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IN THE SUPREME COURT OF FLORIDA

MARVIN LOUIS JERELDS,

Petitioner,

v. CASE NO. 80,420

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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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

Even assuming that the two-pronged test for objective entrapment set forth by this Court in Cruz v. State, 465 So. 2d 516 (Fla. 1985) is still the law of Florida, it cannot be said that, in the instant case, the police were not interrupting a specific ongoing criminal activity and using means reasonably tailored to accomplish that goal. The specific ongoing criminal activity was the street corner sales of crack cocaine. The means reasonably tailored to interrupt those sales was simply for undercover police officers to ask people standing on the street corners if they knew where they could find some cocaine. Without any hesitation or coercion, Petitioner responded affirmatively and obtained $20 worth of crack cocaine for the police and was arrested. The District Court said: "...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...". If the police conduct involved in the instant case violates the Cruz test, perhaps it is now appropriate to recede from that test in favor of a less restrictive due process standard.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE CASE SUBJUDICE THAT PETITIONER WAS NOT ENTITLED TO THE DEFENSE OF OBJECTIVE ENTRAPMENT WAS CORRECT.

The issue of whether or not Section 777.201, Florida Statutes (1987), legislatively abolished the two-pronged test for objective entrapment set out by this Court in Cruz v. State, 465 So. 2d 516 (Fla. 1985) was briefed and argued before this Court last year in Munoz v. State, Florida Supreme Court Case No. 78,900, and is scheduled for oral argument in April in Adams v. State, Florida Supreme Court Case No. 80,239. The State's position in this case, as it was in Munoz and Adams, 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, and that legislation abolished the Cruz two-pronged test for objective entrapment.

However, even assuming that the two-pronged test of Cruz is still the law of Florida, it can be argued that the police conduct involved in the instant case meets that test. The specific ongoing criminal activity involved in this case was the street corner sale of crack cocaine. The means reasonably tailored to interrupt that activity was simply for undercover agents to ask people standing on street corners if they knew where crack cocaine could be purchased. Without any hesitation or coercion, Petitioner responded to such an inquiry by taking the agents to a location where he knew crack cocaine could be found and purchasing $20 worth of it for them. He now contends

that he was objectively entrapped. The State feels and the District Court held 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...

In Cruz, this Court 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 objective and subjective 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...

Even using the standard set forth in Molnar, it cannot be said that asking a citizen if he knows where a crime is being committed does not overstep the bounds of permissible behavior and is certainly not so egregious as to impugn the integrity of the judicial system.

Assuming that the two-pronged test of Cruz has been legislatively abolished, the police conduct in this case would still be subject to a due process "outrageousness" test. In Sherman v. United States, 356 U.S. 369, 382-383, 78 S.Ct. 819, 825-826, 2 L.Ed.2d 848 (1958), Justice Frankfurter suggested that due process required a review of these cases checking for "police conduct...falling below standards, to which common feelings

respond, for the proper use of governmental power." 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. In the instant case, 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.

In his special concurring opinion in the case subjudice, Judge Cobb suggests that the apparent reaffirmation of Cruz in State v. Hunter, 586 So. 2d 319 (Fla. 1991) has been "superceded sub silentio" by this Court's decision in Herrera v. State, 594 So. 2d 275 (Fla. 1992), upholding the constitutionality of Section 777.201. Perhaps, it is now appropriate to use this case to specifically reject the two-pronged test for objective entrapment in favor of a less restrictive test grounded in the due process clauses of the state and federal constitutions.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve the decision of the District Court of appeal affirming the judgment and sentence of the trial court in all respects.

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 delivered to Anne Moorman Reeves, Esquire, Office of the Public Defender, Counsel for Petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 8th day of February, 1993.

Anthony J. Golden
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

MARVIN LOUIS JERELDS,

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A P P E N D I X

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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

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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).