IN THE SUPREME COURT OF FLORIDA

WILLIAM SIMMONS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,094

INITIAL MERIT BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CITATIONS

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INITIAL MERIT BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

Petitioner was the defendant/appellant below, and will be referred to as petitioner in this brief. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A two volume transcript will be referred to as "T". An appendix containing the decisions of the district court will be referred to as "A".

II STATEMENT OF THE CASE

By information filed June 4, 1990, petitioner was charged in counts I and III with sale or delivery of cocaine and possession of cocaine occurring on March 13, 1990 and in counts II and IV with sale or delivery of cocaine and possession of cocaine occurring on March 16, 1990 (R 6). The cause proceeded to a jury trial on September 12, 1990. At the close of the state's case and the close of all the evidence, the petitioner moved for a judgement of acquittal based on the defense of entrapment as a matter of law (T 123, 158). The trial court denied the motions (T 130, 158). The jury returned verdicts of guilty as charged (T 196-197).

The petitioner filed a timely motion for new trial, which was denied (R 24-26). On October 23, 1990, the petitioner was adjudicated guilty and sentenced to six months in jail with credit for one hundred and fifty-six days (R 27-33).

An appeal was taken to the First District Court of Appeal raising the issue of the denial of the motion for judgment of acquittal. In a per curiam opinion, filed November 4, 1991, the District Court affirmed the judgements and convictions, citing to State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991), in which the district court held that the enactment of section 777.201, Florida Statutes (1987), abolished the objective entrapment test as set forth in Cruz v. State, 465 So.2d 516 (Fla. 1985) cert. denied, 473 U.S. 905 (1985). Simmons v. State, 16 FLW D2788 (Fla. 1st DCA Nov. 4, 1991).

The petitioner filed a motion for rehearing or certification. On December 13, 1991, the district court issued an opinion certifying the following as a question of great public importance:

> HAS THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 So.2d 516 (Fla. 1985) cert. denied, 473 U.S. 905 (1985), BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987)?

Simmons v. State, 16 FLW D3092 (Fla. 1st DCA Dec. 13, 1991).

Thereafter, the petitioner filed a timely notice to invoke this Court's discretionary jurisdiction. This Court issued an order postponing its decision on jurisdiction and requesting briefs on the merits.

III STATEMENT OF THE FACTS

At trial, the state presented the testimony of two police officers, Bobby Deal, a detective with the Jacksonville Sheriff's Office and part-time security consultant to United Parcel Service (UPS), and Scott McRae, an auxiliary police officer and police recruit at the Jacksonville Sheriff's Office police academy (T 18-19, 61-62).

Detective Deal testified that he shared a "mutual concern" with his supervisor at UPS about the possibility of drug use and alcoholism among the employees in the main distribution center, known as the HUB. They discussed ways to gauge whether a problem did in fact exist, and if so, how serious it might be (T 20-21). They came up with the idea of placing an "undercover agent" among UPS employees to "find out whether or not we did have a drug problem" (T 22-23, 57). Detective Deal recommended and recruited Officer McRae for this operation (T 23). At that time McRae was a volunteer auxiliary officer with the Sheriff's Office and had assisted on various investigations for about one year (T 23-24).

Detective Deal instructed Officer McRae to misrepresent his own drug use "to appear as if he is a social user of any drug" and that when he was "in conversation with somebody, tell them he parties, tell them he gets out and does a little cocaine, tell them he drinks a lot" (T 26). At one point, however, Detective Deal became concerned that Officer McRae was going too far in his masquerade, giving the appearance that he was not a social user, but rather an addict (T 50-52).

Detective Deal testified that he never suspected the petitioner of using or selling drugs prior to the undercover operation and, in fact, he had no one in particular in mind when he initiated the operation (T 28). Rather, he suspected that "10 percent of any large organization is going to have a problem with either drug usage or alcoholism" and this operation was created to determine "if there was any drug use" (T 43-44, 47-48).

