IN THE SUPREME COURT OF FLORIDA

ANDREW J. MORRIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 90,427

DISTRICT COURT OF APPEAL
5th District - No. 95-1230

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE SEVENTH JUDICIAL CIRCUIT IN AND FOR
ST. JOHNS COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State disagrees with the Statement of Facts contained in the Initial Brief because it fails "to provide the court with a full and fair statement of facts. . . . cast in a form appropriate to the standard of review applicable to the matters presented." See Thompson v. State, 588 So. 2d 687, 689 (Fla. 1st DCA 1991). Accordingly, the State provides its own statement of the case and facts. Fla. R. App. P. 9.210(c).

The State charged Andrew Morris with one count of possession of cocaine and one count of resisting an officer without violence (Vol. I, R 1). A jury trial was held on February 16, 1995 before the Honorable Charles J. Tinlin (Vol. II, T 42-205). The State's first witness was Officer Daniel Brannon of the St. Augustine Police Department (T 59-60).

Officer Brannon testified that at approximately 2 a.m. on October 4, 1994, he was on patrol in the business district of the San Marco area when he noticed three black males standing at the corner of San Marco and Bernard streets by the wall of the Raintree Restaurant (T 60, 78, 79-80). The three men appeared to be concealing themselves and putting an object over the wall (T 61, 81-82).

Officer Brannon testified that it had rained on and off that night and that the rain had stopped 30 minutes prior to the incident (T 61). In fact, Officer Brannon previously had been dressed in his foul weather gear. Officer Brannon testified that the ground in the immediate area was still wet; that the trees were dripping raindrops; and the ground was moist (T 61, 65).

Based on the time (2 a.m.) and their actions at the corner (attempting to conceal themselves and place an object on the other side of the wall), Officer Brannon investigated whether they were loitering and prowling (T 62, 81). Officer Brannon stopped his patrol car at the corner, exited his vehicle and asked the men to come to the patrol car (T 62, 82). Two of the men came to the patrol car while Morris ran westbound on Bernard Street.

Officer Brannon told Morris to stop, and then noticed Officer Makowski coming northbound (in his vehicle) on San Marco (T 62). Officer Brannon gestured to the fleeing Morris, whereupon Officer Makowski went in pursuit (T 62). Officer Brannon detained the other two men in the back of his patrol car (T 63).

Officer Makowski subsequently returned with Morris (T 64). Morris remained with Officer Brannon, while Officer Makowski went to the area where Morris had been running. Officer Makowski notified Officer Brannon that he had discovered several items (T

82). Officer Brannon then went to where Morris had been running (T 65). On the right side of the sidewalk, Officer Brannon discovered some drugs (a little baggie containing 19 rocks of cocaine), some gum (three sticks of unopened Juicy Fruit Gum) and 40 cents in change (quarter, dime and nickel); on the left side of the sidewalk, only a body length away, he found a cassette tape on the ground (T 65, 72, 76, 79, 83-85).

Officer Brannon testified that the items "were dry and had no dirt on them and were not wet." (T 65). He reiterated that there was no moisture, water or any dirt at all on the objects. In contrast, the surrounding area was extremely wet, such that the trees had raindrops coming off; there was moisture on the bushes, on the ground and the mulch; and there were standing puddles of water in the parking lot (T 65).

Officer Brannon testified that the gum was Juicy Fruit Gum (T 65). All of the objects were admitted into evidence without objection, including three photographs showing the area and the objects (T 66-69, 76-77). The photos supported Officer Brannon's testimony on the wet surrounding area in contrast with the dry objects (T 69). Officer Brannon testified that the cassette tape contained rap music (T 70).

Officer Brannon testified that he was very familiar with the

smell of Juicy Fruit Gum; that he had smelled it on numerous occasions growing up and as a child; and that Morris was chewing Juicy Fruit Gum at the time of his arrest (T 78).

The State's second witness was Officer Walter Makowski, a twelve year veteran of the St. Augustine Police Department (T 88-89). Officer Makowski also testified on the "rainy and nasty weather" that night and that he had been wearing a rain jacket (T 89). He heard Officer Brannon radio about the stop and went to provide backup (T 89-90). He observed Officer Brannon standing outside his patrol car with two men while Morris was running away (T 90, 112). While in his police car on the roadway, Officer Makowski pursued the fleeing Morris (T 90, 112).

