IN THE SUPREME COURT OF FLORIDA

CASE NO. 91-2105

80,202

STATE OF FLORIDA,

Petitioner,

vs.

CURTIS SHEFFIELD,

Respondent.

****
ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT
****

PETITIONER'S BRIEF 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

Respondent was charged by information with purchase of cocaine within one thousand feet of a school (R. 748). Prior to trial, he filed a motion to dismiss the information on due process grounds (R. 750-56). At the motion hearing, Chemist Randy Hilliard testified that he prepared the crack cocaine sold to Respondent in the instant case (R. 12). The State and Respondent also stipulated that Hilliard's testimony at a similar hearing in the case of State v. Johnson[1] would be used for purposes of the motion (R. 8).

According to Hilliard powdered cocaine was boiled with baking soda until the elements combined so that the cocaine was no longer water soluble (R. 8-9). At that point, Hilliard poured off the remaining water, poured the cocaine and soda mixture into pans, cooled it until it crystallized, cut it into pieces, and then packaged it in individual and then multiple heat sealed packets (R. 9-10). The Broward Sheriff's Office did not independently through means of chemical synthesis manufacture any new controlled substance (RJ 19). Rather, Hilliard testified, the cocaine was merely converted from powder form to rock form (RJ 19).

Hilliard testified that the source of the powdered cocaine used in the instant case was a kilo of cocaine found in a Greyhound bus station (RJ 5). Hilliard and lab supervisor John Penny devised the idea of converting this cocaine powder into cocaine rock to save time by avoiding the need to analyze each

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[1] State v. Johnson, 17 F.L.W D1609 (Fla. 4th DCA July 1, 1992).

cocaine rock used in reverse sting operations (RJ 5-6). Also, the plan would permit the lab to keep up with the escalating demand for cocaine rock used in reverse sting operations (RJ 8-9).

Hilliard testified that no court permission was obtained before this plan was put into effect, but sheriff Nick Navarro gave them the suggestion to continue (R. 7). By the time the batch of cocaine rocks were converted for use in the instant case, the lab had obtained a D.E.A. License under Title 21 of the Federal Drug Code, §1301.22(5), which authorizes "manufacture" for the purposes being used in the instant case (RJ 19-20).

The trial court denied the motion to suppress and the case proceeded to trial (R. 13-14, 292). At trial, police officers testified that they were conducting a reverse sting operation within 1000 feet of Dillard High School on March 21, 1992 (R. 341, 363, 395-96, 571-73, 575-76). Detective Battle testified that Respondent rode up about two feet from Battle and signaled that Respondent wanted to purchase cocaine (R. 427). When Battle showed Respondent that Battle had cocaine rocks to sell by placing three or four in his hand (R. 428), Respondent said, "let me have one" (R. 429). Upon seeing that the rocks were small, Respondent said, "let me have two, two for ten." (R. 429). Battle said "ok" and Respondent chose the two he wanted and handed Battle two $5 bills (R. 429). Respondent was immediately arrested (R 430-31). Respondent put the crack in his mouth, but spit it out when ordered to do so (R. 432-33, 529). The two cocaine rocks were recovered (R. 372, 433).

Respondent was found guilty as charged (R. 739). The trial court adjudicated Respondent guilty and sentenced him to five and a half years in prison, with the three year mandatory minimum term applicable to the offense (R. 739, 760-62). Credit was given for time served .

Respondent appealed his conviction and sentence to the Fourth Court of Appeal (R. 768). On July 1, 1992, the Fourth District Court of Appeal issued the following opinion:

> Reversed and remanded on the authority of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992). We certify to the Supreme Court the same question as was certified in William v. State, 593 So.2d 1064 (Fla. 4th DCA 1992).

(Exhibit A, 17 F.L.W. D1609 (Fla. 4th DCA July 1, 1992). Kelly was originally reported at 16 F.L.W. D1636 (Fla. 4th DCA June 19, 1991) and is included in the appendix as Exhibit B. In Williams, the Fourth District granted the State's motion for rehearing and certified the following question:

> 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?