Detective Deal testified that the first time Officer McRae gave money to the petitioner to purchase drugs, the petitioner failed to deliver any contraband (T 49-50).

On the afternoon of March 13, 1990, McRae gave the petitioner a ride home from work. Deal followed them to the downtown area, at which time the petitioner got out of the car. Deal parked about one block away and observed the petitioner walk up to a residence, return to the car and hand something to McRae. Deal then followed McRae to the police station where McRae gave him a small packet containing cocaine (T 31-34, 114). Three days later, Deal observed a similar occurrence (T 36-38, 117).

Officer McRae testified that he was to "basically see if there was any drug activity going on at the HUB" and, if so, attempt to purchase drugs from the individuals involved (T 63). At no time during the four or five months of this operation was he ever given a name or lead pertaining to drug use, nor did he observe anyone using, buying or selling drugs at UPS. Nor was he ever approached at UPS concerning drugs (T 84-85).

Officer McRae became acquainted with the petitioner and offered him transportation home from work (T 67-68, 86-87). McRae's curiosity was "peaked" by the petitioner because he was "a bit more talkative than some of the other employees" and became of his general appearance, which was somewhat unkempt, and the fact that he was often without money (T 65-66, 87). During one of these rides, the conversation turned to the petitioner's past involvement in drug (T 68, 73). McRae freely discussed his own mythical drug use and told the petitioner that his supplier had moved away (T 88).

Officer McRae testified that the petitioner stated he would be able to get McRae drugs (T 74). After relaying this information to Detective Deal, McRae was instructed to allow the petitioner to purchase drugs. Officer McRae testified that he gave forty dollars to the petitioner to buy "some drugs" and deliver them to McRae to following day, Friday (T 74). The petitioner did not deliver any narcotics to McRae (T 75). McRae pretended to be upset and on a couple of occasions told the petitioner "something had to be done about my forty dollars" (T 89-90). McRae testified that the petitioner told him "he would try to make it up during the next couple of paydays" (T 76).

The following Tuesday, the petitioner agreed to get drugs for McRae "on the spot", "since he owed me that money" (T 76). While giving the petitioner a ride home after work, Officer McRae gave the petitioner ten dollars to purchase unspecified drugs (T 76-77). The petitioner left McRae's car with the

money and returned with a "small plastic baggie" containing cocaine (T 76). Three days later, a similar transaction took place (T 79-80).

During this operation, the petitioner was the only person arrested (T 53, 57, 95).

The petitioner testified that he was appreciative when Officer McRae offered him rides home, since he did not have a car of his own (T 133). According to the petitioner, the subject of drugs was first raised by Officer McRae (T 132). After the first incident, when the petitioner did not deliver any drugs in return for the forty dollars, the petitioner "felt bad", and guilty "because I spent his money, plus this guy was friendly enough to go out of his way, to give me a ride home" (T 137). According to the petitioner, McRae "basically wanted me to make up the money in some way" (T 137). The following week, Officer McRae approached the petitioner "at least two to three times, asking me can I make up his" money (T 138).

Officer McRae continued to give the petitioner rides home after work and on one of these trips McRae asked the petitioner if he could "get [McRae] some [cocaine]" (T 139). McRae told the petitioner his supplier had left town and he had no way of getting drugs (T 88, 140). McRae also told the petitioner that because he was white, he was scared to go into his predominantly black "dangerous neighborhood" (T 98, 140).

The petitioner testified that he agreed to purchase narcotics for Officer McRae because, "I owed him money and he had been coming at me on the job, which is the wrong spot, to

[be] bothering me about drugs" (T 141). The petitioner did this on two occasions (T 145-148).

IV SUMMARY OF THE ARGUMENT

Cruz v. State, 465 So.2d 516 (Fla. 1985) cert. denied, 473 U.S. 905 (1985) held that the defenses of subjective and objective entrapment are not mutually exclusive, as is the federal view, but rather are two equal, independent defenses. Subsequent to this decision, the Legislature enacted Florida Statutes, section 777.201 (1987). The District Courts of Appeal have differed as to the effect of the statute on the Cruz objective entrapment defense. The First and Third District Courts have concluded that the statute abolished the defense. The Second and Fourth District Courts have rejected this interpretation and hold the defense is still viable.

