IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER N. SARGENT,

Petitioner,

v. CASE NO. 81,911

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, but would point out that the recitation of the facts as contained in Petitioner's Motion to Dismiss in the trial court were incorrect. He contended that the confidential informant (C.I.), Mike Diaz, sold him some LSD "...apparently while the C.I. had already begun working under the guise of an assistance agreement with the Osceola Sheriff's Office." (Petitioner's Brief on the Merits, p.2). Petitioner claimed that the LSD with which he was charged was the same LSD he had obtained from the C.I. around October 15, 1990. However, even assuming that Petitioner testified truthfully that he had purchased the LSD from the CI around October 15, 1990, the District Court found that that would have been approximately two weeks before Diaz entered into his substantial assistance agreement with the Osceola County Sheriff's Office.

STATEMENT OF THE FACTS

The facts are as set forth in the opinion of the Fifth District Court of Appeal:

> The CI involved in this case had been arrested on a charge of selling LSD after a female confidential informant had attempted to purchase some marijuana from the CI at the CI's residence. The CI advised her that he did not have any marijuana but that he could sell her LSD. After his arrest on the charge of selling LSD, the CI was offered a substantial assistance agreement because the Osceola County Sheriff's Department was trying to find out from whom the CI was obtaining his LSD and, ultimately, where the LSD laboratory was located. Specificially, the sheriff's department offered to drop the charges against the CI if he helped to establish three felony cases against persons known to deal drugs. The CI was not given any money as part of the agreement or required to testify at trial. The CI was instructed to abide by several guidelines, including the instruction not to engage in any "buys" without approval. The sheriff's department agreed to make every effort to keep the identity of the CI confidential but informed the CI that his identity might be disclosed and that he might be ordered to testify in court.
>
> The CI provided the sheriff's department with a list of four or five names, including the name "Chris", who lived on Kentucky Avenue in St. Cloud. (Sargent's address at the time of his arrest was 823 Kentucky Avenue, St. Cloud, Florida.). On November 15, 1990, the CI informed the Sheriff's Department that Appellee (Petitioner), Christopher Sargent, had called twice offering to sell marijuana. Sargent testified that

> the CI, who was known to him for the past two years as Mike Diaz, called him first and asked where he could purchase marijuana and that Sargent then called Diaz back with an offer to sell him an ounce of marijuana. Sargent also testified that in the past two years he had sold marijuana to Diaz approximately ten times, that they had smoked marijuana together, and that Diaz had sold LSD to Sargent in the past. That night officers of the sheriff's department conducted surveillance of a prearranged meeting between Diaz and Sargent in a parking lot. Before any drugs changed hands, the officers arrested Sargent and a woman accompanying him. The officers found one ounce of marijuana and seven "hits" of LSD in the woman's purse. Sargent testified that he had bought the seven "hits" of LSD from Diaz a month earlier.

The District Court concluded:

> Here, Sargent specifically testified that Diaz had purchased marijuna from him at least ten times in the past and that they had smoked marijuana together. Sargent also testified that he had bought LSD from Diaz in the past and that the LSD that he possessed when arrested was purchased around October 15, 1990, two weeks before Diaz became a confidential informant. Accordingly, by his own testimony, Sargent established that a specific ongoing criminal activity was occurring between himself and Diaz. (Appendix A, State v. Sargent, 18 FLW D1188 (Fla. 5th DCA Opinion filed May 7, 1993)).

SUMMARY OF ARGUMENT

Even assuming that the two-pronged test for objective entrapment set forth by this Court in Cruz v. State, 465 So. 2d 516 (Fla. 1985) is still the law of Florida, it cannot be said that, in the instant case, the police were not interrupting a specific ongoing criminal activity and using means reasonably tailored to accomplish that goal. The specific ongoing criminal activity was Petitioner's admittedly ongoing marijuana sales. The means reasonably tailored to interrupt those sales was simply for the sheriff's office to get its confidential informant to arrange another marijuana purchase and then to arrest Petitioner. If the police conduct involved in the instant case violates the Cruz test, perhaps it is now appropriate to recede from that test in favor of a less restrictive due process standard.