(Exhibit C, 593 So.2d 1064 (Fla. 4th DCA March 5, 1992). The State filed its notice to invoke the discretionary review of this court. Mandate has issued to the trial court. This court postponed its decision on jurisdiction and ordered briefing on the merits. This brief follows.

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 actions of the sheriff's office was illegal, this illegality would not insulate Respondent 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.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS WRONG WHEN IT HELD THAT THE USE OF "CRACK" ROCKS RECONSTITUTED FROM POWDER COCAINE IN A REVERSE STING VIOLATED A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW. ANY ILLEGALITY IN THE MANUFACTURE OF THE ROCKS SHOULD NOT SHIELD THE DEFENDANT FROM CRIMINAL LIABILITY.

The state requests that the certified question[2] be answered in the negative. The state further argues that the actions of the Broward County Sheriff's office in reconstituting powder cocaine to crack cocaine was not illegal manufacture of contraband. The state maintains the trial court's ruling was correct, especially given valid safety considerations regarding the distribution of adulterated cocaine. The Sheriff's office was not acting in an outrageous manner by reconstituting powder crack cocaine which had no evidentiary value into unadulterated crack cocaine rocks for use in a reverse sting.

The denial of the motion to dismiss is supported by the 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

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[2] 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?

> 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 Petitioner 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.

It should be remembered that Respondent would have purchased the crack cocaine from someone, whether or not the reverse sting was taking place. The Sheriff's Office's actions 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 (Fla. 2d DCA 1984). The District Court erred when it found 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." The holding below was in error[3], conflicts with Bass, and should be reversed.

[3] Petitiioner would note that six judges, one senior judge, and one senior justice of the Fouth District have indicated their disagreement with Kelly and its progeny. See Kelly v. State, 593 So.2d 1060, 1061 (Fla. 4th DCA 1992), Robertson v. State, 17 F.L.W. D1713 (Fla. 4th DCA July 15, 1992), and David James Nero v. State, Case No. 91-2515, 17 F.L.W. - (Fla. 4DCA Aug. 19, 1992) (Exhibits D,E).

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner 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 the charge against Respondent be reinstated.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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Tallahassee, Florida

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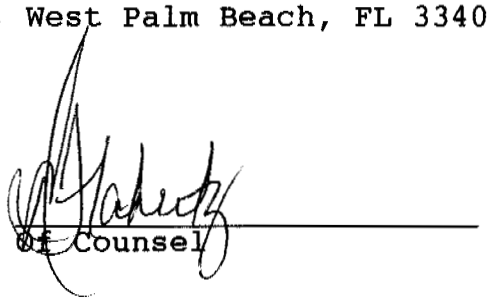
Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by courier to: TANJA OSTAPOFF, Assistant Public Defender, Counsel for Respondent, Criminal Justice Building, 421 3rd Street, West Palm Beach, FL 33401, this 19th day of August, 1992.



Of Counsel

EXHIBIT A

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

CURTIS SHEFFIELD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-2105.

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

Opinion filed July 1, 1992

Appeal from the Circuit Court for Broward County; Richard D. Eade, Judge.

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

Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellant.

PER CURIAM.

Reversed and remanded on the authority of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992). We certify to the Supreme Court the same question as was certified in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992).

LETTS, STONE and WARNER, JJ., concur.

EXHIBIT B

cal status. *Carswell v. Broderick Construction*, 583 So.2d 803, 804 (Fla.1st DCA 1991).

[3] When a claimant has established a satisfactory physician-patient relationship with an authorized physician, employer/carrier may not deauthorize that physician without the claimant's prior agreement or without approval of a judge of compensation claims. Should the employer/carrier attempt to deauthorize without prior approval, good cause must be shown for such action. *Stuckey v. Eagle Pest Control Co., Inc.*, 531 So.2d 350, 351 (Fla.1st DCA 1988); *Cal Kovens Construction v. Lott*, 473 So.2d 249, 253 (Fla.1st DCA 1985).

[4] The issue presented by claimant in this case requires a determination by the judge of compensation claims regarding whether deauthorization is in the best interests of the claimant. Section 440.13(2)(a), Fla.Stat. (1989). Deauthorization without an order by the judge is proper only where overutilization is the basis for deauthorizing such care, and where a determination has been made in accordance with the overutilization review procedures outlined in the statute, and alternate medical care has been offered by the employer or carrier. Section 440.13(2)(a), Fla.Stat. (1989).

