IN THE SUPREME COURT OF FLORIDA

SHAWN WASHINGTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,028

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, SHAWN WASHINGTON, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with Respondent’s statement of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I.

The trial court did not abuse its discretion by refusing petitioner's request for a jury instruction on guilty knowledge when the standard jury instruction was adequate and the current standard jury instructions are discretionary regarding whether a more specific knowledge instruction is necessary. Even if this Court finds that the trial courts election was error, it was harmless. The error was harmless because: (1) the jury instruction was adequate; (2) the current jury instructions are discretionary, regarding whether a more specific knowledge instruction is required and (3) petitioner's defense was not based on a lack of knowledge about the illicit nature of the substance but rather based on misidentification. Thus, petitioner has failed to demonstrate how the standard jury instructions were prejudicial.

ISSUE II.

The trial court did not commit reversible error in allowing the officer to testify that a drug seller would not have paraphernalia on him, that a seller would have a larger amount of drugs than for personal use and that a seller would have at least fifty dollars cash on him. Because appellant was convicted of the lesser included offense of possession of a controlled substance, any error in allowing the officer's testimony could not have affected the jury's verdict. The jury rejected the

State’s contention and the officer’s testimony indicating that the appellant possessed the drugs with intent to sell them.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE IS DISCRETION BY DENYING APPELLANT REQUEST FOR JURY INSTRUCTION ON GUILTY KNOWLEDGE WHEN THE STANDARD JURY INSTRUCTION WAS ADEQUATE AND IF THE COURT'S ELECTION WAS ERROR, IT WAS HARMLESS? (Restated)

Facts

Before trial, petitioner filed a request for a special jury instruction which read as follows:

> The State must prove beyond and to the exclusion of every reasonable doubt that at the time of arrest the Defendant knew of the illicit nature of the content of the retrieved bag. State v. Dominguez, 509 So.2d 917 (Fla. 1987); State v. Medlin, 273 So.2d 394 (Fla. 1973); Chicone v. State, 21 FLW S 458 (Fla. 1996).

(R. 12). At the charge conference, the trial court stated that the defense counsel could argue that petitioner had not known that the substance was drugs but denied appellant's requested instruction because he believed it was "adequately covered by the standard jury instruction." (T. 91-92).

The police officer testified that on the night in question, he watched the defendant while concealed in bushes from twenty feet away. (T. 37). A white car stopped and the defendant "hobbled" to the driver's side window and talked to the driver. (T. 39). The defendant then walked back to where he had been standing, reached into the bushes, retrieved a brown paper bag, reached into the paper bag and took out a dime bag of cannabis. (T. 39). The defendant then put the bag back into the bushes and walked over to the driver's window of the car. The defendant exchanged the dime bag for money. (T. 39). Another person who was

standing near petitioner made a drug sale while the officer was observing by retrieving a pill bottle from a different bush and selling a piece of crack cocaine. (T 41). After petitioner walked away to watch an accident that occurred nearby, the officer retrieved appellant's brown paper bag. (T. 40). The bag contained four dime bags of cannabis and nine pieces of crack cocaine. (T. 42).

On cross-examination, defense counsel asked the officer about his police report. The officer acknowledged that his report said that "D-1", petitioner, had gone out to the car and conversed with the driver and then the report stated that "D-2", who was not petitioner, retrieved the bag from the bushes and gave the drugs to the driver. (T. 56-57). The officer testified that this was a mistake - that the report should have indicated that "D-1", petitioner, had retrieved the bag and sold the drugs to the driver. The officer testified that he had corrected the mistake by contacting the State Attorney's office. (T. 44, 57). The officer testified that although he was permitted to file a supplementary report, he had not done so. (T. 59).

