047 w/app.

IN THE SUPREME COURT OF FLORIDA

ANNETTE HUNTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 82,458

FOURTH DCA CASE NO. 92-2972

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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 the district court. In this brief, the parties will be referred to as Annette Hunter and the State.

The following symbols will be used:

"R" Record on appeal before the Fourth District Court of Appeal.

"SR" Supplemental Record on Appeal before the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

On March 21, 1991, Sergeant T.C. Middleton and Deputy John Battle posed as street level crack cocaine dealers within a school zone in Fort Lauderdale (R 20,37). The officers used crack cocaine illegally manufactured by the Broward County Sheriff's Office (R 20,37). Ms. Hunter walked up to Sergeant Middleton and said, "Can I have a dime rock?" (R 20,37). Sergeant Middleton displayed several packages of the manufactured cocaine (R 20,37). Ms. Hunter stated, "They are too small, give me two for ten" (R 20,37). Sergeant Middleton stated, "Ok," and gave her two packages of manufactured cocaine (R 20,37). Ms. Hunter stated, "Let me taste one" (R 20,37). Sergeant Middleton said, "Ok" (R 20,37). Ms. Hunter was allowed to open the package and taste the illegally manufactured cocaine (R 20,37). Ms. Hunter stated, It's good," and gave Sergeant Middleton ten dollars for the two packages (R 21,37-38). Ms. Hunter was then arrested and charged with purchase of cocaine within 1000 feet of a school (R 21).

On September 16, 1991, Ms. Hunter pled guilty to purchase of cocaine within a 1000 feet of a school in case number 91-5614 CF (R 38; SR). Ms. Hunter was adjudicated guilty and sentenced to 4 1/2 years in state prison with a 3 year minimum mandatory (R 38).

On May 18, 1992, Ms. Hunter filed a motion with the trial court seeking relief on the authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 1280 (Fla. 1992), and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992), dismissed, 599 So. 2d 1280 (Fla. 1992) (SR 1-9).

On June 4, 1992, in open court, the trial court entered an order vacating the judgment and sentence and discharging Ms. Hunter (SR 10). The state did not appeal this order. Instead, on July 2, 1992, the state filed another information charging Ms. Hunter with solicitation to purchase cocaine in case number 92-13170 CF (R 6-7).

On September 22, 1992, Ms. Hunter filed a motion to dismiss the information (R 11-13). On September 24, 1992, the trial court entered its written order granting the motion to dismiss (R 37-39). In its order, the trial court made the finding that the "manufactured cocaine utilized in this case was an integral part of this transaction" (R 38).

On October 9, 1992, the State filed its notice of appeal (R 40). Ms. Hunter argued on appeal that the State's appeal was untimely and should be dismissed and that the trial court correctly dismissed the purchase of cocaine charge after it found that the illegally manufactured cocaine was an integral part of the transaction.

On July 7, 1993, the Fourth District Court of Appeal reversed the trial court's order on the authority of Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), rev. pending, Case No. 81,612. On September 22, 1993, the Fourth District denied Ms. Hunter's motion for rehearing but granted her motion to certify a question of great public importance (see attached appendix). Ms. Hunter filed her notice to invoke discretionary jurisdiction with the Fourth District Court of Appeal on September 23, 1993. On October 5,

1993, this Court entered an order postponing a decision on jurisdiction and scheduling briefs on the merits.

SUMMARY OF THE ARGUMENT

POINT I

This Court's decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), controls and requires this Court to reverse the Fourth District's decision with instructions to affirm the trial court's order dimissing Ms. Hunter's solicitation to purchase cocaine charge. 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 the 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 wanted to deter such misconduct and was concerned that permitting the conviction of purchasing such cocaine to stand would condone the misconduct.

POINT II

Ms. Hunter pled guilty to purchase of cocaine within a 1000 feet of school and was sentenced to state prison. Thereafter, the Fourth District issued its decisions in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 1280 (Fla. 1992), and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992), dismissed, 599 So. 2d 1280 (Fla. 1992). Ms. Hunter filed a motion with the trial court seeking relief under those decisions. On June 4, 1992, the trial court entered a written order granting Ms.

Hunter's motion. The State did not timely commence appeal from that order. Instead, the State filed another information 28 days later and then appealed its dismissal to the Fourth District Court of Appeal. To allow the State to appeal the second order gives the State more time to file an appeal than is allowed by our rules of appellate procedure. The Fourth District should have dismissed the State's appeal.

