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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 6 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JAMES TISBY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,676
(4th DCA #91-1580)

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. He was the appellant in the district court of appeal which affirmed his conviction for attempted purchase of cocaine. He will be referred to as petitioner in this brief.

An appendix is attached which contains the decision in which review is sought.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested and charged with purchasing crack cocaine being sold by the Broward Sheriff's Office in a reverse sting operation. The officers were selling crack cocaine that had been converted from its usual form by the sheriff's laboratory into crack cocaine. The charge lodged against petitioner was purchase of cocaine but the jury only convicted petitioner of attempted purchase of cocaine. On appeal petitioner claimed his conviction violated due process under Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), which holds 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 affirmed and cited to its recent decision of Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993), where the defendant had been convicted of solicitation to purchase police manufactured cocaine.

The district court of appeal distinguished the decision in Kelly where the possession of the substance was an essential element of the offense from the conviction in this case where "the nature and source of the substance attempted to be purchased is not relevant or material to the issue of whether appellant's due process rights have been violated" (Appendix-2).

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 and Metcalf v. State, supra, 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 Art. I, § 9, of the Florida Constitution. Under Art. V, § 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 FOR ATTEMPTED PURCHASE OF POLICE-MANUFACTURED COCAINE, ON THE SOLE BASIS THAT THE JURY ACQUITTED HIM OF PURCHASE AS CHARGED, 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 ruled that the illegal manufacturing of crack cocaine by police officers and their selling those rocks on the street without adequate inventory control to prevent their release into the neighborhood constitutes outrageous police conduct which violates due process. 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. Also, Metcalf v. State, supra cited by the Fourth District to support affirmance is pending review in case 81,612. Therefore, the Court should have jurisdiction based upon the principle established by the decision in Jollie

v. State, 405 So. 2d 418 (Fla. 1981).

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. Here Tisby was an individual facing a charge of purchase of police manufactured cocaine, which offense was subject to a motion to dismiss under Kelly. Mr. Tisby is just as entitled to protection from the outrageous and shocking conduct of law enforcement agents upon conviction for attempted purchase, because the illegal police conduct involved is identical.

The purpose of finding a due process violation in Kelly was to deter illegal police conduct. By the decision in petitioner's case and Metcalf, the district court approved of the same police behavior found offensive to due process in Kelly, as long as the petitioner was found guilty of something other than purchase of cocaine. Due process was construed in petitioner's case when the district court held that officers can engage in the same conduct soundly condemned as a due process violation but get away with it because the jury acquits the defendant of actually buying the cocaine. This offense would not have occurred but for the police trying to sell cocaine rock they had manufactured.

The due process violation found in Kelly involves more than the Broward Sheriff's Office acting illegally in manufacturing "crack" for use in the reverse sting operations. Many factors underlay the court's determination that the police conduct was offensive to principles of due process:

> We find that the Sheriff of Broward County acted illegally in manufacturing "crack" for use in the reverse sting operation which led to the arrest of the appellant. Even more disturbing is the fact that some of the "crack," which is made in batches of 1200 or more rocks, escapes into the community where the reverse sting operations are conducted. The police simply cannot account for all of the rocks which are made for the purpose of the reverse stings.
>
> Such police conduct cannot be condoned and rises to the level of a violation of the constitutional principles of due process of law. State v. Glosson, 462 So.2d 1082 (Fla. 1985). Accordingly. we reverse the appellant's conviction and we instruct the trial court on remand, to enter an order of discharge.

Kelly v. State.

After condemning in Kelly as a violation of due process police practices that led to the presence of the police on the street near schools selling huge quantities of manufactured rocks over which they have no inventory control, the district court in petitioner's case said this very same police activity (selling, losing, and distributing crack cocaine) is no longer offensive to due process as long as (1) the defendant is only convicted of a lesser crime or (2) the state calls it some other crime. Outrageous, offensive police conduct cannot lose its illegal character on such a meaningless distinction as this and the district court's construction of the due process clause which allows such a distinction should be renewed by this Court under Art. V, § (3)(b)(3). Whether the offense was possession, purchase, attempted possession, attempted purchase, solicitation to purchase or solicitation to possess, it should make no difference to the construction of the due process clause.

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.

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 JOAN FOWLER, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 4th day of MAY, 1993.

Margaret Good
MARGARET GOOD
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

JAMES TISBY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-1580.

L.T. CASE NO. 90-18156 CF10.

Opinion filed February 17, 1993

Appeal from the Circuit Court for Broward County; Charles M. Greene, Judge.

Richard L. Jorandby, Public Defender, and Margaret Good, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Michelle Smith, Assistant Attorney General, West Palm Beach, for appellee.

HERSEY, J.

James Tisby appeals his conviction for attempted purchase of cocaine within 1000 feet of a school. The evidence indicates that the drugs used in the reverse sting operation which ensnared Tisby were a form of crack cocaine that had been converted from cocaine powder by the Broward County Sheriff's Department. Tisby seeks reversal on the authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992), and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA), dismissed, 599 So. 2d 1280 (Fla. 1992).

In Kelly we determined that law enforcement personnel were not statutorily authorized to "manufacture" drugs to be used in a reverse sting operation. 593 So. 2d at 1062. We characterized the process of doing so as "illegal." Id.

The subsequent case of Metcalf v. State, No. 92-0885, slip op. at 3 (Fla. 4th DCA Jan. 27, 1993), involved a conviction for solicitation to deliver cocaine. We distinguished Kelly and affirmed the conviction, explaining inter alia:

> 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.)

As in Metcalf we conclude that the nature and source of the substance attempted to be purchased is not relevant or material to the issue of whether appellant's due process rights have been violated.

AFFIRMED.

DELL, J., concurs.
LETTS, J., dissents without opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to JOAN FOWLER, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 4th day of MAY, 1993.

Margaret Good

MARGARET GOOD
Assistant Public Defender