

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

THE STATE OF FLORIDA,

Petitioner,

vs.

CALVIN LEE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

This is a petition for discretionary review by the State following reversal of respondent's/appellant's conviction for conspiracy to traffic in cocaine and the court's remand to correct the judgement for this offense to reflect it as a second degree felony rather than a first degree felony. Exhibits in the appendix to this brief will be referred to as App. "A", B, C and D.

STATEMENT OF THE CASE AND FACTS

The respondent/appellant following a jury trial and verdicts of guilty was so adjudicated by the court on May 14, 1992, for the offenses of conspiracy to traffic in cocaine in the amount of 28 grams or more but less than 200 grams and trafficking in the same amount of cocaine. (Exh. A).

The judgement reflects the conspiracy conviction as a first degree felony. On appeal the respondent contended¹ that the conspiracy conviction was a second degree felony. The State originally conceded this point but later moved for rehearing in an attempt to correct the error, which the court denied. On May 25, 1993 the Third District reversed the conspiracy conviction, holding that a conspiracy to traffic in more than 28 grams but less than 200 grams of cocaine is a second degree felony pursuant to section 777.04(4)(b) and 893.135(1)(b)1a, Fla. Stats. (1991). The court ordered that the judgement be corrected to reflect the court's ruling. (Exh. B).

On June 9, 1993, the State filed a motion for rehearing in the Third District, advising the court of the State's erroneous confession and informing the court based on the express and clear language of section 893.135(5), Fla. Stats. (1991) a

¹ The appellant raised four other issues on appeal all of which the court found to be without merit.

conspiracy to traffic in cocaine is a first degree felony is punishable in the same manner as the person had committed the act. (Exh. C). The court denied the motion for rehearing on July 13, 1993. (Exh. D). On August 11, 1993, the State timely filed a notice to invoke the discretionary jurisdiction of this court pursuant to its conflict jurisdiction.

POINT ON APPEAL

WHETHER THE DECISION OF THE THIRD DISTRICT CONFLICTS WITH THE HOLDING OF THE FIFTH DISTRICT IN STATE V. NIEMCOW, 505 SO. 2D 670 (FLA. 5TH DCA 1987), AND WITH THE HOLDING OF THE FIRST DISTRICT IN STATE V. MAILLIS, 495 SO. 2D 817 (FLA. 2D DCA 1986).

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal decision in this case which held that a conspiracy to traffic in cocaine is a second degree felony, directly and expressly conflicts with the decision of the Fifth and Second District Courts of Appeal. Those courts held that, a conspiracy to traffic in cocaine is a first degree felony and are to be treated in the same manner as the underlying offense for adjudicatory and sentencing purposes.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT CONFLICTS WITH THE HOLDING OF THE FIFTH DISTRICT IN STATE V. NIEMCOW, 505 SO. 2D 670 (FLA. 5TH DCA 1987), AND WITH THE HOLDING OF THE FIRST DISTRICT IN STATE V. MAILLIS, 495 SO. 2D 817 (FLA. 2D DCA 1986).

On May 14, 1993, the respondent/appellant was adjudicated guilty of conspiracy to traffic in cocaine and trafficking in cocaine, as first degree felonies in violation of section 893.135, Fla. Stat. (1991).

The Third District held that a conspiracy to traffic in cocaine is a second degree felony and reversed and remanded with directions to correct the judgement of conviction accordingly.²

The Fifth District Court of Appeal in the case of State v. Niemcow, 505 So. 2d 670 (Fla. 5th DCA 1987) expressly held that a conspiracy to traffic in cocaine is a first degree felony when it stated: The language of section 893.135(4), Florida

² The state, in its initial brief erroneously agreed that conspiracy to traffic in cocaine is a second degree felony. The state tried to rectify this by filing a motion for rehearing describing the court's and the state's error, which was denied. The state notes that the Third District apparently utilized its own judgement and did not rely solely on the state's confession of error in reaching its initial decision. This is evidenced by the language in the opinion which states that "[the court] must agree with the defendant and the state that the judgement incorrectly reflects the conviction for conspiracy to traffic as a first degree felony." (Emphasis added).

Statutes (1985)³ when read in conjunction with section 893.135(1)(b), Florida Statutes (1985), clearly indicates that the legislature intended conspiracy to traffic in cocaine not only to be a felony in the first degree, but also to be punishable as if the defendant had committed the act which he conspired to commit.⁴

In the case of State v. Maillis, 495 So. 2d 817 (Fla. 2d DCA 1986), the Second District, in reversing a suspended sentence, held that the same mandatory - minimum sentences provided in section 893.135 was required on both the trafficking and conspiracy charges pursuant to sections 893.135(1)(b)3 and 893.135(4), Fla. Stat. (1983). Explicit in the court's holding is the equal treatment to be accorded the conspiracy and trafficking convictions, versus the alternative, which reduces the conspiracy to a second degree felony.

It is clear that the Third District has reached a result which directly conflicts with the Second and Fifth Districts and

³ Present numbering is 893.135(5). The language is virtually identical.

⁴ Although Niemcow, involved a conspiracy to traffic in cocaine in an amount greater than 400 grams, and this case involved an amount between 28 and 200 grams, for purposes of the issue raised here, namely the correct degree of the conspiracy conviction, the treatment of the two is the same, as the same statutory authority applies equally to both.

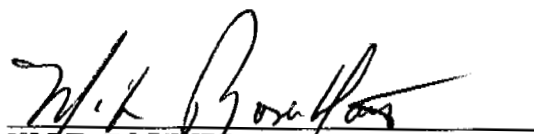
is also in direct contravention of the express unambiguous language of section 893.135(5), Fla. Stat. (1991).

CONCLUSION

Based on the foregoing the State respectfully requests that this court grant discretionary review based on its conflict jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON JURISDICTION was furnished by mail to JULIE LEVITT, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, 1351 N. W. 12th Street, Miami, Florida 33125 on this 18 day of August, 1993.



MARK ROSENBLATT
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