Officer Makowski "visually observed" the fleeing Morris to determine whether Morris had any weapons around his waistband or in his hands (T 90). Officer Makowski testified that Morris' pockets were inside his pants and that Morris did not have anything in his hands (T 91).

Officer Makowski testified:

> A. The subject ran down the sidewalk and turned right into the parking lot behind the Raintree. Now I momentarily lost sight of him as I was driving down Bernard Street in my police car. I drove into the parking lot in the direction that he ran and I again regained visual contact of him as he was stumbling

around a large wrought iron gate that is the northwest corner of the building, still adjacent to this parking lot.

At that time as I drove in the parking lot, he came up in the headlights of the car I could see him stumbling around like he was stunned as if he had hit the wrought iron gate. I again regained visual contact of him and again started to assess his body looking for suspicious bulges, weapons of any type in his hands or around his waist line.

Q. What did you see?

A. I could immediately notice a change in his appearance. On Bernard Street, his pockets were in, his body was streamline. When I regained contact with him and he was stumbling around, I noticed immediately that his pockets had been turned inside out and the reason I noticed that is not only because his body is no longer vertical, it had two pockets protruding here, but the pockets were a strikingly light color and it was a sharp contrast to the dark-colored pants.

(T 91-92, 112-115, 120).

Officer Makowski testified that he stopped his vehicle and exited, yelling for Morris to stop (T 92, 113). Morris attempted to conceal himself behind a van. Officer Makowski again identified himself as a police officer and instructed Morris to move out from behind the van. Morris ran away with Officer Makowski in pursuit (T 93, 113-114). Morris attempted to hide himself in the bushes, but then ran away again. Morris ultimately acquiesced to Officer

Makowski's commands and was arrested (T 94, 115).

While Officer Makowski handcuffed Morris, he noticed a strong pungent odor of Juicy Fruit Gum from Morris (T 95). Officer Makowski testified that he has smelled Juicy Fruit Gum numerous times since childhood; that it was one of the brands that he had chewed in the past (T 95). Officer Makowski testified that there was no mistake that Morris was chewing Juicy Fruit Gum: "That smell is unmistakable" (T 95-96).

Officer Makowski advised Morris of his Miranda rights (T 100-101). Morris waived Miranda and agreed to talk. Morris provided a false name and otherwise false information 2-3 times (T 101). Officer Makowski then followed the path Morris had taken from the place the officer had lost sight of him to the place the officer regained sight of him to find out why Morris had been fleeing and why Morris' pockets were turned out (T 102, 105-106).

Officer Makowski testified that he discovered a cassette tape on the left side where Morris had been running, whereas on the right side he found some Juicy Fruit Gum in the wrapper and a plastic baggie with crack cocaine therein (T 102, 105-106, 116). The distance between the items was the normal width of a sidewalk (T 116). Officer Makowski testified that objects were in the area of where they would have been if Morris had pulled them out of his

pocket while he was running (T 116).

Officer Makowski testified that the objects were dry with no sign of visible moisture (T 102-105, 109). Even the paper on the Juicy Fruit Gum was dry. In contrast, the surrounding area was extremely wet with standing puddles in the parking lot and beads of water still running down the windshield on the van; and you could hear water dripping off the canopy and off the trees onto the ground (T 103). No other objects on the ground were dry (T 104).

Officer Makowski testified that the baggie was sent to obtain latent fingerprints, however, he did not think it would be successful because the type of motion to open an object smears the fingerprint (T 106-108, 122-123, 124).

Afterwards, Officer Makowski asked Morris what kind of gum he was chewing, whereupon Morris answered "Spearmint" (T 108-109). Officer Makowski testified that he did not smell Spearmint, but Juicy Fruit Gum (T 109).

Officer Makowski testified that he never drew his weapon; that he did not see any weapons on Morris as he pursued him (T 126).

The State's third witness was Joseph Dorsey of the FDLE Crime Lab, stipulated as an expert in latent fingerprint identification (T 127-128). Mr. Dorsey testified that there were no latent prints of value on the plastic baggie (T 134).