As justification for the unilateral deauthorization of the treating physician in this case, employer/carrier alleged overutilization, but failed to comply with the utilization review procedures prescribed by section 440.13(4)(d)1, Florida Statutes. In this regard, employer/carrier's reliance on *Carswell, Atlantic Foundation v. Gurlacz*, 582 So.2d 10 (Fla.1st DCA 1991), and *Lamounette v. Akins*, 547 So.2d 1001 (Fla. 1st DCA 1989), is misplaced. Those cases involved resolution of disputes concerning the amount of medical bills submitted by medical providers, and allegations of gouging. The statute contemplates that such disputes are to be decided by the division. This case concerns authorization for treatment, a matter reserved to the judge of compensation claims. *See Carswell*, 583 So.2d at 804.

Accordingly, the order granting employer/carrier's motion to dismiss is reversed, and the cause is remanded for further proceedings.

ERVIN and BARFIELD, JJ., concur.

Kevin KELLY, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 90-0465.

District Court of Appeal of Florida, Fourth District.

Jan. 3, 1992.

The Circuit Court, Broward County, Patti Englander Henning, J., denied defendant's motion to dismiss charge of purchasing cocaine within 1,000 feet of school. Defendant appealed. After appeal was initially denied, the District Court of Appeal, on rehearing en banc, voted to six-to-six tie, and cause then reverted to original panel. On rehearing, superseding its earlier opinion, the District Court of Appeal, Polen, J., held that use by police of reconstituted "crack" manufactured in sting operation infringed on defendant's right to due process of law.

Reversed and remanded.

Letts, J., filed specially concurring opinion.

Hersey, J., filed dissenting opinion.

1. Criminal Law ⇐36.5

Use of reverse sting operations does not, in and of itself, cause defendant's constitutional rights to be violated, even if reverse sting is specifically set up within 1,000 feet of school. U.S.C.A. Const. Amend. 14.

Cite as 593 :

2. Constitutional Law ⇐257.5

Criminal Law ⇐36.5

Reconstitution by police of reg caine into "crack" or rock cocaine in sting operation infringed on defe right to due process; such manufa of "crack" for use in reverse sting tion did not fit into exclusions from prohibiting manufacture of controll stances, which were specifically lir possession and delivery of control stances by police officers. U.S.C.A Amends. 5, 14; F.S.1989, § 893.0 West's F.S.A. §§ 893.01 et seq., 893.13(5).

Richard L. Jorandby, Public D and Cherry Grant, Asst. Public D West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Ge hassee, and John Tiedemann, As Gen., West Palm Beach, for appe

ON REHEARING

POLEN, Judge.

The court, sua sponte, voted to this appeal and appellant's motio hearing en banc. The court hav voted to a six-to-six tie, the cause r the original panel. Fla.R.App.P.

We grant rehearing and subst following for the opinion dated 1991:

The appellant was arrested for ing cocaine within 1000 feet of a violation of section 893.13(1)(e) Statutes (1989). After being cha the crime, the appellant moved t the charges against him. This a lowed the trial court's denial of lant's motion to dismiss, and is two grounds. The first is tha caught in a reverse sting operati second is that the police made, b tution, crack cocaine for use in tion. The appellant argued

1. The process involves the transf powdered cocaine, already in pol into rock form. The police chen

Constitutional Law ⇐257.5
Criminal Law ⇐36.5

Reconstitution by police of regular cocaine into "crack" or rock cocaine for use in sting operation infringed on defendant's right to due process; such manufacturing of "crack" for use in reverse sting operation did not fit into exclusions from statute prohibiting manufacture of controlled substances, which were specifically limited to possession and delivery of controlled substances by police officers. U.S.C.A. Const. Amends. 5, 14; F.S.1989, § 893.02(12)(a); West's F.S.A. §§ 893.01 et seq., 893.13, 893.13(5).

Richard L. Jorandby, Public Defender, and Cherry Grant, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

ON REHEARING

POLEN, Judge.

