IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARIO KRAJEWSKI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80087

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the Fourth District of Appeal, and Respondent was the prosecution in the trial court and the appellee in the Fourth District Court of Appeal. In this jurisdictional brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

The informant who first directed police attention toward Petitioner and his codefendant, Poidomani, initially approached federal authorities with his substantial assistance plan in an effort to obtain more favorable treatment in his own pending prosecution for federal drug offenses. The informant, Phinney, with a sentencing hearing only a month away, was becoming anxious over his lack of success in setting up a drug deal in order to get his own prison sentence reduced: he was "fairly upset that something might not happen" and he would be sentenced to a lengthy prison term. When the federal authorities expressed their lack of interest in the information he had, Phinney went to the Broward County Sheriff's Office. Without any supervision by the government whatsoever, Phinney worked independently to set up drug deals. He was told, in essence, to "go ahead out any time you want, meet anywhere with anyone, set up anything you want and then when you got it set up you come back and let us know."

Phinney ultimately targeted Petitioner and his codefendant Poidomani, who both testified that at one point during their contact with the informant, the latter pulled a gun on them when they expressed reluctance to go through with the deal. This

testimony was later recanted by Poidomani when he testified against Petitioner at Petitioner's trial. Poidomani, who received a reduction in his fifteen to thirty year sentence to a term of seven and a half years in exchange for his testimony, also recanted earlier evidence he had given that he and Petitioner first came to Florida planning to buy a boat, but were convinced by Phinney to substitute the plan to purchase drugs instead. Phinney himself testified that he knew nothing about a plan by Petitioner and his codefendant to buy a boat and denied threatening them with a gun.

Petitioner's motion to dismiss the prosecution against him based on the State's entrapment was denied, and the Fourth District Court of Appeal upheld his ensuing conviction. The appellate court recognized that 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), controlled the disposition of this cause. In its decision, the appellate court ruled that

> A strict and literal interpretation of the phrase "interruption of a specific ongoing criminal activity" might inhibit or even prohibit the use of informants in situations involving first-time or occasional criminal behavior. Thus, a broader interpretation is both logical and more practical. In the present case, the state's evidence, while controverted in part by the defense, supports the proposition that a crime had been planned in advance and was in the process of being executed when the CI entered the picture. This satisfies the requirement of a specific ongoing criminal activity.

Following the denial of his motion for rehearing from the adverse decision in his case, Petitioner timely noticed his intent to seek to invoke the discretionary jurisdiction of this Court to

review the district court's decision based on its conflict with a decision of this Court.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case directly and expressly conflicts with the decision of this Court in Cruz v. State, 465 So.2d 516 (Fla. 1985), on the question of whether the objective entrapment defense requires the defendant to establish that he had no disposition to commit the offense into which the State's informant lured him.

ARGUMENT

POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF THIS COURT IN CRUZ V. STATE, 465 SO.2D 516 (FLA. 1985).

In Cruz v. State, 465 So.2d 516 (Fla. 1985), this Court addressed a police decoy operation set up in a high crime area of Tampa. An officer posed as an inebriated indigent, plainly displaying from a rear pants pocket $150 in currency. The defendant, Cruz, approached the decoy, attempted to engage him in conversation, walked away, and then returned a few minutes later and took the money from the decoy's pocket. This Court noted that, "Police were not seeking a particular individual, nor were they aware of any prior criminal acts by the defendant." Id. at 517, emphasis added.

Cruz was charged with grand theft, but the charge was dismissed on the basis that the police action which led to his arrest constituted entrapment as a matter of law. This Court agreed, distinguishing between so-called subjective entrapment, which will always be determined by a jury, and "objective" entrapment, which was described by Justice Frankfurter in language quoted by this Court:

> The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power....
>
> [A] test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the

> underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society... Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicion, reasonable or unreasonable, of the police concerning the defendant's activities. Appeals to the sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes....

Sherman v. United States, 356 U.S. 369, 382-383, 78 S.Ct. 819, 825-826, 2 L.Ed.2d 848 (1958) (Frankfurter, J., concurring in result); cited in Cruz v. State, supra, 465 So.2d at 520. Also cited with approval by this Court in Cruz was the decision of the court in State v. Molnar, 81 N.J. 475, 484, 410 A.2d 37, 41 (1980), recognizing that "when official conduct inducing crime is so egregious as to impugn the integrity of a court that permits a conviction, the predisposition of the defendant becomes irrelevant...."

Thus, this Court held in Cruz:

> The subjective view recognizes that innocent, unpredisposed, persons will sometimes be ensnared by otherwise permissible police behavior. However, there are times when police resort to impermissible techniques. In those cases, the subjective view allows conviction of predisposed defendants. The objec-

> tive view requires that all persons so ensnared be released.

