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IN THE SUPREME COURT OF FLORIDA

MANUEL MUNOZ

Petitioner,

vs.

CASE NO: 78,900
DCA NO: 91-00008

STATE OF FLORIDA

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT, STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This brief is filed in reply to the Respondent State of Florida's answer brief on the merits. The State of Florida's answer brief will be referred to as "AB" followed by the appropriate page number in parentheses.

ARGUMENT

I

NOTHING IN THE STATUTORY LANGUAGE OF SECTION 777.201 EXPRESSLY ABROGATES THE JUDICIAL DOCTRINE OF OBJECTIVE ENTRAPMENT.

Section 777.201, Florida Statutes does not expressly abrogate the objective form of entrapment. Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989). Section 777.201, Florida Statutes codifies the subjective form of entrapment. As a response to then-existing law, the statute also assigns the burden of proof for subjective entrapment to the defendant. Finally, it makes clear that pre-disposition is an issue for the jury.

In Respondent's brief, Respondent argues that the language of the statute "implies" that Section 777.201 "embodies the subjective test and abandons the objective test." (AB 9). Certainly, Section 777.201 "embodies the subjective test" for entrapment. However, nothing in the plain language

of the statute abandons or, more precisely, abrogates or abolishes the objective form of entrapment. As this Court noted in Shelby Mut. Ins. Co. v. Smith, 556 So.2d 393 (Fla. 1990), "[t]he plain meaning of statutory language is the first consideration of statutory construction." Id. at 395 Legislative committee reports are "superfluous" unless the language of the statute itself is irreconcilably ambiguous. Id.

Even if this Court reaches the legislative history in its analysis of the plain meaning of Section 777.201, the legislative history is itself ambiguous. Although a committee report from the House of Representatives suggests an intent to overrule the objective entrapment aspect of Cruz, the Senate reports apparently lack any such reference. Respondent's brief does not address the effect of this ambiguity in the legislative history.

II

THE TRIAL COURT CORRECTLY RULED THE UNCONTROVERTED MOTION TO DISMISS PRESENTED FACTS THAT FAILED TO PASS BOTH PRONGS OF THE CRUZ TEST FOR OBJECTIVE ENTRAPMENT.

A. Lack of Specific Ongoing Criminal Activity.

As previously noted, the record is thoroughly devoid of any suggestion that Mr. Munoz was involved in any type of ongoing criminal activity. In response, Respondent asserts that the absence of any specific evidence regarding Mr. Munoz is acceptable because police directed their investigation at an "existing problem," apparently referring to the general set of video stores in Bay County, Florida.

Respondent analogizes to those cases where sting operations were not viewed as entrapment because they were directed to high crime or recognized drug neighborhoods. Donaldson v. State,

519 So.2d 737 (Fla. 3d DCA 1988); State v. Burch, 545 So.2d 279 (4th DCA 1989), affirmed, 558 So.2d 1 (Fla. 1990). Respondent argues that a single episode of sale of an X-rated video to a minor at a completely distinct video store permits law enforcement to draw names from the telephone book for investigation. It stretches reason to conclude that a sale at a completely separate and distinct video store constitutes specific ongoing criminal activity on behalf of Mr. Munoz.

Perhaps more importantly, the Respondent's brief mis-states an important fact. Contrary to Respondent's brief, the sting operation was not commenced in response to a telephone complaint about "rentals" of adult videos to minors at Top Banana, a separate and distinct video store. (AB 21). As the uncontroverted motion to dismiss makes clear, the problem at the Top Banana store concerned the ability of an underaged individual to purchase an adult video without benefit of any membership card. (R.140,175).

B. Failure to Use Reasonably Tailored Investigative Tactics.

Police tactics were not reasonably tailored to apprehend only those involved in ongoing criminal activity. The trial judge found the totality of circumstances created a substantial risk that innocent but unwary individuals would be entrapped into criminal activity. For example, it seems reasonable to conclude that a woman who presented the membership card of a 34 year old man she described as her boyfriend would be at least 18. In fact, provision of the membership card to the juvenile informant circumvented the store's then-existing identification procedure.

