

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs.

RICHARD ANDERS and
WILLIAM HOOD,

Respondents.

CASE NO. 76,050

ANSWER BRIEF OF RESPONDENT HOOD ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent William Hood agrees with the facts as presented by the Petitioner except for the following statements made by Petitioner:

Petitioner's Brief at page three, line, 2-3

"with very minimal guidance from law enforcement"

This fact is correctly stated by the District Court of Appeal at Page Seven of it's opinion and the record at Page Seventy Six:

"Livermore was left completely free not only as to whom he approached but also as to the nature of the transaction to be set up."

Petitioner's Brief at page three, line 12-13

"Hood who had also dealt in drugs in the past"

Petitioner's Brief at page five, line 11

"Respondents had a history of involvement in narcotics;"

Petitioner's Brief at page eight, line 23

"Although there was evidence that both had some history of involvement with illicit narcotics"

These statements are totally false. The correct statements as supported by the record are:

Jorge Livermore stated at Page Seventy Five of the record that he bought a \$25.00 bag of marijuana for personal use from Rick Anders on one occasion and further stated he had no knowledge that William Hood was ever involved with drugs. (see record at p.99)

No where, in the entire record, is there any evidence that William Hood was ever involved in the trafficking of drugs in the past.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal correctly decided that the trial court did not commit reversible error by granting respondents Motion to Dismiss the drug trafficking charges against them.

The States' informant, acting as an agent for the Sheriffs Department of Broward County, did violate the constitutional due process rights of the respondent by "manufacturing crime", and the taint of this violation was not dissipated by the fact that the respondent was a third party.

ISSUE

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERROR BY UPHOLDING THE TRIAL COURT'S DISMISSAL OF CHARGES AGAINST RESPONDENT

ARGUMENT

If, at some time in the future this court does reverse Hunter v. State, 531 So. 2d 239 (Fla. 4th DCA 1988), it will not require a reversal in the instant case.

The State has a misplaced belief that a reversal of the decision of the Fourth District's decision in this case is in order even if Hunter is upheld.

Florida case law, and U.S. Federal Case law, both contradict the State's argument and support the decision of the Fourth District in the instant case.

Florida Statute 893.135 (4) (1987) was recently held to be constitutional on its face. Heaton v. State, 543 So.2d 290 (Fla. 4th DCA 1989)

The statute states:

The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirator, or principals or of any other person engaged in trafficking in controlled substances. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filled and heard in camera. The judge hearing the motion

may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

On its face the statute requires that "substantial assistance" can be rendered by causing the arrest of any other person engaged in trafficking in controlled substances.

The record in this case substantiates the fact that Patrick Walsh and Rick Anders were involved only in personal use of narcotic drugs. No proof was offered regarding trafficking in narcotic drugs.

At Page Seventy Five of the record, Livermore testified that he purchased a quarter of an ounce of marijuana for \$25.00 for personal use from Rick Anders.

The aforementioned drug transaction is far from meeting the essential elements of trafficking.

Again, the State is misplaced in thinking that persistent enticement and threats are requirements of due process violations.

The due process violation is initiated by misconduct of the police or its agents (informants). In this case the due process violation was the engaging of other persons not known to be engaged in trafficking in controlled substances.

The State directs this court's attention to Khelifi v. State, 15 FLW D1118 (Fla. 4th DCA April 25, 1990). This case is different from the instant matter in that the informant introduced the Defendant and a Codefendant, Boutelle, to undercover officers as persons wanting to buy drugs. The issue raised by Boutelle on appeal, was that he was not seeking to traffic and that he would have purchased a smaller amount of drugs. This case was not a fishing expedition as was conducted by the State's informant, Livermore, in the instant case.

Livermore, at deposition, described his activities as follows:

if I didn't perform in "X" amount of time, I would be looking at 18 months [in jail]. (Deposition of Livermore at p. 20, R at p. 67)

Q: So, you simply went out in the community and went fishing; fair statement?

Livermore: Fair Statement.

Q: And you fished for a 10 kilo deal; correct?

Livermore: That is what popped into my head. (Deposition of Livermore at p. 22, R at p. 69)

* * *

Q: Did he [the prosecutor] put any other restrictions on your future cooperation, other than it would have to be for Broward County?

Livermore: (Witness shaking head). . .No. (Deposition of Livermore at p. 19-20, R at p. 67)

Q: Were there any other restrictions put on you in terms of your performance.

Livermore: No.

Q: So you basically were told to go out there and "bring something else?"

Livermore: Yes

Q: And that's what you did?

Livermore: Exactly. (Deposition of Livermore at p. 21, R at p. 68)

The District Court in State v. Anders and Hood, 15 FLW D1009 (Fla. 4th DCA April 1990) decided that the States' use of an informant who agreed to provide the State with substantial assistance by setting up new drug transactions in order to avoid a minimum mandatory prison term and State's allowing informant a free hand to decide the type of deal, the quantity of drugs, the manner and method in which to arrange the sale, and the persons whom he would involve in the transaction, violated defendant's due process rights.

In State v. Giraldo, 15 FLW D1001, (Fla. 3rd DCA April 17, 1990) the court reversed the trial court's granting of motion to dismiss on the authority of State v. Pautier, 548 So.2d 709 (Fla. 3rd DCA 1989), State v. Fernandez, 546 So.2d 791 (Fla. 3rd DCA 1989), State v. Saldarriaga, 486, So.2d 683 (Fla. 3rd DCA 1986) and State v. Eshuk, 347 So.2d 704 (Fla. 3rd DCA 1977). Neither, of these cases, reach the issue in the instant matter. Pautier, Saldarriaga, and Eshuk all deal with production of the confidential informant and use of that informant. Fernandez contended that as a matter of law, when a contingency fee is paid to an informant, dismissal is required.

Giraldo's issue was, whether the States use of a confidential informant acting under a substantial agreement violated his constitutional right to due process of law, however, as the case progressed the main issue became that of the States' failure to furnish the defense with the informant's last known address. The dismissal by the trial court was based, predominantly, on the prosecutions dilatory furnishing of information regarding the confidential informant and not on the legal issues presented in this case.

In State v. Embry, 15 FLW D1500 (Fla. 2d DCA June 8, 1990) we find the court stating that the gravamen of their concern was that

the informant manufactured crime to receive a reduced sentence. He initiated and handled all negotiations leading up to the narcotic sale. The District Court affirmed the trial court's dismissal.

Embry is the same scenario as the case involving the respondent, William Hood.

The substantial assistance statute was enlarged by the 1987 amendment to allow for the prosecution of " any other person engaged in trafficking in controlled substance", however, the legislature cannot authorize an informant to manufacture crime and did not do so.

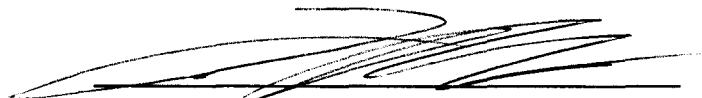
Governmental misconduct which violates the constitutional due process rights of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges. See State v. Glosson, 462 So.2d 1082 (Fla. 1985).

CONCLUSION

The trial court, and the Fourth District, have both rendered correct decisions in this case and this Honorable Court should affirm those decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Mr. John Tiedman, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 and Mr. Edward R. Shohat, Esquire, 175 N.W. 1st Avenue, Miami, Florida 33128 this the 29th day of June 1990.

WH-48/vrd


FRANK A. RUBINO, ESQUIRE