IN THE SUPREME COURT OF FLORIDA

WILLIAM B. HARRIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94,756
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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	)	
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STATEMENT OF CASE

Through the Office of the Statewide Prosecutor, the State charged William Harris (petitioner) with conspiracy to traffic in 28 grams or more of hydromorphone or a mixture containing hydromorphone (Dilaudid) between July 3, 1993 and January 26, 1996 (Count I), trafficking in 4-14 grams of Dilaudid on November 3, 1995 in Volusia County (Count II), and trafficking in 14-28 grams of Dilaudid on January 26, 1996 in Volusia County (Count III). The State alleged that petitioner conspired with Mary Harris and/or others in the Seventh, Ninth, Tenth, Thirteenth, and Eighteenth Judicial Circuits. R. 313, vol. 3.

Pretrial Motions

Motion to Dismiss (mixture).

Petitioner moved to dismiss the information on the ground that each Dilaudid tablet contains only four milligrams of hydromorphone. Based upon the seizure of 349 tablets, the total weight of the hydromorphone is 1.5 grams. The State argued that the combination of hydromorphone and filler constitutes a trafficking amount. The trial court denied the motion. TR. 151-159, vol. 2, R. 559-73, vol. 4.

Motion to Suppress (syringes).

Petitioner moved to suppress and/or to exclude all evidence related to syringes seized from trash pulls and from the residence on the ground that the State combined and cross-contaminated the syringes. He further argued that the syringes were not admissible absent evidence of appellant's actual or constructive possession and that, if relevant, the prejudice outweighed the probative value. The State responded that the syringes were not cross-contaminated by state agents, that the testing method was appropriate, that the syringes were relevant to prove the quantity of Dilaudid sold from the residence, and that the issue was the weight of the evidence rather than relevancy. R. 372-73, vol. 3, R. 386-402, vol. 3, R. 429-31, 449-51, 475, vol. 4, TR. 38-45, vol. 1. The trial court denied the motion on the syringes from the trash pulls without ruling on

relevancy and reserved ruling on the motion on the syringes seized from the residence. TR. 28-49, 121-132, vol. 1.

Trial

At the conclusion of the State's case and at the close of all evidence petitioner moved for a judgment of acquittal on the grounds that (1) the State failed to establish a conspiracy to traffic in Dilaudid or trafficking in Dilaudid, (2) the State failed to adduce evidence of an agreement with Mrs. Harris and/or others, (3) the State failed to prove that petitioner knew the quantity of Dilaudid in the residence, (4) the State failed to adduce evidence of the quantity sold, purchased, delivered or possessed by petitioner, (5) the State failed to adduce evidence supporting the time frame alleged in the information, (6) the State failed to establish that he had actual or constructive knowledge of the contents of the UPS package delivered on January 26, 1996, and (7) since the prescriptions were reasonably necessary for Mrs. Harris' medical condition, the State offered no proof that the entire quantity of Dilaudid seized from the residence was the object of the alleged conspiracy. TR. 836-37, 838-40, 842, 845-46, 851, vol. 11. The trial court held that the locations and dates of the conspiracy were not essential elements and found that, taken in a light most favorable to the State, sufficient evidence was presented on each of the elements in Count I. The court further held that sufficient evidence was

adduced to present a jury question regarding petitioner's knowledge and the quantity of Dilaudid available for sale and/or delivery. TR. 854-55, vol. 11.

The jury found appellant guilty as charged, and the trial court denied petitioner's motion for new trial. TR. 1177-79, vol. 12, R. 674-87, 720, vol. 5. Petitioner scored 224 total points for a recommended sentence of 9-12 years and a permitted sentence of 7-17 years. R. 717-719, vol. 5. The trial court sentenced petitioner to a mandatory minimum 25 years on Count I and 118.75 months on Counts II and III, concurrent. The court imposed a fine of $500,000 plus a $25,000 surcharge on Count I, a fine of $50,000 plus a $2,500 surcharge on Count II, and a fine of $100,000 plus a $5,000 surcharge on Count III. R. 730-39, vol. 5. The trial court also entered judgments for the cost of investigation in the amount of $27,377.47 and $8,988.14. R. 721, 725-26, vol. 5. Petitioner timely appealed. R. 746, 761, vol. 5.

