App reg. 0477

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,080

STATE OF FLORIDA,

Petitioner,

vs.

RONALD PALMER,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

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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

On October 10, 1989, the State filed an information in the Broward County Circuit Court. This information charged respondent with having purchased cocaine within 1,000 feet of a schoolyard on September 20, 1988 in violation of section 893.13(1)(e), Fla. Stat. (R 428). Respondent did not file a pretrial motion to dismiss. The cause was thus tried before Judge Patti Henning on August 8-10, 1990 (R 1-409). At trial, the State sought to prove respondent's guilt for the offense charged by introducing, inter alia, evidence that he had bought crack cocaine from undercover Officer Edward Jackson on the evening in question (R 120-125).

The particular rock cocaine respondent purchased from Officer Jackson had been reconstituted from previously-confiscated powdered cocaine by the chemists of the Broward County Sheriff's Office (R 119, 138, 167-168, 181-183, 196-198, 209-211, 223-224, 232-233, 243-244). Commander Linda DiSanto testified concerning the Office's reasons for employing this practice in reverse stings, as opposed to the alternative of merely recycling street cocaine, as follows:

> The BSO Crime Lab does manufacture cocaine crack rocks that we use on these stings for several reasons. One, there are no additives to the crack cocaine. Using the street cocaine that we've seized, it can be cut with many different things, including arsenic or things of this nature.
>
> If a defendant should for some reason swallow these [street] drugs, then his life is much more in jeopardy than if he had just ingested the crack on its own. The crack cocaine that's manufactured is pure- made from pure cocaine and there are no additives.

(R 198). Commander DiSanto added:

> Project CRADLE [Coordinated Anti-Drug Law Enforcement Officers]....is set up to keep drugs out of the neighborhood twenty-four hours a day both when children are walking to and from school and if they're in classrooms, looking out to see a drug dealer near a school.
>
> They also should not have to go on to their school grounds and find hypodermic needles and crack cocaine vials and things of this nature when they do get to school.

(R 197, 209-211). Officer Charles Wisher confirmed that law enforcement personnel had set up shop in the instant area between two schools because this area was already known as "a very hot spot" for the drug trade (R 170-171). The record does not reveal that any cocaine rocks were "lost" by law enforcement personnel to the streets during the particular operation which had led to respondent's apprehension (R 139).

Respondent was found guilty as charged, and was so adjudged on August 10, 1990 (R 403, 406, 464-465). On August 31, Judge Henning imposed the statutorily-required 3-year mandatory minimum prison sentence (R 421-422, 468). Respondent timely appealed these dispositions to the Fourth District Court of Appeal (R 472). On appeal, respondent alleged that Judge Henning had fundamentally erred by failing to dismiss his drug charge sua sponte on state constitutional due process grounds. Respondent relied upon the Fourth District's ensuing decisions of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992), review denied, Case No. 79,280 (Fla. June 2, 1992) and Grissett v. State, 594 So.2d 321 (Fla. 4th DCA 1992), review dismissed, Case No. 79,664 (Fla. May 29, 1992); see also Williams v. State, 593 So.2d 1064 (Fla.

4th DCA 1992), review granted, Case No. 79,507 (Fla. July 6, 1992). These decisions collectively decree that the State's use of "manufactured" rock cocaine to build a drug purchase or possession case against a criminal defendant renders the defendant immune from prosecution for these offenses, regardless of whether the defendant properly preserved this issue at trial.

The State sought to distinguish Kelly from Palmer because, in the latter case, it had clearly articulated a rational basis for its use of "manufactured" crack rock (R 197-198, 209-211). The State further asserted that, unlike the defendant in Kelly, respondent had not shown that the State had "lost" any of its rocks to the streets during the particular operation which had led to his apprehension (R 139). The State also pointed out that preservation had not been an issue in either Kelly or Williams, and urged that the Fourth District revisit its holding in Grissett that all alleged Kelly errors were fundamental. For this proposition, the State relied prominently upon this Court's subsequent decision of Smith v. State, 17 FLW S213 (Fla. April 2, 1992).[1] Finally, the State asserted that the Fourth District's

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[1] In Smith, this Court announced:

> We hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review.

Smith v. State, 17 FLW S213, 214.

precedents were contrary to the decision of State v. Bass, 451 So.2d 986 (Fla. 2nd DCA 1984).[2]

In Palmer v. State, 17 FLW D1286, 1287 (Fla. 4th DCA May 20, 1992), review pending, Case No. 80,080 (Fla. 1992), the Fourth District nevertheless ruled that respondent's case should be dismissed based upon its interpretations of its aforecited authorities. However, that court certified to this Court that the following question was of great public importance:

> 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?

Id. The Fourth District had earlier certified the identical question in Williams v. State, 593 So.2d 1064. The court also noted possible conflict with the the Second District's decision of State v. Bass. Palmer v. State, 17 FLW D1286, 1287. On June 12, the Fourth District issued its mandate to the trial court. On June 19, the State timely filed its notice to invoke the discretionary certiorari jurisdiction of this Court. On July 2, this Court postponed its decision on jurisdiction, but ordered briefing on the merits. This brief follows.

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[2] In State v. Bass, 451 So.2d 986, 987-988, federal authorities had supplied the Tampa Police Department with marijuana to use in reverse stings, despite the fact that a federal magistrate had ordered the marijuana destroyed. The Second District discounted Bass' argument that the alleged illegal use of the marijuana by the authorities in the sting operation which had led to his arrest constitutionally precluded his prosecution.

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 action of the sheriff's office was illegal, this illegality would not insulate petitioner 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.

ISSUE

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?

ARGUMENT

The State requests that this Court answer the above certified question in the negative. The State believes that the action of the Broward County Sheriff's office in reconstituting powder cocaine to crack cocaine was not illegal manufacture of contraband. The State maintains that the trial court's refusal to dismiss the charge against respondent was correct, especially in light of the valid safety considerations voiced below attending the distribution of adulterated cocaine. Palmer v. State, 17 FLW D1286, 1287. The Sheriff's office was not acting in an outrageous or illegal manner by reconstituting powder crack cocaine, which had no evidentiary value, into unadulterated crack cocaine rocks for use in a reverse sting.

Judge Henning's refusal to dismiss the charge against respondent is supported by a 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 respondent 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.

The State must stress that respondent did not even argue to Judge Henning that he was the subject of improper police conduct. Therefore, respondent implicitly admitted that he would have purchased crack cocaine from someone, whether or not the reverse sting was operational. The Sheriff's Office's action 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. The Fourth District clearly erred by finding 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."

Palmer v. State conflicts with this Court's decision of Smith v. State on preservation. It conflicts with the Second District's decision of State v. Bass on the merits. Moreover, six judges

and two senior judges of the Fourth District have indicated their disagreement with Kelly and its progeny. See Kelly v. State, 593 So.2d 1060, 1061 and Robertson v. State, Case No. 91-2288 (Fla. 4th DCA July 15, 1992). For all these reasons Palmer, the progeny of Kelly and Grissett, must be reversed.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, the State 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 respondent's adjudication and sentence be reinstated.

Respectfully submitted,

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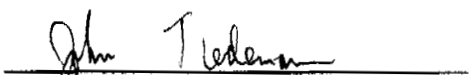
CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing Brief has been furnished by courier to: **Ms. Susan D. Cline,** Assistant Public Defender, Counsel for Respondent, 9th Floor/Governmental Center, 301 N. Olive Avenue, West Palm Beach, FL 33401 this 27th day of July, 1992.



Of Counsel

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