IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,182

THE STATE OF FLORIDA

Petitioner,

vs.

DEAN KEVIN LUCAS, et al.,

Respondent.

* *

ON APPLICATION FOR DISCRETIONARY REVIEW

* *

PETITIONER'S REPLY BRIEF

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I.

INTRODUCTION

The Petitioner, the State of Florida, was the Appellant in the Third District Court of Appeal and will be referred to as "the Petitioner" in this brief. The Respondents, Dean Kevin Lucas, et al., were the Appellees and will be referred to as "the Respondents". The symbol "R" will refer to the record on appeal. The symbol "T" will refer to the transcript of proceedings held before the trial court on April 26, 1988.

II.

STATEMENT OF THE CASE AND FACTS

Petitioner reasserts its statement of the case and facts found in its Brief on the Merits.

III.

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in affirming the dismissal of an Information charging RICO on the basis of failure to sufficiently allege continuity. There is no and should not be any such pleading requirement.

Additionally, the mechanistic approach utilized by the Third District in asserting the absence of continuity flies in the face of both precedent and logic. Application of the reasoning and rationale of numerous federal courts compels a result opposite to that reached below.

IV.

ARGUMENT

A.

THE INFORMATION ADEQUATELY ALLEGED A PATTERN OF RACKETEERING ACTIVITY.

Respondent argues that because a motion to dismiss was timely filed and granted, there is no valid claim of procedural default. Petitioner asserts that where the information tracks the language of the statute and alleges all of the essential elements of the charge, the information is not subject to dismissal under Florida Rule of Criminal Procedure 3.190(b). Major v. State, 180 So.2d 335 (Fla. 1965); Gibbs v. Mayo, 81 So.2d 739 (Fla. 1955); Harrell v. State, 79 Fla. 220, 83 So. 922 (1920). The information sub judice alleges that the "Defendants did unlawfully, willfully and knowingly participate directly or indirectly, in the conduct of the D and R Associates Enterprises affairs through a pattern of racketeering activities, as defined by F.S. 895.03(1)(a)(3), (16) and (17), F.S. 895.02(1)(b) and F.S. 895.02(4), more particularly described but not limited as follows:..." (R. 3). The information then details seventeen (17) separate incidents of racketeering conduct occurring over a six (6) month period. (R. 4-23).

Citing Beatty v. State, 418 So.2d 271 (Fla. 2d DCA 1982), Respondent argues that the RICO count was imprecisely or incompletely alleged since it is completely lacking any allegation directed toward the element of continuity. Put another way, Respondent argues that the State must allege in the information an element of an element of the charge. See, Bowden v. State, 402 So.2d 1173 (Fla. 1981) (pattern of racketeering activity requires, in addition to similarity and interrelatedness of racketeering activities, proof that a continuity of particular criminal activity exists); H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (Federal RICO pattern requires continuity plus relationship).

Petitioner acknowledges that in order to prove a pattern of racketeering activity the State must demonstrate a continuity of racketeering activity. Bowden, supra. However, the State is not required to set forth in the information proof with which it intends to establish its case. Martinez v. State, 368 So.2d 338 (Fla. 1978). An information is legally sufficient if it

expresses the elements of the offense charged in such a way that the accused is neither misled or embarrassed in the preparation of his defense nor exposed to double jeopardy. State v. Dilworth, 397 So.2d 292 (Fla. 1981).

The Court acknowledged in Bowden, that "[o]nly after this 'predicate crime' has been established, can the state proceed to the proof of the RICO Act violation." Id. at 1175 (emphasis added). The Supreme Court in H.J., Inc., noted that a threat of continuity requires either a specific threat of repetition extending indefinitely into the future or a showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. 492 U.S. at ___, 109 S.Ct. at 2902. Thus, while the incidents of racketeering activity constituting the pattern of racketeering activity must be related and continuous, these requirements are subjects of the State's proof; matters more properly addressed via a sworn motion to dismiss or a motion for judgment of acquittal.

In State v. Whiddon, 384 So.2d 1269 (Fla. 1980), this Court had occasion to pass upon the sufficiency of an information charging a RICO Act violation. In Whiddon, the complained of defect was the "state totally failed to describe or even suggest exactly what the criminal enterprise was or how it operated." Id. at 1271. In upholding the validity of the charging document, this Court adhered to the well established legal principle that "an instrument charging a RICO violation need not specify the relationship among crimes or defendants on its face. If the instrument tracks the statute and alleges the existence of a criminal enterprise, defendants are sufficiently on notice as to the nature of the charges." Id. at 1272. This Court also noted that Florida Rule of Criminal Procedure 3.220 provides defendants with full discovery which allows them to obtain full knowledge of the charges against them. Id.