The Fifth District Court of Appeal affirmed the judgment and sentence per curiam and certified conflict with State v. Wells, 23 Fla. L. Weekly D2000 (Fla. 2d DCA Aug. 26, 1998), State v. Alleman, 23 Fla. L. Weekly D2000 (Fla. 2d DCA Aug. 26, 1998), State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998) and State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997). Petitioner timely

filed a notice to invoke discretionary jurisdiction, and this court set a briefing schedule.

STATEMENT OF FACTS

Mark McGaha, an investigator with the South Daytona Police Department, initiated an investigation of petitioner in July 1995. TR. 463, vol. 9. Two or three times each day McGaha noted the vehicles at petitioner's residence and the length of time the vehicles remained at the residence. TR. 465, vol. 9. He did curbside trash pulls from August 1995 through January 1996 which netted, inter alia, numerous used syringes. TR.467, 474-97, Vol. 9. He searched the bags at the police station and tagged certain items. Some of the tagged items were sent to the crime lab for analysis. TR. 466, 468-69, vol. 9.

John Faulds lived with petitioner and petitioner's mother, Mary Harris, from December 1994 to December 1995. He served as a live-in maid and care giver to Mrs. Harris. Faulds described the residence as divided with petitioner having his own apartment. There was no connecting door from the main house to the apartment. Faulds and Mrs. Harris lived in the main part of the house. TR. 234-35, vol. 7.

Faulds testified that when a buyer came to the residence he would take the buyer to Mrs. Harris, who would dispense the Dilaudid and a syringe. The buyer would then take the Dilaudid and the syringe into the kitchen, crush the tablet, mix the powder with hot water, and inject the solution. The used syringes were flushed with bleach water and placed in the trash.

Faulds saw Mrs. Harris take as many as six-ten Dilaudid tablets per day for pain, and he administered some to her by injection. In lieu of wages Faulds received seven-ten Dilaudid per month from petitioner and seven-ten from Mrs. Harris. On occasion he injected as many as ten in one day. He acknowledged that both Mrs. Harris and the dog were diabetic and that many syringes were used for insulin injections. TR. 187-93, 205, 206, 211, 213, 221, 223-24, 234, vol. 7.

Faulds further testified that a man would call, and petitioner would send money for Dilaudid by Western Union from Joe's Jiffy. In return petitioner received monthly UPS packages from California containing an average of 200 pills. After counting the pills, petitioner hid some, gave some to his mother, and kept some. The pills that were to be sold were placed in empty prescription bottles. TR. 195-98, 201-02, 212, 221, 233, vol. 7.

In the summer of 1995 McGaha arrested Faulds for possession of Dilaudid. Faulds agreed to set up a controlled buy at the residence, but later backed out. After he was arrested for driving with a suspended license, Faulds called McGaha and told him about the activities at the residence. TR. 198-99, 216-18, vol. 7. Faulds received immunity from prosecution in exchange for his testimony. TR. 200, vol. 7. After interviewing Faulds,

McGaha continued the trash pulls and specifically looked for UPS envelopes.

Abdul Vanjaria, the owner of Joe's Place, testified that petitioner sent money via Western Union from his store. He identified copies of money orders from petitioner to Scott and/or Kelly Silver in San Jose, California totaling $5,624.00 between July 3, 1995 and January 25, 1996. TR. 665-70, vol. 10, R. 633-656, vol. 5.

