IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALEXANDER BEATTIE

Respondent

Case. No. 79,528

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID R. GEMMER
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

OF COUNSEL FOR THE STATE

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

The memorandum of law filed by the state below sets out the essential facts and exhibits as they relate to the investigation of Beattie. R105-126. The state expressly adopts and incorporates the memorandum of law for its factual and argumentative value, and attaches the memorandum as an appendix to this brief. The memorandum demonstrates that Beattie did not merely fall prey to an idle fishing expedition. He responded to the advertisement with an initial letter assuring the undercover officer that he was not a policeman and that "I particularly like movies with very young people." R105, R113. The remaining letters in the ten-letter correspondence between the customs agent and Beattie clearly show Beattie's familiarity with child pornography from prior rentals of such material, and his desire to purchase such material from the agent. R108, R114-26.

In the depositions made a part of the record, FDLE Special Agent Barbara McLellan, who worked on crimes against children in the Fort Myers area, stated that she received special training in how to place newspaper ads to develop child pornography leads. R49. She also testified that she was aware of several reports of child pornography violations occurring in Collier County prior to placement of the advertisement which ensnared Beattie. R50.

The customs investigation elicited the first correspondence from Beattie in January, 1990. Customs agent Mullikin did not contact Florida FDLE Agent McLellan until some period after the

initial correspondence had developed.[1] This was after Beattie had sent letters saying he wanted to buy child pornography, R105, R113, that he had always rented such movies in the past but they had been of poor quality, R106, R117, that his rentals of such tapes were "all the same stuff," R120, and that he wanted to buy the "Lolita" tape, R120, described in a previous letter from customs agent Mullikin as "kiddie porn," R119. In a letter postmarked March 31, 1990, R106, Beattie enclosed a check to buy the Lolita tape and said his source for rental child pornography tapes had gone out of business and he couldn't get any more. R122.

When Beattie was arrested, he told Agent McLellan that he could rent child pornography from a video store near his area, but that the store had closed. R59.

McLellan testified that an arrest arising from the same investigation was made in April 1990, four months before Beat tie's arrest. R66.

Customs agent Mullikin testified that he was aware of a case in Naples prior to his investigation where nude photographs of children were developed locally and the photo store manager contacted police. R75. Through his training, Mullikin knew that most child pornography films came from the Netherlands, and from elsewhere abroad, which was why customs was concerned about the

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1 McLellan testified at one point she was contacted by customs agent Mullikin in July, R56, but later testified she opened her investigation in mid-March 1990. R64. McLellan said customs officials told her they wanted to bring in state law enforcement because the federal statutes did not provide for simple possession of child pornography. R64.

problem. R75-76. He also knew of an investigation of child pornography involving a video rental store on Marco Island which had been pursued for the past year and a half, well before the investigation which netted Beattie. R76.

Mullikin testified that one other arrest resulted from the advertisement to which Beattie had responded. R78. About a half dozen other persons had responded to the advertisement as well, but they did not pursue a purchase after Mullikin's initial response making clear that he was selling child pornography. R79. He said the initial investigation had been solely the work of United States Customs, R83, initiated by child pornography coordinator in Naples, R86. Pro-active investigations are necessary because the activity is not easily detected. R86. Mullikin was also aware of two or three child pornography tapes being seized during execution of a search warrant about three years prior to his testimony. R87. Mullikin testified that he had learned after Beattie's arrest that Beattie frequently took pornography to his job as a fire-fighter with United States Fish and Game, R92-93, and that he also took pornographic movies to county volunteer fire-fighter meetings, R93.

The Second District reversed.

SUMMARY OF THE ARGUMENT

Jurisdiction indisputably exists due to the pendency of a certified question in Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991), pending on certified question, No. 79,094 (Fla., reply brief filed Mar. 9, 1992) (copy attached), as to whether Cruz remains viable.

The decision below also conflicts with the decision of this court in Echols v. State, 484 So.2d 568 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed. 2d 166 (1986), holding that evidence generated by legal actions by police of other jurisdictions will not be barred from use in Florida, even if the same acts by Florida police would be impermissible. In the instant case, the customs agent violated no federal strictures, and Florida police should not have been barred form using the information generated by the federal investigation to conduct their own investigation. Once the federal agents developed information that Beattie was involved in child pornography, Florida police were free under any reading of Cruz to follow up on the information.

