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IN THE SUPREME COURT OF FLORIDA

BARBARA METCALF,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,612

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the criminal division of the Circuit Court of the Seventeenth Judicial Circuit of Florida. She was the appellant in the district court of appeal which affirmed a conviction for solicitation to purchase cocaine. She will be referred to as she appears in this Court.

An appendix is attached hereto containing those portions of the record, and pertinent other decisions, deemed necessary to demonstrate jurisdiction.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested after purchasing crack cocaine that was sold to her in a reverse sting operation conducted by the Broward Sheriff's Office using crack cocaine that had been converted from its usual form by the sheriff's laboratory into crack cocaine. The charge lodged against her was solicitation to purchase cocaine instead of purchase of cocaine. This was due to the decision by the district court of appeal in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), holding that the sheriff's manufacture of crack cocaine was unauthorized and that the use of such unlawfully manufactured drug by the sheriff's office in making charges of criminal conduct was a violation of due process of law.

The district court of appeal stated the issue as "whether a defendant, who otherwise would be discharged if prosecuted for the purchase of cocaine, pursuant to Kelly ..., may nevertheless be convicted of solicitation to deliver cocaine."

The district court of appeal affirmed the denial of Petitioner's motion to dismiss. The court below distinguished the decision in Kelly where the possession of the substance was an essential element of the offense from the charge in this case where possession was not an element. The court below thus held it to be "irrelevant that the transaction ultimately resulted in the unlawful transfer of a drug."

Based upon its conclusion of a limited relationship between the unlawful drugs utilized by the sheriff and the elements of the crime of solicitation, the court held no violation of Petitioner's right to due process of law.

A timely notice to invoke the jurisdiction of this Court was filed.

SUMMARY OF ARGUMENT

This case involves the same due process of law issue that the Court has under consideration in State v. Williams, Fla. Supreme Court Case No. 79,507.

The jurisdiction of the Court is based upon the pending status of Williams, as the Court's jurisdiction was envisioned in Jollie v. State, 405 So. 2d 418 (Fla. 1981).

Additionally, the Court has jurisdiction because the decision below expressly construes the due process of law clause of Article I, section 9, of the Florida Constitution. Under Article V, section 3(b)(3), the Court has authority to review the decision below.

Uniformity in the law, and justice to parties in substantially similar circumstances, warrants the Court accepting jurisdiction to review this cause. If the Court finds in Williams that the procedure of manufacturing and distributing crack cocaine by a county sheriff's office is so unlawful and inappropriate as a method of identifying and charging drug users that due process of law is offended by such practice, then the Court should review this case in order to ensure uniformity and consistency in the law.

ARGUMENT

THE AFFIRMANCE OF PETITIONER'S CONVICTION BASED ON PURCHASE OF POLICE-MANUFACTURED COCAINE, ON THE SOLE BASIS THAT THE CHARGE WAS FILED AS SOLICITATION, CONSTRUES THE DUE PROCESS CLAUSE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS IN A WAY WHICH REQUIRES THIS COURT'S REVIEW.

The decision below expressly interpreted and construed a controlling provision of the federal and Florida Constitutions, the due process of law clause. Art. I, § 9, Fla. Const.; Amendment 14, U.S. Const. As such, the decision below is reviewable under this Court's jurisdiction granted in Art. V, § 3(b)(3).

Additionally, the Court has jurisdiction to review the decision below because of its reliance upon a distinction with the decision of the same court in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), which established the rule of law that the manufacture of crack cocaine by the sheriff's office was unauthorized and unlawful and that its use in reverse sting operations constituted a violation of due process of law. The decision in Kelly was not brought before this Court by the state for review, but another case

decided by the Fourth District Court of Appeal that followed and relied upon the decision in Kelly is pending review upon the very same issue decided in Kelly. Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992), is pending review on the merits in this Court, oral argument having been heard in November, 1992. Therefore, the Court should have jurisdiction based upon the principle established by the decision in Jollie v. State, 405 So. 2d 418 (Fla. 1981).