William Heiser, an investigator and canine handler for the South Daytona Police Department, testified that in 1995 and 1996 he spent four mornings each week at UPS. Each package was searched on the conveyor belt. In January 1996, the dog alerted to an envelope addressed to petitioner from Mark West, 123 Snell Avenue, San Jose, California. Heiser called the police department, and McGaha responded with FDLE personnel. TR. 310-15, vol. 8, R. 767, vol. 13. Chandra Davis, a special agent with FDLE, secured the UPS package. A second envelope containing a cassette box with 197 Dilaudid tablets was inside the envelope. Davis resealed the envelope for a controlled delivery, and McGaha obtained a search warrant. TR. 346-51, vol. 8, TR. 507, vol. 9.

Robert O'Connor of FDLE assumed the identity of a UPS employee for the controlled delivery. TR. 379-80, vol. 8. Petitioner was in the yard when O'Connor arrived in the late morning of January 26, 1996. He approached the UPS truck, and

O'Connor stated that he had a package for William Harris. Petitioner responded, "I'm not expecting anything." When O'Connor presented the package, petitioner took it and signed the receipt. O'Connor returned to the UPS truck and drove down the street. TR. 383-86, vol. 8. When O'Connor left, McGaha pulled into the driveway. McGaha testified that petitioner looked up, threw the package to the ground, and started to run. McGaha secured the package, and Detective Dennis Thomas chased petitioner. After securing the package and petitioner, the officers executed the warrant. TR. 511-12, 686-87, vol. 9.

Christine May, a chemist with FDLE, tested the syringes submitted by the South Daytona Police Department. She washed each syringe with methanol into one sample and then analyzing the sample. Some of the samples contained hydromorphone, and some did not. She did not test individual syringes. TR. 703, 711, 715-634, vol. 10. May also analyzed the contraband seized from appellant's residence and the controlled delivery. A total of 349 Dilaudid tablets was seized for a combined weight of 31.1 grams. TR. 735-39, vol. 10.

Christopher Berchelmann, M.D., an internist and oncologist in Hillsborough County testified that he treated Mary Harris on a monthly basis from July 1993 to November 1993. Mrs. Harris has severe back problems, and a chronic pain condition. She has had multiple back surgeries and a cordotomy (partial severance of the

spinal cord); she is an insulin-dependent diabetic with peripheral neuropathy; and she has severe ankle and arthritic problems. TR. 287-88, 300, vol. 8. When Berchelmann began treating Mrs. Harris she was receiving 120 Dilaudid per month. He increased the prescription to 180 per month when she developed breast cancer and other problems. Berchelmann testified that the prescriptions were reasonably and medically necessary for Mrs. Harris' medical conditions. He agreed that it is fairly common for a patient to become addicted to Dilaudid if taken on a regular basis and that Mrs. Harris probably built up a tolerance for the drug. TR. 286, 288-90, 300-302-03, vol. 8.

Sharon Conley, an oncologist at Halifax Medical Center, treated Mrs. Harris from January 1994 to November 1995. Conley testified that Mrs. Harris suffers from breast cancer, chronic back pain, diabetes, herpes, gout, hepatitis, neurogenic bladder, and hiatal hernia with chronic indigestion. She described degenerative disk disease in the lower spine with a cordotomy in 1962 which causes severe back pain and confinement to a wheelchair. She agreed that some diabetics have unique problems with pain and healing and that a neurogenic bladder and breast cancer can cause mild to severe pain. TR. 424-28, 435, vol 8. Conley prescribed seven Dilaudid per day (210 per month). The prescription was reasonably and medically necessary for Mrs. Harris' medical condition. TR. 408, 410-11, 436, vol. 8.

SUMMARY OF ARGUMENT

Each Dilaudid tablet contains four milligrams of hydromorphone combined with sodium citrate and citric acid. The two substances are combined in a precise formula, and the tablets are manufactured under the supervision of the federal Food and Drug Administration. The combination of hydromorphone, sodium citrate and citric acid is not a mixture as defined by the United States Supreme Court.

