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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

MICHAEL ALLEN ADAMS,)
)
Petitioner/Appellant,)
)
versus)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 80,239

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Kelley Jo Easterling, upon being arrested for trafficking in cocaine, accepted a substantial assistance agreement by which she would offer up three other arrests for trafficking in exchange for a reduced sentence for herself. She enlisted the aid of her boyfriend Sly (R38-40), and these two and their friend Hollecker arranged for Michael Adams to sell them drugs. (R59-62). Adams was arrested for trafficking.

The trial judge, the Honorable Belvin Perry, Jr., dismissed the charge against Adams upon finding that Adams's due process rights had been violated. Judge Perry traced the development of the Fifth and Fourteenth Amendments' concept of fundamental fairness through State v. Glosson, 462 So.2d 1082 (Fla. 1985) (receiving contingent fees for information is a due process violation because of the informant's incentive for manufacturing crime), and Krajewski v. State, 587 So.2d 1175 (Fla. 4th DCA 1991) (law enforcement activity violated due process where the informant's lack of supervision encouraged the manufacture of crime). (R122-124)

Judge Perry found no evidence that Adams was a trafficker as contemplated by section 893.135(4), Florida Statutes (1989), which was the basis of the substantial assistance agreement. Rather, Easterling and Sly, with help from Hollecker, manufactured a crime. This was made possible by the state's lack of safeguard and supervision. (R27-30,34,42-46ff) The State appealed the dismissal to the Fifth District Court of Appeal,

arguing that objective entrapment has been legislatively abolished and further that Adams's involvement came about through a middleman, rather than a state agent.

The district court reversed, based on State v. Hunter, 586 So.2d 319 (Fla. 1991) (statutory substantial assistance agreement does not violate Glosson's rule that financial agreements violate due process).

In Hunter, a man named Diamond, in order to reduce his own sentence after conviction of trafficking, daily importuned Conklin, a young man who smoked marijuana but had no prior criminal record. To rid himself of Diamond, Conklin turned to Hunter. Hunter found a former employee who would supply the necessary drugs, and Hunter insisted on closing the deal himself.

When both Hunter and Conklin were convicted of trafficking, this court held that Conklin was entitled to judgment of acquittal because he had been, as a matter of law, entrapped. Hunter, on the other hand, had had no intercourse with Diamond, beyond three phone calls after Hunter had agreed to find the drugs, urging the completion of the sale. Because Hunter had "minimal telephone contracts" with Diamond (a state agent), and was induced to sell by Conklin (not a state agent), the defense of entrapment was not available to him.

A notice of intent to seek discretionary review was timely filed, and this proceeding follows.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal in the instant case is in direct conflict with the decision of the Florida Supreme Court in State v. Hunter, 586 So.2d 319 (Fla. 1991), in that the instant opinion cites correct statements of law but misapplies them, generating disharmony and confusion.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN STATE V. ADAMS, 17 FLW D1564 (FLA. 5TH DCA JUNE 26, 1992), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN STATE V. HUNTER, 586 SO.2D. 319 (FLA. 1991).

The decision of the Fifth District Court of Appeal in the instant case is in direct conflict with the decision of the Florida Supreme Court in State v. Hunter, 586 So.2d 319 (Fla. 1991), in that the instant opinion cites correct statements of law but misapplies them, generating disharmony and confusion. Furthermore, this decision permits the state to do indirectly what it may not do directly, without violating those fundamental, immutable principles of fairness and justice that give life to the concept of due process.

The facts at trial showed that Kelley Jo Easterling was participating in a substantial assistance agreement by which her own sentence for trafficking would be reduced if she supplied three other trafficking arrests. The contract included no direction for or supervision of performance. She informed her boyfriend, Sly, of the deal. Sly and another friend, Hollecker, induced a third friend, Adams, to sell Easterling crack cocaine. Adams was arrested and charged with trafficking under section 893.135, Florida Statutes (1989).

The Fifth District made much of Adams's rejection of Easterling as a motive force in the sale. Upon this rejection (which rested upon a choice between only Easterling and

Hollecker), the appellate court fashions its opinion that because Hollecker was not a knowing agent of the state, no state action--whether proper or not--could exist.

But though Sly's role was bypassed in the reasoning portion of the opinion, it remains just visible enough to create confusion as to what pattern of facts defines a Hunter violation of due process. The following paragraph illustrates this point:

Easterling testified that she first met appellee Michael Adams through her boyfriend Danny Sly and his friend Mark Hollecker. Easterling testified that Hollecker bought and sold drugs. During a trip to Lakeland with Sly and Hollecker to meet Adams at a barbecue, Easterling testified the three went back to Adams' house. Sly told Adams that Easterling had the money, and Adams told them he could get methamphetamine. Adams was offered "an extra couple hundred bucks" to bring the drugs to Kissimmee.

