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SID J. WHITE
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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,220

STATE OF FLORIDA,

Petitioner,

-vs-

CALVIN LEE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED CONFLICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

In the Third District Court of Appeal, the Petitioner was the Appellee and the Respondent was the Appellant. The Parties will be referred to as Petitioner and Respondent. The following designation will be used to refer to portions of the record on appeal: transcript of the trial proceedings by the symbol "T" (supplemental volume one); transcripts of sentencing, "TI" (supplemental volume two); record certified on June 23, 1992, "RI"; record certified on August 12, 1992, "RII".

STATEMENT OF THE CASE AND FACTS

The State charged the Respondent in a two-count information with conspiracy to traffic in 28 or more grams of cocaine but less than 200 grams of cocaine and with trafficking in the same amount of cocaine. The information refers to section 893.135 and 777.04 Fla. Stat., (1991) when listing both offenses, and refers to the conspiracy charge as a second degree felony. In the descriptive portion of the information which outlines the specific circumstances which formed the basis for the charge of conspiracy reference is made to section 777.04(3) Fla. Stat. (1991).[1] (RI. 4-5, RII. 4-5).

Following a jury trial and verdicts of guilty of the charged offenses, the Respondent was adjudicated by the trial court on May 14, 1992 and sentenced as a habitual felony offender, to 20 years imprisonment with a 3 year minimum mandatory on both counts. (RI. 87-90, RII. 89-92). The judgment reflects the conspiracy conviction as a first degree felony. On appeal, the Respondent contended[2] that the conspiracy conviction

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1 Section 777.04(3) provides as follows:

> (3) Whoever agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection (4).

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

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, broadly 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. Stat. (1991). The court ordered that the judgment be corrected to reflect the court's ruling.

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. Stat. (1991), that a conspiracy to traffic in cocaine is a first degree felony which is punishable in the same manner as if the person had committed the act. The court denied the motion for rehearing on July 13, 1993. On August 11, 1993, the State timely filed a notice to invoke the discretionary jurisdiction of this court pursuant to its conflict jurisdiction. On October 28, 1993, this Court accepted jurisdiction dispensing with oral argument.

SUMMARY OF THE ARGUMENT

The Third District erroneously concluded that a conspiracy to traffic in cocaine in an amount between 28 and 200 grams is a second degree felony. Within the general conspiracy statute, which normally reduces by one degree, a conspiracy to commit any offense, an exception is carved out to this general rule where there is an express provision for the punishment of the charged conspiracy. Section 893.135(5) applies to trafficking conspiracies and expressly states that a conspiracy to traffic (in cocaine, among other controlled substances), is a first degree felony and thus, applies in this case.

QUESTION PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT A CONSPIRACY TO TRAFFIC IN COCAINE IS A SECOND-DEGREE FELONY.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT A CONSPIRACY TO TRAFFIC IN COCAINE IS A SECOND-DEGREE FELONY.

It is a first principle of statutory construction that specific provisions in legislative enactments take precedence over more general provisions which cover the same subject. Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959); Gretz v. Florida Unemployment Appeals Commission, 572 So. 2d 1384, 1386 (Fla. 1991). In this vein, section 777.04(3), Fla. Stat. (1991), which was referred to in the information charging the conspiracy essentially codifies the aforementioned rule of statutory construction when it provides as follows:

> (3) Whoever agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection (4). (emphasis added)

Section 777.04(4) applies generally to all conspiracies and serves to set the degree of the offense where no express provision is set forth for the punishment of the specific conspiracy involved.

In this case, just such a specific provision exists. Section 893.135(5) Fla. Stat., (1991) relates specifically to conspiracies to traffic in controlled substances referred to in section 893.135(1) Fla. Stat. (1991). It provides that

> (5) Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1) is guilty of a felony of the first degree and is punishable as if he had actually committed such prohibited act. Nothing in this subsection shall be construed to prohibit separate convictions and sentences for a violation of this subsection and any violation of subsection (1).

It is clear therefore, by virtue of the rules of statutory construction and the express language of section 777.04(3) and 893.135(5), that a conspiracy to traffic in cocaine is always a first degree felony, and that section 893.135(5)[3] is the only statute which applies to such conspiracies.

Furthermore, it cannot be argued that the information failed to place the Respondent on adequate notice of the nature of the charged offense. The Respondent was placed on sufficient notice since the information referred to both sections 893.135

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3 A Defendant cannot be charged under section 777.04 as an alternative to section 893.135(5) despite the implications to the contrary in Stidham v. State, 579 So. 2d 319 (Fla. 5th DCA 1991) and Jenkins v. State, 533 So. 2d 297 (Fla. 1st DCA 1988). In fact Jenkins reiterates that section 777.04(3) provides an exception where there is an express provision that applies. The rules of statutory construction clearly mandate that section 893.135(5) takes precedence and is the only statutory provision which applies to trafficking conspiracies.

and 777.04(3), which as previously stated, notifies the reader that specific statutory provisions which set the degree of the conspiracy take precedence over the general conspiracy provisions in section 777.04. Respondent cannot legitimately argue a failure to place him on notice where the statute which expressly states this proposition was included in the information itself.