The decision also conflicts with Cruz and decisions from other districts as to whether the actions and statements of the accused can serve to establish the first prong of the Cruz objective test, i.e. the existence of an ongoing criminal activity.

ARGUMENT

ISSUE

THE DECISION CONFLICTS ON AN ISSUE CURRENTLY PENDING BEFORE THIS COURT. THE DECISION ALSO CONFLICTS WITH THE DECISION OF THIS COURT ALLOWING THE USE OF INFORMATION GATHERED BY MEANS LEGAL FOR THE INVESTIGATING AGENCY, REGARDLESS OF THEIR LEGALITY IN FLORIDA, AND IS IN CONFLICT WITH OTHER DISTRICT COURTS ON THE PRINCIPLE THAT THE ACTIONS OF THE SUSPECT CAUGHT IN THE NET OF A STING CAN ESTABLISH THAT THE POLICE HAVE CAST THEIR NETS IN PERMISSIBLE WATERS

The compelling reason for taking jurisdiction is simply that the opinion below expressly holds that Cruz remains viable despite the passage of section 777.201 Florida Statutes (1987). As discussed in the recent decision of Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991), pending on certified question, No. 79,094 (Fla., reply brief filed Mar. 9, 1992), this Court has yet to expressly rule on this issue. A copy of Simmons is attached.

While State v. Hunter, 586 So.2d 319 (Fla. 1991), appears to find Cruz still applicable when due process issues are implicated, there is no finding in the instant decision that due process is at issue. Regardless, conflict exits with the First District in Simmons, and with the Third and possibly the Fourth, as explained in Simmons. Further, the certified question is squarely although not explicitly raised in the instant opinion as well, and it is this court's custom to take jurisdiction of cases which raise an issue currently pending before this court.

The opinion below also conflicts with a decision from this court, Echols v. State, 484 So.2d 568 (Fla. 1985), cert. denied,

479 U.S. 871, 107 S.Ct. 241, 93 L.Ed. 2d 166 (1986). Echols permits the use of evidence gathered by another police agency which was legitimately and legally gathered by that agency, even if the seizure would have been illegal under Florida law. In Echols, the defendant argued that a tape-recording surreptitiously made in the defendant's Gary, Indiana, home, in violation of Florida privacy law, should be excluded from his Florida trial. This court held that the exclusionary rule was inappropriate when it would not affect officers in the lawful pursuit of their duties, as the officers in Indiana had been doing. So too, the customs agent in this case was acting within the proper bounds of his office, and nothing will be gained by applying another judicial rule of grace, Cruz entrapment, to bar prosecution in Florida. See also e.g., United States v. Rosenthal , 793 F.2d 1214 (11th Cir. 1986), and LaFave, 1 Search and Seizure §§1.2 and 1.8(g) (2d ed. 1987).

In this case, the investigation undertaken by customs officials was never disputed to be impermissible under federal law, i.e. the law controlling the investigators who developed the initial information. The defense raised herein was simply that the advertisement placed in the neighborhood shopper violated the state law under Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905 (1985).[2] Echols was raised and argued in the second

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[2] Cruz established the two-prong objective test:

> The first prong of this test addresses the problem of police "virtue testing," that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Roberts wrote in his separate opinion in Sor-

district, but it was not specifically addressed in the opinion. Regardless, the facts reflected in the opinion, and the holding of the court, clearly fly in the face of the principles enunciated in Echols, and the express and direct conflict is apparent on the face of the opinion.

Further conflict with Cruz and decisions of district courts arises from the application of Cruz to find no preexisting criminal activity in this case. The opinion below sets out the facts that the newspaper ad which caught Beattie's attention was ambiguous, i.e. offered "young love" which was not necessarily illegal child pornography. Beattie's quick response to the ad showed an interest in "very young love," and, as the correspondence continued, he clarified his interest in child pornography. Rejecting Beattie's demonstrable preexisting involvement in possessing child pornography as sufficient to pass the first prong of Cruz conflicts with Lusby v. State, 507 So.2d 611 (Fla. 4th DCA), review denied, 518

> rells, "Society is at war with the criminal classes," 287 U.S. at 453-54, 53 S.Ct. at 217. Police must fight this war, not engage in the manufacture of new hostilities.
>
> 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 or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Model Penal Code s 2.13 (1962).