Other than this glancing summary of the entire complex of testimony showing that Sly knew of Easterling's agreement, and that he engineered the whole deal, the opinion mentions Sly but once, in passing. This organization is crucial, for without it, the court would have to acknowledge that Sly not only "told Adams that Easterling had the money," but also was a state subagent and was responsible for the transaction.

The court would have done better to leave Sly out altogether. Note that Sly brought Easterling and Adams together; Sly and Hollecker took Easterling to Lakeland; Sly talks money. And then the thing is done, leaving the question, when is a state agent not a state agent?

CONCLUSION

BASED UPON the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and reverse the decision of the Fifth District Court of Appeal herein.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

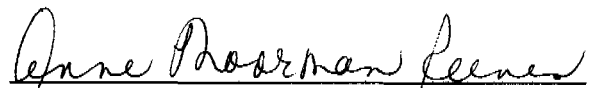


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Michael Allen Adams, 400 W. Beacon, #502, Lakeland, Florida 33802, on this 6th day of August, 1992.



ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

MICHAEL ALLEN ADAMS,)
)
 Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
 Respondent.)
_____)

COURT CASE NO.

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1992

STATE OF FLORIDA,
Appellant,

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

v.

CASE NO. 91-2280 ✓

MICHAEL ADAMS,
Appellee.

Opinion filed June 26, 1992 ✓

Appeal from the Circuit Court
for Osceola County,
Belvin Perry, Jr., Judge.

Robert A. Butterworth, Attorney
General, Tallahassee, and Anthony J.
Golden, Assistant Attorney General,
Daytona Beach, for Appellant.

James B. Gibson, Public Defender,
and Paolo G. Annino, Assistant
Public Defender, Daytona Beach,
for Appellee.

DAUKSCH, J.

This is an appeal from an order granting appellee Michael Adams' motion to dismiss, pursuant to Rule 3.190(b), Florida Rules of Criminal Procedure. The trial court found that appellee's due process rights had been violated as the result of the Kissimmee Police Department entering into a substantial assistance agreement with one Kelley Jo Easterling. We reverse.

On November 24, 1991, appellee was charged with a violation of section 893.135, Florida Statutes (1989), knowingly selling, delivering or possessing more than twenty-eight grams but less than 200 grams of a mixture containing methamphetamine and ephedrine, a substance controlled by section 893.03(2)(c)3, Florida Statutes (1989).

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On February 22, 1991, appellee filed a motion to dismiss pursuant to rule 3.190(b), Florida Rules of Criminal Procedure, arguing that he was entrapped as a matter of law into selling narcotics and that, therefore, his right to due process of law under the United States and Florida Constitutions had been violated.

At a hearing on the motion, Easterling, who had been previously arrested and charged with the offense of trafficking in cocaine, testified that she entered into a substantial assistance agreement with the Kissimmee Police Department. This agreement was described by the officer who arrested Easterling as being that in return for "her providing me with . . . three . . . similar trafficking narcotic cases," the officer would request the State Attorney's Office to change Easterling's charge from trafficking to possession.

Easterling testified that she first met appellee Michael Adams through her boyfriend Danny Sly and his friend Mark Hollecker. Easterling testified that Hollecker bought and sold drugs. During a trip to Lakeland with Sly and Hollecker to meet Adams at a barbecue, Easterling testified the three went back to Adams' house. Sly told Adams that Easterling had the money, and Adams told them he could get methamphetamine. Adams was offered "an extra couple hundred bucks" to bring the drugs to Kissimmee.

Appellee Adams testified that he had known Mark Hollecker and his family about twenty years and that he met Sly three or four years before when he had moved to Florida. Adams testified he had used drugs including marijuana and cocaine with Hollecker before. He was questioned:

Q. Was this your only involvement with Mr. Hollecker concerning the use or sale of drugs?

A. I'm not sure. You talking about this time?

Q. Any time in the past?

A. No. They came to my apartment in Lakeland and I have gone and scored drugs and used them before. We went to a couple of concerts.

Adams testified that his involvement with this case began when he received a message on his answering machine from Hollecker. Hollecker informed Adams that Hollecker needed an ounce of cocaine to make \$100 from "[a] good friend of his." Adams testified he told Hollecker "I would try to do it, but I had to have a gram and a-half for my trouble." Adams indicated that he told Hollecker he could not get cocaine, but could get methamphetamine, and wanted an ounce for himself because he was addicted to the substance.

