IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,582

ZACKERY HOLIDAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

MERIT BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MICHAEL A. WASSERMAN #0003077
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_____/

PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order dated July 13, 1998, this brief has been printed in 12 point Courier New, a font that is not proportionately spaced. Petitioner was the appellant in the First District Court of Appeal and the defendant in the circuit court, and will be referred to as petitioner or by proper name in this brief. Respondent was the appellee and the prosecution respectively. A three-volume transcript, including the record on appeal, jury selection, jury trial, and sentencing, will be referred to as "I, II, or III," followed by the page number in parenthesis.

STATEMENT OF THE CASE

Zackery Holiday was arrested June 14, 1997, and by information filed July 3, was charged with sale or delivery of cocaine (I-1-8). The cause proceeded to trial October 16 (III-101). The jury found Mr. Holiday guilty of sale of cocaine as charged (I-57, III-287). Mr. Holiday was adjudicated guilty and sentenced to 15 years in state prison as an habitual felony offender (I-74-83).

A notice to invoke discretionary jurisdiction of this Court was filed April 13, 1999. This Court subsequently entered an order setting a briefing schedule.

STATEMENT OF THE FACTS

A. Elegino of the Jacksonville Sheriff's Office testified that on June 14, 1997, he was working an undercover buy/bust operation (III-116). Elegino was a passenger in a vehicle driven by Detective Restivo and there were eight other officers that served as take down units in this drug operation (III-117). Around 3:00 p.m., Elegino and Restivo were parked in front of a food market when Holiday approached their car and asked what they were looking for (III-119). Elegino did not ask Holiday anything before he asked this question (III-120). Elegino told Holiday he was looking for $20 worth of crack cocaine (III-120). Holiday told Elegino to stand by, and walked over to another male on 9th Street, who waved Holiday away (III-121). Holiday returned and entered the rear of Elegino's car (III-121). Holiday directed the car to a residential area at 10th and Market Street (III-122). Holiday asked Elegino to go inside the house with him while Restivo remained in the car (III-122). Holiday told another male they were looking for crack cocaine (III-123). The male left while Holiday and Elegino waited (III-123). Elegino noticed a gun on the coffee table and notified the take down units through his monitor (III-123). None of the transmissions were taped (III-124). Elegino went outside to talk with Restivo about the situation and returned to the house with Restivo (III-125). The person returned without any crack cocaine and Elegino told Holiday he was going to check some other locations

(III-126). Holiday said he would help and directed the car to 4th and Market Street, where he asked Elegino for $20 (III-126). Holiday disappeared for a few minutes then returned to the back seat of the car and gave Elegino a piece of crack cocaine (III-127). Elegino gave the take down signal and Holiday, still seated in the car, was arrested within seconds (III-127). Holiday was searched and no money or drugs were recovered (III-127-128). A crack pipe was found on Holiday (III-128).

On cross-examination, Elegino testified that in the year and a half he has done but/bust operations, he had no prior contact with Holiday (III-130). Neither a video camera or a tape recorder was used for this transaction (III-131-134). There were no reports that Holiday was selling drugs outside the store (III-134). Elegino and Restivo had a failed drug transaction right before they met Holiday (III-134). Elegino gave someone a $20 bill in exchange for a promise to return with a piece of crack cocaine (III-134). Elegino did not remember asking Holiday about the guy that ran off, but Restivo may have (III-135). Elegino did not promise to give Holiday a bump[1] because this was not their policy (III-136). Holiday did not ask Elegino for money at the house on 10th Street, but asked him to come inside (III-137). They spoke with an older man, but Elegino did not give him $20 (III-138). While waiting

[1]A bump is a piece of crack cocaine usually taken from the larger purchased piece (III-136).

inside the house, Holiday pulled out his crack pipe and began to warm it with a lighter (III-139). On 4th Street Holiday asked for $20 and received a marked bill (III-140). Holiday returned a few minutes later and reentered the car to give Elegino the piece of crack cocaine (III-140-141).

