OA 4-7-98

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 91,352

STATE OF FLORIDA,

Petitioner,

vs.

MOMPOINT VOLTAIRE,

Respondent.

PETITIONER'S BRIEF THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner 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 Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged with trafficking in cocaine (Count I)and conspiracy to traffic in cocaine (Count II) (R 570). After a jury trial, he was acquitted on the trafficking charge, but convicted on the conspiracy charge (R 583-585).

Prior to trial, Respondent filed a motion to suppress the statements made by him to Officer Poliard of the Oakland Park Police Department (R 575-576). A hearing was held on the motion prior to trial (R 1-71), at the conclusion of which, the trial court denied Respondent's motion (R 577), relying on the holding in Illinois v. Perkins[1].

At the hearing, Kips Poliard, an officer with the Oakland Park Police, testified that he was requested to go into a jail cell with Respondent in an undercover capacity (R 9). Poliard was dressed in a white T-shirt, a pair of shorts, and sneakers; there was no indicia that he was a police officer (R 10, 17). Poliard was placed in an 8 by 10 holding cell with Respondent; they were the only two people in the cell and the door was shut (10-11). Poliard testified that he initially spoke with Respondent in English, basically saying, what's up? (R 12). Poliard asked Respondent what he was in for and Respondent replied "cocaine" (R 12, 17-18). Poliard and Respondent then

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1. Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

discussed where Respondent and Poliard were from and they spoke partly in Creole and partly in English (R 13-14, 19). Respondent asked Poliard what he was in for, and Poliard told Respondent that he had been stopped for a bad tag on his car, that- when the officer checked there was a warrant for his arrest, and that he had cocaine on him (R 13, 18). After Poliard told Respondent that he thought he (Poliard) was going to do 5 years, Respondent stated that the police told him that he (Respondent) would have to do 10 years (R 13, 15-16, 18). In response to Poliard's question why Respondent would have to do 10 years, Respondent 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; Respondent told Poliard that he didn't touch the cocaine, or deliver it, he just set up the deal (R 13, 16, 18). Respondent said he was going to get paid for setting up the cocaine deal (R 14). Respondent told Poliard that he set up the deal between two black males and a female, that he made the phone calls to set up the deal and that only one kilo was delivered (R 14). Respondent said that when he arrived at the location of the deal, the undercover officers asked him where the [other] kilo was and Respondent said he did not know; Respondent was arrested at that time (R 14). Poliard was in the holding cell with Respondent for about 15 to 20 minutes (R 15). Poliard never identified himself as a police officer and it appeared Respondent believed that

Poliard was actually in custody (R 15, 19). Poliard testified that Respondent did not appear to be coerced, and described the conversation as just "a normal conversation" (R 15-16, 19). Poliard did not advise Respondent of his Miranda rights (R 15). Poliard never got the impression that Respondent was refusing to continue talking to him (R 15). After Poliard asked Respondent what he was in for, Poliard stopped, and that was when Respondent began getting into the conversation and questioning Poliard (R 15). After Poliard asked Respondent why he would do so much time, that's when Respondent went into the story about what happened (R 16). Poliard did nothing to induce Respondent converse with him, nor did Poliard make any promises to Respondent (R 16). Poliard testified that Respondent told him about setting up the cocaine deal after Poliard asked why Respondent would have to serve 10 years (R 13-14, 16, 18-19).

Initially, the parties stipulated that Respondent was advised of his Miranda rights, and that he invoked his rights (R 20-21). However, later, the prosecutor stated that he could not determine whether Respondent had been given his Miranda warnings; Respondent's counsel argued that the police knew Respondent did not want to speak and that's why they did not question him any further, and that was why they put the officer in the cell to get a statement from Respondent (R 63-66).

Detective Ghalib Carmichael, an undercover narcotics officer

with the Ft. Lauderdale Police, testified that he came into contact with Respondent through a confidential informant who had given them reliable information in the past; the informant told the police that a person named "Peter"' had a large amount of powdered cocaine to sell (R 24, 39). Carmichael went on to describe the events leading up to the cocaine deal, and the conversations he had with Respondent during the time the deal was set up (R 24-45 , 25, 25-27, 29-30, 36). After the codefendant's arrest, Carmichael called Respondent and asked if Respondent could bring Carmichael another kilo; Respondent said he had no transportation, and that Carmichael would have to pay for a taxi if Respondent was going to bring the other kilo (R 36, 43-44). Carmichael agreed, and Respondent 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, Respondent was also arrested (R 36-37). After he was arrested, Carmichael understood that Respondent did not want to talk with Carmichael or the police because all of a sudden Respondent didn't understand English (R 46). Carmichael did not read Respondent his Miranda rights and he did not know if Officer Stenger did (R 45-46). During the time Respondent worked with the undercover officer, he spoke English; however, after he was arrested, Respondent spoke only Creole (R 46) . They told Officer Poliard to sit in the cell with

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2. Respondent was later identified as Peter (R 26).