While the Court does not have before it pending on the merits the very case cited to and relied upon below, the Court does have before it and pending on the merits a case relied upon by the district court below that held identically as the lead case referred to in the opinion below. It is a slight extension of the holding in Jollie to find jurisdiction under Jollie, but to fail to do so would conflict with the principle established in that case. The Court held that consistency and uniformity in the law required that similar cases decided on the basis of a lead case by district courts of appeal be referenced to the lead case. Upon review in this Court of the lead case, all cases following the lead case will also receive review. This eliminates an invidious inconsistency between similar cases that would deny equal justice. Jollie.

In Jollie, 405 So. 2d at 420-421, the Court said:

> We believe, however, that there can be improvement in the procedure through which district courts can isolate for possible review in this Court those decisions which merely reference to a lead opinion, as we now have for review, as distinguished from those per curiam opinions which merely cite counsel-advising cases such as in Dodi Publishing. There are two prongs to the problem, and we

believe each can be treated by the judges of the district courts without undue problems.

First, we suggest the district courts add an additional sentence in each citation PCA which references a controlling contemporaneous or companion case, stating that the mandate will be withheld pending final disposition of the petition for review, if any, filed in the controlling decision. In essence, this will "pair" the citation PCA with the referenced decision in the district court until it is final without review, or if review is sought, until that review is denied or otherwise acted upon by this Court. If review of the referenced decision is requested, the parties may seek consolidation here. In any event, the district courts' withholding of the mandates will dispose of the need for separate motions to stay mandates in those courts. This simple process, moreover, can be accomplished administratively in the district courts, in the clerk's offices, without significant activity by the judges either before or after the controlling decision is filed with or acted upon by this Court.

A second aspect of the problem calls for a different approach. We recognize that no litigant can guide the district court's selection of the lead case, and that the randomness of the district court's processing would control the party's right of review unless the citation PCA is itself made eligible for review by this Court. To resolve fully this problem, we further suggest that the district courts devise one or more methods to distinguish a contemporaneous or companion case -- for example, with distinguishing citation signals or by certifying that an identical point is at issue in the cited case -- from cases which offer a mere counsel notification citation. We have no doubt that district court judges can produce one or more methodologies to preserve the review strictures of the 1980 amendment on the one hand, while on the other eliminating the possible injustice inherent in foreclosing review to some of several equally situated litigants.

The only difference sub judice is that the district court below cited to the true "lead" case. The actual case that is

pending review is a case that was issued slightly later than the first "lead" case and is for purposes of this case and many others decided below, the "lead" case. To deny review because the district court below failed to comply with the policy course outlined in Jollie would foster disparity among litigants based upon the vagaries of how a district court of appeal set forth its decision rather than on the basis of the actual decision itself. The Court has previously announced that its jurisdiction is to review decisions, not mere opinions, of lower courts, thus its jurisdiction extends to the entire case. Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970), cited in Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). See also, Savoie v. State, 422 So. 2d 308 (Fla. 1982), and Zirin v. Chas. Pfizer & Co., 128 So. 2d 594 (Fla. 1961). In Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960), the Court stated that the principle of review in the Supreme Court based upon conflict of decisions is directed at two situations (1) where the decision to be reviewed has announced a differing rule of law, or (2) where the decision to be reviewed has applied a rule to produce a different result based upon substantially the same controlling facts as the case in which the rule was announced.

Sub judice, the controlling facts are that the state manufactured and sold crack cocaine to the public, and based upon that operation the Petitioner was charged with a criminal offense directly related to the use of that manufactured cocaine. Whether the offense was possession, purchase, attempted possession, attempted purchase, solicitation to purchase or solicitation to possess, it should make no difference.

The decision below is either correct or erroneous, and that can be answered only after this Court decides the lead case. The lead case is now Williams, pending decision, and no longer is Kelly. The citation below to Kelly should not control the jurisdiction of this Court when there is also an opinion explaining the rule that the court below was applying. This case is not a mere "citation PCA." Williams, decided shortly after Kelly, is pending review here on the same issue announced by the court below in Kelly. Thus, the Court should decide that under the rationale of Jollie, jurisdiction vests to review the decision below.

The Court should grant review if it ultimately determines that the practice engaged in by the Broward County Sheriff's Office of manufacturing and selling crack cocaine is unauthorized and that charges premised upon that conduct cannot withstand challenge under the due process of law clause of the constitutions.

