IN THE SUPREME COURT OF FLORIDA

ROBERT M. STAFFORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 82,628

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED THE INFORMATION BECAUSE IT CHARGED ONLY PURCHASE OF COCAINE ILLEGALLY MANUFACTURED BY THE SHERIFF. 5

POINT II

PROSECUTING A DEFENDANT FOR SOLICITATION FOR ANOTHER TO DELIVER COCAINE WHEN THE BASIS OF THE CHARGE IS THE SHERIFF'S REVERSE STING OPERATION SELLING ILLEGALLY MANUFACTURED CRACK COCAINE VIOLATES DUE PROCESS OF LAW UNDER THE FLORIDA CONSTITUTION. 7

CONCLUSION 13

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Cases — Page

Fridovich v. State, 562 So. 2d 328 (Fla. 1990) 5

Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992) 2

Kelly v. State, 593 So. 2d 1060 (Fla. 4th 1992) 1-3, 5-11

Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993) 2, 7, 9, 10

Rochin v. California, 342 U.S. 165,173, 72 S. Ct. 205, 96 L. Ed. 2d 113 (1976) 8

State v. Anderson, 537 So. 2d 1373 (Fla. 1989) 6

State v. Glosson, 462 So. 2d 1082 (Fla. 1985) 8

State v. Hunter, 586 So. 2d 319 (Fla. 1991) 10, 11

State v. Palmer, 18 Fla. L. Weekly S432 (Fla. July 1, 1993) 8

State v. Stafford, 18 Fla. L. Weekly D2182 (Fla. 4th DCA October 6, 1993) 2, 4, 10

State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993) 3, 4, 6-12

Tisby v. State, 614 So. 2d 586 (Fla. 4th DCA 1993), rev. pending case no. 81,676) 9

OTHER AUTHORITIES

Florida Rules of Criminal Procedure

3.140(c)(1) 6

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and the appellee in the district court. He will be referred to as petitioner in this brief.

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

On December, 4, 1991, petitioner was charged with purchase of cocaine which occurred on November 14, 1991 (R-6) (Appendix - 2). This is a "batch case," where the Broward Sheriff's Office was selling crack cocaine they had illegally manufactured in a reverse sting operation. On January, 3, 1992, the Fourth District issued its decision on rehearing in Kelly v. State, 593 So. 2d 1060 (Fla. 4th 1992), finding the Sheriff's practice of selling crack cocaine which they had illegally manufactured to be outrageous police conduct that violated due process of law.

The state then purported to amend the information to charge solicitation to deliver cocaine. The caption of the information which read "purchase of cocaine" was crossed out and the handwriting "solicitation to deliver cocaine" with some initials placed near the caption. The allegations of the information continued to allege that petitioner:

> on the 14th day of November, A.D. 1991, in the County and State aforesaid, did unlawfully purchase a controlled substance, to-wit: Cocaine, contrary to F.S. 893.13(1)(a), and F.S. 893.03(2)(a).

(R-6).

Petitioner then filed a motion to dismiss the information because the Fourth District's decision in Kelly required its dismissal. At a short hearing on December, 16, 1992, which was not the first hearing on the motion but the only one that the State of Florida, appellant in the district court included in the record, the trial judge agreed that Kelly and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992), required dismissal due to the police use of illegally manufactured cocaine (R-2-4).

The state appealed the order of dismissal and on October 6, 1993, the Fourth District reversed but certified the following question as one of great public importance:

> 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?

State v. Stafford, 18 Fla. L. Weekly D2182 (Fla. 4th DCA October 6, 1993).

Petitioner timely filed his notice to invoke discretionary review on October 20, 1993. This Court established a briefing schedule and this brief on the merits follows.

SUMMARY OF ARGUMENT

Point I: Petitioner was charged by an information with purchase of cocaine and the cocaine so purchased was part of the crack cocaine illegally manufactured by the Broward Sheriff's office. Shortly thereafter the Fourth District held that the deputies' sale of crack they had manufactured violated due process. Although the state purported to amend the information to solicitation to deliver cocaine, only an amendment of the title or caption was made. No amendment was made to the statement of the charge against petitioner, which continued to charge only a purchase of cocaine. Under these circumstances, dismissal of the information under Kelly and this Court's decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), was correct and the district court erred in ordering the information reinstated.

Point II: This case is controlled by this Court's recent decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), holding that the illegal manufacturing of crack cocaine by police officers for use in a reverse sting operation constitutes outrageous police conduct which violates due process. The state may not obtain a conviction based on such police misconduct.

Here petitioner had direct contact with the officers who were selling the crack that they illegally manufactured and those officers actually claimed that a completed sale took place. The purpose of finding a due process violation is to deter unlawful police conduct. The district court's decision in petitioner's case allows the exact same unlawful police conduct condemned in Williams to sustain a conviction as long as the conviction is for solicita-

tion. The district Court's decision in Stafford does not square with Williams and the district court must be reversed.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED THE INFORMATION BECAUSE IT CHARGED ONLY PURCHASE OF COCAINE ILLEGALLY MANUFACTURED BY THE SHERIFF.

