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FILED
SID J. WHITE
AUG 30 1993 9/20
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MANATEE CLEMONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 82,136

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court. He will be referred to by name and as Petitioner in this brief.

The decision being reviewed, a conformed copy of which is attached hereto as Appendix 2, will be referred to as the decision of the lower tribunal or of the Fourth District Court of Appeal. It will be cited to by its citation in the Florida Law Weekly, State v. Clemones, 18 Fla. L. Weekly D1628 (Fla. 4th DCA July 21, 1993).

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The trial judge, the Honorable Judge Moe, made the following findings of fact in this cause:

> 1. On September 13, 1991, members of the Operation Cradle Drug Task Force conducted a reverse sting operation to allegedly combat street level drug activity.
>
> 2. Using pre-analyzed, manufacture cocaine, supplied by the BSO Crime Laboratory as Batch 90A, Deputy T. L. Middleton posed as an undercover dealer, making himself available should a Potential buyer approach and request cocaine.
>
> 3. The Defendant [Petitioner] approached Deputy Middleton and solicited the purchase of a single cocaine rock. The Deputy delivered the cocaine to the Defendant, and the Defendant was arrested.
>
> 4. The manufactured cocaine utilized in this case was an integral part of this transaction. Consequently, the State would be unable to establish a prima facie case for Solicitation to Deliver Cocaine without its use.
>
> (R 18) [Emphasis Supplied].

On February 21, 1992, an information was filed in the Seventeenth Judicial Circuit charging Petitioner-Defendant, Manatee Clemones, with solicitation to deliver cocaine in violation of Section 893.03(2)(a), Fla. Stat. (1991) and Section 777.04(2), Fla. Stat. (1991) (R 7).

Petitioner-Defendant on September 24, 1992, filed a Motion to Dismiss the Information charging solicitation to purchase cocaine based on "the fact that there is manufactured crack cocaine." (R

4). The trial court in a written order (R 18-19, See Appendix 1) granted Petitioner's motion ruling:

> 5. Pursuant to Kelly v. State, 17 FLW D154 (Fla. 4th DCA Jan. 1992), [Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992)], the use of manufactured cocaine rocks by law enforcement agencies in reverse sting operations cannot be condoned and rises to a violation of the Defendant's constitutional principles of due process of law. Additionally, the use of manufactured cocaine constitutes fundamental error. Grissett v. State, 17 FLW D459 (Fla. 4th DCA Feb. 1992).
>
> 6. In Fox v. State, Case No. 91-0947 (Fla. 4th DCA June 3, 1992), the Fourth District Court of Appeals reversed a conviction for attempted Purchase of Cocaine at/near a School based upon the authority of Kelly v. State, supra and Grissett v. State, supra. Consequently, this Court finds Fox v. State, supra, controlling in this case involved a charge of Solicitation to Deliver Cocaine.
>
> WHEREFORE, IT IS ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss is granted, and the Defendant is discharged.
>
> (R 19).

On appeal, the Fourth District in the instant case, State v. Clemones, 18 Fla. L. Weekly D1628 (Fla. 4th DCA July 21, 1993) [See Appendix 2], reversed the order of the trial court dismissing the solicitation to purchase cocaine charge on the authority of its decision in Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), rev. pending, Case No. 81,612. However the Fourth District certified the following question to this Honorable Court as one of great public importance:

> WHETHER THE MANUFACTURE OF CRACK COCAINE BY LAW ENFORCEMENT OFFICIALS FOR USE IN A REVERSE-STING OPERATION CONSTITUTE GOVERNMENTAL MISCONDUCT WHICH

VIOLATES THE DUE PROCESS CLAUSE OF THE FLORIDA CONSTITUTION, WHERE THE CHARGE IS SOLICITATION TO PURCHASE, i.e. WHETHER METCALF v. STATE, 614 SO. 2d 548 (FLA. 4th DCA 1993), IS CORRECT?

Timely Notice of Discretionary Review to this Court was then filed by Petitioner-Defendant.

SUMMARY OF ARGUMENT

Petitioner Clemones made a purchase of crack cocaine illegally manufactured and sold by the Broward Sheriff's Office. Due to the intervention of the decision of the Fourth District Court of Appeal in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), the police agency involved and the local prosecutor decided to charge Petitioner with solicitation to purchase cocaine instead of purchase of cocaine.

Petitioner respectfully requests this Honorable Court to apply its decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), to the instant case. This Court should quash the decision of the Fourth District being reviewed as totally inconsistent with the holding in Williams, that Due Process of Law is a general principle of law that prohibits the government from obtaining convictions "brought about by methods that offend `a sense of justice.'" Id. at S372. (Quoting to Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 2d 183 (1952).

This case is controlled by those principles and the specific holding of Williams because here the outrageous practice brought about the prosecution of Petitioner. Some prosecutor should not be able to evade the ruling of this Court in Williams by merely refiling a different type of felony based on the identical crime or episode. As granted by the trial judge below, this prosecution should be dismissed. The decision of the Fourth District Court of Appeal in the instant case, State v. Clemones, 18 Fla. L. Weekly D1628 (Fla. July 21, 1993), should be reversed and the order of the trial court dismissing the charge should be reinstated (R 18-19).

ARGUMENT

WHETHER IT IS A VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF OUR STATE CONSTITUTION FOR THE STATE TO PROSECUTE FOR SOLICITATION TO PURCHASE GOVERNMENTALLY MANUFACTURED AND DISTRIBUTED CRACK COCAINE THAT IS USED BY SHERIFF'S OFFICERS IN A REVERSE STING OPERATION?

In the instant circumstances, this Court should rely upon its Due Process analysis in State v. Glosson, 462 So. 2d 1082, 1085 (Fla. 1985), where this Court stated that "governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges."