Of the 349 tablets (31.1 grams) seized from the residence, 100 tablets (nine grams) were found in a sealed prescription bottle in a locked safe in Mrs. Harris' bedroom. From January 1994 to November 1995, Dr. Conley prescribed Dilaudid for Mrs. Harris. The prescription allowed seven doses per day (210 per month) and was reasonable and necessary for Mrs. Harris' medical condition. The fact that 100 tablets were found in a sealed prescription bottle does not support a conclusion that the tablets were illicit in nature. The fact that the bottle was found in a locked safe in Mrs. Harris' bedroom does not support a conclusion that petitioner knew of the presence of the tablets or that he had dominion and control over them. Without the 100 tablets the conviction for conspiracy to traffic in 28 grams or more must fall.

Over petitioner's objection, the State introduced 327 used and unused syringes, copies of money orders, empty syringe boxes,

copies of valid prescriptions, empty prescription bottles, a UPS envelope with no address label, and a bill for bottled water. Based upon this evidence, the State asked the jury to stack inference upon inference to arrive at the factual conclusion that petitioner conspired with Mrs. Harris and/or others to traffic in 28 grams or more of Dilaudid. Of the 327 syringes, 230 were not tested. The 97 that were tested were flushed with methanol into common solutions, and the solutions were then tested for the presence of hydromorphone. It cannot be said that the admission of irrelevant, cumulative, highly prejudicial, and inherently unreliable evidence did not affect the verdict.

ARGUMENT

POINT I

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY FINDING THAT THE AGGREGATE WEIGHT OF THE DILAUDID TABLETS CAN BE CONSIDERED FOR PURPOSES OF THE TRAFFICKING STATUTE.

The State charged petitioner with conspiracy to traffic in 28 grams or more of Dilaudid (Count I), trafficking in 4-14 grams of Dilaudid, and trafficking in 14-28 grams of Dilaudid (Count III). Petitioner moved to dismiss the information on the ground that each Dilaudid tablet contains four milligrams of hydromorphone, and based upon 349 tablets, the total weight of hydromorphone is 1.5 grams. The Fifth District Court of Appeal affirmed petitioner's judgment and sentence based upon State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), rev. denied, 694 So. 2d 737 (Fla. 1997).

Standard of Review

Questions of law are subject to de novo review. State v. Baldwin, 686 So. 2d 682 (Fla. 1st DCA 1996).

Merits

Section 893.135(c)1, Florida Statutes, provides:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any . . . hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance but

> less than 30 kilograms of such substance or mixture, commits a felony of the first degree[.] If the quantity involved:
>
> * * *
>
> c. Is 28 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of $500,000.

Hydromorphone is a Schedule II narcotic (section 893.03(2)(a)1, Fla. Stat.) and is the active ingredient in Dilaudid, a prescription drug manufactured under the supervision of the federal Food and Drug Administration. Each tablet contains four milligrams of hydromorphone combined with sodium citrate and citric acid. Physician's Desk Reference,1995 edition, p 1224. The tablets seized from petitioner's residence and the controlled delivery weighed 31.1 grams. The hydromorphone in the 349 tablets weighed 1.5 grams.

Chapter 893 contains no definition of the term mixture; however, in Chapman v. United States, 500 U.S. 453 (1991), the Supreme Court interpreted the term mixture, as used in the federal sentencing guidelines. Without a statutory definition, the court turned to the ordinary meaning: a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly co-mingled are regarded as retaining a separate existence (emphasis added) or two substances blended together so that the particles of one are diffused among the particles of the other. The

hydromorphone, sodium citrate and citric acid are in fixed proportions and are precisely combined to form a distinct product. The end product is unique and is not a mixture as defined by Chapman.

Petitioner has found no Florida case involving small amounts of hydromorphone; however, the Fifth District has held that a defendant who deals in tablets containing small amounts of a hydrocordone is subject to prosecution for trafficking if a sufficient number of tablets is involved.[1] State v. Baxley, supra; State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998). The First and Second Districts have held that if a mixture containing a controlled substance falls within the parameters set forth in Schedule III, the amount of the controlled substance per dosage unit, not the aggregate amount or weight, determines whether the defendant may be charged with violating the trafficking statute. State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997); State v. Perry, 716 So. 2d 217 (Fla. 2d DCA 1998).