On redirect examination, testified that video cameras were not used for buy/bust operations because of the availability of take down units (III-143). Audio taping equipment would have required separate officers to monitor and tape, thereby reducing the number of available officers for the take down (III-144). There were four people inside each of the take down cars used in this operation (III-144). On re-cross examination, Elegino testified that good video equipment would have picked up the conversation between himself and Holiday verbatim (III-146).

The next witness was Paul Restivo of the Jacksonville Sheriff's Office (III-147). On March 14, Restivo worked an undercover buy/bust operation with Elegino (III-148). Restivo and Elegino parked in a parking lot in front of a convenience store when Holiday walked up to the passenger window and asked what they needed (III-149). Elegino told Holiday what he wanted and Holiday walked away for a minute (III-150). Holiday returned and decided to get in the back seat of their car (III-150). Holiday gave them directions to a house on 10th and Market (III-151). Holiday got out and told Elegino to come with him and Restivo to wait in the

car (III-151). Eventually, Elegino came outside and waved for Restivo to come inside the house (III-152). They were unable to get any crack cocaine at the house and when Restivo and Elegino attempted to leave, Holiday insisted on trying to get them some crack cocaine (III-152). Holiday left with them and directed them to 4th and Market (III-153). Elegino gave Holiday $20 and waited in the car (III-153). Holiday returned a few minutes later, got back inside the car, and handed Elegino a piece of crack cocaine (III-154). The take down signal was given and units arrived a few seconds later (III-154). Holiday was sitting in the back seat of he car when arrested (III-154).

On cross-examination, Restivo testified that he met Holiday for the first time in the store parking lot (III-156). Restivo and Elegino's attempt to buy crack cocaine just before Holiday was unsuccessful because the person ran off with their money (III-157). This person was wearing a black shirt and Restivo did not remember if Elegino asked Holiday if he knew the guy in the black shirt (III-157). Elegino asked Holiday if he could help him find a 20, and Holiday agreed (III-157). Restivo did not believe Elegino promised Holiday anything for his help, but that Elegino was the person dealing with Holiday (III-158). Holiday and Elegino went inside the house, but Elegino did not give him any money at that time (III-159). When Restivo went inside the house, he saw Holiday lighting his crack pipe (III-160). Since there was nothing inside

the pipe, Restivo did not believe Holiday was smoking anything (III-161). Holiday's pipe was a homemade pipe with a metal rod (III-161). Restivo did not remember offering Holiday a glass pipe that was in the car or if he had a glass pipe (III-162). When the older man came back without any crack cocaine, Elegino, Restivo, and Holiday got back in the car and went to 4th Street (III-163). Holiday got out of the car with $20 that Elegino gave him (III-163). Restivo did not remember if Holiday left his wallet and crack pipe with Elegino to ensure his coming back (III-164). Holiday returned, got back inside the car, and handed Elegino the piece of crack cocaine (III-165). The take down signal was given and Holiday was arrested a few seconds later (III-165). Restivo did not witness the search of Holiday (III-167).

The next witness was L. Thomas of the Jacksonville Sheriff's Office (III-173). Thomas was in the take down unit involved in this case (III-174). Thomas arrested Holiday while he was seated in the undercover police car (III-175). Elegino gave the take down signal and Thomas responded (III-175). Thomas was not paying attention to the conversations in the car, he only listened for the take down signal (III-175). Seconds after receiving the signal, Holiday was arrested and searched (III-176). Thomas found nothing on Holiday, but later that day Thomas found out Holiday had a crack pipe (III-176-177).

On cross-examination, Thomas testified that he did not know

who found the crack pipe (III-177). Thomas searched Holiday for weapons and did not find the crack pipe (III-177). Holiday did not have any contraband or money when he was arrested (III-178).

On redirect examination, Thomas testified that officer Weber took Holiday after he was searched (III-179). Thomas was looking for weapons such as a knife or gun on Holiday (III-180). Holiday did not have any weapons (III-180).

