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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

ROBERT BURATY,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 81,864

FOURTH DCA CASE NO. 92-2205

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Defendant in the Circuit Court, Seventeenth Judicial Circuit in and for Broward County and the Appellant before the District Court of Appeal, Fourth District. The Respondent was the Plaintiff in circuit court and Appellee in district court. In this brief, the parties will be referred to as Mr. Buraty and the State.

The following symbol will be used:

"R" Record on appeal before the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

On June 19, 1992, the State charged Mr. Buraty by information with the offense of solicitation to deliver cocaine on June 5, 1992. R 9. At arraignment on July 6, 1992, the State agreed that the crack cocaine used in this case had been manufactured by the Broward County Sheriff's Office. The court expressed its surprise that the police would be using manufactured cocaine in a June 1992 arrest. R 5.

At the July 6 arraignment, the court agreed it would permit a nolo contendere plea so that Mr. Buraty could appeal the denial of a motion to dismiss the charge because the cocaine had been illegally manufactured by the Sheriff. The State orally amended its information to charge solicitation to deliver cocaine, and Mr. Buraty then pled to that charge, reserving his right to appeal. R 5-7. The court withheld adjudication and placed Mr. Buraty on a drug probation for one year. R 7, 14-17. On July 26, 1992, the circuit court filed a written order denying the motion to dismiss nunc pro tunc to July 6. R 24.

Notice of appeal to the Fourth District was filed July 22, 1992. R 18. An amended notice of appeal was filed August 12, 1992. R 27.

Mr. Buraty argued on appeal that the use of manufactured cocaine in this case violated the due process of law. On March 31, 1993, the Fourth District affirmed, citing Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993). Buraty v. State, 616 So. 2d 550 (Fla. 4th DCA 1993). On April 12, 1992, Mr. Buraty filed a Motion

for Clarification or to Certify a Question of Great Public Importance. The Fourth District denied this motion on April 28, 1993.

Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court was filed with the Fourth District on May 26, 1993. On July 29, this Court granted jurisdiction and ordered briefing on the merits.

SUMMARY OF THE ARGUMENT

This Court's recent decision in Williams v. State, 18 Fla.L. Weekly S371 (July 1, 1993) controls and requires this Court to discharge Mr. Buraty from the charge he solicited to deliver cocaine. In Williams, this Court held it violated due process to use police manufactured crack cocaine in a reverse sting operation. That is what occurred in this case. This Court so held in Williams because statute does not allow police to manufacture controlled substances, and the illegal manufacture of a highly addictive and potentially fatal drug which is then permitted to escape into the community in the course of reverse sting operations is outrageous misconduct. This Court desired to deter such misconduct and was concerned that permitting the conviction of purchasing such cocaine to stand would condone the misconduct.

In this case, the police conducted a reverse sting using manufactured crack six months after the Fourth District held such conduct violated due process in a prosecution for purchasing such cocaine. This shows the police were not deterred from spreading their illegally manufactured poison into the community by the courts striking down purchasing convictions alone. As in Williams, convicting a defendant of conduct which was the intended result of the police use of the illegally manufactured cocaine and which ran the same risk to the community decried in Williams violates due process.

ARGUMENT

CONVICTING A DEFENDANT FOR SOLICITATION TO DELIVER COCAINE WHEN THE CONVICTION WAS THE INTENDED RESULT OF A REVERSE STING OPERATION USING MANUFACTURED COCAINE VIOLATES THE DUE PROCESS OF LAW GUARANTEED BY ARTICLE I, §9 OF THE FLORIDA CONSTITUTION.

The police below arrested Mr. Buraty for the purchase of cocaine; the cocaine in question was manufactured by the police. This arrest occurred in June, 1982, some six months after the Fourth District Court of Appeal ruled in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), review denied, 599 So. 2d 1280 (Fla. 1992) that due process prohibited the conviction of a defendant for purchase of cocaine using cocaine manufactured by the police. The Fourth District in Kelly held that such manufacture of cocaine was not permitted by statute, and thus the charges for purchasing that cocaine could not be condoned by the courts because they resulted from illegal acts by the police.

The State below first filed an information charging purchase of cocaine but then orally amended the information to charge solicitation to deliver cocaine; the court below refused to dismiss the amended charge, and Mr. Buraty pled no contest to it, reserving his right to appeal.

In State v. Williams, 18 Fla.L. Weekly S371 (Fla. July 1, 1993), this Court upheld the result in Kelly. This Court first reformulated the question on appeal to:

Whether the manufacture of crack cocaine by law enforcement officials for use in a reverse-sting operation constitutes governmental misconduct which violates the due process clause of the Florida Constitution?

Id. at S371. This Court concluded that such manufacture of crack cocaine for use in reverse sting operations does constitute outrageous governmental misconduct violating the due process of law guaranteed by Article I, §9 of the Florida Constitution. This Court noted that while it had approved of the concept of reverse sting operations as necessary to obtain convictions in drug cases, it cautioned "While we must not tie law enforcement's hands in combatting crime, there are instances where law enforcement's conduct cannot be countenanced and the court will not permit the government to invoke the judicial process to obtain a conviction." Id. at S372. This Court found the manufacture of crack cocaine, which was not permitted by statute, was such a practice. It found crack cocaine itself a highly dangerous substance which was both addictive and fatal. Some of this highly addictive and potentially fatal crack was lost during reverse sting operations. This Court held this situation was an outrageous act of misconduct; it found such misconduct could not be deterred by prosecuting the police for manufacturing the drug since there was no evidence whatsoever that the police had been or would be prosecuted. "Thus, the only appropriate remedy to deter this outrageous law enforcement conduct is to bar the defendant's prosecution." Id. at S373.

