087 12-4

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,087

MARIO KRAJEWSKI,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellee in the Fourth District Court of Appeal and the Prosecution in the Circuit Court of the Seventeenth Judicial Circuit, Criminal Division, in and for Broward County, Florida. The Petitioner was the Appellee in the Fourth District Court of Appeal, and the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before the Supreme Court of Florida except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts to the extent that it is a true, accurate and non-argumentative recital of the procedural history and facts of this case, and subject to the following additions, corrections and modifications, to wit:

1. At trial, Petitioner's co-defendant, Robert Poidomani, testified that he and Petitioner came to Florida with the intention of buying a kilogram of cocaine so that they could take it back to Connecticut and sell it (R 455).

2. Co-defendant Poidomani also testified that they approached the informant, Vern Phinney for that purpose and the informant did not threaten Petitioner (R 466).

SUMMARY OF ARGUMENT

The decision of the District Court is factually specific. It establishes that Petitioner was arrested after he approached a known drug dealer with the intention of purchasing a kilogram of cocaine. The drug dealer was working as a confidential informant.

Under the facts established by the trial court and accepted by the appellate court, the use of the confidential informant satisfied both "prongs" of the test announced in Cruz v. State, 465 So.2d 516, 522 (Fla. 1985). Further, the use of the confidential informant in such circumstances did not violate Petitioner's right to due process. Accordingly, the decision of the trial court and appellate court should be affirmed.

ARGUMENT

THE STATE'S ACTION IN USING AN INFORMANT WHO WAS SEEKING THE REDUCTION OF HIS OWN CRIMINAL PENALTY AND WHO WAS NOT PROVIDED WITH ANY CONTROL AS TO THE TARGET OF HIS ACTIVITIES DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FLORIDA CONSTITUTION.

Petitioner contends that the use of confidential informant Vern Phinney in the case at bar violated his right to due process under the Florida constitution. In making this argument, Petitioner contends that Phinney's actions in this case did not meet the test set forth by this Court in Cruz v. State, 465 So.2d 516, 522 (Fla. 1985) in that they (1) did not have as their goal the interruption of specific illegal activity and (2) did not utilize means reasonably tailored to apprehend those involved in that activity.

The decision below, Krajewski v. State, 597 So.2d 814 (Fla. 4th DCA 1992), is factually specific. There, the Fourth District Court of Appeal noted that Petitioner's story that Phinney forced or induced him into a drug deal was specifically contradicted both by Phinney and by Petitioner's co-defendant, Robert Poidomani, at trial. Krajewski,, id., at 816. Therefore, not only did Petitoner's story -- that he came to Florida with $14,000 in cash to buy a boat and that over a five-day period Phinney coerced him into a drug deal against his will -- not make sense, but, in addition, it was contradicted by the testimony of the informant as well as the recanted testimony of Petitioner's friend and co-defendant who originally supported it.

Thus, the Fourth District Court of Appeal was able to write:

> 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.

Krajewski, id., at 816.

In its previous brief in Krajewski v. State, 589 So.2d 254 (Fla. 1991), Respondent pointed out the factual absurdity of Petitioner's allegations. It boggles the mind to believe that an innocent bystander could be threatened at gunpoint by a "known drug dealer" -- Vern Phinney -- and that he would thereafter leave the scene and return every day for several consecutive days until a drug deal was arranged and he was dragged into it against his will. As Respondent pointed out in a previous brief in the Fourth District, "Why didn't he (Petitioner) take his $14,000 in cash and take a bus to Stuart or Fort Meyers or Tampa where he could find other boats for sale?" (Appellant's Supplemental Brief, Krajewski v. State, 587 So.2d 1175 [Fla. 4th DCA 1991]).

At bar, Petitioner glosses over the absurdity of his own testimony as well as the fact that his friend Poidomani admitted at trial that the story was a lie. Petitioner argues that viewing the evidence in this matter focuses on the activity of the defendant rather than the activity of the police. Not so.

The case at bar began with Petitioner moving to dismiss the charge in the lower court because, he claimed, he was entrapped by the police. In order to decide such issues, the trial court

must receive evidence in the form of testimony and then sort out the facts. Here, the believable evidence is that although Vern Phinney was a confidential informant, the Petitioner had a fully-formed intention to purchase drugs before he came to Florida, and that he approached Phinney first. In the light most favorable to Petitioner the evidence is contradictory; in the light most favorable to Respondent the evidence is damning. And there is no question that in this Court the evidence must be viewed in the light most favorable to the Respondent. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); State v. Davis, 243 So.2d 587, 591 (Fla. 1971).