465 So.2d at 519.

So.2d 1276 (Fla. 1987). In Lusby, a confidential informant (CI) working for the Clearwater Police Department met the defendant at a sales seminar. The CI had been arrested for trafficking in cocaine, and, pursuant to a substantial assistance agreement, the CI agreed to help the police make new drug cases in exchange for a reduction of the mandatory sentence. 507 So.2d at 611 n.1. The CI first raised the subject of cocaine with the defendant. After several more contacts with the defendant, the CI told Clearwater police about his contact with the defendant. The police had never heard of the defendant before the CI told them about him, and did not check on the defendant through any independent source. 507 So.2d at 612. Police then became involved, and ultimately a drug deal occurred and the defendant was arrested. The court held:

> The interruption of ongoing drug activity is a specific ongoing criminal activity sufficient to satisfy the first prong of the [Cruz] test. In the instant case, although the police did not know of the appellant or his codefendant, the confidential informant had information from the appellant himself that appellant had a friend who was a drug dealer, and that appellant used drugs himself. Further, appellant and the informant conversed about amounts of drugs, appellant seemed familiar with drug jargon, and the confidential informant and appellant exchanged phone numbers to set up something in the future. Thus, the government could reasonably conclude that appellant, either together with his friend or by himself, was engaging in the ongoing sale of drugs.
>
> . . . .
>
> We are concerned, however, that the confidential informant was on a "fishing expedition" in bringing up the topic of drugs to the defendant when the confidential informant had no reason to believe that appellant had any contact with illegal drugs whatsoever. We do not condone general forays [sic] into

> the population at large by government agents to question at random the citizenry of this country to test their law abiding nature, i.e. virtue testing. However, when information is willingly offered regarding illegal activities, especially in the difficult area of detecting drug trafficking, such government--initiated conversation does not per se become entrapment.

507 So.2d at 612-13.

The instant decision therefore conflicts with Lusby on the point that the response of the suspect, admitting prior commissions of the target crime, shows he was involved in the ongoing criminal activity and is sufficient to pass the first prong of Cruz. The case also conflicts with State v. Konces, 521 So.2d 313 (Fla. 3d DCA 1988), on the same principle, i.e. actions and behavior of the suspect can confirm the presence of ongoing criminal activity sufficient to satisfy the first prong of Cruz.

> Here, the first prong of the [Cruz] test was satisfied where the confidential informant introduced Detective Williams to Mason [the middleman or partner for the defendant, who was the seller] who readily agreed to sell cocaine to Williams and admitted that he had purchased drugs in the past. The police did not set up an operation which sought to manufacture crimes where none existed; they simply sought to interrupt a specific drug trafficking operation. See Lusby v. State, 507 So.2d 611 (Fla. 4th DCA), rev. denied, 518 So.2d 1276 (Fla. 1987) ("The interruption of ongoing drug trafficking is a specific ongoing criminal activity sufficient to satisfy the first prong of the [Cruz] test.")

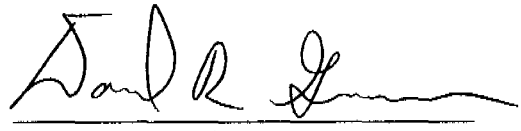
521 So.2d at 314. In other words, statements by the suspect are relevant to show that the defendant is involved in the ongoing target crime.

CONCLUSION

Based on the argument and citations herein, this court should accept jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



DAVID R. GEMMER
Assistant Attorney General
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2366
(813) 873-4739
Florida Bar # 370541

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Lawrence D. Martin, 2660 Airport Road South, Naples, Florida 33962, this date, March 11, 1992.

OF COUNSEL FOR APPELLEE

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ALEXANDER BEATTIE, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 91-00300

Opinion filed March 6, 1992.

Appeal from the Circuit Court for Collier County; Charles T. Carlton, Judge.

Lawrence D. Martin of Vega, Brown, Stanley, Martin & Zelman, P.A., Naples, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David R. Gemmer, Assistant Attorney General, Tampa, for Appellee.

PARKER, Judge.

Alexander Beattie appeals his conviction for possession of child pornography. Beattie argues that the trial court erred in denying his motion to dismiss filed pursuant to Florida Rule

of Criminal Procedure 3.190(c)(4). In his motion, Beattie asserted that he was entrapped unlawfully as a matter of law. We agree and reverse, concluding that the record establishes that law enforcement did not have as its end the interruption of specific ongoing criminal activity.

