047

IN THE SUPREME COURT OF FLORIDA

CASES No. 82,458

ANNETTE HUNTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER, Senior
Assistant Attorney General,
Bureau Chief
West Palm Beach, Florida

MICHELLE A. KONIG
Assistant Attorney General
Florida Bar No. 946966
1655 Palm Beach Lakes Blvd.
Third Floor
West Palm Beach, Florida 33401
(407) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, ANNETTE HUNTER, was the defendant in the trial court and the Appellee in the district court of appeal. She will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State."

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

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts Petitioner's Statement of the Case and Facts for purposes of this appeal.

SUMMARY OF ARGUMENT

POINT I

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.

POINT II

This Court need not consider Petitioner's claim that the State's appeal was untimely, because this issue was not discussed in the district court's opinion, and consideration of this issue is not necessary for resolution of the certified question.

Petitioner's argument also fails on the merits. The State timely filed its notice of appeal fifteen days after the court's order dismissing the information. The fact that the State did not appeal the court's order dismissing the separate information, charging Appellant with the actual purchase of cocaine, is irrelevant.

ARGUMENT

POINT I

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.

There is no question that 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). It is equally clear that 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 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 actually cocaine). As pointed out by the Fourth District Court in Johnson, "The crimes of solicitation

focuses on the culpability of the solicitor. It is irrelevant that the other cannot or will not be 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 that 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. The State submits Petitioner has misinterpreted this Court's decision in Hunter. In Hunter, an informant used what this Court found to be outrageous misconduct to entrap one 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 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

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

entitled to discharge, the fact that police misconduct has occurred does **not** in and of itself require discharge of a 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 violation tainted every prosecution which flowed from it. Instead, this Court found a logical cutoff; 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; Respondent submits that 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. 3rd DCA 1991), (the intent or motives of the person solicited are irrelevant to solicitation charge).

Petitioner's argument that her solicitation would not have occurred if the police had not manufactured the crack cocaine 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 completed at the instant Petitioner offered to buy cocaine from the officer and well before Petitioner tasted the crack.

Finally, Petitioner's 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 likewise 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)(3)1, Florida Statutes (1990). Further, the risk of cocaine escaping into the community is no greater when the police use cocaine they have manufactured that 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. Clearly Petitioner's policy arguments do not survive careful scrutiny.

Respondent respectfully submits that the trial court did not err in denying Petitioner's motion to dismiss, and that 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 decision of the lower court should be affirmed.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY DENIED PETITIONER'S MOTION TO DISMISS THE STATE'S APPEAL, BECAUSE THE STATE'S APPEAL WAS TIMELY. (Restated)

This Court need not consider Petitioner's claim that the State's appeal from the trial court's order dismissing the information was untimely, because this issue was not discussed in the district court's opinion, and consideration of this issue is not necessary for resolution of the certified question.

Petitioner's argument that the State's appeal was untimely also fails on the merits. The State filed its notice of appeal in the instant case On October 9, 1992, fifteen days after the court's order dismissing the information (R 37-40). The fact that the State did not appeal the order vacating Petitioner's sentence in case number 91-5615 CF, where Petitioner had been charged with purchase of cocaine within 1000 feet of a school, is irrelevant to the issue of whether the State's appeal in the instant case was timely.

The State did not appeal the trial court's order in case number 91-5615 CF because the Fourth District Court of Appeals had already decided Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 1280 (Fla. 1992). Kelly was decided against the State's position. Therefore, based on Kelly, it would have been fruitless for the State to appeal that case raising the issue decided in Kelly.

Hawthorne Industries, Inc. v. Transohio Savings, 573 So. 2d 211 (Fla. 4th DCA 1991), and State v. Jones, 613 So. 2d 577 (Fla.

1st DCA 1993), which Petitioner relies on, are inapposite. Unlike Hawthorne and Jones, the present case involves completely separate cases. Herein, the State filed two totally separate informations - one information charging purchase of cocaine and later, a second information charging solicitation of cocaine. The filing of the new information did not give the State more time to file an appeal of the purchase charge as Appellee alleges, because the State never appealed the dismissal of that charge.

Finally, the instant case and case number 91-5615 CF do not involve "the same or similar charge" as argued by Petitioner. Brief of Petitioner at 13. 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)(3)1, Florida Statutes (1990).

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that this Honorable Court AFFIRM the decision of the Fourth District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER, Senior
Assistant Attorney General
Bureau Chief - West Palm Beach

MICHELLE A. KONIG
Assistant Attorney General
Florida Bar No. 946966
1655 Palm Beach Lakes Blvd.
Third Floor
West Palm Beach, Florida 33401
(407) 688-7759

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by courier to: PAUL PETILLO, Assistant Public Defender, Criminal Justice Building, 421 3rd Street/6th Floor, West Palm Beach, Florida 33401, this 2nd day of November, 1993.

Of Counsel

ka

IN THE SUPREME COURT OF FLORIDA

ANNETTE HUNTER,

Petitioner,

vs. CASE NO. 92,458

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHELLE A. KONIG
Assistant Attorney General
Florida Bar No. 946966
Third Floor
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
Telephone (407) 688-7759

Counsel for Appellee

92-12174 D

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.

D

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

92-141874

N-V

STATE OF FLORIDA,

Appellant,

v.

ANNETTE HUNTER,

Appellee.

CASE NO. 92-2972.

L.T. CASE NO. 92-13170.

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.