1999-201

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TERRY McMILLON,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

5th DCA Case No. 99-1139

Supreme Court Case No.

1999-201

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In a trial by jury, the Petitioner was convicted of the sale of cocaine.[1] (A 1,2) At trial, he asserted alternative theories of defense: That his partner, not he, had sold cocaine to an undercover agent; or, that if he did sell a substance to the officer, he sold a counterfeit substance, not cocaine. (A 2)

In his direct appeal to the Fifth District Court, the Petitioner argued that the trial court had erred by refusing to give his requested instruction regarding the State's burden to prove a scienter element; i.e., that the defendant knew that the substance he sold was cocaine. (A 1, 2) The district court affirmed the Petitioner's conviction, and ruled that the failure to give the requested instruction

[1] In this brief, references to the Appendix will be designated by the symbol "A" in a parenthetical, with the page number (s) to which reference is made.

was harmless error, because the defendant had waived the instruction by asserting alternative theories of defense. As authority for this ruling, the District Court cited the following case as controlling authority:

Scott v. State, 722 So. 2d 256 (Fla. 5th DCA 1998)
(A 2)

The Scott decision is presently pending for review in this Court[2].

Petitioner timely filed a Notice to Invoke this Court's jurisdiction, and this Petition follows.

[2] Fla. Supreme Ct. Case # 94,701.

SUMMARY OF ARGUMENT

Petitioner invokes the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal in the above-styled cause, rendered December 10, 1999. Jurisdiction of the Florida Supreme Court is invoked pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981); which states that when the a *per curiam* decision of the district court cites as authority a case which is pending for review in this Court, the jurisdiction of this Court may be invoked to review the *per curiam* decision of the district court.

The district court in this case ruled that when, as an alternative theory of defense, the defendant claims that he did not sell cocaine, but that if he had, he was unaware of its' illicit nature, he waives the right to a jury instruction on the element of scienter, thus relieving the State of its' burden of proof as to that element. As authority for this ruling, the district court cited one of its own decisions, and that decision is now pending for review in this Court.

ARGUMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE DISTRICT COURT'S RULING IN THIS CASE, BECAUSE THE CASE CITED AS CONTROLLING IN THE OPINION AT ISSUE IS PENDING FOR REVIEW IN THE FLORIDA SUPREME COURT.

The District Court's Opinion cited one of its own decisions, Scott v. State, 722 So. 2d 256,258 (Fla. 5th DCA 1998), as authority for its' ruling that the trial court's refusal to instruct on the scienter element of cocaine possession/sale was harmless error. This Court has accepted jurisdiction to review the Scott decision, in order to answer a certified question as to whether the defendant waives an instruction regarding knowledge of the illicit nature of a substance by arguing, as an alternative theory of defense, that he did not possess it. Scott, supra, 722 So. 2d at 258.

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court ruled:

> Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction. Jollie, at 420.

Petitioner therefore submits that this Court may now exercise jurisdiction to

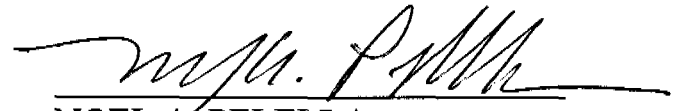
review the decision of the Fifth District Court in the instant case; because the Scott decision, cited here by the District Court as controlling, is now under review by this Court.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Appellant respectfully requests that the Florida Supreme Court accept jurisdiction to review the ruling of the District Court in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Terry McMillon, Dade Correctional Institution, 19000 S.W. 377th Street, Florida City, FL 33034, on this 3rd day of January, 2000.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TERRY McMILLON, Appellant/Petitioner, vs. STATE OF FLORIDA, Appellee/Respondent.	5th DCA Case No. 99-1139 Supreme Court Case No. _____

APPENDIX

99-331
AP

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1999

TERRY McMILLON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 99-1139

Opinion filed December 10, 1999

Appeal from the Circuit
Court for Volusia County,
Richard B. Orfinger, Judge.

James B. Gibson, Public Defender, and
Noel A. Pelella, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Robin A. Compton,
Assistant Attorney General,
Daytona Beach, for Appellee.

HARRIS, J.

An undercover agent drove into an area to purchase drugs. McMillon and Corey Pride rushed to his vehicle and, according to the officer, Pride delivered counterfeit rock cocaine while McMillon delivered the real thing. At trial, McMillon's defense was that Pride had delivered both rocks. The jury accepted the officer's version of the facts and convicted McMillon of sale of cocaine.

McMillon argues on appeal that the court erred in not giving his requested instruction that the State had the burden of proving that McMillon was aware the substance delivered

was cocaine at the time of the sale. We acknowledge that the supreme court in *Chicone v. State,* 684 So. 2d 736 (Fla. 1996), has made such knowledge an element of possession, and presumably, sale of controlled substances. But the *Chicone* court also held that because guilty knowledge is implicit in "possession," it need not be specifically alleged in the information. A jury instruction must, however, if requested, advise the jury of the State's burden of showing defendant's knowledge of the illicit nature of the substance. But even in *Chicone*, by footnote [footnote 14], the court recognizes a connection between a more specific instruction and the issue raised by the defendant.

Here, the *Medlin* inference that one who sells controlled substances knows the illicit nature of the substance sold, unrebutted, is sufficient to carry the day for the State as far as proving its case is concerned. *State v. Medlin*, 273 So. 2d 394 (Fla. 1973). It is up to the jury to determine whether to accept the State's proof as sufficient evidence that defendant knowingly sold a substance later proved to be crack cocaine and, if the issue is presented, whether defendant knew the substance was cocaine that he was selling. McMillon's defense was that he did not sell either the counterfeit or the real rock. He put on a defense witness who testified that he, the witness, had sold both rocks.

Hence, the issue raised by defendant for the jury's consideration was whether he sold the crack cocaine, not whether he knew what he sold was cocaine. As we did in *Scott v. State,* 722 So. 2d 256 (Fla. 5th DCA 1998), *rev. granted*, 729 So. 2d 394 (Fla. 1999), we hold that even if the failure to give the instruction was error, it was harmless. We believe that a jury confronted with an argument that "although I did not sell the rock, if I did sell the rock as crack, I didn't know what it was" would certainly convict.

AFFIRMED.

SHARP, W., and PETERSON, JJ., concur.