In Jenkins v. State, 533 So. 2d 297, (Fla. 1st DCA 1988), the court rejected the Defendant's contention that he was incorrectly sentenced to the 25 year mandatory minimum under section 893.135(5) because, he argued, he was charged under the general conspiracy statute, section 777.04, which provides that the conspiracy offense be reduced to a second degree felony. The court ruled that section 777.04(3) "carves out an exception to the downgrading of the degree of the offense where there is an express provision made by law for the punishment of such conspiracy." Id. at 298 n. 1. The court upheld the minimum mandatory sentence based upon the specific provision contained in Sec. 893.135.

The court next addressed itself to the question of the state's having cited section 777.04 when charging the offense, and whether this ran afowl of pleading requirements in rule 3.140(d) Fla.R.Crim.P. (1987).[4]

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4 Florida Rule of Criminal Procedure 3.140(d)(1), (1987), which remains unchanged provided as follows:

The court determined that the incorrect citation did not mislead the Defendant to his prejudice because it found on the record that the Defendant was aware of the mandatory sentence. In our case, although the State referred to section 777.04 which relates to attempts, conspiracies and solicitation generally, in the title section of the charging document and referred to the conspiracy as a second degree felony in that section of the information, in the body of the information charging the conspiracy, the State referred to section 777.04(3) which clearly notified the Respondent that the specific statute governing trafficking conspiracies would apply and not section 777.04(4).[5]

The Respondent was not misled to his prejudice for several reasons. First, the Respondent was sentenced to concurrent three year minimum mandatory sentences for both the conspiracy and the

> (1) *Allegation of Facts; Citation of Law Violated.* Each count of an indictment or information upon which the defendant is to be tried shall allege the essential facts constituting the offense charged. In addition, each count shall recite the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to his prejudice.

[5] Indeed it was proper if not necessary to refer to section 777.04(3) since that is the operative provision which excludes conspiracies, for which there are specific provisions, from the general conspiracy statute.

underlying trafficking offense. (RI. 88-90, RII. 90-92). Because the sentences were concurrent, no additional punishment is exacted upon the Respondent. This is also true because any gain time which might apply under section 944.275 Fla. Stat. (1991) is applied equally to both sentences imposed.[6] Furthermore, portions of any sentences to be served concurrently are treated as a single sentence when determining basic gain-time. Sec. 944.275(4)(a)1, Fla. Stat. (1991); Fla. Admin. C. Rule 33-11.0045(3)(1989); See also Fulse v. State, 573 So. 2d 139 (Fla. 5th DCA 1991).

Additionally, the Respondent was sentenced as a habitual felony offender. A conviction for a second-degree conspiracy as opposed to a first, would not have altered this sentence. This is because the determination to impose such a sentence is based upon the respondent's prior record and the fact that he was convicted of a felony at trial and would not be affected by the lessening by one degree either of the felony convictions for which he was convicted in this case. See sections 775.084(1)(a)1 and 2, Fla. Stat. (1991).

Finally, the Third District has laid down a very broad rule of law which as Respondent concedes in his brief on jurisdiction, on its face, is in conflict with other districts. The court

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6 Gain time is authorized for both offenses since no exclusion applies. See State v. Hall, 538 So. 2d 468 (Fla. 5th DCA 1985) and Sec. 944.275.

broadly pronounces that "[a] conspiracy to traffic in cocaine is a second-degree felony because the underlying offense, trafficking in cocaine in an amount between 28 and 200 grams, is a first-degree felony" citing sections 777.04(4)(b), and section 893.135(1)(b)1a Fla. Stat. (1991). No further clarification of any kind is rendered by the court in its opinion. This overly broad and erroneous statement, at the very least, as applied to both the charging and prosecuting of the vast majority of trafficking conspiracies, only serves to confuse the interested reader and the courts in their administration of trafficking conspiracy prosecutions. In fact, this counsel has himself received numerous phone calls from attorneys across the State who flatly exclaim that the rule of law, as set forth, is erroneous, and who are greatly troubled by the opinion. At the very least, any exception which the court may be announcing must be clarified. In its present form the court's opinion directly conflicts with the statutory language and other courts of this State. See e.g. State v. Niemcow, 505 So. 2d 670 (Fla. 5th DCA 1987).

CONCLUSION

WHEREFORE, for the foregoing reasons and authorities the State of Florida respectfully requests that this Court reverse the opinion of the Third District Court of Appeal and reinstate Respondent's conviction for conspiracy to traffic as a first-degree felony.

Respectfully submitted,

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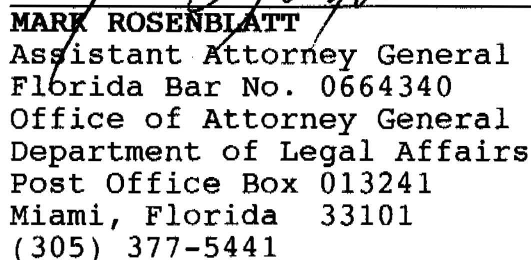

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **JULIE M. LEVITT,** Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, Florida 33125, on this 22 day of November, 1993.

MARK ROSENBLATT
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