SUPREME COURT OF FLORIDA

THOMAS V. CAPALDO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

Case No. 86-390
5th DCA #93-2022

PETITIONER'S AMENDED REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

CITATION OF AUTHORITY

CORRECTIONS AND CLARIFICATION OF RESPONDENT'S VERSION OF "FACTS"

Some of Respondent's references to the trial record are out of context. The third and fourth paragraphs on page two of Respondent's Brief are presented in a way that could mislead this Court into believing that Petitioner was present when Agent Bisland and Osta discussed the illegal nature of the electronics and their private conversations about how they could involve Petitioner in their illegal activity.

At trial, Agent Bisland made it absolutely clear that Petitioner was not privy to or a part of those conversations. (V10/p27, ln.8-20 and V10/p29, ln.7, V10/p30, ln.7-9, V10/p103, ln.8 through p/106, ln.6)

Respondent's second paragraph on page three make reference to the Agent's vague statements concerning serial numbers and Miami. At trial, Agent Bisland admitted that he was the one who brought up serial numbers and that Respondent did not express any concern that the merchandise was serial numbered items. (V10/p108 and 337) The Agent's cryptic comments about the serial numbers and Miami carried no hint of illegality to the Petitioner. (V10/p339-341) Petitioner's interpretation of the Detective's comment about Miami was that he should not try to re-sell in the Miami area because the source did not want competition down there. (V12/p339-340) The Agent's comment about serial numbers on the merchandise lead Mr. Capaldo to believe that Bisland was dealing in legal merchandise and he could check the serial numbers against the paperwork if he were to make a purchase. (V12/p340)

The Court should note that all of the facts relied upon by Respondent on pages two and three occurred on March 20th and 21st, 1990, three and one/half (3 1/2) months before the activity for which Respondent was convicted. The Court should also note that virtually all of the "incriminating" statements and discussions about the stolen character of the merchandise were hearsay conversations between Osta and FDLE Agent Bisland and were not made in Petitioner's presence or during the course or in the furtherance of a conspiracy. Yet, here, as at trial, the State relies upon those inadmissible hearsay statements to have any hope of showing that Petitioner had the requisite knowledge and intent to deal in stolen property essential for a conviction.

Respondent's second paragraph on page four erroneously states that the series of meetings and phone calls between FDLE Agent Bisland and Petitioner were "mostly initiated by the Capaldos". That is absolutely untrue. The Record in this cause clearly shows that Agent Bisland called Petitioner or Osta to ensnare Petitioner no less than fifteen (15) times and had over twenty (20) contacts aimed at entrapping Petitioner. (V6/p96-99, 105, 106, 108, 115, 117, 118, 120-126 and V10/p28-32, 39-41,43, 45, 47-51) Bisland finally called Petitioner three (3) times at his home the morning of July 9, 1990, to lure him into a meeting with the Agent so that he could set him up to arrest him. (V10/p119, 122)

The Court must remember that Agent Bisland admitted that he had no reason to believe that Petitioner had ever engaged in any criminal activity whatsoever before he, Bisland, offered to sell

him the non-existent electronics. (V6/p139; V10/p20-21, 87, 123, 124, 127, 128) Yet, from the very first day that Agent Bisland met Petitioner, the agent targeted Petitioner for a "sting". (V10/p30) The FDLE Agent admitted that he had no reason to believe that Petitioner was predisposed to engage in criminal conduct. (V6/p139; V10/p20-21, 87, 123, 124, 127, 128)

The Respondent does not deny that Agent Bisland pressured Petitioner into saying that he wanted to purchase the imaginary property. (See Quote on Page 4, Respondent's Brief) Petitioner said he was 'interested" and agreed to meet Bisland with the intent to examine, and possibly negotiate a purchase of some of the merchandise. (V10/p52-54, 120-121; V12/p355-356) Regardless of Petitioner's alleged response to the Agent's sale's pressure, it is unrefuted that if Petitioner had been taken to the undercover agent's non-existent place of business to inspect the non-existent electronics he would have taken proper precautions to make certain that the property was not stolen before actually purchasing any of it. (V12/p356-359)