The State's fourth witness was Denise Holmquist of the FDLE Crime Lab, stipulated as an expert chemist. Ms. Holmquist testified that the controlled substance in the baggie was cocaine (T 144). The State rested.

At the close of the State's case, defense counsel moved for a judgment of acquittal on the following ground:

> MR. WOOLBRIGHT: At this time the Defendant would move for a Judgment of Acquittal specifically on Count One of the information, this being the felony, the unlawful possession of a controlled substance, the prima facia [sic] case, in that they haven't been able to prove Andrew Morris was ever in possession of a controlled substance, cocaine. They have not proved constructive possession.

(T 148). The prosecutor responded:

> Mr. Wahl: Your Honor, the State circumstantially has proven that there was cocaine found where the Defendant was standing and his pants pockets were at that time out. He also had a stunned expression on his face a little bit later. That explains why he fled, why he did everything. The cocaine didn't just happen there. There was roughly a 20 to 30 minute period in which it had been raining. The cocaine had to have been put there with the gum wrapper and all the other items because they were dry in that time period.
>
> He is the only person that was near that location during that time period. There is no other way it could have gotten there. There is no other evidence that explained how it could have gotten there other than the

> Defendant putting them there. It explains everything.
>
> Just as if you see rain and snow after a night and you know its rained or snowed even though you didn't hear or see it. Here we know that somehow the cocaine got on the ground. We know it came from above. His pants pockets are out. It had to come from those pockets. That is the logical explanation.
>
> He was seen running to the location He was asked about what he was chewing and he said spearmint. He gave a false name. All of that is because he dropped the goods there. The case law is not that we have to show he dropped it. If cocaine is found at the feet, we have a right to charge and so the case law says and that's what we've done.

(T 148-149).

The trial court denied the motion for a judgment of acquittal, ruling: "I think that considering the evidence and the facts presented in [the] light most favorable to the State there is sufficient factual matters to be presented to the jury." (T 149).

Morris testified that he and "his friends" were sitting in a motel room; that they became hungry and decided to walk to the store to get snacks (T 152-154). Morris denied standing by the telephone; denied having reached over the wall. He testified that they were walking towards the 7-11 when the officer drove up, yelled something to them and walked toward them (T 154-155).

Morris testified, "I got kind of scared, so I ran." (T 155). After the other officer yelled, pulled his gun out and told him to stop and freeze or he would shoot, Morris got down (T 155, 156-157).

Morris initially testified that he always wears his pockets inside out as part of his "normal dress code" (T 156).

Morris denied having run into the gate; did not recall running behind the van; denied having jumped into bushes (T 157-158). Morris testified that he was chewing Spearmint gum (T 160). Morris did not recall whether his friends had Juicy Fruit Gum (T 160). Morris denied having any Juicy Fruit Gum and denied possessing the cassette tape (T 161).

On cross-examination, Morris admitted that he chews gum in the morning and at night; and that he listens to rap music (T 162). In addition, Morris admitted that at the time of his arrest he had lied to the police and given a false name (T 162). The prosecutor requested Morris to lift his shirts and show the state of his pockets (T 164). Morris' pants pockets were not outside his pants (T 164-165). Morris claimed that this was because he had something in both his pockets, but this excuse was not supported by demonstration.

Morris admitted that he was with Mr. Dixon and that they were

at the Motel together, but in response to the question: "But he's a friend of yours?", answered "That's your talk". (T 165). The defense rested.

In rebuttal, the State recalled Officer Brannon (T 166). Officer Brannon testified that he is trained to observe people when they flee from him to observe whether they have unusual bulges in their pants (i.e., whether they are armed) and determine why they're running away (T 166). Officer Brannon testified that he observed Morris fleeing and that Morris' pockets were inside his pants whereas after Morris was arrested, his pants pockets were turned inside-out (T 167). Officer Brannon testified that he also heard the Morris tell Officer Makowski that he was chewing Spearmint gum. Officer Brannon reiterated that he smelled Juicy Fruit Gum on Morris' breath (T 170). This concluded the State's rebuttal.