Petitioner's argument virtually requires this Court to announce a per-se rule, that is, that anytime the State uses a confidential informant in a drug deal, regardless of who approached whom, the defendant's due process rights are violated. This Court has already rejected that argument in State v. Hunter, 586 So.2d 319, 321 (Fla. 1991) when it held that the use of a convicted drug trafficker who would receive a substantially reduced sentence in exchange for setting up new drug deals and testifying for the state would not violate the holding in State v. Glosson, 462 So.2d 1082 (Fla. 1985).

Simply stated, if the use of a confidential informant in such circumstances does not ipso facto violate a defendant's due process rights, then it is clear there was no such violation at bar where a defendant with a fully-formed conscious intent to by drugs approached the informant.

Petitioner further argues that Phinney's activity in this case also violated the second prong of the Cruz test, that is, that it was not "reasonably tailored to apprehend those involved" in ongoing criminal activity. Once again, Petitioner is simply wrong.

In its decision below, the Fourth District Court of Appeal found that Phinney "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.'" Krajewski, 597 So.2d at 816. However, this evidence must be considered -- and apparently the Fourth District did consider it -- in light of the ongoing criminal activity which had been established as a matter of fact. In other words, this was not a case of a confidential informant manufacturing crime by approaching a victim (the scenario in Glosson) nor did the confidential informant pressure anyone into performing a crime as in Hunter. Here the evidence established that the confidential informant was the witness to a crime rather than the instrumentality of one. In short, once it was established that Petitioner approached Phinney, there was no possibility that an innocent citizen had been ensnared, and the "means" argument dissolved. Petitioner's due process rights could not be violated because Phinney agreed to Petitioner's plan and calling the police instead. Once again, it appears that Petitoner is arguing for a per-se rule, that is, that the mere fact that Phinney said he had the freedom to "set up anything" is violative of Petitioner's due process rights even though it is firmly

established that here Petitioner is the one who did the setting-up. Such a conclusion would require an unsupervised informant to turn away any and all suspects who approached him with a criminal design, or, worse, prevent him from reporting a crime which is about to occur. Clearly, it cannot be sustained.

Recently, in Lewis v. State, 597 So.2d 842 (Fla. 3d DCA 1992), the Third District Court of Appeal considered another due process/entrapment case. In Lewis, as in Hunter, there was a factual finding that the confidential informant "continued calling [the defendant] frequently at home and work, insisting that [he] find a buyer for the cocaine." Lewis, id., at 843. In spite of that fact, Chief Judge Alan R. Schwartz, in a special concurring opinion, found no constitutional violation and said that he concurred in the majority decision only because the result was mandated by State v. Hunter, supra. Appellee can do no more than point out that at bar the facts established in the trial court and accepted by the appellate court are one hundred eighty degrees removed from Hunter.

Here, there was no believable evidence of force or inducement on the part of the informant. On the contrary, the believable evidence established that there was an ongoing criminal activity in the form of Petitioner and his friend coming to Florida with $14,000 in cash to buy cocaine. The means utilized by the police -- using a known drug dealer as an informant -- were reasonably tailored to apprehend people like Petitoner who engage in such activity. There was no violation of Petitioner's constitutional rights, and the decision of the trial court and the Fourth District Court of Appeal should be affirmed.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that the District Court's decision be **AFFIRMED.**

Respectfully submitted,

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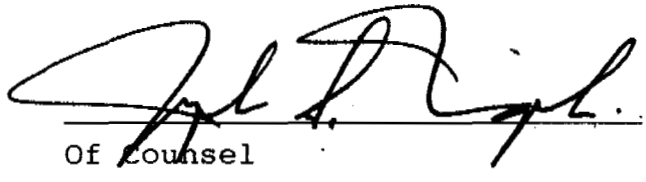
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on the Merits" has been furnished by courier to: **TANYA OSTAPOFF, ESQUIRE,** Assistant Public Defender, 421 3rd Street, West Palm Beach, Florida 33401 this **9th** day of November, 1992.



Of Counsel

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