IN THE SUPREME COURT OF FLORIDA

CASES No. 81,165

STATE OF FLORIDA,

Petitioner,

vs.

PATRICIA FRUETEL,

Respondent.

****

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

****

RESPONDENT'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner/Appellee below, will be referred to herein as either "the State" or "Petitioner". Respondent, Patricia Fruetel, defendant/appellant below, will be referred to herein as "Respondent".

References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Adopted as previously stated in the Initial Brief.

SUMMARY OF ARGUMENT

Respondent's due process arguments must fail as the informant did not testify at trial. The jury was presented with overwhelming evidence from which conspiracy to traffic in cocaine could be inferred.

The trial court correctly performed an in camera inspection of a secret government manual. There was no abuse of discretion shown.

Respondent's counsel consented to the submission of the edited tape to the jury.

The prosecutor's comments during opening and closing were not objected to, therefore are not properly before this Court.

Respondent was correctly allowed to give the concluding argument before the jury.

Respondent did not object to the jury instruction prior to the jury retiring for deliberations.

ARGUMENT

POINT I

THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE HAS BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201 FLORIDA STATUTES (1989). THEREFORE, THE OPINION BELOW MUST BE QUASHED AS IT IS BASED ON AN APPLICATION OF THE TWO PART ANALYSIS OF CRUZ.

Petitioner would readopt the argument made in the Initial Brief as rebuttal to Respondent's arguments found in section A through C of the Answer Brief.

Petitioner also argues that reversal is "appropriate on due process grounds." In Hunter, the court stated: "By focusing on police conduct, this entrapment standard includes due process considerations." Id., 586 So.2d at 322. As held by the Fourth District, however, there can be no due process violation where the informant's testimony was not vital to the State's case. Jaramillo v. State, 576 So. 2d 349 (Fla. 4th DCA 1991); Khelifi v. State, 560 So. 2d 333 (Fla. 4th DCA 1990). At bar, the informant, Duarte, did not testify at Respondent's trial, thus, it is clear that his testimony was not vital to the State's case sub judice. See, State v. Bergeron, 589 So. 2d 462 (Fla. 4th DCA 1991) (Due process defense only applies when an informant is given a direct financial strike in a successful criminal prosecution and that informant is required to testify in order to produce the conviction.)

The informant was not even called to testify at trial, although Respondent was well aware of his identity. Further, the

evidence presented at trial showed that the negotiations for the transaction were conducted exclusively between Respondent and police. Thus, as was the case in Jamarillo, at 350, Respondent "negotiated directly with the officers regarding the details of the transaction, all of whom testified against [Respondent]". Under the facts of this case there can be no violation of Respondent's due process rights.

POINT II

THE TRIAL COURT CORRECTLY DENIED RESPONDENT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CONSPIRACY COUNT.

In 1980, Article V of the Florida Constitution was amended to limit this Court's mandatory review of district court of appeal decisions, and to provide for discretionary review jurisdiction. This amendment was necessary due to the staggering number of cases reaching this Court. The amendment, thus, turned the district courts of appeal into courts with *final appellate* jurisdiction in most cases. Whipple v. State, 431 So. 2d 1011 (Fla. 2d DCA 1983).

If this Court accepts jurisdiction in this case it would be pursuant Art. V, §3(b)(4), Fla. Const., as the District Court certified its opinion is in conflict with a decision of another district court of appeal on the specific issue discussed in issue I, above. Thus, although this Court does have jurisdiction to consider issues ancillary to those directly before the Court, the State urges this Court to decline to entertain the issues raised by Petitioner as his issues II through VII since those issues

have not been resolved by the District Court, and the issues were not discussed in the opinion issued by the District Court. The State contends, that if this court agrees with the State's position in issue one, the proper course of action would be remand to the district court for review of the issues not yet addressed at that level.

However, the State will address each issue raised in the Answer Brief in a succinct manner.