ARGUMENT

POINT I

WHETHER SECTION 777.201, FLORIDA STATUTES (1987), SUPERCEDES THE DECISION IN CRUZ AND PLACES THE DECISION ON BOTH THE SUBJECTIVE AND OBJECTIVE ASPECTS OF ENTRAPMENT IN THE HANDS OF THE TRIER OF FACT EXCEPT IN SITUATIONS WHERE THE GOVERNMENT CONDUCT IS SO OUTRAGEOUS THAT CONSTITUTIONAL DUE PROCESS REQUIRES DISMISSAL?

The issue of whether or not section 777.201, Florida Statutes (1987), legislatively abolished the two-pronged test for objective entrapment set out by this Court in Cruz v. State, 465 So. 2d 516 (Fla. 1985) was briefed and argued before this Court last year in Munoz v. State, Florida Supreme Court Case No. 78,900. The State's position in this case, as it was in Munoz, is that the Florida legislature enacted Ch. 87-243, s. 42, Laws of Florida, section 777.201, Florida Statutes, in direct response to this Court's decision in Cruz, and that legislation abolished the Cruz two-pronged test for objective entrapment.

However, even assuming that the two-pronged test of Cruz is still the law of Florida, it can be argued that the police conduct involved in the instant case meets that test. The specific ongoing criminal activity involved in this case was Petitioner's admitted prolonged involvement in the possession, use and sale of marijuana. The means reasonably tailored to interrupt that activity was simply for the sheriff's department to use a CI, who had purchased marijuana from Petitioner numerous times in the past, to arrange another purchase and then to arrest him.

In Cruz, this Court adopted the view of the New Jersey Supreme Court in State v. Molnar, 81 N.J. 475, 484, 410 A. 2d 37, 41 (1980) that the objective and subjective tests for entrapment can coexist. The New Jersey court fashioned a test of "whether the police activity has overstepped the bounds of permissible conduct" holding that:

> ...when official conduct inducing crime is so egregious as to impugn the integrity of a court that permits a conviction, the predisposition of the defendant becomes irrelevant...

Even using the standard set forth in Molnar, it cannot be said that asking an admitted marijuana dealer to sell an ounce of marijuana does not overstep the bounds of permissible behavior and is certainly not so egregious as to impugn the integrity of the judicial system.

Assuming that the two-pronged test of Cruz has been legislatively abolished, the police conduct in this case would still be subject to a due process "outrageousness" test. In Sherman v. United States, 356 U.S. 369, 382-383, 78 S.Ct. 819, 825-826, 2 L.Ed.2d 848 (1958), Justice Frankfurter suggested that due process required a review of these cases checking for "police conduct...falling below standards, to which common feelings respond, for the proper use of governmental power." Under a due process analysis, the defense would have the burden of showing that the challenged conduct was outrageous or shocking. It involves consideration of the totality of circumstances with no single factor controlling. In the instant case, it cannot be

said that the State agents' conduct was so outrageous that due process principles would absolutely bar Petitioner's prosecution nor can it be said that this conduct was so egregious as to impugn the integrity of the court in which the case is prosecuted.

In his special concurring opinion in Jerelds v. State, 603 So. 2d 643 (Fla. 5th DCA), juris. accepted 613 So. 2d 5 (Fla. 1992), Judge Cobb suggests that the apparent reaffirmation of Cruz in State v. Hunter, 586 So. 2d 319 (Fla. 1991) has been "superceded sub silentio" by this Court's decision in Herrera v. State, 594 So. 2d 275 (Fla. 1992), upholding the constitutionality of Section 777.201. Perhaps, it is now appropriate to use this case to specifically reject the two-pronged test for objective entrapment in favor of a less restrictive test grounded in the due process clauses of the state and federal constitutions. The question certified should be answered by holding that the two-pronged test for objective entrapment was legislatively abolished, that subjective entrapment is a matter for the trier of fact and that the trial court must decide as a matter of law only whether the police conduct in any given case is so outrageous as to impugn the integrity of the entire judicial system.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO DISMISS BASED UPON ENTRAPMENT AS A MATTER OF LAW.

