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IN THE SUPREME COURT OF FLORIDA

CASE NO: 80-338

FILED

SID J. WHITE

OCT 19 1992

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

STEPHEN LEVINE,

Respondent.

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

RESPONDENT'S ANSWER BRIEF

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DISTRICT COURT OF APPEAL
4TH DISTRICT

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PRELIMINARY STATEMENT

Respondent, STEPHEN LEVINE, was the Appellee in the Fourth District Court of Appeal and the defendant in the trial court. The petitioner, the State of Florida, was the Appellant in the Fourth District Court of Appeal and the prosecution in the trial court. The parties will be referred to in this brief as they appear before this honorable court.

The following symbol will be used.

"P.B." Petitioner's Initial Brief.

STATEMENT OF THE CASE AND FACTS

In an effort to arrest drug offenders the Broward Sheriff's Office engaged in reverse sting operations. In order to effectively conduct these reverse stings the Sheriff's Office alleges that it had to have "drugs" with which to operate. Since they did not have any "crack" cocaine that was legally seized as contraband, they illegally manufactured it in their own lab. The illegally manufactured "crack" cocaine was subsequently used in a reverse sting operation in which Respondent was arrested. Respondent was charged with the purchase of "cocaine" within one thousand feet of a school.

At hearing, Respondent moved to dismiss the charge because the Sheriff's conduct violated his Due Process rights. During the hearing on the motion, Petitioner, the State of Florida, conceded that the crack cocaine used was manufactured in the police laboratory. The trial judge granted Respondent's motion to dismiss and Petitioner appealed to the Fourth District Court of Appeal. The Fourth District Court of Appeal affirmed the trial court's ruling that the Sheriff's conduct had violated Respondent's Due Process rights and Petitioner subsequently appealed to this Honorable Court by a request that the question be certified as one of "great public importance" consistent with a similar certified question in Kelly v. State, 593 So.2d. 1060 (Fla. 4th. DCA 1992).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal was correct in holding that when the police illegally manufacture drugs to use in reverse sting operations, due process is violated. The illegal manufacture of drugs is, by the totality of the circumstances, violative of due process. When the police commit a crime in order to set up a reverse sting operation the universal cause for justice is shocked. Illegally manufacturing illegal drugs amounts to governmental misconduct that is so outrageous and fundamentally unfair as to constitute a due process violation and compel dismissal. This conduct violates due process regardless of Respondent's "predisposition." Therefore, Respondent respectfully requests that this Honorable court affirm the Fourth District Court of Appeal's decision dismissing the charge against him.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT THE BROWARD COUNTY SHERIFF'S OFFICE VIOLATED RESPONDENT'S DUE PROCESS RIGHTS WHEN IT ILLEGALLY MANUFACTURED ITS OWN CRACK COCAINE AND USED IT TO ARREST RESPONDENT DURING A REVERSE STING OPERATION.

Misconduct by the government can violate a person's due process rights. Given that, the question becomes: to what extent can the misconduct of the Government go before due process is violated. For a violation of due process the government's actions must violate fundamental fairness and shock the universal cause of justice. United States v. Russell, 411 U.S. 423 (1973); see also United States v. Gianni, 678 F.2d 956 (11th Cir. 1982). However, case law as well as the Florida Statutes do allow police and other governmental officials to engage in otherwise illegal activity if during the course of their official duties. See United States v. Gianni, 678 F.2d 956 (11th Cir. 1982) (Holding that under the totality of the circumstances supply and sale of drugs by government agents is not violative of due process); United States v. Russell, 411 U.S. 423 (1973) (holding that infiltrating criminal activity is not a violation of due process). See also § 893.13; § 893.13(5) F.S.A. (1991) (excepting police officers from the provisions that deal with possession, delivery and trafficking in illegal drugs).

The Florida legislature specifically excepted police officers from being criminally liable for acts that § 893.13 forbids. Of the conduct prohibited by § 893.13, police officers are immune

from criminal liability from all, except manufacturing illegal drugs. The elected officials of Florida knew they could exempt police officers from some liability under § 893.13 and they did. They did not specify that police officers be excepted from the portion of § 893.13 that deals with the manufacture of illegal drugs. If this was the legislature's intention they could have, and would have, added specific words to that effect in §893.13(5) along with the other exceptions for police officers. Therefore, by omission, the Florida legislature did not intend to permit or sanction the illegal manufacturing of drugs by police. If nothing else, the intent of the Florida legislature not to condone, support or encourage the illegal manufacture of drugs by police officers under § 893.13(5) is supported by the statutory construction maxim inclusio unius est exclusio alterius.