Respondent says on page three of it's brief that the Agent did not tell Petitioner that the property was "stolen" because the Agent felt it would have revealed his identity as a police officer. (V10/p36) Yet, the undercover agent Bisland repeatedly told the former co-defendants Osta and Morris that he was dealing in "hot" or "stolen" property. (V10/p87-88) He never told Petitioner that he was dealing in "hot" or "stolen" property. (V10/p30, 36, 104-106, 111, 115, 117, 188, 334, 335)

Respondent claims that Petitioner's arrival at the park with cash and a friend who was driving a truck and Mrs. Capaldo's presence in the vicinity somehow proves criminal intent. Mrs. Capaldo was tried and acquitted of the charge of dealing in stolen property. The truck was driven by a friend who had previously planned to accompany Petitioner to an auction or sale in Orlando where they intended to make cash purchases. Agent Bisland's calls on the morning of July 9, 1990, setting Petitioner up, coincidentally occurred the day that Petitioner had planned to make the cash purchases in Orlando. (V10/p349-355)

Petitioner made an honest living by buying legitimate merchandise and re-selling it. (V12/p333 and 361) Agent Bisland appeared to be a legitimate businessman and did not give Petitioner any reason to believe that he was selling stolen property. (V10/p29, 30, 36, 104, 106, 334, 335; V12/p334, 337)

The original merchandise shown to Petitioner three and one half months earlier, in March, was packaged in original factory boxes with matching serial numbers, it was shown in broad daylight, and in an apparently bonafide place of business in the mist of other adjacent legitimate businesses. (V12/p334, 337) Petitioner had bought legitimate merchandise for re-sale under similar circumstances in the past. (V12/p339-341)

REPLY TO RESPONDENT'S ARGUMENTS

Respondent correctly points out that Section 812.028(3), provides that it is no defense to the crime of trafficking in stolen property that the property in question was not in fact "stolen". However, it is clear that subsection (3) contemplates that at least some property must be offered for sale as stolen property, only, the stolen "character" of the property need not be proven.

Part of subsection (4) of 812.028 is expressly intended to protect innocent citizens from over-zealous entrapping police officers. The legislature recognized that even ordinary law abiding persons could be tempted to violate the law:

> F.S. 812.028
>
> (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 an ordinary law-abiding person to violate any provision of ss. 812.012-812.037.
>
> (Emphasis supplied)

The cases relied upon by Respondent are not applicable to the facts of the instant case. In State v. Rios, 409 So.2d 241 (Fla. 3rd DCA 1982), on three different dates, the defendant actually purchased a television set, blenders and automobile stereo speakers which were not stolen but were, in fact, the property of the City of Miami, Florida, Police Department. In State v. Williams, 442 So.2d 240 (Fla. 5th DCA 1983), the defendant sold an air

conditioner to a law enforcement reverse sting operation. At the time of the sale, the serial number had been removed and that defendant told the undercover police officers "you've got to move this and move it fast...it's brand new...This thing's hot. In State v. Skinner, 397 So.2d 389 (Fla. 1st DCA 1981) the defendant actually purchased property that he thought was stolen from undercover police officers. The trial judge correctly held that proof of the stolen character of the goods was not an essential element of the crime.

In Rios (supra) the court clearly contemplated that to prove a crime, at least the property must exist:

> ***"A defendant, then, cannot be heard to complain in prosecutions of this nature that the property offered to him for sale as stolen property was not, in fact, stolen if he thereafter traffics in said property."*** (Emphasis supplied) State v. Rios, 409 So.2d at 243

U.S. v. Parramore, 720 Fd.Supp. 799, relied upon by Respondent actually supports Petitioner's argument. Parramore's pre-trial motion to dismiss an attempted money laundrying indictment was denied but the court made it clear that to sustain a conviction the government would have to prove objective acts to unequivocally corroborate the necessary criminal intent. U. S. v. Parramore, 720 Fd.Supp. at 801. The Parramore court discussed numerous Federal cases where fake drugs were sold by government agents. In every one of the cited cases, whether the agent was the seller or buyer of the false narcotics, the court's required proof of the defendant's objective conduct unequivocally corroborating the

requisite criminal intent to either purchase or sell actual narcotics.

