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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 81,977

FILED
SID J. WHITE
NOV 4 1993
CLERK, SUPREME COURT
By
Chief Deputy Clerk

HAROLD LINFORD GREEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Appellee in the Fourth District Court of Appeal and the defendant a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Respondent, the State of Florida, was the Appellant and the prosecution, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Respondent's Appendix, which is a conformed copy of the District Court's opinion.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts for purposes of this appeal.

SUMMARY OF THE ARGUMENT

Although this Court has ruled that police manufacture of cocaine violates due process, the fact that police manufactured cocaine was present in this case does not bar Petitioner's prosecution for solicitation to purchase as cocaine is not an element of that offense, thus any due process violation does not taint Petitioner's conviction.

ARGUMENT

IT IS NOT A DUE PROCESS VIOLATION TO CONVICT A DEFENDANT FOR SOLICITATION TO PURCHASE COCAINE WHERE THE COCAINE WAS MANUFACTURED BY THE GOVERNMENT (Restated).

The question presented in the instant case is whether, in light of this Court's decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), condemning the manufacture of crack cocaine by law enforcement as violative of due process, a defendant should be discharged from prosecution for solicitation to purchase illegally manufactured crack cocaine in that the cocaine was neither the instrumentality nor an element of the crime charged. The Fourth District Court of Appeal properly determined that Petitioner should **not** be discharged from prosecution for this charge.

This Court has approved the use of reverse sting operations in which undercover officers offer to sell illegal drugs. Williams at S372; State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989), approved, 558 So. 2d 1 (Fla. 1990). The crime of solicitation is completed when a defendant entices or encourages another to commit a crime, the crime itself need not be completed. State v. Johnson, 561 So. 2d 1321 (Fla. 4th DCA 1990); State v. Milbro, 586 So. 2d 1303 (Fla. 2nd DCA 1991); See also: Louissaint v. State, 576 So. 2d 316 (Fla. 5th DCA 1990) (the crime of "attempt" does not require proof that the substance involved was cocaine).

As pointed out by the Fourth District in Johnson, "The crime of solicitation focuses on the culpability of the solicitor. It is irrelevant that the other cannot or will not follow through." Id.

at 1322. Similarly, in Milbro, the Second District held that " . . . the crime solicited need not be committed." Id. at 1304. Clearly, the crime of solicitation with which Petitioner was charged was committed when Petitioner approached the undercover officer and requested to purchase cocaine. The fact that the cocaine in the officer's possession was manufactured by the police is irrelevant, just as it would be irrelevant that the officer did not have cocaine at all or had a counterfeit substance.

Petitioner contends the Fourth District's reliance on this Court's decision in State v. Hunter, 586 So. 2d 319 (Fla. 1991), in Metcalf v. State[1], is misplaced, arguing that here, unlike there, there was no intervening conduct by a non-state agent which removed the taint of the due process violation. Petitioner has misinterpreted this Court's decision in Hunter. In Hunter, an informant used what this Court found to be outrageous misconduct to entrap Conklin. Conklin then persuaded Hunter to participate in the crime. This Court held that although Hunter's motive may have been benevolent, his conduct was wholly voluntary, regardless of the fact that Conklin's conduct was motivated by improper police misconduct.

Thus in Hunter, this Court made it clear that while a defendant whose due process rights have been violated by police misconduct is entitled to discharge, the fact that police misconduct has occurred does **not** by itself require discharge of a

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[1] Petitioner's conviction was affirmed on authority of Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993).

defendant whose due process rights have **not** been violated. There, as here, a due process violation occurred; however, there, this Court rejected the notion that such a violation tainted every prosecution which flowed from it. Instead, this Court found a logical cut-off; the point at which the due process violation no longer affected the prosecution. In Hunter, the point came when the improper police conduct had minimal conduct with the defendant. Here, the point came when the illegally manufactured crack became irrelevant to prosecution of the crime charged. See also Luzarraga v. State, 575 So. 2d 731 (Fla. 3d DCA 1991), (the intent or motives of the person solicited are irrelevant to a solicitation charge).

Any argument that his 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, misses the point. In fact, if the police below had not manufactured the crack, they could still have set up the **same** reverse sting, in the **same** location, using any substance resembling crack cocaine or even no substance at all. The result for Petitioner would have been the same because the offense charged was solicitation, not purchase or even attempted purchase -- and the crime of solicitation was complete when Petitioner offered to buy cocaine from the officer.

Finally, any arguments that the use of another, substantially similar, charge to avoid the limitations of Williams would defeat justice and that this Court's affirmance of the Fourth District's decision in Metcalf would somehow allow manufactured crack to

escape into the community are similarly without merit.