At the close of all the evidence, defense counsel did not renew the motion for a judgment of acquittal (T 170),[1] nor did he file a posttrial motion for a judgment of acquittal. See Fla. R. Crim. P. 3.380(b) & (c).

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[1]At the close of all the evidence the trial court specifically asked defense counsel whether he had anything further, whereupon defense counsel replied, "No, your Honor." (T 170).

The jury found Morris guilty as charged of possession of cocaine and resisting an officer without violence (T 198, R 15). Morris was sentenced to five years incarceration on the possession count, 364 days in jail on the resisting count (R 29-30,37,84).

Morris appealed to the Fifth District Court of Appeal raising, among other issues, that the trial court erred in denying the motion for a judgment of acquittal at the close of the State's case. The Fifth District affirmed the trial court's ruling as to the acquittal motion on the ground that it was not preserved for appellate review because defense counsel did not renew the motion at the close of all the evidence. See Morris v. State, 689 So. 2d 1275 (Fla. 5th DCA 1997). Specifically, the court held:

> Morris' claim that the court erred in not granting his motion for judgment of acquittal was not preserved for appeal. Although he properly made the motion at the close of the State's case, he did not renew the motion at the conclusion of his case. Rule 3.380(b), Florida Rules of Criminal Procedure provides:
>
> > A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. Such motion must fully set forth the grounds upon which it is based.
>
> In State v. Pennington, 534 So. 2d 393

> (Fla. 1988), the supreme court noted that the above rule expressly states that a defendant's motion for a judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence *if properly preserved by a motion at the close of all the evidence*. Therefore, both the rule and Pennington (at least by implication) require that a motion for a judgment of acquittal must be repeated at the close of all the evidence in order to preserve the denial of such motion for review on appeal (italics in original).

Id.

This Court granted discretionary jurisdiction.

SUMMARY OF ARGUMENT

The Fifth District's opinion does not "expressly and directly" conflict with State v. Pennington, 534 So. 2d 393 (Fla. 1988). The Fifth District properly held that any issue regarding the trial court's ruling on the acquittal motion made at the close of the State's case was waived from appellate review because the acquittal motion was not renewed at the close of all the evidence as required by Rule 3.380(b) and the issue was not of a fundamental nature. The Fifth District's opinion is consistent with Pennington and is a well-reasoned decision giving meaningful effect to the plain language of Rule 3.380(b) and Pennington.

The only alternative interpretation to provide meaningful effect to the "Waiver" portion of Rule 3.380 is for this to Court to hold that where a defendant does not renew the motion at the close of all the evidence, then the Federal Waiver Rule does apply i.e., the State may rely evidence adduced during the defense case and rebuttal.

The State met its threshold burden of introducing competent substantial evidence which is inconsistent with the defendant's theory that the cocaine was not his, and thus it was properly submitted to the jury.

ARGUMENT

POINT ONE:

MORRIS v. STATE, 689 So. 2D 1275 (Fla. 5TH DCA 1997) DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH STATE v. PENNINGTON, 534 So. 2d 393 (Fla. 1988), BUT IS CONSISTENT WITH AND PROVIDES MEANINGFUL EFFECT TO THE PLAIN LANGUAGE OF RULE 3.380(B) AND PENNINGTON.

Morris v. State, 689 So. 2d 1275 (Fla. 5th DCA 1997) does not "expressly and directly" conflict with State v. Pennington, 534 So. 2d 393 (Fla. 1988). Morris is consistent with Pennington and is a well-reasoned decision giving meaningful effect to the plain language of Rule 3.380(b) and Pennington.

In Pennington, defense counsel moved for a judgment of acquittal at the close of the State's case and also renewed it at the close of all the evidence. See Pennington v. State, 526 So. 2d 87, 90 (Fla. 4th DCA 1987)("we hold that the trial court erred when it failed to grant the motions for judgment of acquittal made by appellant at the close of the State's case and at the close of all the evidence.")(emphasis added). The Fourth District certified the question of whether the federal waiver doctrine applied in State proceedings to allow the State to rely on evidence presented in the

defendant's case to cure defects in the State's case.[2] Id.

