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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 78,089

STATE OF FLORIDA,

Petitioner,

vs.

JAMES M. HERNDON,

Respondent.

original

RESPONDENT'S BRIEF ON THE MERITS

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WAS THE APPELLATE COURT CORRECT IN ORDERING THE DISMISSAL OF THE CHARGES AGAINST JAMES HERNDON BASED UPON A VIOLATION OF THE HOLDING IN STATE V. GLOSSON WHERE HERNDON'S ARREST WAS OBTAINED BY THE STATE THROUGH THE USE OF UNSUPERVISED INFORMANTS WHO WERE GIVEN A FREE HAND TO PRODUCE AN ARREST WITH THE AGREEMENT THAT CONTINGENT UPON THE PRODUCTION OF AN ARREST, THE STATE WOULD REDUCE THE INFORMANT'S FINE OF $250,000 AND SENTENCE OF FIFTEEN YEARS 11

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PRELIMINARY STATEMENT

Respondent, JAMES M. HERNDON, was the Defendant/Appellant in the case of Herndon v. State, 16 F.L.W. 1255 (Fla. 4th DCA May 8, 1991), review granted, case number 78,089 (Fla. 1991). The Petitioner, the State of Florida, was the prosecuting authority and Appellee.

References to the record on appeal will be designated "(R)".

STATEMENT OF CASE AND FACTS

This case arose from an arrest which occurred on September 9, 1988 (R. 799, 800). This information, as amended on March 13, 1989, charged the Respondent and his Co-defendant, Michael Maugeri, Jr., with one count of trafficking in cocaine and one count of conspiracy to traffic in cocaine (R. 68-69).

The Respondent filed several motions based upon the Florida Supreme Court's decision in State v. Glosson, 462 So.2d 1082 (Fla. 1985) and the Fourth District Court of Appeal's decision in Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988). These motions included a Sworn Motion to Dismiss Based on Governmental Misconduct and Incorporated Memorandum of Law (R. 876-882); Co-defendant Maugeri's Motion to Dismiss Incorporating Memorandum of Law Based on Due Process Violations (R. 874-875); Defendant's Motion to Adopt Co-defendant Maugeri's Motions (R. 883); Defendant's Motion to Dismiss Count II of Information (R. 855-856); and Defendant's Motion to Apply Rule of Stare Decisis with Incorporated Memorandum of Law to Court's Decision of June 12, 1989 (R. 857-860). These motions resulted in the trial court issuing three orders: (1) Order Granting Co-defendant Maugeri's Motion to Dismiss Based on Entrapment as a Matter of Law (R. 871-873); (2) Order Denying Defendant's Motion to Dismiss Based Upon Entrapment as a Matter of Law (R. 869-870);

and (3) Order Denying Defendant's Motion to Apply the Rule of Stare Decisis, which was ruled upon without a hearing (R. 898-C, paragraph 5). The Defendant/Respondent then filed a Petition for Writ of Mandamus and Prohibition with the Fourth District Court of Appeal (R. 861-898) which was denied without opinion. The Court noted that it adopted the decisions of Hunter and Glosson, while denying the Defendant's Motion to Dismiss based upon these very cases.

The trial court denied the Defendant/Respondent's Motion to Dismiss based on State v. Glosson and Hunter v. State after a full hearing conducted on April 28, 1989 (R. 1-66). The facts in this case, as found by the trial court at the April 28, 1989 hearing, clearly supported the Defendant's Motion for Dismissal Based on Entrapment as a Matter of Law. The confidential informant, number 1277, was arrested by the lead detective, Shawn O'Connor, in January, 1988 and charged with trafficking in four (4) kilograms of cocaine (R. 23, 24). As a seller of this amount of cocaine, he was facing between fifteen and thirty (15-30) years in prison, and a minimum fine of $250,000 (R. 24). Neither Herndon nor Maugeri were involved in the transactions which led to the charge against the informant nor had they ever been involved with this informant in any way (R. 26). In fact, the detective had never even heard the names of either Herndon or Maugeri before actually meeting them in relation to this case (R. 26).