Adams testified Hollecker suggested the sale take place in Kissimmee rather than Lakeland. Easterling was present in Adams's Lakeland apartment during the conversations, but when asked what persuaded him to deliver the narcotics to Easterling, Adams responded, "Nothing persuaded me to Kelley Easterling. I was supposed to deliver them to Mark Hollecker." Adams testified he was arrested when he told Easterling he had the contraband on his person, when he arrived at the Seven-Eleven store in Kissimmee where they had agreed to meet. He further testified that while she was in Lakeland, he didn't believe he "had twenty words" with Easterling.

The trial court entered an order granting appellee's motion to dismiss, concluding that the "action or non-action by law enforcement permitted Ms. Easterling and her cohorts to manufacture a crime in this case. This action by agents of law enforcement clearly [violates] the due process provisions of both the State and Federal Constitutions." We disagree.

In ruling that appellee's due process rights were violated by the actions of Easterling, Sly and Hollecker in getting appellee to obtain methamphetamine for them and deliver it to Kissimmee, the trial court relied primarily on State v. Glosson, 462 So.2d 1082 (Fla. 1985) and State v. Krajewski, 587 So.2d 1175 (Fla. 4th DCA), quashed, 589 So.2d 254 (Fla. 1991), on remand, 17 F.L.W. D900 (Fla. 4th DCA April 8, 1992). The Glosson court held that based upon the due process provision of Article I, Section 9 of the Florida Constitution, governmental misconduct which violates the constitutional due process rights of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges. Thus, the court ruled

that a trial court may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution.

Glosson, 462 So.2d at 1085. In Krajewski v. State, 587 So.2d 1775, 1184 (Fla. 4th DCA 1991), the court certified the following question:

DOES THE PERFORMANCE OF AN AGREEMENT UNDER SECTION 893.135(4) AS AMENDED, WHEREBY AN INFORMER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING, CONSTITUTE A PER SE VIOLATION OF THE HOLDING IN STATE V. GLOSSON, 462 So.2d 1082 (FLA. 1985) AS TO AN INDIVIDUAL ENSNARED BY THAT PERFORMANCE?

The supreme court answered this question in the negative based on its holding in State v. Hunter, 586 So.2d 319 (Fla. 1991). State v. Krajewski, 589 So.2d 254 (Fla. 1991).¹

¹ Two other substantial assistance cases relied upon by appellee below were treated similarly. State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990), vacated, 587 So.2d 455 (Fla. 1991); State v. Embry, 563 So.2d 147 (Fla. 2d DCA 1990), quashed, 588 So.2d 995 (Fla. 1991), on remand, 593 So.2d 327 (Fla. 4th DCA 1992).

We find this case governed by that portion of the Hunter opinion which holds that "[w]hen a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense." State v. Hunter, 586 So.2d at 322, citing to State v. Garcia, 528 So.2d 76 (Fla. 2d DCA), rev. den., 536 So.2d 244 (Fla. 1988); Acosta v. State, 477 So.2d 9 (Fla. 3d DCA 1985); State v. Perez, 438 So.2d 436 (Fla. 3d DCA 1983). See also State v. Petro, 592 So.2d 254 (Fla. 2d DCA 1991); State v. Brugman, 588 So.2d 279 (Fla. 2d DCA 1991). In the instant case, it was Hollecker who made the initial contact with appellee. As with one of the Hunter defendants, appellee's involvement was "wholly voluntary even though his motive may have been benevolent." Hunter, 586 So.2d at 322. (The trial court found appellee "in the final analysis was just trying to do a favor for a friend."). Appellee's own testimony establishes that he had "minimal" contacts with Easterling, another important factor in Hunter. We thus agree with the state that appellee should not have been allowed to raise his entrapment or outrageous conduct and due process claims below. Appellee was not entitled to assert an entrapment defense as a matter of law, because he was induced into bringing the narcotics into Kissimmee by Mark Hollecker, not Kelley Easterling.

We reverse the order of the trial court dismissing the information and remand the cause for trial.

REVERSED and REMANDED.

GRIFFIN, J., concurs.

COWART, J., dissents, with opinion.

COWART, J., dissenting.

Easterling was arrested and charged by the Kissimmee Police Department with trafficking in cocaine. At that vulnerable moment, of course, she was in need of, and desired, any "substantial assistance" she could obtain from the Kissimmee Police Department. A Kissimmee police officer and Easterling agreed that if Easterling would provide the officer with three drug trafficking cases, the officer would request the state attorney's office to reduce the charges against Easterling. Thus motivated, Easterling went about producing three drug trafficking cases for the Kissimmee officer. Presumably Easterling got her credit for this one.