This Court held in State v. Hunter, 586 So.2d 319, 322 (Fla. 1991) that "[b]y focusing on police conduct, this objective entrapment standard includes due process considerations." Justice Kogan's separate opinion stated that the source of Florida's objective entrapment defense is premised entirely on the due process clause of the Florida Constitution. Art.I, sec. 9, Fla. Const.

Since the foundation for the Cruz objective entrapment defense is the Florida Constitution's due process clause, the Legislature cannot eliminate the defense by passage of a statute. If this is what section 777.201 purports to do, then it is unconstitutional.

Applying the defense to the instant facts, it is clear that the first prong of this test has not been met. The evidence established the police activity was not directed

toward any specific ongoing criminal activity, but rather was "virtue testing".

This Court should answer the certified question in the negative and reverse the petitioner's convictions.

V ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL BASED ON OBJECTIVE ENTRAPMENT WHERE THE POLICE ACTIVITY DID NOT HAVE AS ITS END THE INTERRUPTION OF A SPECIFIC ONGOING CRIMINAL ACTIVITY.

At trial petitioner presented a defense of entrapment as a matter of law, or objective entrapment. On appeal he argued that the trial court erred in denying his motions for a judgment of acquittal where the facts established entrapment as a matter of law. Specifically, petitioner argued that the police activity was not focused on any specific ongoing criminal activity, and thus, did not meet the two prong test established under Cruz v. State, 465 So.2d 516 (Fla. 1985) cert. denied, 473 U.S. 905 (1985).

The First District Court of Appeal rejected this argument, citing to State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991) in which the court held that the enactment of section 777.201, Florida Statutes (1987), abolished the objective entrapment test as set forth in Cruz. Simmons v. State, 16 FLW D2788 (Fla. 1st DCA Nov. 4, 1991). In its opinion on rehearing, the district court recognized conflict among the districts regarding the effect of the statute on the defense of objective entrapment and certified the following as a question of great public importance:

HAS THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 So.2d 516 (Fla. 1985) cert. denied, 473 U.S. 905 (1985), BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987)?

Simmons v. State, 16 FLW D3092 (Fla. 1st DCA Dec. 13, 1991),

The petitioner will first address this question, which should be answered in the negative, and then address the application of the objective entrapment test to the instant factual situation.

A. THE OBJECTIVE ENTRAPMENT TEST OF CRUZ IS ALIVE AND WELL.

In Cruz this Court held that the different aspects of the entrapment defense, subjective and objective, are not mutually exclusive, as is the federal view, but rather two equal and "independent methods of protection", which "coexist". Id., 465 So.2d at 519-521. Subjective entrapment focuses on the predisposition of the defendant while the objective view focuses on the conduct of the police. The Court set forth a test for objective entrapment:

> Entrapment has not occurred as a matter of law where the 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 activity.
>
> The first prong of this test addresses the problem of "virtue testing", that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. . .
>
> The second prong of the threshold test addresses the problem of inappropriate techniques. Considerations in deciding whether police activity is permissible under this prong include whether a government agent "induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion of inducement which create a substantial risk that such an offense will be

committed by persons other than those who are ready to commit it".

Id., at 522.

Florida Statutes, section 777.201, applies to offenses committed on or after October 1, 1987. This statute reads:

> (1) A law enforcement officer. . . perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment. The issue of entrapment shall be tried by the trier of fact.

Note that subsection (1) of this statute recites the language of Cruz concerning one of the considerations in determining whether the second prong of the objective entrapment test has been met. That is, whether the government agent induces or encourages another person to engage in conduct constituting such crime by "employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than those who are ready to commit it". Cruz, at 522.

