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IN THE SUPREME COURT OF FLORIDA

HAROLD LINFORD GREEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,977

FOURTH DCA CASE NO. 92-2523

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 Appellee before the District Court of Appeal, Fourth District. The Respondent was the Plaintiff in circuit court and Appellant in district court. In this brief, the parties will be referred to as Mr. Green 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 January 31, 1992, the State charged Mr. Green by information with the offense of soliciting to deliver cocaine on August 23, 1991. R 13. This charge was a refiled information from an earlier case. R 13. On June 22, 1992, Mr. Green moved to dismiss the new charge based on Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), review denied, 599 So. 2d 1280 (Fla. 1992).

At the hearing on the motion to dismiss on July 31, 1992, the prosecutor admitted that the Mr. Green went to an undercover officer and asked for a rock for $9. R 7. The officer gave Mr. Green a piece of manufactured crack cocaine for the money. R 7. Mr. Green was originally charged with purchase of the cocaine, but the charge was dropped and refiled as a solicitation to deliver cocaine charge. R 7. The trial court granted the motion to dismiss, finding the cocaine used in the transaction was manufactured and the prior purchase charge had actually been dismissed. R 10, 27-8. The court's written order dismissing the charge was signed August 6 nunc pro tunc to July 31, 1992 and rendered August 7. R 28.

The State filed a notice of appeal on August 19, 1992. On April 21, 1993, the Fourth District reversed the order dismissing the charge, relying on Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), jurisdiction granted, Order of July 9, 1993 (Fla.S.Ct. 81,612). State v. Green, 618 So. 2d 294 (Fla. 4th DCA 1993). On June 7, 1993, the Fourth District denied Mr. Green's motion for clarification or to certify a question of great public importance.

On July 14, 1993 that court granted Mr. Green's motion to stay issuance of the mandate.

Mr. Green filed a notice of appeal to this Court with the Fourth District on June 21, 1993. A jurisdictional brief was timely filed, and this Court on September 23, 1993 accepted jurisdiction and ordered briefing.

SUMMARY OF THE ARGUMENT

This Court's recent decision in Williams v. State, 18 Fla.L. Weekly S491 (September 16, 1993) controls and requires this Court to discharge Mr. Green 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.

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. The police will face little deterence from their illegal conduct if the courts allow charges of solicitation to deliver cocaine resulting from those reverse stings to stand.

ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED THE CHARGE OF SOLICITATION TO DELIVER COCAINE; THE CONVICTION WAS THE INTENDED RESULT OF A REVERSE STING OPERATION USING MANUFACTURED COCAINE WHICH VIOLATES THE DUE PROCESS OF LAW GUARANTEED BY ARTICLE I, §9 OF THE FLORIDA CONSTITUTION.

The police below arrested Mr. Green for the purchase of cocaine after he bought a piece of crack from them for $9; the cocaine in question was manufactured by the police. The State below first filed an information charging purchase of cocaine but then refiled it to charge solicitation to deliver after the purchase charge was dismissed. The trial court dismissed the new charge as well based on Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), review denied, 599 So. 2d 1280 (Fla. 1992). In Kelly, the Fourth District held that due process prohibited the conviction of a defendant for purchase of cocaine using cocaine manufactured by the police.

The Fourth District reversed the dismissal 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.

However, this Court in State v. Williams, 18 Fla.L. Weekly S491 (Fla. September 16, 1993), upheld the result in Kelly but used an analysis which shows that Metcalf was wrongly decided. 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 S491. 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 S492. The manufacture of crack cocaine, which was not permitted by statute, was such a practice. This Court 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 S493.

Both the letter and spirit of Williams require this Court to reverse the Fourth District and affirm the trial court's order dismissing the charge of soliciting to deliver cocaine. The State, having illegally manufactured an extremely dangerous controlled substance and arrested Mr. Green 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.

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. Green's case, entrapment is not even at issue. It is beyond dispute that the police directly sold Mr. Green a piece of illegally manufactured crack: that is the offense with which the State originally charged, a charge which was refiled only because the original charge had been dismissed based on Kelly. Mr. Green'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. Green to do a drug deal and then charged Mr. Green just as they intended to do.

The Fourth District's holding that there was only a "limited

relationship" between the police misconduct and Mr. Green'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 of the police. 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.

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 can do precisely what they did before Williams was issued and simply charge those who buy the cocaine

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[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.

with soliciting to deliver instead of purchase of cocaine. It is difficult if not impossible to imagine a purchase taking place without a solicitation to deliver. Since both offenses are felonies, the police will hardly be deterred by permitting a conviction for solicitation to deliver to stand but not a conviction for purchase.

Moreover, 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 S491. The police used manufactured crack in this reverse sting. The conviction which was the intended result of that illegality cannot stand in light of this plain holding in Williams.

It was the intent and actions of the police in this reverse sting using police-manufactured crack cocaine which connect their due process violation with Mr. Green. This Court should reverse the Fourth District's decision and affirm the trial court's order dismissing the charge against Mr. Green.

CONCLUSION

For the foregoing reasons, Mr. Green respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal and affirm the trial court's order dismissing the charge of solicitation to deliver cocaine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JAMES J. CARNEY, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 15th day of October, 1993.

Attorney for Harold Green