IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,027

STATE OF FLORIDA,

Petitioner,

vs.

SHELDON GATHERS,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

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INITIAL BRIEF OF THE PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
SENIOR ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL LAW,
WEST PALM BEACH BUREAU
FLORIDA BAR NO. 339067

CO-COUNSEL FOR PETITIONER

JOHN TIEDEMANN
Assistant Attorney General
Florida Bar #319422
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Co-Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA RULE:

FLORIDA STATUTES:

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.

The symbol "R" will be used to reference the record on appeal.

STATEMENT OF THE CASE AND FACTS

On February 14, 1991, the State filed an information in the Broward County Circuit Court charging respondent with having purchased cocaine within 1,000 feet of a schoolyard contrary to §893.13(1)(e), Fla. Stat. the previous January 25 (R 245-246). Respondent did not file any pretrial motions to dismiss this charge, and the cause proceeded to trial before Judge William Dimitrouleas on May 20-21 (R 1-234). At trial, the State sought to prove respondent's guilt for the offense charged by introducing evidence that respondent had approached undercover Deputy Ryan Allen to buy cocaine (R 96-100). Respondent then gave Deputy Ryan cash for some crack cocaine rocks which, it turned out, had been reconstituted from previously-confiscated powdered cocaine by the chemists of the Broward County Sheriff's Office (R 129-130).

Obviously angling for either a conviction for the lesser included offense of attempted purchase of cocaine within 1,000 feet of a schoolyard (R 248) or an outright jury-pardon acquittal, respondent testified in his own defense that he had actually obtained the cocaine solely as a conduit for a prostitute whom he was patronizing on the evening in question (R 161-163). Defense counsel secured the appropriate jury instructions (R 170, 176-177, 182, 209-210, 213, 220-222), and pursued these tracts in his closing arguments (R 184-185, 191-192, 207-208). Nonetheless, his client was found guilty and adjudicated as charged, and on June 27 received a 3-year mandatory minimum prison sentence (R 227-231, 240, 248, 253-254, 256-258).

Respondent timely appealed these dispositions to the Fourth District (R 259). He essentially alleged that the trial judge had fundamentally erred by failing to dismiss the charge sua sponte upon state constitutional due process grounds, citing that court's post-trial decisions of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), review denied, 599 So. 2d 1280 (Fla. 1992) and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992), review denied, 599 So. 2d 1280 (Fla. 1992). These decisions collectively hold that the State's use of so-called "manufactured" rock cocaine to build a drug purchase or possession case against a criminal defendant renders the defendant immune from prosecution for these offenses, regardless of whether the defendant properly preserved this issue at trial. See also Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992), review granted, Case No. 79,507 (Fla. July 6, 1992) and Palmer v. State, 602 So. 2d 577 (Fla. 4th DCA 1992), review pending, Case No. 80,080 (Fla. 1992). The State retorted that respondent had failed to preserve this issue for further review under this Court's recent decision of Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). The State further contended that Kelly v. State and its progeny were substantively incorrect and would subsequently be declared so by this Court in Williams v. State.
See also Palmer v. State.

The Fourth District nevertheless ruled that respondent's case should be dismissed based upon its prior interpretations of its aforecited authorities. Gathers v. State, 17 F.L.W. D2684, 2685 (Fla. 4th DCA December 2, 1992). However, that court

certified to this Court that the following question, very similar to that certified in Williams v. State and Palmer v. State, was of great public importance:

> DOES A POLICE AGENCY'S CONVERSION OF POWDER COCAINE INTO "CRACK" OR ROCK COCAINE FOR SUBSEQUENT USE IN A REVERSE STING SALE CONSTITUTE ILLEGAL MANUFACTURE OF THE DRUG UNDER CHAPTER 893, FLORIDA STATUTES (1989), AND IF SO, DOES THIS AMOUNT TO A DEPRIVATION OF DUE PROCESS AS WOULD SHIELD FROM PROSECUTION A DEFENDANT ACCUSED OF PURCHASING THIS CRACK COCAINE?

Id. On December 18, 1992, the Fourth District issued its mandate to the trial court. On January 4, 1993, the State timely filed its notice to invoke the discretionary certiorari jurisdiction of this Court. On January 11, this Court postponed its decision on jurisdiction, but ordered briefing on the merits. This brief follows.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal should be quashed, and this case remanded with directions that respondent's conviction be reinstated. Respondent's failure to preserve the instant issue for direct appeal at the trial court level constituted an irrevocable procedural default which forever barred its judicial review on the merits.

In any event, the District Court was incorrect in holding that the practice of the Broward County Sheriff's Office of reconstituting powder cocaine seized as contraband into the crack rock form of cocaine was illegal. Further, even if the action of the law enforcement agency was illegal, this would not insulate petitioner from criminal liability, since his state constitutional 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.