This Court held that the federal waiver doctrine did not apply because Rule 3.380(b) expressly provides that a "defendant's motion for a judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence if properly preserved by a motion at the close of all the evidence." Id. 534 So. 2d 395-396 (emphasis added). See also Walker v. State, 604 So. 2d 475, 476-477 (Fla. 1992)("This Court has ruled that a defendant's motion for a judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence if the motion is renewed at the close of all the evidence.")(emphasis added).[3] Accordingly, this Court held that the denial of a motion for a judgment of acquittal at the close of the State's case may be reviewed on appeal, without resort

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[2]The federal waiver doctrine provides that a defendant cannot challenge the denial of an acquittal motion made at the close of the State's case if any deficiency therein is cured during the defense's case. Pennington, 534 So. 2d at 394. "Under the 'waiver doctrine,' a defendant's decision to present evidence in his behalf following the denial of his motion for a judgment of acquittal made at the conclusion of the Government's case operates as a waiver of his objection to the denial of the motion." Id. at 395 (quoting from United States v. White, 611 F.2d 531, 536 (5th Cir.), cert denied, 446 U.S. 992, 100 S.Ct. 2978, 64 L.Ed.2d 849 (1980).

[3]Walker, like Pennington, reflects that a motion for judgment of acquittal was made at the close of the State's case and was renewed after the defense rested. Walker, 604 So. 2d at 476.

to the curing of any defects in the State's case by defense testimony, if the motion was renewed at the close of all the evidence. Id.

In Morris, defense counsel moved for a judgment of acquittal at the close of the State's case, but unlike Pennington or Walker, did not renew the motion at the close of all the evidence (nor in a posttrial motion).[4] Applying the plain language of Rule 3.380(b) so as to give it meaningful effect and, in light of the implications of Pennington, the Fifth District ruled that any issue regarding the trial court's ruling on a motion for a judgment of acquittal made at the close of the State's case, absent fundamental error, was waived from appellate review.

Therefore, it is apparent that Morris does not "expressly and directly conflict" with Pennington, but constitutes proper application of Rule 3.380(b) so as to give the waiver subsection meaningful effect. Contrary to the arguments in Petitioner's jurisdictional brief, the Fifth District never approved the federal "waiver doctrine," but applied the plain language of Rule 3.380(b) so as to give it meaningful effect, as implicated by the rule and

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[4]See State v. Stevens, 694 So. 2d 731 (Fla. 1997)(ground for judgment of acquittal may be raised for the first time in a posttrial motion).

Pennington.

Pennington superseded or overruled prior decisions of the Fifth District and other district courts of appeal relied on in the petitioner's jurisdictional brief. This Court has expressly stated that its "concern in cases based on [its] conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law." Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). Therefore, the Court should dismiss a case that reflects the correct rule of law if the conflicting incorrect cases have been eliminated as to their precedential effect. See Bailey v. Hough, 441 So. 2d 614 (Fla. 1983); Wackenhut Corp. v. Judges of District Court of Appeal, 297 So. 2d 300 (Fla. 1974).

There is no "express and direct" conflict with Interest of T.M.M, 560 So. 2d 805 (Fla. 4th DCA 1990) or Williams v. State, 511 So. 2d 740 (Fla. 5th DCA 1987). T.M.M. and Williams involve situations wherein the State failed to present a prima facie case, i.e., where there was no evidence to support the crime or that the defendant's conduct did not constitute the crime for which he was convicted. In this type of a situation, the error is fundamental and is reviewable on appeal notwithstanding the failure to renew the motion for a judgment of acquittal at the close of all the

evidence. See Hornsby v. State, 680 So. 2d 598 (Fla. 2d DCA 1996); Brown v. State, 652 So. 2d 877, 881 (Fla. 5th DCA 1995).

Petitioner's reliance on Wiggins v. State, 101 So. 2d 833 (Fla. 1st DCA 1958) for conflict jurisdiction is distinguishable as it did not rely on an interpretation of Rule 3.380(b), but section 918.08, Florida Statutes (1957). As indicated by the First District's opinion, the statute modified the common law and governed in the absence of a conflicting rule of court. Section 918.08, was repealed by the Chapter 70-339, §180, Laws of Florida. Rule 3.380 was adopted and specifically labeled the "waiver" subsection of the rule.

