IN THE SUPREME COURT OF FLORIDA

JAMES TISBY,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 81,676

PETITIONER'S BRIEF ON THE MERITS

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15th Judicial Circuit

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	
WHETHER PETITIONER'S CONVICTION FOR ATTEMPTED POSSESSION OF COCAINE MUST BE VACATED UNDER STATE v. WILLIAMS, 18 Fla. Law Weekly S371 (Fla. July 1, 1993).	6
CONCLUSION	12
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

Cases	Page
Kelly v. State 593 So. 2d 1060 (Fla. 4th DCA 1992)	3, 6-9
Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), juris. accepted Case No. 81,612	3, 8-11
Rochin v. California, 342 U.S. 165,173, 72 S. Ct. 205, 96 L. Ed. 2d 113 (1976)	7
State v. Clemones, DCA# 92-2997, opinion filed July 21, 1993	11
State v. Glosson, 462 So. 2d 1082 (Fla. 1985)	7
State v. Hunter, 586 So. 2d 319 (Fla. 1991)	9
State v. Palmer, 18 Fla. L. Weekly S432 (Fla. July 1, 1993)	7
State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993)	5-11
Tisby v. State, 614 So. 2d 586 (Fla. 4th DCA 1993)	3, 5, 8-10
Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992)	6

PRELIMINARY STATEMENT

Petitioner was the appellant in the district court and the defendant in the trial court. He will be referred to as petitioner in this brief.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with purchase of cocaine within 1000 feet of Dillard High School in Broward County (R-640). This charge rested on the work of Operation C.R.A.D.L.E., a special force of the Broward County Sheriff's Office (B.S.O.), which dealt exclusively with crack within 1000 feet of a school; their mission was to "combat drugs in school zone") (R-348). Here, B.S.O engaged in a reverse sting operation in which the deputies sold crack cocaine manufactured by the B.S.O. laboratory (R-377,456-7).

On August 30, 1990, Deputy Wiggins, accompanied by Deputy Forsythe, posed as an undercover drug seller in front of apartments at 2563 N.W. 13th Court in Fort Lauderdale (R-348,388), only 890 feet from Dillard (R-485). According to Wiggins and Forsythe, around 7:20 pm. petitioner drove up in a Bronco, parked in the apartment parking lot, approached the deputy, and asked for 3 rocks or $30 of cocaine (R-350-1,390). Petitioner supposedly took the rocks from Wiggins, gave him $40, 2 twenties, and walked away toward his truck. Wiggins gave the take down signal and several officers charged from across the street to arrest petitioner. Detective Steele said he saw petitioner drop three plastic bags with the cocaine rock (R-402); Detective Maney recovered the rocks and put them into evidence (R-461).

Petitioner testified that he went to the neighborhood to visit his cousin and while there was approached by the deputy who offered to sell him cocaine. He considered buying it but changed his mind when he saw what large cocaine rocks were offered for sale,

believing the sellers then to be police officers. Petitioner said that the officer snatched his money that he held in his hand and tried to push the rocks on him. As the officers closed in, the cocaine rocks fell to the ground from the officer's hand, petitioner said (R-510-523).

The jury found petitioner guilty of the lesser-included offense of attempted purchase of cocaine near a school (R-658). Petitioner was sentenced to 12 months of community control followed by three years of probation (R-662-663).

Petitioner timely appealed to the District Court of Appeal, Fourth District, contending that his conviction violated fundamental principles of due process of law because his offense occurred in the B.S.O. reverse sting of selling crack illegally manufactured by the sheriff's department as condemned in Kelly v. State 593 So. 2d 1060 (Fla. 4th DCA 1992), and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992).

On February 17, 1993, The Fourth District affirmed petitioner's conviction on Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), juris. accepted Case No. 81,612, which distinguished Kelly and Grissett where the defendant was convicted of solicitation to purchase cocaine. Tisby v. State, 614 So. 2d 586 (Fla. 4th DCA 1993) (Appendix 1-2).

Petitioner timely filed for rehearing and rehearing en banc and requested certification of the issue to Supreme Court, which was denied on March 26, 1993 (Appendix - 3).

Petitioner timely filed his notice invoking this Court's Discretionary Jurisdiction on April 23, 1993. On July 9, 1993,

this Court accepted jurisdiction and established a briefing schedule. This brief on the merits follows.

