FILED
SID J. WHITE
APR 20 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 79,528
	)	
ALEXANDER BEATTIE,	)	
	)	
Respondent.	)	

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

RESPONDENT'S BRIEF ON JURISDICTION

LAWRENCE D. MARTIN
Vega, Brown, Stanley,
Martin & Zelman, P.A.
Counsel For Respondent
2660 Airport Road South
Naples, Florida 33962
(813) 774-3333

TABLE OF CONTENTS

Table Of Cases ii

Statement Of The Case And Facts 1

Argument

Issue 2

THE DECISION IN THIS CAUSE IS CONSISTENT WITH THIS HONORABLE COURT'S DECISION IN HUNTER AND WITH THE UNITED STATES SUPREME COURT'S DECISION IN U.S. V. JACOBSON. HUNTER AND JACOBSON EFFECTIVELY RESOLVE ANY CONFLICT AMONG THE DISTRICT COURTS ON THE SUBJECT OF ENTRAPMENT AS A MATTER OF LAW. ACCORDINGLY, SINCE THE DECISION BELOW IS CONSISTENT WITH HUNTER AND JACOBSON, THERE IS NO NEED FOR FURTHER REVIEW OF THIS CASE.

Conclusion 8

TABLE OF CASES

Case	Page
Cruz v. State, 465 So.2d 516 (Fla), cert. denied, 473 U.S. 905 (1985)	5,6
Echols v. State, 484 So.2d 568 (Fla. 1985)	2,3,
Futch v. State,	6
Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990)	5
Jacobson v. U.S.,	3,4,6
State v. Hunter, 586 So.2d 319 (Fla. 1991)	5,6
State v. Krajewski, 589 So.2d 254 (Fla. 1991)	5

STATEMENT OF THE CASE AND FACTS

Respondent relies upon the statement of the case and facts as set forth in the Second District Court's opinion in this cause and strongly disputes the facts of the Attorney General, which are in conflict therewith.

ARGUMENT

ISSUE

THE DECISION IN THIS CAUSE IS CONSISTENT WITH THIS HONORABLE COURT'S DECISION IN HUNTER AND WITH THE UNITED STATES SUPREME COURT'S DECISION IN U.S. V. JACOBSON. HUNTER AND JACOBSON EFFECTIVELY RESOLVE ANY CONFLICT AMONG THE DISTRICT COURTS ON THE SUBJECT OF ENTRAPMENT AS A MATTER OF LAW. ACCORDINGLY, SINCE THE DECISION BELOW IS CONSISTENT WITH HUNTER and JACOBSON, THERE IS NO NEED FOR FURTHER REVIEW OF THIS CASE.

Respondent disputes the State's opening assertion that jurisdiction indisputibly exists in this case. Jurisdiction is a matter of discretion with this Court; and for the reasons set forth below, such discretion should be exercised against acceptance of jurisdiction.

The State contends that the decision below conflicts with the decision of this Court in Echols v. State, 484 So.2d 568 Fla. 1985, cert. denied, 479 U.S 871 (1986). In the first place, Echols does not apply in that Echols confines itself solely to the issue of the admissibility of evidence rather than whether or not a crime occurred. In fact, in Echols, the Court states, "The evidence of Appellant's guilt is overwhelming."

This Court goes on to say that appellant did not deny that under Indiana and federal law the evidence against him was admissible. He argued only that this Honorable Court should apply Florida law to the actions of Indiana police because Florida's interest in the prosecution of this capital felony was greater than that of Indiana. In other words, the search and seizure was legal under the state law of Indiana and under the Federal law.

The State then attempts to stretch this reasoning and apply it to a situation in which the federal and state government conspire to entrap a citizen of this state.

Beyond the lack of applicability of Echols to this case, Respondent would show that both the state and federal agencies committed entrapment as a matter of law. If there was ever any question as to whether or not this type of conduct was prohibited by the federal government, there can be no doubt that such question was laid to rest by the United States Supreme Court in its decision on Jacobson v. U.S., 6 FLW Fed. 166 (April 6, 1992).

In Jacobson the facts are nearly identical to those in the instant case. The difference is that in Jacobson, the federal agents at least had some basis to target Mr. Jacobson in that the pre-investigation evidence showed that Mr. Jacobson had bought arguably child pornographic magazines before the government got involved. In the instant case, United States Customs had absolutely no reason to suspect either Mr. Beattie or anyone else in Collier County of buying, possessing, or dealing in child pornography. As the opinion in the case below shows, the Federal Government simply began virtue testing the entire county to see who could be tempted into buying the smut it was peddling.

An examination of the Jacobson case is germane both to show that Echols has no application to this case and to show that the highest court in the land condemns the procedures employed by the Federal Government to create crimes so that otherwise innocent persons may be prosecuted.

