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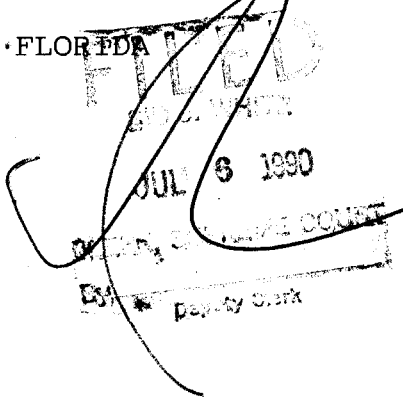
IN THE SUPREME COURT OF FLORIDA



STANLEY CAMPBELL,

Petitioner,

v. CASE NO. 75,873

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, Stanley Campbell, was the defendant in the trial court, the appellant in the district court, and will be referred to here as the defendant or by his last name. The respondent, State of Florida, was the prosecuting authority in the trial court, the appellee in the district court, and will be referred to here as "State."

Citations to the record on appeal will be referred to by the symbol, "R," and the transcript by the symbol, "T," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts the statement of the case and facts presented in the initial brief with the following additions.

At trial, Detective Locey testified, in pertinent part, as follows:

> [Immediately after testing the cocaine], **Stanley [Campbell] approved it** and said I have come all the way, you know. **He was very satisfied with it** and then we went to get out of the car, but prior to that he said it was going to be good for the sniffers, too, right? And I said, oh, yes, good for sniffers, and we started to get out of the car to get the other three kilos, and Stanley was going to his car to get the money when the surveillance people moved in and Stanley was arrested. (T. 44-45)

(T. 44-45) (emphasis supplied)

During Detective O'Hara's testimony at trial, the following colloquy took place:

> Q. What occurred next [after Campbell had the cocaine in his lap]?
>
> A. **He tasted it and he said he was going to take it.**
>
> Q. . . . When he tasted it and agreed to take it as you testified, where was the kilo physically located?
>
> A. It was in his lap. . . . **He said he would take it.** He said it was small for four kilos of cocaine and we told him that was just one, that the other three were in the trunk of the car and at that time Detective Locey told him, we will get out the other three and do the transaction, and then we will be on our separate ways.
>
> Q. By the transaction do you mean the exchanging of money for the cocaine?

A. That's correct. The other three plus the one he was in possession of and with the money.

Q. And what occurred at that point?

A. At that time Detective Locey exited the vehicle, Mr. Campbell exited the vehicle, left the kilo on the back seat of the car, they exited the vehicle at which time the arrest signal was given, at which time he was placed under arrest.

(T. 70-71) (emphasis supplied)

A bag containing $50,660 in cash was found in Campbell's vehicle after his arrest. (T. 51)

SUMMARY OF ARGUMENT

The issue presented to the First District Court of Appeal was whether the trial court had erred in refusing the tendered instruction, which was a direct quote from Garces v. State, infra. While not disagreeing with the principle announced in Garces, the First District in substance held that the tendered instruction was an incomplete statement of the law and as such could have misled or confused the jury. It noted that the tendered instruction did not make it clear that the jury could consider the down payment made on the cocaine and the defendant's acceptance of the cocaine after testing it. To this extent there is no direct and express conflict between the decisions of the First and Third Districts. The First District's decision was correct, for the tendered instruction was an incomplete statement of the law as applied to the evidence and was covered by another instruction.

The First District, nevertheless, certified conflict with Garces and Roberts v. State, infra, apparently because of its concern that these two cases might stand for the broader proposition that a prospective buyer can never be convicted under the trafficking statute because he does not obtain possession of the drugs until the deal is consummated. That proposition is incorrect. A prospective buyer's possession of the illegal drugs may be proven by his acceptance of the drugs as tendered by the seller.

ARGUMENT

ISSUE

[REPHRASED] WHETHER THE TRIAL COURT ERRED IN REFUSING THE TENDERED INSTRUCTION, WHERE THE INSTRUCTION WAS AN INCOMPLETE STATEMENT OF THE LAW AS APPLIED TO THE EVIDENCE AND WAS COVERED BY ANOTHER INSTRUCTION.

By amended information, Campbell was charged with armed trafficking in cocaine by knowingly possessing, either actually or constructively, 400 grams or more of cocaine in violation of sections 893.135(1)(b)3 and 775.087, Florida Statutes (1987). (R. 25) Section 893.135(1)(b)3 provides:

> (1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:
> (b) Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of 28 grams or more of cocaine as described in s. 893.03(2)(a)4, or of any mixture containing cocaine is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:
> 3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

At trial, the State introduced evidence revealing the following facts: Campbell agreed to purchase four kilograms of cocaine for $54,000 and made a down payment of $3,000. Campbell placed a kilogram of cocaine on his lap, pulled some of it out of the bag, and tasted it. He was very satisfied with the cocaine and agreed to take it, stating that he was going to make crack out of it and that it would be good for the sniffers too. He

agreed to exit the vehicle to obtain his money to make the trade, and the undercover officer agreed to obtain the other three kilograms of cocaine. When arrested, cash totalling $50,660 was found in Campbell's vehicle. (T. 20-21, 25, 36-37, 44-45, 49-51, 58, 61-62, 65, 70-71)

During the charge conference, defense counsel requested the following special jury instruction:

> Temporary control of contraband in the presence of an actual owner for the purpose of verifying that it is what it purports to be or to conduct the test for quantity prior to completion of transaction without more does not constitute legal possession.

