IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MARVIN V. TAYLOR,

Appellant,

vs. DOCKET # 81,446

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

JAMES R. THIES, SR., ESQUIRE
Florida Bar #340111
Post Office Box 815
Orange Park, FL 32067-0815
(904) 264-8602

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Appellant was the Defendant in the Trial Court and will hereafter be referred to as "Appellant". Appellee will hereinafter be referred to as "State". The Record on Appeal is contained in three (3) volumes. Volumes one through three will be referred to by the symbol "R". All references will include appropriate page number designations.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT NO DUE PROCESS VIOLATION OCCURRED WHEN THE POLICE AGREED TO PAY AN INFORMANT TO PARTICIPATE IN CONTROLLED BUYS AND TO TESTIFY IN DEPOSITION AND COURT.

Appellate first argues that the State, in their Merit Brief, without basis and evidence rendered a number of opinions as to the facts of the case that are misleading. The first such opinion is that the informant (Gerald Jefferson) was paid an "insignificant amount of money" for purchasing crack cocaine from a street vendor and then testifying against him at trial. If the answer as to the total compensation paid this informant in the instant case for his participation in the drug deals with both the Appellant and his co-defendant, Robert Tisdale, was known, a major portion of the puzzle as to the relationship between the informant and the Clay County Sheriff's Office would be known. Appellant's argument for disclosure of such payments under the rules of discovery concerns trying to gain that very information. Such disclosed information will give insight into whether it is an "insignificant amount of money".

Second, what may seem to be an "insignificant amount of money" to the State in the way of a payment to an informant may not be seen the same to the informant himself. An informant who is relying upon the government for his income is most likely to see a hundred dollars as being a "significant amount of money" as opposed to a working individual who draws a pay check every week.

In addition, Appellant would point out it is clear from the record that the informant was being paid in more than one way for his in-court testimony on November 5, 1991. It is clear from the record that the informant was going to be paid cash for his testimony and that he was continuing to work for the Clay County Sheriff's Office. (R134) Appellant argues how well the informant did in testimony on November 5, 1991, also had an impact upon whether he would continue to stay in the employment of the Clay County Sheriff's Office.

The State next opinions that Appellant was a street vendor with a predisposition to commit this crime. The State overlooked the fact that the informant in this case did not testify he ever did a drug transaction with Appellant. The informant testified he did a hand-to-hand buy with Appellant's co-defendant, Robert Tisdale on both occasions. It was Robert Tisdale that gave the informant the crack cocaine and it was Robert Tisdale that was paid by the informant for the drugs. This fact situation is the same for both charged drug transactions against Appellant. The only evidence as to the Appellant's participation and thus, his predisposition, in the alleged drug transactions was supplied by the informant. It was the informant's statement that Appellant handed something to his co-defendant, Robert Tisdale, which the informant believed was sold to him as crack cocaine. The informant did not testify he had ever seen crack cocaine in the possession of Appellant. From the testimony of the informant the State concluded the Appellant was a street vendor, was predisposed to commit this

crime and would have sold these drugs to someone else if not to the informant. If the testimony of the informant is suspect or perjured, this conclusion as to the predisposition of the Appellant is totally incorrect. Regardless, there is no testimony in the record to substantiate this conclusion.

The State, in its brief, spent a considerable amount of time discussing State v. Glosson, 462 So.2d 1082 (Fla.1985). It is this Court that decided that case and the reasoning behind the case is well understood by this Court. However, the Appellant feels it is necessary to discuss what the State has pointed out as being two significant ways that makes Glosson distinguishable from the instant case. The State first suggests it is the predisposition of the Defendant who must raise the defense of entrapment as in the Glosson case before a due process violation can occur. The State's inference being that if the defendant is selling as opposed to buying controlled substances, a due process violation can not occur because there can be no entrapment defense because the defendant's predisposition to commit crime is assumed if he is selling controlled substances.

This Court addressed that very issue in Glosson, supra, when it held that regardless of the defendant's predisposition, governmental misconduct which violates the constitutional due process of the defendant requires dismissal of criminal charges, Glosson, at 1085. This Court also had the opportunity to reexamine the entrapment issue in light of Glosson, supra, in State v. Hunter, 586 So.2d 319 (Fla. 1991). The Hunter Court makes two

important points as it relates to the State's argument. First, the Court knew that the defendants in Hunter, supra, were selling a trafficking amount of cocaine to the State's informant and yet the Court did not conclude because of that fact, a due process violation could not occur. Second, the Hunter Court held that Defendant Conklin as a matter of law had established an entrapment defense inferring that a predisposition to commit crime is not assumed because the defendant is selling as opposed to buying controlled substances.

