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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,042

THE STATE OF FLORIDA,

Petitioner,

-vs-

FRANCISCO RAMOS, et al.,

Respondents

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF ON THE MERITS

RESPONSIVE BRIEF FROM
RESPONDENT LAZARO DIAZ

✓
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INTRODUCTION

Petitioner was the Appellant in the Third District Court of Appeals and the prosecution in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondents were the Appellees in the District Court and the defendants in the trial court.

In this brief, the parties will be referred as they appear before this Honorable Court, except that Petitioner may also be referred to as the "State"; Respondent Lazaro Diaz may also be referred to as "Respondent Diaz" or "Defendant Diaz".

The following symbols will be used:

"R" Record on Appeal

"T" Trial Transcript

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, Lazaro Diaz, and co-respondents Francisco Ramos and Jose Ramos, were arrested on March 22, 1990, and charged by arrest affidavit with armed trafficking. (R8-11) On April 12, 1990, an Information was filed against the respondents herein, charging them with armed trafficking, possession of a firearm while engaged in a criminal offense and burglary. (R1-7)

On or about September 20, 1990, Respondent Diaz filed a Motion to Dismiss Information, based upon a due process violation and entrapment as a matter of law. (R23-36) At a hearing held before the Honorable Judge Steven D. Levine on January 10, 1991, the co-respondents Francisco Ramos and Jose Ramos requested, and were allowed by the court, to join in the motion filed by Respondent Diaz. (T5, 9) At the January 10, 1991, hearing, Diaz' counsel specified to the trial court that the principal ground for his motion to dismiss was upon due process. (T8)

On January 14, 1991, a hearing was held on Diaz' Motion to Dismiss. (T11-117) Diaz testified that he had met Salvador Xique (the confidential informant) at a meeting approximately one month before his arrest. (T21) Diaz further testified that Xique had called him approximately 15 or 16 times during this period. Xique told him he had a deal going on where Diaz could make a lot of money. Despite Diaz' lack of interest,

Xique continued to call him. (T22) Xique told Diaz that he (Xique) had to meet some people, and would later give Diaz the key to a warehouse where Diaz could go to pick something up and then make a lot of money. (T22-23) Prior to these conversations or plan by Xique, Diaz had no plans or intentions to go to any warehouse or take anything. (T23)

On the day of the arrest, Xique called Diaz and instructed him to go to a cafeteria to meet a man who was going to give Xique the key to the business. (T23) Xique would then hide the key over at the business. He further told Diaz that he would be armed, and that he would give the weapons to Diaz in order to be prepared. (T23) On the same day of the arrest, Xique (C.I.) gave the weapons to Diaz to be used during the rip-off. (T24) Xique also told Diaz to take two other men with him. (T24)

Diaz proceeded to the warehouse with co-respondents Jose and Francisco Ramos. When they could not find the key, Diaz called a beeper number that Xique had given him. The unidentified man who Diaz had met at the cafeteria insisted that Diaz look further for the key and gave him additional instructions. After a further search, Diaz located the key left by Xique and proceeded to the warehouse. (T25, 36) Upon exiting the warehouse, which plan had been set up by police, the respondents were arrested.

It was Xique's idea that Diaz do the rip-off, provided the key to the warehouse, and provided the firearms to Diaz.

(T26-27, 36) It was Xique who provided the information and plan of the warehouse to Diaz. (T33) Xique was aware that Diaz was having financial problems. (T39-40)

During cross examination, Det. Garcia, who in an undercover capacity had met Diaz at the cafeteria, stated that the C.I., Xique, had never been under his supervision or control. (T53) Det. Fernandez, on cross examination also testified that the C.I. was not under his control or supervision, nor did he know of his day to day activities. (T88) He further testified that he did not know whether or not the C.I. had ever threatened Diaz, made promises, or provided firearms to Diaz. (T54) Det. Garcia further testified that he did not know for what length of time the C.I. had been contacting Diaz, neither had he had any contact with the C.I. prior to the day of the arrest that would have given him any information to the effect that Diaz was involved in ongoing criminal activity. (T55-56) Upon inquiry by the Court, Det. Garcia testified that he did not know whether the "plan" for the warehouse rip-off had originated with the C.I. or the other detective (Det. Fernandez). (T57-59)

Det. Fernandez, the lead officer, upon direct examination, testified that the C.I. was Salvador Xique and that he was working for monetary reasons. The informant in this case was paid two or three hundred dollars, after the respondents were arrested. (T61, 76) Upon cross examination Det. Fernandez testified that "it depends" whether or not the

C.I. would be paid if arrests were made or not, regardless of whether he would be required to testify. (T89)