Alternatively, this Court should direct that respondent's adjudication be reduced to attempted purchase of cocaine near a schoolyard, or dismissed without prejudice to the State's refiling of an amended information.

ISSUE

DOES A POLICE AGENCY'S CONVERSION OF POWDER COCAINE INTO "CRACK" OR ROCK COCAINE FOR SUBSEQUENT USE IN A REVERSE STING SALE CONSTITUTE ILLEGAL MANUFACTURE OF THE DRUG UNDER CHAPTER 893, FLORIDA STATUTES (1989), AND IF SO, DOES THIS AMOUNT TO A DEPRIVATION OF DUE PROCESS AS WOULD SHIELD FROM PROSECUTION A DEFENDANT ACCUSED OF PURCHASING THIS CRACK COCAINE?

ARGUMENT

The State requests that this Court answer the above compound certified question in the negative.

In Smith v. State, 598 So. 2d 1063, 1066, this Court clearly announced:

> We hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review.

As noted, respondent did not preserve any objection regarding the source of his cocaine for direct apellate review, and hence was clearly precluded from receiving relief from the Fourth District. The State notes for future reference that respondent would be ineligible for post-conviction relief should he subsequently present the same claim raised here under to the trial judge by the plain language of this Court's Fla.R.Crim.P. 3.850:

> This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

But see Haussoun v. State, 17 F.L.W. D2766, 2767 note 1 (Fla. 4th DCA December 9, 1992).

In any event, the State believes that the action of the Broward County Sheriff's Office in reconstituting powder cocaine to crack cocaine was not illegal manufacture of contraband. The State therefore maintains that the trial court's refusal to dismiss the charge against respondent sua sponte was correct, particularly considering the valid safety considerations to the purchaser recited by the Fourth District in Palmer v. State attending the distribution of adulterated cocaine. The Sheriff's Office was not acting in an outrageous or illegal manner by reconstituting powder crack cocaine, which had no evidentiary value, into unadulterated crack cocaine rocks for its safer use in conducting reverse stings.

Judge Dimitrouleas' refusal to dismiss the charge against respondent on his own volition is supported by a federal court of appeals case, 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.

The instant case does not meet the level of outrageous conduct found in United States v. Twigg, 588 F.2d 373, 380-381 (3d Cir. 1978). That court found that "the government involvement in the criminal activities of this case ... reached 'a demonstrable level of outrageousness,'" 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 they "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.

The State must stress that respondent did not even argue to his trial judge that he was the subject of improper police conduct. Therefore, respondent implicitly admitted that he would have purchased crack cocaine from someone, whether or not the reverse sting was operational. The Sheriff's Office's action in having for sale unadulterated reconstituted crack does not vitiate the lawfulness of the reverse sting. In other words, the officers below did not "create" a crime, any more than they "created" a criminal. Respondent was a willing buyer; the Sheriff's Office merely provided him with a controlled environment in which to commit the offense charged without harming miself or others in the process. As such, any alleged illegality of the actions of the Sheriff's Office should not insulate respondent from criminal liability for his crime. See State v. Bass, 451 So.2d 986, 988 (Fla. 2nd DCA 1984). The Fourth District clearly erred by finding that the actions of the officers created a violation of respondent's right to due process of law. Respondent's conduct was "outrageous," not that of the

government. See State v. Burch, 545 So. 2d 279, 285 (Fla. 4th DCA 1989), approved, Burch v. State, 558 So. 2d 1, 3 (Fla. 1990).

Reversal of the district court's opinion is also supported by an opinion from a California appellate court. 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 result 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 State anticipates that respondent will argue in his answer brief that the holding in Greene v. United States, 454 F.2d 783 (9th Cir. 1971) augurs for this Court's approval of the decision under review. This is not so, since that decision was based upon a virtually unique factual scenario, quite unlike that presented here:

> However, the facts presented by this unique record do reveal circumstances which, in combination, require reversal of these convictions. First it was Courtney [government agent] who, after the 1962 raid and arrest, re-initiated telephone contact with Becker [defendant]. This re-establishment of contact occurred at a time

when Courtney would ordinarily have had no reason to re-contact the defendants, because his earlier undercover work had been successfully completed.

Second, the course of events which led to the 1966 arrests was of extremely long duration, lasting approximately two and one-half years if measured from the defendants' 1963 release from jail, or three and one-half years if measured from Courtney's reinitiation of contact.

Third, Courtney's involvement in the bootlegging activities was not only extended in duration, but also substantial in nature. He treated Thomas [defendant] and Becker as partners. He offered to provide a still, a still site, still equipment, and an operator. He actually provided two thousand pounds of sugar at wholesale.

