion is denied.

(TR. 210-214)(Emphasis supplied).

During closing argument, the defense asked the jury to focus on knowledge, the fact that the State had to prove that the defendant knew that the cocaine was hidden under the seat. (TR. 244-245) The defense argued as follows:

DEFENSE COUNSEL: Ladies and gentlemen of the jury, opposing counsel, Your Honor.

Initially, I do want to thank you for paying attention.

And I watched you, and I know you have been listening, and I thank you for that.

It's very important.

I also want you to listen to my closing argument, to draw on your common sense and what your good sense tells you and what your life experiences, what would normally tell you the truth.

I mentioned in opening, the prosecutor has the burden.

The prosecutor has to prove each and every element of the offense charged.

The Defendant is charged with trafficking and cocaine.

I asked you to focus on knowledge.

The State has to prove that the Defendant was knowingly in possession of that cocaine.

The State has to prove that he knew that cocaine was hidden under the seat.

He knew it.

That's what they have to prove.

The Defendant doesn't have to prove anything.

Going back to the date of February 7th, 1986, let's look at what we heard from the witness stand.

And again, I want you to remember that the only evidence is the credible evidence you hear from the witness stand.

The Defendant was taken to work that day by Vanessa Brown.

He didn't have the car that day.

We saw that he had punched at 8:00 in the morning and punched out at 5:00 without any breaks.

That has been the only evidence before this Court.

We heard how Batraville [sic] Delva's brother, John Delva, had the car that day, and that he had a phone installed for his own purposes.

And that he had dropped Mr. Delva's fiance off, Cecelia Jackson.

He came in to work, and he heard that the car was later dropped off at Chrysler Plymouth of North Miami sometime before 5:00.

The State called Officer Artesani.

And you remember Artesani, he testified it was just a routine traffic stop.

But what else did he say?

He said the Defendant just pulled right over.

He said the Defendant was courteous.

He said the Defendant wasn't nervous.

He wasn't fumbling with anything.

Does this sound like someone who knows there was a kilo of cocaine under his seat?

He was very calm, like it was a traffic stop.

I don't know about all of us, but I have been stopped for a typical traffic stop.

ASSISTANT STATE ATTORNEY: I'm going to object to counsel's personal ---

THE COURT: Sustained.

DEFENSE COUNSEL: You heard testimony that Officer Artesani then ran the Defendant's license plate, and it came back suspended.

And you heard Officer Artesani say that when someone's license comes back suspended, he can impound the car.

And when he impounds the car, he does an inventory of the car.

He searches the car, and he has the car towed.

But, remember, Officer Artesani also testified -- and please remember this, that at that instance, he said, "Do you have someone who can take the car away?

He asked the Defendant, "Is there someone who can take this car away?" before he has the car towed.

The Defendant had an opportunity to completely avoid the situation.

Does this sound like someone who knows there's a kilo in the car?

He could have avoided the whole thing.

I'd ask you to just ask yourselves, who in their right mind wouldn't take the opportunity to just have some come for the car?

What did those actions tell you?

I'm not asking you to draw any crazy inferences.

I am asking you to use your common sense.

Here's someone who culd have avoided the entire situation.

He says, "No. There's no one to come for the car. Just take it."

Officer Artesani testified that the kilo wa hidden underneath the passenger seat.

It was out of plain view.

You couldn't have seen it.

Then Detective Pijuan took the stand.

Detective Pijuan stated when he arrived, most of the action was already over.

Then dope was already in the police car.

And he gets handed to him a wallet.

And we heard there was a lot of papers in that wallet.

And inside, we hear there was a price list.

And the prosecutor wants us to believe that's the Defendant's price list.

Detective Pijuan testified that he has no idea who wrote that price list.

He has no idea about any of those papers.

He has simply no idea.

Also, he testified that there was something else in the wallet, someone else's identification.

Do you remember that?

