IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,467

STATE OF FLORIDA,

Petitioner,

-vs-

LUIS MANUEL ESTEVEZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM CERTIFICATION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is an appeal from a final judgment of conviction and sentence for trafficking cocaine entered by the Honorable Jeffrey Rosinek, Eleventh Judicial Circuit Court Judge, Criminal Division, Miami-Dade County. The Third District Court of Appeal reversed the conviction and certified to this Honorable Court the following question as one of great public importance:

> **DOES THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT IS GUILTY OF COCAINE TRAFFICKING IN AN AMOUNT OF 400 GRAMS OR MORE, IN THE FACE OF UNCONTROVERTED EVIDENCE THAT THE AMOUNT AT ISSUE EXCEEDED 400 GRAMS PRECLUDE IMPOSITION OF A MINIMUM MANDATORY SENTENCE UNDER 893.135?**

The Defendant below, LUIS MANUEL ESTEVEZ, was prosecuted by the State of Florida. In this brief, the Defendant will be referred to as Defendant. The State of Florida will be referred to as the State. The symbol “T” will be used to designate the transcripts of the trial proceeding and “R” will be used to denote the record; both will be followed by the Clerk’s stamped page number, respectively.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by information with trafficking in cocaine, in excess of 400 grams. (R. 1).

The Defendant was arrested after a confidential informant met him in a Metro-Dade police undercover warehouse. (T. 170). At the undercover warehouse, the police had placed four kilograms of cocaine signed out from the police laboratory which the confidential informant was to show the Defendant. (T. 180). The entire transaction at the police warehouse was videotaped. The four kilograms of cocaine used was taken from the Metro Dade crime lab. (T. 185). A second meeting was set up between the confidential informant and the Defendant, to which the informant brought five blocks of wood made to look like five kilograms of cocaine. (T. 222). The Defendant exchanged twenty five thousand dollars for the five kilograms of sham cocaine, and was arrested. (T. 227, 230).

Defense counsel did not challenge the amount of the cocaine. (T. 240-270). A Metro-Dade criminalist tested a small sample of the cocaine used, and testified that the amount was 999.9 grams of cocaine. (T. 274). He testified that the 999.9 grams was only a representative sample used to determine that the powder was a controlled substance. (T. 275).

The fact that the amount of cocaine at the warehouse was four kilograms was not disputed, in fact Defense counsel asked the

Defendant if he had money to buy “those four kilograms of cocaine.” (T. 315). Defense counsel also asked the Defendant, if at the time of his arrest he had enough money to buy the five kilograms of cocaine. (T. 322).

During closing arguments, the prosecutor pointed out that the Defendant was being charged with four hundred grams or over, that the amount was undisputed, and that there was no evidence to support any lesser amount. (T. 386).

The jury was instructed regarding the elements of the trafficking offense as follows:

> Before you can find the defendant guilty of trafficking in cocaine, the state must prove the following four elements beyond a reasonable doubt: 1) Luis M. Estevez knowingly purchased or possessed a certain substance, 2) the substance was cocaine or a mixture containing cocaine, 3) the quantity involved was 28 grams or more 4) Luis M. Estevez intended to purchase or possess cocaine. (T. 401).

Prior to jury deliberations, the court asked both the prosecutor and defense counsel if the jury verdict forms were the agreed upon forms. Both parties agreed that the verdict forms were the agreed on forms. (T. 418). The verdict form listed categories of trafficking by quantity, with a space for the jury to indicate which quantity the Defendant possessed. (R. 65).

The jury found the Defendant guilty of trafficking in cocaine as charged in Count One of the information. (T. 420). Defense counsel polled the jury, after which the court discharged the jury.