Cruz v. State, id., emphasis added. The correct analysis of entrapment is to be performed in the following manner: first, as a threshold matter to be ruled on by the trial court, the State must establish the validity of police activity; only thereafter should it be given to the jury to decide whether "the criminal design originates with the officials of the government, and they plant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." This question is answered by deciding if the defendant is predisposed. Id. at 521. On the other hand, the threshold question of whether there has been objective entrapment by the police is determined by examining the police conduct: no entrapment has occurred where the police activity has as its end the interruption of specific, ongoing criminal activity, and it utilizes means reasonable tailored to apprehend those involved in the ongoing activity. Id. at 522.

Despite this Court's clear explanation that the focus of the objective entrapment test is on the conduct of the police and their agents, the Fourth District Court of Appeal applied, in its decision in the instant case, a standard which returns the focus back to the defendant and his predisposition. The district court expressed itself dissatisfied with the test as formulated by this Court, stating:

> A strict and literal interpretation of the phrase "interruption of a specific ongoing criminal activity" might inhibit or even prohibit the use of informants in situations involving first-time or occasional criminal

> behavior. Thus, a broader interpretation is both logical and more practical. In the present case the state's evidence, while controverted in part by the defense, supports the proposition that a crime had been planned in advance and was in the process of being executed when the CI entered the picture. This satisfies the requirement of specific ongoing criminal activity.

The relaxed formulation of the Cruz test employed by the district court in the instant case returns the objective entrapment test into an examination of the defendant's predisposition to commit an offense, rather than restricting attention, as required by this Court in Cruz and necessitated by the very purpose of the objective test, on what the police knew and did. That this case is not an isolated expression is demonstrated by the description of the Cruz test contained in the decision of the Fourth District Court of Appeal in State v. Anders, 596 So.2d 463 (Fla. 4th DCA 1992):

> As to the objective test, the court held that as a matter of law, there was no entrapment if police activity:
>
> > (1) has as its end the interruption of a specific ongoing criminal activity [the predisposition element]; and
> > (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity [the objective entrapment element].

Id. at 466-467 (emphasis added, brackets original).

The instant case itself demonstrates the danger of altering the emphasis of the objective entrapment test formulated by thus Court in Cruz. For, as noted by the district court, the evidence of whether or not Petitioner and his codefendant Poidomani actually planned to buy drugs when they came to Florida, rather than a boat

as Petitioner claimed, was conflicting. Poidomani originally testified under oath at pretrial proceedings that he and Petitioner had a legitimate purpose in coming to Florida. It was only after he obtained his deal from the State in exchange for his trial testimony that he altered this story. The only other evidence supporting the pre-existence of a criminal plan on the part of Petitioner came from Phinney, the informant, who was admittedly under pressure to produce some kind of drug deal in order to obtain a sentencing concession in his own case, who was totally unsupervised by any governmental agency in his dealings with the targets of his machinations, and who admitted his willingness to lie and cheat in the furtherance of his own interests.

Accepting the district court's re-interpretation of Cruz, then, would allow the very agent whose activities were subject to controversy to provide his own rehabilitation by the simple expedient of stating that the defendant he brought to police attention was, in essence, predisposed to commit the crime. The defendant, once caught in this web, would have no recourse other than his own denials, which a trial court would likely reject as self-serving (forgetting that the informant's contrary evidence was no less self-serving).

This Court wisely avoided such thorny quandaries in its Cruz test by requiring the State to demonstrate that the police knew of some specific, ongoing criminal activity toward the interruption of which it directed its informants to act. The decision of the Fourth District Court of Appeal in the instant case is therefore in direct and express conflict with the decision of this Court in

Cruz, supra. This conflict should be resolved by this Court before it spreads to other district courts of appeal and totally undermines the salutary purpose sought to be effected by Cruz, supra. This Court should therefore accept jurisdiction of the instant case in order to correct the persistent and ongoing confusion of the Fourth District Court of Appeal as to the appropriate standard to employ when objective entrapment is raised as a defense.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court accept jurisdiction of the instant case for the purpose of resolving the conflict between the decision of the Fourth District Court of Appeal and prior decisions of this Court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOSEPH A. TRINGALI, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 29th day of June, 1992.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

MARIO KRAJEWSKI,

Petitioner,

vs. CASE NO. _____

STATE OF FLORIDA,

Respondent.
_____/

P E T I T I O N E R ' S A P P E N D I X

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

MARIO KRAJEWSKI,

Appellant,

v. CASE NO. 90-0703.

STATE OF FLORIDA,

Appellee.

Opinion filed April 8, 1992

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

Appeal from the Circuit Court for Broward County; Patti Englander Henning, Judge.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

HERSEY, J.

The issue in this case is whether the defense of entrapment is available to appellant, Mario Krajewski. The facts are set out at length in our earlier opinion in which we discussed both entrapment and application of the due process clause to appellant's situation. Krajewski v. State, 587 So.2d 1175 (Fla. 4th DCA), quashed, 589 So.2d 254 (Fla. 1991).

Upon remand from the supreme court we confine our analysis to entrapment and some necessarily related legal principles.