There are several other cases in which the Fourth District Court of Appeal has decided the same issue and has cited to Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993), as authority. The district court below has refused on rehearing to either certify conflict or to cite to the Williams case. See, e.g., Gordon v. State, Fourth District No. 92-00972, and Lacy v. State, Fourth District No. 92-00953. Thus, numerous convictions have been affirmed based upon Metcalf as the "lead" case. Review should granted sub judice.

CONCLUSION

The Court is requested to accept jurisdiction to review constitutional interpretation announced by the decision of the district court in the present case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOSEPH TRINGALI, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 23rd day of APRIL, 1993.

LOUIS G. CARRES
Assistant Public Defender

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1993

BARBARA METCALF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-0885.

L.T. CASE NO. 91-24354 CF.

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

Opinion filed January 27, 1993

Appeal from the Circuit Court for Broward County; Robert Fogan, Judge.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

STONE, J.

The issue is whether a defendant, who otherwise would be discharged if prosecuted for the purchase of cocaine, pursuant to Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992), may nevertheless be convicted of solicitation to deliver cocaine. The deputy arrested the Defendant in a "reverse sting" in which the only drug involved was crack cocaine unlawfully manufactured by the sheriff's lab, a circumstance which this Court has determined is a due process violation. Kelly. The trial court denied Appellant's motion to dismiss. We affirm.

Section 777.04(2), Florida Statutes, provides:

> Whoever solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation.

The Appellant contends that the State may not prosecute her on the related charge, when she could not be charged with the purchase, within 1000 feet of a school, which ultimately occurred following the "solicitation." She asserts that to hold otherwise is to effectively condone unlawfully "ensnaring" the purchaser where the sheriff's intent is to complete a delivery proscribed by Kelly. The Appellant does not dispute that, but for the source of the drug, the solicitatibn charge is otherwise valid.

In Kelly, the purchase of the crack was an essential element of the charged offense. Here, however, the State need not prove a completed purchase, nor even that the undercover "seller" possessed drugs, in order to convict the potential buyer of solicitation. E.g., State v. Johnson, 561 So. 2d 1321 (Fla. 4th DCA 1990); State v. Milbro, 586 So. 2d 1303 (Fla. 2d DCA 1991). The crime of solicitation is completed prior to any purchase or delivery. All of the elements of a solicitation are present when the defendant entices or encourages the other party to commit the crime. Johnson; Milbro. In Johnson, this Court stated:

> The crime of solicitation is completed when the actor with intent to do so has enticed or encouraged another to commit a crime; the crime need not be completed.

***

> The crime of solicitation focuses on the culpability of the solicitor. It is irrelevant that the other cannot or will not follow through.

It is irrelevant that the transaction ultimately resulted in an unlawful transfer of a drug. We note by analogy that the supreme court has recognized that outrageous police misconduct constituting a due process violation ensnaring one defendant, does not entitle a codefendant, who had no direct contact with the police informant involved, to a discharge as well. State v. Hunter, 586 So. 2d 319 (Fla. 1991). It has also been determined with respect to charges involving attempts, that where a substance is not itself an essential element of the crime, it does not matter whether the substance used is introduced, or is even real. See Tibbetts v. State, 583 So. 2d 809 (Fla. 4th DCA 1991). See also Louissaint v. State, 576 So. 2d 316 (Fla. 5th DCA 1990); State v. Cohen, 409 So. 2d 64 (Fla. 1st DCA 1982).

We conclude that the limited relationship between the drugs in the deputy's possession and the elements of this offense is not sufficient to violate Appellant's due process rights.

WARNER, J., concurs.
FARMER, J., concurs specially with opinion.

FARMER, J., specially concurring.

I concur in the essential rationale and result of Judge Stone's opinion. I stress that I do so only because the defendant has not, as observed by Judge Stone, made any challenge to the application of the solicitation statute, section 777.04(2), Florida Statutes (1991), to the facts of this case. Her sole contention on appeal is that the crack cocaine sought to be sold by the sheriff in this undercover sting operation was manufactured by the sheriff in his own lab, a practice which we condemned in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 1280 (Fla. 1992) as a violation of constitutional due process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to JOSEPH TRINGALI, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 23rd day of APRIL, 1993.

Louis G. Carres

LOUIS G. CARRES
Assistant Public Defender