ARGUMENT

POINT I

CONVICTING A DEFENDANT FOR SOLICITATION TO PURCHASE COCAINE WHEN THE CONVICTION WAS THE INTENDED RESULT OF A REVERSE STING OPERATION USING MANUFACTURED COCAINE VIOLATES DUE PROCESS OF LAW GUARANTEED BY ARTICLE I, § 9 OF THE FLORIDA CONSTITUTION

The Fourth District Court of Appeal reversed the trial court's order dismissing Ms. Hunter's solicitation to purchase cocaine charge without the benefit of this Court's decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993). In Williams this Court held that the police manufactue of crack cocaine was an outrageous act of misconduct. Id. at S373. Furthermore, this Court found that 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 S373.

Both the letter and spirit of Williams require this Court to reverse the decision under review. The State, having illegally manufactured an extremely dangerous controlled substance, and having arrested Ms. Hunter 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.

The Fourth District reversed the trial court's order on the authority of Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), rev. pending, Case No. 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.

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 Ms. Hunter's case, entrapment is not even at issue. It is beyond dispute that the police directly sold Ms. Hunter a piece of illegally manufactured crack: that is the offense with which the State originally charged Ms. Hunter. Ms. Hunter'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 Ms. Hunter to do a drug deal and then charged Ms. Hunter just as they intended to do.

The Fourth District's implicit holding that there was only a "limited relationship" between the police misconduct and Ms. Hunter's decision to solicit the purchase of crack is beside the point of Williams (and is factually incorrect as well). 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 by the government. Permitting the police to do what they did in Williams but simply charge the offense as a solicitation to purchase 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 purchase cocaine 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 these felony convictions, the public will see that the government can commit dangerous and illegal acts and that the courts will simply look the other way.

Finally, 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 S371. The police used manufactured crack in this reverse sting. Indeed, Ms. Hunter's case is even more outrageous than the typical reverse sting because the Sheriff's deputies actually allowed Ms. Hunter to taste the deadly drug which they had illegally manufactured (R 20,37). Thus, if there were ever a case where the institution of a lesser charge should be barred it is this one. The Fourth District's decision must be reversed and the trial court's order dismissing Ms. Hunter's charge affirmed.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN NOT DISMISSING THE STATE'S APPEAL BECAUSE THE STATE DID NOT TIMELY APPEAL THE TRIAL COURT'S ORDER ENTERED JUNE 4, 1992

On September 16, 1991, Ms. Hunter pled guilty to purchase of cocaine within a 1000 feet of a school in case number 91-5615 CF (R 38; SR 1). Ms. Hunter was adjudicated guilty and sentenced to 4 1/2 years in state prison with a 3 year minimum mandatory (R 38).

On May 18, 1992, Ms. Hunter filed a motion with the trial court seeking relief under the Fourth District's decisions in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 1280 (Fla. 1992), and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992), dismissed, 599 So. 2d 1280 (Fla. 1992) (SR 1-9).

On June 4, 1992, in open court, the trial court entered an order vacating Ms. Hunter's judgment and sentence and ordering that she be discharged (SR 10). The State failed to take an appeal from this order. Instead, on July 2, 1992, the state filed another information charging Ms. Hunter with solicitation to purchase cocaine[1] (R 6-7). On September 22, 1992, Ms. Hunter filed a motion to dismiss this information (R 11-13). On September 24, 1992, the trial court entered its written order granting the motion to dismiss (R 37-39). On October 9, 1992, the State filed its notice of appeal (R 40). As appellee in the Fourth District Court of Appeal, Ms. Hunter argued that the State's appeal was untimely. The Fourth District erroneously rejected her argument.

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[1] The information indicates it was refiled from case no. 91-5615 CF (R 6).

After the trial court entered its June 4, 1992, order discharging Ms. Hunter, the State had 15 days to file its notice of appeal. Fla.R.App.P. 9.140(c)(2). The State failed to do so. Instead, the State made an end-run around the rules of appellate procedure by filing another information 28 days later and then appealing its dismissal. Thus, instead of 15 days to commence an appeal, the State's tactic allowed it 127 days. Allowing the State to appeal the second order gave the State more time to file an appeal than allowed by Fla.R.App.P. 9.140(c)(2). Accordingly, the State's appeal was untimely and should have been dismissed by the Fourth District Court of Appeal. See State v. Jones, 613 So. 2d 577 (Fla. 1st DCA 1993) (State appeal dismissed where state did not timely appeal order dismissing charge; instead, State appealed order which denied rehearing of order dismissing charge); Hawthorne Industries, Inc. v. Transohio Savings, 573 So. 2d 211, 212 (Fla. 4th DCA 1991) (in granting appellee's motion to dismiss appeal where appellant did not timely appeal an order appointing a receiver but instead appealed order denying motion to vacate the order appointing receiver, Fourth District stated: "...to allow appellant to appeal the order denying its motion to vacate gives appellant more time to file an appeal of the order appointing the receiver than allowed by our appellate rules.")

