IN THE SUPREME COURT OF FLORIDA

CASES No. 82,629

ROBERT JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, ROBERT JOHNSON, was the defendant in the trial court and the Appellee in the district court of appeal. He 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 to the extent that it is accurate, and non-argumentative. However, the state hereby submits the following additions, clarifications and modifications to point out areas of disagreements between Appellant and Appellee.

When the District Court of Appeal reversed Petitioner's conviction for purchase of cocaine on the authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied 599 So. 2d 1280 (Fla. 1992), the State charged Petitioner with Solicitation to Deliver Cocaine (R. 24). Petitioner filed a motion to dismiss alleging several grounds (R. 25-33). After listening to the arguments of counsel on the motion to dismiss (R. 3-20), the trial court specifically **denied** the motion on the double jeopardy and collateral estoppel grounds (R. 20), but **granted the motion to dismiss on due process grounds** (R. 20, 34). The reasoning of the court was that since the cocaine which Petitioner purchased from an undercover sheriff's deputy was "manufactured and packaged" by the Broward Sheriff's Office, and as the manufacture of cocaine rocks by law enforcement agencies was held to be unlawfult and to violate due process in Kelly, the police misconduct "tainted" the entire police operation (R. 12-14).

The State appealed the order of dismissal. Before the District Court, Petitioner **only** argued that this case is unlike Metcalf v. State, 18 Fla. L. Weekly D381 (Fla. 4th DCA Jan. 27, 1993), and totally controlled by Kelly, because "but for the

presence of the undercover police on the streets and the lure of their illegally manufactured cocaine, the criminal activity which is the subject matter of this appeal, would not have occurred." See Appellee's Answer Brief.

On October 6, 1993, the District Court of Appeal issued its opinion reversing the dismissal of the solicitation charges, finding that this case was controlled by Metcalf. See Appendix.

Pursuant to this Court's Order of October 29, 1993, Petitioner filed his brief on the merits November 19, 1993. The State's brief on the merits follows.

SUMMARY OF ARGUMENT

POINT I

This Court need not consider Petitioner's claim that the refiled information was properly dismissed on double jeopardy grounds. This argument was not presented to the trial court or to the District Court of Appeal.

Petitioner was originally charged with purchase of cocaine within 1000 feet of a school in violation of §893.13(1)(e), Fla. Stat. The refiled information charged Petitioner with Solicitation to Deliver Cocaine contrary to §777.04(2), Fla. Stat. The refiled information contained an element not contained in the initial charge. Thus, under the Blockburger test, and United States v. Dixon, the trial court was correct in denying the motion to dismiss on these grounds.

POINT II

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.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS. (Restated)

Petitioner was originally charged and convicted of Purchase of Cocaine within 1000 feet of a school. On the authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied 599 So. 2d 1280 (Fla. 1992), that conviction was reversed and remanded to the trial court by the Fourth District Court of Appeal. Johnson v. State, 599 So. 2d 1057 (Fla. 4th DCA 1992).

On remand, the State charged Petitioner with Solicitation to Deliver Cocaine. Petitioner filed a Motion to Dismiss for Governmental Misconduct and Violation of Defendant's Double Jeopardy Rights (R. 25-33). After listening to the arguments of counsel on the motion to dismiss (R. 3-20), the trial court specifically **denied** the motion on the double jeopardy and collateral estoppel grounds (R. 20), but **granted the motion to dismiss on due process grounds** (R. 20, 34). The reasoning of the court was that since the cocaine which Petitioner purchased from an undercover sheriff's deputy was "manufactured and packaged" .by the Broward Sheriff's Office, and as the manufacture of cocaine rocks by law enforcement agencies was held to be unlawfult and to violate due process in Kelly, the police misconduct "tainted" the entire police operation (R. 12-14).

On appeal to the Fourth District Court, Petitioner failed to make any argument regarding a double jeopardy bar. The Fourth District Court's opinion reversed the trial court's dismissal on

the authority of Metcalf. Thus, the State maintains that this Court need not consider Petitioner's claim that the the trial court properly dismissed the refiled information on double jeopardy grounds when the statement is in error. That was not the basis for the dismissal in the trial court. The trial court specifically rejected the double jeopardy argument, and dismissed due to the alleged government misconduct. Further, the argument was not made to the District Court, and was not discussed in the district court's opinion.

The double jeopardy argument presented to the trial court in the motion to dismiss was based on the Fifth Amendment to the United States Constitution and the United States Supreme Court decision in Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990). (R. 29-32). This argument was not made in the District Court of Appeal. The argument presented to this Court based on Rule 3.151(c) of the Florida Rules of Criminal Procedure was never presented to the trial court, or the District Court of Appeal. Therefore, this Court should not entertain same.

In any event, the State submits that Petitioner's argument that the refiled information is barred on double jeopardy grounds lacks merits. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const, Amdt 5. This protection applies both to successive punishments and to successive prosectuions for the **same criminal offense**. See North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

In both the multiple punishment and multiple prosecution contexts, the United States Supreme Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. See, e.g., Brown v. Ohio, 432 U.S. 161, 168-169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The same-elements test, also referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution. After overruling Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the United States Supreme Court reaffirmed the "Blockburger" test in United States v. Dixon, 509 U.S. ___, 113 S. Ct. ___, 125 L. Ed. 2d 556, 573 (1993).

Petitioner was originally charged with purchase of cocaine within 1000 feet of a school in violation of §893.13(1)(e), Fla. Stat. The refiled information charged Petitioner with Solicitation to Deliver Cocaine contrary to §777.04(2), Fla. Stat. The refiled information contained an element not contained in the initial charge. Thus, under the Blockburger test, and United States v. Dixon, the trial court was correct in denying the motion to dismiss on these grounds.

POINT II

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 had the officer 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 entitled to discharge, the fact that police misconduct has

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

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).

That the solicitation would not have occurred if the police had not manufactured the crack cocaine is erroneous. The acts of Petitioner were totally independent of any action of the police. Petitioner did not know he was soliciting from a police officer, or where the cocaine he sought to buy came from. 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.

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,

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Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by courier to: MARGARET GOOD, Assistant Public Defender, Criminal Justice Building, 421 3rd Street/6th Floor, West Palm Beach, Florida 33401, this 9th day of December, 1993.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,629

ROBERT JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

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APPENDIX TO

RESPONDENT'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1993 92-111956

(3)

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 to Respondent's Brief on the Merits" has been furnished by courier to: MARGARET GOOD, Assistant Public Defender, Counsel for Petitioner, 6th Floor/Criminal Justice Bldg., 421 Third Street, West Palm Beach, FL 33401 this 9th day of December, 1993.

Georgina Jorge Rosa
Of Counsel