These tactics are all the more problematic because of the nature of the crime. In this case, rental of the video was a normal and otherwise lawful event. The criminality of the rental act is not apparent on its face. This is not, for example, a case in which the target defendant is asked to buy drugs, purchase stolen property or otherwise commit

some act that is illegal on its face. Police tactics should, as here, be especially carefully tailored where the sting operation is directed at an act that is lawful under certain circumstances and unlawful under other circumstances.

III

BECAUSE OBJECTIVE ENTRAPMENT IS ROOTED IN DUE PROCESS CONSIDERATIONS, THIS COURT SHOULD PROVIDE GUIDANCE TO LAW ENFORCEMENT AND TRIAL COURTS THROUGH A SPECIFIC LIMITATION ON POLICE-INSTIGATED CRIMINAL ACTIVITY.

By whatever name, courts have universally recognized their authority to refuse to ratify police-instigated criminal activity. In the federal system, the due process clause of the Fifth Amendment prohibits law enforcement techniques that are "fundamentally unfair, outrageous or shocking to the universal sense of justice." United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Predictably, this type of standard produces a mixed bag of results. Like beauty, outrage is in the eye of the beholder. Compare United States v. Pardue, 765 F. Supp. 513 (W.D. Ark. 1991)(government conduct outrageous in facilitating murder for hire conspiracy); United States v. Batres-Santolino, 521 F. Supp. 744 (N.D.

Cal. 1981)(government conduct outrageous in instigating conspiracy to possess cocaine), with, United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982) cert. denied, 102 S.Ct. 2906. (government's offer to bribe not outrageous).

In State v. Johnson, 127 N.J. 458, 607 A.2d 624 (1992), the New Jersey Supreme Court terms its outer limit on police behavior as objective or due process entrapment. According to Johnson, relevant factors for this determination are "(1) whether the government or the defendant was primarily responsible for creating and planning the crime, (2) whether the government or the defendant primarily controlled and directed the commission of the crime, (3) whether objectively viewed the methods used by the government to involve the defendant in the commission of the crime were unreasonable, (4) whether the government had a legitimate law enforcement purpose in bringing about the crime."

Respondent concedes that these factors are "virtually identical" to the more succinct two prong

test set forth in Cruz. (AB 18). The New Jersey Supreme Court was concerned, for example, "whether the police had adequate justification to target and investigate defendants as criminal suspects." Johnson, appendix at 9.

The first prong of the Cruz test requiring specific ongoing criminal activity parallels this concern about justifiable targeting of citizens. In the case at hand, it seems patently offensive for law enforcement to have plucked Mr. Munoz from the telephone book and made him the target of the government's efforts to get him to commit a crime. Florida's constitutionally expressed concern for the privacy of its citizens militates in favor of a requirement that police have some credible evidence of wrongdoing before bringing the weight of their vast array of inducements and encouragements to bear on an otherwise law-abiding citizen.

Finally, the second prong of the Cruz test requiring police to use reasonably tailored investigative tactics is a much more well-

articulated standard than the federal standard of unfairness, shock or outrage. In the face of an infinite number of different fact scenarios, even this prong of the Cruz test will be fleshed out in the context of offers of exorbitant gain, sex, appeal to family relationships or the apparent lawfulness of the proposed criminal activity. In any event, this Court should not, as Respondent suggests, simply adopt the amorphously defined federal due process limitation on judicial complicity with government created criminal activity.

CONCLUSION

Wherefore the undersigned respectfully requests this Court to reverse the First District Court of Appeal and to reinstate the trial court's dismissal of the information against Mr. Munoz.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Laura Rush, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 25th day of August, 1992.

ALVIN L. PETERS