IN THE SUPREME COURT OF FLORIDA

ROBERT JOHNSON, Petitioner,	)	
vs.	)	CASE NO. 82,629
STATE OF FLORIDA, Respondent.	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

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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

In 1991 petitioner was charged with purchase of cocaine within 1000 feet of a school. He was convicted at a jury trial, sentenced to the mandatory minimum three years in prison but his conviction was reversed on appeal under Kelly v. State, 593 So. 2d 1060 (Fla. 4th 1992), because of the outrageous police conduct of selling petitioner crack that was manufactured by the Broward Sheriff's laboratory. Johnson v. State, 599 So. 2d 1057 (Fla. 4th DCA 1992) (R-3,15,18,20).

After remand by the district court, the State filed a new information charging petitioner with a different crime based on the same conduct, solicitation to another to deliver cocaine (R-24). Petitioner filed a Motion to Dismiss for Governmental Misconduct and Violation of Defendant's Double Jeopardy Rights (R-25-33), which the trial court granted at an October 15, 1992, hearing (R-34). The petitioner was then released from jail (R-34).

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. Johnson, 18 Fla. L. Weekly S2184 (Fla. 4th DCA Oct. 6, 1993) (Appendix - 1).

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 successfully prosecuted by the state for purchase of cocaine within 1000 feet of a school but that conviction was reversed on appeal as a violation of due process of law under Kelly v. State. On remand, the state refiled a separate charge of solicitation to purchase cocaine arising out of the identical act or transaction which had resulted in his prosecution for purchase of cocaine. The trial court was correct to dismiss the refiled case of solicitation because the Criminal Rules provide for dismissal of all related offenses after the defendant has previously been tried on a related offense. The rules prohibit successive prosecutions for a related offense that could have been prosecuted in the former information. Fla. R. Crim. P. 3.151(c).

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 within one thousand feet of a school 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 Johnson does not square with Williams and the district court must be reversed.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED THE REFILED INFORMATION BECAUSE THE STATE FAILED TO CHARGE THE RELATED OFFENSE OF SOLICITATION IN THE FIRST INFORMATION ON WHICH PETITIONER HAD PREVIOUSLY BEEN TRIED FOR PURCHASE OF THE SAME COCAINE ILLEGALLY MANUFACTURED BY THE SHERIFF.

Petitioner was tried and convicted for purchase of police manufactured crack cocaine and his conviction was reversed due to outrageous police conduct that violated the Florida Constitution. Johnson v. State, 599 So. 2d 1057 (Fla. 4th DCA 1992). The state then refiled a related charge of solicitation to another to deliver cocaine based on the same facts of the purchase transaction (R-3,6-7). On the defendant's motion, the trial court dismissed the refiled charge. At the hearing on the motion to dismiss, the state took the position that the district court had reversed for the equivalent of trial error, which returned the case to the position it was in before trial and the refiled solicitation charge was not a successive prosecution to the purchase charge, for which petitioner had been ordered discharged by the district court (R-16).

The trial court's decision to dismiss the solicitation charge was imminently correct based on the plain meaning of Fla. R. App. P. 3.151(c):

> (c) Dismissal or Related Offenses After Trial. When a defendant has been tried on a charge of 1 of 2 or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion unless a motion by the defendant for consolidation of the charges

> has been previously denied, or unless the defendant has waived the right to consolidation. Or unless the prosecution has been unable, by due diligence, to obtain sufficient evidence to warrant charging the other offense or offenses.

The state did not charge petitioner with the related offense of solicitation to another to deliver cocaine until after the Fourth District informed the state that its conviction of petitioner for the purchase of cocaine under the same set of facts was not sustainable under Kelly. Both offenses arose out of the identical transaction of the police offering to sell crack cocaine they manufactured (R-6-7). At the hearing the state confirmed that the solicitation charge arose from petitioner's interaction with the deputy before the illegally manufactured cocaine was offered to the petitioner (R-8). Thus, the solicitation and the purchase of the illegally manufactured cocaine are "related offenses" within the meaning of Rule 3.151(a). The state's failure to charge these related offenses in the initial information on which petitioner stood trial required dismissal of the subsequent refiled information for solicitation. Dixon v. State, 486 So. 2d 67 (Fla. 4th DCA 1986).

POINT II

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

Petitioner was charged with purchase of crack cocaine which had been manufactured by B.S.O., convicted, imprisoned and his conviction reversed on appeal. Johnson v. State, 599 So. 2d 1057

(Fla. 4th DCA 1992). On remand the state charged petitioner with solicitation and the trial court dismissed on authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992). 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. L. 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, which it sold to petitioner and having Mr. Johnson's conviction for purchase overturned on appeal now seeks "to invoke the judicial process to obtain [another] 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 defen-

dant 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 occurs from the police manufacture of crack cocaine and sale of that substance near a school 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 approves 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 Johnson 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 benefiting 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. Johnson's situation. Entrapment is not even at issue here. It is beyond dispute that the police directly sold Mr. Johnson a piece of illegally manufactured crack; that is the offense with which Mr. Johnson was originally convicted and for which he has been discharged. Mr. Johnson had

direct contact with the police officers who were selling the crack that they had illegally manufactured. Mr. Johnson'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. Johnson to do a drug deal and then charged Mr. Johnson with solicitation when their 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. Indeed, Mr. Johnson's case is even more outrageous than the typical reverse sting because the state has already been reprimanded by the first reversal in Johnson's case for their due process violation, but the state seeks to obstruct that judicial determination by obtaining a conviction for something in spite of their agents' outrageous misconduct. 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 Mr. Johnson's charge affirmed.

CONCLUSION

Based on the foregoing argument and authorities cited therein, petitioner respectfully requests this Court reverse the Fourth District's decision and affirm the order of the trial court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 19th day of NOVEMBER, 1993.

Margaret Good

MARGARET GOOD
Assistant Public Defender

A P P E N D I X

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

STATE OF FLORIDA,

Appellant,

v.

ROBERT JOHNSON,

Appellee.

CASE NO. 92-3180.

L.T. CASE NO. 92-16618CF.

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

Opinion filed October 6, 1993

Appeal from the Circuit Court for Broward County; Robert Zack for Richard D. Eade, Judges.

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 19th day of NOVEMBER, 1993.

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