Petitioner contends that the police activity in this case "...did not have as its end the interruption of a specific ongoing criminal activity, and did not use means reasonably tailored to apprehend someone involved in ongoing criminal activity." He points to the testimony of Agent Haydel to support this contention. However, he notes that Haydel said: "We just required him (CI) to, you know, help us by introducing us to a person that he had prior dealings with, or you know, purchasing." (R33). Appellant argues that he only used drugs socially and was not a dealer, stating:

> Apparently, Mr. Diaz had only used drugs with Mr. Sargent in a social setting...Mr. Sargent was not targeted as a "dealer", in any sense of the word, although he was admittedly engaged in using marijuana for his personal use. (Petitioner's Brief on the Merits, p. 21).

This line of argument ignores Petitioner's own admission that he had sold marijuana to the CI (Diaz) at least ten times over a two year period. (R80-81). As the District Court concluded from Sargent's own testimony, there was a specific ongoing criminal activity occurring between Petitioner and Diaz.

Petitioner cites State v. Banks, 499 So. 2d 894 (Fla. 1986), for the proposition that the actions of law enforcement must be "accurately directed only at the apprehension of one involved in

a specific ongoing criminal activity." He contends that, in this case, the police did not employ means reasonably tailored to apprehend someone involved in an ongoing criminal activity. Respondent would simply disagree. The CI (Diaz), as part of his substantial assistance agreement, was to establish felony cases against persons he knew to deal drugs. He prepared a list of those dealers he knew including "Chris" on Kentucky Avenue in St. Cloud. Petitioner, Chris Sargent admitted that he had lived on Kentucky Avenue and that he had sold marijuana to Diaz for two years. Having Diaz make one final purchase was the most reasonable means of apprehending Mr. Sargent. He was not entrapped either under the two-pronged test for objective entrapment set forth in Cruz, under the predisposition test for subjective entrapment or under the federal due process "outrageousness" test.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve the decision of the District Court of Appeal reversing the trial court's order of dismissal and remanding the cause for further proceedings and answer the certified question by holding that the two-pronged test for objective entrapment has been legislatively abolished.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been delivered to Sophia Ehringer, Esquire, Office of the Public Defender, Counsel for Petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 16 day of August, 1993.

Anthony J. Golden
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER N. SARGENT,

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A P P E N D I X

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DOCUMENT: **APPENDIX:**

too involved a venue agreement designating Orange County, Florida, as the forum for resolving any disputes arising from the agreement. As in this case, the defendants petitioned the court to transfer venue to Palm Beach County, Florida, and based their request solely on the ground of convenience. This court held that a contractual waiver of venue privileges encompasses and controls the ground of convenience as well as other statutory grounds to change venue set out in Chapter 47.

However, with regard to the two torts alleged in counts three and four, there is no overriding contractual provision applicable to them. They are entirely independent and unrelated to the contract between the parties. Both torts were alleged and shown at the hearing to have taken place, or "accrued," in Palm Beach County. And, extensive evidence and numerous witnesses necessary to try these issues were shown to be located in Palm Beach County.

A plaintiff may select as venue for a lawsuit any county where one of other joined causes of action arose.[3] In instances where the cause of actions arise in different counties, venue is proper in any one of them.[4] Thus, in this case, venue was "proper" in Orange County, because counts three and four were joined with counts one and two, and Orange County is the designated venue for those counts.

However, even though venue may be "proper" in Orange County pursuant to section 47.041, venue can be changed pursuant to section 47.122,[5] the "*forum non-conveniens*" statute. Counts three and four, if filed alone, would have to be brought in Palm Beach County because that is where both torts allegedly "arose" or took place and the defendant resides.[6] *See Fitzgerald v. Westinghouse Credit Corp.*, 498 So. 2d 657 (Fla. 5th DCA 1986). And there was a strong showing in this case that numerous witnesses reside in Palm Beach County, and considerable documentary evidence is located there.

