IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,390

THOMAS V. CAPALDO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON MERITS

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TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fifth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

References to the Appendix attached to this brief will be by use of the symbol "A."

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

Statement of Case and Facts

Respondent does accept Petitioner's statement of the case, for purposes of this appeal. However, Respondent cannot accept the statement of facts provided by Petitioner, as, it is slanted and argumentative, and consists primarily of Petitioner's own defense which was wholly rejected by the jury as well as the Fifth District Court of Appeal. Respondent will rely on the facts recited by the Fifth District Court in its opinion, Exhibit A, supplemented as follows:

At the trial which resulted in Petitioner's conviction, Detective Bisland testified that when he was talking to Gus Osta, about tax numbers, Petitioner, who he never met, injected himself into the conversation with the statement "the less you tell them, the less you have to pay." (V10 26). Subsequently, Osta introduced Petitioner and said he was a good guy (V10 22).

Bisland informed Osta that he had electronics for sale that had been hijacked from a truck. Osta responded that serial numbers were tough and they should talk to Petitioner about it (V10 28). Osta asked Petitioner if he was available for a deal the next day (V10 29).

According to Bisland, Bisland and Osta conversed about a possible deal:

> [Osta] told me what we were going to do was I would sell property to Tom. Tom had a tax number. And Tom could turn around -- would turn around and sell it to Mr. Osta, the owner of the pawn shop, which would legitimize the merchandise when he was the ultimate recipient of it. He told me Tom was a good guy, he had a lot of cash. I told him that I was a bit nervous doing business with him because I did not know him.

(V10 31).

The Capaldos arrived to view the electronics without Osta. Bisland showed them 15 TV's, 20 VCR's, and 10 microwaves, worth $20,000 (V10 33). The detective said his only advise to them was not to move it in Miami, and what they did with the serial numbers was their business (V10 36). Petitioner responded "yeah, you like to know where you're dealing from." (V10 38).

Bisland did not come out and say the word "stolen" because he felt that it would have revealed his identity as a police officer (V10 36). Petitioner wanted to buy the equipment for $6800 but Bisland told him it was not available (V10 37).

Petitioner stated that he was interested in "anything he could make a buck on. He liked electronics because they were impulse items and he could market and sell them, turn them over quick." (V10 38). Mrs. Capaldo told Bisland that when he got a load in, he

should contact them through Osta (V10 38).

Later Osta asked Bisland why he did not sell the electronics to Petitioner (V10 39).

The original meeting was followed by a series of meetings and phone calls, mostly initiated by the Capaldos, wherein the Capaldos asked if Bisland had any electronics for them yet (V10 45-52). Bisland testified that if Petitioner had ever said he was not interested, he would not have called him anymore (V10 130).

On the morning of the arrest, Bisland called Petitioner in the morning and said he had electronics for him. Petitioner asked the detective for a list. Bisland called Petitioner back and read a list of the items that Petitioner had previously viewed and offered to buy, with the addition of 15 camcorders (V10 52-53). Bisland informed Petitioner that the electronics were valued at $30,000 and would cost $9,800 (V10 52-54).

Capaldo stated that he would buy the electronics:

> I (Bisland) asked him after we talked about the price if he was interested, if so, how much, because I had somebody else if he wasn't interested in all of it. And he said he wanted all of it.

(V10 54).

When Bisland arrived at the park, he observed Petitioner, a

U-Haul truck, and Mrs. Capaldo driving back and forth, and eventually parking her truck (V10 57-58). Petitioner possessed $9,000 in cash, in his glove box (V10 59).

SUMMARY OF THE ARGUMENT

Petitioner was properly convicted of trafficking, because he attempted to buy stolen property with the intent of reselling it. The fact that Petitioner could not have actually completed the transaction, because there was no stolen property available for purchase, is irrelevant to Petitioner's guilt.

It is well established that the non-existence of the instrumentality of a crime is not a defense when a defendant is charged with attempt.

The evidence against Petitioner was overwhelming regardless of whether Gus Osta's statements were properly admitted. However, the opinion on review incorrectly states that statements made during a conspiracy to commit one crime cannot be admitted in a prosecution for a different crime. Once the Fifth District Court of Appeal concluded that Osta and Capaldo were involved in a conspiracy when Osta made the statements, the court should have also concluded that those statements were properly admitted under Section 90.803(18)(e).

ARGUMENT

IT IS NOT NECESSARY TO PROVE THE EXISTENCE OF STOLEN PROPERTY IN ORDER TO CONVICT UNDER SECTION 812.019(1), FLORIDA STATUTES (1993).