On recross examination, Thomas testified that he did a pat down search of Holiday for additional cocaine and weapons but did not search the inside of Holiday's pockets (III-181). Thomas did not find anything during this search (III-182).

The state's final witness was chemist Neils Bernstein (III-182). The substance Bernstein received tested positive as cocaine (III-184-187).

The defense called Zachary Holiday (III-201). Holiday is a 29 years old and has been addicted to crack cocaine for ten years (III-202). Holiday has been to a detoxification center, but never to drug rehabilitation (III-203). Holiday has been convicted of six felonies and one petit theft (III-206). On March 14, Holiday had an argument with his wife and left their house (III-206). Holiday had no money, so he donated plasma to get $20 (III-206). Holiday went to his stepfather's house and the two used drugs (III-207). Holiday went to the convenience store to get a 50 cent beer (III-207). The undercover police car was parked right in front of

the store's entrance (III-208). Holiday said, "How y'all doing?" and Elegino asked if he had seen someone wearing a black shirt (III-208). Elegino said he gave that person money to get some dope, but that he did not come back (III-208). Elegino asked Holiday if he knew where to get $20 worth of crack cocaine and Holiday said he would find them some if they would give him a piece (III-208). Holiday got in their car and they drove to his stepfather's house (III-209). Holiday and Elegino went inside the house (III-210). Elegino gave Holiday's stepfather $20 to get drugs, while Holiday and Elegino waited in the house (III-210). Holiday sat in a chair and warmed up his crack pipe so he could smoke any remaining residue to get high (III-210). Elegino and Restivo were inside when Holiday smoked the residue (III-211). Restivo asked Holiday if he wanted to use the glass pipe[2] that was in their car, but Holiday told them not to run in and out of the house (III-211). Holiday's pipe was a five or six inch piece of metal car antenna (III-212). Holiday's stepfather returned after ten or fifteen minutes without any cocaine and gave Elegino the $20 (III-213). Holiday told them they could go somewhere else to find crack cocaine (III-213). Holiday made this offer because he wanted a bump (III-213). They drove to 4th Street and Holiday asked about the money (III-214). Elegino said he wouldn't let his money go

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[2]A glass pipe provides a better high because you only taste cocaine (III-212).

like that, so Holiday gave him his wallet and crack pipe (III-214). Holiday got the crack cocaine and returned to the car (III-215). Holiday got back inside the car because he was going to get a piece of the crack cocaine and Elegino had his wallet and crack pipe (III-215). The car began to drive and then the other detectives arrived and Holiday was arrested and searched (III-216). Holiday did not have any marked money or cocaine in his possession (III-216). Holiday would not have tried to help Elegino and Restivo if he had not been offered a piece of cocaine (III-217).

On cross-examination, Holiday testified that his wallet did not have any money inside but contained his ID (III-217-218). Three of Holiday's convictions are for sale or delivery of cocaine (III-220-221). Holiday did not approach the police officers regarding crack cocaine (III-222). Holiday was walking into the store and asked the officers how they were doing (III-222). Elegino then asked if Holiday had seen the guy in the black shirt (III-222). Holiday didn't care who they were when they asked him about providing crack cocaine (III-225). Holiday did not walk away because the officers said they would give him a piece of the crack cocaine, which would help to feed his addiction (III-226). Holiday could have run away with the piece of cocaine that he purchased, but returned for his wallet and crack pipe (III-228).

SUMMARY OF ARGUMENT

At trial, petitioner admitted selling cocaine to an undercover police officer. However, during petitioner's case, he testified he was entrapped into doing so. The trial court instructed the jury that the burden was on the defendant to prove by a preponderance of the evidence that he was entrapped. At no time did the trial court instruct the jury that the state had the burden to prove beyond a reasonable doubt that petitioner was not entrapped. Petitioner contends that the jury instruction on entrapment was incomplete and misleading. Since the incomplete and misleading instruction went to the foundation of the case or merits of the cause of action and because the only contested issue at trial was whether petitioner was entrapped, the error is fundamental.