Standard of Review

Trial judges have broad discretion regarding jury instructions, and the appellate courts will not reverse a decision regarding an instruction in the absence of prejudicial error that would result in the miscarriage of justice. Shepard v. State, 659 So. 2d 457, 459 (Fla. 1995). A trial court's decision on the giving or withholding of a proposed jury instruction is

reviewed under the abuse of discretion standard of review. Pozo v. State, 682 So.2d 1124, 1126 (Fla. 1st DCA 1996); Bozeman v. State, 714 So. 2d 570. (Fla. 1st DCA 1998); Booker v. State, 514 So. 2d 1079, 1085 (Fla. 1987)(defining "abuse of discretion" -- discretion is abused only where no reasonable man could take view adopted by the trial court.)

Preservation

Appellant preserved the issue within the meaning of § 924.051(1)(b), Fla. Stat. (1997).

Merits

At issue is whether this Court's decision in Chicone v. State, 684 So. 2d 736 (Fla. 1996) established a per se rule that upon a defendant's request the court must grant the requested guilty knowledge instruction regardless of whether the defendant asserts a lack of knowledge as a defense and regardless of whether the standard jury instructions are adequate. It is the State's position that the trial court did not abuse its discretion by denying Appellant's requested instruction because the standard jury instruction was adequate and a more specific knowledge instruction is discretionary and contingent upon the "defense seeking to show a lack of knowledge as to the nature of particular drug." See, Fla. Std. Jury Instr. (Criminal), Drug Abuse-Possession F.S. 893.13(1)(f).

A source of the confusion, is that typically a requested jury instruction is contingent upon an Appellant's defense. In Chicone v. State, 684 So. 2d 736 (Fla. 1996), this Court has

ruled that the guilty knowledge jury instruction is actually an element of the State's case, an element of the crime.

> We hold that guilty knowledge is an element of possession of a controlled substance under section 893.13(1)(f), Florida Statutes, (1991), and possession of drug paraphernalia under section 893.147(1), Florida Statutes (1995).

Id. at 737. At the same time, this Court has ruled that standard jury instructions are adequate but suggests that the court should grant the guilty knowledge instruction if requested.

> While the existing jury instructions are adequate in requiring 'knowledge of the presence of the substance,' we agree that, if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed. We hold that the defendant was entitled to a more specific instruction as requested.

Id. at 745-746.

It is the State's position that if the current instruction is adequate, then there is no abuse of discretion by the trial court denying the requested instruction. If this instruction is critical to informing the jury, then it should be or should have been incorporated into the standard jury instructions. See, Chicone supra, footnote 14,

> This is an appropriate subject to be address by the Committee on Standard Jury Instructions in Criminal Cases. In fact, the current instructions, by a Note to Judge, already suggest that more specific instructions on knowledge or lack of knowledge may be required if the defendant raises the issue as to the nature of a particular drug. Further, consistent with Medlin, the present instructions also note the inference of knowledge that may appropriately be drawn in cases of actual possession.

In 1997 the Committee on Standard Jury Instructions amended the instruction for trafficking. See, Standard Jury Instructions In Criminal Cases, 697 So. 2d 84 (Fla. 1997). The Chicone decision or guilty knowledge instruction was expressly included under the Definitions section for Trafficking in Cocaine, F.S. 893.135(1)(b), and reads as follows:

> Give if applicable See Chicone v. State, 684 So. 2d 736 (Fla. 1996)
> IF a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, (2) knowledge that the thing was within the person's presence and (3) knowledge of the illicit nature of the thing.

Fla. Std. Jury Instr. (Criminal). The current standard jury instruction on possession, reads as follows:

> Before you can find that defendant guilty of (crime charged), the State must prove the following three elements beyond a reasonable doubt.
> 1. (Defendant) possessed a certain substance.
> 2. The substance was (specific substance alleged).
> 3. (Defendant) had knowledge of the presence of the substance.

The instruction also includes Notes to Judge and read as follows:

> 1. IF the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. See, State v. Medlin, 273 So. 2d 394 (Fla. 1973).

