097

FILED
SID J. WHITE
SEP 15 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 81,614

CHARLES BAKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TAVBLE OF CITATIONS

CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Respondent, the State of Florida, was the Appellee and the prosecution, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Respondent's Appendix, which is a conformed copy of the District Court's opinion, attached hereto.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts for purposes of this appeal.

SUMMARY OF THE ARGUMENT

Although this Court has ruled that police manufacture of cocaine violates due process, the fact that police manufactured cocaine was present in this case does not bar Petitioner's prosecution for solicitation to purchase as cocaine is not an element of that offense, thus any due process violation does not taint Petitioner's conviction.

ARGUMENT

A CONVICTION FOR SOLICITATION TO PURCHASE POLICE-MANUFACTURED COCAINE DOES NOT VIOLATE DUE PROCESS.

The question presented in the instant case is whether, in light of this Court's decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), condemning the manufacture of crack cocaine by law enforcement as violative of due process, a defendant should be discharged from prosecution for solicitation to purchase illegally manufactured crack cocaine in that the cocaine was neither the instrumentality nor an element of the crime charged. The State submits that the trial court and the Fourth District Court of Appeal properly determined that Petitioner should **not** be discharged from prosecution for this charge.

There is no question that this Court has approved the use of reverse sting operations in which undercover officers offer to sell illegal drugs. Williams at S372; State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989), approved, 558 So. 2d 1 (Fla. 1990). It is equally clear that the crime of solicitation is completed when a defendant entices or encourages another to commit a crime, the crime itself need not be completed. State v. Johnson, 561 So. 2d 1321 (Fla. 4th DCA 1990); State v. Milbro, 586 So. 2d 1303 (Fla. 2nd DCA 1991); See also: Louissaint v. State, 576 So. 2d 316 (Fla. 5th DCA 1990) (the crime of "attempt" does not require proof that the substance involved was actually cocaine). As pointed out by the Fourth District in Johnson, "The crime of solicitation focuses on the culpability of the solicitor. It is irrelevant that the

other cannot or will not follow through." Id. at 1322. Similarly, in Milbro, the Second District held that "... the crime solicited need not be committed." Id. at 1304. Clearly, the crime of solicitation with which Petitioner was charged was committed when Petitioner approached the undercover officer and requested to purchase cocaine. The fact that the cocaine in the officer's possession was manufactured by the police is irrelevant, just as it would be irrelevant that the officer did not have cocaine at all or had a counterfeit substance.

Petitioner contends the Fourth District's reliance on this Court's decision in State v. Hunter, 586 So. 2d 319 (Fla. 1991), in Metcalf v. State[1], is misplaced, arguing that here, unlike there, there was no intervening conduct by a non-state agent which removed the taint of the due process violation. Respondent submits Petitioner has misinterpreted this Court's decision in Hunter. In Hunter, an informant used what this Court found to be outrageous misconduct to entrap one Conklin. Conklin then persuaded Hunter to participate in the crime. This Court held that although Hunter's motive may have been benevolent, his conduct was wholly voluntary, regardless of the fact that Conklin's conduct was motivated by improper police misconduct. Thus in Hunter, this Court made it clear that while a defendant whose due process rights have been violated by police misconduct is entitled to discharge, the fact that police misconduct has occurred does **not** in and of itself

---

[1] Petitioner's conviction was **per curiam** affirmed on authority of Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993).

require discharge of a defendant whose due process rights have **not** been violated. There, as here, a due process violation occurred; however, there, this Court rejected the notion that such a violation tainted every prosecution which flowed from it. Instead, this Court found a logical cut-off; the point at which the due process violation no longer affected the prosecution. In Hunter, the point came when the improper police conduct had minimal conduct with the defendant; Respondent submits that here, the point came when the illegally manufactured crack became irrelevant to prosecution of the crime charged. See also: Luzarraga v. State, 575 So. 2d 731 (Fla. 3rd DCA 1991), (the intent or motives of the person solicited are irrelevant to a solicitation charge).

Petitioner's argument that his solicitation would not have occurred "but for the desire of the police to use that illegally manufactured crack to make a case against buyers in a reverse sting operation" (AB 6), misses the point. In fact, if the police below had not manufactured the crack, they could still have set up the **same** reverse sting, in the **same** location, using any substance resembling crack cocaine or even no substance at all. The result for Petitioner would have been the same because the offense charged was solicitation, not purchase or even attempted purchase -- and the crime of solicitation was completed at the instant Petitioner offered to buy cocaine from the officer.

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's decision in Metcalf would somehow allow manufactured crack to escape 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 third degree felony which carries no mandatory minimum prison term; the latter is a first degree felony which carries a three year mandatory minimum sentence with no possibility of probation. Section 893.13(1)(e)1. Florida Statutes (1990). Further, the risk of cocaine escaping into the community is no greater when the police use cocaine they have manufactured than when they use cocaine they have previously seized. Additionally because the crime of solicitation to deliver cocaine does not require the use of actual cocaine, there is little chance of the drug escaping into the community. Clearly Petitioner's policy arguments do not survive careful scrutiny.

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

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court AFFIRM the decision of the Fourth District below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Florida Bar No. 339067

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished by Courier to: ALLEN J. DeWEESE, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 13th day of September, 1993.

Of Counsel

APPENDIX

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

ROBERT BURATY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-2205.

L.T. CASE NO. 92-11334CF.

Opinion filed March 31, 1993

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

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

Richard L. Jorandby, Public Defender, and Eric M. Cumfer, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed on the authority of Metcalf v. State, 18 Fla. L. Weekly D381 (Fla. 4th DCA Jan. 27, 1993).

DELL, WARNER and POLEN, JJ., concur.