CONSPIRACY TO TRAFFIC IN COCAINE

The law is well settled that the crime of conspiracy consists of an express or implied agreement between two or more persons to commit a criminal offense. Velunza v. State, 504 So. 2d 780 (Fla. 3d DCA 1987). Although mere presence is insufficient to establish participation in conspiracy, and a conspiracy may not be inferred from mere aiding and abetting, the jury is free to infer from all the circumstances surrouding the act that the common purpose to commit the crime existed. Gonzalez v. State, 571 So. 2d 1346, 1348 (Fla. 3rd DCA 1990); Herrera v. State, 532 So. 2d 54 (Fla. 3rd DCA 1988). "Direct proof of an agreement is not necessary to establish a conspiracy; the jury is free to infer from all circumstances surrounding and accompanying the act that the common purpose to commit the crime existed." McCain v. State, 390 So. 2d 779, 780 (Fla. 3rd DCA 1980). The jury is free to consider the defendant's presence at the place of the sale in determining guilt. Gonzalez at 1348.

At bar, viewing the evidence in the light most favorable to the State, there was sufficient evidence of a conspiracy to withstand Appellant's motion for judgment of acquittal.

Under Cummings v. State, 514 So. 2d 406 (Fla. 4th DCA 1987), a defendant may be found guilty of conspiracy if she had knowledge of its essential objective and voluntarily became a part of it, even if he lacked knowledge of all the details of the conspiracy or played only a minor role in the total operation. Hence, even if it could be said that Respondent's participation was a minor one, the requirement for the offense of conspiracy has been satisfied. The evidence presented at trial was more than enough to form a jury question and the motion for judgment of acquittal was properly denied.

POINT III

THE TRIAL COURT PROTECTED THE CONFIDENTIALITY OF SECRET GOVERNMENT DOCUMENTS BY PERFORMING AN IN CAMERA INSPECTION.

Appellant suggests that the trial court reversibly erred in performing an in camera inspection of the DEA manual rather than requiring the government to turn the manual over to Respondent. The State disagrees. The State believes the trial court did not abuse his discretion in holding an in camera review of the DEA manual, preventing discovery of the manual and sealing the manual for possible appellate review. See Washington v. State, 452 So. 2d 82 (Fla. 1st DCA 1984).

The State strongly believes that the in-camera review of the DEA manual utilized in the trial court was the correct procedure

under the facts at bar. Fla. R. Crim. P. §3.220(b)(1)(xii); §3.220(i)(m).

The United States argued that disclosure of the classified portions of the DEA manual would reveal sensitive law enforcement information and would endanger the lives and physical safety of DEA agents and their informants. Also, the government argued that release of the manual could greatly decrease the effectiveness of certain law enforcement techniques (R-6). The government also asserted a privilege from discovery for confidential information. Roviaro v. United States, 353 U.S. 53 (1957); United States v. Van Horn, 789 F.2d 1492, 1507 (11th Cir. 1986). Respondent argued the material was needed to prepare the defense (R. 4-5).

Under these circumstances the trial court correctly conducted an in camera review of the manual to balance the public interest in protecting the flow of information against the individual's right to prepare his defense. See State v. William, 369 So. 2d 416 (Fla. 3rd DCA 1979); State v. Zamora, 534 So. 2d 864 (Fla. 3rd DCA 1980). This is the exact argument asserted by the United States government and State below (R. 19-21). After the court examined the manual in an in-camera hearing the court stated "there are sensitive materials in there and I find that the disclosure would not be relevant to the defense. And in any event any relevance is outweighed by the prejudice in disclosing the confidential nature" (R. 274). The manual was then placed in a sealed envelope for Appellate purposes (R. 274). The State belives that court ruled correctly.

Respondent's reliance on State v. Tascarella, 580 So. 2d 154 (Fla. 1991) is misplaced. In Tascarella, the DEA agents refused to appear for depositions despite service of subpoenas. The trial court found that Tascarella would be prejudiced if forced to confront the witnesses at trial without pretrial discovery. Tascarella, 580 So. 2d at 156. As a sanction for refusing to appear at deposition the trial court prohibited the DEA agents from testifying at trial. Id. This Court held "that the trial court did not abuse its discretion in excluding the witnesses from testiying at trial." Id. at 157. Tascarella dealt with whether the court abused his discretion in dealing with a discovery violation. The Tascarella court concluded exclusion of witnesses, as a sanction for failing to appear at deposition, did not amount to an abuse of judicial discretion. Likewise, the State contends the trial court did not abuse its discretion in holding an in camera inspection of the DEA manual in question.