Recently, the Fifth District Court of Appeal reversed the lower court's granting of a sworn motion to dismiss a RICO charge alleging that "the three alleged drug transactions nor the sworn deposition of the undercover officer supports the contention that these incidents were interrelated or that the defendants were associated with an enterprise." State v. Purvis, 560 So.2d 1296, 1298 (Fla. 5th DCA 1990). The Court observed that merely concluding that several sales of cocaine made on several dates does not establish the requirement of the interrelatedness, without more, does not set forth facts sufficient to justify a dismissal under Rule 3.190(c)(4). Id. at 1298.

Petitioner asserts that, as happened in the instant case, the mere legal conclusion that seventeen incidents of racketeering conduct committed over a six-month period of time, is insufficient to justify dismissal where the charging instrument alleges that such incidents constituted a pattern of racketeering activity. Moreover, from a factual perspective, the State asserted in the trial court below that the fraudulent scheme was disrupted by the execution of a search warrant, and would have continued indefinitely but for the State action. (T. 29).

B.

THE THIRD DISTRICT MISCONSTRUED AND MISAPPLIED THE REQUIREMENT OF CONTINUITY.

For almost a decade preceding the United States Supreme Court's decision in H.J., Inc., this Court has required a continuity of criminal activity as well as a similarity and interrelatedness between these activities constituting a pattern of racketeering activity. Bowden, 402 So.2d 1173. For the first time since announcing the "continuity plus relationship" requirements in Bowden, this court must now develop a meaningful application of the concept of pattern.

Contrary to Respondent's assertion, Petitioner has not overlooked the difference in language and scope between the federal RICO Act and Florida's RICO Act. Nor did Petitioner overlook the Florida appellate court decisions addressing those differences.

Prior to the Third District Court of Appeal's decision in Lucas, only one other District Court of Appeal had addressed the proper scope of Florida's RICO Act definition of pattern. See, State v. Russo, 493 So.2d 504 (Fla. 4th DCA 1986). The Russo decision dealt with the proper scope of the term incident and not with the proper scope of continuity of incidents. Thus, while Petitioner agrees that the term "incident" is more inclusive than the term "act", and therefore would narrow the application of Florida's RICO Act beyond that of the federal RICO Act; Petitioner disagrees with Respondent's suggestion that Russo can be read to equate a boiler room operation that defrauds seventeen people over six months as being one incident of racketeering conduct. (Respondent's brief pg. 20).

In Tinwood N.V. v. Sun Banks Inc., 570 So.2d 955 (Fla. 5th DCA 1990), the Fifth District Court of Appeal affirmed the granting of a directed verdict in favor of defendants after a six-week jury trial. Tinwood involved a fraudulent investment scheme involving the parceling and subsequent sale of a 54 acre tract of land. The Fifth District relied on the Supreme Court decision in H.J., Inc., and the Third District Court of Appeal decision in Lucas, in concluding that the plaintiff had failed to establish the continuity prong of the pattern of racketeering activity. The Court found that the defendant's conduct had a limited purpose, was directed to a limited set of investors and covered only a short-term operation with no possibility of continuous existence. Id. at 961. Significantly, these findings were arrived at only after all the evidence had been presented.

At least twenty-seven states have independently passed state RICO statutes. See, Blakey and Cessar, Equitable Relief Under Civil RICO, 62 Notre Dame Law Rev. 526, 596 (1987). Each state RICO statute has its own legislative history, text, and jurisprudence. As such, courts ought to interpret each state statute on its own merits. However, if a Florida statute is patterned after a federal law on the same subject, it will take the same construction in the Florida courts as its prototype had been given in the federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject. Kidd v. Jacksonville, 97 Fla. 297, 120 So. 556 (1929); State ex rel. Packard v. Cook, 108 Fla. 157, 146 So. 223 (1933). The Florida legislature specifically incorporated federal case law by explicitly defining "pattern of racketeering activity" to include interrelated incidents that are not isolated. Morehead v. State, 383 So.2d 629, 631 (Fla. 1980). Moreover, this Court explicitly relied on the reasoning of United States v. Stofsky, 409 F.Supp. 609, 614 (S.D.N.Y. 1973), in requiring continuity as well as relationship between criminal activity constituting a pattern of racketeering activity under Florida RICO. Bowden, 402 So.2d at 1174. More recently, the United States Supreme Court also held that continuity plus relationship are required under federal RICO's pattern of racketeering activity. Despite the above, Respondent urges this Court to disregard federal interpretations of the federal RICO Act in attempting to apply a meaningful definition of the continuity requirement under Florida's RICO Act. (Respondent's brief pg. 11). With the exception of the one difference between Florida's RICO Act

and the federal RICO Act as pointed out in Russo, the Supreme Court's decision in H.J., Inc. has aligned federal jurisprudence with Florida jurisprudence in requiring continuity plus relationship in a pattern of racketeering conduct.