On December, 4, 1991, petitioner was charged with purchase of cocaine which occurred on November 14, 1991 (R-6) (Appendix - 2). This is a "batch case," where the Broward Sheriff's Office sold crack cocaine they had illegally manufactured in a reverse sting operation. On January, 3, 1992, the Fourth District issued its decision on rehearing in Kelly v. State, 593 So. 2d 1060 (Fla. 4th 1992), finding the Sheriff's practice of selling crack cocaine which they had illegally manufactured to be outrageous police conduct that violated due process of law.

The state then purported to amend the information to charge solicitation to deliver cocaine. The caption of the information which read "purchase of cocaine" was crossed out and the handwriting "solicitation to deliver cocaine" with some initials placed near the caption. But the state did not in any way change the offense to be tried, Cf. Fridovich v. State, 562 So. 2d 328 (Fla. 1990) (State's filing a new information for manslaughter after appellate reversal of defendant's conviction for manslaughter as a lesser included of premeditated murder was not a new or different charge, "the state was not in any way changing the offense to be tried or abandoning the charge of manslaughter for this incident.") Id. at 329.

The allegations of the information against petitioner continued to allege that petitioner:

> on the 14th day of November, A.D. 1991, in the County and State aforesaid, did unlawfully purchase a controlled substance, to-wit: Cocaine, contrary to F.S. 893.13(1)(a), and F.S. 893.03(2)(a).

(R-6) (Appendix - 2).

The state's amendment was ineffective to change the charge against petitioner from purchase of cocaine to solicitation to deliver cocaine because only an amendment of the title or caption was actually made. The caption is not an essential part of an information on which the defendant is to be tried. Fla. R. Crim. P. 3.140(c)(1). No amendment was made to the statement of the charge against petitioner, which continued to charge only a purchase of cocaine. Had petitioner entered a plea of guilty or gone to trial on this information and been convicted under it of solicitation to deliver cocaine, the state's failure to comply with constitutional provisions on filing of informations would have been waived. State v. Anderson, 537 So. 2d 1373 (Fla. 1989). However, petitioner has not been convicted under this information. Instead, he moved for and was granted dismissal due to the deputies' due process violation of selling him crack cocaine which they had illegally manufactured. Under these circumstances, dismissal of the information under Kelly and this Court's decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), was correct and the district court erred in ordering the information reinstated.

POINT II

PROSECUTING A DEFENDANT FOR SOLICITATION FOR ANOTHER TO DELIVER COCAINE WHEN THE BASIS OF THE CHARGE IS THE SHERIFF'S REVERSE STING OPERATION SELLING ILLEGALLY MANUFACTURED CRACK COCAINE VIOLATES DUE PROCESS OF LAW UNDER THE FLORIDA CONSTITUTION.

Assuming for one short moment that this "amended information" is sufficient to charge solicitation to deliver cocaine, the trial court was correct to dismiss it under the principles of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992) and State v. Williams, supra. However, the Fourth District reversed but certified as a question of great public importance to this Court, whether Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993) was correctly decided.

Recently, in State v. Williams, 18 Fla. Law Weekly S371 (Fla. July 1, 1993), this Court strongly condemned the Broward Sheriff's Office practice of illegally manufacturing rock cocaine for resale near schools in reverse sting operations. Important to that decision was the nature of the substance manufactured by B.S.O. "It is undisputed that crack cocaine is highly addictive and has caused death." Id. at 372. This Court concluded that manufacture of "an inherently dangerous controlled substance, like crack cocaine," could never be done for the public safety. Id. at 373. With alarm, the Court noted that "a significant portion of the crack cocaine manufactured for use in reverse-sting operations was lost." Id. at 373. The lack of strict inventory control allowed an undetermined amount of the crack to escape into the community in close proximity to a school. This Court called this fact

"particularly outrageous." Id. at 373.

In State v. Palmer, 18 Fla. L. Weekly S432 (Fla. July 1, 1993), the state attempted to distinguish that defendant's situation from Kelly because in Palmer there were no allegations that the police lost portions of the crack cocaine during the reverse sting operation. This Court affirmed the finding of the Fourth District, that it makes no difference that rock cocaine was not lost in the particular operation in which the defendant was arrested. Under the holding of Williams, drugs do not have to be lost, nor does a completed sale have to occur before due process is violated. Williams held:

> [T]he illegal manufacture of crack cocaine by law enforcement officials for use in a reverse-sting operation within one thousand feet of a school constitutes governmental misconduct which violates the due process clause of the Florida Constitution.

Id. at 371.