Respondent and see if he wanted to speak or if he said anything to him (Poliard)(R 47-48).

In moving to suppress his statements, Respondent argued that the he had invoked his right to remain silent, and instead of all activity ceasing as it should have, the police placed a police officer in Respondent's cell to question Respondent; Respondent argued that in trying to elicit further statements from Respondent, the police conduct was a violation of Respondent's due process rights (R 56-57, 59). Finding that the words spoken between the officer and Respondent were a conversation and not an interrogation, the trial court denied Respondent's motion citing Illinois v. Perkins (R 66-69, 71, 577). The trial court found that Respondent had not invoked his right to remain silent, rather immediately upon his arrest, Respondent, who had previously spoken to the undercover officers in English, elected no longer to speak English, and as a consequence thereof, all conversations ceased (R 66-67, 69). The trial court further found that when Officer Poliard, posing as a defendant, was placed in the holding cell with Respondent, Respondent viewed the officer as a fellow cellmate, and a normal conversation occurred between Respondent and Officer Poliard (R 67-68, 71). The trial court [mistakenly, but without objection or correction] found that Respondent initiated the conversation (R 67), and that when he chose to speak freely to his fellow cellmate, he did so at his

own peril, noting that had Respondent's cellmate actually been a Creole speaking inmate, there was noting in the record to show that a similar conversation would not have taken place, the contents of which could have been reported to the police by the cellmate (68-69). The lower court found that Poliard did not exhibit any indicia of being an officer, that a holding cell was not a place for interrogation, that an interrogation had not taken place, that this was not a coercive environment, and that the police took advantage of Respondent's misplaced trust which resulted in voluntary statements by Respondent (R 67-68, 71).

The Fourth District reversed, relying on the concurring opinion in Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), and this Court's opinion in Walls v. State, 580 so. 2d 131 (Fla. 1991). Voltaire v. State, 697 So. 2d 1002 (Fla. 4th DCA 1997). The district court found that the officer had initiated an interrogation, that the officer's conduct constituted a "gross deception" and as the police "went out of their way to deceive [Respondent] into making a statement without concern for [Respondent's] constitutional rights", Respondent's due process rights had been violated.

SUMMARY OF THE ARGUMENT

The Fourth District erred in determining that Respondent's statements to an undercover police officer should not have been admitted at trial where the police tactic of placing an undercover in Respondent's holding cell to talk with Respondent was not violative of his due process rights and where Respondent had not invoked his right to remain silent. Simply placing an undercover officer in a cell with a defendant to see what the defendant will say, in the absence of an elaborate ruse, or affirmative misrepresentation, or prolonged or pointed questioning, does not constitute gross deception nor rise to the level of a violation of due process. Thus, the trial court correctly denied Respondent's motion to suppress. Further, in light of Respondent'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 Respondent on the trafficking count, it is clear that the admission of Respondent's statements to Poliard were harmless.

ARGUMENT

PLACING AN UNDERCOVER OFFICER IN A HOLDING CELL WITH A DEFENDANT DOES NOT CONSTITUTE GROSS DECEPTION NOR VIOLATE A DEFENDANT'S DUE PROCESS RIGHTS.

The Fourth District held that Respondent's 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[3]. The State submits that Respondent'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 to affect the prisoner's future treatment.

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3. Contrary to the Fourth District's assumption, this issue was not preserved for review. In the trial court, Respondent neither cited Walls v. State, nor argued that his statements were the product of illegal subterfuge (R 56-57, 59, 65-66, 69-70, 575-576). While he once used the phrase 'due process (R 57), the record establishes that his argument was predicated on an alleged violation of his invocation of his right to remain silent (R 56-57, 59, 65-66, 69-70).

In interpreting that decision, this 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). 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 was requested to conduct a surveillance of the defendant whose competency to stand trial was at issue; she falsely 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 insisted he not tell his attorney of their conversations. Finding that due process concerns came into play when information to be used against a defendant, who was litigating the issue of his competency, is gathered by means of illegal subterfuge, this Court held that due process required an examination of the particular methods used to extract the statement, even where the statement was "voluntary in the strictest sense of the term." Id. at 133. There, this Court found that the procedure employed by the police, particularly as applied to Walls in his questionable mental condition, constituted a gross deception and illegal

subterfuge contrary to the basic concept of fairness embodied in Article I, Section 9 of the Florida Constitution, as well as interfering with the defendant's right to counsel.