To establish continuity or its threat, federal RICO uses "acts" as a unit for counting. See, H.J., Inc., 492 U.S. at ___, 109 S.Ct. at 2897. Florida uses "incidents". Russo, 493 So.2d at 505. In order to apply the requirement of continuity to the concept of pattern of racketeering activity, we must first define the concept of "incident". Since the legislature did not define the term "incident", the assumption is that the legislative purpose is expressed by the ordinary meaning of the words used. Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962).

Several states, including Florida, have narrowed the reach of their RICO statutes by using "incidents" (Florida), "episodes" (Utah), or "events" (Washington) as counting units to establish the continuity prong of pattern of racketeering activity. Each of those terms is synonymous with "occurrence." As such they reflect the reasoning of United States v. Moeller, 402 F.Supp. 49 (D. Conn. 1975), and codify the guidelines of the United States Department of Justice. See, United States Attorney's Manual, Title 9 - Criminal Division § 9-110.340 ("single criminal episode").

In Moeller, the issue was whether the statutory requirement of a pattern of racketeering activity was adequately alleged by an allegation of two acts that occurred in the course of a single criminal episode at the same place and on the same day. Id. at 57. The undisputed facts[1] revealed that a group of individuals kidnapped three employees of a manufacturing plant and burned the plant. It was further stipulated that the specific plant that was burned was the only building that the enterprise had a purpose to destroy.

In arriving at a common sense interpretation of the word "pattern", the court observed that the term "implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity." Id. at 57 (emphasis in original). Thus, while a single conspiracy to traffic in cannabis and the underlying trafficking constitute

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[1] Petitioner points out that the facts in Moeller were crystalized for the lower court by way of a bill of particulars.

but one incident or transaction and not a pattern, Russo, supra.; four ventures over a two-year period do. Schremmer v. State, No. 89-2862 (Fla. 3d DCA April 16, 1991) [16 F.L.W. D 1033].

In the case sub judice, the fraudulent sales of securities and accompanying use of the telephones to seventeen different victims on different dates constitute seventeen separate events, incidents, episodes, or occurrences related to the overall fraudulent scheme. Having satisfied the requirement of "at least two incidents of racketeering conduct", we must now analyze whether these incidents were sufficiently continuous to constitute a pattern.

To establish a RICO pattern it must be shown that the incidents of racketeering conduct themselves amount to, or that they otherwise constitute a threat of, continuing racketeering conduct. H.J., Inc., 492 U.S. at ___, 109 S.Ct. at 2901. As the Supreme Court noted, this may be done in a variety of ways, thus making it a difficult task to formulate in the abstract any general test for continuity. Id. "Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." Id. at 2902. It is for these reasons that the United States Supreme Court adopted a "flexible approach" in applying the concept of pattern of racketeering activity. Id. at 2900.

> The Florida RICO Act was enacted to resist organized crime from infiltrating and corrupting legitimate businesses by providing an outlet for illegally obtained capital, from harming innocent investors, entrepreneurs, merchants and consumers, and from interfering with free competition and thereby constituting a substantial danger to the economic and general welfare of the state.
>
> State v. Bowen, 413 So.2d 798, 799 (Fla. 1st DCA 1982).

Petitioner asserts that the legislature had in mind a natural and commonsense approach to RICO's pattern element, intending a more stringent requirement than proof simply of two incidents of racketeering conduct, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

See Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36 (3d Cir. 1987). By zeroing in on the facts and issues in a given case and looking at the multiplicity of factors that suggest pattern; concepts like duration or open-endedness, criminal dimension and degree, numerosity of victims and racketeering incidents, commonality of purpose, intensity or extent of the activity, etc., there would appear a greater likelihood of achieving a thoughtful consistency in the application of the definition of pattern of racketeering conduct.

V.

CONCLUSION

Based on the foregoing, it is respectfully suggested that this Court respond to the certified question in two forms. On the one hand, it should be established that, in a criminal RICO, continuity is an issue to be resolved only after a full presentation of the prosecution's case. And, on the other hand, a flexible approach must be utilized in determining the existence vel non of continuity. It is therefore respectfully requested that the decision of the courts below be reversed and remanded.

Respectfully submitted,

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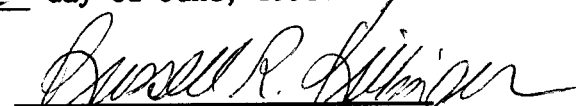
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Paul Morris, Esquire, 2600 Douglas Road, Penthouse 2, Coral Gables, Florida 33134, on this the 20th day of June, 1991.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