The purpose of finding a due process violation is to deter illegal police conduct. Due process prohibits the government from obtaining convictions "brought about by methods that offend 'a sense of justice.'" Rochin v. California, 342 U.S. 165,173, 72 S. Ct. 205, 96 L. Ed. 2d 113 (1976). Where law enforcement's misconduct cannot be countenanced, "the courts will not permit the government to invoke the judicial process to obtain a conviction." Williams, supra at 372, State v. Glosson, 462 So. 2d 1082 (Fla. 1985).

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 Mr. Stafford 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 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 outrageous police misconduct.

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. Contrary to Williams, the district court has determined that no due process violation occurred from the police manufacture of crack cocaine and sale of that substance if the state only charges the defendant with solicitation to purchase cocaine (Metcalf) or if the state can only convince the jury that an attempt and not a completed sale occurred Tisby v. State, 614 So. 2d 586 (Fla. 4th DCA 1993), rev. pending case no. 81,676. Thus, the Fourth District approved the same illegal police conduct of manufacturing crack cocaine for use in a reverse-sting operation, as long as the defendant's conduct is not called purchase of cocaine.

If the Fourth District's conclusion is correct, then this Court might well have not decided State v. Williams at all. The Fourth District has established a very handy way for the state to completely avoid the finding of a due process violation in these circumstances - just call the defendant's conduct by some other name. Although in Metcalf and petitioner's case, the police engaged in the identical outrageous and illegal conduct as in Kelly

and Williams, the Fourth District approved prosecution in these circumstances, even though the police claim a completed sale took place. Under Metcalf no illegal conduct is deterred. The court allows the B.S.O. business as usual. The Metcalf and Stafford decisions are plainly wrong in light of Williams and cannot stand.

One basis the Fourth District found for this Metcalf exception to Kelly comes from State v. Hunter, 586 So. 2d 319 (Fla. 1991). In Metcalf, the Fourth District said:

> 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 427.

In Hunter, the Court discussed the objective entrapment standard and found that the police informant Diamond's activity toward one Conklin did not address specific ongoing criminal activity until Diamond created such activity to meet his substantial assistance quota. Therefore, Conklin established entrapment as a matter of law and was entitled to a judgment of acquittal. Conklin had obtained Hunter's help to acquire the drugs that Diamond purchased but this Court upheld Hunter's conviction:

> Conklin's benefitting from the entrapment defense, however, does not mean that Hunter should too. Although Diamond's acts amounted to entrapment of Conklin, the middleman, he had minimal telephone contacts with Hunter. When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense.

Id at 322.

Hunter is not analogous to Mr. Stafford's situation. Entrapment is not even at issue here. It is beyond dispute that the police directly sold Mr. Stafford a piece of illegally manufactured crack; that was the original charge which was only attempted to be changed when Kelly was decided by the Fourth district. Mr. Stafford had direct contact with the police officers who were selling the crack that they had illegally manufactured. Mr. Stafford's alleged 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. Here there was no intervening conduct at all to remove the taint of the misconduct: the government used the illegally manufactured crack to entice Mr. Stafford to do a drug deal and then charged Mr. Stafford with solicitation when their plan to procure a purchase conviction was thwarted by the due process violation. Here the deputies were directly involved in the identical conduct which Williams condemns. The Fourth District's decision in the present case cannot stand given this Court's holding in Williams that "the only appropriate remedy to deter this outrageous law enforcement conduct is to bar the defendant's prosecution." Id. at 373.

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' 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 this refiled felony prosecution, 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. The Fourth District's decision must be reversed and the trial court's order dismissing Mr. Stafford's charge affirmed.

A P P E N D I X

91-21435CF10

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

vs.

ROBERT STAFFORD

INFORMATION FOR

~~PURCHASE OF COCAINE~~
SOLICITATION TO
DELIVER COCAINE
WDM

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that ROBERT STAFFORD

on the 14th day of November, A.D. 19 91, in the County and State aforesaid, did unlawfully purchase a controlled substance, to-wit: Cocaine, contrary to F.S. 893.13(1)(a), and F.S. 893.03(2)(a),

JRC/jlg/12/4/91

6

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

STATE OF FLORIDA, Appellant, v. ROBERT M. STAFFORD, Appellee.	)	CASE NO. 93-0042. L.T. CASE NO. 91-21935 CF.

Opinion filed October 6, 1993

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

Appeal from the Circuit Court for Broward County; Howard M. Zeidwig, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Barbara J. Wolfe, Assistant Public Defender, West Palm Beach, for appellee.

PER CURIAM.

We reverse but certify the following question as one of great public importance:

> 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?

Reversed.

HERSEY, KLEIN, JJ., and OWEN, WILLIAM C., JR., Senior Judge, concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 22nd day of NOVEMBER, 1993.

Margaret Good

MARGARET GOOD
Assistant Public Defender