Solicitation to deliver cocaine is in no way substantially similar to the crime of actual delivery. The former is a third degree felony which carries no mandatory minimum prison term; the latter is a first degree felony which carries a three year mandatory minimum sentence with no possibility of probation. Section 893.13(1)(e)1. Florida Statutes (1990). Further, the risk of cocaine escaping into the community is no greater when the police use cocaine they have manufactured than when they use cocaine they have previously seized. Additionally, because the crime of solicitation to deliver cocaine does not require the use of actual cocaine, there is little chance of the drug escaping into the community. Petitioner's policy arguments do not survive scrutiny.

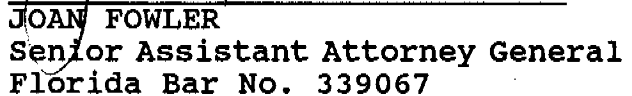
The Fourth District correctly held that the fact that the cocaine was manufactured was irrelevant to the solicitation charge. This Court accomplished what it set out to do in Williams; the conduct condemned by this Court has ceased. There is no reason to extend Williams. The decisions of the lower courts should be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court AFFIRM the decision of the Fourth District below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida



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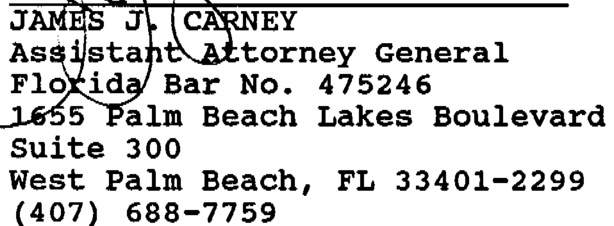

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished by Courier to: ERIC CUMFER, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 3 day of November 1993.

Of Counsel

APPENDIX

ON MOTION FOR REHEARING

PER CURIAM.

We grant the State's motion for rehearing, withdraw our original opinion, and issue the following opinion in its stead.

Appellant, Timothy Stidhum, was convicted of burglary with an assault and appeals his sentence as a habitual violent felony offender. We affirm.

Appellant concedes that the State introduced evidence of prior criminal convictions, including certified copies of convictions, necessary for the court to habitualize appellant. However, appellant contends that the trial court did not make the requisite factual findings pursuant to section 775.084, Florida Statutes (1991), and *Adams v. State*, 559 So.2d 1293 (Fla. 3d DCA), *dismissed*, 564 So.2d 488 (Fla.1990).

Adams v. State, 559 So.2d 1293, construed the 1987 version of the habitual offender statute, which required a specific finding that the defendant constituted a danger to the public. Section 775.084, Florida Statutes (1991), does not require a specific finding that the defendant constitutes a danger to the public. *State v. Rucker*, 613 So.2d 460 (Fla.1993).

Accordingly, because the State presented sufficient evidence to allow the trial court to sentence appellant as a habitual violent felony offender, we affirm.

Affirmed.

1

STATE of Florida, Appellant,

v.

Harold Linford GREEN, Appellee.

No. 92-2523.

District Court of Appeal of Florida,
Fourth District.

April 21, 1993.

Motion for Clarification or
Certification of Question
Denied June 7, 1993.

Appeal from the Circuit Court for Broward County; Susan Lebow, Judge.

Robert A. Butterworth, Atty. Gen., Tallahassee, and James J. Carney, Asst. Atty. Gen., West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Eric M. Cumfer, Asst. Public Defender, West Palm Beach, for appellee.

PER CURIAM.

The state appeals from the trial court's order granting appellee's motion to dismiss the information charging him with solicitation to deliver cocaine. The trial court dismissed on the authority of *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA), *review 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). The trial court found the police had manufactured the crack cocaine used in this transaction and that its use constituted an integral part of the transaction whether charged as purchase of cocaine or solicitation to purchase cocaine.

We reverse. In *Metcalf v. State*, 614 So.2d 548 (Fla. 4th DCA 1993), this court expressly rejected the reasons relied upon by the trial court in its order of dismissal. We also find no merit in appellee's argument that the dismissal should be upheld on grounds of double jeopardy.

REVERSED and REMANDED.

DELL, GUNTHER and FARMER, JJ., concur.

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John Douglas LINKOUS, Appellant,

v.

STATE of Florida, Appellee.

No. 93-00957.

District Court of Appeal of Florida,
Second District.

April 21, 1993.

Rehearing Denied May 13, 1993.

Defendant convicted of engaging minor in sexual activity moved to correct sentence based on alleged err
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PER CURIAM.

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(Fla. 2d DCA 1993).
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