IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,731

STATE OF FLORIDA,

Petitioner,

vs.

JOHN FRANCIS ROBERTSON,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

****

PETITIONER'S BRIEF ON THE MERITS

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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 438). Just prior to trial, Appellant's trial counsel orally moved to suppress the cocaine, claiming that the cocaine had been illegally "manufactured." (R 119). Defense counsel also orally moved to dismiss the charge against Appellant, contending that the actions in law enforcement in manufacturing cocaine violated "due process" and "fundamental fairness." (R 120). The state acknowledged the cocaine in this case was part of Batch 9-A, which was crack cocaine reconstituted in the lab from powder cocaine (R 123). The trial court denied both the suppression motion and the motion to dismiss. (R 123). Appellant was thereafter found guilty following a jury trial and sentenced to 5½ years in prison, with a mandatory minimum term of 3 years. (R 436, 450). Appellant thereupon appealed his conviction to the Fourth District Court of Appeal.

On July 15, 1992, the Fourth District Court of Appeal per curiam reversed the above-styled case, citing to Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992), rev. denied, No. 79,280 (Fla. June 2, 1992) and Grissett v. State, 594 So.2d 321 (Fla. 4th DCA 1992), appeal dismissed, No. 79,664 (Fla. May 29, 1992). In their concurring opinion, Senior Justice Alderman and Senior Judge Owen stated that they felt that the above precedents were "wrongly decided." (PA 1-2). Subsequently, on October 14, 1992, the Fourth District certified to this Court the same question it certified in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992), rev. granted, No. 79,507 (Fla. 1992), to-wit:

> 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?

In addition, the Fourth District stayed mandate pending review in this Court. (PA 3). Thereafter, the state filed its notice to invoke the discretionary review of this 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 by the Fourth District be answered in the negative.[1] 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

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[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.

Moreover, 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,'" supra 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 Respondent 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, namely 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.

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[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. D1946 (Fla. 4th DCA, August 19, 1992) [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,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Joseph R. Chloupek, Assistant Public Defender, Counsel for Respondent, Criminal Justice Bldg., 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this 7th day of December, 1992.

DOUGLAS J. GLAID
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,731

STATE OF FLORIDA,

Petitioner,

vs.

JOHN FRANCIS ROBERTSON,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

****

APPENDIX

ROBERT A. BUTTERWORTH
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Counsel for Petitioner

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

JOHN FRANCIS ROBERTSON,

Appellant,

v. CASE NO. 91-2288.

STATE OF FLORIDA,

Appellee.

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

Opinion filed July 15, 1992

Appeal from the Circuit Court for Broward County; Barry E. Goldstein, Judge.

Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Douglas J. Glaid, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Reversed on the authority of Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992), and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992). Upon remand the trial court shall enter an order of discharge.

REVERSED AND REMANDED.

LETTS, J., concurs.
ALDERMAN, JAMES E., Senior Justice, and OWEN, WILLIAM C., JR., Senior Judge, concur specially, with opinion.

ALDERMAN, JAMES E., Senior Justice, and OWEN, WILLIAM C., JR., concurring specially:

We concur because of the above precedents, cases which we feel were wrongly decided.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

JOHN FRANCIS ROBERTSON

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 91-02288

L.T. CASE NO. 90-8093 CF10
BROWARD

October 14, 1992

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed July 30, 1992, for rehearing en banc is hereby denied; further,

ORDERED that appellee's motion filed July 30, 1992, for certification of question is granted. The following question is hereby certified to the Supreme Court of Florida:

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?

ORDERED that appellee's motion filed July 30, 1992, to stay mandate pending Supreme Court review is hereby granted.

I hereby certify the foregoing is a true copy of the original court order.

Marilyn Beuttenmuller

MARILYN BEUTTENMULLER
CLERK.

cc: Public Defender 15
Attorney General-W. Palm Beach

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/CH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by U.S. Mail to: Joseph R. Chloupek, Assistant Public Defender, Counsel for Respondent, Criminal Justice Bldg., 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this 7th day of December, 1992.

DOUGLAS J. GLAID
Assistant Attorney General