Fourth, Courtney applied pressure to prod Becker and Thomas into production of bootleg alcohol. The Government concedes that Courtney made the statement, "the boss is on my back." And we believe that in the context of criminal "syndicate" operations, of which Courtney was ostensibly a part, this statement could only be construed as a veiled threat.

Fifth, the Government, through its agent Courtney, did not simply attach itself to an on-going bootlegging operation for the purpose of closing it down and prosecuting the operators. Any continuing operation had been terminated with the 1962 raid and arrest. We think, rather, that the procedure followed by Courtney in this case helped first to re-establish, and then to sustain, criminal operations which had ceased with the first convictions.

Finally, throughout the entire period involved, the government agent was the only customer of the illegal operation he had helped to create. It is undisputed that the only alcohol sold went to Courtney, who paid for it with government funds. (footnote omitted)

Id., 454 F.2d 783, 786-787. The reversal was based upon the combination of factors. The extensive nature of government involvement present in Green v. United States is not present in the case at bar. As such, respondent is mixing apples with oranges; there was no bar to his prosecution.

The State notes that six judges, one senior justice, and one senior judge of the Fourth District have indicated their disagreement with Kelly v. State and its progeny. See Kelly v. State, 593 So. 2d 1060, 1061; Robertson v. State, 605 So. 2d 94 (Fla. 4th DCA 1992) (Alderman, J. and Owens, J., concurring specially), review pending, Case No. 80,731 (Fla. 1992); and Nero v. State, 604 So. 2d 550 (Fla. 4th DCA, 1992) (Hersey, J., concurring specially), review pending, Case No. 80,477 (Fla 1992). Kelly v. State and its progeny in the Fourth District also conflict with this Court's decision of Smith v. State on preservation, and with the Second District's decision of State v. Bass on the merits. The State reiterates that this Court should reverse the opinion of the District Court of Appeal, and remand this cause with directives that the charge against respondent be reinstated.

Alternatively, the State would submit that this case, and the other cases now pending before this Court on this subject, should be remanded to the Fourth District pursuant to §924.34, Fla. Stat. with directions that the defendants in these cases be adjudicated and sentenced for either attempting, soliciting or conspiring to purchase or possess cocaine near a schoolyard under §§893.13(1)(a), 893.13(1)(e), and 777.04, as these individual

cases may warrant. See e.g. Metcalf v. State, Case No. 92-0885 (Fla. 4th DCA January 27, 1993); Vinyard v. State, 586 So. 2d 1301, 1302 (Fla. 2nd DCA 1991) and McClam v. State, 288 So. 2d 285, 286 (Fla. 4th DCA 1974); but see Gould v. State, 577 So. 2d 1302 (Fla. 1991). Respondent, like any other defendant, would have been found guilty of attempting to purchase cocaine near a schoolyard if the officer had handed him a placebo instead of "manufactured" crack cocaine in return for his cash. See Tibbetts v. State, 583 So. 2d 809, 810 (Fla. 4th DCA 1991). It is ilogical that a criminal defendant should receive total absolution for his actions simply because of the fortuity that the contraband he plans to purchase is real instead of fake. Cf. State v. Thomas, 487 So. 2d 1043 (Fla. 1986).

Alternatively again, at the very worst, this Court should approve the Fourth District's reversals in cases such as these without prejudice for the State to refile amended informations charging the highest offense for which the various defendants may be constitutionally convicted. See United States v. Felix, 503 U.S. ___, 118 L.Ed.2d 25 (1992); compare State v. Rodriguez, 500 So. 2d 120 (Fla. 1986) with State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991); cf. Scharfschwerdt v. Kanarek, 553 So. 2d 218 (Fla. 4th DCA 1989), review denied, 563 So. 2d 633 (Fla. 1990) and Kranites v. Speiser, 560 So. 2d 1361 (Fla. 4th DCA 1990). The State reiterates that it is illogical that one who seeks to acquire fake cocaine may be imprisoned, while one who seeks to acquire real "manufactured" cocaine may be freed.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, the State respectfully requests this Honorable Court **ACCEPT** discretionary jurisdiction in the instant case, **QUASH** the opinion of the District Court, and **REVERSE** this cause with directions that respondent's adjudication and sentence be either reinstated, or **MODIFIED** as indicated.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
SENIOR ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL LAW,
WEST PALM BEACH BUREAU
FLORIDA BAR NO. 339067

CO-COUNSEL FOR PETITIONER

JOHN TIEDEMANN
Assistant Attorney General
Florida Bar #319422
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished by courier to: Ms. Debra Moses Stephens, Esq., Assistant Public Defender, 421 3rd Street, West Palm Beach, FL 33401, this 2nd day of February, 1993.

John Tiedemann

Of Counsel