In addition, the legal reasoning by the First District in Wiggins is unsound. As demonstrated the foregoing analysis, the former statute was not "so ineptly phrased that its object is confused." As demonstrated above, and below, there are interpretations which give meaning and effect to the language in the statute as a whole. The First District's failure to interpret the statute as a whole demonstrates the flaw in legal reasoning.

The only alternative interpretation to provide meaningful effect to the "Waiver" portion of Rule 3.380 is for this to Court to hold that where a defendant does not renew the motion at the close of all the evidence, then the Federal Waiver Rule does apply

i.e., the State may rely evidence adduced during the defense case and rebuttal. As demonstrated below:

Rule 3.380(b)

> **(b) Waiver.** A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. Such motion must fully set forth the grounds upon which it is based.

Two Possible Situations

Pennington & Walker	Morris
Facts: Defense moves for JOA at close of State's case **and** renews it at close of all the evidence or in posttrial JOA motion	Facts: Defense moves for JOA at close of State's case but does **not** renew it at close of all the evidence or in posttrial JOA motion.
Legal Effect: Federal Waiver Rule does not apply. Defendant does not waive first JOA motion; State may not rely on evidence in Defense case or in rebuttal to cure defects in State's case.	Legal Effect: Federal Waiver Rule does apply. State may rely on evidence adduced in defendant's case or rebuttal to cure defects in State's Case-in-chief.

As demonstrated in the next issue on appeal, this interpretation is not consistent with this Court's prior decisions.

POINT TWO:

THE FIFTH DISTRICT PROPERLY RULED THAT THE FAILURE TO RENEW THE MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE WAIVED THE ISSUE FROM APPELLATE REVIEW.

The Fifth District ruled that Morris' failure to renew his motion for a judgment of acquittal at the close of all the evidence waived the issue from appellate review. This Court has repeatedly held that the denial of a motion for a judgment of acquittal may be waived or not preserved for appeal where the motion or ground was not made or renewed below at trial. Marquard v. State, 641 So. 2d 54, 58 n.4 (Fla. 1995)(issue as to the trial court's denial of motion for judgment of acquittal on murder charge was not preserved for appellate review); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993)(defendant waived argument for acquittal that murder actually committed was independent of agreed-upon plan by not raising claim at trial); Tillman v. State, 471 So. 2d 32, 33 (Fla. 1985); Tompkins v. State, 502 So. 2d 415, 418-419 (Fla. 1996); State v. Allen, 335 So. 2d 823, 825 (Fla. 1976).

Where the defendant has waived his motion for a judgment of acquittal, review of the evidence is limited to a fundamental error analysis. While the State is required to bring forth substantial evidence tending to show the commission of the charged crime, the

standard does not require the proof to be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime. Allen, 335 So. 2d at 825 (emphasis added). See also Hornsby v. State, 680 So. 2d 598 (Fla. 2d DCA 1996); Brown v. State, 652 So. 2d 877, 881 (Fla. 5th DCA 1995); Interest of T.M.M, 560 So. 2d 805 (Fla. 4th DCA 1990); Williams v. State, 511 So. 2d 740 (Fla. 5th DCA 1987).

In the instant case, the Fifth District properly held that any issue regarding the trial court's ruling on the acquittal motion made at the close of the State's case was waived from appellate review because the motion for a judgment of acquittal was not renewed[5] at the close of all the evidence as required by Rule 3.380(b) and the issue was not of a fundamental nature.

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[5]A direct appeal is not the forum to speculate on why defense counsel chose to waive the issue. It is properly the subject of a 3.850 motion for post-conviction relief.

POINT THREE:

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE'S EVIDENCE WAS SUFFICIENT TO SHOW POSSESSION OF COCAINE.

Morris argues that the trial court erred in denying the motion for a judgment of acquittal at the close of the State's case because the evidence was circumstantial and failed to exclude every reasonable hypothesis of innocence. The State disagrees, responding that this is not the proper standard; that the State met its threshold burden of introducing competent substantial evidence which is inconsistent with the defendant's theory that the abandoned cocaine was not his, and thus it was properly submitted to the jury. Orme v. State, 677 So. 2d 258, 262 (Fla. 1996); Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995).

