IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

SHAWN WASHINGTON, :

Appellant, :

v. : CASE NO. 97-3915

STATE OF FLORIDA, :

Appellee. :

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

SHAWN WASHINGTON, :

Petitioner, :

vs. : CASE NO. 96,028

STATE OF FLORIDA, :

Respondent. :

______________________________:

PETITIONER'S REPLY BRIEF ON THE MERITS

I ARGUMENT

ISSUE I

THE TRIAL COURT ERRED REVERSIBLY IN FAILING TO GIVE A REQUESTED JURY INSTRUCTION ON THE ESSENTIAL ELEMENT OF KNOWLEDGE OF THE ILLI-CIT NATURE OF THE CONTRABAND.

With all due respect, the issue in the instant case was created by this court's opinion in Chicone v. State, 684 So.2d 736 (Fla. 1996). The state calls Chicone "illogical" (State's Brief (SB), p. 9). On the one hand, the court held that know-ledge of the illicit nature of the substance was an element of every drug offense. On the other hand, it held that existing jury instructions are adequate, and an instruction on illicit nature need be given only if the defendant requests it.

Undersigned surmises that holding the existing jury instruction to be adequate was intended to save convictions which had been obtained without such an instruction having been given. But whatever the court's intent may have been, its

holding that knowledge of the illicit nature is an element, but that it need not be instructed upon, unless the defendant requests, leads directly to the state's claim here the instruction need not be given because lack of knowledge was not petitioner Washington's defense.

This argument - that it is not reversible error to omit a jury instruction on an element, where the element is not disputed - is the standard of review for fundamental error, that is, error which was not objected to in the trial court. See State v. Delva, 575 So.2d 643 (Fla. 1991). As argued in the initial brief, petitioner contends that the correct standard of review for the court's refusal to give a requested jury instruction on an element is that stated in Gerds v. State, 64 So.2d 915 (Fla. 1953). In Gerds, this court held the failure to instruct correctly and intelligently on each element which the state is required to prove "cannot be treated with impunity under the guise of harmless error." Yet, either no error, or harmless error is exactly the result the state seeks here.

As argued in the initial brief, if Delva were truly the standard, and the jury need not be instructed on elements of the crime, then standard jury instructions would no longer be standard, but would become open to dispute in every case depending on the prosecutor's and the judge's view of the accused's defense.

Inter alia, the state's brief points out that, after this court's decision in Chicone, the Florida Bar Committee on Stan-

dard Jury Instructions amended the trafficking instruction but not that for simple possession. Standard Jury Instructions in Criminal Cases, 697 So.2d 84 (Fla. 1997) (SB-8). This is true, but it does not make sense. There is no apparent reason why the instruction for simple possession or possession with intent to sell should not be the same as that for trafficking, which includes possession, the only distinction being as to quantity, not as to the quality of the possession. Both have the element of knowledge of the illicit nature of the substance, but the instruction is standard/required only in trafficking.

Moreover, because trafficking can also be committed by, for example, sale or delivery, the omission of the illicit nature instruction is even more untenable, as the discussion below concerning the Medlin presumption will demonstrate. State v. Medlin, 273 So.2d 394 (Fla. 1973).

Where constructive possession is alleged, the jury is instructed on knowledge not just once, but twice, but only in a trafficking case. The jury is instructed that one of the elements is that

> Defendant knew that the substance was [cannabis][cocaine][whatever].

As to constructive possession, the jury is instructed:

> Give if applicable. See Chicone, [supra]
>
> 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) **know-ledge of the illicit nature** of the thing. (emphasis added)

By any logical or legal standard, these instructions should also be given where the charge is possession or possession with intent to sell.

Both the state and the Fifth District in Scott misapprehend the presumption of Medlin. 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).[1]

To repeat from the initial brief, according to Scott, this court held in Medlin, supra:

> . . .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.

722 So.2d at 258. Thus,

> . . .[a]lthough Chicone places the burden of proof on the state to prove knowledge of the illicit nature of the contraband, it does not, at least expressly, overrule the Medlin presumption.

Therefore,

> it appears that the defendant has the bur-den of going forward with an explanation as to why he was unaware of the illicit nature of the substance (man, I don't know what cannabis looks like) in order to overcome this presumption.

Id.

Petitioner believes the key to the distinction between this case and Medlin concerns what may reasonably be presumed

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[1] This court previously denied review in Lambert v. State, 728 So.2d 1189 (Fla. 2d DCA 1999), review denied, 741 So.2d 1137 (Fla. 1999), in which the Second District certified questions similar to those in Scott, but it has granted review on the same questions in Williamson v. State, 24 Fla.L. Weekly D852 (Fla. 2d DCA 1999), review granted, no. 95,721 (Fla. November 30, 1999).

from a given act. Per State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982), app'd in part, Chicone, supra, the state concedes that knowledge of the illicit nature may not be inferred from "nonexclusive constructive possession" (SB-10).