(T. 104-105) The trial court declined to give the above-requested instruction, stating:

> I think that the standard jury instructions are applicable here because I think that we have more facts in this case than they did in that one. I will deny that request for a special instruction.

(T. 105)

The trial court instructed the jury in pertinent part 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, the defendant 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 and, four, the defendant knew the substance was cocaine.
>
> To possess means to have personal charge of, or exercise the right of ownership, management or control over the thing

> possessed. Possession may be actual or constructive. If a thing is in the hand of or on the person or in a bag or a container in the hands of or on the person or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person.
>
> If a thing is in a place over which the person has control over or which the person has hidden or concealed it, it is in the constructive possession of that person. Possession may be joint. That is, two or more persons may jointly have possession over an article exercising control over it and in that case each of those persons is considered to be in possession of that article.
>
> If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

(T. 129-130)

Campbell was convicted as charged. (R. 28)

To determine whether error resulted from the refusal of a tendered instruction, the reviewing court should examine whether (a) the tendered instruction correctly states the law; (b) evidence in the record supports the instruction; and (c) the substance of the tendered instruction is covered by other instructions given. Munn v. State, 30 So.2d 501 (Fla. 1947)(no error in refusing to give requested instructions that either constituted a misstatement of the law as applied to the evidence or was covered by another instruction). The State will address each factor separately.

(A) WHETHER THE TENDERED INSTRUCTION CORRECTLY STATES THE LAW. In the instant case, the special jury instruction was a direct quote from Garces v. State, 485 So.2d 847, 848 (Fla. 3rd DCA 1986), with which the First District in principle did not disagree. The First District stated:

> Therefore, while the special jury instruction could be seen as appropriate to this case, in view of the factors present here that are not present in Garces and Roberts, denial of the special instruction does not constitute reversible error.

Campbell v. State, 558 So.2d 34, 38 (Fla. 1st DCA 1989)

What the First District in substance held was that the tendered instruction was an incomplete statement of the law and as such could have misled or confused the jury. It noted that the instant case was not limited to the defendant's temporary control of the cocaine to test it, but rather that the defendant had gone well beyond the testing stage by putting a down payment on the cocaine and by accepting the cocaine after testing it. The tendered instruction did not make it clear that the jury could consider these additional facts in determining whether the defendant was in possession of the cocaine.

The precise holding in the instant case does not expressly and directly conflict with the holding in Garces. What prompted the First District to certify conflict appears to have been its concern that Garces might stand for a much broader principle; i.e., that a prospective buyer can never be convicted under the trafficking statute because he does not obtain possession of the

drugs until the deal is consummated. This is even more apparent in a later decision from the Third District, Roberts v. State, 505 So.2d 547 (Fla. 3rd DCA 1987). It is this principle with which the First District disagrees. In the instant case, Campbell did all that he could do to acquire possession of the drugs without actually consummating the deal. He made a down payment on the cocaine, and after he tested the cocaine, he accepted it. Whether Campbell might have subsequently withdrawn his acceptance of the kilogram of cocaine is irrelevant. At the moment of his arrest, he indeed had accepted it.[1]

The dispositive factor for purposes of a prospective buyer's possession under the trafficking statute is his acceptance of the tendered cocaine. This is well illustrated in Santiago v. U.S., 889 F.2d 371 (1st Cir. 1989). There, an undercover agent and a confidential informant delivered to three defendants a pair of shoes laden with cocaine. The confidential informant first handed the shoes to one defendant who then handed them to another defendant, and this defendant placed the shoes on a table without examining them. One of the defendants asked the confidential

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[1] It is very awkward to analyze this issue. The instant appeal involves the trial court's failure to give a requested jury instruction and the two cases with which conflict was certified involve the trial court's failure to grant the defendant's motion for judgment of acquittal. Even if this Court decides that the Third District is correct, that does not resolve the issue of the tendered instruction. By approving the decisions of the Third District, Campbell could be entitled to a judgment of acquittal and still not be entitled to the requested instruction. Campbell challenges only the trial court's order denying the requested instruction, and this is the issue on which conflict was certified.

informant if he had brought an extra pair of shoes, and when he indicated negatively, this defendant directed another defendant to purchase him a pair of shoes. As the defendant moved toward the door, the agent reached it first and yelled, "Federal Agents."