During the testimony of Det. Garcia, the trial court let it be known that it was addressing the motion to dismiss from a due process standpoint, and secondly under entrapment as it is overlapped by due process protections. (T49, 51, 62) Further, the court expressed the position that it was attempting to determine whether the police were investigating ongoing criminal activity or simply initiating or creating the crime. (T46) In fact, the court expressed to the State that the real issue was whether Det. Fernandez had any information that this respondent (Diaz) was involved in ongoing criminal activity. (T63) In response to questioning by the court, the State made the following stipulation:

Mr. Pardo:

I would stipulate that Det. Fernandez is going to testify that prior to being informed by the confidential informant, that they had no intelligence information as to any of these individuals, and that they did not know as to whether or not these three individuals were dealing for the drug trade. That is in the deposition. (T47)

Det. Fernandez in fact, in direct examination, testified that he had received no intelligence information about any of the three defendants. (T67, 87)

On January 15, 1991, the trial court made an oral pronouncement of its ruling. (T121-122) In its ruling, the court specifically found, as had been stipulated to by the State, (T47) that the police action did not have as its aim

the interruption of a specific ongoing criminal activity.

On the due process argument, I am granting the Motion to Dismiss insofar as it reduces the charges from armed trafficking or any charges related to the use of a firearm, to unarmed. I believe that the actions of the confidential informant violated the due process provision as described in the various cases that were mentioned yesterday, but only to the extent that it would call for a reduction of the charges.

However, as to the objective entrapment test, the Court finds that, based upon the Cruz case, the police activity does not meet the first prong of the test ...

With regards to the first prong, I find that the police action did not have as its aim interruption of a specific ongoing criminal activity in this case. There was nothing to interrupt. The police set it all up.

Second, the second prong deals with whether the activities were reasonably tailored to apprehend those involved in ongoing criminal activity. I also don't think the police activity met that test. ...

Based on all those matters, the Court is granting the Motion to Dismiss. ... (T121-122)

Although the court's pronouncement spoke of objective entrapment, it is clear from the record that the court's direction and analysis was based on a due process violation. (T49, 51, 62) The court's written order, entered on February 11, 1991, after reconsideration of all the applicable law submitted by the State and defense is quite clear that the court's analysis was based upon due process and secondarily upon objective entrapment as it is paralleled by due process. (R224-226)

1. This case involves a "reverse sting" with police providing the contraband and the warehouse

for the so-called "rip-off."

2. A confidential informant was utilized by the police in this case. This individual initiated and handled substantially all negotiations leading up to the arrest of the defendants, including being present during the undercover officers' meeting with Defendant Diaz. The confidential informant advised the defendants on all essential aspects of committing the crimes alleged by the State.

3. In particular, the confidential informant told the defendants to use firearms in committing the crime, and in fact, provided the firearms used by the defendants.

4. The [sic] was no history, information, or intelligence known to law enforcement of any involvement by these defendants in any narcotics activities or drug "rip-offs" before the confidential informant brought the defendants into the scheme.

5. The informant's [sic] target, Defendant Diaz, brought the order co-defendants into the scheme, at the instance of the confidential informant.

6. The confidential informant utilized in this case operated on essentially a contingent fee basis. The informant was not under prosecution by the state, was not seeking a promise of release from any prison sentence, nor was he to be paid a percentage of the value of any property seized.

7. The confidential informant in this case operated in a manner that was unsupervised and uncontrolled by any agent of the State, and he would only make contact with the State when he decided to do so. He was left unrestricted and unguided in how he was to set up transactions and who his targets might be. He would have been a key witness in the case had the matter proceeded to trial.

8. The informant, acting under the apparent law enforcement authority, was given a free reign to instigate and create criminal activity where none previously existed. (R224-226) This order was filed with the Clerk's office on April 5, 1991.

The State's objection to the court's oral pronouncement

on January 15, 1991, based upon an inability to argue objective entrapment was misplaced because the court had reached its decision on due process grounds and had never reached the issue of entrapment.

ARGUMENTS OF LAW

The leading case on entrapment in Florida is Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). That Cruz remains viable has recently been acknowledged by the Supreme Court in State v. Hunter, 586 So.2d 319 (Fla. 1991), and consequently thereafter by the Fourth District Court of Appeals in Florida v. Mendiola, 18 F.L.W. D570 (Fla. 4th DCA February 24, 1993), Strickland v. State, 588 So.2d (Fla. 4th DCA 1991) and Ricardo v. State, 591 So.2d 1002 (Fla. 4th DCA 1992) and Herrera v. State, 594 So.2d 275 (Fla. 1992) as well as the Third District Court of Appeals in Lewis v. State, 597 So.2d 842 (Fla. 3d DCA 1992), (receding from Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), and Jeralds v. State, 603 So.2d 643 (Fla. 5th DCA 1992).

