IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Appellant,

v.

Case No. 76,199
2DCA No.89-1220

DEONA EMBRY,

Respondent/Appellee.
_____/

DISCRETIONARY REVIEW OF THE DECISION OF THE
SECOND DISTRICT COURT OF APPEAL
SECOND DISTRICT

BRIEF OF PETITIONER/APPELLANT ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES:

PRELIMINARY STATEMENT AND NOTICE OF SIMILAR ISSUE

The Appellant/Petitioner adopts those arguments as already advanced in the initial briefs in the cases of State v. Hunter, No. 73,230; State v. Anders, No. 76,050; and State v. Evans, No. 73,779 and gives notice that similar issues are contained therein.

SUMMARY OF THE ARGUMENT

Appellee, Deona Embry, was charged with Trafficking in Cocaine on November 7th, 1988, pursuant to Section 893.135, Florida Statutes. (R. 5) On April 14, 1989, Appellee filed a Motion to Dismiss in the Circuit Court of the Twelfth Judicial Circuit, in and for Sarasota County, Florida. His Motion alleged that Mr. Frank Gammichia, a C.I. working for the Tampa Police Department, had entered into a "substantial assistance" agreement with the police department whereby he was to "make cases against two (2) people". For his assistance, he was to receive probation instead of imprisonment on various charges that were pending against him. (R. 11) On the basis of these facts, Appellee alleged a due process violation contrary to the holding in State v. Glosson, infra

During the course of his work on the agreement, Mr. Gammichia came in contact with Appellee. He had never transacted a drug deal with Appellee before and Appellee was apparently not known to law enforcement to be a drug dealer. (R. 11, 12) Mr. Gammichia was successful in convincing Appellee to deliver 116 grams of cocaine to an undercover police officer in Sarasota County,. (R. 12)

No evidentiary hearing was held on the merits of the motion. Rather, counsel and the court engaged in a discussion of the facts and applicable law while on the record. During the "hearing", it came out that Mr. Gammichia had already been sentenced for his charges. (R. 28) It was further noted that Gammichia brought Appellee to the attention of the police. (R.

30, 32) When referring to a prior deposition of Gammichia, it was acknowledged that he had met Appellee before and had information that he dealt in drugs outside the state and had heard from friends that he "does deals" in the Fort Myers area. (R. 31) The State indicated that Gammichia's testimony was not key to the State's case against Appellee. (R. 34, 36) Nor was the State Attorney's Office involved in the case. (R. 34)

At the continuation of the hearing, the court gave its reasoning behind his decision to grant Appellee's Motion to Dismiss. During this hearing, it was again brought to the court's attention that Appellee was known to Mr. Gammichia as a drug dealer. (R. 49) Ultimately, the court concluded that because the agreement with Gammichia did not limit him to making deals with "certain people ... that were already involved in the drug business and predisposed to buy or sell drugs", that Hunter v. State, infra, mandated that he grant Appellee's Motion to Dismiss. (R. 59)

On August 24, 1989, the court entered its Order granting Appellee's Motion to Dismiss. (R. 44) Thereafter, on May 1, 1989, the State filed its timely Notice of Appeal, citing as error the court's order granting appellee's motion to dismiss. (R. 65) On June 1, 1990, the Second District Court of Appeals affirmed the decision of the trial court in a per curiam decision. Therein, the court certified as a question of great public importance the same question as was posed to this Court in

Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988):

DOES AN AGREEMENT WHEREBY A CONVICTED DRUG TRAFFICKER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE VIOLATE THE HOLDING IN STATE V. GLOSSON?

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED BY DECIDING THAT A DUE PROCESS VIOLATION OCCURRED BECAUSE THE TARGET OF A CONFIDENTIAL INFORMANT ACTING UNDER A "SUBSTANTIAL ASSISTANCE" AGREEMENT WAS NOT PREVIOUSLY KNOWN TO LAW ENFORCEMENT AS A TRAFFICKER IN ILLEGAL DRUGS?

The crux of the Second District's decision was their belief that the confidential informant actually went out and manufactured crime in order to meet the requirements of his "substantial assistance" agreement with the Tampa police. The court relied on language from Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988) and State v. Glosson, 462 So.2d 1082 (Fla. 1985) wherein the process of "manufacturing" rather than "detecting" crime was found to be violative of due process. Such a line of thought places the constitutionality of Section 893.135(4), Florida Statutes (1987), in question and squarely puts the burden of interpretation upon this Court to decide whether the phrase "any person engaged in trafficking in controlled substances" means only those persons previously known to law enforcement.

