IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

v. CASE NO. 95,749

DEBRA WRIGHT,

RESPONDENT.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

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Respondent.

BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court, and will be referred to as respondent in this brief. Petitioner will be referred to as petitioner or the state. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as State v. Wright, 24 Fla. L. Weekly D1290 (Fla. 1st DCA May 27, 1999).

Counsel certifies that this brief is printed in 12 point Courier New font.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts set forth by petitioner.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that the position of the lower tribunal on this issue is correct. The lower tribunal was correct in following its previous precedent. The lower tribunal read all of the statutes together and held that when a defendant is charged with trafficking in a mixture of hydrocodone, the amount of the controlled substance per dosage unit, and not the aggregate amount or weight, is determinative. The other district courts of appeal are divided on this issue and have certified conflict. This Court should adopt the position expressed by the First District.

IV ARGUMENT

THE DISTRICT COURT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S ORDER DISMISSING A COUNT CHARGING THE DEFENDANT WITH TRAFFICKING IN HYDROCODONE WHEN F.S. 893.135(1)(c)1. IS NOT VIOLATED BY THE POSSESSION OF FOUR OR MORE GRAMS OF ANY MIXTURE CONTAINING HYDROCODONE.

The lower tribunal was controlled by its prior opinion in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), in which the court held that a defendant charged with trafficking in a mixture containing hydrocodone could not be prosecuted based upon the aggregate weight of the substance. The Holland court certified conflict with State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), *rev. denied* 694 So. 2d 737 (Fla. 1997), but apparently the state did not seek further review of State v. Holland.

Since State v. Holland, the other district courts of appeal have split over this issue. The Second follows the First District's position. State v. Perry, 716 So. 2d 327 (Fla. 2nd DCA 1998); State v. Alleman, 23 Fla. L. Weekly D2000 (Fla. 2nd DCA Aug. 26, 1998), *rev. granted*, case no. 93,883 (Fla. Dec. 28, 1998); and State v. Wells, 23 Fla. L. Weekly D2000 (Fla. 2nd DCA Aug. 26, 1998), *rev. granted*, case no. 93,882 (Fla. Dec. 28, 1998).

The Fourth follows the Fifth District's position. State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998); Johnson v. State, 23 Fla. L. Weekly D2419 (Fla. 4th DCA Oct. 28, 1998);

State v. Falkenstein, 720 So. 2d 1143 (Fla. 4th DCA 1998); State v. Bates, 24 Fla. L. Weekly D116 (Fla. 4th DCA Dec. 23, 1998); and State v. Dial, 730 So. 2d 813 (Fla. 4th DCA 1999).

The Fifth has adhered to State v. Baxley. Potts v. State, 710 So. 2d 1387 (Fla. 5th DCA 1998); and Harris v. State, 24 Fla. L. Weekly D215 (Fla. 5th DCA Jan. 15, 1999).

In State v. Holland, the First District construed §§893.03(2)(a)1., 893.03(3)(c)4., and 893.135(1)(c)1., Fla. Stat. (1993):[1]

> Section 893.135(1)(c)1, Florida Statutes (1993), prohibits the sale, purchase, manufacture, delivery, or possession of 4 grams or more of any substance described in section 893.03(1)(b)(Schedule I narcotics), any substance described in section 893.03(2)(a)(Schedule II narcotics), or 4 grams or more of any mixture containing any such substance. Hydrocodone is not listed as a Schedule I narcotic. It is, however, listed as a Schedule II narcotic as follows:
>
> > (2) SCHEDULE II.--A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. The following substances are controlled in Schedule II:
> >
> > (a) Unless specifically excepted or unless listed in another schedule, any of the following substances, whether

[1]The statute is the same today.

> produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis:
>
> 1. Opium and any salt, compound derivative, or preparation of opium, except nalmafene or isoquinoline alkaloids of opium, including, but not limited to the following:
>
> j. Hydrocodone.

Section 893.03(2)(a)1, Florida Statutes (1993). Hydrocodone is also listed as a Schedule III narcotic as follows:

> (3) SCHEDULE III.--A substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. The following substances are controlled in Schedule III:
>
> (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following controlled substances or any salts thereof:
>
> 4. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.

Section 893.03(3)(c)4, Florida Statutes

(1993).

689 So. 2d at 1269. The First District read the statutes together and held:

> Herein, the amount of hydrocodone contained in the Vicodin and/or Lortab tablets was less than 15 milligrams per dosage unit. The State, while conceding that this concentration of hydrocodone per dosage unit brings the substance charged within the ambit of Schedule III, argues that the trafficking statute nevertheless applies because it prohibits the sale or possession of 4 grams or more of any mixture containing hydrocodone. We disagree. **Reading sections 893.135(1)(c)1 and 893.03(3)(c)4 in concert, it is clear to us that, if a mixture containing the 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 section 893.135(1)(c)1, Florida Statutes.** The Lortab and/or Vicodin tablets allegedly sold by Holland do not fall within the trafficking statute charged because the concentration of hydrocodone per dosage unit is less than 15 milligrams; the concentration of hydrocodone per dosage unit will remain below this threshold regardless of the number of tablets sold.
>
> We acknowledge that the Fifth District Court of Appeal has recently reached a contrary result in *State v. Baxley,* 684 So.2d 831 (Fla. 5th DCA 1996)(where the number of tablets aggregates 4 grams or more of hydrocodone or a mixture of hydrocodone, prosecution is proper under s 893.135). We therefore certify conflict with that decision.

689 So. 2d at 1269-70; emphasis added.

The reasoning of the First District is preferred over that of the Fifth. This Court should approve the holding of the First District in State v. Holland and overrule the contrary holdings of the Fourth and Fifth Districts.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court affirm the decision of the lower tribunal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief of Respondent has been furnished to James W. Rogers and Giselle Lylen Rivera, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, this ___ day of July, 1999.

P. DOUGLAS BRINKMEYER