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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,507

STATE OF FLORIDA,

Petitioner,

vs.

LEON WILLIAMS,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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AMENDED INITIAL BRIEF OF PETITIONER ON THE MERITS

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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. 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

Respondent was charged by information with purchase of cocaine within one thousand feet of a school (R 384-385). He filed a motion to dismiss the information on due process grounds (R 386-390). The state and defense entered into a written factual stipulation for the purposes of the motion (R 391-393). The trial court denied the motion to dismiss (R 142, 396-397).

The case proceeded to trial. Officer Jackson testified that he was posing as a drug dealer in a reverse sting conducted near Dillard High School when Respondent approached him and said, "Give me three for 28." (R 114-225). Jackson understood this to mean three pieces of crack cocaine in exchange for twenty-eight dollars (R 226). When Jackson showed Respondent packaged cocaine rocks, Respondent picked out two bags containing cocaine out of his hand and gave Jackson twenty-eight dollars (R 226-227). After a prearranged signal, Respondent was arrested.

Detective Brian Miller of the Broward County Sheriff's Office testified that he saw Respondent and Jackson have a brief conversation. He saw Jackson open his hand, and then saw an exchange (R 159-160). When Respondent was arrested, Detective Miller saw the cocaine drop from Respondent's right hand (R 161-162). Officer Wilson picked up the cocaine and handed it to Detective Miller (R 162). Detective Miller testified that Respondent said "you got me," as the police approached (R 170).

Sergeant Thomas Tiderington of the Fort Lauderdale Police Department testified that he saw Respondent walk up to Jackson, saw them having a conversation, saw Jackson pull cocaine out of

his pocket, and saw Respondent reach into Jackson's hand and take something out (R 205-206). Sergeant Tiderington also testified that the cocaine used in this reverse sting was made by a chemist from the Broward Sheriff's Office (R 220-221). Randy Hilliard testified that he was the person who made the crack, and that he had the approval of Sheriff Navarro and a license from the Drug Enforcement Administration (DEA) (R 272).

Detective Joel Maney of the Fort Lauderdale Police Department testified that he also saw the transaction between Respondent and Jackson, saw Respondent drop the cocaine from his hand, and heard Respondent say "you got me." (R 252-256). Commander Linda Disanto of the Fort Lauderdale Police Department testified that she measured the distance from the area where Respondent was arrested and it was 182 feet from the school fence line (R 186).

Respondent was found guilty as charged (R 370, 394). The trial court adjudicated Respondent guilty (R 372, 395). Respondent was sentenced to a three year minimum mandatory sentence (R 382-400). Respondent appealed his conviction and sentence to the Fourth District Court of Appeal (R 401). On February 5, 1992, the Fourth District Court of Appeal "Reversed and remanded for further proceedings in accord with Kelly v. State, 17 F.L.W. 154 (Fla. 4th DCA Jan. 3, 1992)." (Exhibit A, 17 F.L.W. D406). Kelly was originally reported at 16 F.L.W. D1636 (Fla. 4th DCA June 19, 1991) and is included in the appendix as Exhibit B. After rehearing, the court declined en banc consideration, and issued its revised opinion in Kelly at 17

F.L.W. D154 (Exhibit C). The state filed a motion for certification in the Fourth District Court of Appeal in the case at bar, which was granted. The following question was certified to this court:

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?

(Exhibit D). The state filed its notice to invoke the discretionary review of this court. Mandate has issued to the trial court. This court postponed its decision on jurisdiction, and ordered briefing on the merits. This brief follows.

SUMMARY OF THE ARGUMENT

The opinion of the Fourth District Court of Appeal should be quashed, and this case remanded with directions that Respondent's conviction be reinstated. The District Court was incorrect 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. Further, even if the actions of the sheriff's office was illegal, this illegality would not insulate Respondent from criminal liability as his right to due process of law was not violated. Respondent would have purchased the crack cocaine, no matter what the source, so there was no prejudice.



## ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS WRONG 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 NOT SHIELD THE DEFENDANT FROM CRIMINAL LIABILITY.