As stated by this court in State v. Yu, 400 So. 2d 762 (Fla. 1991), a mixture can be distributed to a greater number of people than the same amount of an undiluted substance. Under the Baxley rationale, any person who knowingly sells, purchases, manufactures, delivers, or brings into Florida 28 grams or more

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[1]Hyrdocodone is both a Schedule II and Schedule III controlled substance. § 893.03(2)(a)1, Fla. Stat.

of a mixture containing a total of 1.5 grams of hydromorphone will receive a 25-year mandatory minimum sentence while any person who knowingly sells, purchases, manufactures, delivers, or brings into Florida 27.9 grams of pure hydromorphone is less severely punished. It is illogical to conclude that the legislature intended such a disparate result.

Such a disproportionate sentence leads to an absurd result, and statutes should not be interpreted in a manner that leads to absurd results. State v. Goodson, 403 So. 2d 1337 (Fla. 1981). Penal statutes must be strictly construed (State v. Camp, 596 So. 2d 1055 (Fla. 1992)), and where a statute is susceptible to more than one meaning, it must be construed in favor of the accused (Scates v. State, 603 So. 2d 504 (Fla. 1992)). The trial court erred by considering the aggregate amount of hydromorphone in the seized Dilaudid, and the Fifth District erred by affirming the trial court's ruling.

POINT II

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO ESTABLISH THE QUANTITY OF DILAUDID INVOLVED IN THE ALLEGED CONSPIRACY.

The State alleged that between July 3, 1993 and January 26, 1996, petitioner conspired with Mary Harris and/or others to traffic in 28 grams or more of Dilaudid. At the conclusion of the State's case and at the conclusion of all evidence petitioner moved for a judgment of acquittal on the ground that the State failed to prove the quantity of Dilaudid involved in the alleged conspiracy. The trial court denied the motions.

Standard of Review

In ruling on a motion for acquittal, the trial judge must determine if the State presented competent evidence from which the jury could infer guilt to the exclusion of all other inferences. State v. Law, 559 So. 2d 187, 189 (Fla. 1989).

Merits

Even if this court determines that the aggregate weight of the hydromorphone in the 349 Dilaudid tablets can be considered, petitioner's conviction must be reversed where the State failed to adduce competent substantial evidence to support the verdict. The record does not support a conclusion that the entire quantity of Dilaudid seized from the residence was the object of the alleged conspiracy.

A conspiracy to traffic in Dilaudid requires an express or implied agreement or understanding between two or more persons to commit the offense. The State must prove both the agreement and the intent. See, Spera v. State, 656 So. 2d 550 (Fla. 2nd DCA 1995). The conspiracy is a separate and distinct crime from the object of the conspiracy.

To support a conviction for conspiracy to traffic, the State had to prove the amount of Dilaudid involved in the conspiracy. See, Williams v. State, 592 So. 2d 737 (Fla. 1st DCA 1992), rev. denied, 601 So.2d 553 (Fla. 1992). A conviction cannot be sustained when the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, unless the evidence is inconsistent with any reasonable hypothesis of innocence. State v. Law, supra. The State failed to adduce evidence that petitioner conspired with Mrs. Harris and/or others to sell, purchase, deliver, or possess 28 grams of more of Dilaudid.

The State charged petitioner with trafficking in 4-14 grams on November 3, 1995 (Count II), trafficking in 14-28 grams on January 26, 1996 (Count III), and conspiracy to traffic in 28 grams or more between July 3, 1993 and January 26, 1996 (Count I). Count II is based upon 52 Dilaudid tablets (4.5 grams) seized from petitioner's bedroom on November 3, 1995. Count III is based upon 197 Dilaudid tablets (17.6) grams seized by a

controlled delivery on January 26, 1996. Count I is based upon the quantity in Counts II and III plus 100 Dilaudid tablets (nine grams) found in a locked safe in Mary Harris' bedroom on January 26, 1996.