It is clear from the standard jury instructions on possession that a more specific jury instruction on knowledge is discretionary and contingent upon the defense raising the issue of "a lack of knowledge" about the illicit nature of the substance. Accordingly, the Fifth District Court of Appeals decision in Scott v. State, 722 So. 2d 256 (Fla. 5th DCA 1998)(on

rehearing en banc), review granted, 729 So. 2d 394 (Fla. April 4, 1999) was not erroneous on this point. The decision to deny the instruction because the defendant in Scott did not raise the illicit nature of the substance as a defense was consistent with the jury instruction, as was the instant case. The guilty knowledge instruction should not be contingent upon whether petitioner request the instruction or not. The Chicone decision is illogical in this aspect. Otherwise, the effect of the Chicone decision is a per se rule that the trial court must always grant such an instruction if requested. A trial court's election not to do so, would be error.

Even if this court finds that the trial court's election to deny the requested jury instruction was error, it is the State's position that it was harmless error. The trial court was correct to find that the jury instruction was adequate and to likewise consider the Appellant's defense in determining whether to grant or deny the requested jury instruction. The standard jury instructions adequately informed the jury about the element of knowledge in a simple possession case. The current jury instructions are discretionary as to whether the trial court should give a more specific instruction on knowledge. Furthermore, Appellant's defense was not that he did not know the illicit nature of the substance but rather the police officer apprehended the wrong man. But See, Oliver v. State, 707 So. 2d 771 (Fla. 2d DCA 1998)(The Second District Court of Appeals found that the error could not be deemed harmless where a lack of

guilty knowledge was the primary defense) Accord ,Lambert v. State, 728 So. 2d 1189 (Fla. 2d DCA 1999); See, State v. Delva, 575 So. 2d 643 (Fla. 1991)(failure to instruct on knowledge of the substance was not fundamental error); Ryals v. State, 716 So. 2d 313 (Fla. 4th DCA 1998)(failure to instruct on knowledge element was harmless error); Scott v. State, 722 So. 2d 256 (Fla. 5th DCA 1998). Thus, petitioner has failed to demonstrate how he was prejudiced by the trial court's election to use the standard jury instructions.

As this Court held in, State v. Medlin, 273 So. 2d 394 (Fla. 1973), proof that the defendant committed the prohibited act (delivery of a controlled substance) raised a rebuttable presumption that the defendant was aware of the nature of the drug delivered, and Chicone, supra did not expressly overrule this proposition. Appellant contends that Chicone decision receded from Medlin. Chicone in no way altered the fact that the State has a presumption of knowledge based on the prohibited act. Except that such a presumption does not exist when there is nonexclusive constructive possession. As this Court's Chicone opinion illustrated when it cited State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982),

> Proof of an act does raise a presumption that it was knowingly and intentionally done. However, there is a distinction in presuming knowledge from actual possession and from constructive possession in that the State can make out a prima facie case of knowledge of proof of actual or exclusive constructive possession, but proof of non exclusive constructive possession alone is insufficient to justify an implication knowledge. In the latter situation, the State must

present some corroborating evidence of knowledge to establish a prima facie case.

Id. at 741. (Emphasis added)

This presumption must remain valid, because without the jury being able to infer that a defendant was aware of the illicit nature of the substance form the fact that he knowingly possessed the illicit substance, the State would rarely be able to independently prove that the defendant knew the illicit nature of the substance in a simple possession case. Accordingly, this Court should affirm.

ISSUE II

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY ALLOWING THE POLICE OFFICER TO TESTIFY TO THE HABITS OF DRUG DEALERS AS OPPOSED TO DRUG USERS WHEN PETITIONER WAS CONVICTED OF THE LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE? (Restated)

Facts

Petitioner was charged with two counts of possession of a controlled substance with intent to sell. (R. 10). The jury found petitioner guilty of two counts of the lesser include offense of possession of a controlled substance. (R. 34-37).

Petitioner filed a motion in limine to prevent the state from "all argument, testimony or evidence that Officer Chuck Perry is an expert in street narcotics, and or that the area of 2525 Texas Street has experienced a wave of shooting, fights, narcotic sales and other criminal activities." (R. 38). Petitioner asked that the State be prohibited from attempting to have the officer "draw a correlation between carrying large amounts of cash and selling narcotics". (R. 38).