This Court in State v. Williams, 18 Fla. L. Weekly S371, 372 (Fla. July 1, 1993), recently adopted the view that the Due Process Clause provides a "defense to overturn criminal convictions as a check against outrageous police conduct." This Court further found persuasive authority that included a situation where a predisposed defendant's burglary conviction had been overturned due to police having both sponsored and operated a burglary for him to participate in as a look-out. See State v. Hohensee, 650 S.W. 2d 268 (Mo. Ct. App. 1982).

At bar, the Fourth District reversed the trial court's dismissal of Petitioner's charge by relying upon his alleged pre-disposition but ignored the clear governmental misconduct. The Fourth District's decision is sharply at odds with this Court's rationale as well as with its specific determination of the controlling facts sub judice. Simply because a prosecutor may choose a related offense to charge, instead of charging purchase

of the illegally police manufactured crack cocaine, the decision below would permit the practice of using that cocaine in reverse sting operations to continue totally unabated.

The decision below cited Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), rev. pending, Case No. 81,612, which noted that the offense of solicitation does not include as an essential element, the transfer of the cocaine to the police. Yet there was indeed a transfer of that police manufactured crack cocaine in the instant case (See R 9-10 the Probable Cause affidavit of police officer.) Only by enforcing this Court's holding in Williams, that "the courts refuse to invoke the judicial process" where such outrageous conduct occurs will the practice be stopped. This Court cannot allow a State Attorney's Office to evade its ruling by recasting the identical conduct in a different light. The decision of the Fourth District in Kelly only caused the State Attorney's Office of the Seventeenth Judicial Circuit to change the nature of the charges prosecuted. This practice must end now and forever.

This Honorable Court held this illegal practice cannot be countenanced consistently with the august principles embodied in the Due Process Clause of our State Constitution. The people of Florida expect these principles to govern the basic practices of their own government and various law enforcement agencies.

Crack cocaine will still be "lost" into the community unless all charges arising out of the direct use of that cocaine in reverse sting operations are dismissed. The central point of the Due Process Clause in these situations is to deter the outrageous conduct of the governmental authorities. The focus is less on the conduct of the person ensnared by the illegal police practices than

it is on removing the judicial process from becoming a partner to the illegal police practices.

The various legal and factual distinctions drawn by the Fourth District in Metcalf are illusory distinctions that were inappropriately applied to this case by the Fourth District. First, the Fourth District's factual distinction in Metcalf ignored the fact in the instant case that there was an actual transfer in this case of the manufactured crack cocaine (R 9-10). The crack cocaine would not need to become evidence against the defendant in Metcalf at any trial proceedings. There would be less need for inventory control of it than if it had been an actual element of the offense.

Further the legal distinction drawn by the Fourth District in Metcalf was that this Court's decision in State v. Hunter, 586 So. 2d 319 (Fla. 1991), did not extend the Due Process protection to persons removed from the police misconduct. The Fourth District noted the following about this in Metcalf:

> It is irrelevant that the transaction ultimately resulted in an unlawful transfer of a drug. We note by analogy that the Supreme Court has recognized that outrageous police misconduct constituting a due process violation ensnaring one defendant, does not entitle a codefendant, who had no direct contact with the police informant involved, to a discharge as well. State v. Hunter, 586 So. 2d 319 (Fla. 1991).

Id. at 549-550.

First, Petitioiner had direct contact with the outrageous police misconduct (R 9-10). Second, he was not once or more removed as the defendant was in Hunter (R 9-10). Third, the misconduct is not irrelevant to this criminal prosecution. If the

police below had not manufactured the crack cocaine they would not have been positioned near the school delivering it to persons, attracting persons to come up to view it, offer to buy it, and to further attract all the evil that is associated with such transactions. As the trial judge found in the instant case: "The manufactured cocaine utilized in this case was an integral part of the transaction." (R 18).

This Court's opinion in Williams is designed to apply a standard long in existence that governmental conduct must be consistent with the general welfare. This Court carefully examined the practice of the Broward Sheriff's Office and has determined that it is "incredible that law enforcement's manufacture of an inherently dangerous controlled substance, like crack cocaine, can ever be for the public safety." Williams, 18 Fla. L. Weekly at S373. Also this Court has resolved the issue of whether the judicial process can be made party to such convictions when it held:

> Moreover, the protection of due process to obtain a conviction where the facts of the case show that the methods used by law enforcement officials cannot be countenanced with a sense of justice and fairness. The illegal manufacture of crack cocaine by law enforcement officials violates this Court's sense of justice and fairness.

Id. at S373.

This case should be controlled by the conclusion in Williams that "the only appropriate remedy to deter this outrageous law enforcement conduct is to bar the defendant's prosecution." Williams, 18 Fla. L. Weekly at S373. The result should be exactly the same whether there is a purchase of illegally manufactured

cocaine, attempted purchase of illegally manufactured cocaine, or solicitation to purchase illegally manufactured cocaine. Williams should control all circumstances. This Court is urged to apply the Due Process Clause of our State Constitution to bar such outrageous conduct from continuing now and forever.

This Honorable Court should answer the certified question by holding that Metcalf was incorrectly decided by the Fourth District Court of Appeal in light of Williams. The use of another, substantially similar, charge to avoid the limitations of Williams would defeat justice and fairness as mandated by our State Constitution as interpreted and applied by this Honorable Court.

CONCLUSION

WHEREFORE, this Honorable Court is respectfully urged to quash the decision below and remand with directions that the ruling of the trial court dismissing the instant prosecution be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Carol Cobourn Asbury, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 26th day of August, 1993.

ANTHONY CALVELLO
Assistant Public Defender