The state requests that the certified question<sup>1</sup> be answered in the negative. The state further argues that the actions of the Broward County Sheriff's office in reconstituting powder cocaine to crack cocaine was not illegal manufacture of contraband. In denying Respondent's motion, the trial court made the following findings of fact and law:

1. On February 15, 1990, the Defendant, LEON WILLIAMS, was arrested for allegedly purchasing crack cocaine within 1,000 feet of Dillard High School.
2. The alleged purchase was a result of a reverse sting operation conducted by a county wide task force known as Project C.R.A.D.L.E. headed by Commander Linda DiSanto.
3. In this reverse sting operation, Deputy Ed Jackson of the Broward Sheriff's Office, in an undercover capacity, posed as a street level drug dealer and the Defendant allegedly purchased four (4) rocks of crack cocaine for Twenty-eight Dollars (\$28.00).
4. The crack cocaine used in this case was manufactured by Broward Sheriff's Office Chemist Randy Hillard from cocaine powder that had been abandoned at a bus station locker and seized by the Broward Sheriff's Office. No arrests were made as a result of the abandoned cocaine.

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<sup>1</sup> 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?

5. The crack cocaine was manufactured after it was determined by the chain of command of the Broward Sheriff's Office that such manufacture was necessary to conduct reverse sting operations and combat unlawful street level drug activity.

6. The ultimate decision to manufacture the crack cocaine was made by the Sheriff of the Broward Sheriff's Office. Strict policies and procedures were set up and followed.

7. The Broward Sheriff's Office made the determination that it is safer to use crack cocaine manufactured by a Broward Sheriff's Office chemist rather than crack cocaine confiscated from the streets of Broward County. Crack cocaine confiscated from the streets of Broward County have, in the past, contained foreign substances.

8. Florida Statute 893.13(1) makes it unlawful to manufacture or deliver crack cocaine. F.S. 893.13(5)(b)(5) states that F.S. 893.13(1) which makes it unlawful to manufacture or deliver crack cocaine, does not apply to "officers or employees of state, federal, or local governments acting in their official capacity only or informers acting under their jurisdiction." Additionally, F.S. 893.13(5)(c) states that F.S. 893.13(1), which makes it unlawful to manufacture and/or deliver crack cocaine, does not apply to "the delivery of controlled substances by a law enforcement officer for bonified (sic) law enforcement purposes in the course of an active criminal investigation."

9. In State v. Bass, 451 So.2d 986 (1984), the Second District Court of Appeals of Florida held that the police do not need specific statutory authority to conduct "reverse sting" deliveries of controlled substances. Additionally, Florida law relieves law enforcement officers from civil or criminal liability as a result of lawful engagement in enforcing laws relating to controlled substances. Id. at 988. As to the entrapment issue, the court held as follows: "The furnishing of a controlled substance by governmental agents in a 'reverse sting' operation has been held not to constitute entrapment as a matter of law." Id. at 988 citing State v. Brider, 386 So.2d 8181 (Fla. 2d DCA).

10. In light of the foregoing, as to the case sub judice this court finds as follows:

a) The manufacture of crack cocaine by the Broward Sheriff's Office was for a bonified (sic) and legitimate law enforcement purpose and is allowed pursuant to F.S. 893.13(5)(b)(5) and State v. Bass, 451 So.2d 986.

b) The delivery of crack cocaine by the Broward Sheriff's Office within 1,000 feet of a school was for a bonified (sic) and legitimate law enforcement purpose and is allowed pursuant to F.S. 893.13(5)(b)(5) and F.S. 893.13(5)(c) and State v. Bass, 451 So.2d 986.

(R 396-397). The state maintains the correctness of the trial court's ruling, especially in light of the valid safety considerations voiced therein regarding the distribution of adulterated cocaine. The Sheriff's office was not acting in an outrageous manner by reconstituting powder crack cocaine which had no evidentiary value into unadulterated crack cocaine rocks for use in a reverse sting.