The police officer testified that he had seized a brown paper bag containing four dime bags of cannabis and nine pieces of crack cocaine. (T. 42). The crack cocaine weighed 2.4 grams. (T. 47). The officer testified that when he stopped the petitioner, he had $841 in his pocket. (T. 45).

The officer had previously made 2,500 to 3,000 drug related arrests and had witnessed four to five times as many drug sales. (T. 26). The officer testified that a person who is selling crack cocaine would usually not have any paraphernalia on them

and they would have a larger amount of drugs. (T. 27-28). A person possessing drugs for personal consumption would usually have a dime rock or a twenty dollar size piece of crack. (T. 28). The trial court refused to let the officer testify that in his opinion the large amount of cash along with the drugs meant the appellant was dealing drugs. (T. 31, 46). The officer agreed that based on his experience, it is common "to find individuals with large amounts of money with drugs on them that is for sale, as opposed to personal consumption." (T. 46). The officer testified that in his experience, a person having crack for personal consumption is usually going to have a small rock of cocaine. (T. 48). The officer testified that based on his observation of petitioner and the amount of drugs and money found on him, he decided to charge appellant with possession with intent to sell. (T. 50).

Standard of Review

This issue is governed by the abuse of discretion standard. See, Prescott v. State, 23 Fla. L. Wkly. D 1542 (Fla. 4th DCA June 24, 1998)(holding that the trial court did not abuse its discretion in "permitting a properly qualified witness to testify about whether drugs were intended for personal use or for sale based on the among and packaging of the drugs.")

Preservation

Petitioner preserved the issue for appeal within the meaning of § 924.051(1)(b), Fla. Stat. (1997).

Merits

Appellant argues that the trial court erred in allowing the officer to "testify as to the characteristics by which to distinguish a drug seller from a drug user." (I.B. at 8). In the cases cited in petitioner's brief, the defendants were convicted of sale of cocaine or possession of cocaine with intent to sell. In those cases, the courts held that the officers testimony regarding general characteristics of drug dealers was prejudicial because "every defendant has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminals in general." Lowder v. State, 589 So.2d 933, 935 (Fla. 3d DCA 1991).

However, "[c]ourts have long recognized that a police officer, when properly qualified as an expert, may testify regarding whether drugs were intended for person use or for sale, based on the amount and packaging of the drugs. Scarlett v. State, 704 So. 2d 615, 616 (Fla. 4th DCA 1997, rev. denied. No. 92028 (Fla. 1998); Accord, Prescott v. State, 23 Fla. L.Wkly. D1542 (Fla. 4th DCA June 24, 1998); Brooks v. State, 700 So.2d 473, 474 (Fla. 5th DCA 1997)("It is proper for an appropriately trained and experienced law enforcement officer to offer expert opinion concerning packaging of drugs for sale versus personal use. (citation omitted) We find no error in the admission of this testimony.")

It is the State's position that such testimony if error, was harmless. See, Baskins v. State, 732 So. 2d 1179 (Fla. 1st DCA 1999). When contrasting Petitioner's cases to the instant case, the jury convicted appellant of the lesser included offense of possession of cocaine. The jury rejected the State's contention that the appellant possessed the drugs with the intent to sell them. Obviously, the jury did not give weight to the officer's testimony distinguishing the habits of drug dealers from people possessing drugs for their own consumption. The jury judged the petitioner based on the evidence against him and did not find him guilty of possession with intent to sell because of the similarity of his behavior with that of a drug dealer but rather found he had not possessed the drugs with the intent to sell. Petitioner has not adequately explained how the officer's testimony could have prejudiced the jury's decision that the petitioner had possessed the drugs. The officer testified that he had observed the appellant taking drugs out of a bag hidden in the bushes. (T. 37-39). Thus, this court should affirm petitioner's conviction for possession of cocaine.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 732 So. 2d 1225 should be approved, and the judgment and sentence entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S ANSWER BRIEF ON THE MERITS** has been furnished by U.S. Mail to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of December, 1999.

_____
Veronica S. McCrackin
Attorney for State of Florida

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