The sole function of the trial court on motion for a judgment of acquittal in a circumstantial evidence case is to determine whether there is prima facie inconsistency between the evidence, viewed in the light most favorable to the State, and the defense theory. Orme v. State, 677 So. 2d 258, 262 (Fla. 1996); State v. Law, 559 So. 187, 188-189 (Fla. 1989). If there is such inconsistency, then the question is for the finder of fact to resolve. Orme, supra; Law, supra. The trial court's finding in

this regard will be reversed on appeal only where unsupported by competent substantial evidence. Orme, supra; Law, supra.

The State need not conclusively rebut every possible variation of events which could be inferred from Morris' hypothesis of innocence. Barwick, 660 So. 2d at 695; Law, 559 So. 2d at 189; State v. Allen, 335 So. 2d 823, 826 (Fla. 1976). Whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to decide. Orme, supra; Barwick, supra; Law, supra; Allen, supra.

The evidence, when taken together in a light most favorable to the State, is sufficient to disprove Morris' hypothesis of innocence that the cocaine was not his. The State's theory is that while Morris fled, he emptied out his pockets containing, among other things, the cocaine. The State's theory was supported by the following evidence: Morris' flight; both Officers' observations of the state of Morris' pants pockets immediately before and after he momentarily disappeared from view; the location of the abandoned cocaine alongside the path Morris had run (and at the location where he momentarily disappeared from Officer Makowski's view); the extremely wet condition of the area due to the rainy weather immediately preceding the incident; the fact that the time (2 a.m.) and weather conditions do not suggest that any one else was in the

area; the fact that the baggie of cocaine was dry, notwithstanding the wet weather; the fact that Morris provided false information regarding his identity (as well as the type of gum he was chewing at the time of his arrest). The circumstances surrounding the existence of the cocaine baggie alone were sufficient to show possession.

Contrary to Morris' position, this case does not solely require the impermissible pyramiding of inferences to show the ultimate existence of constructive possession. The State readily acknowledges there is other additional evidence which requires some pyramiding of inferences: the other items found near or with the cocaine baggie (Juicy Fruit Gum, change and cassette); the fact that these items also were dry, not wet; the smell of Juicy Fruit Gum on Morris' breath; the fact that he was chewing Juicy Fruit Gum; the fact that the cassette contained music (Rap music) listened to by Morris. While pyramiding of inferences may not be sufficient to support guilt where it is the only evidence, it is not impermissible to consider such additional evidence in cases where there already is substantial, competent evidence of guilt. The law does not operate in a vacuum.

Given the foregoing circumstances, the defense did not provide a reasonable hypothesis of innocence. Prima facie inconsistency

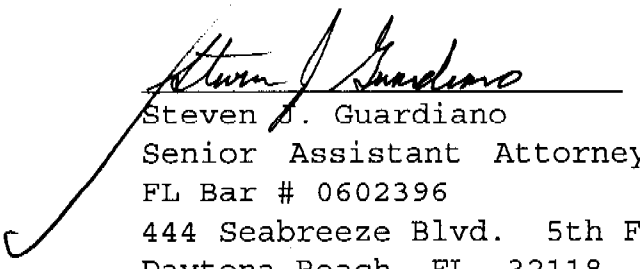
with any reasonable hypothesis of innocence was adequately demonstrated. The trial court properly denied the motion for judgment of acquittal.

CONCLUSION

The State respectfully requests this Honorable Court to approve the opinion of the Fifth District or approve the alternative interpretation of Rule 3.380(b) and affirm Petitioner's conviction and sentence.

Respectfully submitted,

Robert A. Butterworth
Attorney General



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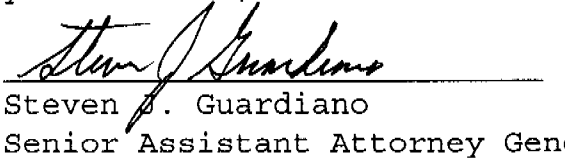
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's Brief has been furnished to M. A. Lucas, Assistant Public Defender, by hand delivery to the Public Defender's Box at the Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, FL 32118, this 6th day of October, 1997.



Steven J. Guardiano
Senior Assistant Attorney General