The trial judge found that, for the convenience of the parties and the courts, the litigation should go forward in Palm Beach County. Since there was a reasonable basis in the record for such a decision, no gross abuse of discretion was shown as to counts three and four in ordering their transfer to Palm Beach County. Accordingly, the trial judge's decision as to counts three and four should be upheld. *See Levy v. Hawk's Cay, Inc.*, 505 So. 2d 24 (Fla. 3d DCA 1987).

We conclude, however, that counts one and two must be tried in Orange County because of the contract provision. But, there is no reason counts three and four must be held hostage to counts one and two. On remand, the trial judge may sever and transfer them for trial in Palm Beach County if he deems it "expedient" after all interested parties have been afforded an opportunity to present their respective positions to the court. § 47.041. Also on remand, Derrick may wish to reconsider its decision to try counts one and two in Orange County, thereby necessitating trials in both counties. With the parties' consent, the whole case could be transferred to Palm Beach County or remain in Orange County.

AFFIRMED in part; REVERSED in PART; and REMANDED. (DIAMANTIS and THOMPSON, JJ., concur.)

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[1]§ 47.122, Fla. Stat. (1991).

[2]Count I is for injunctive relief based on a noncompete provision in the contract; count II is for breach of the contract.

[3]§ 47.041, Fla. Stat. (1991) provides:

Actions on several causes of action. Actions on several causes of action may be brought in any county where any of the causes of action arose. When two or more causes of action joined arose in different counties, venue may be laid in any of such counties, but the court may order separate trials if expedient.

[4]*See Pearson v. Wallace Aviation, Inc.*, 400 So. 2d 50 (Fla. 5th DCA 1981); *Steinhardt v. Palm Beach White House No. 3, Inc.*, 237 So. 2d 590 (Fla. 3d DCA 1970); *Motsinger v. E.B. Malone Corp.*, 297 So. 2d 839 (Fla. 2d DCA 1974).

[5]Section 47.122 provides:

Change of venue; convenience of parties or witnesses or in the interest of justice.—For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought.

[6]§ 47.011, Fla. Stat.

* * *

Criminal law—Probation—Conditions—Sentencing court lacked authority to order defendant to pay $250 for State Attorney's fee as special condition of probation

ZACHARY BADIE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-1722. Opinion filed May 7, 1993. Appeal from the Circuit Court for Volusia County, Shawn L. Briese, Judge. James B. Gibson, Public Defender and James T. Cook, Assistant Public Defender, Daytona Beach, for Appellant. No Appearance for Appellee.

(PER CURIAM.) Zachary Badie appeals from his conviction and sentence for burglary of a dwelling and grand theft which were entered after Badie pled nolo contendere. We find no merit to Badie's appeal except for his contention that the court was without authority to order Badie to pay a $250 State Attorney's fee as a special condition of probation. *See Smith v. State*, 606 So. 2d 501 (Fla. 5th DCA 1992); *Smith v. State*, 606 So. 2d 427 (Fla. 1st DCA 1992). We therefore strike the provision in the order of probation requiring the payment of the State Attorney's fee. Accordingly, we affirm Badie's conviction and sentence as amended.

CONVICTION AFFIRMED; SENTENCE AFFIRMED AS AMENDED. (GOSHORN, C.J., SHARP, W. and DIAMANTIS, JJ., concur.)

