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JAN 22 1993
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARVIN LOUIS JERELDS,

Petitioner/Appellee,

versus

STATE OF FLORIDA,

Respondent/Appellant.

S.CT. CASE NO. 80,420

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On March 25, 1991, the petitioner, Marvin Lewis Jerelds, was charged by information with delivery of cocaine (Count I) and possession of cocaine (Count II). A jury found Jerelds guilty on both counts (R233-234). On September 5, 1991, the trial court adjudicated Jerelds guilty and sentenced him to concurrent seven-year sentences as a habitual offender. On appeal, the conviction was affirmed by the district court (Appendix). This court accepted jurisdiction of this cause on December 23, 1992.

STATEMENT OF THE FACTS

Agents Parsell, Guy, and Hanton drove an unmarked car around to local street corners attempting to puchase cocaine. They saw Jerelds, whom they did not know, who they stated was not the target of any narcotics investigation, and who did not signal the car in any way. The agents drove up to Jerelds and asked whether he knew Lisa and her whereabouts. (Lisa is a local drug user.) There is contradictory testimony about whether the agents first offered Jerelds a ride to his housing project and then mentioned drugs after they arrived, or asked about drugs first and were joined by Jerelds as guide. It is agreed that the agents prevailed upon Jerelds to buy $20 worth of crack cocaine from some dealers standing around. Jerelds got the crack from these dealers, turned it over to the agents, and got $20, which he in turn gave the dealers. The dealers immediately ran off, and the agents made no effort to apprehend them.

SUMMARY OF THE ARGUMENT

Police actions that are not directed toward the interruption of specified ongoing criminal activity and that lead to the arrest of a person not known to engage in that activity are improper and cannot be tolerated. The enactment of section 777.201, Florida Statutes (1987), does not eliminate the need to insure that government not "play an ignoble part" in the enforcement of criminal law.

ARGUMENT

THE PETITIONER WAS ENTRAPPED AS A MATTER OF LAW ACCORDING TO THE "OBJECTIVE" STANDARD OF ENTRAPMENT WHICH IS VIABLE FLORIDA LAW.

"[I]t is a less evil that some criminals should escape than that the Government should play an ignoble part." Mr. Justice Holmes stated this principle in 1928, Olmstead v. U.S., 277 U.S. 438, 470, 72 L. Ed. 944, 952, 48 S. Ct. 564 (1928), Holmes, J., dissenting, and Mr. Justice Frankfurter repeated thirty years later in Sherman v. U.S., 356 U.S. 369, 2 L. Ed. 2d 848 78 S. Ct. 819 (1958), in a separate opinion in which he was joined by Justices Douglas, Harlan, and Brennan.

The idea of a government that refuses to play an ignoble part remains a fundamental concept in our legal system, and this court, 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), enunciated a rule to bear the concept out. That rule is the so-called "objective" test for entrapment. It proscribes police "virtue testing" and inappropriate police techniques. For all the reasons put forward since 1928, it is a good rule, and right. It is, moreover, the existing law in Florida. See, e.g., State v. Hunter, 586 So. 2d 319 (Fla. 1991); Ricardo v. State, 591 So. 2d 1002 (Fla. 4th DCA 1991); Bowser v. State, 555 So. 2d 879 (Fla. 2d DCA 1989). But cf. Gonzales v. State, 571 So. 2d 1346 (Fla. 3d DCA 1990) (section 777.201 abolished the Cruz objective test).

The petitioner, Mr. Jerelds, did not buy the drugs for himself. The purchase was not his idea. He made no money on his purchase. What he got, if anything, was a ride home. The state would justify the undercover officers' actions by pointing to Mr. Jerelds's sentence, at the low end of the guidelines, and assure this court that the trial judge took account of the circumstances of the bust. After all, Mr. Jerelds is an addict, and did make the buy. This is nothing but cavil; worse, it misses the mark entirely. It is not the particular purchase that this case is about, but "standards of justice."

According to the state, this case is not "an appropriate vehicle" for clarification of the law on entrapment. On the contrary, it is a perfect enactment of the inner limit of unacceptable police behavior--where "outrageous" has its beginnings.

The police had no knowledge of drug use on Mr. Jerelds's part; they saw or suspected no "ongoing" activity (except that of the sellers, who escaped handily, without pursuit). There was no reason whatever to conclude that Mr. Jerelds belonged to the "street corner" coterie whose trade was under attack. The random inquiry whether persons know a certain "Lisa" is as little "focused" as the $150 in the pocket of the decoy "drunken bum" of Jones v. State, 483 So. 2d 119 (Fla. 2d DCA), rev. denied (1983) (entrapment as a matter of law where police acts do not target specific ongoing activities, even though "[s]ociety is at war with the criminal classes" [citation omitted]).

It has been suggested that "objective" entrapment has been abolished when the legislature enacted "subjective" entrapment as section 777.201, Florida Statutes (1987). Gonzales v. State, 571 So. 2d at 1349; State v. Lopez, 522 So. 2d 537 (Fla. 3d DCA 1988). The suggestion is not a desideratum but a district court's attempt to apply the law as it sees fit. The Gonzales decision represents what has been called the "crime control" model of constitutional procedural requirements, while the Cruz decision stands for the "due process" model. See R. M. Smith, Liberalism and American Constitutional Law (1985), citing H. Packer, The Limits of the Criminal Sanction (1968). The "crime control" adherents look upon the due process model as an "obstacle course" for police and prosecutors. The fundamental problem is that crime control that winks at--even encourages--substandard police conduct can never achieve its object.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, Petitioner respectfully requests that this honorable court reverse the judgment and sentence of the Fifth District Court of Appeal, and remand this cause to the trial court with directions that the petitioner be discharged.

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 Marvin Louis Jerelds, Inmate No. C- 075860, MB#102, Charlotte Corr. Inst., 33123 Oil Well Road, Punta Gorda, Florida 33955, on this 19th day of January, 1993.

Anne Moorman Reeves

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

MARVIN LOUIS JERELDS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	SUPREME COURT CASE NO. 80,420

A P P E N D I X

91-1008
PA

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

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[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.

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[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).