Easterling had two friends, Danny Sly and Mark Hollecker, both of whom were involved in the buying and selling of drugs. Hollecker had a long time trusting friend named Michael Adams. Easterling induced Sly and Hollecker to contact Adams, who lived in Lakeland, and to induce him to sell drugs to Easterling and to cause the transaction to take place in Kissimmee so Easterling could receive the credit. Hollecker with Easterling went to see Adams in Lakeland and arranged the transaction. When Adams arrived in Kissimmee and told Easterling he had the contraband drugs with him, he was arrested by the Kissimmee police officer.

The trial court granted Adams' motion to dismiss the charges against him because the action by the Kissimmee police officer permitting "Ms. Easterling and her cohorts to manufacture" the crime in this case "violated the due process provisions of both the state and federal constitutions". The State appeals. The majority opinion reverses.

Apparently under the particular facts and circumstances of this case and the law relating to due process and entrapment, if the Kissimmee police officer had himself directly induced Adams to obtain drugs to sell to the officer and the trial court had held that Adams' due process was thereby violated, the decision would be upheld.

Likewise and similarly, if Easterling alone acting at the behest and supplied motivation of the Kissimmee police officer, had induced Adams to obtain drugs to sell to Easterling and the trial court had held that Easterling was an agent of the Kissimmee police officer and that Adams' due process rights were violated, that decision would be upheld.

However, in this case, because Easterling, acting on behalf of the police officer induced a "middleman" (Hollecker) to handle the mechanics of contacting and inducing Adams to commit the crime of obtaining and possessing drugs to sell, the trial court's ruling that Adams' due process rights were violated is being reversed. There is no logical or moral basis for this distinction.

If the police officer cannot violate Adams' due process rights by inducing Adams to commit a crime which he would not have otherwise committed, then morally, logically and legally the police officer cannot do the same thing indirectly by using Easterling to do for him what he cannot legally do directly himself. Likewise, if Easterling, as a state agent, cannot violate Adams' due process rights by inducing him to commit a crime which he would not have otherwise committed, then morally, logically and legally, neither the police officer nor Easterling, can do the same thing indirectly by using Hollecker to do for them what they cannot legally do directly themselves. Easterling used Hollecker to do the exact same thing that the Kissimmee police officer used Easterling to do, -- that which had the officer or Easterling done directly would have been held to have violated Adams' due process rights. Just as surely as Easterling was acting at the instigation and behest of the Kissimmee police officer, Hollecker was acting at the instigation and behest of Easterling. Hollecker was just as much of a police agent as was Easterling, although he may have been more innocent in that Easterling knew she was acting on behalf of the Kissimmee police officer, while Hollecker might not have known why, and on whose behalf, he and Easterling were really acting. This ignorance on the part of Hollecker does not make him any less a person acting as a result of the Kissimmee police officer's agreement with Easterling. The result on Adams' due process rights is the same. To call Hollecker a "middleman" rather than to call him what he

really was -- a sub-agent acting on behalf of an agent (Easterling) -- acting on behalf of a state agent (the Kissimmee police officer), is rather shallow sophistry. However desired the result may be, in legal substance there is no magic when a principal uses an agent to do something for the principal. Good law always holds the principal responsible for the acts of agents. That Hollecker made the initial contact with Adams is the simple result of Easterling using Hollecker to do that and has, in substance, no more legal significance than had the Kissimmee police officer used Easterling to make the initial contact with Adams. Again, that Adams' contacts with Easterling (acting as principal to Hollecker as agent), were "minimal" is no more important than the fact that Adams had no contact with the Kissimmee police officer (acting as principal to Easterling as agent).

If this is good law, then, in order to avoid due process entrapment problems, law enforcement officers need only (1) not do the acts themselves, (2) tell their first level agents (like Easterling) not to directly induce persons to commit crimes they would otherwise not commit, and (3) instruct first level agents (like Easterling) to themselves solicit others (second level agents like Hollecker) to do the dirty work because the courts are only able to see and understand first level agents and hold that law enforcement officers as principals will not be held responsible for the acts of sub-agents like Hollecker (calling them "middlemen") as law enforcement agents are held responsible

for the acts of first level agents like Easterling. The legal principle in this case appears to be that a principal can do indirectly what the principal cannot do directly if enough agents are used to remove an agent's wrongful act two agency steps away from the principal. The law should look to substance and not form and if principals are to be held responsible for the acts of their agents, they should also be held responsible for the acts of agents obtained and used by their agents to accomplish the principal's purposes and objectives. In law no one should be able to do indirectly what they cannot do directly; otherwise the law places value on form, procedure, and subterfuge rather than on substance, and if the law does that, the law is shallow and useless and all is lost.