Petitioner contends that the state's case against him is based on a theory of nonexclusive constructive possession, thus the state has conceded that illicit knowledge may not be inferred from possession. The state proved several other people were close to Washington, including a man who the police officer allegedly saw make a drug sale from a pill bottle in a bush nearby the bush which held the brown paper bag Washington is charged with possessing. That the officer once saw Washington take something from the bag is not sufficient, without more, to infer he knew everything the bag contained. The officer did not see him look into it, closely or otherwise. While the officer did not see anyone other than Washington touch the bag, that hardly proves beyond a reasonable doubt that it did not belong to someone else, for example, to someone for whom Washington was working for, and that only the owner, not Washington, knew what was in the bag beyond the one baggie (alleged to be marijuana) that he retrieved from it.

Further, as a general principle, the state's concession as to nonexclusive constructive possession does not go nearly far enough, and Medlin is inapposite. Sale or delivery alone, without incriminating statements, may or may not be sufficient to prove knowledge of the illicit nature of the substance.

Medlin did not reach that issue, as it involved delivery, but also incriminating statements from the defendant that one drug would make the girl "go up" and another pill was to be taken when she "came down" from the high. In Ryals, the Fourth District said sale, but only in the context of an incriminating statement, was sufficient to presume knowledge:

> Cocaine was asked for and cocaine was delivered and sold. No jury. . .could have concluded that [Ryals] did not know the substance being delivered was cocaine.

Ryals v. State, 716 So.2d 313 (Fla. 4th DCA), review denied, 727 So.2d 910 (Fla. 1998).

What can be presumed without an incriminating statement? In Oliver v. State, 707 So.2d 771 (Fla. 2d DCA 1998), the defendant sold cocaine, but explained that he sold it only because he believed it to be fake. Naturally, failure to give an instruction that he knew of its illicit nature was not harmless error. Theoretically, possession - probably actual and possibly even constructive - with an incriminating statement, such as that in Medlin, may be sufficient to presume/ infer knowledge. Petitioner contends, however, that knowledge which can be inferred from sale or delivery with an incriminating statement **cannot** be inferred from possession - actual or constructive - with no statement, yet that is what the state is asking for here.

Such a presumption would be unconstitutional under the United States Supreme Court's holding in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The court

found reversible error where a trial court effectively excused the state's obligation to prove an essential element of the offense. This occurred when Montana created a "presumption" that proof of certain elements of the offense automatically proved another element. Such a presumption, the Court held, could have convinced a jury that the element must be accepted as proven. 442 U.S. at 523, 99 S.Ct. at 2458-59. Or it could have improperly shifted the burden to the defense to disprove the existence of the last element. 442 U.S. at 524, 99 S.Ct. at 2459. As the Seventh Circuit later noted:

> Clearly, if a Sandstrom-type instruction is invalid because it may be interpreted as describing either a conclusive or a burden- shifting presumption on an element of the offense, an instruction that completely omits an element of the offense must also be invalid.

Cole v. Young, 817 F.2d 412, 425 (7th Cir. 1987).

Petitioner reminds the court that it has amended the standard jury instruction on trafficking, which can be committed not only by possession, but also by sale, purchase, manufacture, delivery, or bringing into Florida. In a trafficking case, even where the method of trafficking is alleged to be sale or delivery, the jury is instructed that knowledge of the illicit nature of the substance is an element of the offense and may be instructed on illicit knowledge a second time in the context of constructive possession. Yet, where the charge is simple possession - from which, petitioner contends, no inference as to knowledge of the illicit nature reasonably arises - according to the state it is not error for the court to refuse

to instruct the jury on illicit nature! As well as violating due process, this state of affairs probably violates equal protection as well, in that alleged drug traffickers receive more protection of the law than alleged cocaine possessors.

The state says it needs this unconstitutional inference

> because without the jury being able to infer that a defendant was aware of the illicit nature of the substance [from] the fact that he knowingly possessed the illi-cit substance, the state would rarely be able to independently prove that the defen-dant knew the illicit nature of the sub-stance in a simple possession case.

(SB-11). The state has greatly exaggerated its problem, because the jury can infer knowledge from all the evidence. The state, however, wants to keep the jury ignorant of the elements of the crime.

The instant case involves constructive possession of crack cocaine and no incriminating statements of any kind. Petitioner contends that, upon his request, the jury must be instructed on the knowledge of illicit nature of the substance element.

Petitioner was entitled to his requested instruction, the Scott opinion is ill-conceived, and this court must reverse and remand for new trial. Petitioner urges this court to amend the standard instructions as appropriate to conform to those for trafficking.

ISSUE II

THE TRIAL COURT ERRED REVERSIBLY IN ALLOW-ING THE POLICE OFFICER TO TESTIFY AS TO THE GENERAL CHARACTERISTICS OF A DRUG SELLER AS DISTINGUISHED FROM A DRUG USER.