If this Court holds that the State can appeal the second order dismissing Ms. Hunter's charge then the 15 day time limit in Fla.R.App.P. 9.140(c)(2) will be rendered meaningless. In the future, if the State neglects to timely appeal a trial court's

order dismissing a charge, the State need not worry: all the State need do is file a new information with the same or similar charge and then appeal the order dismissing that information (as the State did here).

The Fourth District's decision must be reversed and the trial court's order dismissing Ms. Hunter's charge affirmed.

CONCLUSION

For the foregoing reasons, Ms. Hunter respectfully requests this Court to vacate the decision of the Fourth District Court of Appeal and affirm the trial court's order dismissing Ms. Hunter's solicitation to purchase cocaine charge.

Respectfully submitted,

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Attorney for Annette Hunter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Michelle Konig, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida, 33401-2299 by courier this 12th day of October, 1993.

Paul E. Petillo
Attorney for Annette Hunter

IN THE SUPREME COURT OF FLORIDA

ANNETTE HUNTER, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 82,458 FOURTH DCA CASE NO. 92-2972

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1993

STATE OF FLORIDA, Appellant, v. ANNETTE HUNTER, Appellee.	CASE NO. 92-2972. L.T. CASE NO. 92-13170.

Opinion filed July 7, 1993

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; Leroy H. Moe, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Dawn S. Wynn, Assistant Attorney General, West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellee.

PER CURIAM.

Reversed. See Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993).

DELL, C.J., and WARNER, J., concur.
ANSTEAD, J., concurring specially with opinion.

ANSTEAD, J., concurring specially.

While I agree with the majority that this case should be reversed based upon our holding in Metcalf, I write separately to note that the current case is not the typical Metcalf scenario. In Metcalf, we held that the use of crack cocaine illegally manufactured by the government would not require the dismissal of a charge of solicitation to purchase cocaine, as distinguished from a charge of purchase of cocaine. See Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992).

The charge here is solictation, and the trial court dismissed on the authority of Kelly, a case of purchase. Hence, Metcalf appears to require reversal. However, the appellee points out that this case has another twist, since it appears that appellee was initially prosecuted for purchase and, after conviction and sentence, the trial court vacated her conviction and discharged her. The state did not appeal this decision. However, subsequently, the state filed the present solicitation charge.

Since the trial court's ruling was based on Kelly, we have limited our review to that issue. It would appear that there may be other issues, such as double jeopardy, involved in this case. Those issues may be explored more fully upon remand.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1993

STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 92-2972.
	)	
ANNETTE HUNTER,	)	L.T. CASE NO. 92-13170.
	)	
Appellee.	)	
	)	

Opinion filed September 22, 1993

Appeal from the Circuit Court for Broward County; Leroy H. Moe, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Dawn S. Wynn, Assistant Attorney General, West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellee.

PER CURIAM.

ON MOTION FOR CERTIFICATION

We certify to the supreme court as a question of great public importance the same question as was certified in State v. Clemones, slip op 92-2997 (Fla. 4th DCA July 21, 1993):

> 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, WHERE THE CHARGE IS SOLICITATION TO PURCHASE, I.E., WHETHER METCALF V. STATE, 614 SO. 2D 548 (Fla. 4th DCA 1993), IS CORRECT?

DELL, C.J., ANSTEAD and WARNER, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

STATE OF FLORIDA

Appellant(s),

vs.

ANNETTE HUNTER

Appellee(s).

CASE NO. 92-02972

L.T. CASE NO 92-13170 CF10
BROWARD

September 22, 1993

BY ORDER OF THE COURT:

ORDERED, Appellee's July 20, 1993, motion for rehearing is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Attorney General-W. Palm Beach
Public Defender 15

/MG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Appendix has been furnished by courier to Michelle Konig, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 this 12th day of October, 1993.

Paul E. Petillo

Attorney for Annette Hunter