IN THE SUPREME COURT OF FLORIDA

96-209

ERNESTO AMADO, :

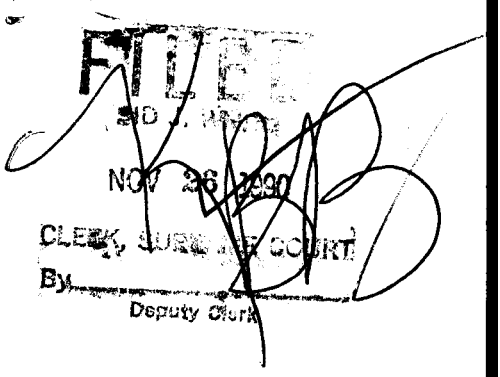
Petitioner, :

vs. : Case No. 87-1859

STATE OF FLORIDA, :

Respondent. :

_____:



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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE

In the Circuit Court for Hillsborough County, the State filed an information charging Appellant, ERNESTO AMADO, with trafficking in cocaine, count one, and delivery of cocaine, count two. [R373--374] Count one of the information charged,

> [Appellant] did knowingly sell, manufacture, deliver, or bring into this State, or was/were knowingly in actual or constructive possession of Cocaine, a controlled substance as described in F.S. 893.03 (2)(a)4, or of any mixture containing cocaine, in an amount of twenty-eight (28) grams or more, but less than two hundred (200) grams. [R373]

Appellant appeared for a jury trial on May 13, 1987. [R1] Over Appellant's objections, the trial court declined to instruct the jury on any lesser included offenses of trafficking, including simple possession. [R255] The jury returned verdicts of guilty for both of the charged offenses. [R345,428]

The trial court adjudicated Appellant guilty. [439-440] The court sentenced Appellant to thirty years imprisonment for count one and fifteen years imprisonment for count two, the sentences to run consecutive with credit for time served. [R362,441-443] A filed sentencing guidelines scoresheet indicates that this sentence was a departure from the recommended sentence. [R444] Appellant filed a timely notice of appeal. [R446]

In Amado v. State, 563 So.2d 736 (Fla. 2nd DCA 1990), the district court rejected Appellant's arguments regarding the admission of hearsay statements and jury instructions on lesser included offenses. [App. at 4-6] The court noted that its decision on the

jury instruction issue conflicted with Essex v. State, 539 So.2d 559 (Fla. 4th DCA 1989). [App. at 6] The court also ruled that the conviction for delivery of cocaine was a double jeopardy violation and that the reason for departure from the guideline sentence was invalid. [App. at 7] On October 29, 1990, this court accepted jurisdiction of the instant case.

STATEMENT OF THE FACTS

On October 16, 1985, Harry Enos, a confidential informant, informed Detective Blaine Defreitas that a suspect Miguel was selling cocaine at 1213 East Columbus Avenue. [R16-17] This residence was similar to a rooming house. [R110] Enos did not mention Appellant. [R85] Defreitas and Enos proceeded to the above address in order to make a control purchase of cocaine. [R20] Enos entered the residence and returned with a half-gram of cocaine. [R21-22] This purchase did not involve Appellant. [R86]

Defreitas attempted to arrange a purchase that evening of two ounces of cocaine. [R22] When Defreitas and Enos returned to the residence, a small group of Latin males said that Miguel was not available. [R24]

On October 17, 1985 at about 6:00 p.m., Defreitas and Enos again went to the residence. [R26] Hernandez and Delgado, two Latin males, were at the house. [R27-28] About five minutes after Defreitas arrived, Miguel arrived. [R27] An agreement was made for the purchase of cocaine. [R27,31] Miguel said that he would not be present for the transaction. [R32] However, Miguel, pointing to Hernandez, said that someone would be present. [R32] Miguel told Defreitas to return at about 8:30 p.m. [R33]

Defreitas and Enos arrived at the arranged time. [R36] They came in contact with Hernandez and Appellant. [R37] No one else was present. [R37] Either Hernandez or Appellant said the cocaine was being packaged at that time. [R37] The word cocaine was used. [R37] Defreitas testified that Hernandez was doing most of the

speaking and Appellant was agreeing with what was said. [R38] According to Defreitas, Appellant spoke English. [R38,40] However, Appellant testified that he knew little English. [R218]