In the instant case, Petitioner had a reasonable explanation for his conduct which was entirely consistent with his denial of any intent to purchase stolen property or commit any other crime.

Petitioner's unrefuted testimony concerning his motives, intentions, and the safeguards he would have taken to be certain the property offered was legitimate did not unequivocally corroborate or support the State's theory that Petition had the requisite criminal intent to purchase stolen property.

In the instant case, the Petitioner was never told that the imaginary merchandise was "hot" or "stolen" and he would have to examine the goods and verify their legitimate character before he would have actually attempted to make any purchase. (V10/p52-54, 120-121; V12/p355-359)

The court should note that throughout Respondent's brief there is a repeated misstatement of fact inferring that the Agent was supposed to have the imaginary merchandise in a "truck somewhere". (Respondent's Brief pages 10 and 12) In fact, the Agent told Respondent that he would meet him in the park and take him to his new place of business where the merchandise was located. (V10/p 54, 54)

INADMISSIBLE HEARSAY

Throughout Respondent's Brief the State relies heavily upon hearsay conversations carried on between FDLE Agent Bisland and Osta, all outside the presence of Petitioner and without any proof, independent of the hearsay, that a conspiracy ever existed. Respondent argues that the Fifth District Court of Appeal erred in holding that the Osta-Bisland hearsay statements should not have been admitted at Petitioner's trial. Respondent's concern is well founded because without those hearsay statements, which the Fifth District Court of Appeal deemed "harmless", there was no evidence whatsoever that Petitioner knew or should have known that Bisland was dealing in stolen goods.

The Respondent agrees with the Fifth District Court of Appeal's statement that "it is clear that the conspiracy between Osta and Capaldo had ended prior to the offense charged in this Information". (5th DCA Opinion, Pg.2) Petitioner denies that there was any proof, independent of Osta's and Bisland's hearsay, that he was ever engaged in a conspiracy with Osta. But, for the sake of argument, even if he were, Osta's and Bisland's hearsay conversations would not be admissible against Petitioner for the prosecution of an alleged independent criminal act committed many months after the termination of the alleged original conspiracy.

Respondent's desperate attempt to save the blatant highly prejudicial hearsay upon which the State relied for a conviction and which the Attorney General is even now so heavily depending upon to win it's case before this Court, falls short.

Section 90.803, Florida Statutes, (1993) subsection (18)(e), creates a limited exception to the hearsay rule. A co-conspirator's statement may be offered against a fellow conspirator when it is:

> "A statement made by a person who was a co-conspirator of the party during the course and in furtherance of **the conspiracy.** (Emphasis supplied)

The exception clearly is dealing with statements made during a single or at most interrelated conspiracies. If a conspiracy ever existed between Osta and Petitioner, of which there was no independent proof, it was terminated long before Petitioner's entrapment and arrest by Agent Bisland on July 9, 1990. (V6/p 103, 104; V10/p109-128, 157; V11/p 163)

The Fifth District Court of Appeal correctly relied upon Usher v. State, 642 So.2d 29 (Fla. 2nd DCA 1994) for the propostition 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 difference offense not involving the conspiracy." (5th DCA Opinion, Page 2)

The Fifth District Court of Appeal was mistaken in its determination that the Court's erroneous admission of the numerous Osta-Bisland hearsay statements was harmless error. At trial, the State could not have avoided a judgment of acquittal and certainly would not have pursuaded the jury to convict except for the inadmissible hearsay. The State's need for that hearsay is amply demonstrated by Respondent's continued reliance upon it before this Court in it's Brief On The Merits.

Respondent wants to ignore the State's burden to introduce at trial evidence, independent of the hearsay, to support the existence of conspiracy before the hearsay is deemed admissible. The trial testimony was that the Osta-Bisland hearsay conversations were not made during the pendency of the conspiracy and in the furtherance of its objectives. That, too, required proof independent of the hearsay. Usher (supra) and Boyd v. State, 389 So.2d 642.