The certified question

Section 812.019(1), Florida Statutes (1993) provides:

> Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony of the second degree...

This Court has repeatedly defined "endeavor" as "an overt act manifesting criminal intent." In other words, an attempt. State v. Tomas, 370 So. 2d 1142,1143 (Fla. 1979); State v. Allen, 362 So. 2d 10,12 (Fla. 1978). See also Dixon v. State, 559 So. 2d 354, 356 (Fla. 1st DCA 1990); M.L.K. v. State, 454 So. 2d 753 (Fla. 1st DCA 1984).

Section 812.012(7)(b)(5) defines "traffic" as

> To buy, receive, possess obtain control of, or use property with the intent to sell, transfer, distribute, dispense or otherwise dispose of such property.

Section 812.028, Florida Statutes (1993), states that the following are not defenses to the crime of trafficking:

> (1) Any stratagem or deception, including the use of an undercover operative or law

enforcement officer, was employed.

(2) A facility or an opportunity to engage in conduct in violation of any provision of this act was provided.

(3) Property that was not stolen was offered for sale as stolen property.

(4) A law enforcement officer solicited a person predisposed to engage in conduct in violation of any provision of ss. 812.012-812.037 in order to gain evidence against that person, provided such solicitation would not induce as ordinary law-abiding person to violate any provision of ss. 812.012-812.037.

Based on the authority cited above, Petitioner was properly convicted of trafficking, because he attempted to buy stolen property with the intent of reselling it. The fact that Petitioner could not have actually completed the transaction, because there was no stolen property available for purchase, is irrelevant to Petitioner's guilt.

In State v. Rios, 409 So. 2d 241 (Fla. 3d DCA 1982), review denied, 419 So. 2d 1199 (1982), the court concluded that the crime of "endeavoring to traffic in stolen property," does not require that there actually be "property that has been the subject of criminally wrongful taking." Rather, the court concluded that even though the person who does not accomplish his goals is not actually trafficking in stolen property, "he is certainly endeavoring to do

so with requisite criminal intent." Id at 243. The Rios court reasoned:

> The defense of legal impossibility has never been adopted in Florida in any criminal attempt prosecution and is generally discredited by the overwhelming weight of authority in other jurisdictions. The more appropriate inquiry in criminal attempt prosecutions should focus, we think, on the defendant's intent to commit a crime and any overt act done to effectuate this intent. A person [then] is guilty [in our view] of an attempt to commit a crime if, acting with a kind of culpability otherwise required for the commission of the crime, he purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be. ALI, Model penal Code § 5.01(a)(proposed official draft, May 4, 1962).

409 So. 2d 244. The Rios court concluded:

> [T]he result reached seems both sensible and fair as without a doubt a person who with requisite criminal intent traffics in property represented to him as stolen, although not in fact stolen, is engaging in criminal-type conduct, in no sense innocent in nature, which society should have a right to punish under its criminal law.

Id. See also State v. Williams, 442 So. 2d 240 (Fla. 5th DCA 1983); Dixon v. State, 559 So. 2d 354 (Fla. 1st DCA 1990); Padgett v. State, 378 So. 2d 118 (Fla. 1st DCA 1980); State v. Skinner, 397 So. 2d 389 (Fla. 1st DCA 1981);

Likewise, the fact that no merchandise (stolen or otherwise)

existed at all is not a defense to this crime. Whether the undercover agent actually had a truck somewhere containing merchandise is irrelevant, because, Petitioner was guilty of the crime as soon as he arrived at the assigned site with money and a truck, after agreeing to purchase the merchandise.

It is well established that the non-existence of the instrumentality of a crime is not a defense when a defendant is charged with attempt. For example, in U.S. v. Parramore, 720 F.Supp 799 (N.D. Cal. 1989), the court concluded that a defendant who was charged with attempted money laundering, was not entitled to an impossibility defense merely because the government agents who were posing as cocaine traffickers did not actually have the money which the defendant had attempted to launder. The court reasoned:

> It adds nothing to the proof of defendant's intent to require the government to deposit in some bank somewhere actual currency seized in the course of a drug raid. The defendant's "knowledge" and the jury's perception of it would remain unchanged. Those who innocently conduct financial transactions without the requisite knowledge are protected by the reasonable-doubt standard for proof of their intent, not by the fact that the money was real.

