IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,909

THE STATE OF FLORIDA,

Petitioner,

vs.

DARREL JENNINGS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The respondent, Darrel Jennings, was the defendant in the trial court and the appellee in the district court of appeal. The petitioner, the State of Florida, was the prosecution in the trial court and the appellant in the district court of appeal. This brief refers to the parties as the "defendant" and the "state." The symbols "T." and "R." denote, respectively, the transcript of the proceedings in the trial court and the remainder of the record on appeal.

STATEMENT OF THE CASE AND FACTS

The respondent adds the following to the petitioner's statement of the case and facts:

The initial observation of the alleged marijuana cigarette was made with the aid of binoculars. The officers were in an unmarked car, watching a park, when they saw the defendant enter a car as a passenger, and ride towards a 7-11 store. The defendant appeared to be holding a marijuana cigarette. The defendant got out of the car and stood in front of the 7-11, studying his palm. One of the officers approached. As he neared the defendant, the officer saw what appeared to be loose cocaine rocks in the defendant's palm. The officer shouted "police" and the defendant tossed the suspect rocks into his mouth and swallowed. (R. 17-18).

QUESTION PRESENTED

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE DEFENDANT DID NOT TAMPER WITH EVIDENCE, AND ITS DECISION IS NOT IN CONFLICT WITH *HAYES v. STATE*, 634 So. 2d 1153 (Fla. 4th DCA 1994), OR OTHER DECISIONS OF THE DISTRICT COURTS OF APPEAL OR THIS COURT, BECAUSE AT THE TIME THE DEFENDANT SWALLOWED THE ALLEGED COCAINE ROCKS HE WAS NEITHER UNDER ARREST NOR DID HE KNOW THAT A LAW ENFORCEMENT OFFICER WAS ABOUT TO INSTIGATE AN INVESTIGATION. (Restated).

SUMMARY OF ARGUMENT

Tampering with physical evidence is a crime that requires knowledge and specific intent. It is not enough to show that the defendant destroyed something that an officer believed to be evidence. There must be proof that the defendant knew that a proceeding or investigation was pending or about to be instituted, and that the thing was destroyed with the specific intent to "impair its verity or availability in such proceeding or investigation." § 918.13(1)(a), Fla. Stat. (1993);

In the present case, the evidence did not establish the requisite knowledge of a pending investigation or the specific intent to make evidence unavailable in that investigation. The defendant was not under arrest at the time he swallowed the alleged cocaine rocks. Nor was he told that he was suspected of possessing drugs. Shouting "police" could not, without more, put the defendant on notice that he was under arrest, or under investigation for the possession of drugs, and therefore could not establish that he swallowed the alleged cocaine rocks with the specific intent to make them unavailable in such investigation, as required by the statute.

The fact that the defendant was not told that he was under arrest or investigation for possession of drugs distinguishes this case from *McKenzie v. State*, 632 So. 2d 276 (Fla. 4th DCA 1994), *Hayes v. State*, 634 So. 2d 1153 (Fla. 4th DCA 1994), and *McKinney v. State*, 640 So. 2d 1183 (Fla. 2d DCA 1994). In those cases, unlike here, the defendant had either been told that he was under arrest for possession of cocaine, or he was fleeing from officers who were attempting to arrest him for the possession of cocaine. Since in *McKenzie*, *Hayes*, and *McKinney*, the defendants knew that the officers were arresting them for possession of cocaine, it could be inferred that the destruction or attempted destruction of the cocaine was done with the specific intent of making it unavailable at trial. Here, the evidence permits no such inference because the defendant was

neither under arrest nor told that he was the subject of an investigation for possession of drugs. As the Third District correctly held, this evidence did not establish the crime of tampering with evidence. There is no conflict between this case and any decision of the district courts of appeal or of this Court.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE DEFENDANT DID NOT TAMPER WITH EVIDENCE, AND ITS DECISION IS NOT IN CONFLICT WITH *HAYES v. STATE*, 634 So. 2d 1153 (Fla. 4th DCA 1994), OR OTHER DECISIONS OF THE DISTRICT COURTS OF APPEAL OR THIS COURT, BECAUSE AT THE TIME THE DEFENDANT SWALLOWED THE ALLEGED COCAINE ROCKS HE WAS NEITHER UNDER ARREST NOR DID HE KNOW THAT A LAW ENFORCEMENT OFFICER WAS ABOUT TO INSTIGATE AN INVESTIGATION. (Restated).

Tampering with physical evidence is a crime that requires knowledge and specific intent. *State v. News-Press Publishing Co.*, 338 So. 2d 1313, 1318-19 (Fla. 2d DCA 1976); *Rader v. State*, 420 So. 2d 110, 111 (Fla. 4th DCA 1982); *McNeil v. State*, 438 So. 2d 960, 962 (Fla. 1st DCA 1983). Section 918.13(1)(a), Florida Statutes (1993), which defines this third-degree felony, provides:

> (1) No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:
>
> (a) Alter, destroy, conceal or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation;

To obtain a conviction under this statute it is not enough to show that the defendant destroyed something that an officer believed to be evidence. There must be proof that the defendant (1) knew that a proceeding or investigation was pending or about to be instituted, and (2) that the thing was destroyed with the specific intent to "impair its verity or availability in such proceeding or investigation." § 918.13(1)(a), Fla. Stat. (1993); *see News-Press Publishing Co.*, 338 So. 2d at 1318-19; *McNeil*, 438 So. 2d at 962.