Nevertheless, after this statute went into effect, the Third District Court simply stated in footnotes in State v. Lopez, 522 So.2d 537 (Fla. 3rd DCA 1988) and Gonzalez v. State, 525 So.2d 1005 (Fla. 3rd DCA 1988) [Gonzalez I] that the

objective test of Cruz had been "abolished" by section 777.201. A conflict arose when the Second District Court of Appeal later declined to follow the Third District's "footnoted suggestion" and held that there was nothing express or implied in the wording of section 777.201 which revealed a legislative intent to abolish the Cruz objective test. Bowser v. State, 555 So.2d 879, 881 (Fla. 2d DCA 1989). The second district has recently reiterated this position in Wilson v. State, 589 So.2d 1036 (Fla. 2d DCA 1991).

In Gonzalez v. State, 571 So.2d 1346 (Fla. 3rd DCA 1990) rev. denied, 584 So.2d 998 (Fla. 1991) [Gonzalez II] the Third District explained its rationale. In yet another footnote, the court characterized the language of the statute as codifying subjective entrapment:

> Subsection (1) of the entrapment statute appears, at first reading, to focus on the conduct of the police by providing that an entrapment has occurred if the police conduct creates a "substantial risk that such crime will be committed by a person other than one who is ready to commit it." However, subsection (2) of the statute makes it clear that a defendant will be acquitted on the basis of entrapment only if he can prove, by a preponderance of the evidence, that "his criminal conduct occurred as a result of an entrapment." The sole statutory test for entrapment is, therefore, the subjective test of whether the defendant was predisposed to commit the crime, or as the statute provides, whether the defendant was a person who was "ready to commit the crime." Subsection (1) appears to prevent a defendant from taking advantage of "coincidental improper police conduct." (emphasis original).

Id. at 1349-1350 n. 3. The court pointed to the House of Representatives Committee on Criminal Justice Staff Analysis, June 27, 1987, at 177, which states; "This section overrules the Florida Supreme Court's decision in Cruz [citation omitted], which held that the objective test of whether law enforcement conduct was impermissible was in the discretion of the trial court." Gonzalez II, at 1349.

The Third District concluded in Gonzalez II that although the entrapment statute did not codify the Cruz objective test, the federal due process clause still set the outer limits of permissible police conduct. Id. 571 So. 2d at 1350.

The petitioner disagrees with the Third District's characterization of section 777.201. Further, the legislative intent is, at least, ambiguous as to whether the statute was created to eliminate objective entrapment altogether or whether the intent was to make objective entrapment a question for the trier of fact as opposed to a matter of law. Nevertheless, the real problem with the statute is that the objective entrapment defense is founded upon state constitutional due process considerations. Thus, this defense cannot be abolished by a statute.

In its opinion on rehearing in the instant case, the First District Court aligned itself with the Third and Fourth Districts in Gonzalez II and Krajewski v. State, 586 So.2d 1175 (Fla. 4th DCA 1991) and wrote:

> We recognize, as expressed by the Third District Court of Appeal in Gonzalez, an intent by the Legislature to do away with

> the Cruz objective entrapment test. At the same time, we recognize that due process considerations parallel the objective entrapment test, and permissible police conduct must be limited by constitutional due process. That is, "prosecution of a defendant may be barred where the government's involvement in the criminal enterprise 'is so extensive that it may be characterized as 'outrageous.'" Gonzalez, supra [571 So.2d] at 1350, quoting Brown v. State, 484 So.2d 1324, 1327 (Fla. 3rd DCA 1986). The Florida Supreme Court has also noted, in the Cruz opinion, that objective entrapment involves issues which may overlap or parallel due process concerns. . .

Simmons v. State, 16 FLW D3092-3093 (Fla. 1st DCA Dec. 13, 1991).

The Fourth District Court of Appeal initially agreed with the Third District and held that the statute abolished the defense of objective entrapment. Krajewski v. State, 587 So.2d 1175 (Fla. 4th DCA 1991); Garcia v. State, 582 So.2d 88 (Fla. 4th DCA 1991). However, later that year this Court issued its opinion in State v. Hunter, 586 So.2d 319 (Fla. 1991).