The court, sua sponte, voted to consider this appeal and appellant's motion for rehearing en banc. The court having then voted to a six-to-six tie, the cause reverts to the original panel. Fla.R.App.P. 9.331(a).

We grant rehearing and substitute the following for the opinion dated June 19, 1991:

The appellant was arrested for purchasing cocaine within 1000 feet of a school in violation of section 893.13(1)(e), Florida Statutes (1989). After being charged with the crime, the appellant moved to dismiss the charges against him. This appeal followed the trial court's denial of the appellant's motion to dismiss, and is based on two grounds. The first is that he was caught in a reverse sting operation and the second is that the police made, by reconstitution, crack cocaine for use in the operation. The appellant argued on both grounds that his constitutional right to due process of law was violated.

[1] We wish to clarify that in the prior opinion we did not mean to imply that the constitutional implications involved in the reconstitution or manufacture of cocaine into "crack" were decided in *State v. Burch*, 545 So.2d 279 (Fla. 4th DCA 1989), *aff'd, Burch v. State*, 558 So.2d 1 (Fla. 1990). We only wished to point out that the use of reverse sting operations does not, in and of itself, cause a defendant's constitutional rights to be violated, even if the reverse sting is specifically set up within one thousand feet of a school. *Burch.*

[2] We have reconsidered the issue of the police manufacture or reconstitution of powdered cocaine into "crack" rocks, and we find that the practice is illegal. We hold that the use by the police of such reconstituted "crack" infringed on the appellant's right to due process of law. In other words, the police agencies cannot themselves do an illegal act, albeit their intended goal may be legal and desirable.

Manufacture is defined in section 893.02(12)(a), Florida Statutes (1989), as:

> The production, preparation, propagation, compounding, cultivating, growing, *conversion*, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container....

(Emphasis supplied.)

Thus, it seems that the statute is sufficiently broad as to encompass the reconstitution of regular cocaine into "crack," or rock cocaine. Depositions of the police chemist supplied with the record in the instant case support our decision that the process of reconstitution constitutes manufacture under Chapter 893, Florida Statutes (1989).[1] Certainly, as Judge Letts wrote in the dissent from our original opinion, there is more to this reconstitution

1. The process involves the transformation of powdered cocaine, already in police custody, into rock form. The police chemist testified that the process involves the mixture of water and baking soda followed by a procedure which aids in the crystallization of the diluted mixture.

process than "simply adding hot water to instant coffee grounds."

Section 893.13 provides several exclusions from its application for police officers acting in the course of their duties, but these exclusions apply only and specifically to the possession and delivery of controlled substances. *See* § 893.13(5), Fla.Stat. (1989). If the legislature intended that police officers be permitted to manufacture "crack", or any controlled substance, before its possession or delivery, then such permission would presumably appear on the face of the statute. The legislature, if it intends to allow such practices, must expressly indicate their intent so that the courts can apply the law accordingly. At this time, however, there is no authority for the police to manufacture controlled substances by reconstitution or otherwise.

We find that the Sheriff of Broward County acted illegally in manufacturing "crack" for use in the reverse sting operation which led to the arrest of the appellant. Even more disturbing is the fact that some of the "crack," which is made in batches of 1200 or more rocks, escapes into the community where the reverse sting operations are conducted. The police simply cannot account for all of the rocks which are made for the purpose of the reverse stings.

Such police conduct cannot be condoned and rises to the level of a violation of the constitutional principles of due process of law. *State v. Glosson*, 462 So.2d 1082 (Fla. 1985). Accordingly, we reverse the appellant's conviction and we instruct the trial court, on remand, to enter an order of discharge.

HERSEY, J., dissents with opinion.

LETTS, J., specially concurs with opinion.

HERSEY, Judge, dissenting.

It is one thing to express righteous indignation over the fact that police illegally "manufacture" drugs in the first instance and then, in the second instance, allow some of those drugs to escape into the community. It is quite another thing, however, to suggest that one who buys such drugs acquires immunity from prosecution because his constitutional right to due process has been violated by that activity. Because I disagree with this illogical transference for several reasons, I respectfully dissent from the majority opinion.