The objective entrapment defense is explained 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). That defense is still viable. See State v. Hunter, 586 So.2d 319, 321-22 (Fla. 1991). See also State v. Evans, 17 F.L.W. 431 (Fla. 2d DCA Feb. 2, 1992); Ricardo v. State, 591 So.2d 1002 (Fla. 4th DCA 1991); Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991); Wilson v. State, 589 So.2d 1036 (Fla. 2d DCA 1991).

In Cruz, the Florida Supreme Court determined that there are two coexisting tests to be applied in cases involving entrapment. The threshold test, which is objective, focuses on police conduct and whether it falls below the standards for proper use of governmental power in an entrapment situation. 465 So.2d at 520-21. The trial court decides this as a matter of law by applying a two prong test. If either prong is violated, then there is entrapment as a matter of law because of impermissible police (government) conduct, and the charges against the defendant are dismissed.

The first prong is whether the police conduct has as its goal the interruption of a specific ongoing criminal activity; this addresses the problem of police "making" crime, i.e., police seeking to prosecute crime where no such crime exists but for the police conduct originating the crime. Id. at 522.

A confidential informant's activity is interpreted as government or police activity because he or she is acting as the agent of the state. Hunter, 586 So.2d at 322.

A strict and literal interpretation of the phrase "interruption of a specific ongoing criminal activity" might inhibit or even prohibit the use of informants in situations involving

first-time or occasional criminal behavior. Thus, a broader interpretation is both logical and more practical. In the present case the state's evidence, while controverted in part by the defense, supports the proposition that a crime had been planned in advance and was in the process of being executed when the CI entered the picture. This satisfies the requirement of a specific ongoing criminal activity.

The second prong of the Cruz test is whether the police utilize means reasonably tailored to apprehend only those already involved in an ongoing criminal activity. This addresses the problem of a government agent using inappropriate techniques to induce or encourage a person to engage in conduct constituting the offense where the person normally, and in the absence of such inducements, would not engage in such conduct.

Applying that test to the facts of the present case, it is first observed that the testimony of the CI, Vern Phinney, was the state's primary evidence to rebut appellant's defense of entrapment. That evidence was corroborated by the testimony of appellant's codefendant, Poidomani, at trial, although he earlier gave a different version of the facts.

Phinney testified to the following: he first went to the federal authorities with his substantial assistance plan, but when they were not interested he approached the Broward Sheriff's office; his sentencing hearing was less than a month away; he was becoming anxious about his lack of success in setting up a drug deal in order to get his own prison sentence reduced; the prosecutor told him that if he did not provide substantial assistance,

he would be sentenced in accordance with his conviction; and that he was "fairly upset that something might not happen."

Phinney further testified that he was totally unsupervised by the government and was working independently to set up drug deals; that he was told, in essence, to "go ahead out any time you want, meet anywhere with anyone, set up anything you want and then when you got it set up you come back and let us know."

One final factor weighing upon this inquiry is that both appellant and his codefendant, Poidomani, gave testimony at hearings held prior to the trial that the informant had pulled a gun on them when they expressed reluctance in going through with the deal.

These factors considered in isolation would tend to indicate that the informant may have used impermissible means to induce appellant, Krajewski, to become involved in a reverse sting drug deal, and thus the second prong of the Cruz test would be violated. Placed in the context of the conflicting testimony contained in this record, however, these same factors are not convincing. The coodefendant, Poidomani, recanted his testimony regarding the boat purchase (given during the hearing on a motion to dismiss) when he testified at trial that he and appellant actually came down to Florida in order to buy cocaine. Poidomani later had his sentence of fifteen to thirty years reduced to seven and one-half years in exchange for this testimony.

Appellant Krajewski admitted that he did not look at any boats while he was in Florida. Phinney testified that the two

men said nothing to him about buying a boat, and he denied threatening either man with a gun.

In short, there are conflicts in the evidence, and the credibility of witnesses was a key element in making a determination as to whether entrapment, as measured by the objective test, was a viable defense on the facts of this case.

It is not part of the appellate function to re-weigh the evidence or to second guess the fact-finder on credibility issues. There is sufficient evidence to support the trial court's conclusion that no entrapment occurred as measured by the objective criteria, and we find no error in that regard.

Turning briefly, then, to the second test for entrapment, we note that this is the subjective aspect of the defense and whether or not it succeeds is for the jury, not this court, to decide. Its parameters are spelled out in section 777.201(2), Florida Statutes (1989).

We affirm.

DOWNEY, J., and WALDEN, JAMES H., Senior Judge, concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

MARIO KRAJEWSKI

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 90-00703

L.T. CASE NO 88-3679 CF10A
BROWARD

May 20, 1992

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed April 23, 1992, for rehearing en banc is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Public Defender 15
Attorney General-W. Palm Beach

/CH

10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Appendix has been furnished to JOSEPH TRINGALI, ESQ., Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 24th day of JUNE, 1992.

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634