(T. 422). Defense counsel did not ask to see the verdict form, or interpose an objection to the verdict form prior to the jury being discharged. (T. 421-422). After the jury left, sentencing issues were discussed. (T. 423). Defense counsel then noted that the jury verdict form did not specify a quantity and argued that it was defective. (T. 424). The court noted that the jury checked the following on the verdict form, "That the Defendant is guilty of trafficking in cocaine as charged in count one of the information." (T. 425). The prior judge, who handled the majority of the case crossed out the following sentence, which specified that a quantity should be entered and had specific quantities listed. (T. 425) The court noted that it was obviously the judge's intention that the specific quantity section did not apply, and that the jury should either find the Defendant guilty as charged in the information or not guilty. (T. 425). Defense counsel objected on the grounds that the verdict form was defective, and the court overruled the objection. The Third District reversed the Defendant's conviction, and certified the question of whether a minimum mandatory sentence could be imposed as a question of great public importance. The State filed a notice to invoke discretionary jurisdiction of this Court. This Petition follows.

CERTIFIED QUESTION ON APPEAL

DOES THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT IS GUILTY OF COCAINE TRAFFICKING IN AN AMOUNT OF 400 GRAMS OR MORE, IN THE FACE OF UNCONTROVERTED EVIDENCE THAT THE AMOUNT AT ISSUE EXCEEDED 400 GRAMS PRECLUDE IMPOSITION OF A MINIMUM MANDATORY SENTENCE UNDER 893.135?

SUMMARY OF THE ARGUMENT

The absence of a specific finding by the jury on the verdict form that the Defendant is guilty of cocaine trafficking in an amount of 400 grams or more in the face of uncontroverted evidence that the amount at issue exceeded 400 grams does not preclude imposition of a minimum mandatory sentence under section 893.135.

Applying the logic of the firearm reclassification statutes, a defendant can either be found guilty of a crime which encompasses the specific quantity of drugs, *or* a special finding could be made, specifying the jury's determination as to the quantity. In the instant case the defendant could have been found guilty only of trafficking in an amount in excess of 400 grams, since the evidence was uncontroverted. Therefore, a specific jury finding as to quantity was unnecessary.

Secondly, the concept that the jury intended to find the Defendant guilty of trafficking in a lesser quantity in order to exercise their inherent pardon power is inconsistent with the intent of the statute itself, which mandates specific sentences and does not even allow judicial leniency. Therefore, preclusion of the minimum mandatory sentence in a case such as the present would be contrary to the intent of the statute as well as contrary to common sense.

ARGUMENT

I.

THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT IS GUILTY OF COCAINE TRAFFICKING IN AN AMOUNT OF 400 GRAMS OR MORE, IN THE FACE OF UNCONTROVERTED EVIDENCE THAT THE AMOUNT AT ISSUE EXCEEDED 400 GRAMS DOES NOT PRECLUDE IMPOSITION OF A MINIMUM MANDATORY SENTENCE UNDER 893.135.

A.

THE MANDATORY PROVISIONS OF THE DRUG TRAFFICKING STATUTE ARE DISTINGUISHABLE FROM THE FIREARM RECLASSIFICATION STATUTES WHICH THE THIRD DISTRICT RELIED UPON IN THEIR DECISION.

The Third District Court of Appeal in "reluctantly reversing" the Defendant's minimum mandatory sentence for drug trafficking in the amount of 400 grams or more, noted that the required result seems both illogical and absurd. (Emphasis in opinion). The State agrees, and submits that a mandatory minimum sentence should not be precluded where uncontroverted evidence supports such a sentence. To do otherwise would contradict both the language and the meaning of Florida Statutes Section 893.135.

In reversing the minimum mandatory sentence, the Third District relied on cases interpreting the reclassification statute, Section 775.087(1). See Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); State v. Tripp, 642 So. 2d 728 (Fla. 1994), State v.

Overfelt, 457 So.2d 1385 (Fla. 1984). These cases all stand for the correct proposition that if the State seeks to have a defendant's crime upwardly reclassified and thus enhanced because of the use of a weapon, the jury must make a finding that the defendant committed the crime while using a firearm. State v. Overfelt, supra. However, it is crucial to note that the language in Overfelt, supra states:

> "before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm **either by finding him guilty of a crime which involves a firearm *or* by answering a specific question of a special verdict form so indicating**." Id. at 1386. (Emphasis added).