The legislature has drawn an imaginary circle with a radius of 1000 feet around each of our schools. Drug dealers who penetrate that protective mantle are subjected to severe penalties. The public policy prompting the creation of that circle is that school children should not be subjected to either the temptations or the potential for violence associated with drug neighborhoods. The real tragedy here, then, is not that the police "manufacture" drugs, but that the police conduct stings and reverse stings near schools. If the police conduct at issue in this case violates the due process rights of anyone, it is the students, and their parents as parents, as citizens, and as taxpayers. This violation of the public's rights is hardly vindicated by immunizing a person who, by purchasing or selling drugs however manufactured, actually contributes to the violation in a very real way with potentially devastating consequences.

Another aspect of the problem is that the process which we condemn is simply the conversion of cocaine powder to cocaine rocks. We should note that the police have not thereby increased the total quantity of drugs in the marketplace; they merely have changed the form of a portion of the available supply. The conversion process that was employed here is one which any reasonably intelligent eighth-grader, after reading the chemist's testimony in this case, could readily replicate. That being so, is the police action, while technically a violation, really sufficiently egregious to merit the condemnation which we heap upon it? Standing alone, without reference to where, when or whom, does this conversion by the police shock the conscience of the court? I suggest that it ought not.

There is yet another aspect of this case that is disturbing: at some point in time the police converted cocaine powder to co-

Cite as 5

caine rock. Does it matter when? The point, however, is that police did in this case is to *del* cocaine rock in a reverse sting which is condoned by specific stat thority. Are we now and in a cases to explore the *source* of th band? It seems to me that an af answer to this question is pregn adverse implications. For exam pose the cocaine rock produced b lice is in some way distinctive. then, that the police sell several this reverse sting operation. O buyers goes across town and rese to an undercover agent conductir operation. He is immediately Remember the source of the coc it was illegally "manufactured" l lice. Have the seller's due proces constitutional rights been vio strongly suggest a negative answ judge, I would not relish the task ing an esoteric line between t product and the "second hand" l future cases.

In summary, while I may pers lore the operation of stings ar stings in close proximity to sch we do in this case will not deter ty. It will simply send the me the police may not use "man drugs in those operations. In m misses the point. And along th vindicate the due process right purchaser (and all drug dealers ilar circumstances) not to have ensnare him with rock cocaine b taint of having been illegally tured" by the police. In my jud is not a worthwhile endeavor, an I dissent.

LETTS, Judge, specially conc

I must protest Judge Hersey

In the first place, I do *not* pe police stings and reverse s schools are "the real tragedy" "deplore" them.

My agreement with the major cated on my belief that it is a d process to allow the police to n

caine rock. Does it matter when? Should it? The point, however, is that what the police did in this case is to *deliver* that cocaine rock in a reverse sting operation, which is condoned by specific statutory authority. Are we now and in all future cases to explore the *source* of the contraband? It seems to me that an affirmative answer to this question is pregnant with adverse implications. For example, suppose the cocaine rock produced by the police is in some way distinctive. Suppose, then, that the police sell several rocks in this reverse sting operation. One of the buyers goes across town and resells a rock to an undercover agent conducting a sting operation. He is immediately arrested. Remember the source of the cocaine rock: it was illegally "manufactured" by the police. Have the seller's due process or other constitutional rights been violated? I strongly suggest a negative answer. As a judge, I would not relish the task of drawing an esoteric line between the "new" product and the "second hand" product in future cases.

In summary, while I may personally deplore the operation of stings and reverse stings in close proximity to schools, what we do in this case will not deter that activity. It will simply send the message that the police may not use "manufactured" drugs in those operations. In my view this misses the point. And along the way we vindicate the due process right of a drug purchaser (and all drug dealers under similar circumstances) not to have the police ensnare him with rock cocaine bearing the taint of having been illegally "manufactured" by the police. In my judgment this is not a worthwhile endeavor, and therefore I dissent.

LETTS, Judge, specially concurring.

I must protest Judge Hersey's dissent.

In the first place, I do *not* perceive that police stings and reverse stings near schools are "the real tragedy" nor do I "deplore" them.