Id. at 801. Likewise it would have added nothing to the State's proof in the instant case to show that there was a truck somewhere

containing merchandise. See also U.S. v. Contreras, 950 F.2d 232 (5th Cir. 1991); State v. Mitchell, 170 Mo. 633, 72 S.W. 175 (1902).

In the opinion below, the Fifth District Court of Appeal recognized the weight of authority supporting its decision to affirm the case. However, the court expressed the following concern:

> The wording of the [section 812.019] indicates that the legislature intended to address the evil of dealing in "stolen property." In requiring that the offender "knows or should know [the property] was stolen,' the legislature appears to be criminalizing only the act of dealing in property that was actually stolen, not the intention to do so. Had the legislature intended otherwise, the statute would not require that the individual "know" that the property was stolen, but instead would prohibit dealing in property that the individual merely "believed" or "suspected" was stolen or that he reasonably should have believed or suspected was stolen. "To know" is a different concept from "to believe' or "to suspect." One addresses the evil of commercializing stolen property; the other addresses the evil intent itself.

(A 3).

In determining that the statute was only intended to deal with crimes involving actual stolen property the court apparently overlooked section 812.028(3) where the legislature clearly conveyed its intent to address the acts and intentions of the

offenders, regardless of whether stolen property is actually involved. Moreover, In distinguishing the term "should know" from the term "believe," the court overlooked clear language contained in this Court's decision in State v. Tomas, 370 So. 2d 1142 (Fla. 1979). In Tomas this Court stated that the term "should know" is "essentially synonymous" with the more lengthy phrase, "'under such circumstances as would induce a reasonable man to **believe** that the property was stolen.'" 370 So. 2d at 1153 (emphasis added). Thus, this Court has already concluded that the requirement that a defendant "should know" that property is stolen, includes the possibility that a defendant may merely "believe" that the property is stolen.

In Conclusion, the fact that the undercover investigator did not actually have a truck somewhere containing merchandise available for sale is irrelevant to Petitioner's guilt.

The sufficiency of the evidence and admission of hearsay.

In his brief, Petitioner argues that there was insufficient evidence of his guilt, absent the hearsay statements of Gus Osta, which the Fifth District Court of Appeal determined to have been admitted in error. Respondent disagrees.

The Fifth District Court of Appeal correctly concluded that

even without the statements by Osta the evidence of Petitioner's guilt was overwhelming. As the prosecutor argued at trial, "[Osta's] testimony is just gravy. Because the important testimony came from Agent Bisland as to what took place and as to what the defendant was told and what he knew about the electronics. So the case doesn't fall on Osta's testimony." (V12 427).

However, Respondent submits that the Fifth District Court of Appeal was incorrect when it determined that Osta's statements should not have been admitted. The court concluded that the statements were not admissible because they were made to further a conspiracy which had ended prior to the instant offense. However, even if the statements were not made to further the charged crime, they should still have been admitted, because at the time the statements were made, Osta was trying to further his conspiracy with Petitioner.

Section 90.803, Florida Statutes (1993), provides exceptions to the hearsay rule. Statements that qualify under this section are admissible because they have indicia of reliability. Subsection (18)(e), creates an exception for a statement that is offered against a party when it is:

> A statement made by a person who was a coconspirator of the party during the course and in furtherance of the conspiracy.

The reason for this exception is that parties who are involved in a conspiracy together can be presumed to be speaking on each other's behalf. Thus, the fact that the conspiracy that they are involved in is not a charged crime is irrelevant to the issue of whether one conspirator's statement can be attributed to the other.

In Boyd v. State, 389 So. 2d 642, 648 (Fla. 2d DCA 1980), the court concluded that hearsay statements of an alleged coconspirator may be offered in a case in which the crime of conspiracy is charged; in a case in which a substantive offense is charged on a theory of vicarious liability; or, theoretically, "**in any other criminal case.**" In Robinson v. State, 610 So. 2d 1288, 1289 (Fla. 1992), this Court adopted the language of Boyd, when it concluded that conspiracy is "'an express or implied agreement of two or more persons to accomplish, by concerted action, some criminal or unlawful act.'" See also Tresvant v. State, 396 So. 2d 733 (Fla. 3d DCA 1981).

The appellate court mistakenly relied on Usher v. State, 642 So. 2d 29 (Fla. 2d DCA 1994), for the proposition that "section 90.803(18)(3), Florida Statutes (1993), does not permit statements made during a conspiracy to commit one crime to be admitted in prosecution for an entirely different offense not involving the

conspiracy." (A 2). In Usher, the court concluded that hearsay statements were not properly admitted because *inter alia* any conspiracy had ended before the statement was made. Thus, since the Usher statements were not made in furtherance of any conspiracy, the alleged coconspirator's statements could not be attributed to the defendant. In contrast, in the instant case, the statements were made in the course of a conspiracy, and, therefore, were attributable to Petitioner.