Because John Faulds did not know the exact quantity of Dilaudid sold from the residence, the State introduced, inter alia, copies of money orders to Scott and/or Kelly Silver in San Jose, California, used and unused syringes seized from trash pulls and the residence, empty syringe boxes, copies of prescriptions for Dilaudid, empty prescription bottles, a prescription bottle containing jewelry, a UPS envelope with no address label, a bill for bottled water, and 349 Dilaudid tablets seized from the residence. Of the 349 tablets (31.1 grams) seized, 4.5 grams were recovered from petitioner's bedroom, 17.6 grams were seized from the controlled delivery, and nine grams were in a sealed prescription bottle in a locked safe in Mrs. Harris' bedroom. Based upon this evidence, the State asked the jury to infer that petitioner conspired with Mrs. Harris and/or others to traffic in 28 grams or more of Dilaudid.

Mrs. Harris is an insulin-dependent diabetic with peripheral neurophy. She has severe ankle and arthritic problems, chronic back pain, herpes, gout, hepatitis, a neurogenic bladder, a hiatal hernia, degenerative disc disease in the lower spine, and breast cancer. She had a cordotomy (partial severance of the

spinal cord) in 1962 and has had multiple back surgeries. She is confined to a wheelchair. A neurogenic bladder and breast cancer can cause mild to severe pain. Christopher Berchelmann, an internist and oncologist, testified that it is fairly common for a patient to become addicted to Dilaudid if taken on a regular basis and that Mrs. Harris probably built up a tolerance for the drug. Sharon Conley, an oncologist at Halifax Medical Center, prescribed Dilaudid for Mrs. Harris from January 1994 to November 1995. Both doctors testified that the prescriptions were reasonable and necessary for Mrs. Harris' medical conditions.

Dr. Conley prescribed seven Dilaudid per day for Mrs. Harris. Faulds testified that Mrs. Harris used six-ten per day and that she sometimes took the drug by injection.[2] Officer Thomas testified that she used two tablets per day. If Mrs. Harris took two Dilaudid per day, over a 30-day period she would consume 60 tablets; if she took the prescribed seven tablets per day, she would consume 210 tablets; and if she took 10 per day, she would consume 300 tablets. The evidence is clear that Mrs. Harris used some Dilaudid every day to control pain and that she sometimes injected the drug. Thus, any Dilaudid obtained by a valid prescription and used by Mrs. Harris could not be part of an alleged trafficking conspiracy.

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[2]Although perhaps not medically recommended, injecting Dilaudid is not a crime where the individual obtains the drug with a valid prescription.

During execution of the warrant, Magaha recovered 100 tablets (nine grams) in a sealed prescription bottle from a locked safe in Mrs. Harris' bedroom (State Exhibit 71). To support the conviction for conspiracy to traffic in Dilaudid, the State had to first prove that the 100 tablets were illicit in nature. A sealed prescription bottle containing Dilaudid tablets which two physicians testified were reasonable and necessary for Mrs. Harris' medical condition does not support an inference that the tablets were illicit in nature. Based upon Dr. Conley's prescribed seven tablets per day, the 100 tablets were less than a 15-day supply.

Assuming arguendo that the 100 tablets were illicit in nature, to establish constructive possession by petitioner, the evidence must demonstrate that petitioner knew of the presence of the substance, that he knew the substance was illicit, and that he had dominion and control over the substance. See, Dupree v. State, 23 Fla. L. Weekly D142 (Fla. 4th DCA Jan. 1. 1998); T.W. v. State, 666 So. 2d 1001 (Fla. 5th DCA 1996). Ability to control cannot be inferred; it must be established by independent proof. Loyd v. State, 677 So. 2d 76 (Fla. 2d DCA 1992). The State offered no evidence that petitioner had dominion and control over tablets. Without the 100 tablets found in Mrs. Harris' bedroom, petitioner's conviction for conspiracy to

traffic in 28 grams or more of Dilaudid alleged in Count I must fail.