In September, 1988, eight or nine months after his arrest, the informant had been unable to meet the requirements placed on him by the State as to substantial assistance, and had exhausted all contacts with the drug dealers he knew or had been involved with. He had been advised by the State Attorney that, essentially, you do not get an "A" for effort, you have to get results -- you have to get an arrest or you do not receive credit (R. 31) -- no arrest, no reduction in sentence (R. 32).

Facing these odds, confidential informant 1277 then turned to a second individual (confidential informant number 2) to assist him in trying to get a drug deal together (R. 36). This unmonitored, totally unsupervised second party allegedly provided confidential informant 1277 with the name, phone number, and information regarding co-defendant Maugeri. That this happened is solely based on information provided by informant 1277, as there was no monitoring or supervision of any kind on this second person's contacts with Maugeri or with the first informant (R. 36).

What this second informant did or did not do in an attempt to set up an arrest is unknown as the police officers can only say what the first informant, number 1277, told them the second informant told him (R. 37). There was no independent police confirmation of this, nor were any sworn statements taken from the second informant (R. 37).

The second informant never even gave the supervising police officer the names of Maugeri or Herndon (R. 38).

The targets were selected by either this second informant or the first informant, 1277, but not by the police officer.

"Q: (By Mr. Turner) The person, Maugeri or Herndon, the person who selected those people as targets for the deal was the informant, I assume, is that correct?

A: Yes.

Q: It wasn't you?

A: No.

Q: You had no information whatsoever as to who they were prior to that meeting, is that true?

A: Yes.

Q: You made no effort to check out this background or to determine if _they_ had a criminal record or if _they_ were predisposed prior to committing that crime, did you?

A: No.

Q: You didn't know Mr. Herndon existed until the day after the meeting, is that correct?

A: Yes.

Q: You didn't know who he was until after his arrest, is that correct?
A: Yes."

(R. 38, 39)(emphasis added).

As a result of the confidential informant's assistance _in this case_, his sentence was reduced from a fifteen-year

mandatory to three years and the $250,000 fine waived (R. 27). His sentence was further reduced to community control after he testified in his own original case (R. 30)

A. THE TRIAL COURT'S FINDING AS TO THE USE OF THE CONFIDENTIAL INFORMANT

The trial court found: that this was clearly a case of "horizontal substantial assistance" (R. 57), that in terms of basic instructions given by the State Attorney or the police, it appears ". . . that unless arrests are made, there is no reduction" [in sentence or fine] (R. 57, 58)(emphasis added), there is no supervision of the confidential informant (R. 58), it is the confidential informant who picks the target, and the confidential informant is not monitored in his initiations with the target (R. 58). The trial court further found that the informant did not have direct contact with the Defendant, James Herndon (R. 59).

The Defendant was found guilty after a jury trial and sentenced in accordance with the mandatory requirements of the trafficking statutes. The Defendant filed a Motion for New Trial (R. 923, 924) based on the trial court's denial of the Defendant's Motion to Dismiss based on the holdings of Glosson and Hunter.

B. THE APPEAL TO THE FOURTH DISTRICT COURT OF APPEAL

The Defendant filed a Notice of Appeal on December 19, 1989 (R. 925).

The Fourth District Court of Appeal found that the trial court's ruling dismissing the charges of Co-defendant Maugeri, which was appealed by the State, should be affirmed in the case of State v. Maugeri, 570 So.2d 1153 (Fla. 4th DCA 1990), review granted, case number 77,323, based on the authority of State v. Glosson, 462 So.2d 1082 (Fla. 1985); State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990); and Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988).

Subsequent to its ruling in State v. Maugeri, the Fourth District Court of Appeal issued its decision in the instant case and found as follows:

> "The sole issue in this appeal is whether a co-defendant, who was not the informant's target and who has no entrapment defense of his own, must nevertheless be discharged. Our review of Glosson, Anders, and Hunter, reveals that in each case others who were not the targets of the government agent were similarly discharged. This issue is presently pending before the Supreme Court in the second issue certified in Hunter.
>
> There is no need to address the underlying facts in this appeal because we must assume that Maugeri, the co-defendant target, was properly discharged. For this reason we also need to consider Jamarillo v. State, 576 So.2d 349 (Fla. 4th DCA 1991), and Khelifi v. State, 560 So.2d 333 (Fla. 4th DCA), rev. denied, 574 So.2d 141 (Fla. 1990).
>
> Therefore, the judgment and sentence are reversed. Upon remand, the defendant is to be discharged. As to all other issues raised we find no error or abuse of discretion.

