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IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
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Chief Deputy Clerk

MICHAEL ALLEN ADAMS,

Petitioner,

v. CASE NO. 80,239

STATE OF FLORIDA,

Respondent.

______/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

On October 24, 1990, Petitioner was charged by Information 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). (Appendix I -- Second Supplement to the Record on Appeal). Petitioner filed a Motion to Dismiss in the trial court grounded upon a claim of objective entrapment. (R105-107). After an evidentiary hearing on February 11, 1991, that motion was granted by the trial court. (R3-67, 119-126). The State filed a timely Notice of Appeal from that order. (R127). The Fifth District Court of Appeal reversed the trial court's order of dismissal and remanded the cause for trial in its opinion filed on June 26, 1992 in State v. Adams, 600 So. 2d 1302 (Fla. 5th DCA 1992). Notice to Invoke this Court's Discretionary Jurisdiction was filed in the District Court on July 27, 1992. By order dated November 16, 1992, this Court accepted jurisdiction of this case.

STATEMENT OF THE FACTS

Kelley Jo Easterling was arrested on July 20, 1990 by the Kissimmee Police Department and charged with Trafficking in Cocaine. In order to obtain a reduction of the charge against her, she agreed to provide substantial assistance to the department in making three additional narcotics trafficking arrests. (R32-34, 119-121).

Toward this end, she enlisted the aid of her boyfriend, Danny Sly. They contacted a friend, Mark Hollecker, who directed them to Michael Adams, the Petitioner. (R35). As Petitioner pointed out in his Motion to Dismiss, Sly was aware that Easterling was acting as a confidential informant for the police, but Hollecker was not aware of this fact. (R106).

Petitioner, Michael Adams, testified in his own behalf and said that he had known Hollecker for about twenty years. They had used marijuana and cocaine together in the past. Adams said that he received a message on his answering machine from Hollecker. He returned the call and Hollecker told him that he needed an ounce of cocaine for a friend of his. Adams called back and told Hollecker that he had been unable to get any cocaine, but that he could get some methamphetamine (crank). Adams said that he agreed to get the methamphetamine because both he and Hollecker would profit from the transaction -- Hollecker would make $100 and Adams would get an ounce and one-half of methamphetamine for his own use. They agreed that Adams would deliver the methamphetamine at a Seven-Eleven store in Kissimmee. Adams said that he was supposed to deliver the narcotics to

Hollecker and that, during their meeting in Lakeland, he did not believe that he had spoken twenty words with Easterling. When he arrived at the store and told Easterling he had the contraband, he was placed under arrest. (R54-63).

SUMMARY OF ARGUMENT

Petitioner was induced to commit this offense by a middleman, not a State agent, and, therefore, the defense of objective entrapment is not available to him. State v. Hunter, 586 So. 2d 319, 322 (Fla. 1991). In any event, the two-pronged test for objective entrapment propounded in Cruz v. State, 465 So. 2d 516 (Fla. 1985) has been legislatively abolished.

Even if it could be said that a State agent induced Petitioner to commit this crime, under Section 777.201, Florida Statutes (1989), Petitioner has not established that he was not predisposed to commit this offense and, under a due process analysis, Petitioner has not established that the actions of the government in this case were shocking or outrageous.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT REVERSING THE ORDER OF THE TRIAL COURT FINDING THAT PETITIONER HAD BEEN OBJECTIVELY ENTRAPPED SHOULD BE APPROVED BY THIS COURT.

The major thrust of Petitioner's argument is that the District Court was incorrect in concluding that a middleman (Mark Hollecker), not a State agent, induced Petitioner (Adams) to engage in the narcotics transaction and that entrapment was, therefore, not an available defense. State v. Hunter, 586 So. 2d 319, 322 (Fla. 1991). His contention is that Ms. Easterling's boyfriend, Danny Sly, who was aware of her substantial assistance agreement with the Kissimmee Police Department, had negotiated the sale on her behalf and improperly induced Petitioner to engage in the commission of this crime and that he was acting as a State agent.