Cruz establishes that there are two aspects of the defense of entrapment: one tested objectively by the court and the other subjectively by the trier of fact. The threshold test is an objective one, focusing on the conduct of the law enforcement personnel involved, and whether that conduct falls below the standard of proper use of governmental power. The trial court addresses this issue by applying a two prong test and making a determination as a matter of law before the case is presented to the jury.

The first prong of this inquiry is whether the police

conduct has, as its goal, the interruption of a specific ongoing criminal activity. In other words, were police to prosecute a criminal where no crime would have been committed but for the police conduct originating the crime. The second prong is whether law enforcement has utilized means reasonably tailored to apprehend only those already involved in ongoing criminal activity. This phase addresses itself to government agents using inappropriate techniques to induce or encourage an individual to engage in conduct constituting a criminal offense where the individual normally would not have engaged in such conduct.

If either prong is violated, then there is entrapment as a matter of law and the entrapped individual is entitled to be discharged. Ricardo, supra. The facts of this particular case fall squarely within the objective test of Cruz in that the Third District Court of Appeals held in affirming the trial court that the State failed on both prongs of the inquiry. It was clear from the facts before the trial court as well as the stipulation of the Assistant State Attorney before the court (T-47) that the Respondent Diaz was not involved in any ongoing criminal activity of any kind at the time he was first contacted by the informant. Neither did law enforcement officers ever hear the Respondent's name, much less have any information or intelligence that he was involved with drugs. As to the second prong, the informant used inappropriate techniques in order to get the Respondent Diaz

into making or participating in a drug deal. He persisted by calling respondent Diaz 15 to 16 times over a several week span and provided the weapons which escalated the charge from a trafficking offense to an armed trafficking offense punishable by life.

In Hunter, supra, the Florida Supreme Court, subsequent to the enactment of Section 777.201, Florida Statutes (1987), reaffirmed the objective entrapment standard it adopted in Cruz, 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." 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.

Hunter is a case similar to the case at bar and therefore, should control the resolution of this issue. In Hunter, as in the present case, the Florida Supreme Court rejected the argument that the Respondent's due process rights had been violated. In this case, the Third District Court of Appeals, although not agreeing with the rationale of the due process violation by the trial court, nonetheless found, in affirming the dismissal of the charges against Diaz, that the Respondent Diaz had been objectively entrapped by the police.

In Hunter the court limited the holding of State v. Glosson, 462 So.2d 1082 (Fla. 1985), to cases where the confidential informant's contingent fee was conditioned on his trial testimony. In the instant case, the confidential informant, as found by the Third District Court of Appeals, was not required to testify in order to receive his fee. Therefore, and as a result of that, the Court of Appeals rejected Diaz' due process argument citing Hunter. However, the appellee Diaz' arguments that charges should have been dismissed because of the objective entrapment argument was accepted and agreed to by the Third District Court of Appeals. In its brief as well as oral arguments before the Court of Appeals, the state contended that Section 777.201 F.S. (1989), had the effect of abolishing the objective entrapment test enunciated in Cruz. The Court of Appeals disagreed and rejected this argument citing Lewis v. State, supra. (See Footnote 1, State v. Ramos, 608 So.2d 830 (Fla. 3d DCA 1992)).

In Lewis, the Third District Court of Appeals, in a case very similar to the case at bar, found that neither part of the Cruz test was satisfied. Specifically, the Court found that the first prong of the Cruz test was not met because Lewis was not involved in a specific ongoing criminal activity. Similar to the case at bar, there was no crime in Lewis until the informant created it. Similar to this case, no crime had been committed until it was created by the informant, Xique.

In Lewis, at Footnote 1, the Court indicated as follows:

We are not unaware of the line cases holding that the enactment of Section 777.201, Florida Statutes, evinces a legislative intent to overrule Cruz. See, e.g., State v. Pham, 595 So.2d 85 (Fla. 1st DCA 1992); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), review denied, 584 So.2d 998 (Fla. 1991). However, we choose to rely on our most recent Supreme Court cases on the issue. See State v. Krajewski, 589 So.2d 254 (Fla. 1991); State v. Hunter, 586 So.2d 319 (Fla. 1991).

By the wording contained in its footnote in the Lewis opinion, the Third District Court of Appeals has in fact receded from Gonzalez.

