IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 96-00408

MOMPOINT VOLTAIRE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA CRIMINAL DIVISION

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ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

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MICHELLE BAZELAIS, Codefendant

JOSEPH R. CHLOUPEK, Assistant Public Defender

DALE GEISLER, Assistant State Attorney

THE HONORABLE CHARLES GREENE

SARAH B. MAYER, Assistant Attorney General

MOMPOINT VOLTAIRE, Appellant

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal.

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

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statements of the case and facts for purposes of this appeal, subject to the following additions, corrections, and/or clarifications:

Poliard testified that he initially spoke with Appellant in English (R 12). Poliard asked Appellant what he was in for and Appellant replied ▒cocaine▒ (R 12). Poliard and Appellant then discussed where Appellant and Poliard were from and they spoke partly in Creole and partly in English (R 13-14, 19). After Poliard told Appellant that he thought he (Poliard) was going to do 5 years, Appellant stated that the police told him that he (Appellant) would have to do 10 years (R 13, 15-16, 18). In response to Poliard's question why Appellant would have to do 10 years, Appellant told Poliard that he had set up a deal for two kilos of cocaine with a person who turned out to be a police officer (R 13, 16, 18). Appellant said he was going to get paid for setting up the cocaine deal (R 14). Appellant told Poliard that when he arrived at the location of the deal, the undercover officers asked him where the [other] kilo was and Appellant said he did not know; Appellant was arrested at that time (R 14). Poliard was in the holding cell with Appellant for about 20 minutes (R 15). Poliard described the conversation as just ▒a normal conversation▒ (R 15). Poliard did nothing to induce Appellant converse with him, nor did Poliard make any promises to Appellant (R 16). Poliard testified that Appellant told him about setting up the cocaine deal after Poliard asked why Appellant would have to serve 10 years (R

13-14, 16, 18-19).

Initially, the parties stipulated that Appellant was advised of his Miranda rights, and that he invoked his rights (R 20). However, later, the prosecutor stated that he could not determine whether Appellant had been given his Miranda warnings (R 63-66). Although Appellant was able to converse in English with Carmichael prior to his arrest, after he was arrested, Appellant indicated that he did not speak any English (R 64).

Detective Carmichael was the undercover officer involved in Appellant's arrest. Carmichael received information from a confidential informant who had been reliable in the past, that the CI had spoken with a man named ▒Peter▒[1], and that Appellant told the CI that he had a large amount of powdered cocaine to sell (R 24, 39). Carmichael directed the CI to give Appellant Carmichael's beeper number; later that day, Appellant beeped Carmichael (R 24). Appellant told Carmichael that he had a kilo of cocaine to sell, and that he could cook the cocaine into crack for Carmichael (R 25, 40). Several days later, Carmichael met with Appellant; Appellant told Carmichael and Detective Alexander (Carmichael's partner) that he could furnish them with a kilo of cocaine for $21,000 (R 25-27, 40-41). In Carmichael's experience this was a reasonable price for a kilo of cocaine (R 27). Appellant told Carmichael that he could cook the cocaine into crack for an additional $500 (R 27-28). Appellant gave Carmichael his home phone number and said he would contact Carmichael at 4 p.m. the next day (R 28). Appellant beeped

[1] Appellant was later identified as Peter (R 26).

Carmichael and when Carmichael spoke with Appellant, Appellant told Carmichael that he wanted Carmichael to pick him up from his home, and that they would go pick up the cocaine from ▓Michelle▓[2] (R 29-30). Carmichael told Appellant that he did not have possession of the money at that time, and that he would like to be able to call Michelle and give her an exact time of his arrival; Appellant gave Carmichael Michelle's phone number (R 30, 41). Carmichael called Michelle and told her he was the person Appellant had told her about, and that he was interested in purchasing a kilo of cocaine; Michelle said she would be there all day and that he could come and get it anytime (R 30-32). Michelle also stated that Carmichael did not have to bring Appellant with him (R 32). Michelle and Carmichael agreed to meet at 3:30 to exchange the money for the cocaine (R 32). Later Carmichael again called Michelle before going to her place of business; she told him that there was one there and that he could get it then (R 33, 41-42). Carmichael asked about getting more cocaine, and she said that there was one there, but that it would just take a phone call to get the other one (R 33, 42). Carmichael went to Michelle's store, introduced himself as Gabe, she introduced herself, and asked if she had the thing he came for; Michelle directed Carmichael to the rear, storage area of the store (R 34-35). Michelle showed Carmichael the kilo, and she was arrested (R 35).

