IN THE SUPREME COURT OF FLORIDA

WILLIAM SIMMONS,

Petitioner,

v. CASE NO. 79,094

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

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

II ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'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.

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

Respondent asserts that the codification of one form of entrapment (subjective) in section 777.201 (1987) eliminated the other (objective) (AB 4, 7-8). This is not so. 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), this Court held that the subjective and objective aspects of the entrapment defense are not mutually exclusive, as is the federal view, but rather are two equal and "independent methods of protection", which "coexist". Id. at 519-521. Subjective entrapment focuses on the predisposition of the defendant while the objective view focuses on the conduct of the police.

Even if the respondent's position is supported by statements of legislative intent[1], the Florida Constitutional

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[1]The petitioner maintains that the statement's taken from the Staff Analyses do not show a clear legislative intent to eliminate objective entrapment by enactment of section 777.201 (1987). The House of Representatives' Committee on Criminal Justice Staff Analysis is discussed in the initial brief. The Senate Staff Analysis and Economic Impact Statement on Crime Prevention quoted by respondent states that the bill was meant to clarify entrapment as an affirmative defense available to a defendant who establishes a lack of predisposition by the preponderance of the evidence. Thus, essentially, this bill's

(Footnote Continued)

underpinnings of the objective entrapment defense prevent the legislature from statutorily eliminating this defense. As Justice Kogan pointed out in his separate opinion in State v. Hunter, 586 So.2d 319, 325 (Fla. 1991), concurring in part and dissenting in part, the view expressed in footnote 2 of Cruz noting that objective entrapment parallels a due process analysis, but is not founded on constitutional principles, is attributed to the federal advocates of objective entrapment. This Court rejected this federal view, first, by holding in Cruz that subjective and objective entrapment are not mutually exclusive, and secondly by holding in Hunter that objective entrapment does include "due process considerations". In fact, in Hunter this Court refused the entrapment claim of one defendant as he could not raise a due process violation which was allegedly suffered by the co-defendant. Hunter, at 322 (Fla. 1991).

In Cruz, this Court recognized the important function served by the existence of an objective entrapment defense independent of a subjective entrapment defense, quoting Justice Frankfurter's opinion in Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958):

(Footnote Continued)
intent is directed toward clarifying the burden of proof on subjective entrapment. See Herrera v. State, discussing section 777.201 and the revised standard jury instructions on entrapment. The Senate Staff Analysis does not discuss objective entrapment, even implicitly, as predisposition is irrelevant to objective entrapment.

> . . .[A] test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclination to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him to further crime is not to be tolerated by an advanced society. . . Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected.

Cruz, at 520, quoting Sherman, 356 U.S. at 382-83 (Frankfurter, J. concurring in the result).

Respondent relies on this Court's recent decision in Herrera v. State, 17 FLW S 84 (Fla. Feb. 6, 1992) for the proposition that "entrapment was a judicially created affirmative defense articulated by this Court in Cruz" (AB 4). This reliance is misplaced. Herrera dealt only with subjective entrapment. This is made clear not only by the concurring opinion of Justice Kogan, but also the fact that the case dealt with jury instructions. Jury instructions are irrelevant to objective entrapment, which is a question of law for determination by the trial court, not the jury.

Respondent states that "nothing in the new statute permits entrapment to be considered as a matter of law by the trial court, as required by the Cruz objective test" (AB 9). While this statement is somewhat true (as the statute addressed only subjective entrapment) it is equally true that nothing in the new statute prevents the application of the co-existing objective entrapment test by the trial court. The footnoted

statement by the Third District Court of Appeal that the "sole statutory test for entrapment" is the subjective test is equally true, although irrelevant to the issue here. Gonzalez v. State, 571 So.2d 1346, 1349-1350 n.3 (Fla. 3rd DCA 1990) (emphasis added) (AB 9). The legislature has seen fit to codify one of the two entrapment tests. This does not lead to the conclusion, however, that the other test is eliminated.

Respondent argues that this Court's acceptance and reliance on objective entrapment in Hunter does not establish a present defense of objective entrapment because the facts of Hunter occurred prior to the enactment of section 777.201 (AB 11). The timing of the events in Hunter are irrelevant. As discussed above, objective entrapment, based on state constitution due process, existed prior to and after the enactment of section 777.201.