SUMMARY OF ARGUMENT

Petitioner was charged with purchase of crack cocaine which had been manufactured by B.S.O., yet the jury found petitioner guilty only of an attempted purchase. The Fourth District saw no due process violation in this conviction and affirmed. Tisby v. State, 614 So. 2d 586 (Fla. 4th DCA 1993).

This case is controlled by this Court's recent decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), holding that the illegal manufacturing of crack cocaine by police officers for use in a reverse sting operation within one thousand feet of a school constitutes outrageous police conduct which violates due process. The state may not obtain a conviction based on such police misconduct.

Here petitioner had direct contact with the officers who were selling the crack that they illegally manufactured and those officers actually claimed that a completed sale took place. The purpose of finding a due process violation is to deter unlawful police conduct. The District court's decision in petitioner's case allows the exact same unlawful police conduct condemned in Williams to sustain a conviction as long as the conviction is for an attempt or solicitation. The district Court's decision in Tisby does not square with Williams and petitioner must be discharged.

ARGUMENT

WHETHER PETITIONER'S CONVICTION FOR ATTEMPTED POSSESSION OF COCAINE MUST BE VACATED UNDER STATE v. WILLIAMS, 18 Fla. Law Weekly S371 (Fla. July 1, 1993).

This Court's recent decision in State v. Williams, 18 Fla. Law Weekly S371 (Fla. July 1, 1993), reviewed the Fourth District's decision in Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992), which reversed Williams conviction 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 those cases the Fourth District recognized that the police practice of manufacturing crack and selling those rocks in school neighborhoods with such poor inventory control that some rocks escaped into the neighborhood violated fundamental principles of due process. Kelly v. State, supra, Grissett v. state, supra. Likewise in Williams, this Court found such outrageous police conduct violated due process.

In State v. Williams, this Court strongly condemned the Broward Sheriff Office practice of illegally manufacturing rock cocaine for resale near schools in reverse sting operations. Important to that decision was the nature of the substance manufactured by B.S.O. "It is undisputed that crack cocaine is highly addictive and has caused death." Id. at 372. This Court concluded that manufacture of "an inherently dangerous controlled substance, like crack cocaine," could never be done for the public safety. Id. at 373. With alarm, the Court noted that "a significant portion of the crack cocaine manufactured for use in reverse-sting operations was lost." Id. at 373. The lack of strict inventory control

allowed an undetermined amount of the crack to escape into the community in close proximity to a school. This Court called this fact "particularly outrageous." Id. at 373.

In State v. Palmer, 18 Fla. L. Weekly S432 (Fla. July 1, 1993), the state attempted to distinguish that defendant's situation from Kelly because in Palmer there were no allegations that the police lost portions of the crack cocaine during the reverse sting operation. This Court affirmed the finding of the Fourth District, that it makes no difference that rock cocaine was not lost in the particular operation in which the defendant was arrested. Under the holding of Williams, drugs do not have to be lost, nor does a completed sale have to occur before due process is violated. Williams held:

> [T]he 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.

Id. at 371.

The purpose of finding a due process violation is to deter illegal police conduct. Due process prohibits the government from obtaining convictions "brought about by methods that offend 'a sense of justice.'" Rochin v. California, 342 U.S. 165,173, 72 S. Ct. 205, 96 L. Ed. 2d 113 (1976). Where law enforcement's misconduct cannot be countenanced, "the courts will not permit the government to invoke the judicial process to obtain a conviction." Williams, supra at 372, State v. Glosson, 462 So. 2d 1082 (Fla. 1985).

Petitioner was charged and tried for purchase of cocaine within one thousand feet of a school, where the cocaine the undercover officers were offering for sale had been illegally manufactured under the same scheme condemned in Williams and Kelly. However, the jury returned a verdict for the lesser included offense of attempted purchase of cocaine (R-658) and the Fourth District affirmed in spite of their holding in Kelly. By the decision in petitioner's case, Tisby v. State, 614 So. 2d 586 (Fla. 4th DCA 1993) (Appendix - 1-2) and Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), on which Tisby was decided, the Fourth District determined that no due process violation occurred from the police manufacture of crack cocaine and sale of that substance near a school if the state only charges the defendant with solicitation to purchase cocaine (Metcalf) or if the state can only convince the jury that an attempt and not a completed sale occurred (Tisby). Thus, the Fourth District approved the same illegal police conduct of manufacturing crack cocaine for use in a reverse-sting operation, as long as the defendant's conduct is not called purchase of cocaine.