In State v. Hunter, the defendant raised the defense of entrapment under Cruz at the trial level. On appeal, the defendant raised several issues, including violation of due process under State v. Glosson, 462 So.2d 1082 (Fla. 1985). Glosson held that constitutional due process is violated where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution. Hunter asked whether constitutional due process was violated where the informant's reward was not a fee, but a substantial reduction

of the charges against him. The district court agreed with the defendants' Glosson claim and did not address the remaining issues. The Florida Supreme Court, however, reversed the district court on the Glosson issue, finding Hunter factually distinguishable from Glosson.

Of greater significance to the instant case is the fact that this Court ultimately held the district court should have decided the appeal on the objective entrapment issue, rather than Glosson. Hunter, 586 So.2d at 321. The Court then applied the Cruz objective entrapment test, granting relief to the co-appellant, Conklin, since there was no specific ongoing criminal activity until the state's agent created such activity.[1]

While Hunter did not expressly address the effect of section 777.201 on the objective entrapment defense, it held that "[b]y focusing on police conduct, this objective entrapment standard includes due process considerations." Id. at 322.

In a separate opinion, concurring in part and dissenting in part (in which Justice Barkett concurred), Justice Kogan

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[1]Hunter was denied relief under the objective entrapment theory because he had become involved in the drug trafficking scheme through Conklin, who acted as a middleman. The Court held that when a middleman, as opposed to a state agent, induces another person to engage in a crime, entrapment is not an available defense.

addressed the foundation for the objective entrapment defense in Cruz:

> The question of whether police conduct meets the Cruz objective standard is one entirely of law. [Cruz], at 521.
>
> The Cruz Court did not directly confront whether the objective test finds it origins in the the Florida Constitution, although it did note that the federal advocates of the objective standard had not claimed a constitutional basis for their views. Id. at 520 n.2 (discussing opinions of federal justices favoring objective standard). The Cruz Court did, however, note that the objective entrapment defense involves issues that substantially overlap due process concerns. Id. at 519 n. 1 (citing cases so holding).
>
> Today, the majority opinion resolves the question of the source of Florida's objective entrapment defense. The majority holds that "this objective entrapment standard includes due process considerations." Majority op. at 322. It goes on to deny Hunter's claim because he allegedly is vicariously asserting the due process rights of Conklin. Id. at 322. Because the federal system does not recognize the objective entrapment defense, the majority opinion clearly is premised entirely on the due process clause of the Florida Constitution. Art.I, sec. 9, Fla. Const. I fully concur in this conclusion. Indeed, I believe it necessarily flows from our prior case law.

Hunter, at 325.

Thus, the foundation for the Cruz objective entrapment defense is the Florida Constitution's due process clause. The Legislature cannot eliminate constitutional due process by passage of a statute. If this is what section 777.201 does, then it is unconstitutional.

The First District Court issued its opinion in Munoz, supra, on October 8, 1991. One week later, and two months

after Hunter, the Fourth District Court decided Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991). The court receded from Krajewski and held:

> Preliminarily, we agree with appellant that the trial court erred in initially concluding that the law of Cruz was superseded by the enactment of section 777.201.
>
> Although this court came to that same conclusion in Krajewski, the Florida supreme court has subsequently issued an opinion indicating that Cruz is still alive and well. More importantly, for purposes of our analysis here, the supreme court held in State v. Hunter, [supra] that the objective entrapment aspects of Cruz are predicated upon constitutional due process concerns. . .
>
> Those constitutional due process considerations, of course, can not be superseded by statutory enactments.

Id., at 270-271. See also State v. Hernandez, 587 So.2d 1171 (Fla. 4th DCA 1991) (Court applied Cruz and Hunter in determining police activity was not designed to interrupt ongoing criminal activity).