The First and Third District Courts of Appeal have concluded that section 777.201 eliminated objective entrapment. The Fourth and Second District Courts of Appeal has rejected this view. State v. Evans, 17 FLW D431 (Fla. 2d DCA Feb. 5, 1992); Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991).[2] This Court should also reject this view and recognize the continued viability of objective entrapment.

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[2]Extensive research has revealed no cases from the Fifth District Court of Appeal on this issue.

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

While it is true, as respondent asserts, that a "police response [] directed at an existing problem is sufficient to satisfy the first prong of the Cruz test" (AB 13), the facts here do not support the finding of an existing problem. Rather, the testimony of the state's witnesses show that the operation was initiated to determine if, in fact, a drug problem existed at this private business. As discussed in the initial brief, Detective Deal's testimony clearly shows that this operation was geared toward determining whether a "drug problem" existed, not toward interrupting an ongoing specific criminal activity (T 22-23, 28). In fact, it was started based on Detective Deal's personal opinion that in any large organization ten percent of the people are abusing drugs and alcohol (T 47-48).

The respondent's reference to Detective Deal receiving information from fellow employees about drug use (AB 14), neglects to state that this information was in reference to unspecified time frames in the past, not current, ongoing activity (T 46).

The instant case is similar to Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1990) in which the district court found the first prong of the Cruz objective entrapment test had not been met. The court held:

> . . . it is clear that the police activity in question did not have as its end the interruption of a specific ongoing criminal

> activity. The detectives in essence manufactured a crime by seeking out appellant and persuading him to sell the codeine tablets which appellant did not have until Detective Hall paid for the prescription. Prior to this incident, the detectives had no information whatsoever that appellant had been involved in any illicit drug activity. . . Here, but for the police action of paying for appellant's prescription, appellant would not have had the drugs to sell.

Id. at 882.

In the instant case, the police also "in essence manufactured a crime", in that the undercover officer sought out a UPS employee to sell him drugs and provided that person, the petitioner, with the money to obtain the drugs.

Respondent asserts that "the fact that the police had no specific information about the drug problem at the facility is as irrelevant to establishing objective entrapment in this case as was the officers' lack of information about the defendant in Donaldson [v. State, 519 So.2d 737 (Fla. 3d DCA 1988)] (AB 14). First, the respondent is mixing apples and oranges. Information about a specific ongoing criminal activity (the alleged drug problem at the facility) is essential to showing entrapment did not occur. In Burch v. State, 545 So.2d 279, 282 (Fla. 4th DCA 1989), aff'd 558 So.2d 1 (Fla. 1990) the district court found it significant that the police conduct was undertaken in response to the untenable high volume of drug trade near the school. Secondly, the Donaldson opinion made no mention of whether the police had any prior knowledge about the defendant. The opinion simply states that the first prong was

met because the police activity was focused on burglaries of conveyances and businesses in the downtown area - specific ongoing criminal activity. Donaldson, at 738.

Respondent argues that although the police lacked any information about the petitioner, this is irrelevant. A number of cases, however, have found this factor to be of significance. State v. Evans, 17 FLW D431 (Fla. 2d DCA Feb. 5, 1992) ("Because the appellees were not targeted suspects in a specific ongoing criminal prosecution, the first part of the Cruz test for entrapment is satisfied."); Ricardo v. State, 17 FLW D1, D2 (Fla. 4th DCA Dec. 18, 1991) ("It is clear that appellant was not involved in ongoing criminal activity of any kind at the time he was first contacted by the informant. He had no criminal record and neither the informant nor the law enforcement officers had ever heard appellant's name, much less rumors that he was involved in drugs".); Cruz v. State, at 517 ("Police were not seeking a particular individual, nor were they aware of any prior criminal acts by the defendant."); Bowser v. State, at 882 (In applying first prong of Cruz, court noted; "Prior to this incident, the detectives had no information whatsoever that appellant had been involved in any illicit drug activity.").

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. Applying the objective entrapment test to the facts at hand shows that this is the classic case of "virtue testing" condoned in Cruz. The petitioner's convictions should be reversed.

III 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 his convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits 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 9th day of March, 1992.

NANCY L. SHOWALTER