POINT III

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY AFFIRMING THE TRIAL COURT'S ADMISSION OF IRRELEVANT, CUMULATIVE, AND PREJUDICIAL EVIDENCE THAT TENDED TO CONFUSE THE ISSUES AND MISLEAD THE JURY.

At trial the State introduced, inter alia, 327 used and sterile syringes seized from trash pulls and from the residence, copies of money orders to Scott and/or Kelly Silver in San Jose, California, empty syringe boxes, copies of prescriptions for Dilaudid, empty prescription bottles, a prescription bottle containing jewelry, a UPS envelope with no address label, and a bill for bottled water. Petitioner objected on the grounds of relevancy, prejudice, confusion, cumulative evidence, improper predicate, authentication, and/or hearsay.

Standard of Review

Evidentiary rulings are within the discretion of the trial court. Denny v. State, 617 So. 2d 323 (Fla. 4th DCA 1993).[3] Where errors are not of a constitutional nature, this court should apply the prejudicial error test of section 924.051. Doherty v. State, 24 Fla. L. Weekly D339 (Fla. 4th DCA Feb. 3, 1999).

Merits

[3]Petitioner notes that Judge Padovano suggests trial judges do not have discretion to admit evidence in violation of a definitive provision of the evidence code. Florida Appellate Practice, 2d ed. (1997), § 9.5 at 153.

Relevant evidence is evidence that tends to prove or disprove a material fact. § 90.401, Fla. Stat. (1997). The State charged appellant with conspiracy to traffic in 28 grams or more of dilaudid (Count I), trafficking in 4-14 grams of dilaudid (Count II), and trafficking in 14-28 grams of dilaudid (Count III). The material fact common to each count is the quantity of dilaudid involved in the alleged conspiracy.

Florida courts have long adhered to the rule proscribing stacking an inference upon an inference to arrive at a factual conclusion. When two or more inferences must be drawn from the evidence and then pyramided to prove the offense, the evidence lacks the conclusive nature to support a conviction. See, Keys v. State, 606 So. 2d 669, 673 (Fla. 1st DCA 1992) and cases cited therein. Petitioner's conviction can only be supported by improperly stacking inferences.

Syringes

Mark McGaha pulled trash from appellant's curbside from August 1995 through January 22, 1996 and participated in the execution of search warrants on November 3, 1995 and January 26, 1996. McGaha seized 327 syringes from trash pulls and from the residence. Of the 327 syringes admitted at trial, 79 tested positive for Dilaudid; 18 tested negative, and 230 were not testing. Based upon the presumption of innocence afforded every criminal defendant and the lack of evidence to the contrary, this

court must assume that the syringes not tested would have tested negative.

The syringes were offered to prove the quantity of Dilaudid involved in the alleged conspiracy. The syringes that were not submitted for testing and the syringes that tested negative are not relevant to prove quantity or any other material fact. Even if the syringes were relevant, the prejudice far outweighed the probative value. By admitting all of the syringes, the trial court confused the issues and misled the jury into believing that all of the syringes were used by buyers of Dilaudid.[4] It cannot be said that the error did not affect the judgment. See, Doherty v. State, supra.

Test Results

Christine May tested the syringes submitted by McGaha by washing each syringe with methanol into a common solution and testing the solution for the presence of hydromorphone. She did not test each individual syringe.[5]

In Ross v. State, 528 So. 2d 1237 (Fla. 3d DCA 1988), rev. denied, 537 So. 2d 569 (Fla. 1988), law enforcement officers seized 92 packets of suspected cocaine in two separate bundles.

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[4]It must be remembered that two insulin-dependent diabetics were in the household and that Mrs. Harris sometimes took Dilaudid by injection.