In Ricardo v. State, 17 FLW D1 (Fla. 4th DCA Dec. 18, 1991) the Fourth District reconciled Cruz objective entrapment and the statute. The court held that Cruz established that there are two aspects of entrapment, "one tested objectively by the court and the other subjectively by the trier of fact." The objective aspect is the "threshold test" outlined in Cruz. If either prong of this test is violated, then there is entrapment as a matter of law. However, if objective entrapment is not established, then section 777.201(2), Fla. Stat. allows the defendant to present his affirmative defense of entrapment to the trier of fact by alleging that he was not predisposed to

commit the offense. A subjective test is thus applied at this stage. Id. at D2. This is a correct interpretation.

In conclusion, the caselaw underpinnings for the district court's decision in the instant case are no longer viable, particularly in light of this Court's decision in Hunter. Further, the conclusion that the enactment of section 777.201 somehow eliminated the defense of objective entrapment is error, as the state constitutional foundation for objective entrapment can not be legislatively abolished.

B. THE POLICE ACTIVITY IN THE INSTANT CASE DID NOT HAVE AS ITS END THE INTERRUPTION OF A SPECIFIC ONGOING CRIMINAL ACTIVITY.

The first prong of the threshold test of objective entrapment states that entrapment has not occurred as a matter of law where the police activity has as its end the interruption of a specific ongoing criminal activity. This prong addresses the problem of "virtue testing", which has been defined as "police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. . . " Cruz, at 522.

In the instant case, the first prong of this test has not been met. The best evidence that this police activity was not directed toward any specific ongoing criminal activity, but rather was "virtue testing", is the testimony of the state witnesses. On direct examination, Detective Deal testified that the operation was set up to determine if, in fact, a drug problem existed at this private business:

Q. Did you have cause to, to have concern about potential drug use at the UPS facility?

A. Yes, ma'am. I think it was a mutual concern that I shared with my boss, who was the loss-prevention manager for this entire district.

As in any big companies, we were concerned with what you read in the newspapers, especially, my closeness to it in my job, there was a possibility any time you have a large amount of employees, which UPS has over 3500 locally, you are going to have the possibility of drug use among the employees. And what we were doing is talking about ways to gauge how serious a problem was, if we had one, inside our facility.

Q. Were you aware of any rumors to that effect?

A. We had a lot of rumors, what you would normally expect circulating around. It is enough to raise your concern about the possibility of drug use and alcoholism, which I am considering the same. . .(T 20).

* * *

Q. Did you come up with an idea as to how you could determine whether there was a problem there [UPS central facility]?

A. Yes, ma'am. Well, you never really come up with the solution to it, but what we did, was we came up, when I said "we" it is Mr. Tom Starke and myself, we were the ones who were discussing ways on how to gauge if we had a problem or not.

So, we came up with the idea, I did, that he suggested to me that maybe we could put somebody in, and I said, "I have somebody in mind that we could place inside as kind of an undercover agent," to find out whether or not we did have a problem in the HUB (T 22-23).

* * *

Q. What I am specifically getting at is

> prior to the time going in there, into the facility, were there specific names that you gave him [McRae] that he should approach?
>
> A. No, we told him to go in there and keep an open mind (T 28).

Clearly, Detective Deal's testimony shows that this operation was geared toward determining whether a "drug problem" existed, not toward interrupting an ongoing specific criminal activity. Any testimony concerning the actual existence of a drug problem at UPS was in reference to unspecified time frames in the past. On cross-examination, Deal testified:

> A. . . .I had several people over a period of six years I have been at United Parcel Service, in the same capacity and seen it move all around and seen it grow.
> As far as employees, yes, several people have told me there is drug use and there is a drug problem in some areas, and I have done other investigations along those lines.
>
> Q. Since 1984?
>
> A. Since 1984, yes (T 46).

Detective Deal stated that "individuals had come to me in the past and I have made other arrests at the HUB for drug use", however, just prior to the start of this operation no one had come to him with information about drug use (T 46). This operation was not initiated based on knowledge regarding any ongoing specific criminal activity. Rather it was started based on Detective Deal's personal opinion that in any large organization ten percent of the people are probably using drugs and alcohol (T 47-48):

> A. . . . that 10 percent of any large organization is going to have a problem with either drug usage or alcoholism. . . (T 47).