Appellant argues it is not the predisposition of the Defendant to commit crime that is of concern to this Court in a due process violation, but the predisposition and actions of the informant in acting lawfully and then testifying truthfully when producing the evidence against the Defendant. In determining a due process violation, Appellant argues the trial court should look at what is motivating or potentially motivating the informant; (a) to create or participate in a crime, (b) how the informant is to be compensated for his participation, and, (c) how the informant supports his participation in the crime through subsequent sworn testimony. If the informant is being motivated by the government in the form of compensation or reward which is contingent upon a case being made or testimony being given in order for the State to gain a successful prosecution against a defendant, then a due process violation has occurred. The due process violation can occur along the drug prosecution sequence at any point; at the time of the drug transaction on the street, or as in this case, in the

courtroom at the time of testifying. The critical issue is whether the informant continues to be paid a contingency fee or to receive a reward in terms of leniency for his continued participation in the prosecution.

Appellant's argument is extremely strengthened in the instant case where the informant gave a deposition on October 9, 1991, less than thirty days before his trial testimony and it became obvious to the State that without a drastic change in the informant's testimony on November 5, 1991, there would be no conviction of Appellant. Informant's testimony on October 9, 1991, was not in agreement with Detective Jett's records as to the money spent, amount of cocaine purchased or the supporting facts of what took place with Appellant on the two dates charged in the information. The informant in the instant case had to minimally correct his testimony, if not commit perjury, on November 5, 1991 to get his testimony to match Detective Jett's. The Prosecuting Assistant State Attorney who was present at the deposition of the informant clearly knew this and she could elect to "correct the testimony" of the informant or drop the charges. The State elected to proceed by motivating this informant to testify. The informant's motivation for correcting his testimony was: (a) he would be compensated for his testimony, although he did not know how much he would be compensated and, (b) he would continue to work for the Clay County Sheriff's Office.

The State's second distinction concerns the manner in which the informant in Glosson, supra, was compensated. The State

incorrectly states the informant in Glosson, supra, was going to be compensated and it was contingent upon the defendant being convicted. Actually, the informant in Glosson, supra, was going to be compensated through civil forfeitures which is a civil action separate and apart from a criminal conviction. Civil forfeiture hearings are based upon the preponderance of evidence before the sitting judge. It is a different standard than used in a criminal charge where it must be proved beyond a reasonable doubt before a jury that the defendant is guilty of committing a crime and it is very possible a civil forfeiture will occur without a criminal conviction having occurred. What was critical in Glosson, supra, was that the informant cooperated with the criminal prosecution and therefore made it a successful prosecution and then the informant cooperated in the civil forfeiture hearings where he gained his contingent fee (Appellant assumes - What would be interesting is to know whether the civil forfeitures would be set aside for this same due process violation). Appellant simply argues that in Glosson the informant could have received his compensation without a guilty verdict against defendants. In the instant case, the informant would not have been paid nor would he have continued to work for the Clay County Sheriff's Office if he had not testified and there would have been no successful prosecution.

The State argues that compensation agreements to obtain trial testimony are common occurrences. It is interesting to note the State's use of the term "compensation agreements" as opposed to "contingency fee agreements". Appellant agrees there clearly are

different theories behind "compensation agreements" as opposed to "contingency fee agreements".

The State gives a number of examples where witnesses are compensated for coming into court and testifying, none of which are on a contingency basis. Such witnesses' testimony can be broken down into several different categories. The first category consists of witnesses that are paid a set fee or salary for coming into court and giving their testimony either in the form of an opinion or factual observation such as expert witnesses or police officers who are paid a salary. These individuals are not being motivated by some future payment of unknown compensation. Everyone (including the witness) knows exactly what they will be paid and the State and defense know exactly what their testimony will be at trial. The State may not be able to proceed to trial without this witness' testimony, but, this witness doe not have an agreement with the State that they must cooperate with the State for a successful prosecution.