In Conclusion, the evidence against Petitioner was overwhelming regardless of whether Gus Osta's statements were properly admitted. However, the opinion on review incorrectly states that statements made during a conspiracy to commit one crime cannot be admitted in a prosecution for a different crime. Once the Fifth District Court of Appeal concluded that Osta and Capaldo were involved in a conspiracy when Osta made the statements, the court should have also concluded that those statements were properly admitted under Section 90.803(18)(e).

CONCLUSION

WHEREFORE, based on the above and foregoing reasons and authorities cited therein, Respondent respectfully requests that this Court answer the certified question in the negative, and, affirm Petitioner's conviction.

Respectfully submitted,

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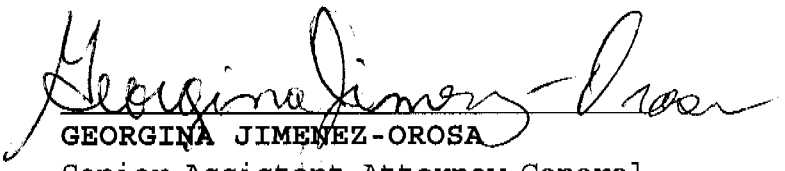

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Brief of Respondent on Merits" has been furnished by mail to: John W. Tanner, Esquire, 630 North Wild Olive Avenue, Daytona Beach, Florida 32118, this 16th day of February, 1996.

Michele Kenny

Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,390

THOMAS V. CAPALDO,

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APPENDIX TO RESPONDENT'S BRIEF ON MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

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

THOMAS V. CAPALDO,

Appellant,

v.

CASE NO. 93-2022

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed April 28, 1995

Appeal from the Circuit Court
for Volusia County,
Uriel Blount, Jr., Senior Judge.

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HARRIS, C. J.

The state was conducting an investigation concerning suspected dealing in stolen property by Ghazi Osta, Jose Zaetar and Stephen Morris when Thomas V. Capaldo wandered onto the scene. Capaldo happened into Osta's pawn shop while an undercover officer was attempting to set up a sting operation. Osta introduced Capaldo to the undercover officer and later described him as being "cool." The next day, the officer

showed Capaldo electronics merchandise that, although not available to Capaldo because it had already been "sold," was a sample of the type of merchandise that the officer represented might be available to him later. Capaldo stated that he would like to buy similar electronics in the future and that he could be contacted "through Osta."

Subsequently and through Osta, the undercover officer sold a shipment of cigarettes to Capaldo at a price which suggested that the cigarettes were stolen. After that transaction, Capaldo and the officer agreed that Osta would no longer be a part of their dealings. Shortly thereafter, the officer called Capaldo and advised him that electronic merchandise similar to that which he had been shown was again available. In fact, no such merchandise existed. When Capaldo showed up to purchase the imaginary merchanidse, he was arrested for violation of section 812.019(1) -- Dealing in Stolen Property. He appeals his conviction of that charge; we affirm.

Capaldo raises two points that warrant discussion. First, he contends that the court improperly admitted hearsay statements made by Osta on the basis of the coconspirator exception to the hearsay exclusion. Although the evidence supports the finding that a conspiracy to deal in stolen property did exist for a period of time and that the statements in question were made during that conspiracy, it is clear that the conspiracy between Osta and Capaldo had ended prior to the offense charged in this information.

We agree with Capaldo that section 90.803 (18)(3), Florida Statutes (1993), does not permit statements made during a conspiracy to commit one crime to be admitted in a prosecution for an entirely different offense not involving the conspiracy. *See Usher v. State*, 642 So. 2d 29 (Fla. 2d DCA 1994). We find, however, that the error was harmless

under the facts of this case. The purpose of these statements was to show that Capaldo believed that the merchandise was stolen. We find that even without the admission of the hearsay statements, the evidence of Capaldo's intent to purchase stolen property was overwhelming. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

The more basic issue requiring discussion, however, is whether an individual can be convicted under a statute that prohibits him from trafficking in, or endeavoring to traffic in, "property that he knows or should know was stolen" when, in fact, the allegedly stolen property did not exist.