After Michelle's arrest, Carmichael called Appellant and asked

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[2] Michelle is Appellant's codefendant; she pled guilty to both offenses charged (R 31).

if Appellant could bring Carmichael another kilo; Appellant said he had no transportation, and that Carmichael would have to pay for a taxi if Appellant was going to bring the other kilo (R 36, 43-44). Carmichael agreed, and Appellant arrived, but did not have the cocaine and said he had to contact someone in Miami to bring it (R 35, 44). At this time, Appellant was also arrested (R 36-37). After he was arrested, Carmichael understood that Appellant did not want to talk with Carmichael or the police because all of a sudden Appellant didn't understand English (R 46).

SUMMARY OF THE ARGUMENT

The trial court did not err in denying Appellant's motion to suppress where the undercover officer who conversed with Appellant in the holding cell did not interrogate Appellant or misrepresent to Appellant that their conversation was confidential in nature, or trick Appellant into making a statement. Further, in light of Appellant's admissions in open court that he assisted Billy in setting up this cocaine deal, and that Billy was going to pay him to do so, and the jury's acquittal of Appellant on the trafficking count, it is clear that the admission of Appellant's statements to Poliard were harmless.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS.

Appellant asserts that his statements to the police should have been suppressed because they were induced by police action which amounted to a violation of his due process rights. The State submits that Appellant's statement to Officer Poliard was not a product of improper police interrogation, thus it was properly allowed into evidence.

In Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990), the United States Supreme Court held that Miranda considerations were not implicated with respect to conversations between incarcerated suspects and undercover agents posing as fellow inmates. The Court held that ploys to mislead a prisoner or lull him into a false sense of security, do not rise to the level of compulsion or coercion, particularly where, as here, there was no reason for the prisoner to feel that the undercover officer had any legal authority to force him to answer questions or affect the prisoner's future treatment. In interpreting that decision, the Florida Supreme Court, noting Justice Brennan's concurrence, held that notwithstanding the lack of a need for Miranda warnings in these circumstances, due process considerations required an examination of the methods used to extract the suspect's statement. Walls v. State, 580 So. 2d 131 (Fla. 1991); cert. denied, U.S. , 115 S. Ct. 943, 130 L. Ed. 2d 887 (1994). The Court found that where the police engage in gross deception to obtain a prisoner's statements, the requirements of

the Constitution were circumvented, and the prisoner's statements should be suppressed.

In Walls, a corrections officer befriended the defendant, fraudulently encouraged him to speak freely in confidence with her, failed to warn him that the information she obtained would later be used against him, and discouraged him from telling his attorney of her advice. Similarly, in Malone v. State, 390 So. 2d 338 (Fla. 1980), cert. denied, 450 U.S. 1034, 101 S. Ct. 1749, 68 L. Ed. 2d 231 (1981), cited in Walls, the Court found that the defendant's statements had been elicited in violation of his Sixth Amendment rights to counsel. There, another inmate who was incarcerated with Malone was asked by the police to help find the body of the victim thought to have been killed by Malone; the inmate devised a plan whereby Malone would think the inmate had been released from custody, that the inmate was obtaining counsel for Malone, and that the inmate was able to assist Malone from the outside. Malone had refused to answer police questions on several prior occasions, yet after learning that the inmate was going to be released from custody, Malone confided in the inmate that he committed the murder and told the inmate where the body was hidden. Id. at 339-340.