Considering the language of § 893.13 and § 893.13(5) as did the Fourth District Court of Appeal in Kelly v. State, 593 So.2d. 1060 (Fla. 4th DCA 1992), there is no statutory basis or justification for the Sheriff's illegal manufacture of crack cocaine to be used in a reverse sting. In fact, the Fourth District Court of Appeal specifically held in Kelly that manufacturing crack cocaine was illegal under §893.13(5) - even for police.

Finding that there was no statutory authority under which the Broward County Sheriff's Office could legally manufacture crack cocaine, the Court concluded that such manufacture rose to the level of a constitutional due process violation. Kelly at 1062 citing State v. Glosson. The court held that "police agencies cannot themselves do an illegal act, albeit the intended goal is

legal and desirable." Kelly at 1061. After determining that the manufacturing of crack cocaine by police is a violation of due process, the court noted that it was disturbed that "some of the "crack," which is made [by the Sheriff's department] in batches of 1200 or more rocks, escapes into the community where the reverse sting operations are conducted." Kelly at 1062 [Emphasis added].

Petitioner cites the case United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978); P.B. at 6-7. In Twigg, Drug Enforcement Agents, with the aid of a convicted felon trying to reduce his sentence, set up a laboratory to manufacture speed. Twigg at 380. The Government supplied the laboratory with all the essentials for manufacture including glassware, the indispensable ingredient, and even the location. The felon/agent then enlisted the aid of the defendant. At every step in the manufacturing process the felon/agent "was in charge and furnished all of the laboratory expertise." Id. at 381. The court in Twigg held that the government's conduct in facilitating and operating a laboratory for the illegal manufacture of speed was demonstrably outrageous. Id. at 380.

Ironically, the facts in Twigg are applicable in the case at bar because it was the conduct of the government in supporting such an illegal enterprise that created the "egregious conduct." In the instant case, the Broward County Sheriffs Office laboratory personnel were at all times in charge of the manufacture of the crack cocaine and at all times provided the expertise. This is identical to what the government's agent did in Twigg. The "government may not instigate criminal activity, provide the

place, equipment, supplies and know-how, and run the entire operation with only meager assistance from defendants without violating due process." United States v. Tobias, 662 F.2d 381,386 (5th Cir. 1981) citing Twigg.

In the present case, the Broward County Sheriff's Office provided its personnel with an equipped laboratory for the purpose of illegally manufacturing crack cocaine. The Sheriff's Office ran the entire operation. After the crack cocaine was made, officers merely waited for Respondents "meager assistance" in purchasing it. In light of Tobias and Twigg supra, this conduct is violative of Respondent's constitutionally protected due process rights.

Further, Petitioner contends that the outrageous (and concededly illegal) conduct of the Sheriff's Office should not prevent Respondent from being criminally liable because he "would have purchased the crack cocaine from someone, whether or not the reverse sting was taking place." P.B. at 7. However, the Florida Supreme Court held that "governmental misconduct which violates the constitutional due process right of a defendant regardless of a defendant's predisposition . . ." requires dismissal. State v. Glosso 462 So.2d. 1082, 1084 (Fla 1985).

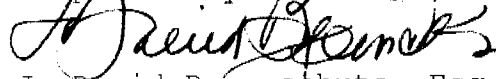
The illegal manufacturing of crack cocaine by the Broward County Sheriff's Office, and subsequent dissemination to Respondent, and others unknown. is by the totality of the circumstances, shocking to the universal cause of justice. To allow the police to engage in patently illegal and harmful conduct for any purpose violates

the Fifth Amendment requirement of fundamental fairness and therefore violates due process of law.

CONCLUSION

THEREFORE, in light of the foregoing, Respondent respectfully urges this Honorable court to AFFIRM the Fourth District Court of Appeal's decision and hold the Broward County Sheriff's illegal manufacture and production of crack cocaine to be a violation of due process in accordance with Glosson, supra, and as such should constitutionally shield Respondent from criminal liability.

Respectfully submitted,

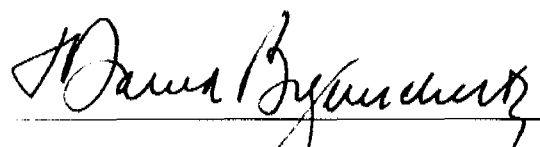


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Initial Brief of Appellant" has been furnished by U.S. Mail to : JOAN FOWLER, Senior Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, on this 12 day of October, 1992.

A handwritten signature in cursive script, reading "J. David Bogenschutz", written over a horizontal line.

J. David Bogenschutz
FL BAR # 131174