In support of its holding in Hunter, the Fourth District relied primarily upon this Court's decision in Glosson. Therein, this Court condemned a scheme whereby the State had agreed to pay an informant a percentage of all civil forfeitures resulting from the criminal convictions he was to help obtain by selling those defendants drugs. The Court reasoned that the informant's enormous financial stake in ensuring the defendant's convictions carried with it an intolerable risk that the informant would

commit perjury at trial. Glosson, at 1085. The Hunter court simply failed to appreciate that the instant sort of situation was vastly distinguishable from that in Glosson in that the Hunter informant, unlike the Glosson informant, had little incentive to perjure himself at trial because he had already been rewarded for his efforts. The informants reward was not contingent upon the defendant's convictions and, indeed, the State would have had little recourse against its informants had he perjured himself at trial and the defendants acquitted accordingly. *See* Acosta v. State, 506 So.2d 387 (1987).

Sub judice, the same criticism can be levied at the Second District's decision. Gammichia had already received the benefit of his bargain by the time of Respondent's trial. Moreover, the State indicated that his testimony would enter only as that of a rebuttal witness. Therefore, there was no particular incentive for the informant to lie as was the case in Glosson.

In State v. McQueen, 501 So.2d 631, 633 (Fla. 5th DCA 1986), review denied, 513 So.2d 1062 (Fla. 1987), the State, as it did here, allowed a previously-sentenced drug dealer to render substantial assistance by arranging narcotics transactions "with persons who were known to him or who were already in the drug business and predisposed to buy or sell illegal controlled substances[1] The Fifth District held that the defendants who were

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[1] In attempting to show that McQueen was factually distinguishable from the case at bar, the Fourth District inadvertently changed the underlined work in the foregoing quote from "or" to "and" and emphasized it, Hunter v. State, 13 F.L.W. 2186, 2188 note 3, which would appear to have altered the court's legal reading of McQueen's import considerably.

apprehended as a result of the informant's efforts had no standing to fruitfully contest the statutory irregularities in the prosecutorial and judicial processing of the informant, State v. McQueen, 501 So.2d 631, 633; accord, State v. Stella, 454 So.2d 780, 782 (Fla. 4th DCA 1984); compare, Campbell v. State, 453 So.2d 525, 526 (Fla. 5th DCA 1984), holding that an informant, himself, does have such standing. This holding comports with the general axiom that the government's failure to strictly comply with statutory procedures of a nonconstitiutional nature should not result in a windfall to a complaining defendant via the exclusion of reliable incriminating evidence. See, e.g., State v. Castillo, 528 So.2d 1221, 1222 (Fla. 1st DCA 1988) and Rice v. State, 525 So.2d 509, 511 (Fla. 4th DCA 1988).

Even more significant than the McQueen court's holding concerning standing, upon which the State of course relies here, is its holding distinguishing Glosson:

> Appellees contend that [the informant] Bennett's inducement in having a seventeen and one-half year reduction in sentence as well as the elimination of a $250,000 fine is clearly analogous to the contingent fee conditioned on cooperation and testimony held to be invalid in Glosson. Glosson, however, is distinguishable from the instant case in more ways than one. In Glosson, the defendants were targeted by law enforcement. The informant had an oral agreement with the sheriff's department, which agreement was carried out under the supervision of the state's attorney. Moreover, the informant's fee was contingent upon his cooperation and testimony in the criminal prosecution. The criminal activity involved a "reserve-sting" operation. The operation was conducted with the use of government controlled cannabis.

> Unlike Glosson, however, appellees in the instant case were targeted by the informant rather than by the state. In addition, the operation was not conducted with the use of government controlled contraband. Although the assistant state attorney was involved in the operation, he did not sign the written agreement. Moreover, Bennett was supervised by Metropolitan Bureau of Investigation agents. Finally, Bennett was not to receive a percentage of any forfeitures, proceeds or cash. Although he was required to testify, when necessary, there was no agreement that convictions must result from his testimony. His sole inducement in entering into this agreement was that the assistant state attorney would recommend a reduction of sentence to the judge.

State v. McQueen, 501 So.2d 631, 633-634. *See also* United States v. Lane, 693 F.2d 3385, 387-388 (5th Cir. 1982). The Fifth District, in other words, has in essence accepted the State's aforenoted view that Glosson should be distinguished from cases of the instant ilk because the Glosson informant's rewards, unlike the McQueen or Hunter informants' rewards, was contingent upon the successful prosecution of the defendants he had implicated in drug trafficking.