Defreitas testified Appellant told him that he would inquire as to what Miguel was doing. [R39] Appellant went across the street and returned shortly thereafter. [R39] According to Defreitas, Appellant said Miguel was making the package and it would soon be ready. [R39-40] Defreitas, Enos, and Hernandez entered the residence; Appellant left the residence. [R40] While the three waited in the kitchen, Appellant arrived with a brown paper bag. [R41] Defreitas did not know where the bag came from. [R134] The bag was closed. [R135] Defreitas testified Appellant handed the bag to Hernandez who handed it to Defreitas. [R41]

Defreitas opened the bag and observed what he thought were three packages of cocaine. [R41] Defreitas pulled the packages out of the bag. [R42] Appellant observed the cocaine being pulled out of the bag, Defreitas testified. [R42] Defreitas placed the packages on the kitchen table. [R42] According to Defreitas, Appellant began pacing about as if nervous. [R43,44] Defreitas informed Hernandez that Enos would obtain the money from the car. [R43]

Defreitas testified that Appellant and Hernandez began speaking Spanish. [R44] Shortly thereafter, Hernandez turned on the faucet to the sink. [R44] A witness for the state testified that the running water could have been a possible method of disposing of the cocaine if law enforcement arrived. [R198] However, the wit-

ness admitted the water could have been turned on for other reasons. [R202]

Enos returned with the money. [R44] Defreitas counted the money in front of Appellant and Hernandez. [R51] Meanwhile, law enforcement officers were signaled. [R45] Officers arrived and announced their presence in both Spanish and English. [R52] R. L. Alvarez, one of the officers, testified that Appellant ran out the front door when the officers announced their presence. [R175176--177] Officer Robert Holland testified he apprehended Appellant after Appellant had run over a block. [R188] However, Holland stated in a deposition that he was not sure if Appellant or Hernandez was the one chased. [R191] Michael George and W.J. Hill, two officers who entered the home with Alvarez, testified they did not see Appellant in the residence. [R210,212,213,215]

Patricia Pattee, a crime lab analyst, testified the substance obtained from the packages was cocaine and weighed 58.1 grams. [R169,170-172] On the other hand, Defreitas testified that the substance weighed 56 grams. [R57]

Appellant testified that he lived at the residence on Columbus Avenue. [R216] Miguel was in charge of the house. [R216] Appellant denied having participated in any drug transaction. [R220] When Defreitas and Enos arrived and began speaking, Appellant testified that he crossed the street in order to pickup his dinner. [R219] Appellant returned with a yellow plastic box that contained his food. [R219] Appellant said he went into the kitchen with the food. [R220]

Appellant testified that he told Hernandez in Spanish that he should look for work instead of selling drugs. [R221] Appellant then left the kitchen. [R221] According to Appellant, Delgado was the one who brought the cocaine into the kitchen. [R222] Explaining why he ran when he knew the police were coming, Appellant stated that he was scared because the police had mistreated him during an unrelated search. [R222-223]

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal made two erroneous rulings in affirming Appellant's conviction of trafficking. One, the court ruled that a jury instruction on simple possession of cocaine as a necessarily lesser included or as a permissive lesser included was not required. This ruling is in error because simple possession is a necessarily lesser included offense of trafficking when the later offense is charged in the disjunctive. In the alternative, the evidence support the giving of the instruction as a permissive lesser included. Two, the district court erred in ruling admissible hearsay statements of coconspirators. This ruling is erroneous because the state did not properly establish Appellant's participation in the conspiracy.

ARGUMENT

ISSUE ONE

DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT ON SIMPLE POSSESSION OF COCAINE, A LESSER INCLUDED OFFENSE OF TRAFFICKING?