In January 1990, Beattie read an advertisement in a local free shopping publication. The ad, placed by U.S. Customs, listed a name and address for a distributor of "hard to find Foreign videos/magazines in Miniature & Young Love." Beattie responded by letter and stated that he was not involved in law enforcement and was interested in movies "with very young people and with Black men, white women." After an exchange of ten letters[1] between Beattie and an undercover customs official, a customs agent telephoned Beattie and arranged a meeting in a parking lot. The purpose of the meeting was to sell Beattie a child pornography video tape, "Sexy Lolita," that U.S. Customs previously had seized.

Because possession of child pornography was not at that time an offense against the laws of the United States, the customs agent brought the Florida Department of Law Enforcement (FDLE) into this investigation. The FDLE arrested Beattie after they received his check and delivered the video tape to him in the parking lot.

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[1] The letters discussed types of movies available, film titles, prices, and usual lengths of time from order to delivery.

It is undisputed that law enforcement did not know Beattie for any deviant activity or involvement with child pornography until he responded to the advertisement. U.S. Customs did not target individuals when the advertisement was placed in the publication. Before the advertisement was run, customs was aware of one child pornographic video tape which local authorities had seized from a video rental store and one local film developer who reported to local authorities that he had developed a customer's film containing still photographs of nude children.

The trial court denied Beattie's motion to dismiss after reviewing the motion, the depositions, and the memoranda of law. Beattie pleaded no contest, reserving his right to appeal the trial court's order denying his motion to dismiss. The trial court withheld adjudication and placed Beattie on two years' probation.

We conclude, based on the facts in this case, that the trial court erred in denying Beattie's motion to dismiss. Our supreme court's holding in Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S. Ct. 3527, 87 L. Ed. 2d 652 (1985) controls this case. In Cruz, the supreme court stated:

> To guide the trial courts, we propound the following threshold test of an entrapment defense: Entrapment has not occurred as a matter of law where 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 criminal activity.

> The first prong of this test addresses the problem of police "virtue testing," that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime.

Cruz, 465 So. 2d at 522. In Bowser v. State, 555 So. 2d 879 (Fla. 2d DCA 1989), this court followed Cruz and affirmed that Cruz is still the law in this district, notwithstanding passage of the new entrapment statute[2] and the Third District Court's contrary position.[3] See also Wilson v. State, 589 So. 2d 1036 (Fla. 2d DCA 1991) (objective test not abolished by section 777.201, Florida Statutes (1987)).

We conclude that Beattie established entrapment as a matter of law. Law enforcement created criminal activity where none existed. The government knew of no ongoing criminal activity prior to placing the advertisement. Law enforcement did not know Beattie. No known child pornography existed in the county at the time law enforcement established this reverse sting operation. Because no federal prosecution was possible, U.S. Customs brought FDLE in to arrange a crime against the laws of Florida. Because the Cruz test was not satisfied, we direct the trial court to dismiss the charge.

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[2] § 777.201, Fla. Stat. (1987).

[3] See Gonzalez v. State, 525 So. 2d 1005 (Fla. 3d DCA 1988); State v. Lopez, 522 So. 2d 537 (Fla. 3d DCA 1988).

Reversed and remanded with directions to the trial court to dismiss the charge.

HALL, A.C.J., and PATTERSON, J., Concur.

Maria KANE, as Personal Representative of the Estate of Alfred B. Kane, Appellant,

v.

Marilyn LORD, Michelle Lord, Ellen Lord, and Debra Lord Hirsh, Appellees.

No. 91-848.

District Court of Appeal of Florida, Third District.

Sept. 24, 1991.

On Motion for Rehearing Dec. 31, 1991.

An Appeal from the Circuit Court for Dade County; Harold G. Featherstone, Judge.

Tescher, Chaves & Hochman and Donald R. Tescher, Miami, for appellant.

Peter M. MacNamara, Miami, for appellees.

Before NESBITT, BASKIN and GODERICH, JJ.

PER CURIAM.