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, this 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; during the month-long period of time prior to the inmate-informant's 'release', Malone did not tell his fellow inmate that he killed the victim not ever mention where the body was located. It was not until after learning that the inmate was going to be released from custody, that Malone confided to the inmate that he committed the murder and told the inmate where the body was hidden. Id. at 339-340.

Further, Petitioner submits that the decision in Walls is specific to the facts of that case, and should not be interpreted as a general rule of law. It has repeatedly been held that the

purpose in allowing certain types of police 'trickery', is to solve crimes; indeed, public policy of this state is served by allowing law enforcement the use of some forms of deception. "[D]etection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement.... The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw..." Havnes v. Washinuton, 373 U.S. 503, 514-515, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513 (1963). In Martin v. Wainwriuht, 770 F.2d 918 (11th Cir. 1985), modified, 781 F.2d 185, cert. denied, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986), the Eleventh Circuit quoted with approval Justice Frankfurter's plurality opinion in Culombe v. Connecticut, 376 U.S. 568, 571, 579, 81 S.Ct. 1860, 1862, 1866, 6 L.Ed.2d 1037 (1961):

> ... [W]hatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths.
> ... But if it is once admitted that questioning of suspects is permissible, whatever reasonable means are needed to make the questioning effective must also be conceded to the police.

Martin, at 924-925.

In Walls, this Court found that notwithstanding the decision in Illinois v. Perkins, under the facts and circumstances of that case, the police conduct rose to the level of a due process violation. There, the defendant was possibly suffering from a mental defect, the complained-of conduct took place over a sustained period of time, and involved systematic, deliberate, and affirmative misrepresentations designed to elicit incriminating information from Walls. Thus, this Court reasoned that the police conduct in Walls amounted to gross deception. **However**, this Court

> hasten[ed] to distinguish this case from other cases in which police surveillance does: not involve a ruse or subterfuge. The state and its agents clearly are entitled to watch a person in custody and make notes of that person's voluntary or spontaneous behavior or comments.

Id. at 135). In the instant case however, unlike Walls or Malone, Respondent had **neither** invoked his right to remain silent or **nor** his right to counsel; Respondent simply stopped speaking to the officers in English, making communications between them impossible. Further, here, there was no evidence of an elaborate scheme to induce Respondent to incriminate himself. During the brief 15 to 20 minute period Officer Poliard was with Respondent, the officer did not ask repeated or pointed questions of Respondent, nor misrepresent to Respondent that Respondent's communications to Poliard were confidential; moreover, here there

was no evidence that Respondent was particularly susceptible to any of Poliard's comments or questions. Thus here, the police conduct was neither inquisitorial, nor did it rise to the level of coercion or compulsion.

Indeed, 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 496 U.S. 295. Notwithstanding conduct which is obviously far 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 496 U.S. 296.

Here, the circumstances surrounding Respondent's statements

were far less interrogational and/or coercive than in the cases relied upon by the Fourth District. Below, in ruling on Respondent's motion to suppress, the trial court found that there was no evidence that Respondent had invoked his Miranda rights, that the evidence showed that Respondent 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 Respondent and the police ceased (R 66-67). Additionally, the trial court found that when Respondent 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 Respondent 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 (R 68). The court held that the conversation between Respondent and Poliard was not an interrogation (R 71).

This Court has recognized that it is bound to follow the decisions of the Supreme Court in this area of the law. See State

v. Owen, 696 So. 2d 715 (Fla. 1997). Particularly where, as here, the police procedure involves brief contact with a defendant, does not involve an elaborate plan or false representations of confidentiality, nor sustained or pointed questioning of a defendant, the police conduct of placing an informant in a jail cell with a defendant in hopes that he would talk to the informant, does not constitute "gross deception" nor violate a defendant's due process rights. Here, as observed by the trial court, Officer Poliard engaged Respondent in a normal conversation and did nothing that any other fellow inmate could as easily have done (R 68-69). Consequently, the decision of the Fourth District in this case must be quashed and Respondent's conviction affirmed.

Finally, 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 Respondent regarding setting up the cocaine deal (R 230-235, 323, 325-326). His partner Officer Alexander likewise testified regarding Respondent'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, Respondent 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 Respondent arrived at the scene of the cocaine transaction (R 412-416, 422, 424-425, 427-428, 431-432). Respondent even admitted that Billy was going to pay him for assisting Billy in this transaction (R 414). As the jury acquitted Respondent on the trafficking charge and only convicted Respondent on the conspiracy charge (R 558-559, 583-585), which Respondent virtually 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, Respondent's conviction must be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Petitioner 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 "Petitioner's Brief on the Merits" 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 12th day of January, 1998.

Of Counsel