[5]A list of the syringes and the test results is provided in Appendix A.

One bundle contained 36 packets; the other contained 56 packets. The lab technician chemically tested one packet from each bundle. He then combined the packet with the remaining packets in each bundle and weighed the two bundles. The first bundle weighed 12.6 grams and the second weighed 26.2 grams. Based upon the total weight of 38.8 grams, the defendant was charged with trafficking in cocaine. The appellate court held that the State failed to establish a prima facie case of trafficking where the offense is based upon the amount of contraband. See also, State v. Clark, 538 So. 2d 500 (Fla. 3d DCA 1989), rev. denied, 545 So. 2d 1369 (Fla. 1989) (State commingled contents of tested capsules with contents of untested capsules). In a more recent case the Second District held that the State failed to prove the defendant possessed the requisite amount of cocaine for trafficking where the chemist combined 40 packets into one mixture for testing. Safford v. State, 708 So. 2d 676 (Fla. 2d DCA 1998).

Like the syringes, the test results were offered to prove quantity and suggest that where ten syringes were tested and the solution was positive, all ten contained hydromorphone residue. As in Ross, Clark, and Safford, the charges against appellant are based upon the amount of contraband, and as in Ross, Clark, and Safford, the syringes were separate and distinct containers of contraband. In a household that has two insulin-dependent diabetics, the test method was inherently unreliable, and it

cannot be said that the admission of the test results did not affect the judgment. See, Doherty v. State, supra.

CONCLUSION

Based upon the authorities cited and the arguments presented, this court should reverse the decision of the Fifth District Court of Appeal and remand for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. William B. Harris, DC# C060303, South Bay Correctional Institution, 600 U.S. Highway 27 South, South Bay, FL 33493, this 23d day of February, 1999.

_____
DEE BALL
ASSISTANT PUBLIC DEFENDER

APPENDIX A

Date (1995)	Item	Exhibit No.	Test Results
8/7	71 syringes	30	Not tested
	10 syringes	31(Q1)[6]	Positive
8/28	2 syringes	32(Q2)	Negative
9/4	7 syringes	33(Q3)	Positive
9/11	10 syringes	36(Q4)	Positive
	35 syringes	37	Unknown[7]
9/21	10 syringes	38(Q5)	Positive
	46 syringes	39	Not tested
10/9	10 syringes	41(Q6)	Positive
	5 syringes	42	Not tested
10/19	27 syringes	43	Not tested
10/19	3 syringes	44(Q7)	Positive
11/3	1 syringe	18	Not tested
	2 syringes	21	Not tested

[6]Each submission was assigned a Q number by FDLE.

[7]The transcripts indicates that State Exhibit 37 consisted of 35 syringes. McGaha testified that of the 35, the ones contained in the yellow envelope were submitted for testing. Petitioner is unable to identify the syringes submitted for testing.

Date	Item	Exhibit No.	Test Results
11/19	4 syringes	45	Not tested
11/20	7 syringes	47(Q9)	Positive
12/4	3 syringes	48(Q10)	Positive
12/7	1 syringe	49(Q11)	Positive
12/18	12 syringes	50(Q12)	Positive
	11 syringes (6 tested)	51(Q13)	Positive
	8 syringes	52	Not tested
(1996) 1/4	3 syringes	53	Not tested
	8 syringes	54	Not tested
1/8	5 syringes	57(Q16)	Negative
1/22	8 syringes	58(Q17)	Negative
1/26	3 syringes	60(Q21)	Negative
	7 syringes	23	Not tested
	3 syringes	27	Not tested
	5 syringes	29	Not tested

All exhibits were admitted over objection. The list is extrapolated from TR. 472-505, 514-520, vol. 9, TR. 677-80, 715-35, 743, vol. 10, and the index to record on appeal, vols. 4 and 5.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 12 point proportionally spaced Courier New.

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Dee Ball
Assistant Public Defender