In the instant case, as to the Respondent Diaz, the first prong of the Cruz test was not satisfied. The trial court found, and the Court of Appeals agreed, that there was no history, information, or intelligence known to law enforcement of any involvement by these defendants in any narcotics activities of drug rip-offs before the confidential informant brought the defendants into the scheme. This finding was not only supported by the evidence, but was also stipulated to by the assistant state attorney in open court and on the record (T-47). When the confidential informant contacted Respondent Diaz, Diaz was not involved in any specific ongoing criminal activity. In addition, the second prong of the Cruz test was not satisfied where the police used means which were not reasonably tailored to apprehend those involved in the ongoing criminal activity. Cruz, 465 So.2d at 522.

The State has through the legislature decided that the

burden is on a defendant claiming entrapment to prove that they were entrapped, Section 777.201(2). The allocation of this burden to a defendant is not unconstitutional. See, e.g. Patterson v. New York, 432 U.S. 197 at 210, 97 S.Ct. 2319; 53 L.Ed.2d 281 (1977) also Herrara v. State, supra. However, 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. Predisposition is not the same as mens rea. The former involves a defendant's character and criminal inclinations, the later involves the defendant's state of mind while carrying out the allegedly criminal act. State v. Rockholt, 476 A.2d 1236, 1242 (NJ 1984), Herrera, supra. A distinct dichotomy exists between objective and subjective entrapment. And before one ever reaches the subjective entrapment aspect of a trial they must overcome the prohibitions of the objective entrapment as set forth by Cruz and reaffirmed by Hunter. The emphasis of objective entrapment is on forbidding the state from prosecuting "crime" that never would have existed but for police activity engendering the offense or police conduct that otherwise overstepped the standards of permissible governmental conduct. Cruz 465 So.2d at 521.

The Hunter case, which was a case similar to the one at bar, is controlling and its holding that "objective entrapment" as defined by the Florida Supreme Court remains a

conclusive defense to a criminal prosecution should equally apply in this case. The facts of this case show that the state violated both prongs of the Cruz objective standard for entrapment. The trial court found objective entrapment, the Third District Court of Appeals affirmed that holding pursuant to the authority of Cruz, Hunter, and its decisions in Lewis, and therefore, should be affirmed by this Court.

SUMMARY OF THE ARGUMENT

Respondent Diaz, a defendant in the trial court, filed a Motion to Dismiss based upon the principal ground of due process and objective entrapment. After a hearing on Respondent Diaz' Motion to Dismiss, the trial court ruled on the motion stating that, based on the due process argument, it was "reduc[ing] the charges from armed trafficking or any charges related to the use of a firearm, to unarmed." The Court further stated that it was dismissing all charges based on the objective entrapment test enunciated in Cruz v. State, 465 So.2d 615 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed. 652 (1985).

The trial court later reconsidered its prior ruling on the Motion to Dismiss and granted the motion to dismiss based on the due process argument. The court further found that the facts of the present case justified dismissal under the objective entrapment test, although it was not dismissing the charges on that ground.

The Petitioner herein appealed the trial court's order contending that the defendants' due process rights were not violated. The appellate court agreed with this argument, finding that since the confidential informant's fee was not conditioned on his testimony at trial, the Respondent's due process argument was rejected. However, Respondent Diaz also argued that the charges should have been dismissed based on

the objective entrapment argument. See Cruz v. State. The Petitioner herein contends that §777.201, F.S., (1989) has the effect of abolishing the objective entrapment test enunciated in Cruz. The Third District Court disagreed. See State v. Ramos and Lewis v. State.

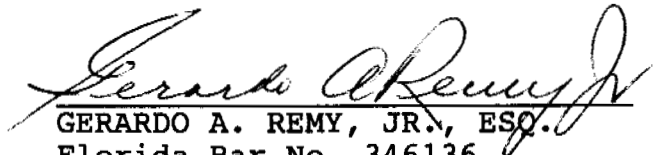
The leading case on entrapment in Florida is Cruz which remains vital under the due process analysis by the Supreme Court in Hunter, Strickland, Ricardo, Lewis, Gonzalez, Herrera, and Jeralds. The Florida Supreme Court noted in Cruz that objective entrapment involves issues which may overlap or parallel due process concerns.

CONCLUSION

Based upon the holding of Hunter and its progeny, Respondent Diaz would respectfully requests that this Honorable Court affirm the holding of the Court of Appeals and find that §777.201, F.S., does not abolish the objective entrapment defense as set forth in Cruz and acknowledged by the Supreme Court in Hunter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSIVE BRIEF ON THE MERITS was furnished by mail to ANGELICA D. ZAYAS, Asst. Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Post Office Box 013241, Miami, Florida 33101 and HARVEY SEPLER, Counsel for Jose and Francisco Ramos, Office of the Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 14 day of May, 1993.



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