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MAY 11 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,507

STATE OF FLORIDA,

Petitioner,

vs.

LEON WILLIAMS,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF
on behalf of the Broward
Association of Criminal Defense
Lawyers

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellant and the defendant, respectively, in the lower courts. On behalf of the Broward Association of Criminal Defense Lawyers, hereinafter referred to as "BACDL" an Amicus Curiae Brief is hereby submitted on behalf of the Respondent, Appellant/Defendant in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will be used to reference the record on appeal.

STATEMENT OF THE CASE AND FACTS

The "BACDL" in this Amicus Curiae Brief accepts the facts as stated in the Petitioner's Brief as true and correct, with no amendments or additions thereto.

SUMMARY OF THE ARGUMENT

The opinion of the Fourth District Court of Appeal should be affirmed, and Petitioner's conviction be reversed and the information be dismissed. The District Court was correct in holding that the practice of the Broward Sheriff's Office of reconstituting powder cocaine seized as contraband into the crack rock form of cocaine was illegal for use in reverse sting operations.

Public policy is the cornerstone or foundation of all constitutions, statutes, and judicial decisions, but its latitude and depth are greater than any and all of them. The State, through the exercise of its police power may enact laws for the protection of lives, health, morals, comfort, and general welfare; however, this power is not absolute. It is restricted by constitutional limitations of substantive due process of law. If governmental misconduct violates this guarantee, constitutional due process rights of a defendant requires that the information be dismissed. If a statute is unreasonable, arbitrary and capricious, due process of law requires that as a matter of public policy the statutory enactment be declared void. The actions of the Broward Sheriff's Office in using manufactured crack cocaine in reverse sting operations constituted governmental misconduct and the use of a statutory scheme to authorize same should be declared void based on public policy.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEALS WAS CORRECT WHEN IT HELD THAT THE USE OF "CRACK" ROCKS RECONSTITUTED FROM POWDER COCAINE IN A REVERSE STING VIOLATED A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW. ANY ILLEGALITY IN THE MANUFACTURE OF THE ROCKS SHOULD SHIELD THE DEFENDANT FROM CRIMINAL LIABILITY.

The "BACDL" request that the certified question - Does the source of illegal drugs used by law enforcement personnel to conduct reverse stings constitutionally shield those who become illicitly involved with such drugs from criminal liability? - be answered in the affirmative. This question is unique to Broward County, Florida as the Sheriff's Department of Broward County is the only known law enforcement agency in the country to engage in a business enterprise of manufacturing of crack cocaine for reverse sting operations.

The amicus curiae brief in this case is not directed to the issue of the use of reverse sting operations vis a vis a defendant's constitutional rights, even if the reverse sting is specifically set up within one thousand feet of a school as decided in State v. Birch, 545 So.2d 279 (Fla. 4th DCA 1989), aff'd Burch v. State, 558 So.2d 1 (Fla. 1990). Neither is this brief directed to the issue of entrapment as a matter of law as set forth in Cruz v. State, 465 So.2d 516 (Fla. 1985) as to inappropriate techniques in conducting a reverse sting operation. This brief however, is directed to the issue recognized in Cruz, id. at 519, footnote 1, to-wit: "In United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) and Hampton v.

United States, 425 U.S. 484, 96 S.Ct. 1637, 36 L.Ed.2d 366 (1976), the Court recognized that **"we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."** This Court now has the opportunity to address conduct of this magnitude as to the manufacture of crack cocaine by the Broward County Sheriff's Office for use in reverse sting operations.

This Court has rejected a narrow application of due process defenses recognized under federal law for admittedly predisposed defendants in State v. Glosson, 462 So.2d 1082 (Fla. 1985). Recognizing that two states courts had relied upon due process defenses to overturn criminal convictions, see State v. Hohensee, 650 S.W.2d 268 (Mo. Ct. App. 1982); People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978), and one federal case of United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), this Court interpreted the due process provisions of article 1, Section 9 of the Florida Constitution. In so construing, this Court recognized that governmental misconduct which violates due process rights of a defendant, U.S.C.A. Const. Amends. 5, 14, requires dismissal of criminal charges, regardless of a defendant's predisposition.

What is so outrageous about the conduct of the Sheriff's Office in manufacturing crack cocaine and using these rocks in reverse stings. To begin with in Kelly v. State, 17 FLW D154, (Fla. 4th DCA 1992) the Court recognized that some of the crack

made in batches of 1200 or more rocks are never recovered and disappear into the neighborhoods wherein the stings are conducted. The Court furthermore correctly observed that "To suggest that cocaine rocks are simply another converted from of cocaine, and no more, may be technically correct, but in practice, the two forms are worlds apart."

If civilized society were to permit the police to manufacture this deadly form of drug and then to distribute it, so as not to be tantamount to a denial of due process, then the next logical extension would be to permit the police to manufacture heroin, conduct reverse stings, and deliver the drugs to heroin addicts needing a fix. This method of treatment of drug addicts via arrest disappeared with the Model T Ford as reasonable alternative forms of treatment were developed such as Methadone treatment centers. For a law enforcement agency to create a highly addictive drug, both physiologically and psychologically, that did not exist previous to its manufacture for reverse sting operations, is so outrageous so as to shock the conscience of the court. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

Finally, the Court in Kelly, supra, observed that the Broward Sheriff's Office was violating the law in manufacturing rock cocaine. Section 893.13(5)(c), Florida Statutes (1989), permits the delivery of controlled substance, not the manufacture thereof, for bona fide law enforcement purposes in the course of an active criminal investigation. No legislative intent exists otherwise.

Assuming arguendo that the Petitioner is correct in its interpretation of the legislative enactments as set forth in the brief, specifically F.S. 893.13(1), (5)(b)(5), and 5(c), then this Court should as a matter of public policy declare void those portions of the statutes authorizing the manufacture of rock cocaine for reverse sting operations. The police power of the State is the sovereign right to enact laws for the protection of lives, health, morals, comfort and general welfare of the public, Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972), and to avoid infringement on some provision of the Constitution, Carroll v. State, 361 So.2d 144 (Fla. 1978). When the statute manifestly infringes on the Constitutional provision, as in this case U.S.C.A. Const. Amends 5, 14, and Article 1, Sec. 9 of the Fla. Const. then it can be declared void for that reason. See Carroll, supra at 145. The police power of the Legislature is broad, but fenced about by Constitutional limitations, Corneal v. State Plant Board, 95 So.2d 1(Fla. 1957), are not absolute and must serve the public welfare, State v. Lee, 356 So.2d 276 (Fla. 1978) and must be confined to those acts which may reasonably be construed as expedient for protection of public safety, welfare, and health or morals. No such legitimate and rational purpose exists so as to permit the manufacture of rock cocaine as previously discussed. The Court must declare this practice, if exercised pursuant to legislative enactment, void as a matter of public policy.

CONCLUSION

WHEREFORE based on the foregoing reasons and authorities cited therein, "BACDL" as amicus curiae respectfully requests that this Honorable Court DENY discretionary jurisdiction in the instant case, AFFIRM the opinion of the District Court, REVERSE the conviction in the trial court and DISMISS the information filed in this cause.

Respectfully submitted this 7th day of May, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 7th day of May, 1992, to Joan Fowler, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33402 and to Cherry Grant, Assistant Public Defender, 9th Floor, Government Center, 301 North Olive Avenue, West Palm Beach, Florida 33402.

BY: Marc A Lowdon
OF COUNSEL