It is also interesting to note then in Jacobson, the United States Supreme Court states directly that it is unlawful for anyone to knowingly receive through the mails a visual depiction that involves the use of a minor engaging in sexually explicit conduct (18 USC 2252(a)(2)(A). From the opinion below, it is apparent that the Federal Government, through its agents, has deceived even the Second District Court into believing that there was no federal law which could have been employed against this defendant.

In Jacobson, as in the instant case, the government employed a bogus pen pal. In Jacobson, the pen pal's name was, "Long." In Beattie, the bogus pen pal was named, "Cox."

In both cases, the government's operatives, over a period of time, eventually induced the defendant into ordering pornographic materials and then arrested him when the materials were delivered. In both cases, the government used its ploys to appeal to the defendant's private thoughts. Upon this issue, Jacobson states, "Furthermore, a person's inclinations and fantasies are his own and beyond the reach of government."

Editorializing on this point, William Safire stated in his column on April 14, 1992, "The notion that entrapment is permissible if 'predisposition' can be shown by mind-reading cops is an assault on the presumption of innocence, the bedrock of our liberty. A person's mailbox is part of his castle, which the king may not enter." Mr. Safire goes on to state, "Heroic police officers who lay their lives on the line every day must be disgusted with the deskbound Torquemadas who prefer to mail out

nude photos to test the citizenry rather than expose themselves to danger in drug-ridden neighborhoods."

The State in this case seems to ignore its former favorite argument to the effect that Florida Statutes 777.201 evinces a legislative intent to overrule Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905 (1985). Previously, the Third District Court applied that reasoning in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990). The Third District receded from this reasoning in Lewis v. State, 17 FLW 793 (3d DCA March 24, 1992). The Third District said in that case, "We choose to rely on our most recent Supreme Court cases on the issue. See State v. Krajewski, 589 So.2d 254 (Fla. 1991), State v. Hunter, 586 So.2d 319 (Fla. 1991).

There can be no doubt that this Honorable Court put that argument to rest in Hunter, where this Court stated, "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.'" Such due process considerations would encompass, at a minimum, the notion that the government should not attempt to engage its criminal machinery to deprive its citizens of their liberty without some inkling that the law is being violated.

In short, nothing would be gained from subjecting Mr. Beattie to further judicial review by accepting jurisdiction in this case. He was not guilty of any crime when the government entrapped him, prosecuted him, convicted him, and forced him to go through an appeal to vindicate his rights. Subjecting him to

the further expense and agony of protracted appellate proceedings only compounds the wrong the government committed when it initially set out to ensnare any citizen of Collier County who was curious enough or foolish enough to respond. The law in this state was settled by Cruz in 1985. Since then, the various District Courts have strayed; but Hunter and Jacobson have already resolved the conflicts that have arisen.

In the very recent case of Futch v. State, 17 FLW 802, the Fourth District quoted Cruz in reaffirming:

> "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity."

Futch goes on to say, "Conversely, entrapment exists as a matter of law if the police activity fails to satisfy either prong." Finding that the State had not established the first prong of the Cruz test, Futch states that the government agent interjected drug talk into her conversation with Futch before he was engaged in any specific ongoing criminal activity. Continuing, the Court points out that the agent knew nothing about Futch before she met him and the State never proved that he had a prior history of drug involvement. Concluding, the Court observes, "Any conversation that Futch had about drugs only occurred after Cook cast her 'fishing expedition' to bait, hook, net, and land him for the purchase of illegal drugs . . . . We do not condone general forays 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."

There can be no doubt that the government in this case was engaging in virtue testing on the same magnitude as if it had gone door to door to every citizen in the county to sell its wares and to make criminals of any hapless buyers. Since such virtue testing has been so roundly condemned by this Honorable Court and by the United States Supreme Court, judicial economy and justice would be better served if this Honorable Court refused jurisdiction and allowed the eminently correct decision of the Second District Court of Appeals to stand without further review.

CONCLUSION

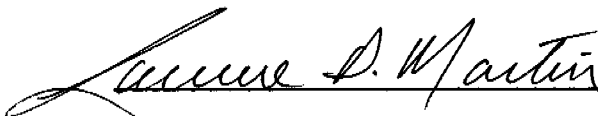
Based on the argument and citations herein, this Court should exercise its discretion to reject jurisdiction.

Respectfully submitted,

LAWRENCE D. MARTIN
Florida Bar No. 119754
Vega, Brown, Stanley,
Martin & Zelman, P.A.
Attorneys for Respondent
2660 Airport Road South
Naples, Florida 33962
(813) 774-3333

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to David R. Gemmer, Assistant Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366, by regular U.S. Mail this 16 day of April, 1992.



LAWRENCE D. MARTIN