The State wants you to look at a price list alleged to have come out of a wallet, the same wallet that had someone else's ID, someone else's picture on it, and someone else's address on it.

This case is 11 months old.

Detective Pijuan didn't even bother to look on the back.

There was an address.

There was a phone number.

Remember, Detective Pijuan works for the police.

He has at his access an entire Metro-Dade Crime Lab.

And in that Crime Lab, they got people who are experts in their field.

And what they do is, they test cocaine.

There are guys that just look through microscopes.

They got people who test fingerprints.

They have lasers that can fingerprints off someone's skin.

ASSISTANT STATE ATTORNEY: We're going to object.

THE COURT: Sustained as to that.

DEFENSE COUNSEL: Detective Pijuan testified as to what a handwriting exampler is.

A handwriting exampler is a comparison.

It's how they check to see handwriting.

It's how they check to be sure in a case like this.

But there were no handwriting examplers done.

They didn't take one piece of paper he had written and compared it.

So, they don't even know who wrote the price list.

They could have taken a fingerprint off the paper.

And he said he didn't bother to take that.

And that's the piece of evidence the State wants you rely on.

They didn't bother to compare handwritings.

They didn't bother to compare fingerprints.

And he showed you that paper, and he showed you that it was oily.

Don't you think that a guy that's a mechanic, he would have left a fingerprint on it?

He is a mechanic with grease.

Couldn't they have been sure if they lifted a fingerprint off the paper?

Let's look at the cocaine, itself.

Detective Pijuan testified that he had it processed for prints.

He knew that he would need proof that the Defendant handled the cocaine.

He would have to prove it.

He would check for prints.

There were baggies.

He checked them all.

There was one problem.

Batraville [sic] Delva's fingerprints weren't on any of it.

That's why there's no one here testifying about his fingerprints, because they're not on it.

Let's take a look at the Defendant, Batraville [sic] Delva.

Let's focus on what we know.

We know there's a kilo found underneath the seat where he can't see it.

We heard testimony that that amount of cocaine could be worth $35,000 and upward to $100,000 when it's broken down.

Here's a guy who works at Chrysler Plymouth of Miami.

He's been there for years, but he's doing $100,000 drug deals?

He figure he would just continue working at Chrysler Plymouth of Miami for years.

Is this guy who trafficks around hundred of thousand of dollars of cocaine?

You heard that there was an '84 Cadillac involved.

And you heard testimony that there was $500 put down on it.

That's it.

And an old trade-in and $500.

And between the two of them, they make the payments.

Hardly the vehicle of choice for a big drug dealer to buy a used Cadillac.

Put down $500.

You have heard no other testimony, none.

Remember, the only evidence is the credible evidence that comes from that witness stand.

What he tells you is not evidence.

What I tell you is not evidence.

Just remember what came from the witness stand.

Now, you're going to go the jury room to deliberate.

And you're all going to be in there.

And I want you to remember something.

<u>The State must show that the Defendant had knowledge</u>.

Remember that the Defendant could avoided the entire thing by having someone just come for the car.

Remember, the Defendant's brother, he had the car all day for his own purposes, and he dropped it off.

The Defendant was driven to work by Vanessa Brown.

That's the only evidence that came from the witness stand.

That's evidence.

The judge will instruct you on what is evidence and what is not evidence.

The Defendant was at work all day.

We saw that he punched in at 8:00 and he punched out at 5:00.

That's evidence.

There's no evidence to contradict that.

Now, let's look at what the State's relying on to show knowledge.

They have no fingerprints, because none of them matched Batraville [sic] Delva.

ASSISTANT STATE ATTORNEY: Objection.

Again, outside the scope of evidence.

THE COURT: Bring it up in rebuttal.

DEFENSE COUNSEL: Detective Pijuan testified that the Defendant's fingerprints were not on the cocaine.

They're not going to tell you that his fingerprints are on the cocaine.