* * *

Criminal law—Possession of marijuana—Possession of LSD—Entrapment—Substantial assistance agreement did not violate defendant's due process rights where confidential informant did not receive any remuneration for helping sheriff's department establish three felony drug cases and agreement did not require confidential informant to testify—Defendant's testimony that confidential informant had purchased marijuana from him at least ten times in the past, that he bought LSD from confidential informant in the past and that LSD defendant possessed when arrested was purchased from confidential informant on date two weeks before he became informant established specific ongoing criminal activity—Sheriff's department utilized means reasonably tailored to apprehend those involved in ongoing criminal activity—Police conduct did not constitute objective entrapment—Question certified whether Section 777.201, Florida Statutes (1987), supersedes the decision in *Cruz* and places the decision on both the subjective and objective aspects of entrapment in the hands of the trier of fact except in situations where the government conduct is so outrageous that constitutional due process requires dismissal

STATE OF FLORIDA, Appellant, v. CHRISTOPHER N. SARGENT, Appellee. 5th District. Case No. 92-92. Opinion filed May 7, 1993. Appeal from the Circuit Court for Osceola County, Belvin Perry, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Nancy Ryan, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Sophia B. Ehringer, Assistant Public Defender, Daytona Beach, for Appellee.

(DIAMANTIS, J.) The state appeals the order entered by the trial court dismissing the charges of possession of lysergic acid diethylamide (LSD)[1] and possession of marijuana[2] which were filed against appellee, Christopher Sargent. The trial court dismissed these charges because it concluded that the state's use of a confidential informant (CI) to help establish its case against Sargent either violated Sargent's due process rights or constituted objective entrapment. We disagree with the trial court's conclusion and, therefore, reverse the order of dismissal and remand this cause for further proceedings.

The CI involved in this case had been arrested on a charge of selling LSD after a female confidential informant had attempted to purchase some marijuana from the CI at the CI's residence. The CI advised her that he did not have any marijuana but that he could sell her LSD. After his arrest on the charge of selling LSD, the CI was offered a substantial assistance agreement because the Osceola County Sheriff's Department was trying to find out from

"A"

whom the CI was obtaining his LSD and, ultimately, where the LSD laboratory was located. Specifically, the sheriff's department offered to drop the charges against the CI if he helped to establish three felony cases against persons known to deal in drugs. The CI was not given any money as part of the agreement or required to testify at trial. The CI was instructed to abide by several guidelines, including the instruction not to engage in any "buys" without approval. The sheriff's department agreed to make every reasonable effort to keep the identity of the CI confidential but informed the CI that his identity might be disclosed and that he might be ordered to testify in court.

The CI provided the sheriff's department with a list of four or five names, including the name "Chris", who lived on Kentucky Avenue in St. Cloud.[3] On November 15, 1990, the CI informed the sheriff's department that appellee, Christopher Sargent, had called twice offering to sell marijuana. Sargent testified that the CI, who was known to him for the past two years as Mike Diaz, called him first and asked where he could purchase marijuana and that Sargent then called Diaz back with an offer to sell him an ounce of marijuana. Sargent also testified that in the last two years he had sold marijuana to Diaz approximately ten times, that they had smoked marijuana together, and that Diaz had sold LSD to Sargent in the past. That night officers of the sheriff's department conducted surveillance of a prearranged meeting between Diaz and Sargent in a parking lot. Before any drugs changed hands, the officers arrested Sargent and a woman accompanying him. The officers found one ounce of marijuana and seven "hits" of LSD in the woman's purse. Sargent testified that he had bought the seven "hits" of LSD from Diaz a month earlier.

Under *State v. Hunter*, 586 So. 2d 319, 320-321 (Fla. 1991), the substantial assistance agreement in this case does not violate the due process rights of Sargent because Diaz did not receive any remuneration for helping the sheriff's department establish the three felony drug cases and the substantial assistance agreement did not require Diaz to testify. *See also State v. Ramos*, 608 So. 2d 830 (Fla. 3d DCA 1992), *rev. granted*, No. 81,042 (Fla. Mar. 19, 1993); *Pidkameny v. State*, 569 So. 2d 908 (Fla. 5th DCA 1990).