Although his "ten percent" rule of thumb applied to any large organization, he initiated an undercover operation at UPS because:

> A. . . .I had a responsibility to UPS, and this is something that we were just trying to gauge if we had a problem to begin with.
>
> Q. In fact, you wanted to at that time, in your own words, get a feeling, if there was any drug use or random drug use at the HUB?
>
> A. Correct (T 48).

When asked if he considered this to be an undercover operation, Deal responded:

> A. I considered it to be a mutual understanding between Mr. Starke and I, what we were trying to do is to see, as I told you, is to gauge and get a feel, if we had a problem in the HUB (T 57).

Officer McRae also had this understanding and described his assignment as:

> A. My duties were to pose as a regular employee at UPS, to meet as many different people as I could, and to basically see if there was any drug activity going on at the HUB, and if there was, possibly determine which individuals were involved and to see if I could become involved in an undercover capacity with those individuals and possibly purchase drugs from them.
>
> Q. Were, at that time, were any individuals specifically named to you as people you should approach?
>
> A. No there was no names given to me (T 63).

On cross-examination, McRae stated:

Q. Noone (sic) came forward at any time and told you so-and-so at the HUB is using drugs?

A. Yes, sir.

Q. In fact, at no time during the four or five months during this operation, were you ever given a name or a lead?

A. That's correct.

* * *

Q. You considered it an undercover operation?

A. I considered it an operation, whereby, I would find out if there was, in fact, drug activity at UPS.

* * *

Q. And that in your own mind, you were to get to know whoever?

A. Right.

Q. Make whatever contacts you could?

A. Yes.

Q. And find out if, in fact, there was any drug activity at the HUB?

A. Correct.

Q. What you found out, sir, was at the HUB there was no drug activity?

A. There was some drug activity, yes.

Q. Nobody ever approached you at the HUB, you never bought any drugs at the HUB?

A. No, sir.

Q. Never sold any?

A. No, sir.

Q. Never observed anyone using drugs at the HUB?

A. No, sir (T 84-85).

Thus, it appears clear that this operation was not focused on any specific ongoing criminal activity. An extensive review of the caselaw reveals no other case in which a similar fishing expedition was approved. This is the classic case of "virtue testing" condoned in Cruz. Applying the objective entrapment test to the instant case, it fails the first prong of the test.

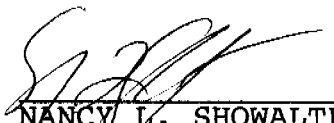
In conclusion, the objective entrapment defense cannot be abolished by section 777.201 because the defense is based on state constitutional due process considerations. Objective entrapment occurred in the instant case. The appellant's convictions should be reverse.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative and reverse the petitioner's convictions and sentences.

Respectfully submitted,

NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Merit Brief of Petitioner has been furnished by hand delivery to Gypsy Bailey, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, William Simmons, this 24th day of January, 1992.

NANCY L. SHOWALTER

IN THE SUPREME COURT OF FLORIDA

WILLIAM SIMMONS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 79,094

APPENDIX TO
INITIAL MERIT BRIEF OF PETITIONER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIAM SIMMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

* CASE NO. 90-3499

Opinion filed November 4, 1991.

Appeal from the Circuit Court for Duval County; David Wiggins, Judge.

Nancy A. Daniels, Public Defender; Nancy L. Showalter, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Simmons appeals from a judgment and sentence for two counts of sale or delivery of cocaine and two counts of possession of cocaine. He asserts on appeal that the trial court erred in denying his motion for judgment on acquittal on the grounds that the facts established entrapment as a matter of law in light of the holding in Cruz v. State, 465 So.2d 516 (Fla. 1985), cert.

denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). We find no merit in this contention as a result of the opinion of this court in State v. Munoz, 16 F.L.W. 2665 (Fla. 1st DCA Oct. 8, 1991).