They have got a price list, a price list alleged to have come from the wallet.

A price list where there own detective on the stand, swearing under oath, that he doesn't know who wrote it.

He has no idea who wrote any of that.

In fact, there's other people's identification in the wallet.

This is what the State wants you to rely on.

Now, remember, they have to prove the Defendant guilty beyond and to the exclusion of reasonable doubt.

What do we have here?

They're asking you to make quantum leaps in connecting evidence, because they can't prove it.

They don't have fingerprints.

They didn't check handwriting.

They didn't bother to check the paper.

They have all this Crime Lab at their disposal.

The case is 11 months old.

Ladies and gentlemen of the jury, the State's case, when you think about your experience, when you think about the facts, when you think about the evidence, it just doesn't add up.

When you were picked as jurors, you swore to stick by your beliefs and conscience and follow the law and to hold the State to their burden.

Even if you stood alone in your beliefs, you've got to stick to what you believe is the evidence and how you feel about this case.

I ask you to hold the State on their burden.

I ask you to see if they can prove it beyond a reasonable doubt, because they didn't:

They don't have evidence.

They don't have fingerprints.

They don't have handwriting.

They did a shoddy job with typing, in any way, because they don't have any evidence.

And like Assistant State Attorney Mr. Daniel said, the facts are innocuous.

They're damn innocuous.

All the facts are that he didn't know.

Every factually thing states that he didn't know.

He could have had someone take the car away and avoid the whole thing.

> The officer testified he wasn't nervous.
>
> He wasn't fumbling with anything.
>
> Use common sense, and hold the State to their burden.
>
> And I'm confident that you will find that they didn't prove their case, that there's a reasonable doubt, because there's no evidence here.
>
> Ladies and gentlemen of the jury, I ask that you find my client not guilty.
>
> Thank you.

(TR. 244-257)

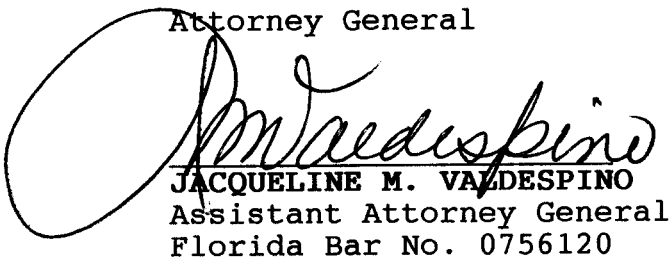
The record clearly establishes that knowledge of the "substance" was not at issue. Since there was no genuine dispute as to the element, the error was not fundamental, and review should be declined absent objection. Lawson v. State, 552 So.2d 257 (Fla. 4th DCA 1989); Williams v. State, 400 So.2d 542, 544 (Fla. 3d DCA 1981), cert. denied, 459 U.S. 1149, 103 S.Ct. 793, 74 L.Ed. 2d 998 (1983); Jones v. State, 465 So.2d 566 (Fla. 3d DCA 1985).

CONCLUSION

Based on the foregoing arguments and citations of authority the opinion of the Third District Court of Appeal should be quashed and the conviction affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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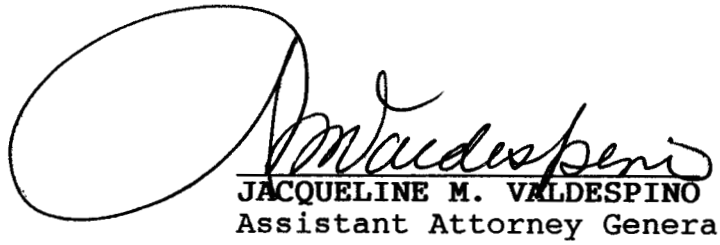
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** was furnished by mail to **DAVID A. CORDEN, Esq.**, 320 S.E. 9th Street, Ft. Lauderdale, Florida 33316 on this 2nd day of July, 1990.



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