Citing Hough v. State, 448 So.2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So.2d 570 (Fla. 5th DCA 1981). Thus, the language in Overfelt is alternative. Either a defendant can be found guilty by a jury of committing a crime which involves a firearm, or by making a specific finding. Id. at 1386. It is axiomatic that if the defendant is found guilty of committing a crime necessarily involving a firearm, requiring a special jury finding that a firearm was used would be both unnecessary and redundant. This is so because the finding of guilt encompasses the use of a firearm, such that the trial court may

turn to the enhancement provisions of Section 775.087 without the specific jury finding that a weapon was used.

Likewise, in finding a defendant guilty of trafficking in cocaine, the jury necessarily finds the Defendant guilty of trafficking in a specific quantity of cocaine. See State v. Weller, 590 So. 2d 923) (Offense of conspiring to traffic in cocaine in amounts less than 400 grams are necessarily lesser included offenses of trafficking in an amount of 400 grams or over). Applying this Court's language in Overfelt, supra, we are left with the hypothesis that under the trafficking statute, a defendant can either be found guilty of a crime which encompasses the specific quantity of drugs, *or* a special finding could be made, specifying the jury's determination as to the quantity.

In the case sub judice, the jury's finding of guilt necessarily encompassed a finding of guilt of trafficking in an amount of 400 grams or more. This is so because absolutely no contrary evidence was introduced as to the amount, the amount was completely undisputed and was even referred to by defense counsel as being an amount in excess of 400 grams. (T. 315). Had the amount been at issue whatsoever, a specific jury determination would be needed as to the quantity. Since the amount could not have been anything but in excess of 400 grams, the trial court properly applied the appropriate minimum mandatory sentence, 15 years. See 893.135.

This view was expanded upon by the Fifth District's opinion in Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983) (critized by Overfelt) and by Justice Alderman and Justice Ehrlich's dissent in State v. Overfelt, 457 So. 2d at 1386. In the dissent, Justice Alderman stated:

> "I disagree with the Court's holding that there must be a specific jury finding that an accused actually possessed a firearm before the trial court can apply the enhancement provisions of section 775.087, Florida Statues (1983). A defendant can be sentenced to the three-year mandatory minimum under this provision without such a specific finding by the jury. In my view, the trial court, in the context of sentencing a defendant, can make a finding from the evidence that a firearm was used without any express indication by the jury as to its use." Id.

Justices Alderman and Ehrlich agreed with the rationale and holding of Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983), stating:

> "where a defendant is charged with a crime which requires possession of a firearm to commit the crime **or where the allegations and the proof lead to the inescapable conclusion that defendant possessed a firearm during the commission of the crime, the jury need not render a specific verdict finding such firearm possession** in order to impose the three year minimum mandatory sentence under section 775.087(2). This determination is part of the sentencing process and may be made by the trial court. Id. (Emphasis added).

In the instant case, the charged crime required possession of 400 or more grams of cocaine in order to commit the crime. If the Defendant had not possessed the uncontroverted 400 grams used in

the reverse sting operation, the crime would not have been committed ***because it was impossible for the Defendant to be in possession of a lesser amount***. Also, applying the well reasoned language of Justice Alderman and Ehrlich's dissent, the allegations and the proof lead to the inescapable conclusion that defendant possessed in excess of 400 grams of cocaine during the commission of the crime and the jury need not render a specific verdict finding such quantity. Id. To hold otherwise, would be to invite absurd and illogical results such as the result achieved in the instant case. To hold otherwise leads to the irreconcilable results where either a stipulation is made as to quantity or there is no issue as to quantity, and yet a minimum mandatory cannot be imposed. This result is both contrary to common sense, as well as contrary to the intent behind the formulation of Section 839; to impose strict and mandatory penalties for cocaine trafficking directly correlated with the amount trafficked in.