In response to substantial case law cited in the initial

brief which holds that evidence of the general characteristics of a drug dealer is not admissible, the state argues the officer's testimony was admissible here because "[i]t is proper for an appropriately trained and experienced law enforcement officer to offer expert opinion concerning packaging of drugs for sale versus personal use." Brooks v. State, 700 So.2d 473, 474 (Fla. 5th DCA 1997) (SB-14).

Almost all the cases cited by the state involve a substantial number of individually wrapped crack rocks or quantities of marijuana: Prescott v. State, ____ So.2d ____, 23 Fla.L. Weekly D1542 (Fla. 4th DCA June 24, 1998) (24 manila envelopes containing marijuana; clear plastic baggies with either marijuana or one or two rocks of cocaine in each; and a large baggie containing approximately 6.4 grams of crack cocaine in small, individually wrapped pieces); Scarlett v. State, 704 So.2d 615, 615 (Fla. 4th DCA 1997), review denied, 717 So.2d 437 (Fla. 1998) (11 individually packed baggies of marijuana); Brooks, supra (12 ziplock baggies, each containing $5 worth of crack) (SB-13-14).

The instant case involves smaller amounts of marijuana and crack cocaine. The paper bag from which the charges arise contained only four small individually wrapped baggies of marijuana, which is a quantity too small to distinguish intent to sell from personal use, since small baggies which can be sold can also be brought, and 2.4 grams of crack cocaine which was not individually wrapped and in a quantity too small to

infer possession with intent to sell, per federal and Florida cases cited in the initial brief and undistinguished by the state. In other words, even if the officer's opinion were based on packaging and quantity, the packaging and quantity here were not such that they could reasonably give rise to an inference of intent to sell.

Moreover, while the officer did cite quantity, he never cited packaging as the reason he believed Washington to be dealing, as opposed to using. Perhaps, this omission is because the officer recognized - although the state fails to recognize it in its answer brief - that the quantity of marijuana and "packaging" of the crack cocaine in the instant case were not remarkable enough to give rise to any reasonable inference of intent to sell.

While the officer did testify as to his opinion that a dealer will have 1 to 5 grams of cocaine, a user would have less, and Washington had 2.4 grams, the other factors on which he relied were that 1) a user would have paraphernalia on him and Washington did not have paraphernalia; and 2) Washington had $841 cash. As to the amount of cash, in Lowder v. State, 589 So.2d 933, 936 (Fla. 3d DCA 1991), dism., 598 So.2d 78 (Fla. 1992), the Third District held it was not reasonable to infer from possession of $1290 cash that it must have been obtained illegally. As to what inference reasonably arises from not possessing paraphernalia, petitioner contends it self-evidently has very little probative value of possession

with intent to sell.

Finally, the state argues that "[p]etitioner has not adequately explained how the officer's testimony could have prejudiced the jury's decision that the petitioner possessed drugs" (SB-15). As this court has recently reiterated in Goodwin, the burden is on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error could not have affected the jury's verdict. Goodwin v. State, 24 Fla.L. Weekly S583(Fla. Dec. 16, 1999). Even though the jury acquitted Washington of possession with intent to sell, given the extent and source (the police officer) of testimony concerning drug dealers, petitioner contends that the state has failed to prove beyond a reasonable doubt that this improper testimony did not affect the jury's verdict.

While the officer claimed to have seen a sale of marijuana, he did not claim to have seen Washington sell or even touch crack cocaine. Therefore, his conviction can arise only from an inference that, if Washington sold marijuana from the bag, he must have known what else was in it. To put it another way, the conclusion that Washington possessed cocaine would have to be based on a theory of constructive possession, as there was no direct evidence.

Especially in the absence of direct evidence of possession, improper evidence, the "only purpose" of which

> is to place **prejudicial and misleading** inferences in front of the jury[,] (emphasis added)

Nowitzke v. State, 572 So.2d 1346, 1356 (Fla. 1990), is harmful

error. The prejudice and misleading inferences of the improper evidence pervaded the whole trial, rendering it fundamentally unfair, especially as to the cocaine charge, of which there was no direct evidence. There is a reasonable possibility the jury might have acquitted Washington altogether, especially of the cocaine charge, on the question of whether he possessed it at all, but for the improper evidence.

II CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court reverse his conviction and remand for new trial, with directions that no evidence may be admitted on the general characteristics of drug sellers versus drug users, and the jury be instructed that knowledge of its illicit nature is an essential element of possession of cocaine and cannabis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Veronica McCrackin, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Shawn Washington, inmate no. N02407, Lawtey Correctional Institution, P.O. Box 229, Lawtey, FL 32058-0229, this _____ day of January, 2000.

____
KATHLEEN STOVER