The denial of the motion to dismiss is supported by the federal court of appeals case, United States v. Beverly, 723 F.2d 11 (3d Cir. 1983), which held in response to a similar "violation of due process of law claim":

Unlike the entrapment defense, the argument defendants now raise is constitutional and should be accepted by a court only to "curb the most intolerable government conduct." [*State v. Jannotti*, [673 F.2d 578 (3d Cir. 1983)] at 608. The Supreme Court has admonished us that the federal judiciary should not exercise "'a Chancellor's foot' veto over law enforcement practices of which it [does] not approve." *United States v. Russell*, 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973). We are not prepared to conclude that the police conduct in this case

shocked the conscience of the Court or reached that "demonstrable level of outrageousness" necessary to compel acquittal so as to protect the Constitution. *Hampton [v. United States]* 425 U.S. [484] at 495 n.7, 96 S.Ct. [1646] at 1653 n.7, [48 L.Ed.2d 113 (1976)](Powell, J., concurring). This conclusion, however, should not be construed as an approval of the government's conduct. To the contrary, we have grave doubts about the propriety of such tactics.

Id., at 12-13.

While finding that the tactics used by the government agents in facilitating the defendants' participation in a conspiracy and attempt to destroy a government building by fire troubled the court, it was not a constitutional violation, and was not a violation of due process. Id. The same result should apply here.

The instant case does not meet the level of outrageous conduct found in United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). That court found that "the government involvement in the criminal activities of this case ... reached 'a demonstrable level of outrageousness,'" at 380 because in that case:

At the behest of the Drug Enforcement Agency, Kubica, a convicted felon striving to reduce the severity of his sentence, communicated with Neville and suggested the establishment of a speed laboratory. The Government gratuitously supplied about 20 percent of the glassware and the indispensable ingredient, phenyl-2-propanone. ... The DEA made arrangements with chemical supply houses to facilitate the purchase of the rest of the materials. Kubica, operating under the business name "Chem Kleen" supplied by the DEA, actually purchased all of the supplies with the exception of a separatory funnel. ... When problems were encountered in locating an adequate production site, the Government found the solution by providing an isolated farmhouse well-suited for the

location of an illegally operated laboratory.  
... At all times during the production  
process, Kubica [the government agent] was  
completely in charge and furnished all of the  
laboratory expertise.

Id., at 380-381. Therefore, the finding that the actions of the DEA agents were "egregious conduct" because it "deceptively implanted the criminal design in [the defendant's] mind," is limited to the facts of that particular case. Clearly, Twigg is not applicable to the facts in the case at bar, since Petitioner was not set up or enticed by the police into any criminal enterprise analogous to the criminal enterprise which took place in Twigg. Further, Twigg was limited by Beverly.

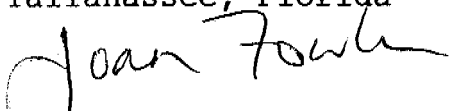
It should be remembered that Respondent did not argue below that he was the subject of improper entrapment. Respondent would have purchased the crack cocaine from someone, whether or not the reverse sting was taking place. The Sheriff's Office's actions in having for sale unadulterated reconstituted crack does not vitiate the lawfulness of the reverse sting. Respondent was a willing buyer. As such, any alleged illegality of the actions of the Sheriff's Office would not insulate Respondent from criminal liability for his crime. State v. Bass, 451 So.2d 986, 988 (Fla. 2d DCA 1984). The District Court erred when it found that the actions of the police below created a violation of Respondent's right to due process of law. The government conduct was not "outrageous." The holding below was in error, conflicts with Bass, and should be reversed.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests this Honorable Court ACCEPT discretionary jurisdiction in the instant case, QUASH the opinion of the District Court, and REVERSE this cause with directions that the charge against Respondent be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Brief has been furnished by courier to: CHERRY GRANT, Assistant Public Defender, Counsel for Respondent, 9th Floor/Governmental Center, 301 N. Olive Avenue, West Palm Beach, FL 33401; and by U.S. Mail to: MARC A. GORDON, Esquire, 1000 South Federal Highway, Suite 202, Fort Lauderdale, Florida 33310 this 16 day of July, 1992.

  
Of Counsel