Respondent's effort to stretch the Boyd decision falls short. In discussing the co-conspirator exception to the hearsay rule, Judge Danahay said:

> ***"That rule has its genesis and the basic principle that when a conspiracy is established, everything said, written or done by any of the co-conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by everyone of them and may be proved against each."***
> Boyd v. State, 389 So.2d 642 at 644 (Emphasis supplied)

CONCLUSION

The Court should note that Respondent has not produced one single case wherein a conviction was obtained where the property or drugs which were the subject of the transaction were totally non-existent. That is because, until this case, apparently no law enforcement officer was ingenious enough to try to create a criminal transaction out of thin air. At the very least, sting operations involve the sale or purchase of tangible property which, by its perceived character is believed by the citizen who is the target of the sting to be stolen. Even reverse sting drug deals always involve actual drugs or, at the very least, "fake" dope. There do not appear to be any cases wherein a citizen has been convicted for simply agreeing to purchase police offered contraband that is non-existent.

Imagine a police officer offering an honest citizen a "good deal" on a car and making ambiguous hints intended by the officer to convey the idea that the vehicle is stolen. Imagine further the citizen meeting the officer at a pre-selected rendezvous, with purchase money in hand and the intent to inspect the non-existent vehicle and purchase it provided proper documentation of ownership. Then, as in this case, upon arrival of the unsuspecting citizen he is immediately arrested for attempting to buy a stolen vehicle that never existed.

If the evidence in this case is sufficient, anyone could be convicted anytime an officer persuades them to look at imaginary, non-existent stolen goods. The potential would be limitless for

over-zealous agents to create enumerable criminal transactions in their minds to ensnare countless ordinary, honest citizens.

Even Jesus of Nazareth, whose standards are higher than our laws, required the existence of an actual live woman before a man should be reproved for lusting after her, to-wit:

> "Ye have heard that it was said by them of old time, Thou shall not commit adultery:
>
> But, I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart.
>
> And if thy right eye offend thee pluck it out and cast it from thee: for it is profitable for thee that one of thy members should perish, and not that thy whole body should be cast into hell.
>
> Matthew 27-29, Authorized King James Version

Jesus, at least, allowed for a cursory examination of the "merchandise".

The legislature did not criminalize the act of considering the purchase of non-existent property even if the circumstances were out of the ordinary or suspicious.

This Court should hold that there must at least be some actual property in existence for a citizen to attempt to buy before one can be convicted of attempting to traffic in stolen property knowing that the merchandise he is attempting to purchase is stolen and that the intended purchase is to obtain the property for re-sale. Even a consummated purchase of admittedly stolen merchandise will not support a conviction under F.S. 812.019 unless there is proof that the goods were purchased for re-sale. Adkins v. State, 576 So.2d 392 (1st DCA 1991) Grimes v. State, 477 So.2d 649 (1st

DCA 1985) Lancaster v. State, 369 So.2d 687 (1979) Coley v. State, 391 So.2d 725 (1980).

Here Petitioner was seriously considering an undercover agent's offer to sell him non-existent merchandise. The law, as written, does not punish one for considering or even attempting to purchase property without at least giving the targeted citizen an opportunity to inspect, confirm legitimacy and refuse to buy.

WHAT'S WRONG WITH THIS PICTURE?

Numerous thieves and burglars who have knowingly bought admittedly stolen goods have had their convictions for dealing in stolen property reversed. Adkins (supra); Grimes (supra); Lancaster (supra) and Coley (supra).

Petitioner who had no criminal record and no predisposition or intent to commit a crime was enticed by an undercover FDLE agent to meet him and go to the agent's place of business to look at imaginary merchandise and decide if he would purchase some of it. Petitioner was immediately arrested upon arrival at the meeting place, without being taken to the new business sit and given an opportunity to inspect, determine legitimacy and purchase or decline to purchase the non-existent property. Petitioner's conviction for trafficking in stolen property was affirmed. Thomas V. Capaldo v. State, 5th DCA #93-2022, April 28, 1995)

Respectfully submitted,

JOHN W. TANNER, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Michelle A. Konig, Assistant Attorney General, Florida Bar No. 0946966, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401, this 7th day of March, 1996.

JOHN W. TANNER, P.A.