In finding that the evidence was sufficient to support the conviction for possessing cocaine with intent to distribute it, the court stated:

> In the present case, the informant had handed over his shoes to petitioner and his co-conspirators. Delivery had taken place. But for arrest, for all that appears, the cocaine would have remained in the conspirators' possession, at least until the next step of the transaction. We conclude that, for however briefly, petitioner, in conjunction with his co-defendants, had joint possession of the cocaine laden shoes. That arrest precluded defendants from enjoying the fruits of that possession is irrelevant. . . . [T]he drugs had been handed over to petitioner and his co-defendants. The informant had unequivocally given up his shoes, and petitioner was about to go buy him new shoes. Delivery was complete. . . . [T]he drugs had not only been brought to the room, but had been unambiguously turned over to petitioner and his cohorts. We find no merit to petitioner's claim of insufficient evidence.

Id., 376-377.

True, Santiago involved a controlled delivery, not a controlled sale, but there is no reason why the analysis applicable there should not apply here. The above result is consistent with that reached in the instant case (delivery and acceptance); in Garces (delivery but no acceptance), and in

Roberts (acceptance but no delivery). More precisely, in the instant case, Campbell accepted the kilogram of cocaine which was placed in his lap; in Garces, the defendants were examining the cocaine but were arrested before they had expressed their acceptance; and in Roberts, the defendants had accepted the bales of marijuana but were arrested before the bales were fully delivered inside the house.

Constructive possession is nothing more than a doctrine which was developed to broaden the application of possession-type crimes to situations in which actual physical possession could not be directly proved. Although the doctrine is often described in terms of dominion and control, these terms are merely labels used to characterize given sets of facts. When other evidence of possession exists there is no need to resort to the use of these labels. By way of illustration, in the criminal cases cited by Campbell that discuss this issue, except for Roberts, there was no evidence that the defendants had in fact accepted the items in question. Possession, therefore, had to be determined some other way. In contrast here, the State introduced evidence that the cocaine was offered to Campbell, and he accepted it. Possession was inherent in the acceptance.

The Legislature enacted section 893.135(1)(b), Florida Statutes (1987) to reduce the distribution of cocaine in the State of Florida. Purchasers of large quantities of cocaine are quite frequently apprehended as the consequence of reverse-sting operations, which are inherently volatile situations. If a very

narrow construction of the term, "possession," were applied here, as is urged by Campbell, it would be quite impracticable to ever convict a prospective buyer of trafficking in cocaine, even though he was apprehended while in the process of consummating a drug deal. The Legislature never intended such a result.

Campbell's argument that he never acquired possession of the cocaine because he was not free to leave with it until he had paid for it is a red herring. In a reverse-sting operation, the buyer is never free to leave with the controlled substance, and courts have consistently held this to be an irrelevant factor. See, e.g., State v. Brider, 386 So.2d 818 (Fla. 2d DCA 1980)(J. Grimes); Angel v. State, 450 So.2d 292 (Fla. 4th DCA 1984); United States v. O'Connor, 737 F.2d 814 (9th Cir. 1984); and Santiago v. U.S., supra, and the cases cited therein. To hold otherwise would erect an insurmountable impediment to undercover operations, which have long been a recognized and permissible means of investigation in drug-related offenses. United States v. Russell, 411 U.S. 423, 36 L.Ed.2d 366, 373-374 , 93 S.Ct. 1637 (1973).

(B) WHETHER EVIDENCE IN THE RECORD SUPPORTS THE INSTRUCTION. While there is evidence in the record to support the instruction, there is also additional evidence in the record, which made the instruction incomplete and potentially misleading or confusing. True, the cocaine was only temporarily in Campbell's possession for the purpose of testing it. In addition to this evidence, however, is evidence that Campbell made a down

payment on the cocaine and accepted the cocaine after testing it. Neither one of these facts applied in Garces, and the court, therefore, did not take them into consideration in announcing its holding, which constituted Campbell's tendered jury instruction.

(C) WHETHER THE SUBSTANCE OF THE TENDERED INSTRUCTION IS COVERED BY OTHER INSTRUCTIONS GIVEN. In the instant case, the standard jury instruction on possession was given. It defined, with elaboration, possession as "hav[ing] personal charge of, or exercis[ing] the right of ownership, management or control over the thing possessed." (T. 129-130) The instruction was couched in positive terms, from which it is clear that possession means something more than mere momentary physical control.[2] On the other hand, Campbell's tendered instruction was couched in negative terms and served only to exclude from the definition one particular act. The standard jury instruction adequately covered the tendered instruction. Even with the tendered instruction, the jury would still have been in the posture of deciding whether Campbell possessed the cocaine based on his down payment and verbal acceptance of the tested cocaine.

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[2] The Ninth Circuit has held that the handling and testing of cocaine extensively during a two-hour delivery constituted actual possession. United States v. O'Connor, supra.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief on the merits has been furnished by U.S. Mail to William J. Dorsey, 211 Liberty Street, Jacksonville, Florida, 32202, this 6th day of July, 1990.

Carolyn J. Mosley
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