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AUG 20 1993

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,61²~~8~~

BARBARA METCALF,

Petitioner,

vs

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution in the trial court and the appellee in the District Court of Appeal, Fourth District.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"PB" Petitioner's Brief on the Merits

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented in the Initial Brief of Petitioner to the extent that they are not argumentative.

SUMMARY OF THE ARGUMENT

Reverse sting operations in which undercover officers offer to sell drugs have been approved. The crime of solicitation to deliver cocaine is committed when one offers to purchase cocaine, without regard to whether the purported seller is or is not in actual possession of the drug.

This Court has ruled that the police violated due process requirements when they "manufactured" cocaine to use in reverse sting operations. However, because that cocaine is not an essential element of the crime of solicitation, that due process violation does not bar prosecution.

ARGUMENT

IT IS NOT A VIOLATION OF DUE PROCESS OF
LAW FOR THE STATE TO PROSECUTE A DEFENDANT
FOR SOLICITATION TO COMMIT A CRIME WHEN THE
COMPLETED CRIME WOULD HAVE BEEN THE PURCHASE
OF GOVERNMENTALLY MANUFACTURED COCAINE

In State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), this Court held that the illegal manufacture of crack cocaine by law enforcement officials for use in a reverse-sting operation within one thousand feet of a school constitutes governmental misconduct which violates the due process clause of the Florida Constitution. The Court said that "the only appropriate remedy to deter this outrageous law enforcement conduct is to bar the defendant's prosecution." The question now presented is whether, given the fact that crack cocaine was illegally manufactured by police, every defendant who was subsequently arrested by them must be discharged regardless of the offense charged.

In State v. Hunter, 586 So. 2d 319 (Fla. 1991), this Court made it clear that while a due process violation would result in a defendant's discharge, the mere fact that such a violation occurred would not bar every subsequent prosecution of every defendant. Thus, this Court held that while outrageous police conduct on the part of a police informant violated one defendant's due process rights and resulted in a discharge, the same conduct did not bar the prosecution of a co-defendant who had "minimal contact" with the informant but was also ensnared. Hunter, id., at 322.

There is no question that this Court has approved reverse

sting operations in which undercover officers offer to sell drugs. State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989), approved, Burch v. State, 558 So. 2d 1 (Fla. 1990). It is equally certain that the crime of solicitation is completed when a defendant with intent to do so entices or encourages another to commit a crime, even though the crime is not completed. As pointed out by the Fourth District Court of Appeal, "The crime of solicitation focuses on the culpability of the solicitor. It is irrelevant that the other cannot or will not follow through." State v. Johnson, 561 So. 2d 1321 (Fla. 4th DCA 1990). A similar conclusion was reached by the Second District in State v. Milbro, 586 So. 2d 1303, 1304 (Fla. 2d DCA 1991), where the Court held that "the crime solicited need not be committed." Clearly, therefore, at bar the crime of solicitation was committed when Petitioner Metcalf approached the undercover officer and solicited the delivery of cocaine. The fact that the cocaine in his possession was "manufactured" is as irrelevant as it would be if the cocaine was nonexistent.

In attacking the Hunter analogy used by the Fourth District Court of Appeal and Respondent in its brief below, Petitioner focuses on the fact that two individuals were involved in that case, and that the violation of one defendant's due process rights was severed from the other. Obviously, Petitioner misunderstands the significance of Hunter to the case at bar.

Here, Petitioner's argument hinges on the governmental misconduct; arguing, in effect, that the due process violation which resulted from the illegal cocaine manufacture bars the

prosecution of any crime which is later connected to that act. In Hunter, the informant, Diamond, used what this Court said was outrageous conduct to entrap one Conklin. Conklin then ensnared Hunter. There, as here, a due process violation occurred; the point is that this Court rejected the notion that such a violation, in and of itself, tainted every prosecution which flowed from it. Instead, the Court found a logical cut-off: the point at which the due process violation no longer affected the prosecution. In Hunter, that point came when the outrageous conduct decried by the Court had minimal contact with the defendant; Respondent respectfully suggests that at bar the point came when the illegal drug became irrelevant to the case.

Petitioner's argument that "If the police below had not manufactured the crack cocaine they would not have been positioned near the school delivering it to persons and attracting persons to come up to view it, offer to buy it, and to attract all the evil that is associated with such transactions," (AB 8), clearly misses the point. In fact, if the police below had not manufactured the crack cocaine they could have set up the same reverse sting in the same location using any substance resembling rock cocaine, or even no substance at all. The result for Petitioner would have been exactly the same because the crime charged was solicitation, not purchase or even attempted purchase -- and the crime of solicitation was completed at the instant Petitioner offered to buy cocaine.

Finally, Petitioner's arguments that "the use of another,

substantially similar, charge to avoid the limitations of Williams would defeat justice" and that this Court's affirmance of the Fourth District would somehow allow manufactured cocaine to be "lost" into the community are likewise without merit.

Solicitation to deliver cocaine is in no way "substantially similar" to the crime of actual delivery. The former is a felony of the third degree which carries no mandatory minimum prison sentence. It is a far cry from the latter, a felony of the first degree requiring a mandatory minimum prison sentence of three calendar years and where probation is not a possibility. Fla. Stat. §893.13(e)1. Likewise, because the crime of solicitation to deliver cocaine does not require the use of actual cocaine, there is little or no chance of the drug escaping into the community. Clearly, Petitioner's public policy arguments do not stand up to careful scrutiny.


Respondent respectfully suggests that the trial court did not err in denying Petitioner's motion to dismiss, and the Fourth District Court of Appeal correctly held that the fact that the cocaine was manufactured was irrelevant to the solicitation charge. This Court accomplished what it sent out to do in Williams; the conduct decried by it has ceased. There is no reason to extend Williams. The decisions of the lower courts should be affirmed.

CONCLUSION


WHEREFORE, based upon the foregoing reasons and citations of authority cited herein, Respondent respectfully requests that the Judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

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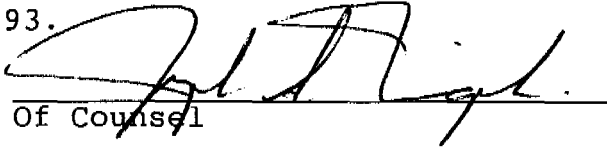


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to: LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this 18th day of August, 1993.


Of Counsel

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