However, that contention is refuted by Petitioner's own testimony. He said that he had known Hollecker for twenty years, that they had smoked pot, cocaine and crank together before. (R54). He said that Hollecker left a message on his answering machine asking him to call. Adams returned the call and Hollecker said he wanted an ounce of cocaine for a friend. Hollecker was going to get $100 for arranging the purchase. Adams called again later and told Hollecker that he could not get any cocaine, but that he could get an ounce of methamphetamine but that he wanted a gram and one-half of methamphetamine for his trouble. (R55-58). When he was asked what persuaded him to proceed with this transaction, Petitioner said: "The fact that

Mark would make a hundred dollars and I would get a gram and a half." (R58). Petitioner later said:

> ...I had a problem with Kelley and I was trying to make it so Mark did the deal. That was my part of it. That way I didn't have to mess with Kelley. Mark would take care of everything... (R61-62).

When asked who suggested that the sale take place in Kissimmee, Petitioner said it was Hollecker. (R62). He said no one persuaded him to deal with Kelley Easterling. "I was supposed to deliver them to Mark Hollecker." (R62). When Petitioner arrived at the agreed meeting place for the drug transaction, Hollecker was not there but Easterling was. She asked Petitioner if he had the dope and, when he said he did, he was arrested. (R63).

Based upon this testimony, it can hardly be said that Petitioner was entrapped. He testified that he was a methamphetamine addict. He said that he had "scored drugs" and used them with Hollecker before. He said that they had smoked pot, cocaine and crank (methamphetamine) together. (R54-55). He said he agreed to participate in this transaction because both he and Hollecker would profit from it. He repeatedly said that he was dealing with Hollecker and that he never intended to deal with Easterling. Petitioner admitted in his Motion to Dismiss that Hollecker was not aware of Easterling's substantial assistance agreement. (R106). Ms. Easterling also testified that she had not told Hollecker about her substantial assistance agreement. (R38).

This Court dealt with a virtually identical problem in Hunter, Supra. Ron Diamond was a convicted drug trafficker who was providing substantial assistance to the State in arresting other traffickers. He attempted to get his neighbor, Kelly Conklin, to supply him drugs. After much coaxing, she enlisted David Hunter who sought out a former employee to provide the drugs. The Court concluded that Conklin had been entrapped by Diamond, a State agent. However, the Court held that the defense of objective entrapment was not available to Hunter because he had been induced to engage in the crime by Kelly Conklin, a middleman, not a State agent. (See Appendix II -- Judge Cowart's dissent questioning the morality and logic of this middleman distinction).

In the instant case, Kelley Easterling was providing the substantial assistance to the State. She got her boyfriend, Danny Sly, to help her find a drug dealer. He enlisted Mark Hollecker who sought out his long time friend, the Petitioner, Michael Adams. The defense of objective entrapment might be available to Mr. Hollecker, who had been enlisted by a State agent, Easterling, and her boyfriend, Sly. However, like Hunter, Adams was induced to engage in the crime by a middleman, not a State agent. The trial court properly applied the doctrine of Hunter to the facts of this case.

There seems to be little question that Petitioner was predisposed to commit this crime. He had been a drug addict for years and he had purchased and used pot, cocaine and methamphetamine with Hollecker in the past. He admitted that he

was motivated to involve himself in the transaction by the prospect of profit for himself and Hollecker. There was no need for any coaxing to get Petitioner involved in this scheme as opposed to the extended harassment necessary to induce Conklin's participation in the Hunter case. In any event, this entrapment issue is now an issue for the trier of fact and is not properly the subject of a pretrial motion to dismiss. See Section 777.201, Florida Statutes (1987).

The issue before this Court, assuming that the middleman principle of Hunter is for some reason found to be inapplicable to the facts of this case, is whether the concept of substantial assistance inevitably collides with the doctrine of objective entrapment as set forth 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), and, ultimately, whether the two-pronged test for objective entrapment is still applicable in light of the 1987 enactment of Section 777.201 as a direct legislative response to Cruz.