The state charged Appellant with trafficking in cocaine and offered alternative means of proof. [R373] The information states,

> [Appellant] did knowingly sell, manufacture, deliver, or bring into this State, or was/were knowingly in actual or constructive possession of Cocaine, a controlled substance as described in F.S. 893.03(2)(a)4, or of any mixture containing cocaine, in an amount of twenty-eight (28) grams or more, but less than two hundred (200) grams. [R373]

Despite the above charge including trafficking by possession, the trial court declined to give Appellant's requested jury instruction on simple possession of cocaine. [R255] This ruling is reversible error under two alternative theories: one, an instruction on simple possession is required because it is a necessarily lesser included offense of trafficking when the latter offense is charged in the disjunctive; two, the instruction is required because simple possession is a permissive lesser included offense that is supported by the evidence. Under both theories, the trial court's error demands that Appellant be given a new trial.

A. Simple possession is a necessarily lesser included offense of trafficking when trafficking is charged by alternative means of proof.

Jury instructions on necessarily lesser included offenses are mandated regardless of the degree of the proof of the greater or lesser offense. State v. Wimberly, 498 So.2d 929 (Fla. 1986). A necessarily lesser included offense is defined as "a lesser offense that is always included in the major offense." Id. at 932. The above requirement is grounded on the nonconstitutional right of the jury to pardon the offender of the greater offense. State v. Baker, 456 So.2d 419 (Fla. 1984); Hayes v. State, 564 So.2d 161 (Fla. 2d DCA 1990).

In the present case, the district court held that simple possession was not a lesser included offense of trafficking. Amado v. State, 563 So.2d 736 (Fla. 2d DCA 1990). The court reached this conclusion because the state offered alternative means of proof of trafficking. Id. Because trafficking by delivery was one of these means, the district court relied on State v. Daophin, 533 So.2d 761 (Fla. 1988), in ruling that simple possession was not a necessarily lesser included offense. This court in Daophin, Id. at 762, held that simple possession was not a necessarily lesser included offense of trafficking by delivery.

The district court's reliance on Daophin is misplaced. In that case, the state charged the accused with only trafficking by delivery. Id. That charge contrasts with the instant case where the state charged Appellant with trafficking by delivery as well as trafficking by possession. If trafficking by possession were solely alleged, an instruction on simple possession as a necessarily lesser included offense would be required. State v. Abreau, 363

So.2d 1063 (Fla. 1978); Carvalho v. State, 513 So.2d 1321 (Fla. 3d DCA 1987). This court has not decided whether simple possession is a necessarily lesser included offense when both trafficking by possession and by other means such as delivery are alleged in the alternative.

The above issue was present but not resolved in Essex v. State, 539 So.2d 559 (Fla. 4th DCA 1989), and Garrison v. State, 530 So.2d 365 (Fla. 5th DCA 1988). In both cases, the state charged the defendant with trafficking and offered alternative means of proof. The court in Essex held that an instruction on simple possession should have been given under the doctrine of jury pardon. The court also noted that the evidence supported the instruction. In Garrison, 530 So.2d at 367, the court expressly declined to address whether simple possession was a necessarily lesser included. The court held the offense was "at least" a permissive included offense. Id. Because the information charged and the evidence supported simple possession, the failure to give an instruction on that offense was reversible error. Id.; See also, Munroe v. State, 514 So.2d 397 (Fla. 1st DCA 1987) (conspiracy to possess cocaine is, at best, a permissible lesser included offense of conspiracy to traffic).

A ruling that simple possession is a necessarily lesser included offense of trafficking when the greater offense is charged in the disjunctive is consistent with this court's interpretation of Florida Rule of Criminal Procedure 3.510 and the jury pardon doctrine. If this court were to hold that simple possession were

not a necessarily lesser included offense of trafficking when trafficking was charged by alternative means, the state could use this alternative means of proof to circumvent the requirement of a simple possession instruction in cases where the evidence clearly showed possession of cocaine in excess of 28 grams. This outcome is inconsistent with the distinction drawn by this court in Wimberly between necessarily lesser included offenses and permissive included offenses. In Wimberly, this court interpreted Rule 3.510 to require an instruction on a necessarily lesser included offense regardless of the evidence presented. State v. Wimberly, 498 So.2d at 932. Although simple possession is a necessarily lesser included offense of trafficking by possession, the state could avoid Wimberly's requirement of an instruction by pleading trafficking in the disjunctive. This result would also be contrary to the jury's power to find the defendant guilty of a lesser included offense, the jury pardon doctrine. See, Id.; Lomax v. State, 345 So.2d 719 (Fla. 1977); Weller v. State, 501 So.2d 1291 (Fla. 4th DCA 1986); State v. Abreau, 363 So.2d 1063.

