IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHNNY MORALES,

Respondent

79,533

Case. No.

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

PETITIONER'S BRIEF ON JURISDICTION

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OF COUNSEL FOR THE STATE

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

Sufficient facts are provided in the opinion below to make a determination on jurisdiction.

SUMMARY OF THE ARGUMENT

The decision below conflicts on the issue of whether the objective entrapment test of Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905 (1985) remains applicable after the enactment of section 777.201 Florida Statutes (1987).

ARGUMENT

ISSUE

THE DECISION BELOW CONFLICTS WITH SIMMONS V. STATE, PENDING BEFORE THIS COURT.

The Second District applied the two-prong objective entrapment test of Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905 (1985). The First District recently held that Cruz was overruled by the enactment of section 777.201 Florida Statutes (1987). 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.

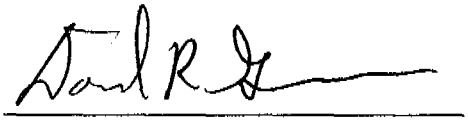
While State v. Hunter, 586 So.2d 319 (Fla. 1991), appears to find Cruz still applicable when due process issues are implicated, there is no finding in the instant decision that due process is at issue. Regardless, conflict exists with the First District in Simmons, and with the Third and possibly the Fourth, as explained in Simmons. Simmons is pending before this court, and it is this court's custom to take jurisdiction of cases which raise an issue currently pending before this court.

CONCLUSION

This court should take jurisdiction to ensure consistency with the outcome of Simmons.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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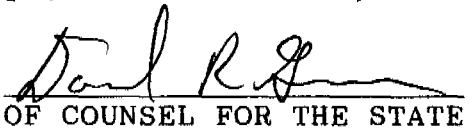
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Gerry Gordon, Gerry Gordon P.A., 1413 South Howard Avenue, Tampa, Florida 33606, this date, March 12, 1992.



OF COUNSEL FOR THE STATE

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHNNY MORALES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 91-00232

Opinion filed March 4, 1992.

Appeal from the Circuit Court for Hillsborough County; Susan C. Bucklew, Judge.

Gerry Gordon of Gerry Gordon, P.A., Tampa, for Appellant.

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

PATTERSON, Judge.

The appellant challenges his judgment and sentence for dealing in stolen property. He argues that his conviction should be reversed based on an objective entrapment defense. We agree and reverse.

When an undercover sting operation to infiltrate organized crime in Hillsborough County proved to be unsuccessful, the authorities in charge directed officers to attempt to sell stolen beer to individuals in the area. Detective Garafalo introduced himself to the appellant, representing himself as an agent of a vending machine company. Over the ensuing months, Garafalo negotiated with the appellant and a person who had an interest in various lounges. Garafalo installed a music box and two video games at one of the lounges and made collections on a weekly basis. During one visit, he approached the appellant to sell him stolen beer. Prior to that time, Garafalo had spoken with the appellant only about vending machines and had no information relating the appellant to criminal activity, other than what an acquaintance of the appellant and a video vendor had told him.

Garafalo testified, over objection, that the acquaintance had told him the appellant was a thief. Garafalo also testified, again over objection, that the vendor told him the appellant was known to have broken into games to retrieve money. Garafalo sold the appellant beer on three occasions. The appellant was charged and convicted of dealing in stolen property.

A two-prong test determines whether entrapment has occurred. Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985); see State v. Hunter, 586 So. 2d 319, 321 (Fla. 1991). The first prong asks

whether the police sought to interrupt a specific ongoing criminal activity. The second prong asks whether the police used means reasonably tailored to apprehend those involved in the criminal activity. In this case, the state failed to prove the first prong of Cruz.

There was no evidence that the appellant was involved in a specific ongoing criminal activity before the police initiated the scheme to sell stolen beer to him. The statements of the acquaintance and the video game vendor are inadmissible hearsay and cannot be used to establish a reasonable suspicion of the appellant's involvement in criminal activity. Bauer v. State, 528 So. 2d 6, 9 (Fla. 2d DCA), cause dismissed, 531 So. 2d 1355 (Fla. 1988).

We therefore reverse the appellant's judgment and sentence for dealing in stolen property.

LEHAN, A.C.J., and FRANK, 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.