Both the letter and spirit of Williams require this Court to order Mr. Buraty be discharged from his conviction for soliciting to deliver cocaine. The State, having illegally manufactured an extremely dangerous controlled substance and arrested Mr. Buraty by their use of this crack, now seeks "to invoke the judicial

process to obtain a conviction." Id. at S372. As in Williams, the State used the crack in a reverse sting. As in Williams, the State risked distributing this extremely addictive and fatal drug to the community. As in Williams, the criminal act of the defendant was discovered as the intended result of the act which constituted the misconduct. As in Williams, that act by the police was outrageous and must be stopped.

The Fourth District upheld Mr. Buraty's conviction based on Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), jurisdiction granted, Order of July 9, 1993 (Fla.S.Ct. 81,612). In Metcalf, the Fourth District held a conviction for solicitation to deliver cocaine could stand although the crack used in that case was manufactured. The Fourth District noted the crime of solicitation is complete upon the solicitation, and that no delivery need be made. Solicitation convictions have been upheld when there was no drug at all to be delivered or the drug in question was not real. The Fourth District reasoned, therefore, that "the limited relationship between the drugs in the deputy's possession and the elements of this offense is not sufficient to violate Appellant's due process rights." 614 So.2d at 550. The Fourth District analogized this situation to that in State v. Hunter, 586 So. 2d 319 (Fla. 1991) in which this Court held that when an entrapped middleman induced a third person to become involved in a crime, due process did not prevent that third person from being convicted.

Williams, not Hunter controls here. In Hunter, this Court was not concerned primarily with the deterrence of police misconduct,

but rather with the creation of crime by police action. This Court first held that there was not the danger of perjury in court by an informant which had caused the Court in State v. Glosson, 462 So. 2d 1082 (Fla. 1985) to find a due process violation for informant fees contingent on convictions. Hunter, 586 So.2d at 321. This Court then held that Hunter's codefendant, Conklin, had been entrapped because there was no ongoing crime when the informant solicited Conklin to traffic in cocaine. However, this Court held Hunter could be convicted because he was not enticed into the deal by the informant but rather by Conklin. Thus, when Hunter entered the picture, there was an ongoing crime between him and Conklin; due process was not offended by his conviction.

In Mr. Buraty's case, entrapment is not even at issue. It is beyond dispute that the police directly sold Mr. Buraty a piece of illegally manufactured crack: that is the offense with which the State originally charged Mr. Buraty, a charge which was amended only because the State knew it would not be permitted in light of Kelly. It is also undisputed that the police sold this manufactured crack some six months after Kelly declared the practice illegal. Mr. Buraty's solicitation was to the officer with the crack; that particular 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. Unlike Hunter, there was no intervening conduct by a non-state agent which removed the taint of the original due process violation. There was no intervening conduct at all to remove the

taint of the misconduct: the government used the manufactured crack to entice Mr. Buraty to do a drug deal and then charged Mr. Buraty just as they intended to do.

The Fourth District's holding that there was only a "limited relationship" between the police misconduct and Mr. Buraty's decision to solicit the delivery of crack is beside the point of Williams.¹ This Court in Williams desired to deter the police misconduct and to protect the integrity of the courts and the law from being infected by the illegal acts by the government. Permitting the police to do what they did in Williams but simply charge the offense as a solicitation to deliver cocaine instead of purchase of cocaine does very little to deter the misconduct and nothing to protect the integrity of the courts and the law from being smeared by that illegality. Permitting the charge of solicitation to deliver to stand would make a mockery of Williams's holding that the courts will not condone this police misconduct. The same dangers to the community are present regardless of the particulars of the charge: the crack will escape and the police will have violated the law which they purport to uphold. If this Court guts Williams by permitting convictions which were the intended result of the police illegality to stand, the public would see that the government can commit dangerous and illegal acts and that the courts would simply look the other way.

¹ Of course, this Court's Williams opinion had not been issued at the time Metcalf was decided and the rationale in Williams differed somewhat from the Fourth District's Kelly opinion, so the Fourth District can hardly be faulted for not following Williams.

Nor can the State credibly claim that the police will be deterred because they can obtain a conviction only on a less serious crime. The police in this case sold this drug six months after Kelly was issued. The police were well aware that a charge of purchase of cocaine would not be permitted, yet that knowledge did not deter them from continuing to spread the poison they created through the community because they believed the courts would permit another felony charge to be brought. This case vividly demonstrates that deterrence requires the courts to dismiss a charge of solicitation to deliver cocaine made to an officer who intends to and does deliver manufactured cocaine in the course of a reverse sting transaction. This Court held in Williams that due process is violated if the police "use" manufactured crack "in a reverse sting operation." 18 Fla.L. Weekly at S371. The police used manufactured crack in this reverse sting. The conviction which was the intended result of that illegality cannot stand. It was the intent and actions of the police in this reverse sting which connect their due process violation with Mr. Buraty: this Court should vacate the Fourth District's decision and order that Mr. Buraty be discharged.

CONCLUSION

For the foregoing reasons, Mr. Buraty respectfully requests this Court to vacate the decision of the Fourth District Court of Appeal and reverse Mr. Buraty's conviction for solicitation to deliver cocaine and order him discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sarah Mayer, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 20th day of August, 1993.



Attorney for Robert Buraty