My agreement with the majority is predicated on my belief that it is a denial of due process to allow the police to manufacture this deadly form of drug and then distribute it. To suggest that cocaine rocks are simply another converted form of cocaine, and no more, may be technically correct, but in practice, the two forms are worlds apart.

Robert RIVERA, Appellant,

v.

STATE of Florida, Appellee.

No. 90-0858.

District Court of Appeal of Florida, Fourth District.

Feb. 5, 1992.

Motion for Certification and/or Stay of Mandate Denied March 18, 1992.

Appeal from the Circuit Court for Broward County; Thomas M. Coker, Jr., Judge.

Richard L. Jorandby, Public Defender and Joseph S. Shook, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Melvina Flaherty, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Reversed and remanded on the authority of *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1992).

LETTS, DELL and WARNER, JJ., concur.

EXHIBIT C

1

Leon WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1778.

District Court of Appeal of Florida, Fourth District.

Feb. 5, 1992.

On Motion for Certification March 5, 1992.

Appeal from the Circuit Court for Broward County; William P. Dimitrouleas, Judge.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Reversed and remanded for further proceedings in accord with *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1992).

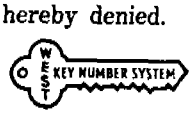
ANSTEAD, DELL and FARMER, JJ., concur.

ON MOTION FOR CERTIFICATION

ORDERED that appellee's motion filed February 20, 1992, for certification is hereby granted, and the following question is certified to the Florida Supreme Court:

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?

FURTHER ORDERED that appellee's motion filed February 20, 1992, to stay mandate is hereby denied.



2

Shawn SCOTT, Appellant,

v.

STATE of Florida, Appellee.

No. 91–0132.

District Court of Appeal of Florida, Fourth District.

Feb. 5, 1992.

Appeal from the Circuit Court for Broward County; Paul Backman, Judge.

Richard L. Jorandby, Public Defender, and Robert Friedman, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Patricia G. Lampert, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Reversed and remanded on the authority of *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1992).

DOWNEY, LETTS and WARNER, JJ., concur.

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Donnie Everett GIBSON, Appellant,

v.

STATE of Florida, Appellee.

No. 90–3406.

District Court of Appeal of Florida, First District.

Jan. 6, 1992.

On Motion for Certification Feb. 11, 1992.

An Appeal from the Circuit Court for Bay County; Clinton Foster, Judge.

A. Daniels, Public Defender, Gifford, Asst. Public Defender, ee, for appellant.

ert A. Butterworth, Atty. Gen., ley R. Bischoff, Asst. Atty. Gen., ssee, for appellee.

OANOS, Chief Judge.

ppellant challenges his sentence tual felony offender, contending er the 1988 statute applicable t e, out-of-state convictions cannot upon to establish predicate convi bjecting an offender to habitual off ntencing. The state concedes tha ntencing disposition in this case i ary to this court's decision in *Bar State*, 576 So.2d 758 (Fla. 1st DCA We reverse and remand for resente

The record reflects that the pr convictions relied upon to support h elony offender sentencing consisted Alabama convictions occurring on 1989, and November 7, 1988, and n Florida convictions occurring on Ju 1987. In *Parrish v. State*, 571 So.2d (Fla. 1st DCA 1990), the court deter To be deemed a habitual felony of the 1988 habitual offender statut sitates an initial finding that the dant has "previously been convi two or more felonies in this § 775.084(1)(a)1, Fla.Stat. (Sup Although the statute contains ad requirements which permit the out-of-state convictions, the stat ure to establish the first requ forecloses the possibility of hab fender classification.

Accord Flewelling v. State, 576 S (Fla. 1st DCA 1991).

The convicted offense in this curred on June 6, 1989. Therefor ant to *Parrish* and *Flewelling*, could be sentenced as an habitu offender only upon proof of two prior felony convictions in th When the Alabama convictions moved from consideration, appe not meet the criteria for habitua sentencing—since his prior Flori convictions occurred on the s

EXHIBIT D

jshed by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole." §775.082(1), Fla. Stat. (1983). We hold that the legislature intended that the minimum mandatory time to be served before becoming eligible for parole from a conviction of first-degree murder may be imposed either consecutively or concurrently, in the trial court's discretion, for each and every homicide. See § 775.021(4), Fla. Stat. (1983).