BOOTH, WOLF and KAHN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIAM SIMMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

* CASE NO. 90-3499

Opinion filed December 13, 1991.

Appeal from the Circuit Court for Duval County; David Wiggins, Judge.

Nancy A. Daniels, Public Defender; Nancy L. Showalter, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for appellee.

ON MOTION FOR REHEARING OR CERTIFICATION

WOLF, J.

Appellant seeks rehearing or certification, arguing that current law from other districts is in conflict with this court's decision which relied on State v. Munoz, 16 F.L.W. D2665 (Fla. 1st DCA Oct. 8, 1991), to affirm the trial court's denial of the appellant's motion for judgment of acquittal. In Munoz, this court aligned itself with the Third District Court of Appeal in

Gonzalez v. State, 571 So.2d 1346 (Fla. 3rd DCA 1990), rev. denied, 584 So.2d 998 (Fla. 1991), and with the Fourth District Court of Appeal in Krajewski v. State, 16 F.L.W. D692 (Fla. 4th DCA March 13, 1991), quashed on other grounds, 16 F.L.W. S682 (Fla. Oct. 17, 1991), holding that section 777.201, Florida Statutes (1987), effectively abolished the objective entrapment test set forth in Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985). The appellant argues that in Strickland v. State, 16 F.L.W. D2671 (Fla. 4th DCA Oct. 16, 1991), the Fourth District Court of Appeal has receded from Krajewski. Strickland relies, however, on the Florida Supreme Court's opinion in State v. Hunter, 16 F.L.W. S588 (Fla. Aug. 29, 1991), where the court applied Cruz in a due process analysis, but did not address section 777.201, Florida Statutes.

A review of current law shows that, even if the fourth DCA intends to recede from its holding in Krajewski, the 3rd DCA still expressly holds that section 777.201 has abolished the Cruz objective entrapment test. See Gonzalez v. State, supra; State v. Lopez, 522 So.2d 537 (Fla. 3rd DCA 1988). The only case which expressly declines to find that the objective entrapment test of Cruz has been abolished by statute at this time is the Second District Court of Appeal's opinion in Bowser v. State, 555 So.2d 879 (Fla. 2nd DCA 1989). The Fifth District Court of Appeal has applied Cruz since the enactment of section 777.201, Florida Statutes, but has not to date addressed the effect of the statute on the Cruz objective entrapment test. See Smith v. State, 575

So.2d 776 (Fla. 5th DCA 1991); State v. Purvis, 560 So.2d 1296 (Fla. 5th DCA 1990).

We recognize, as expressed by the Third District Court of Appeal in Gonzalez, an intent by the Legislature to do away with the Cruz objective entrapment test. At the same time, we recognize that due process considerations parallel the objective entrapment test, and permissible police conduct must be limited by constitutional due process. That is, "prosecution of a defendant may be barred where the government's involvement in the criminal enterprise 'is so extensive that it may be characterized as 'outrageous.'" Gonzalez, supra at 1350, quoting Brown v. State, 484 So.2d 1324, 1327 (Fla. 3rd DCA 1986). The Florida Supreme Court has also noted, in the Cruz opinion, that objective entrapment involves issues which may overlap or parallel due process concerns. Cruz, 465 So.2d at 519 n.1.

In Hunter, supra, the defendant below had raised a defense of entrapment under Cruz, but on appeal the primary issue was whether police conduct violated due process. In Hunter the supreme court held that objective entrapment under Cruz included due process considerations. The discussion in Hunter of due process considerations in light of an entrapment analysis does not answer the question of whether entrapment as a matter of law continues to exist where the police conduct does not rise to the level of a due process violation. While the Florida Supreme Court has indicated in Hunter that Cruz may be alive and well for purposes of due process analysis, it has failed to address the effect of section 777.201, Florida Statutes (1987), on the Cruz

objective entrapment test. We, therefore, certify the following question as one of great public importance:

> HAS THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985), BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987)?

Appellant's motion for rehearing or certification is granted to the extent indicated herein.

BOOTH and KAHN, JJ., concur.