If the Fourth District's conclusion is correct, then this Court might well have not decided State v. Williams at all. The Fourth District has established a very handy way for the state to completely avoid the finding of a due process violation in these circumstances - just call the defendant's conduct by some other name. Although in Metcalf and Tisby the police engaged in the identical outrageous and illegal conduct as in Kelly and Williams, the Fourth District upheld the resulting convictions, even though

the police claim a completed sale took place. Under Metcalf and Tisby no illegal conduct is deterred. The court allows the B.S.O. business as usual. The Tisby decision is plainly wrong in light of Williams and cannot stand.

One basis the Fourth District found for this Metcalf exception to Kelly comes from State v. Hunter, 586 So. 2d 319 (Fla. 1991). In Metcalf, the Fourth District said:

> 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).

Id. at 427.

In Hunter, the Court discussed the objective entrapment standard and found that the police informant Diamond's activity toward one Conklin did not address specific ongoing criminal activity until Diamond created such activity to meet his substantial assistance quota. Therefore, Conklin established entrapment as a matter of law and was entitled to a judgment of acquittal. Conklin had obtained Hunter's help to acquire the drugs that Diamond purchased but this Court upheld Hunter's conviction:

> Conklin's benefitting from the entrapment defense, however, does not mean that Hunter should too. Although Diamond's acts amounted to entrapment of Conklin, the middleman, he had minimal telephone contacts with Hunter. When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense.

Id at 322.

Hunter is hardly analogous to Mr. Tisby's situation. Mr. Tisby had direct contact with the police officers who were selling

the crack that they had illegally manufactured. Wiggins held out specific cocaine rocks that, he said, he showed Mr. Tisby at Tisby's request and sold to him! (R-350-351). Tisby told a different story, that he thought about buying the crack displayed but when he changed his mind, the officer snatched his money, tried to force the crack on him and it fell to the ground. Wiggins was directly involved in the identical conduct which Williams condemns. The Fourth District's decision in Tisby cannot stand given this Court's holding in Williams that "the only appropriate remedy to deter this outrageous law enforcement conduct is to bar the defendant's prosecution." Id. at 373.

The only distinguishing feature between this case and Williams is that the jury acquitted petitioner of the more serious offense of purchase and returned a verdict for attempt. That verdict should enure to the benefit of the defendant, not the state. The verdict does not change the character of the outrageous police conduct that occurred nor acquit the police of their violations of petitioner's due process rights. The verdict to the lesser certainly should not prevent petitioner's discharge on the authority of Williams.

Another basis for the Fourth District's decision in Tisby was their conclusion that "the nature and source of the substance attempted to be purchased was not relevant or material to the issue of whether [Tisby's] due process rights have been violated." (Appendix - 1). However, that is exactly the question decided, although rephrased by this Court in Williams.

Given a recent opportunity to reconsider Metcalf in light of

this Court's decision in Williams, the Fourth District declined to change Metcalf and certified a question to this Court inquiring if Metcalf v. State was correctly decided in State v. Clemones, DCA# 92-2997, opinion filed July 21, 1993.

Accordingly, the Fourth District's decision in petitioner's case upholding a conviction where the police were engaged in a reverse sting operation within one thousand feet of a school using crack that was illegally manufactured by law enforcement officials must be reversed under Williams.

CONCLUSION

Based on the foregoing argument and authorities cited therein, petitioner respectfully requests this Court reverse his conviction.

Respectfully Submitted,

RICHARD L. JORANDBY
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15th Judicial Circuit

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 27th day of JULY, 1993.

Margaret Good
MARGARET GOOD
Assistant Public Defender

A P P E N D I X

Decision Pending Riview: Tisby v. State, 614 So. 2d 586 (Fla. 4th DCA 1993) 1 - 2

Denial of Rehearing 3

GLICKSTEIN, C.J., STONE, J., and OWEN, WILLIAM C., Jr., Senior Judge, concur.

James TISBY, Appellant,

v.

STATE of Florida, Appellee.

No. 91–1580.

District Court of Appeal of Florida, Fourth District.

Feb. 17, 1993.

Rehearing, Rehearing En Banc and Certification Denied March 26, 1993.

Defendant was convicted in the Circuit Court, Broward County, Charles M. Greene, J., of attempted purchase of cocaine within 1000 feet of school. Defendant appealed. The District Court of Appeal, Hersey, J., held that any impropriety in sheriff department's conversion of cocaine powder to crack cocaine used in reverse sting operation did not result in deprivation of defendant's due process rights.

Affirmed.

Letts, J., dissented.