In its opinion subjudice, the Fifth District Court of Appeal concluded that such substantial assistance agreements do not constitute a per se violation of the Florida State Constitutional due process rights of a defendant as enunciated in State v. Glosson, 462 So. 2d 1082 (Fla. 1985). In reaching that conclusion, the District Court relied on this Court's decisions in Hunter, Supra, and State v. Krajewski, 587 So. 2d 1175 (Fla. 4th DCA), quashed 589 So. 2d 254 (Fla. 1991), on remand 597 So. 2d 814 (Fla. 4th DCA 1992), as well as its decisions in State v. Anders, 560 So. 2d 288 (Fla. 4th DCA 1990), vacated 587 So. 2d

455 (Fla. 1991); and 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) .

However, as for the effect of Section 777.201 on the test for objective entrapment, the answer is not quite so clear. In Herrera v. State, 594 So. 2d 275, 278-280 (Fla. 1992), the majority of this Court found that Section 777.201(2) allocating the burden of proof of subjective entrapment to the defendant was not unconstitutional. In concurring in the result only, Justice Kogan noted that, because the defense of objective entrapment was not available to the defendant under the facts of that case, the Court's opinion had appropriately declined to address the issues raised by this statute as it relates to objective entrapment.

This objective entrapment issue has been briefed and argued before this Court in Munoz v. State, Florida Supreme Court Case Number 78,900. No decision in that case has been forthcoming as of yet. The State's position in this case, as it was in Munoz, is that the Florida legislature enacted Ch. 87-243, s. 42, Laws of Florida, Section 777.201, Florida Statutes, in direct response to this Court's decision in Cruz, Supra, and that legislation abolished the Cruz two-pronged test for objective entrapment.

It seems apparent from his opinion in Herrera that Justice Kogan at least is convinced that the enactment of Section 777.201 did not effect the viability of the doctrine of objective entrapment as enunciated by this Court in Cruz, Supra. Likewise, Justice McDonald's opinion in Glosson, Supra, indicates that he too feels that Article I Section 9 of the Florida Constitution

offers greater due process protections than have been recognized by the federal courts. He noted that the United States Supreme Court and the other federal courts have only recognized a federal due process defense, regardless of a defendant's predisposition, if:

> ...the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. United States v. Russell, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1642-1643, 36 L.Ed.2d 366 (1973).

In Cruz, this Court rejected the United States Supreme Court's view that the objective and subjective views of entrapment are mutually exclusive and adopted the view of the New Jersey Supreme Court in State v. Molnar, 81 N.J. 475, 484, 410 A. 2d 37, 41 (1980) that the two tests for entrapment can coexist. The New Jersey court fashioned a test of "whether the police activity has overstepped the bounds of permissible conduct" holding 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...

This Court further expanded the concept of objective entrapment by judicially enacting a two-pronged test for objective entrapment purportedly based on the Model Penal Code, Section 2.13 (1962). It was this judicial intrusion into the legislative realm that Section 777.201 was intended to redress. The trial court would

still have to address as a matter of law the threshold due process question whether "police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." However, the two-pronged test of Cruz far exceeds any prior interpretation of what is meant by that phrase and was an improper judicial incursion into the realm of the legislature. Section 777.201 was a direct legislative response to Cruz. While it may still be appropriate for a trial court to determine as a matter of law whether there has been governmental misconduct amounting to a violation of a defendant's constitutional due process rights requiring the dismissal of criminal charges, the two-pronged test for objective entrapment propounded in Cruz as a guide to trial courts is overly restrictive.

Under a due process analysis, the defense would have the burden of showing that the challenged conduct was outrageous or shocking. It involves consideration of the totality of circumstances with no single factor controlling. Under Cruz, the State has the burden of showing that both prongs of the test have been met regardless of whether the totality of the circumstances demonstrate the proper use of governmental power. A failure to show a known specific ongoing criminal activity involving the defendant would be fatal to the prosecution regardless of the defendant's predisposition or the reasonableness of the government's conduct resulting in his apprehension. For example,

in a situation where undercover agents go out to any street corner and ask if anyone has any crack cocaine, under the Cruz test, charges against those dealers responding to the agents query would arguably have to be dismissed unless the police are able to show that they knew that there were prior drug deals at that corner and that the individuals who responded to their requests had been involved in them. The conduct of the police is reasonable. No one not predisposed is being tricked into selling drugs. But under the Cruz test, they could not be prosecuted. Clearly, this test is unreasonably restrictive.

