0 95 App

IN THE SUPREME COURT OF FLORIDA

MARVIN LOUIS JERELDS,

Petitioner,

v. CASE NO. 80,420

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW OF A
DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANTHONY J. GOLDEN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #162172
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES

CASES: PAGES:

OTHER AUTHORITIES

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

On the night of March 6, 1991, undercover drug agents from the Orange County Sheriff's Office were driving around in an unmarked car attempting to buy narcotics on local street corners in Orlando. They asked Petitioner if he knew where they could buy twenty dollars worth of crack cocaine. Petitioner said that he did and would take them there. He got into the car and directed the agents to the Piper Ridge apartment complex. There, he got out, approached two or three other black males and returned with a bag of suspected crack cocaine. An agent then gave Petitioner twenty dollars and Petitioner gave it to one of the other black males. Petitioner was subsequently arrested.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in the case sub judice is not in conflict with any of the decisions cited by Petitioner. Asking a citizen if he knows where to find crack cocaine is not the type of police activity condemned in this Court's Cruz and Hunter decisions.

Petitioner was not entrapped. He was asked by the undercover agents to get some cocaine for them and he did. He could have refused, but he did not. He showed no hesitation in becoming involved in a drug transaction.

The facts that he was a crack cocaine addict and that he had not profited from the cocaine sale were apparently taken into account by the trial judge in sentencing him to the bottom of the recommended range of the sentencing guidelines despite his habitual offender status.

This is not an appropriate vehicle for this Court to clarify the case law on objective entrapment in Florida.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE IS NOT IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT OR THOSE OF THE SECOND DISTRICT COURT OF APPEAL.

Under Article V, Section 3(b)(3), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(4), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. In Reaves v. State, 485 So.2d 829 (Fla. 1986), this Court held that the conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. In Department of HRS v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986), this Court said that inferential or implied conflict no longer may serve as the basis for jurisdiction. In Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983), this Court initially accepted jurisdiction, but discharged jurisdiction because the case was distinguishable on its facts from those cited as being in conflict with it. Given these bases for determining jurisdiction based on conflict, it cannot be said that the opinion of the Fifth District Court of Appeal in the case sub judice is in express and direct conflict with State v. Hunter, 586 So.2d 319 (Fla. 1991); Cruz v. State, 465 So.2d 516 (Fla. 1985); Beattie v. State, 595 So.2d 249 (Fla. 2d DCA 1992) or Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989), cited by Petitioner.

In the case sub judice, the Fifth District Court simply ruled:

> ...that a police officer asking a citizen where the police officer could find some cocaine is not the type of police activity which entitles a defendant to the defense of objective entrapment under Cruz and Hunter. (Appendix I, p.2).

None of the cases cited by Petitioner are on all fours factually or legally with the instant case. In the Hunter case, a defendant, Ron Diamond, tried to get his drug trafficking sentence reduced by providing substantial assistance in arresting others. He contacted a neighbor named Conklin about assisting him in obtaining drugs. Conklin had no prior criminal record. Diamond pestered Conklin with almost daily telephone calls until Conklin finally agreed to help him find some drugs. In Cruz, the police used an officer posing as an inebriated drunk with $150 hanging out of his pocket to entice Cruz to steal the money.

Nothing like that occurred in the instant case. There was no substantial assistance agreement or quick money. Petitioner did not have to be coerced into becoming involved in the cocaine transaction. The police were attempting to interrupt a specific ongoing criminal activity, the street corner sales of crack cocaine. They used a means reasonably tailored to apprehend those involved in the street corner sales, asking people loitering on street corners where they could purchase some crack cocaine. This case simply does not involve the level of coercive police behavior designed to dupe an innocent citizen into Participating in illegal activity which was involved in Hunter and Cruz.

In Beattie, law enforcement agencies had placed an ad in a local Collier County shopping publication advertising child pornography. When Beattie purchased a video from the police, he was arrested. The Second District found that he had been objectively entrapped. There was no known child pornography in the Collier County area at the time and the police did not know Mr. Beattie. Clearly, nothing near that type of outrageous police conduct could be said to have occurred in the instant case.

In Bowser, undercover police officers picked up a hitchhiker who had just been to the doctor with a broken arm and who had been given a prescription for Tylenol III (Codeine). They gave the defendant the money to fill the prescription, bought him some beer and then offered him three dollars for six of the pills. Again, nothing anywhere near this outrageous could be said to have occurred in the instant case.

While it is true that the law on objective entrapment in Florida needs some clarification, this case is not the appropriate vehicle for it. Counsel for Petitioner admits that his client's virtue was "easier to test than one would wish." Petitioner got on the witness stand and admitted his willing participation in this venture. This Court should decline to exercise its discretionary jurisdiction in this case.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent would submit that the decision of the Fifth District Court of Appeal in the case sub judice is not in direct conflict with any of the cases cited by Petitioner and this Court should decline to accept jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANTHONY J. GOLDEN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #162172
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished to Anne Moorman Reeves, Esquire, Office of the Public Defender, Counsel for Petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 28th day of September, 1992.

Anthony J. Golden
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

MARVIN L. JERELDS,
a/k/a MARVIN L. JERALDS,

Petitioner,

v. CASE NO. 80,420

STATE OF FLORIDA

Respondent.

_____/

APPENDIX

Decision of the Fifth District Court of Appeal
dated August 7, 1992

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANTHONY J. GOLDEN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #162172
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

C 91-2099 24

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

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

MARVIN JERALDS,

Appellant,

v.

CASE NO. 91-2370

STATE OF FLORIDA,

Appellee.

Opinion filed August 7, 1992

Appeal from the Circuit Court for Orange County, Jeffords D. Miller, Judge.

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

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

PER CURIAM.