In the present case, the defendant was observed holding what law enforcement officers believed was a marijuana cigarette. As one of the officers

approached the defendant, the officer also saw what appeared to be loose cocaine rocks in the defendant's palm. When the officer shouted "police," the defendant put the alleged cocaine rocks into his mouth and swallowed. The defendant was then arrested but the objects he swallowed were never recovered. (R. 17-18).

This evidence was insufficient to sustain a conviction for tampering with evidence because it did not establish the requisite knowledge of a pending investigation or the specific intent to make evidence unavailable in that investigation. The defendant was not under arrest at the time he swallowed the alleged cocaine rocks. Nor was he told that he was suspected of possessing drugs. The initial surveillance took place at a distance, with the aid of binoculars, and there was no evidence that the defendant knew of the police presence until the officer shouted "police." Shouting "police" could not, without more, put the defendant on notice that he was under arrest, or under investigation. It certainly did not tell him that he was under investigation for the possession of drugs and therefore could not establish that he swallowed the suspect cocaine rocks with the specific intent to make them unavailable in "such" investigation.

The defendant was not under arrest at the time he swallowed the alleged cocaine rocks because, as the Third District noted, the officers had not even reached him at that time, *State v. Jennings*, 19 Fla. L. Weekly D2600, 2600 (Fla. 3d DCA Dec. 14, 1994), and because even if the officers' intended to arrest him, the shout of "police," was insufficient to communicate that intent to the defendant, *see Melton v. State*, 75 So. 2d 291, 294 (Fla. 1954) (elements of an an arrest include an intent to arrest, a seizure of the person to be arrested, "[a] communication by the arresting officer to the person whose arrest is sought of an intention or purpose then and there to effect an arrest," and "[a]n understanding by the person whose arrest is sought that it is the intention of the arresting officer then

and there to arrest and detain him"); *State v. Williams*, 462 So. 2d 69, 72 (Fla. 1st DCA) (although officers blocked-in defendant's vehicle and ordered him to open safe found in trunk, defendant was neither effectively nor actually under arrest at the time of the search because there was no evidence that the officers intended to arrest defendant, or had communicated such an intent to defendant, or that defendant understood that to be their intention), *review denied*, 476 So. 2d 676 (Fla. 1985).

Indeed a shout of "police" cannot establish, beyond a reasonable doubt, that the defendant knew he was the subject of an investigatory stop. Such an announcement might be interpreted as a command to stop, but it could also support a contrary view. *See Hollinger v. State*, 620 So. 2d 1242, 1243 (Fla. 1993). Accordingly, it was insufficient to establish the essential element of knowledge that an investigation was about to be instituted. *See State v. Law*, 559 So. 2d 187, 188-89 (Fla. 1989) ("Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."); *McArthur v. State*, 351 So. 2d 972 (Fla. 1977) (applying circumstantial evidence standard to proof of intent).[1]

Moreover, even if, *arguendo*, the shout of "police" could be deemed sufficient evidence of the defendant's knowledge that he had been stopped, it did not tell the defendant that he was under investigation for the possession of drugs and therefore could not establish that he swallowed the suspect cocaine rocks with the specific intent to make them unavailable in "such" investigation, as required by

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[1] *See also Ellis v. State*, 346 So. 2d 1044, 1047 (Fla. 1st DCA 1977) (where the material facts are undisputed, the trial court in considering a motion to dismiss must determine whether the undisputed facts raise a jury question, in much the same manner as a judge evaluates a motion for judgment of acquital made at trial).

the statute, *see* §918.13(1)(a), Fla. Stat. (1993).

Contrary to the state's argument (Brief of Petitioner at 11), it is not enough that the defendant be on notice that he is about to be stopped and questioned. The statute requires a specific intent to render evidence unavailable in a particular investigation which is either pending or about to be instituted. The defendant cannot have that specific intent unless he knows what sort of thing might constitute evidence in that investigation, and he cannot know that unless he knows what sort of criminal activity the police are investigating. This follows from the plain language of the statute: The thing must be destroyed with the purpose to impair its verity or availability in "such proceeding or investigation," i.e., the proceeding or investigation of whose pendency the defendant is aware. § 918.13(1)(a), Fla. Stat. (1993). If there is any ambiguity, it must be resolved in favor of the defendant. § 775.021(1), Fla. Stat. (1993); *Boice v. State*, 560 So. 2d 1383, 1384 (Fla. 2d DCA 1990).