Enmund, 476 So.2d at 168.

Although section 775.082(1) deals with a capital felony whereas section 775.0825 deals with a life felony, the statutes contain identical language regarding mandatory punishment. For either offense, the defendant "shall be required to serve no less than twenty-five years before becoming eligible for parole." It seems clear that the legislature intended, pursuant to section 775.021(4), Florida Statutes (Supp. 1988), that the mandatory minimum time to be served before becoming eligible for parole from a conviction of attempted murder of a law enforcement officer may be imposed either consecutively or concurrently, in the trial court's discretion, for each and every attempt.

Finally, appellant argues that the trial court's written sentencing order must be corrected to conform to the oral pronouncement of sentence. Although this would ordinarily be correct, the record sub judice mandates a different remedy. During sentencing in open court, the trial court sentenced appellant to consecutive terms in prison for counts I through IV. For counts V, VI and VIII, the trial court sentenced appellant to concurrent terms in prison. After giving appellant 386 days credit for time served as to count I, the trial court stated:

> There will be no credit for time served as to the other counts. You're not entitled as a matter of law, since they're consecutive sentences. He's only entitled to credit for time served in the event that the sentences were to run concurrent, so it will only be as to the first one.

Based on this record, we conclude that the trial court made inconsistent statements regarding its intent to impose consecutive or concurrent sentences. On the authority of *Gates v. State*, 535 So.2d 359 (Fla. 4th DCA 1989), we remand this cause to the trial court with directions to clarify the sentences imposed and to enter such corrected sentencing orders as may be appropriate.

AFFIRMED IN PART, REVERSED IN PART and REMANDED. (LETTS and POLEN, JJ., concur.)

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[1]The relevant portion of §775.082(1) states:

A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole ....

* * *

Criminal law—Purchase of cocaine within 1000 feet of school—Manufacture of cocaine by police—Due process violation

JOHN FRANCIS ROBERTSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-2288. Opinion filed July 15, 1992. Appeal from the Circuit Court for Broward County; Barry E. Goldstein, Judge. Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Douglas J. Glaid, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Reversed on the authority of *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1992), and *Grissett v. State*, 594 So. 2d 321 (Fla. 4th DCA 1992). Upon remand the trial court shall enter an order of discharge.

REVERSED AND REMANDED. (LETTS, J., concurs. ALDERMAN, JAMES E., Senior Justice, and OWEN, WILLIAM C., JR., Senior Judge, concur specially, with opinion.)

(ALDERMAN, JAMES E., Senior Justice, and OWEN, WILLIAM C., JR., concurring specially.) We concur because of the above precedents, cases which we feel were wrongly decided.

* * *

Criminal law—Sentencing—Error to enhance second degree murder conviction from first degree felony punishable by life to a life felony and to impose three-year mandatory minimum sentences for convictions of second degree murder, attempted robbery, and aggravated assault in absence of jury finding that defendant used firearm in commission of offenses

DANIEL SAMSON, A/K/A PAUL AARONS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-2108. Opinion filed July 15, 1992. Appeal from the Circuit Court for Broward County; Arthur J. Franza, Judge. Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Daniel Samson, also known as Paul Aarons, appeals his judgment and sentence. We affirm the trial court in all respects, except for its entry of enhanced and mandatory minimum sentences on Counts I, IV, VI, and VII.

As the State concedes, the trial court entered incorrect sentences on Counts I, IV, VI, and VII. The trial court enhanced Aarons's second degree murder conviction (Count I) from a first degree felony punishable by life to a life felony. The trial court also imposed three-year mandatory minimum sentences for Aarons's convictions of second degree murder (Count I), attempted robbery (Count IV), and aggravated assault (Counts VI & VII). In order for the trial court to have properly enhanced the second degree murder conviction and imposed the mandatory minimum sentences, the jury first needed to find that Aarons had used a firearm to commit the offenses. Because the jury did not make such a finding, the trial court erred in entering the sentences and is, therefore, reversed. *Sears v. State*, 539 So. 2d 1174, 1175 (Fla. 4th DCA 1989); *Holt v. State*, 512 So. 2d 268, 269 (Fla. 3d DCA 1987) (per curiam).