In the instant case, Petitioner admitted using "every drug that come to town". He said that he had been using drugs for twenty years and had been addicted to methamphetamines since 1983. (R53-54). He also admitted that he had "scored drugs" and used them with Hollecker in the past. He exhibited no hesitation in responding to Hollecker's request on this occasion. Regardless of whether Hollecker was a middleman or a State agent, it can hardly be said that his asking Petitioner to find him some drugs violated either a due process "outrageousness" standard or the standard for objective entrapment proposed by Justice Frankfurter in Sherman v. United States, 356 U.S. 369, 382-383, 78 S.Ct. 819, 825-826, 2 L.Ed.2d 848 (1958): "police conduct...falling below standards, to which common feelings respond, for the proper use of governmental power." It cannot be said that the State agents' conduct was so outrageous that due process principles would absolutely bar Petitioner's prosecution nor can it be said that this conduct was so egregious as to

impugn the integrity of the court in which the case is prosecuted.

Despite the fact that this substantial assistance approach to attacking the drug epidemic has been approved by this Court in Hunter and Krajewski, Supra, and despite the fact that asking Petitioner to supply some drugs can hardly be characterized as outrageous conduct impugning the integrity of the Court, the conduct of the State agents here might not even pass the first prong of the threshold test for objective entrapment propounded "To guide the trial courts" by this Court in Cruz at 522. In enacting Section 777.201, the legislature was saying that it was not its intent to be that unduly restrictive in defining prosecutable criminal conduct.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve the decision of the Fifth District Court of Appeal reversing the order of the trial court dismissing the charge against Petitioner based upon objective entrapment.

Respectfully submitted,

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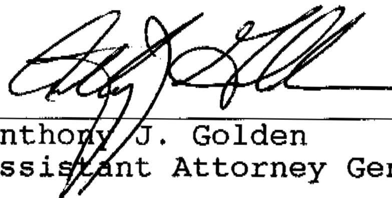
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished to Anne Moorman Reeves, Esquire, Office of the Public Defender, Counsel for Petitioner, 112 Orange Avenue Suite A, Daytona Beach, Florida 32114, this 30th day of December, 1992.



Anthony J. Golden
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

MICHAEL ALLEN ADAMS,

Petitioner,

v. CASE NO. 80,239

STATE OF FLORIDA

Respondent.

______________________________/

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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IN THE CIRCUIT COURT OF OSCEOLA COUNTY, STATE OF FLORIDA

INFORMATION # CR90-1433

THE STATE OF FLORIDA

CT. I TRAFFICKING IN METHAMPHETAIME
CT. II POSSESSION OF COCAINE

VS

MICHAEL ALLEN ADAMS (CT. I)
FARON EUGENE LEDFORD (CT. II)
_______________________/

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, or LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, by and through the undersigned designated Assistant State Attorney under oath, charges that MICHAEL ALLEN ADAMS, on or about the 24th day of September, 1990, in said County and State, did in violation of Florida Statute 893.135, knowingly sell, deliver or possess, more than 28 grams but less than 200 Grams of a mixture containing Methamphetaime and ephedrine, a substance controlled by Florida Statute 893.03(2)(c)(3).

COUNT II

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, or LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, by and through the undersigned designated Assistant State Attorney under oath, charges that FARON EUGENE LEDFORD, on or about the 24th day of September, 1990, in said County and State, did in violation of Florida Statute 893.13(1)(f), unlawfully possess Cocaine, or a mixture containing Cocaine, a substance controlled by Florida Statute 893.03(2)(a).

NOTE: "This information encompasses the transaction and all charges listed on Complaint Number CR90-1433, CR90-1434, and the bond thereon is hereby superseded. The Osceola County Sheriff's Office shall substitute the charge(s) and bond indicated on this information for those on the above cited complaint."