Since the defendant was not told that he was under arrest, it cannot be assumed that he believed he was about to be subjected to a generalized search for drugs or for whatever other evidence of criminal activity he might have on his person, *see United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (police may search the person incident to arrest to disarm and to discover evidence), or that the articles in his possession had come into the custody of the police, *cf. Brown v. State*, 575 So. 2d 1360 (Fla. 3d DCA 1991) (picking up and attempting to conceal cocaine rock which police officer had taken from a codefendant and which was in the custody of the officer constituted tampering because "[o]nce the officer had taken the evidence into his custody, the defendant was not entitled to remove it"); *Gilbert v. State*, 19 Fla. L. Weekly D1138 (Fla. 2d DCA May 18, 1994) (removing and throwing away bag of marijuana which the police had seized during a consensual search of the vehicle driven by defendant

constituted tampering with evidence because the contraband was in the physical custody of the police).

The mere act of stopping someone does not inform the person stopped of the nature of the police investigation. An investigatory stop, unlike an arrest, does not entitle the officers to search for anything except, in some circumstances, weapons. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).. A shout of "police" gives no clue as to what sort of activity the police are investigating, or what sort of evidence they are after, and therefore cannot, without more, establish the knowledge and specific intent required under the statute.

The fact that the defendant was not told that he was under arrest or investigation for possession of drugs distinguishes this case from *McKenzie v. State*, 632 So. 2d 276 (Fla. 4th DCA 1994), *Hayes v. State*, 634 So. 2d 1153 (Fla. 4th DCA 1994), and *McKinney v. State*, 640 So. 2d 1183 (Fla. 2d DCA 1994), where convictions for tampering or attempted tampering were upheld based on the defendant's act of getting rid of suspect cocaine. Unlike in this case, in those cases the defendant had either been told that he was under arrest for possession of cocaine, or he was fleeing from officers who were attempting to arrest him for the possession of cocaine. In *McKenzie*, the defendant swallowed the suspect cocaine after an officer "identified himself and told defendant he was under arrest for possession of cocaine." *McKenzie* at 276. In *Hayes*, the defendant dropped a baggie containing crack cocaine into a drainage outlet, "while being pursued by a police officer attempting to arrest him ...." *Hayes* at 1154. In *McKinney*, the defendant fled after selling cocaine to an undercover officer and attempted to eat a bag of cocaine during a struggle with the arresting officers. *McKinney* at 1183-84.

Since in *McKenzie*, *Hayes*, and *McKinney*, the defendants knew that the officers were arresting them for possession of cocaine, it could be inferred that the

destruction or attempted destruction of the cocaine was done with the specific intent of making it unavailable at trial. Here, the evidence permits no such inference because the defendant was neither under arrest nor told that he was the subject of an investigation for possession of drugs. As the Third District correctly held, this evidence did not establish the crime of tampering with evidence. *State v. Jennings*, 19 Fla. L. Weekly D2600, 2600 (Fla. 3d DCA Dec. 14, 1994). There is no conflict between this case and *Hayes*, *McKenzie*, or *McKinney*.

CONCLUSION

Based on the foregoing argument and authorities, the respondent requests this Court to deny review because there is no conflict, or, in the alternative, to affirm the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, CONSUELO MAINGOT, 401 N.W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 10th day of March, 1995.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

A P P E N D I X

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 94-617
DARREL JENNINGS,	**	
Appellee.	**	

Opinion filed December 14, 1994.

An Appeal from the Circuit Court for Dade County, W. Thomas Spencer, Judge.

Robert A. Butterworth, Attorney General, and Lucrecia R. Diaz, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellee.

Before BASKIN, JORGENSON, and GERSTEN, JJ.

PER CURIAM.

The State appeals the dismissal of a charge of tampering with physical evidence in violation of section 918.13, Florida Statutes

defendant was not under arrest because the officer had not even reached the defendant before he put the alleged cocaine rocks in his mouth. Jones v. State, 590 So. 2d 982 (Fla. 1st DCA 1991); Thomas v. State, 581 So. 2d 993 (Fla. 2d DCA 1991); see also, Brown v. State, 575 So. 2d 1360 (Fla. 3d DCA 1991) ("Once the officer had taken the evidence into his custody, the defendant was not entitled to remove it."). Additionally, shouting "police," without more, was insufficient to put the defendant on notice that an investigation was about to be instigated. Cf. Hayes v. State, 634 So. 2d 1153 (Fla. 4th DCA)(defendant convicted of tampering with evidence when he dropped baggie containing crack cocaine in a drainage outlet while being pursued by police), rev. denied, No. 83,942 (Fla. Aug. 30, 1994). To the extent our decision conflicts with Hayes, we certify conflict to the Florida Supreme Court.

The time of arrest distinguishes this case from two others where our sister courts have determined that defendants who attempted to swallow alleged cocaine rocks after their arrest had committed the crime of tampering with evidence. McKenzie v. State, 632 So. 2d 276, 277 (Fla. 4th DCA 1994); McKinney v. State, 640 So. 2d 1183 (Fla. 2d DCA 1994).

We affirm the dismissal of the tampering with evidence charge but certify any conflict with Hayes to the Florida Supreme Court.

AFFIRMED.