Constitutional Law ⇐257.5
Criminal Law ⇐36.5

Any impropriety in county sheriff department's conversion of cocaine powder to crack cocaine used in reverse sting operation did not result in deprivation of defendant's due process rights in prosecution for attempted purchase of cocaine within 1000 feet of school; nature and source of substance attempted to be purchased was not relevant or material to issue of whether defendant's due process rights had been violated. U.S.C.A. Const.Amend. 14.

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

Robert A. Butterworth, Atty. Gen., Tallahassee, and Michelle Smith, Asst. Atty. Gen., West Palm Beach, for appellee.

HERSEY, Judge.

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*, 614 So.2d 548, 549–50 (Fla. 4th DCA 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 Lo State*, 576 So.2d 316 (Fla. 5t *State v. Cohen*, 409 So.2d DCA 1982.)

As in *Metcalf* we conclude t ture and source of the substanc to be purchased is not relevant to the issue of whether appe process rights have been viola

AFFIRMED.

DELL, J., concurs.

LETTS, J., dissents without

Gary B. McCRAY and Mari McCray, his wife, Appell

v.

Louis C. MYERS, an individ Julius L. Bacon, an indivi Appellees.

No. 92–850.

District Court of Appeal of F First District.

Feb. 17, 1993.

Eastbound motorist who was westbound motorist as he was tu shopping center filed personal inj against owner of property on wh edly distracting sign was located, er, lessee and operator of groce and other motorist. The Circuit C val County, A.C. Soud, J., ente mary judgment for defendants, a tiff appealed. The District Cour peal, Kahn, J., held that: (1) o property on which sign was locate owe duty to motorcylist to remo and (2) no causal connection ex tween any act or omission of prope ers and injuries suffered by mo

Affirmed.

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.

Gary B. McCRAY and Mariane A. McCray, his wife, Appellants,

v.

Louis C. MYERS, an individual, and Julius L. Bacon, an individual, Appellees.

No. 92-850.

District Court of Appeal of Florida, First District.

Feb. 17, 1993.

Eastbound motorist who was struck by westbound motorist as he was turning into shopping center filed personal injury action against owner of property on which allegedly distracting sign was located, sign owner, lessee and operator of grocery store, and other motorist. The Circuit Court, Duval County, A.C. Soud, J., entered summary judgment for defendants, and plaintiff appealed. The District Court of Appeal, Kahn, J., held that: (1) owners of property on which sign was located did not owe duty to motorcylist to remove sign, and (2) no causal connection existed between any act or omission of property owners and injuries suffered by motorcylist.

Affirmed.

1. Automobiles ⇐269

Continued existence of metal advertising sign on land in front of owners' property but within public right-of-way of road, did not constitute a potential distraction of passing motorists which created a risk of harm that should have been eliminated or minimized by property owner to avoid potential tort liability.

2. Automobiles ⇐269

Conduct of property owners in failing to remove advertising sign from public right-of-way abutting their property did not foreseeably create broader zone of risk, that posed general threat of harm to others; sign did not obstruct view or make ingress and egress to shopping center more difficult, and there was no evidence that injured motorcyclist was aware of sign which allegedly distracted turning motorist who collided with him, and thus there was no relationship between landowners and injured motorcyclists giving rise to legal duty.

3. Negligence ⇐134(11)

The mere possibility that a negligent act may cause a particular consequence is not sufficient to support recovery.

4. Automobiles ⇐282

Existence of metal cigarette advertising sign on public right-of-way near landowner's property was not a proximate cause of injury to motorcyclist who was struck by turning motorist allegedly distracted by sign.

Richard G. Rumrell and O. Mark Zamora of Rumrell & Johnson, Jacksonville, for appellants.

Jack W. Shaw, Jr. and Michael J. DeCandio of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, Jacksonville, for appellees Myers and Bacon.

KAHN, Judge.

In this tort action, appellants/plaintiffs (McCray) challenge the trial court's entry of summary judgment against them. We

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

JAMES TISBY

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 91-01580

L.T. CASE NO 90-18156 CF10
BROWARD

March 26, 1993

BY ORDER OF THE COURT:

ORDERED that appellant's Motion for Rehearing, Rehearing En Banc and Request for Certification of Issue to Supreme Court as Passing on a Question of Great Public Importance filed March 4, 1993, is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Attorney General-W. Palm Beach
Public Defender 15

/DM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 27th day of JULY, 1993.

Margaret Good

MARGARET GOOD
Assistant Public Defender