In addition, requiring an instruction on simple possession as a necessarily lesser included offense of trafficking would be consistent with this court's past double jeopardy analysis of the trafficking statute. In Bell v. State, 437 So.2d 1057, 1060 (Fla. 1983), this court stated,

> By including sale and possession of drugs within the trafficking statute, it is apparent that the legislature intended to facilitate trafficking prosecutions through the use of

> alternative methods of proof rather than attempting to provide for multiple convictions and punishments for criminal conduct which is basically unitary.

The classification of simple possession as a necessarily lesser included offense is logical when trafficking is viewed as one offense encompassing alternative means of proof. The instruction is required not because simple possession is a lesser offense of delivery or sale of cocaine in excess of a charged amount but because simple possession is a lesser offense of trafficking. This reasoning led this court in Bell to rule that convictions for both trafficking and possession violated the proscription against double jeopardy. Although this court receded from Bell in Rotenberry v. State, 468 So.2d 971 (Fla. 1985), Rotenberry was overturned in Carawan v. State, 515 So.2d 161 (Fla. 1987).

B. An instruction on simple possession is required because it is a permissive lesser included offense of trafficking and the evidence supports the instruction.

Permissive lesser included offenses are those offenses that may or may not be lesser included offenses depending on the pleadings and the presented evidence. Wilcott v. State, 509 So.2d 261, 262 (Fla. 1987). An instruction on permissive lesser included offenses must be given "when the pleadings and other evidence demonstrate that the lesser offense is included in the offense charged." Id. In the instant case, the district court held that simple possession was a permissive lesser included offense of trafficking, but the court ruled that the evidence did not support the

instruction. Amado v. State, 563 So.2d 736. Contrary to the district court's decision, the evidence presented below supports a finding of simple possession.

The evidence, construed most favorably to the state, indicates Appellant's possession of cocaine. When the narcotic transaction was being discussed, Appellant went across the street to where Miguel was ostensibly preparing the cocaine. [R39-40] Appellant later arrived with a brown paper bag in hand. [R41] Appellant gave the bag to Hernandez who handed it to Defreitas, the undercover officer. [R41] Appellant stood nearby while the cocaine was examined. [R41-44]

Appellant's handling of the cocaine and his proximity to the transaction indicate both his actual and constructive possession of the cocaine. The issue then becomes whether the evidence supports a finding that the amount involved was less than twenty-eight grams. This finding is supported by the discrepancy in the state's evidence as to the amount of cocaine present. Patricia Pattee, a crime lab analyst, testified that the substance obtained from the packages was cocaine and weighed 58.1 grams. [R169,170-172] On the other hand, Defreitas testified that the substance weighed 56 grams. [R57] It is axiomatic that a jury is entitled to weigh the credibility of evidence and can discount any evidence including expert testimony. Given the discrepancy in the evidence presented as to the amount of cocaine, a conclusion that the state's evidence of the amount was unreliable was within the province of the jury.

Without competent evidence of the weight of the cocaine, the jury was entitled to find Appellant guilty of the lesser offense of simple possession.

By prohibiting an instruction on simple possession, the trial court foreclosed the jury's opportunity to find Appellant guilty of the lesser offense. This foreclosure was an invasion of the jury's province as the sole finder of fact, a concern present in Lomax v. State, 345 So.2d 719 (Fla. 1977). Although the greater weight of the evidence may support a finding of in excess of 28 grams, this evidence does not preclude an instruction on simple possession as a permissive lesser included. An instruction on a permissive lesser included should only be precluded where "there is a total lack of evidence of the lesser offense." In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instruction in Misdemeanor Cases, 431 So.2d 594, 597 (Fla. 1981). As there was no such absence of evidence in the instant case, the trial court committed reversible error in refusing the requested instruction on simple possession.