In this case, the state set up a sting operation to ensnare Capaldo, who apparently had a propensity to deal in stolen property. But the undercover officer used nonexistent goods as bait. The issue before us, then, is whether it is a crime under section 812.019, Florida Statutes (1993), merely to be willing, even anxious, to deal in stolen property. The wording of the statute indicates that the legislature intended to address the evil of dealing in "stolen property." In requiring that the offender "knows or should know [the property] was stolen," the legislature appears to be criminalizing only the act of dealing in property that was actually stolen, not the intention to do so. Had the legislature intended otherwise, the statute would not require that the individual "know" that the property was stolen, but instead would prohibit dealing in property that the individual merely "believed" or "suspected" was stolen or that he reasonably should have believed or suspected was stolen. "To know" is a different concept from "to believe" or "to suspect." One concept addresses the evil of commercializing stolen property; the other addresses the evil intent itself.

Even so, this panel is bound by this court's previous decision of *Lamar v. Keesee*, 512 So. 2d 1066 (Fla. 5th DCA 1987), in which we held:

> In *State v. Williams*, 442 So.2d 240 (Fla. 5th DCA 1983), this court stated that it was in agreement with *State v. Rios*, 409 So.2d 241 (Fla. 3d DCA), *rev. denied*, 419 So.2d 1199 (1982), which held that the crime of endeavoring to traffic in stolen property does not require that the property be stolen, but is complete upon proof that the defendant committed "an overt act manifesting criminal intent directed toward committing the substantive crime of trafficking." This court stated that there was "no reason to require the proof that the property was stolen in a solicitation to traffic case as opposed to an endeavoring to traffic case." 442 So.2d at 242. *See also State v. Skinner*, 397 So.2d 389 (Fla. 1st DCA 1981) and *Padgett v. State*, 378 So.2d 118 (Fla. 1st DCA 1980) (both cases holding that a person could be convicted of endeavoring to traffic in stolen goods even though it was established that the goods were not stolen).

Id. at 1067.

From the above quote, it is apparent that we are not the only appellate court that has held that there need be no stolen property involved for a conviction under section 812.019(1). It is also apparent, however, that in reaching this conclusion, the courts distinguish between trafficking in stolen property and endeavoring to traffic in stolen property as though these are two separate offenses under the same statute. We seem to agree that, although one cannot deal in stolen property unless the property is in fact stolen, if one "endeavors" to do so, then it is irrelevant that there is no property or, if there is property, it is not stolen. This proposition prompted Judge Cowart to write in his dissent in *Lamar*:

> [T]he average layman is probably hard pressed to understand how one can be convicted of dealing in stolen property if the property is not stolen and why, if the person does not commit a completed crime because the property was not stolen, he can be convicted of trying ("attempting" or "endeavoring") to do something that is legally and physically impossible for him to do.

Lamar, 512 So. 2d at 1068

As Judge Cowart recognized, our holding in *Lamar* was based on a distinction between trafficking and endeavoring to traffic, which distinction may be inconsistent with holdings of our supreme court. In *State v. Sykes*, 434 So. 2d 235, 237 (Fla. 1983), the court held in a case involving theft:

> By including the words, "or endeavor to obtain or use," the statutory language reveals on its face a legislative intent to define theft as including the attempt to commit theft. (Citation omitted). That is, the substantive offenses defined in the theft statute are defined so that one who attempts to commit [them] is deemed to have committed the completed crime. The substantive, completed crime is fully proved when an attempt, along with the requisite intent, is established.

This identical language was used in section 812.019(1). It appears, therefore, that there is but one crime established by the statute and that crime is "dealing in stolen property." In *State v. Thomas*, 370 So. 2d 1142, 1143 (Fla. 1979), the supreme court upheld the constitutionality of section 812.019(1), stating:

> The terms "traffic" and "stolen property" are defined in section 812.012(6) and (7), from which it is clear that the statute applies only to certain acts relating to the disposition of "property that has been the subject of any criminally wrongful taking." (Emphasis added).

We affirm on the basis of *Lamar* but certify the following question to the supreme court:

> IS IT NECESSARY TO PROVE THE EXISTENCE OF STOLEN PROPERTY IN ORDER TO CONVICT UNDER SECTION 812.019(1), FLORIDA STATUTES (1993)?

COBB and SHARP, W., JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix to Brief of Respondent on Merits" has been furnished by mail to: John W. Tanner, Esquire, 630 North Wild Olive Avenue, Daytona Beach, Florida 32118, this 16th day of February, 1996.

Michele Konig

Of Counsel