The second group of witnesses the State cites as being compensated are those that are given monetary rewards for giving information that leads to subsequent convictions. These witnesses are generally non-participatory in the criminal acts for which they are turning over information to law enforcement officers. These witnesses give hearsay testimony and independently can not establish in court the corpus delicti of the crime without making themselves criminally responsible. If they are criminally liable they will not receive the reward and they can not be made by the

State to testify against themselves. Therefore, the State can not condition the monetary reward for this class of witnesses upon the witness' cooperation with the State in order to gain a successful prosecution. In addition, the witness generally knows how much the reward will be before ever giving any information and knows their information must lead to credible evidence that will result in a conviction in order to gain the reward.

The third class of witnesses who are compensated for their testimony are participants in some criminal act who have either inside information or directly participated in an act with co-defendants and who makes a trade with the State in the form of criminal sanctions to be imposed against them for testimony against their co-defendants. This classification of witnesses is unique in that the State will not deal with these individuals without knowing the events that occurred. The State gains that information through the use of sworn statements of the witness and then tests it against the other known facts of the case. If the testimony does not fit with the known facts of the case and the State does not have the leverage of a criminal conviction over the informant, the informant's information will be disregarded and subsequently not used in another prosecution. If the information is used,the State then has the availability of the using perjury charges or negating the negotiated deal with the informant if the informant's testimony changes at later proceedings.

What makes all three of the above discussed classifications different than the case now before the Court is that all of the

above described witnesses know what the end result will be from their testimony. Additionally, none of the these classifications of witnesses are involved in the manufacturing of cases in which they subsequently must testify, if testimony is necessary.

The exceptions to the above generalizations may be police officers that are working undercover to intercept crimes and individuals that are under sentence that are cooperating with law enforcement officers to make cases against potential defendants that are involved in criminal activity. In the case of police officers, they are paid a set salary that is a matter of public record and are not compensated for courtroom testimony for a particular prosecution. It is a part of their job responsibility to intercept crime for which they have been trained and which is internally monitored by their department and controlled by the principles of law.

In the case of those individuals seeking a reduction or leniency in their sentence, they are participating for a one time consideration of criminal charges pending against them. Additionally, the reward they will receive is not unknown in that the informant is told that their sentence will be reduced if they complete certain acts on behalf of the prosecuting authority. Usually, testimony is not a requirement in that the activities of the informant are in the form of an introduction to law enforcement officials or under the close supervision of law enforcement. Appellant argues this group of informants should be examined as closely as paid informants because of the added element that this

informant can potentially manufacture crime or fact situations as can paid informants. This Court recognized this added element in Hunter, supra, where this Court stated that "gaining or preserving one's liberty could produce as great an interest in the outcome of a criminal prosecution as a financial interest ****", at pg. 321.

Confidential informants that work on a contingency fee basis are different in several respects from the classifications of witnesses as discussed above. By their acts and participation as agents of the State, they are in the position of having to generate crimes, as the Courts have previously pointed out, in order to be monetarily compensated. In the case before the bar, the informant, Gerald Jefferson, was free to generate as many cases as he wished and did generate 40 to 60 different cases prior to his trial testimony of November 5, 1991. (R132-133) For those 40 to 60 cases he had been paid approximately $2,000.00. He was continuing to be paid for his participation in those cases as depositions and trials came about as a result of his generating those cases.

Second, what distinguishes "contingency fees" and the case before the bar from all other "compensation fee" agreements discussed by the State and placing it squarely within a due process violation is that the informant in the instant case, at the time of trial, still had no idea what his monetary compensation would be by his giving testimony at the trial of Appellant. This informant was never given a figure as to what he would be paid for each event of a criminal prosecution in which he participated. He was told by Detective Jett the bigger the case, the more money he (the

informant) would receive and that there was no limit as to what he could be paid. It was up to Detective Jett to determine how much the informant would be paid. (R131-132) All of this was in the mind of the informant and set the stage for the informant's testimony on the day of trial, when the informant stated he did not know what he was going to be paid for that day, but he knew he would be "treated right". (R178) Appellant argues this statement in itself clearly shows the motivation of this informant testifying against appellant. Coupled with the conflict in testimony given by this informant at deposition and trial, the predisposition of this informant to fabricate the testimony the State needed for a conviction against Appellant is well defined and clearly a due process violation.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original and seven copies of the foregoing REPLY BRIEF OF APPELLANT has been furnished by U.S. MAIL DELIVERY to the FLORIDA SUPREME COURT, Tallahassee, Florida and a true and correct copy of same has been furnished by U.S. MAIL to JAMES ROGERS, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, Appeals Division, The Capitol Building, Tallahassee, Florida 32301 on this 17th day of September, 1993.

James R. Thies, Sr.