On remand, the trial court is instructed to change Aarons's second degree murder conviction (Count I) to a first degree felony punishable by life and to strike Aarons's three-year mandatory minimum sentences on his second degree murder conviction (Count I), his attempted robbery conviction (Count IV), and his two aggravated assault convictions (Counts VI-VII).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART. (GUNTHER, J., and ALDERMAN, JAMES E., Senior Justice, concur. WARNER, J., concurs specially with opinion.)

(WARNER, J., concurring specially.) I concur in the majority and only wish to address one issue respecting the trial. Appellant rightly asserts that the trial court erred in giving the flight instruction. *Fenelon v. State*, 594 So.2d 292 (Fla. 1992). However, I conclude that it was harmless error beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). The real issue in this case was whether or not appellant was the trigger man in a robbery/murder. While there was inconsistency in the testimony as to who actually did the shooting, there was no contradiction that appellant was at least a participant in the robbery and fled the scene with his accomplices. Thus, the flight instruction would have had no impact on the uncontradicted testimony regarding the robbery, and I cannot conceive of how the instruction impacts on the issue of identification of the trigger man when all three robbery participants fled the scene.

* * *

Contracts—Consideration—Statute of frauds—Defendant's oral agreement to pay amount to plaintiff over four-year period as inducement for plaintiff to accept employment with parties to whom defendant had entered into contract to sell accounting practice, which contract was contingent upon plaintiff's acceptance of employment with purchasers—Plaintiff, by agreeing to employment with purchasers, furnished consideration for defendant's oral promise—Statute of frauds not applicable where plaintiff, by signing employment contract with purchasers, has fully performed oral agreement with defendant

KENNETH S. SHAFFER, Appellant/Cross Appellee, v. ROBERT L. RICCI,

EXHIBIT E

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

DAVID JAMES NERO,

Appellant,

v. CASE NO. 91-2515

STATE OF FLORIDA,

Appellee.

Opinion filed August 19, 1992

Appeal from the Circuit Court for Broward County, Robert B. Carney, Judge.

Kevin J. Kulik of Kay, Bogenschutz and Dutko, P.A., Fort Lauderdale, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We reverse appellant's conviction on the authority of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1991), and Grissett v. State, 594 So.2d 321 (Fla. 4th DCA 1992), and remand to the trial court with instructions to discharge appellant. As we did in Johnson v. State, 17 F.L.W. 1609 (Fla. 4th DCA July 1, 1992), Sheffield v. State, 17 F.L.W. 1609 (Fla. 4th DCA July 1, 1992), Palmer v. State, 17 F.L.W. 1286 (Fla. 4th DCA May 20, 1992), and Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992)[1], we again

[1] But see Robertson v. State, No. 91-2288 (Fla. 4th DCA July 15, 1992), Mercano v. State, No. 91-1345 (Fla. 4th DCA July 8, 1992), Walker v. State, 17 F.L.W. 1516 (Fla. 4th DCA Jun. 17, 1992), Fox v. State, 17 F.L.W. D1408 (Fla. 4th DCA Jun. 3, 1992), Rhodes v. State, 597 So.2d 974 (Fla. 4th DCA 1992), Hamilton v. State, 596 So.2d 175 (Fla. 4th DCA 1992), Grissett v. State, 594

certify the following question to the Florida Supreme Court as a question 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?

REVERSED AND REMANDED WITH DIRECTIONS; QUESTION CERTIFIED.

DOWNEY and FARMER, JJ., concur.
HERSEY, J., concurs specially with opinion.

So.2d 321 (Fla. 4th DCA 1992), Rivera v. State, 593 So.2d 1063 (Fla. 4th DCA 1992), and Scott v. State, 593 So.2d 1064 (Fla. 1992), all of which involve the same crack cocaine manufactured by Sheriff Navarro, where we failed (for some unarticulated reason) to certify the same question.

HERSEY, J., concurring specially.

I concur only because I am obliged by precedent to do so.