IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,477

STATE OF FLORIDA,

Petitioner,

v.

DAVID JAMES NERO,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The respondent was the appellant and the defendant, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court. References to the record will be preceded by "R." 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 372-73). No pre-trial motion to dismiss was filed. Respondent never challenged the charge and conviction in the trial court based on the allegedly outrageous conduct of the Sheriff's Department.

Respondent was found guilty as charged (R 379). The trial court adjudicated respondent guilty (R 387-90). Respondent was sentenced to four years, with a three year mandatory minimum sentence (R 387, 388). Respondent appealed his conviction and sentence (R 336). On August 19, 1992, the Fourth District Court of Appeal reversed appellant's conviction on the authority of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1991) and Grissett v. State, 594 So.2d 321 (Fla. 4th DCA 1992). The following question was certified to this Court:

> Does the source of illegal drugs used by law enforcement personnel to conduct reverse stings constitutionally shield those who because illicitly involved with such drug from criminal liability?

The State filed its notice to invoke jurisdiction. This Court postponed its decision on jurisdiction and set a briefing schedule.

SUMMARY OF THE ARGUMENT

I

The opinion of the Fourth District should be quashed, and this case remanded with directions that respondent's conviction be reinstated. The Fourth District was incorrect in holding that the practice of the Broward Sheriff's Office of reconstituting powder cocaine was illegal. Further, even if the actions were illegal, they would not insulate respondent from criminal liability as his right to due process has not been violated.

Additionally, there was no objection at trial on the grounds relied on by the Fourth District. This issue was not preserved and does not constitute fundamental error.

POINT I

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. THERE WAS NO FUNDAMENTAL ERROR.

The State requests that the certified question be answered in the negative. The actions of the Broward Sheriff's Office did not constitute the illegal manufacture of contraband. The Sheriff's Office was not acting in an outrageous manner by reconstituting powder crack cocaine that had no evidentiary value into unadulterated crack cocaine rocks for reverse stings.

The propriety of the actions of the Sheriff's laboratory is 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 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.

This 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 illegality 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 380-81. 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 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 that took place in Twigg. Further, Twigg was limited by Beverly. See also United States v. Tobias, 662 F.2d 381, 386-87 (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, is not fundamental. See Ray v. State, 403 So.2d 956 (Fla. 1981) and State v. Smith, 240 So.2d 807 (Fla. 1970). Respondent would have purchased the cocaine from someone, whether or not the reverse sting operation occurred. The Sheriff 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 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 People v. Wesley, 224 Cal.App.3d 1130, 274 Cal.Rptr. 326 (1990). In that case the defendant argued that the state was prevented, on due process grounds, from prosecuting him because it was the State that sold him the cocaine. The Court disagreed, stating:

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 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 329-32.

Respondent should not be protected from prosecution for

purchase of cocaine within 1000 feet of a school. The source of the drug is not an element of the crime.

The holding below was in error,[1] conflicts with Bass, and should be reversed.

[1] Petitioner notes 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), Nero v. State, 17 F.L.W. D1946 (Fla. 4th DCA Aug. 19, 1992).

CONCLUSION

Based on the preceding argument and authorities, this Court should quash the opinion of the Fourth District and reverse with directions that the charge against respondent be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by mail to Kevin Kulick, 633 Southeast Third Ave., Suite 4F, Fort Lauderdale, FL 33301, this 12th day of October 1992.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. **80,477**

TERRY LITE,

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STATE OF FLORIDA,

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Petitioner's Appendix

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Criminal Procedure, is misplaced, as that rule is applicable only after trial has begun. Also, the dicta in *Harp v. Hinckley*, 410 So.2d 619 (Fla. 4th DCA 1982), upon which the state relies was superseded by section 907.041, Florida Statutes (1991).

Accordingly, we grant the petition for writ of habeas corpus and remand with instructions to the trial court to hold a hearing and to set reasonable bond for petitioner within 48 hours of receipt of this opinion. (DOWNEY, GUNTHER and FARMER, JJ., concur.)

* * *

Criminal law—Question certified whether source of illegal drugs used by law enforcement personnel to conduct reverse stings constitutionally shields those who become illicitly involved with such drugs from criminal liability

DAVID JAMES NERO, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-2515. Opinion filed August 19, 1992. Appeal from the Circuit Court for Broward County, Robert B. Carney, Judge. Kevin J. Kulik of Kay, Bogenschutz and Dutko, P.A., Fort Lauderdale, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We reverse appellant's conviction on the authority of *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1991), and *Grissett v. State*, 594 So.2d 321 (Fla. 4th DCA 1992), and remand to the trial court with instructions to discharge appellant. As we did in *Johnson v. State*, 17 F.L.W. 1609 (Fla. 4th DCA July 1, 1992), *Sheffield v. State*, 17 F.L.W. 1609 (Fla. 4th DCA July 1, 1992), *Palmer v. State*, 17 F.L.W. 1286 (Fla. 4th DCA May 20, 1992), and *Williams v. State*, 593 So.2d 1064 (Fla. 4th DCA 1992),[1] we again certify the following question to the Florida Supreme Court as a question of great public importance:

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?

REVERSED AND REMANDED WITH DIRECTIONS; QUESTION CERTIFIED. (DOWNEY and FARMER, JJ., concur. HERSEY, J., concurs specially with opinion.)