ARGUMENT

ISSUE PRESENTED:

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY THAT THE DEFENDANT WAS REQUIRED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HIS CRIMINAL CONDUCT OCCURRED AS A RESULT OF ENTRAPMENT, SINCE SUCH INSTRUCTION IS INADEQUATE AND INCOMPLETE, THEREBY DEPRIVING PETITIONER OF HIS RIGHT TO DUE PROCESS OF LAW SECURED BY ARTICLE I, SECTIONS 9 AND 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V AND XIV, CONSTITUTION OF THE UNITED STATES OF AMERICA.

In its decision in the instant case, the First District Court of Appeal affirmed Mr. Holiday's conviction, holding that he had not demonstrated fundamental error, as the omission was to a portion of the jury instruction on entrapment, a defense, rather than an essential element of the crime charged. The First District Court recognized the Fourth District ruled to the contrary in Miller v. State, 723 So. 2d 353 (Fla. 4th DCA 1998), and certified conflict with that decision.

At trial, Mr. Holiday took the stand on his own behalf and testified that, while indeed he did sell cocaine, he had been entrapped by Detective Elegino (III-217). After Mr. Holiday testified, the state never did claim he was not entitled to an instruction on entrapment as a defense. Without objection, the trial court gave the standard jury instruction on entrapment (III-278). As part of that instruction, the trial court instructed the jury as follows:

> THE COURT: On the issue of entrapment the defendant must prove to you by preponderance of the evidence that his criminal conduct occurred as a result of entrapment.

(III-278).

Petitioner contends this portion of the entrapment instruction is both incomplete and misleading. Petitioner further contends that, since the erroneous instruction went to the only contested issue at trial, whether or not petitioner was entrapped, the error is fundamental.

In Miller v. State, 723 So. 2d 353 (Fla. 4th DCA 1998), the petitioner was tried and convicted for trafficking and conspiracy to traffic in 400 grams or more of cocaine. Miller did not object as the trial court instructed the jury on the defense of entrapment via the standard jury instruction. The Fourth District, following their own precedent in Vazquez v. State, 700 So. 2d 5 (Fla. 4th DCA 1997), held the trial court committed fundamental error by giving the standard jury instruction on entrapment.

In Vazquez v. State, 700 So. 2d 5 (Fla. 4th DCA 1997), the Fourth District held that the standard jury instruction in entrapment was incomplete and misleading in that it suggests the defendant has the burden of proving entrapment by a preponderance of the evidence. See Henkel v. State, 709 So. 2d 130 (Fla. 4th DCA 1998). The court in Vazquez noted that, in Munoz v. State, 629 So. 2d 90 (Fla. 1993), our supreme court aligned the law of entrapment with that of the Supreme Court of the United States in Jacobson v.

United States, 503 U.S. 540 (1992). Under both Jacobson and Munoz, it was held that, while the defendant has the burden of proving inducement, once the defendant presents any evidence showing a lack of predisposition, the burden of proving predisposition shifts to the government to overcome the defendant's showing beyond a reasonable doubt.

Petitioner cannot express the reasoning any better that Judge Farmer did in authoring the Vazquez opinion for the Fourth District. Petitioner accordingly expressly relies upon Judge Farmer's erudite analysis and reasoning.

Based upon Vazquez, petitioner contends he has shown that, to the extent the standard jury instruction does not advise the jury that the state has to prove beyond a reasonable doubt that the accused was not entrapped, after the accused has presented evidence of entrapment, the standard instruction is incomplete and misleading. As noted in Vazquez, there is no magic in the fact that the erroneous instruction is a standard one, because in State v. Bryan, 287 So. 2d 73 (Fla. 1973), it was held that despite the approval of a standard jury instruction, the trial judge is not relieved of his duty to correctly instruct the jury.