Secondly, the State believes that the contents of a confidential government informant supervision manual is not relevant at bar. The government agent openly admitted that Duarte was not considered an informant (R. 494). Duarte was a "source of information" (R. 494). Therefore, it seems clear that general government policies related to supervision of informants was not relevant. What is relevant is how the informant/source of information in the case before the court (Duarte) was supervised and controlled. At bar, defense counsel during a pretrial deposition had a full opportunity to question the government agent who was responsible for the supervision of

Duarte. This was discussed extensively at a hearing (R. 17-51). Appellant was offered the opportunity to depose Duarte (R. 8). The agent answered all questions regarding his relationship with and supervision of Duarte. The only questions which were not answered were general questions regarding supervision of government informants and DEA policies regarding informants in general (R. 172-174). Indeed, defense counsel had full discovery regarding the supervision of the informant/source of information in this case. The government manual would not have provided Respondent with any evidence admissable at trial. Respondent has failed to demonstrate that the failure to examine the DEA manual has caused any cognizable harm. See State v. Rodriguez, 483 So. 2d 807, 808 n.1 (Fla. 3rd DCA 1986).

Respondent does not even suggest or speculate what could have been in the manual which could have changed the results of the proceedings below. Respondent's point is based wholly on speculation and conjecture that cannot form the basis for reversible error. Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974).

POINT IV

THE TRIAL COURT CORRECTLY SUBMITTED THE EDITED TAPE TO THE JURY WITHOUT OBJECTION FROM RESPONDENT'S COUNSEL.

Respondent gives the impression that his trial counsel was totally unaware that a redacted tape would be offered into evidence by the State. This is incorrect! Shortly after the jury was sworn, counsel for codefendant Williams, moved to redact

a small portion of the tape recorded discussion between Respondent and the undercover officers (R. 363-364). Respondent's counsel was present (R. 358) throughout the entire discussion regarding redacting a small portion of the tape (R. 363-378). The court ruled that the tape would be redacted (R. 376-377). Respondent's counsel did not object.

The State would also point out that prior to trial, Respondent filed a motion to suppress the tape (R. 1067). The motion was denied (R. 1069). Additionally, immediately prior to the introduction of the tape it is abundantly clear Respondent's counsel was aware the redacted tape was to be played (R. 689, 691). Even if Respondent's counsel was not present during codefendant's argument regarding the tape, it had no impact on Respondent. Clearly, the tape was fully admissable against Respondent.

The record clearly shows that Appellant's counsel: 1) knew a redacted tape was to be played; 2) agreed to the playing of the redacted tape and; 3) did not object to the playing of the redacted tape (R. 700). To now suggest the playing of the redacted tape was error amounts to a classic example of invited error.

POINT V

THE PROSECUTOR'S COMMENTS DURING OPENING AND CLOSING WERE PROPER; THIS ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

Respondent suggests the trial judge erred in denying her two motions for mistrial (R. 401, 941) based on prosecutorial

comments during opening statement and closing argument. The State disagrees.

The law of our State is well settled that a motion for mistrial is addressed to the sound discretion of the trial judge. Salvatore v. State, 366 So. 2d 745 (Fla. 1979); Buenoano v. State, 527 So. 2d 194 (Fla. 1988). The power to declare a mistrial and discharge the jury should be exercised with great caution and should only be done in cases of absolute necessity. Salvatore, at 750. A mistrial is a device used to halt the proceedings when an error is so prejudicial and fundamental that the expenditure of further time and expenses would be wasteful if not futile. Johnsen v. State, 332 So. 2d 69 (Fla. 1976).

Additionally, Respondent points out several comments made by the prosecutor as examples of error, however, most were not objected to below (R. 938-939, 947-948, 950, 951, 963). Since the prosecutor's comments which Appellant relies on to form the basis of this argument were not objected to below, this issue is not properly before this Court. Respondent only lodged one objection during the State's closing argument (R. 941). In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). Since this was not done, this issue is not properly before this Court. Hoffman v. State, 474 So. 2d 1178, 1181 (Fla. 1985).

As a general rule, wide latitude is permitted in arguing to a jury during closing argument. Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). Logical inferences may be drawn and counsel are allowed to advance all legitimate arguments. Spencer v. State, 133 So. 2d 729 (Fla. 1961). The control of comments during closing argument is within the trial court's discretion and an appellate court will not interfere unless an abuse of discretion is shown. Breedlove, 413 So. 2d at 8, Thomas v. State, 326 So. 2d 413, 415 (Fla. 1976). No abuse of discretion occurred in the present case, especially in view of the lack of objections.