> We certify to the Supreme Court the same questions certified in Krajewski v. State; State v. Anders, and Hunter v. State."

Although the Respondent's conviction was reversed on May 8, 1991, he was denied bond pending release.

On June 3, 1991, the State filed its Notice to Invoke Discretionary Jurisdiction with this Court.

On June 18, 1991, the Supreme Court issued its Order Postponing Decision on Jurisdiction and Briefing Schedule which stated that the Petitioner's brief was due on or before July 15, 1991.

On July 26, 1991, the Fourth District Court of Appeal issued its Mandate.

On July 29, 1991, the Petitioner filed its initial brief along with a Motion to Accept Brief as Timely Filed, which was opposed by the Respondent.

On August 9, 1991, the Florida Department of Corrections discharged the Respondent, James M. Herndon.

SUMMARY OF ARGUMENT

The certified question should be answered as follows: The use of unsupervised informants and their unmonitored and unsupervised allies to obtain unscreened targets for arrest, whom the informant has held no prior drug dealings with, where the State has promised the informant that he may receive a reduction of his fifteen-year sentence or $250,000 fine contingent upon his efforts producing an arrest, so offends the concept of due process under Article I, Section 9 of the Florida Constitution that it requires a dismissal of charges against all persons directly or indirectly ensnared by this misconduct.

Any other answer to this question would allow the State to recruit convicted drug dealers by promising them a substantial reduction of their fifteen-year sentence and $250,000 fine in return for results, i.e., arrests. These informants would then be entitled to recruit whomever they wish to assist them in their objective, with the understanding that neither they nor the person they recruit to assist them will be monitored or supervised in their meetings or phone conversations with the targets until and unless the informant is ready to do so. This produces an implicit understanding that the informants could use any methods they wish as they would not be monitored. In the case of State v. Glosson, 462 So.2d 1082 (Fla. 1985), the incentive was a contingency

agreement for money. In the instant case, contingent upon the arrest of the Defendant and his Co-defendant was not only a promise of money, in the form of a reduction of the $250,000 fine, but an even stronger promise--freedom from the fifteen-year sentence.

With such strong incentives, informants can only be utilized where their activities are carefully monitored; where, if they recruit other informants to assist them, their activities are also monitored and supervised; and where the targets the informants select are carefully screened. Otherwise, these convicted felons can be expected to remember one thing -- "You don't get an `A' for effort".[1]

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[1] "You don't get an `A' for effort" were words that State officials used in explaining to the informant the meaning of his agreement (R. 31).

ARGUMENT

I

THE APPELLATE COURT WAS CORRECT IN ORDERING THE DISMISSAL OF THE CHARGES AGAINST JAMES HERNDON BASED UPON A VIOLATION OF THE HOLDING IN STATE V. GLOSSON WHERE HERNDON'S ARREST WAS OBTAINED BY THE STATE THROUGH THE USE OF UNSUPERVISED INFORMANTS WHO WERE GIVEN A FREE HAND TO PRODUCE AN ARREST WITH THE AGREEMENT THAT CONTINGENT UPON THE PRODUCTION OF AN ARREST, THE STATE WOULD REDUCE THE INFORMANT'S FINE OF $250,000 AND SENTENCE OF FIFTEEN YEARS.

The District Court of Appeal affirmed the trial court's Findings of Fact as to the informants' illegal activities, affirming the trial court's decision to dismiss the charges against Co-defendant Maugeri. State v. Maugeri, 570 So.2d 1153 (Fla. 4th DCA 1990), review granted, case number 77,323. The Fourth District Court of Appeal found that the trial court had correctly determined that the contingency agreement with the informant constituted a due process violation based on several factors.