Here, Appellant had **not** invoked his right to remain silent or his right to counsel, Appellant simply stopped speaking to the officers in English, making communications between them impossible. Further, here, the officer did not ask repeated or pointed questions of Appellant, nor misrepresent to Appellant that Appellant's communications to Poliard were confidential. Thus

here, the police conduct did not rise to the level of coercion or compulsion.

Even in Illinois v. Perkins, the conduct of the police was far more deceptive and manipulative than here. There, an inmate who had befriended Perkins went to the police and told them that Perkins had confessed committing a murder to the inmate. A police officer went undercover in the cellblock where Perkins was housed and was introduced to Perkins by the inmate. The officer told Perkins that he was not going to do any more time and suggested that the three of them escape. In the course of planning the 'escape' the use of a pistol was discussed and the officer asked Perkins whether he had ever ▓done▓ anyone. Thereupon, Perkins told the officer about the murder the officer was investigating Id. at 110 S. Ct. 2396. Notwithstanding conduct which is obviously more coercive that occurred below, the United States Supreme Court held that Perkins statements should not have been suppressed because they were not the product of a custodial interrogation, and that the essential ingredients of a police dominated atmosphere and compulsion were not present when a suspect speaks freely to someone he believes is a fellow inmate. Id. at 110 S. Ct. 2397.

Here, the circumstances surrounding Appellant's statements were far less interrogational and/or coercive than in the cases relied upon by Appellant. Below, in ruling on Appellant's motion to suppress, the trial court found that there was no evidence that Appellant had been advised of his Miranda rights, that there was no evidence that Appellant had invoked his Miranda rights, that the

evidence showed that Appellant upon learning that the individuals he had previously been conversing with in English were in fact police officers, elected to no longer speak English, and that as a result, all conversations between Appellant and the police ceased (R 66-67). Additionally, the trial court found that when Appellant and Officer Poliard, posing as a defendant, were in the holding cell, their conversation was a normal conversation, and that Poliard did not exhibit any indicia of being a police officer, such as wearing a uniform, displaying a badge or carrying a gun (R 67, 71). The court found that Appellant initiated certain aspects of the conversation, such as when he volunteered that he was going to do 10 years (R 67). The trial court held that in accordance with Illinois v. Perkins, a holding cell is not a place for police interrogation as there is no intimidation when the suspect views the police officer as a fellow cellmate (68). The court held that the conversation between Appellant and Poliard was not an interrogation (R 71).

It is the trial judge who hears the testimony and observes the demeanor of witnesses at a suppression hearing, and absent a clear showing of an error of law the trial court's finding comes to the appellate court with a presumption of correctness. State v. Dilyerd, 467 So. 2d 301 (Fla. 1985). The State submits that Appellant's motion to suppress was properly denied, and Appellant's conviction must be affirmed.

Finally, contrary to Appellant's assertion, the admission of his statement into evidence was harmless, in that it could not have

affected the verdict. Below, Officer Carmichael testified as to his conversations with Appellant regarding setting up the cocaine deal (R 230-235, 323, 325-326). His partner Officer Alexander likewise testified regarding Appellant's discussions of the cocaine deal (R 323, 325-326, 330). Additionally, tapes were played of several of the conversations which were recorded (R 234-235, 335-345, 355-359). More importantly, Appellant did not deny making the phone calls, or being involved in the conversations, or coming to the site of the cocaine transaction; at best he asserted he was coerced into making these calls, being told what to say to Carmichael, and that incredibly, the real dealer, ▒Billy▒ jumped out of the cab at the last minute before Appellant arrived at the scene of the cocaine transaction (R 412-416, 422, 424-425, 427-428, 431-432). Appellant even admitted that Billy was going to pay him for assisting Billy in this transaction (R 414). As the jury acquitted Appellant on the trafficking charge and only convicted Appellant on the conspiracy charge (R 558-559, 583-585), which Appellant all but admitted in his own testimony, there can be no reasonable doubt that the admission of his statements to Poliard did not affect the verdict in this case. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Thus, Appellant's conviction must be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests this Court AFFIRM the judgment and sentence below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by Courier to: JOSEPH CHLOUPEK, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this _____day of December, 1996.

Of Counsel