POINT VI

THE TRIAL COURT CORRECTLY ALLOWED APPELLANT TO GIVE THE CONCLUDING ARGUMENT BEFORE THE JURY.

Respondent suggests the trial court erred in prohibiting his counsel from using the entire forty minutes as the concluding argument before the jury.

It is clear that although Respondent requested "the whole 40 minutes in one shot" any objection was waived when Respondent's counsel stated "I'll take thirty and ten" (R. 890). The State also contends the issue was not properly preserved below. In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). Since this was not done,

this issue is not properly before this Court. Hoffman v. State, 474 So. 2d 1178, 1181 (Fla. 1985).

Alternatively, the State believes that what occurred below, if error, is an example of invited error. If Respondent truly wanted the majority of the requested time (R. 889) on his last appearance before the jury, he would have divided his time differently than "thirty minutes and ten" (R. 980).

Furthermore, the State contends that Florida Rules of Criminal Procedure, §3.250 was fully complied with below. Respondent gave "the concluding argument before the jury." Id. (R. 891). This is the only requirement. There is no requirement that a criminal defendant argues before and after the State. See Dean v. State, 478 So. 2d 38 (Fla. 1985).

POINT VII

ANY OBJECTION TO THE JURY INSTRUCTIONS AS GIVEN WAS WAIVED AS RESPONDENT DID NOT OBJECT PRIOR TO THE JURY RETIRING TO DELIBERATE.

The State contends that the issue presented by Respondent was not preserved for appellate review.

Florida Rules of Criminal Procedure §3.390(d) states:

> (d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of the presence of the jury. (emphasis supplied).

At the conclusion of jury instructions and prior to the jury retiring the following side bar discussion occurred:

> THE COURT: Any exception or objection to the content or the manner in which the instructions were given?
>
> MR. GALLAGHER: No, sir.
>
> MR. TEDESCO: None, Your Honor.
>
> MR. HOEG: No, Judge.
>
> MR. TEDESCO: Only thing I would do, I recommended two instructions. You decided to do the '88 one. I guess I should object to my denial of my proposed jury instructions for the record.
>
> THE COURT: Okay.
>
> MR. TEDESCO: That's it.
> (R. 1007-1008).

The above clearly shows that Appellant's attorney, Mr. Tedesco, never objected to the two instructions on possession given as part of each count. Therefore, the issue is not preserved for appellate review. Foster v. State, 436 So. 2d 56, 57-58 (Fla. 1983); Jones v. State, 411 So. 2d 165, 167 (Fla. 1982).

Contrary to Respondent's position a close reading of the charge conference clearly shows that Respondent's attorney agreed with the trial judge that the possession instruction would be read twice (R. 881). No objection was lodged during the charge conference that would preserve this issue for review. State v. Heathcoat, 442 So. 2d 955 (Fla. 1983) is easily distinguishable. Heathcoat involves the denial of a request for a specific instruction that went to the very foundation of Heathcoat's

defense. Obviously, the same cannot be said for the present case.

Finally, the objection made by Mr. Tedesco on page 1007 of the record clearly relates to the proposed special instructions that were submitted (R. 885-888) and not to the charge conference discussion regarding possession.

CONCLUSION

This Court should quash the opinion below and remand the case to the District Court with instructions that the District Court reinstate the trial court's denial of Appellant's Motion for Judgment of Acquittal.

Respectfully submitted,

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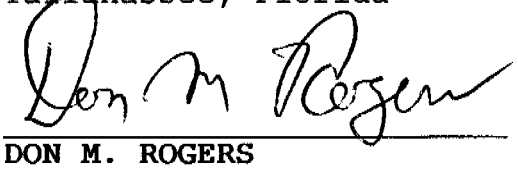

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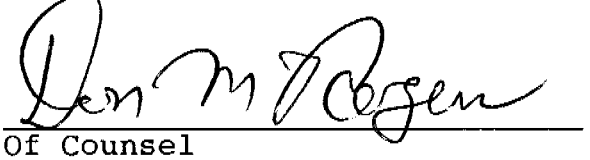
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished, by U.S. Mail, to: **ANTHONY MUSTO**, Esquire, P.O. Box 16-2032, Miami, Florida 33316, this 10th day of May, 1993.



Of Counsel

DMR/ka