ISSUE TWO

DID THE TRIAL COURT ERR IN ADMITTING HEARSAY STATEMENTS ON THE BASIS OF THE COCONSPIRATOR EXCEPTION TO THE HEARSAY RULE?

During the trial below, the State sought to introduce hearsay statements made by Miguel and Hernandez. [R28] Appellant objected to these statements arguing that they were hearsay. [R28,29,32] The trial court ruled that the statements could be introduced under the coconspirator exception to the hearsay rule. [R29] In a motion for a new trial, Appellant again objected to the statements. [R356--359,431-434] The trial court's overruling of these objections is reversible error because the State failed to show that Appellant participated in a conspiracy--a prerequisite to the admission of coconspirator hearsay statements.

The State offered evidence of the agreement to purchase cocaine by using the hearsay statements of Hernandez and Miguel. Neither of these men testified during the trial below. On October 17, 1985 at about 6:00 p.m., the agreement was made for the purchase of cocaine. [R27,31] Appellant was not present at this time. Miguel, Hernandez and Delgado were present. [R27-28] Miguel said that he would not be present for the final transaction. [R32] However, Miguel, pointing to Hernandez, said that someone would be present. [R32] Miguel told Detective Defreitas to return to complete the transaction. [R33]

The State introduced additional hearsay statements of Hernandez in order to show the circumstances immediately preceding the

cocaine transaction. Defreitas arrived at the arranged time. [R36] He came in contact with Hernandez and Appellant. [R37] No one else was present. [R37] Either Hernandez or Appellant said that the cocaine was being packaged at that time. [R37] Defreitas testified that Hernandez was doing most of the speaking. [R38]

Section 90.803(18)(e), Florida Statutes (1987), permits the admission of hearsay statements of coconspirators against a defendant who is a member of the conspiracy. Before these statements can be admitted, evidence other than the hearsay statements themselves must establish both the conspiracy and the defendant's participation in the conspiracy. Romani v. State, 542 So.2d 984 (Fla. 1989). In State v. Morales, 460 So.2d 410, 414 (Fla. 2d DCA 1984), the court established a three-pronged test to determine admissibility:

> [T]he court must determine as a factual matter whether the prosecution has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy.

In the instant case, the state failed to establish Appellant's participation in a conspiracy. Section 777.04(3), Florida Statutes (1987), defines conspiracy as an agreement with one or more persons to commit an offense. An agreement and an intention to commit the offense are necessary elements of conspiracy. King v. State, 104 So.2d 730 (Fla.1973). Appellant was not present when the agreement to purchase cocaine was made by Defreitas, Miguel, and Hernandez.

[R27-28] Miguel and Hernandez conspired to traffic in cocaine; however, the state failed to show that Appellant was a member of this conspiracy at the time the agreement was made.

The state may have shown that Appellant aided and abetted trafficking in cocaine. The state presented testimony that Appellant carried the bag of cocaine to Detective Defreitas. Appellant was also present during the final stages of the transaction. However, a conspiracy may not be inferred from aiding and abetting alone. Boyd v. State, 389 So.2d 642 (Fla. 2d DCA 1980). Therefore, Appellant's transportation of the cocaine does not establish a conspiracy. Appellant's presence during the final transaction also does not establish a conspiracy. A conspiracy requires more than mere presence at the scene of an offense. Ashenoff v. State, 391 So.2d 289 (Fla. 3d DCA 1980).

In State v. Edwards, 536 So.2d 288, 293 (Fla. 1st DCA 1988), the court ruled that a preponderance of the evidence must favor admissibility before coconspirator hearsay statements are admissible. See also, Romani v. State, 528 So.2d 15 (Fla. 3d DCA 1988), rev'd on other grounds, 542 So.2d 984 (Fla. 1989). Because the state failed to show by a preponderance of the evidence that Appellant conspired to traffic in cocaine, the hearsay statements of Miguel and Hernandez were not admissible under the coconspirator exception to the hearsay rule. The trial court's ruling permitting admissibility is reversible error.

CONCLUSION

If this court finds lower court error with regard to the issues presented in this brief, Appellant respectfully requests that this court reverse his conviction and remand this case for a new trial.

APPENDIX