Affirmed. *See Spohr v. Berryman*, 564 So.2d 241 (Fla. 4th DCA 1990); *Scutieri v. Estate of Revitz*, 510 So.2d 1003 (Fla. 3d DCA 1987), *review denied*, 519 So.2d 986 (Fla.1988); *Harbour House Properties, Inc. v. Estate of Stone*, 443 So.2d 136 (Fla. 3d DCA 1983).

ON MOTION FOR REHEARING

PER CURIAM.

We grant appellant's motion for rehearing and reverse the order under review based on the authority of *Spohr v. Berryman*, 589 So.2d 225 (Fla.1991).

Reversed.

William SIMMONS, Appellant,

v.

STATE of Florida, Appellee.

No. 90-3499.

District Court of Appeal of Florida, First District.

Nov. 4, 1991.

On Motion for Rehearing or Certification Dec. 13, 1991.

Defendant appealed from his conviction in the Circuit Court, Duval County, David Wiggins, J., on drug charges. After initially affirming conviction, the District Court of Appeal, Wolf, J., on motion for rehearing or certification, held that issue of whether objective entrapment test of case law had been abolished by enactment of entrapment statute was one of great public importance which would be certified to the Florida Supreme Court.

Motion granted in part.

Constitutional Law ⇐257.5
Criminal Law ⇐36.5

Permissible police conduct is limited by due process considerations such that prosecution of defendant may be barred where government's involvement in criminal enterprise is so extensive that it may be characterized as outrageous. U.S.C.A. Const. Amend. 14.

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

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

Robert A. Butterworth, Atty. Gen., Gypsy Bailey, Asst. Atty. Gen., 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*, 586 So.2d 515 (Fla. 1st DCA 1991).

BOOTH, WOLF and KAHN, JJ., concur.

ON MOTION FOR REHEARING OR CERTIFICATION

WOLF, Judge.

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*, 586 So.2d 515 (Fla. 1st DCA 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*, 587 So.2d 1175 (Fla. 4th DCA 1991), *quashed on other grounds*, 589 So.2d 254 (Fla.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, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). The appellant argues that in *Strickland v. State*, 588 So.2d 269 (Fla. 4th DCA 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*, 586 So.2d 319 (Fla.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 analy-

sis, 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 [105 S.Ct. 3527, 87 L.Ed.2d 652] (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.

Osmani SANTA CRUZ and Albert DeLara, Appellants,

v.

NORTHWEST DADE COMMUNITY HEALTH CENTER, INC., Appellee.

No. 90-662.

District Court of Appeal of Florida, Third District.

Nov. 5, 1991.

Rehearing Denied Jan. 15, 1992.

Persons who were shot by mental health patient brought action against mental health center. The Circuit Court, Dade County, Amy Steele Donner, J., dismissed, and victims appealed. The District Court of Appeal held that: (1) victims could not maintain medical malpractice action against health center, and (2) health center owed no duty to the victims to protect them from the patient.

Affirmed.

1. Mental Health ⇐414(2)

Persons who were shot by patient of mental health center did not have a medical malpractice action against the center as they were not patients of the medical staff there.

2. Mental Health ⇐414(2)

There was no affirmative obligation on the part of psychiatrist or mental health center to detain voluntary patient or to have him involuntarily committed, and they could not be held liable for failing to do so to those subsequently injured by the patient.

3. Negligence ⇐4

For purposes of rule that one who takes charge of a third person whom he knows to be likely to cause bodily harm to others is under duty to exercise reasonable care to control the third person to prevent that harm, "one who takes charge" is one who has the right and duty to control the third person's behavior.

4. Mental Health ⇐414(2)

Even if mental health center knew that patient whom it was treating had escaped from another institution to which he had been involuntarily committed, that did not give rise to duty of center to third parties to prevent the patient from harming them.

Touby Smith DeMahy & Drake, and Kenneth R. Drake, Miami, for appellants.

McIntosh & Craven and Douglas M. McIntosh and Carmen Y. Cartaya, Ft. Lauderdale, for appellee.

Osborne, McNatt, Cobb, Shaw, O'Hara & Brown and Jack W. Shaw, Jr., Jacksonville, for amicus curiae, Florida Defense Lawyers Ass'n.

Before HUBBART, BASKIN and COPE, JJ.

PER CURIAM.

Plaintiffs Osmani Santa Cruz and Albert DeLara appeal the dismissal of their complaint for medical malpractice against Northwest Dade Community Mental Health Center (Northwest Dade). We affirm.