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FILED

SID J. WHITE

AUG 4 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

CASE NO. 81,676

By _____
Chief Deputy Clerk

JAMES TISBY,

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

Petitioner was the appellant in the district court of appeal, and the defendant in the trial court. Respondent was the appellee in the district court of appeal, and the prosecution in the trial court.

The symbol "R" refers to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The case at bar is distinguishable from State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), as Petitioner was convicted of attempted purchase of cocaine, and the nature of the contraband is not an element of that charge. The state urges this court to approve the Fourth District Court of Appeal's decision in Metcalf v. State, 614 So.2d 548 (Fla. 4th DCA 1993), and affirm the decision below.

ARGUMENT

PETITIONER'S CONVICTION FOR ATTEMPTED
POSSESSION OF COCAINE CAN STAND.

The instant case is not controlled by State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993). That case involved the purchase of manufactured cocaine. This case, by contrast, involved a charge of possession, with a conviction of attempted possession of cocaine. Since actual possession of the cocaine was not an "essential element" of the offense, the conviction can still stand under the Fourth District Court of Appeal's decision in Metcalf v. State, 614 So.2d 548, 549 (Fla. 4th DCA 1993). This court has granted, review of Metcalf in Case No. 81,612, July 9, 1993. Since Metcalf is presently pending before this court, the State would ask that this court review this case in conjunction with Metcalf,¹ and affirm both decisions.

¹ The state adopts and incorporates by reference the brief of the State in Metcalf, which will be filed shortly after the filing of this brief.

CONCLUSION

The state respectfully requests that this court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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Tallahassee, Florida

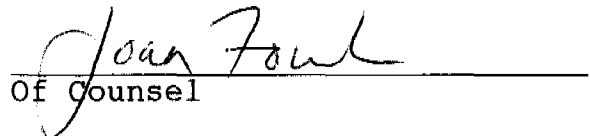


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on the Merits" has been furnished by courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, 421 3rd Street, West Palm Beach, Florida 33401 this 2 day of August, 1993.



Of Counsel

/pas