The Defendant, in Appellant's Initial Brief, cites to this Court's decision in State v. Weller, 590 So. 2d 923 (Fla. 1992). In Weller, the defendant was charged with trafficking in 400 grams or more of cocaine and conspiracy to traffic in 400 grams or more of cocaine. Id. The defendant requested a jury instruction on the lesser included offense of trafficking in lesser amounts, which was denied. Id. at 924. This Court reversed, holding that "the law requires an instruction be given for any lesser offense all the

elements of which are alleged in the accusatory pleadings and supported by the evidence adduced at trial." Id. This Court noted that conspiring or trafficking in amounts less than 400 grams are necessarily lesser included offenses of the crime which the defendant was charged with, and that before a minimum mandatory sentence is imposed, the jury must be informed as to the differing minimum mandatory punishments depending on the quantity. According to this Court:

> "the jury then must determine from the evidence adduced at trial the quantity of contraband involved in the commission of the offense, in effect advising the court as to the appropriate minimum penalty." Id.

In Weller, the Court noted that the testimony surrounding the circumstances of the transaction was conflicted. Id. It logically follows that if the evidence adduced at trial is such that there is no dispute as to the quantity of contraband involved in the commission of the offense, that the jury need not advise the court as to the minimum penalty because the quantity is uncontroverted and the penalty mandated by the statute itself.

B.

THE LEGISLATIVE INTENT BEHIND THE STATUTE MANDATES IMPOSITION OF THE MINIMUM MANDATORY SENTENCE WITHOUT THE PROSPECT OF LENIENCY.

The theory that the jury could indicate a lesser amount in order to exercise its "inherent pardon power" does not coincide

with the legislative intent behind the promulgation of section 893. See Date v. State, 528 So. 2d 547 (Fla. 3d DCA 1988).

Section 893.135 was enacted for the purposes of eliminating illegal drug trafficking and its resulting detrimental effects on society. See State v. Benitez, 395 So. 2d 514 (Fla. 1981)(Holding that Section 893.135 is constitutional). In State v. Benitez, this Court analyzed the statute, stating:

> "Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe minimum sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking."
>
> "Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from importer-organizer down to the "pusher" on the street." Id.at 514.

This Court noted the meritorious goals of the legislature in enacting the statute, calling the statute a "beneficial and

worthwhile goal." Id. In this Court's analysis of the statute, the mandatory nature and lack of discretion in applying the statute are unquestionable. Specifically, this Court referenced the fact that the only way to ameliorate the effects of subsection (1) would be to have the offender assist authorities under subsection (3). Id.

Thus, it is clear that since not even the sentencing judge has the authority for leniency under the statute, neither should the jury. This is especially true in situations where the evidence as to quantity is completely uncontradicted.

In the instant case the Defendant entered into a transaction to purchase over four kilograms of cocaine, obviously with the intent to redistribute the drugs on the street and earn a profit. Defense counsel, in view of the uncontradicted evidence on quantity, referenced the quantity several times as being "four kilograms" or over four kilograms. (T. 315, 322). Quantity was not an issue. The scenario described above of an offender buying huge quantities of narcotics in order resell the drugs is exactly the type of crime sought to be penalized and deterred by the enactment of Section 893.135. To preclude imposition of the mandatory minimum sentence in the case sub judice would be contrary to the "beneficial and worthwhile" goals of the statute and as aptly described by the Third District Court of Appeal, would yield an absurd and illogical result.

Therefore, this Honorable Court should answer the certified question in the negative and reverse the Third District's decision remanding the case for resentencing due to the absence of a specific quantity finding.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the State respectfully requests that this Court answer the certified question in the negative and reverse the Third District's decision remanding the case for resentencing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was mailed this _____ day of AUGUST

1998, to MARIA LAUREDO, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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