[1]*But see Robertson v. State*, No. 91-2288 (Fla. 4th DCA July 15, 1992) [17 F.L.W. D1713], *Mercano v. State*, No. 91-1345 (Fla. 4th DCA July 8, 1992) [17 F.L.W. D1657], *Walker v. State*, 17 F.L.W. 1516 (Fla. 4th DCA Jun. 17, 1992), *Fox v. State*, 17 F.L.W. D1408 (Fla. 4th DCA Jun. 3, 1992), *Rhodes v. State*, 597 So.2d 974 (Fla. 4th DCA 1992), *Hamilton v. State*, 596 So.2d 175 (Fla. 4th DCA 1992), *Grissett v. State*, 594 So.2d 321 (Fla. 4th DCA 1992), *Rivera v. State*, 593 So.2d 1063 (Fla. 4th DCA 1992), and *Scott v. State*, 593 So.2d 1064 (Fla. 1992), all of which involve the same crack cocaine manufactured by Sheriff Navarro, where we failed (for some unarticulated reason) to certify the same question.

(HERSEY, J., concurring specially.) I concur only because I am obliged by precedent to do so.

* * *

Torts—Medical malpractice—Failure of defendant to conduct presuit screening or investigation after receiving notice of intent to litigate

JOSEPH PLEMONDON, DEBBIE PLEMONDON, his wife, and their minor dependent children, HOPE DANIELLE PLEMONDON, and LAURA PLEMONDON, Petitioners, v. ALBERTO FERNANDEZ, M.D., CARLOS VIDALON, M.D., FERNANDEZ AND ASSOCIATES, P.A., PHILIP GORDON, M.D., and STEVEN DOLBERG, D.C., Respondents. 4th District. Case No. 92-0490. Opinion filed August 19, 1992. Petition for Writ of Certiorari to the Circuit Court for Broward County, Miette K. Burnstein, Judge. Donald Tobkin of Sheldon J. Schlesinger, P.A., Fort Lauderdale, for petitioners. Esther E. Galicia of George, Hartz, Lundeen, Flagg & Fulmer, Coral Gables, for respondents Fernandez, Vidalon and Fernandez and Associates. Lewis S. Kimler, Plantation, for respondents Gordon and Dolberg.

(PER CURIAM.) The petition for a writ of common law certiorari is hereby DENIED. (GUNTHER, J., and OWEN, WILLIAM C., JR., Senior Judge, concur. FARMER, J., dissents with opinion.)

(FARMER, J., dissenting.) The issue raised in this medical malpractice case is whether a trial court should strike a doctor's defenses when the doctor fails entirely to conduct any presuit screening or investigation after receiving a notice of intent to initiate litigation. In my opinion, the statute requires the presumptive remedy to be a dismissal of the doctor's defenses for such a statutory default unless there are special reasons to decline to do so. As there are none in this case, I think that certiorari should be granted and the case returned to the trial court for appropriate action.

The procedural facts are simple. Plaintiffs sent the respondents Fernandez, Vidalon, their professional association, and Doctors Gordon and Dolberg a notice of intent to initiate medical malpractice litigation. The notice was ostensibly sent with some requests for presuit discovery, but the trial court's resolution of contested facts appears to be that no such requests were actually received by the doctors. They did testify that they thought their office staff sent the notice to their malpractice insurance carrier. The insurance carrier apparently says that it did not receive any such notice from its insureds. In any event, nothing was done during the ensuing 90-day period, and longer for that matter, to investigate, review and evaluate plaintiffs' possible claim.

Ultimately, without receiving any response from the doctors, plaintiffs filed their malpractice action in the circuit court. After the doctors filed responsive pleadings, plaintiffs moved to strike their defenses on the grounds that they had failed to conduct any presuit screening or investigation of the incipient claim, a fact not seriously disputed by the doctors or their carrier, and that they had failed to respond to presuit discovery requests, a failure which the circuit court appears to have resolved in favor of the doctors upon a finding that no such request was enclosed with the notice.

In refusing to strike the doctors' defenses, the trial court said:

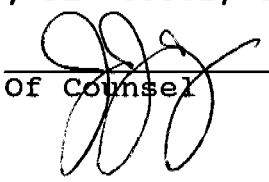
> THE COURT: I don't favor striking those kinds of defenses or those kinds of claims for this kind of reason.
>
> * * *
>
> THE COURT: Let me put it this way. I wouldn't be doing you any favors; it would come right back. The Fourth District does not favor not hearing merits any more than I do. They are probably a lot more anxious to have trials on merits, rather than [dismissals on] technical defects.
>
> * * *
>
> THE COURT: As I understand Dressler,[1] apparently there were egregious actions by the plaintiff to specifically prohibit the doctors from properly evaluating the case. A, I don't think that so far what you're telling me is egregious. So far what you are saying to me, according to counsel for the physicians, [is] that they were sloppy or negligent or whatever, at worst. At best it was an honest error. In any event, it's not the kind of thing where they are flaunting [flouting-sic?] court orders and say I don't care what the judge says, I won't do it. I guarantee under situations like that where we have that kind of behavior and attitude, that is the purpose, for the court to say we have discretion, you have yanked the court around long enough, paint or get off the ladder. I think we have not risen to that point yet and hopefully we won't.

I interpret the foregoing to amount to a determination that doing absolutely nothing to investigate a potential malpractice claim after receiving a notice of intent may be unreasonable, but the failure should not result in a dismissal of the doctors' defenses because dismissal is too harsh a sanction for such non-compliance with the statute.

I cannot agree with this construction of the statute. Section 766.106(3)(a), Florida Statutes (1991), creates a comprehensive duty of presuit investigation and screening. It begins by saying flatly that during the 90-day period after receipt of a notice to initiate litigation "the prospective defendant's insurer or self-insurer *shall* conduct a review to determine the liability of the

CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by mail to Kevin Kulick, 633 Southeast Third Ave., Suite 4F, Fort Lauderdale, FL 33301, this 12th day of October 1992.



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