The more difficult question involves the issue of entrapment. In *Cruz v. State*, 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905, 105 S. Ct. 3527, 87 L. Ed. 2d 652 (1985), the Florida Supreme Court outlined the defenses of entrapment, explaining that a defendant may raise both a subjective entrapment defense and an objective entrapment defense. The objective entrapment defense focuses on the police conduct leading up to defendant's arrest. The court ruled that the determination as to whether police conduct constitutes objective entrapment must be made by reference to the following test:

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

Cruz, 465 So. 2d at 522. The first prong of the test is aimed at discouraging the police from manufacturing new crimes where, but for the activities of the police, no crime would exist. The second prong of the test is concerned with preventing the police from inducing someone into committing a crime, either by persuading the person that the conduct is not illegal or by using methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it. *Cruz*, 465 So. 2d at 521-522. If the police conduct was such as to constitute entrapment, then the trial court is authorized to dismiss the charges as a matter of law.

In *Cruz*, the court also discussed the subjective entrapment defense, explaining that the subjective entrapment defense focuses on whether the defendant was predisposed to commit a particular offense. The existence of subjective entrapment is a question of fact for the jury. *Cruz*, 465 So. 2d at 519. The defense of subjective entrapment may be raised at trial even though the trial court has ruled previously as a matter of law that the police conduct did not constitute objective entrapment.

Subsequent to *Cruz*, the legislature enacted section 777.201, effective as to offenses committed on or after October 1, 1987, which generally codifies the defense of entrapment without distinguishing between the theories of objective and subjective entrapment:

> 777.201 Entrapment.—
>
> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

§ 777.201, Fla. Stat. (1987).

In *Herrera v. State*, 594 So. 2d 275 (Fla. 1992), the court upheld the constitutionality of section 777.201(2) and the corresponding criminal jury instruction 3.04(c)(2), rejecting the argument that the statute and jury instruction violate federal and state constitutional due process provisions. While *Herrera*, in several of its passages, refers to the "predisposition" of a defendant to commit a crime, which historically has been language used in defining subjective entrapment, the majority opinion does not discuss whether section 777.201 includes both the objective and subjective entrapment defenses. *See Cruz*, 465 So. 2d at 519-521. In this regard, of significant import is the discussion in *Cruz* concerning the New Jersey entrapment statute:

> Subsequent to the [*State v. Molnar*, 81 N.J. 475, 410 A. 2d 37 (1980)] decision, the New Jersey court held that statutory law had superseded the common law, placing the decision on both the subjective and objective aspects of entrapment in the hands of the trier of fact. *State v. Rockholt*, 96 N.J. 570, 476 A. 2d 1236 (1984). Even though the New Jersey court concluded that its common law paradigm had been supplanted, it noted that there may still be situations where the government conduct is so outrageous that constitutional due process requires dismissal. See discussion at note 1, *supra*. There is no parallel to the New Jersey legislative action in Florida.

Cruz, 465 So. 2d at 521 n.3. Because the New Jersey entrapment statute closely parallels the Florida entrapment statute, section 777.201,[4] it appears that, when presented with the issue, the Florida Supreme Court will adopt the reasoning of the New Jersey court and rule that the enactment of section 777.201 operates to supersede the decision in *Cruz* and places the decision on both the subjective and objective aspects of entrapment in the hands of the trier of fact except in situations where the government conduct is so outrageous that constitutional due process requires dismissal.

Although our district courts of appeal have not specifically addressed this related issue, the courts have addressed the current issue of the continued viability of the *Cruz* objective entrapment defense. In this regard our courts are split, with the first district holding that the entrapment statute abolishes the objective entrapment defense. *See Gonzalez v. State*, 571 So. 2d 1346 (Fla. 1st DCA 1990), *rev. denied*, 584 So. 2d 998 (Fla. 1991). *See also State v. Thinh Thien Pham*, 595 So. 2d 85 (Fla. 1st DCA 1992) (question certified); *Simmons v. State*, 590 So. 2d 442 (Fla. 1st DCA 1991) (question certified); *State v. Munoz*, 586 So. 2d 515 (Fla. 1st DCA 1991), *juris. accepted*, 598 So. 2d 77 (Fla. 1992). In contrast, this district, as well as the second, third, and fourth districts have either specifically or impliedly recognized that the objective entrapment defense defined in *Cruz* is still viable and is