Respondents will surely contend that, even conceding that the Glosson informant had the greater incentive, Gammichia still had a motive to lie at trial. Of course he did; as did the respondents. This fact, however, is insufficient to justify judicial abrogation of the State's general right in criminal cases to have the credibility of its witnesses passed upon by a jury. Indeed, this Court has established that the State may reach a jury and the jury may thereafter convict a murder defendant solely upon the uncorroborated testimony of his accomplice, *See* Petersen v. State, 117 So. 227 (Fla. 1928), even

though the accomplices may have been induced to testify against the defendant through promises of a lesser sentence or even total immunity. *See* Downs v. State, 386 So.2d 788 (Fla. 1980), cert. denied, 449 U.S. 976 (1980) and Barfield v. State, 402 So.2d 377 (Fla. 1980). Are accomplices to drug dealers less reliable than accomplices to murderers? This Court well-reasoned holding in Glosson simply should not be extended to cover the instant scenario.

Respondent may also very well argue that even if his outright discharge is not mandated on due process grounds under State v. Glosson, it should be mandated under Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985) on grounds that they were allegedly entrapped by the State. In Cruz, this Court drew a distinction between the defense of "subjective entrapment," wherein a defendant argues to a jury that he was not predisposed to commit the charged offenses but merely succumbed to unfair police inducements and should thus be acquitted, and the defense of "objective entrapment," wherein a defendant argues to the judge that regardless of his predisposition to commit the charged offenses the attendant police conduct was so outrageous that he should be discharged. Any contention that the respondent here were subjectively entrapped would be nonsense. It is well-settled that the State may prove predisposition by showing either that the defendants had previously committed illegal acts similar to those for which they were on trial, or that they readily acquiesced to committing

these latter acts. State v. Wheeler, 468 So.2d 978, 981 (Fla. 1985). Herein, Respondent was known to the informant to have been someone who had dealt in the drug trade and was willing to set up another deal in Fort Myers. Accordingly, the State met both of these prerequisites below. Compare Taffer v. State, 504 So.2d 436 (Fla. 2d DCA 1987), cause dismissed, 506 So.2d 1043 (Fla. 1987).

As for objective entrapment, the Cruz Court cautioned:

> [Objective] entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

Cruz v. State, 465 So.2d 516, 522. In Cruz itself, this Court held that the actions of a Tampa policeman who induced the defendant to thieve $150.00 which protruded from his pocket as he portrayed a "drunken bum" in an alleyway failed both prongs of the aforestated test because the State did not establish either that other drunks had been "rolled" in the area or that the dubious means adopted to curtail any such activity would be effective. Cruz v. State, 465 So.2d 516, 522. In contrast, the instant governmental conduct involving the respondents clearly passed both prongs of the Cruz test. After all, the State's arrangement with Gammichia was designed to stem the flow of drugs into Sarasota by detecting as many drug suppliers as possible. Moreover, it cannot be said that the state did not "utilize means reasonably tailored to apprehend those involved in the ongoing

criminal activity". Apparently, the Gammichia's other "deal" was successful. Further, that Gammichia's efforts resulted in the interdiction of admittedly illegal drug activity only indicates that his "means" were indeed effective in curtailing respondent's drug activity. Compare Lusby v. State, 507 So.2d 611 (Fla. 4th DCA 1987) with Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985).

In sum, the State's conduct below was well within permissible bounds, and cannot be used as a sword by these drug dealing respondents to obtain legal immunity for their misbehavior. In State v. Bednitez, 395 So.2d 514, 517 (Fla. 1981), this Court declared that "the elimination of illegal drug traffic is ... a beneficial and worthwhile goal." *See also* Cardwell v. State, 482 So.2d 512, 515 (Fla. 1st DCA 1986) and State v. Eshuk, 347 So.2d 704, 707 (Fla. 3d DCA 1977). The State beseeches the Court to revitalize this declaration by reversing the decision under review and approving the judgments and sentences imposed by the trial judge against respondents, thereby upholding in essence the constitutionality of §893.135(4) as written and as applied in this case, *see* Mack v. State, 504 So.2d 1252 (Fla. 1st DCA 1986).

CONCLUSION

Based on the foregoing arguments and citations of authority, the Petitioner/Appellant respectfully requests this Honorable Court to answer the Certified Question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to T. ORIN LEE, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33830, on this 16th day of July, 1990.

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