It is recognized that no objection was made to the given entrapment instruction by either party. However, if an error is deemed "fundamental," no objection is necessary. Clark v. State, 363 So. 2d 331 (Fla. 1978). An error is fundamental if it goes to

the foundation of the case or tot he merits of the cause of action. Clark.

Here, the error in the jury instruction related to the sole issue at trial, namely, whether petitioner was entrapped. While the jury was instructed that the state must prove the elements of sale or delivery of cocaine beyond a reasonable doubt, they were ***never*** instructed that, once the defense of entrapment was raised, the government had to prove beyond a reasonable doubt that appellant was not entrapped. Moreover, in closing, the prosecutor pointed out that the burden of proving entrapment was appellant's, and that the defense had not proved entrapment (III-261).

Case law holds that it is fundamental error if the jury is instructed on a crime different from that with which the defendant is charged and convicted. Viveros v. State, 699 So. 2d 822 (Fla. 4th DCA 1997) and Adams v. State, 681 So. 2d 917 (Fla. 4th DCA 1996). The present situation is analogous because the defense of entrapment, as described in Vazquez and Munoz, is not the same defense of entrapment that was actually instructed on.

Case law holds that fundamental error results when an incomplete and inaccurate instruction is given on the element of the offense. Viveros and Jones v. State, 666 So. 2d 995 (Fla. 5th DCA 1996). The instant case is analogous in the sense that, in this case, there was an incomplete and misleading instruction as to who has the burden of proving the elements of the defense of

entrapment, the defense or the state.

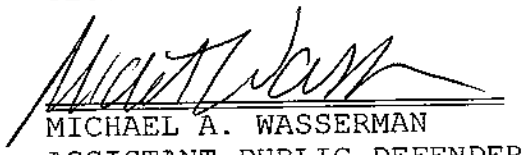
For these reasons, petitioner contends he has shown that the error in the entrapment instruction is fundamental, and as such can be reviewed in the absence of an objection in the trial court.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Mr. Holiday requests that this Court quash the decision of the First District Court of Appeal, apply the Fourth District Court of Appeal decision in Miller v. State, 723 So. 2d 353 (Fla. 4th DCA 1998), and reverse the judgement and sentence below, with directions that Mr. Holiday be afforded a new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to appellant, Mr. Zackery Holiday, DOC# 117806, Bay Correctional Institution, 5400 Bayline Drive, Panama City, FL 32404, on this ____ day of June 1999.

MICHAEL A. WASSERMAN

IN THE SUPREME COURT OF FLORIDA

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APPENDIX

PAGE

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ZACKERY HOLIDAY,

Appellant,

v.

CASE NO. 97-4353

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed April 13, 1999.

An appeal from the Circuit Court for Duval County.
William A. Wilkes, Judge.

Nancy A. Daniels, Public Defender; Michael A. Wasserman, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

The issue raised in this appeal is whether the trial court erred fundamentally by giving the jury the standard instruction on entrapment in effect in 1997, when this offense and appellant's trial took place. The standard instruction was changed effective

July, 1998, and is now consistent with the supreme court's analysis of the entrapment defense found in Munoz v. State, 629 So. 2d 90 (Fla. 1993). See Standard Jury Instructions in Criminal Cases, 723 So. 2d 123 (Fla. 1998). See also Vasquez v. State, 700 So. 2d 5 (Fla. 4th DCA 1997), appeal dismissed, 718 So. 2d 755 (Fla. 1998). It is undisputed that no objection was raised at trial to the standard jury instruction.

In Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993), the supreme court ruled that "[f]ailure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error." Since the entrapment instruction pertains to a defense rather than to an essential element of the crime charged, no fundamental error occurred. We recognize that the Fourth District recently ruled to the contrary in Miller v. State, 723 So. 2d 353 (Fla. 4th DCA 1998), and accordingly certify conflict with that decision.

AFFIRMED.

BOOTH, JOANOS and WEBSTER, JJ., CONCUR.