The first factor was that confidential informant 1277's freedom was at stake (R. 827, 878). A confidential informant with an important interest at stake is prima facie unreliable. State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990); State v. Glosson, 462 So.2d 1082 (Fla. 1985); Hunter v. State, 531 So.2d 239, 242 (Fla. 4th DCA 1988)(the informant has an inclination to create crime when the informant's liberty is at stake). The fear is that confidential informant 1277 would deprive rights of others since he is more interested in

securing his own freedom than in guaranteeing rights. This Court recognized the inherent problem with contingent agreements with informants. Incentive to create crimes or manufacture evidence by the use of other illegal and improper methods is too great where the reduction in fine or sentence is contingent upon the arrests which the informant obtains. In this case, the incentive for corruption by the informant and an unidentified co-informant is even greater than in the case of Glosson, for here the informant is looking at a savings of $250,000 in fines as well as the much greater reward of his own freedom. The Fourth District Court of Appeal, in applying this Court's decision in Glosson stated:

> "We believe the facts of this case are at least as compelling as those relied upon in Glosson . . . As in Glosson, the informant here had an invaluable stake in making new cases: his own freedom."
>
> State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990).

This factor was further aggravated by a second factor: The necessity of success in an arrest: "[Y]ou don't get an A for effort, but you need results" (R. 33). Thus, instead of merely bringing targets to the attention of the police, confidential informant 1277 was required to do whatever it took to produce arrests.[2]

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[2] Based upon the arrests of Herndon and Maugeri, the informant's sentence was reduced to three (3) years and his fine of $250,000 was reduced to zero (R. 27).

A third factor, no supervision of confidential informant 1277, further aggravated the situation (R. 827, 871). State v. Embry, 563 So.2d 147 (Fla. 2d DCA 1990); State v. Anders, supra. Confidential informant 1277 was allowed to initiate negotiations for a drug transaction without any supervision.[3]

A fourth factor is that a second unsupervised confidential informant assisted confidential informant 1277. This second confidential informant's actions are even more obscure than confidential informant 1277's. He was not "supervised" during his participation and he was not debriefed following his participation. This second confidential informant may have then pressured potential defendants with coercions, threats, or other acts of desperation to obtain their participation in a drug transaction. The trial court found that a total lack of supervision was a primary factor in the due process violation.

The final factor was that these informants, with no input or checks from the police, selected their targets (R. 873).

The trial court found that the totality of these factors (personal stake, necessity of success, lack of supervision, confidential informants selecting unchecked targets) created a violation of due process against co-defendant Maugeri:

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[3] Because of the lack of supervision, confidential informant 1277 was allowed to go on a "fishing expedition".

". . . where the confidential informant has a personal stake in the outcome of case, whether it be monetary or personal liberty, and where he is, without supervision, permitted to detect crime previously unknown to the police, the likelihood that he will create new crime for his personal benefit is so great (and the 'loose cannon' approach to law enforcement disapproved so much) that the courts will find the practice to violate the due process rights of anyone so ensnared."

June 12, 1989 Order (R. 827-828).

The Fourth District Court of Appeal correctly found that the promise of freedom and the elimination of a $250,000 fine, contingent upon obtaining an arrest, constituted too great an inducement for unsupervised informants to select random targets without any checks by police officers. Today, inducements are so great that informants not only work by themselves but they go out and enlist the aid of their friends to work with them, totally unsupervised, in an effort to achieve these contingent promises.

If this Court is to find that informants must be used, and that a contingent agreement with the informants offering freedom and money is an acceptable method of paying these informants, then it must certainly find that in such cases where informants are used in this manner, they must be closely supervised and monitored as to all their meetings and phone contacts with potential targets, meetings with other co-informants, and their selection of targets.

CONCLUSION

Respondent urges this Honorable Court to affirm the Fourth District Court of Appeal's decision in this cause.

Respectfully submitted,

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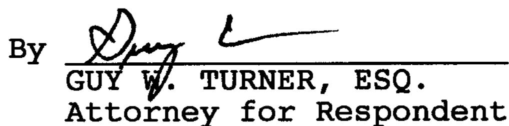

By
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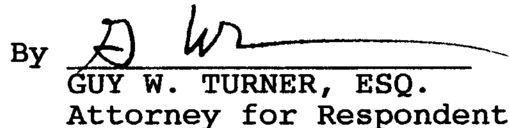
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: CAROL COBOURN ASBURY, ESQ., Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401 this 14th day of August, 1991.



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