a matter which the trial court may decide in response to a pretrial motion to dismiss the charges. This view is primarily based on the supreme court's decision in *State v. Hunter*, 586 So. 2d 319 (Fla. 1991).[5] *See Jeralds v. State*, 603 So. 2d 643 (Fla. 5th DCA), *juris. accepted*, 613 So. 2d 5 (Fla. 1992); *Ramos v. State*, 608 So. 2d 830 (Fla. 3d DCA 1992), *rev. granted*, No. 81,042 (Fla. Mar. 19, 1993); *Lewis v. State*, 597 So. 2d 842 (Fla. 3d DCA), *juris. accepted*, 605 So. 2d 1266 (Fla. 1992); *Krajewski v. State*, 597 So. 2d 814 (Fla. 4th DCA), *juris. accepted*, 605 So. 2d 1261 (Fla. 1992); *Bowser v. State*, 555 So. 2d 879 (Fla. 2d DCA 1989). *See also Adams v. State*, 600 So. 2d 1302 (Fla. 5th DCA), *juris. accepted*, 613 So. 2d 1 (Fla. 1992); *Smith v. State*, 575 So. 2d 776 (Fla. 5th DCA 1991); *State v. Purvis*, 560 So. 2d 1296 (Fla. 5th DCA 1990).

Applying the objective entrapment analysis set forth in *Cruz*, we conclude that the police conduct in this case did not constitute objective entrapment.[6] Under *Cruz*, the threshold question is whether the defendant was involved in specific ongoing criminal activity. *See Cruz*, 465 So. 2d at 522. Here, Sargent specifically testified that Diaz had purchased marijuana from him at least ten times in the past and that they had smoked marijuana together. Sargent also testified that he had bought LSD from Diaz in the past and that the LSD that he possessed when arrested was purchased around October 15, 1990, two weeks before Diaz became a confidential informant. Accordingly, by his own testimony, Sargent established that a specific ongoing criminal activity was occurring between himself and Diaz. *See State v. Purvis*, 560 So. 2d 1296 (Fla. 5th DCA 1990); *Taffer v. State*, 504 So. 2d 436 (Fla. 2d DCA), *cause dismissed*, 506 So. 2d 1043 (Fla. 1987). *Compare State v. Ramos*, 608 So. 2d 830 (Fla. 3d DCA 1992), *rev. granted*, No. 81,042 (Fla. Mar. 19, 1993); *Pezzella v. State*, 5[illegible]o. 2d 1328 (Fla. 3d DCA 1987), *rev. denied*, 523 So. 2d 578 (Fla. 1988).

We further conclude that the sheriff's department utilized a means reasonably tailored to apprehend those involved in the ongoing criminal activity. *See Cruz*, 465 So. 2d at 522. Here, Diaz agreed to "make" three cases and, in exchange, the sheriff's department agreed to drop the charges which were pending against him. Diaz was not given any money as part of the agreement, and the evidence establishes that Diaz was asked first to list those persons he knew who were engaging in drug sales and then was instructed to abide by several guidelines, including the instruction not to engage in any "buys" without approval.

Because we conclude that the police conduct in this case did not violate Sargent's due process rights and did not constitute objective entrapment, we must reverse the order of the trial court and remand for further proceedings consistent with this opinion. Further, because of the great public importance of the impact of the enactment of the entrapment statute upon the decision in *Cruz*, we certify the following question:

> WHETHER SECTION 777.201, FLORIDA STATUTES (1987), SUPERSEDES THE DECISION IN *CRUZ* AND PLACES THE DECISION ON BOTH THE SUBJECTIVE AND OBJECTIVE ASPECTS OF ENTRAPMENT IN THE HANDS OF THE TRIER OF FACT EXCEPT IN SITUATIONS WHERE THE GOVERNMENT CONDUCT IS SO OUTRAGEOUS THAT CONSTITUTIONAL DUE PROCESS REQUIRES DISMISSAL.

