FILED
SID J. WHITE
SEP 28 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,338

STATE OF FLORIDA,

Petitioner,

vs.

STEPHEN LEVINE,

Respondent.

****

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

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney
General, Bureau Chief
Florida Bar No. 339067
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellant in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellee 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. "PA" refers to the appendix to this initial brief.

All emphasis has been added by Petitioner.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with purchase of cocaine within one thousand feet of a school (R 10). A motion to dismiss was filed based on the original opinion in Kelly v. State, 17 F.L.W. D154 (Fla. 4th DCA January 3, 1992) (R 4, 13-22). A hearing was held on the motion to dismiss. The state conceded the cocaine in this case was part of Batch 91-A, which was crack cocaine "reconstituted" in the lab from powder cocaine (R 5). The trial court, although disagreeing with the result reached in Kelly, recognized that he was bound by the decision, and granted the motion to dismiss (R 7-8, 23). The state filed its notice of appeal to the Fourth District Court of Appeal (R 24).

On August 5, 1992, the Fourth District Court of Appeal "affirm[ed] the trial court's dismissal of the charge against appellee on the authority of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992), rev. denied, No. 79,280 (Fla. June 2, 1992). However, we certify to the supreme court the same question certified in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992)." (PA).The following question was certified to this court by the Fourth District Court of Appeal in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992):

> 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?

The state filed its notice to invoke the discretionary review of this court. Mandate has issued to the trial court. This court

has postponed its decision on jurisdiction while ordering briefing, and 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 question certified in Williams[1] 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 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 propriety of the actions of the Sheriff's laboratory are supported by 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 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

---

[1] 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?

> 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. See also, United States v. Tobias, 662 F.2d 381, 386-387 (5th Cir. Unit B 1981).

It should be remembered that Respondent did not challenge the charge against him at the trial level on the grounds of outrageous governmental action. Error, if any, would not be fundamental. 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."

Reversal of the district court's opinion is also supported by an opinion from a California appellate court. People v. Wesley, 274 Cal.Rptr. 326 (Cal. App. 2 Dist. 1990). In that case, the defendant argued that the state was prevented from prosecuting him on due process grounds because it was the state which sold him the cocaine. In rejecting that argument, the court stated:

> While Officer Qualls' possession of the rock cocaine was not legal, defendant's due process rights were not violated by his use of the cocaine in this operation, no matter how or from whom Qualls had obtained the cocaine.
>
> First, the source of the contraband is not an element of the crime (possession of cocaine) with which defendant was charged. "The elements of the crime of possession of narcotics are physical or constructive possession thereof coupled with knowledge of the presence of the drug and its narcotic character." (citations omitted)
>
> Second, defendant had no constitutional or other right to purchase only unrecycled street cocaine which had not been obtained by police from another case, or only that which had not been **illegally manufactured by police** or, for that matter, *any* kind of cocaine at all regardless of the source. Indeed, *all* cocaine is contraband, and it is a crime to possess it or manufacture it or possess it for sale or sell it; and possession or manufacture of cocaine is illegal, even when possessed or manufactured by police. (citations omitted) As to the possession by a duly authorized police officer, it is still a crime, but he is immune from prosecution under section 11367 if possession or sale occurs while investigating narcotic violations in the performance of his official duties. **But there is simply no way at all in which defendant would have any immunity from prosecution; thus, we fail to perceive any "substantial right" of defendant that was implicated because of the source of the cocaine.**

> * * *
> In any case, we fail to perceive in what manner the source of the cocaine, or Qualls illegal possession of the contraband would have affected defendant's criminal conduct or would have had a bearing on his due process rights. Further, Qualls' use of the cocaine in this operation, alone, **would not constitute "outrageous governmental conduct."**
> * * *
> Given California, federal and out of state authorities and the record before us, we can only conclude that the police activity here did not rise to the level of outrageous governmental conduct which would preclude the prosecution of defendant on due process grounds. 274 Cal.Rptr. at 329-332.

The result in the California case should be the same here. Respondent should not be protected from prosecution against a prosecution for purchase of cocaine within 1000 feet of a school any more than the California defendant should be protected against prosecution for possession of cocaine, as the source of the drug is not an element of the crime.

The holding below was in error[2] , conflicts with Bass, and should be reversed.

---

[2] Petitioner would note that six judges, one senior judge, and one senior justice of the Fourth 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 Nero v. State, 17 F.L.W. D (Fla. 4th DCA, August 19, 1992)[case no. 91-2515, J. Hersey, specially concurring].

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests this Honorable Court, **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
Attorney General
Tallahassee, Florida

JOAN FOWLER, Senior
Assistant Attorney General
Florida Bar No. 339067
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: J. DAVID BOGENSCHUTZ, Esquire, Suite 4F, Trial Lawyers Building, 633 Southeast Third Ave., Fort Lauderdale, Florida 33301 this 23 day of September, 1992.

Of Counsel

PETITIONER'S APPENDIX

OPINION OF THE FOURTH DISTRICT COURT OF
APPEAL FILED AUGUST 5, 1992
STATE V. STEPHEN LEVINE, CASE NO. 92-0281

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

STATE OF FLORIDA,

Appellant,

v.

STEPHEN LEVINE,

Appellee.

CASE NO. 92-0281.

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

Opinion filed August 5, 1992

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

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

J. David Bogenschutz of Bogenschutz & Dutko, P.A., Fort Lauderdale, for appellee.

RECEIVED
AUG 05 1992
DEPT OF LEGAL AFFAIRS
CRIMINAL DIVISION
WEST PALM BEACH, FL

PER CURIAM.

We affirm the trial court's dismissal of the charge against appellee on the authority of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992), rev. denied, No. 79,280 (Fla. June 2, 1992). However, we certify to the supreme court the same question certified in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992).

GLICKSTEIN, C.J., ANSTEAD and STONE, JJ., concur.

"PA"

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by U.S. Mail to: J. DAVID BOGENSCHUTZ, Esquire, Suite 4F, Trial Lawyers Building, 633 Southeast Third Ave., Fort Lauderdale, Florida 33301 this 23 day of September, 1992.

Of Counsel