Marvin Jeralds was charged with and convicted of delivery and possession of cocaine. The issue raised by this appeal is entrapment. We affirm.

Three undercover agents approached Jeralds, who was standing on a street corner, and asked if he knew "Lisa," a known drug user. Jeralds himself was unknown to the agents at the time. When Jeralds acknowledged knowing Lisa, the agents asked him where they could find some cocaine. Jeralds got into the unmarked police car and directed them to an apartment complex. Once there, Jeralds left the car, approached several men, and returned to the agents' car with some crack cocaine. One of the agents handed $20 to Jeralds, who in turn

handed the money to one of the drug dealers. The drug dealers immediately ran off, and only Jeralds was arrested and prosecuted.

Based on the foregoing facts and the case of State v. Hunter, 586 So. 2d 319 (Fla. 1991), Jeralds contends that the trial court erred by denying his motion for judgment of acquittal. In Hunter, the Florida Supreme Court reaffirmed the objective entrapment standard adopted 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). Hunter, 586 So. 2d at 321-22.

The Hunter rationale supports the defense of objective entrapment except where police activity interrupts "specific ongoing criminal activity." Id. at 322. As noted by the Hunter court, the objective entrapment standard focuses solely on police conduct, not on the subjective willingness or proclivity of the defendant to commit the crime. See id. In the instant case, the trial court found, and we agree, that a police officer asking a citizen where the police officer could find some cocaine is not the type of police activity which entitles a defendant to the defense of objective entrapment as explained in Cruz and Hunter.

AFFIRMED.

GOSHORN, C.J. and DIAMANTIS, J., concur.
COBB, J., concurs specially with opinion.

COBB, J., concurring specially.

If this case is governed by the rationale of State v. Hunter, 586 So.2d 319 (Fla. 1991), then it seems to me that Jeralds was entitled, as he contends, to a judgment of acquittal. In Hunter the Florida Supreme Court, subsequent to the enactment of section 777.201, Florida Statutes (1987), reaffirmed the objective entrapment standard it adopted 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), thereby implicitly invalidating the statute pursuant to the due process clause of the Florida Constitution. See Hunter (Kogan, J., concurring in part, dissenting in part) at 325.

The Hunter rationale supports the defense of objective entrapment except where police activity interrupts "specific ongoing criminal activity." Its focus is solely on police conduct, not on the subjective willingness or proclivity of the defendant to commit the crime; the defendant's guilt cannot be inferentially established by the alacrity with which he participates in activity created or suggested by the police.

It may very well be, as Judge Schwartz recently observed, that the opinion in Hunter is at odds with the federal courts, the other forty-nine states, the Florida Legislature, executive law enforcement, and the doctrine of separation of powers. See Lewis v. State, 597 So.2d 842 (Fla. 3d DCA 1992) (Schwartz, C.J., concurring specially). It may also be that the implications of Hunter are incompatible with standard sting operations in Florida. See Lewis, n. 1 at 844. Nevertheless, as Judge Schwartz reluctantly concedes, appellate court judges are obligated to follow the ipse dixit of the Florida Supreme Court. If Hunter represents the current law of Florida in regard to the defense of entrapment, then the instant conviction should be reversed.

The true issue on this appeal is whether Hunter has been superseded sub silentio by Herrera v. State, 594 So.2d 275 (Fla. 1992). In Herrera, the majority opinion considered the constitutionality of section 777.201(2), Fla. Stat.,[1] which was enacted in 1987 -- but which was not mentioned in Hunter. Herrera was charged, inter alia, with trafficking in cocaine. The charges resulted from a sting operation initiated by a confidential informant. Herrera raised the affirmative defense of entrapment. At trial he sought a jury instruction that the burden to disprove entrapment was on the state. Instead, the trial court instructed the jury in accordance with section 777.201(2), that the defendant carried the affirmative burden to prove entrapment.

The Herrera opinion specifically upheld the 1987 legislation against the contention that it was violative of the due process clauses of the United States and Florida Constitutions. Said the court:

> As stated earlier, the lack of predisposition to commit the crime charged is an essential element of the defense of entrapment. The predisposition to commit a crime, however, is not the same as the intent to commit that crime. As explained by the New Jersey Supreme Court in its consideration of this issue, "predisposition is not the same as *mens rea*. The former involves the defendant's character and criminal inclinations; the latter involves the defendant's state of mind while carrying out the allegedly criminal act." State v. Rockholt, 476 A.2d 1236, 1242 (N.J. 1984). Requiring a defendant to show lack of predisposition does not relieve the State of its burden to prove that

---

[1] Section 777.201(2), Florida Statutes (1987) reads:

> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

> the defendant committed the crime charged. The standard instructions require the State to prove beyond a reasonable doubt all the elements of the crime, and we find no violation of due process in requiring defendants to bear the burden of persuading their juries that they were entrapped.

Herrera at 278.

Justice Kogan's special concurrence lamented the majority's failure to discuss, or even mention, the objective entrapment analysis developed in Cruz, Glosson,[2] and Hunter. The concurrence attempted to limit the majority opinion to subjective entrapment only, but succeeded in picking up only one supporting vote for this view. Apparently, five members of the court were unwilling to draw the objective-subjective dichotomy urged by the concurring opinion, and Herrera's conviction, affirmed by the district court,[3] was approved. Logic compels the conclusion that if Hunter involved the issue of objective entrapment, so, then, did Herrera, since the latter case arose from a sting operation initiated by law enforcement. Based on Herrera, I concur in the affirmance of Jerald's conviction.

---

[2] State v. Glosson, 462 So.2d 1082 (Fla. 1985).

[3] Herrera v. State, 580 So.2d 653 (Fla. 4th DCA 1991), aff'd, 594 So.2d 275 (Fla. 1992).