STATE OF FLORIDA
COUNTY OF OSCEOLA

Personally appeared before me: Joseph P. Miurich
Assistant State Attorney of the [illegible] Judicial Circuit of Florida, who being first duly sworn, says that he certifies that he has received testimony under oath from the material witness or witnesses for the offense, and that he instituted the prosecution [illegible] I have hereunto set my hand and seal this 24th day of October, 1990.

[signature]

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES AUGUST 21, 1994
BONDED THRU ASHTON AGENCY INC.

LAWSON LAMAR, State Attorney
Ninth Judicial Circuit of Florida

By [signature]
Designated Assistant State Attorney

FLORIDA BAR NUMBER 157200

12-17-91

APPENDIX PART 2

STATE of Florida, Appellant,

v.

Michael ADAMS, Appellee.

No. 91-2280.

District Court of Appeal of Florida, Fifth District.

June 26, 1992.

Defendant was charged with knowingly selling, delivering, or possessing controlled substance. The Circuit Court, Osceola County, Belvin Perry, Jr., J., granted defendant's motion to dismiss, and state appealed. The District Court of Appeal, Dauksch, J., held that defendant was not entitled to assert entrapment defense.

Reversed and remanded.

Cowart, J., dissented and filed opinion.

Criminal Law ⚷37(8)

Defendant charged with selling controlled substance was not entitled to assert entrapment defense based upon substantial assistance agreement between informer and police where mutual friend of informer and defendant, who was not state agent, rather than informer, made initial contact with defendant regarding sale and defendant had minimal contact with informer throughout transaction.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Anthony J. Golden, Asst. Atty. Gen., Daytona Beach, for appellant.

James B. Gibson, Public Defender, and Paolo G. Annino, Asst. Public Defender, Daytona Beach, for appellee.

DAUKSCH, Judge.

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).

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 *Krajewski v. State*, 587 So.2d 1175 (Fla. 4th DCA), *quashed*, 589 So.2d 254 (Fla.1991), on remand, 597 So.2d 814 (Fla. 4th DCA 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 1175, 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]

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, Judge, 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.

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).

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.

Dauksch, J., concurred in conclusion only.

Kevin Theodore FRASER, Appellant,

v.

STATE of Florida, Appellee.

No. 91-2477.

District Court of Appeal of Florida, Fifth District.

June 26, 1992.

Defendant was convicted of possessing destructive device resulting in bodily injury in the Circuit Court, Osceola County, Belvin Perry, Jr., J., and he appealed. The District Court of Appeal, Cowart, J., held that crime of culpable negligence was not necessarily lesser included offense of possessing destructive device resulting in bodily injury.

Affirmed.

1. Indictment and Information ⚷191

Misdemeanor of culpable negligence is not necessarily lesser included offense of possessing destructive device resulting in bodily injury. West's F.S.A. §§ 784.05(2), 790.161.

2. Indictment and Information ⚷191

Under allegations in charging document, misdemeanor culpable negligence offense was not permissive lesser included offense of destructive device offense as alleged, although facts would have supported giving of verdict alternative jury instruction and would have supported conviction of culpable negligence as lesser included offense had information charging destructive device offense contained adequate allegations relating to culpable negligence. West's F.S.A. §§ 784.05(2), 790.161.

James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David S. Morgan, Asst. Atty. Gen., Daytona Beach, for appellee.

COWART, Judge.

We affirm on the authority of *McNeil v. Wisconsin*, — U.S. —, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); *Traylor v. State*, 596 So.2d 957 (Fla.1992); *Owen v. State*, 596 So.2d 985 (Fla.1992); and *State v. Lints*, 596 So.2d 523 (Fla. 5th DCA1992).[1]

[1, 2] We further hold that the crime of culpable negligence, a misdemeanor under section 784.05(2), Florida Statutes, is not a necessarily lesser included offense of the

1. We note that this court's decision in *Walker v. State*, 573 So.2d 415 (Fla. 5th DCA1991), *rev. denied*, 595 So.2d 558 (Fla.1992), *vacated and remanded*, — U.S. —, 112 S.Ct. 1927, 118 L.Ed.2d 535 (1992), relied upon by the defendant, has recently been remanded to this court for reconsideration in light of *McNeil v. Wisconsin*.