REVERSED and REMANDED. (SHARP, W. and THOMPSON, JJ., concur.)

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[1]§§ 893.13(1)(a)2, 893.03(1)(c), Fla. Stat. (1989).

[2]§§ 893.03(1)(c), 893.13(1)(f), Fla. Stat. (1989).

[3]Sargent's address at the time of his arrest was 823 Kentucky Avenue, St. Cloud, Florida.

[4]The New Jersey statute, N.J.S.A. 2C:2-12, which became effective in 1979, provides in pertinent part:

> a. A public law enforcement official or a person engaged in cooperation with such an official or one acting as an agent of a public law enforcement official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense by either:
>
> * * * * * *
>
> (2) Employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.
>
> b. Except as provided in subsection c. of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the trier of fact.
>
> c. The defense afforded by this section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

State v. Rockholt, 476 A. 2d at 1239 (footnote omitted).

[5]Such reliance appears to be misplaced because apparently the crimes in *Hunter* occurred prior to the enactment of section 777.201. The Florida Supreme Court's opinion in *State v. Hunter*, 586 So. 2d 319, 320 (Fla. 1991), and the fourth district's opinion, *Hunter v. State*, 531 So. 2d 239, 240 (Fla. 4th DCA 1988), both indicate that the substantial assistance agreement which led to the arrest of the defendants was rendered pursuant to section 893.135(3), Florida Statutes (1985). More importantly, the fourth district opinion indicates 1986 appellate case numbers 4-86-0807 and 4-86-0808. Consequently, we have reservations concerning whether *Hunter* should be considered to be a post-statutory case.

[6]In reaching this decision we recognize that, because this is a post-statutory case, objective entrapment is, in all probability, a question for the fact-finder to determine.

* * *

Administrative law—Commission on Ethics—Attorney's fees—Commission on Ethics properly awarded attorney's fees against party who filed complaint against public official which was found to be frivolous and without basis in law or fact, and which was filed with malicious intent—Inaccurate complaint which charged that County Chairman, as member of Expressway Authority, voted to retain services of company that employed Chairman's son was properly found to be frivolous where complaint was based on newspaper article which did not support allegations of complaint—Complaint which was filed against public official by member of opposition political party for political purposes was filed with malicious intent—Attorney's fees properly awarded although County Chairman was represented by county attorney at expense of county—Attorney's fee awarded by Commission not excessive

MARVIN COUCH, Appellant, v. COMMISSION ON ETHICS, STATE OF FLORIDA, et al., Appellees. 5th District. Case No. 92-2016. Opinion filed May 7, 1993. Administrative Appeal from the Commission on Ethics. Mathew D. Staver and Jeffery T. Kipi of Staver & Associates, Orlando, for Appellant. Philip C. Claypool and C. Christopher Anderson, III, Tallahassee, for Appellee Commission on Ethics. Joseph L. Passiatore, Orlando, for Appellee Orange County Chairman, Linda Chapin.

(DAUKSCH, J.) This is an appeal from a final order of the Florida Commission on Ethics ("the Commission") awarding attorney's fees against appellant Marvin Couch ("Couch"). We affirm.

On May 17, 1991, appellant Couch filed a complaint with the Commission on Ethics alleging that appellee Orange County Chairman Linda Chapin ("Chapin"):

> . . . violated Part III, Chapter 112, Florida Statutes by serving on the Orlando/Orange County Expressway Authority and voting to retain the services of an engineering company that employs her son as admitted by Chairman Chapin in *Orlando Sentinel* dated week of May 6-10th.

On September 18, 1991, the Commission issued a "Public Report and Order Dismissing Complaint." That order states in part:

> .... The Commission's review was limited to questions of jurisdiction of the Commission and of the adequacy of the details of the complaint to allege a violation of the Code of Ethics for public officers and employees. No factual investigation preceded the review, and therefore the Commission's conclusions do not reflect on the accuracy of the allegations of the complaint.
>
> The Commission voted to adopt the legal sufficiency analysis