ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TERRY McMILLON,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

DCA Case No. 5D 99-1139

Supreme Court Case No. SC 99-201

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS' BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

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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 actually supplied two "rocks" 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, jurisdiction was accepted, and this brief on the merits follows.

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

SUMMARY OF ARGUMENT

The defendant argued that there had been no evidence sufficient to prove that the Petitioner knowingly sold cocaine. Contrary to the District Court's opinion, the Petitioner did not argue that he had not been involved in the sale of cocaine to the undercover officer. That was Mr. Pride's testimony, but it was not the entirety of the Petitioner's theory of the case. Moreover, the defendant is entitled to present alternative theories, and it is not the province of the trial court to deny jury instructions on elements of the charged offense simply because the court is of the opinion that the defendant's theories of defense incredible.

ARGUMENT

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S REQUEST FOR A JURY INSTRUCTION REGARDING AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE IS NOT HARMLESS ERROR.

In the jurisdictional brief, due to less than artful drafting by undersigned counsel, the impression was conveyed that at trial, the Petitioner had denied involvement in the subject drug deal, while simultaneously claiming that if he had been involved, he had not known the nature of the substance involved. While that is certainly the District Court's characterization of the Petitioner's argument in the trial court, it was not, in counsel's view, the Petitioner's argument below. To resolve this issue, the precise argument made by trial counsel in requesting the jury instruction at issue has been included in the Appendix hereto; so that this Court may decide what trial counsel intended.

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 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. Initially, Petitioner argues that when, as here, the defendant was involved with another person, at least to some extent, in the delivery of a controlled substance, he may argue in the alternative that he did not actually convey the substance, or that if he actually conveyed it, he did not know it was cocaine. While this argument at first appears to defy logic, it is not as inconsistent as it seems.

In the instant case, the arresting officer testified that both the Petitioner and Mr. Pride each supplied him with a "rock" purported to be cocaine. The officer testified that the Petitioner supplied real cocaine, and that Mr. Pride's rock was counterfeit. Mr. Pride testified that he supplied both rocks to the officer; the real one, and the fake. Thus, there were two issues for the jury to resolve: First, had Mr. Pride supplied both rocks, or did the defendant supply one of them? And, Second, if the defendant supplied the rock later determined to be cocaine, did he know it was real cocaine at the time he sold it? No matter how the jury resolved those issues, knowledge of the nature of the substance at issue was an element the State had to prove, and was therefore an element the defendant could dispute.

The District Court would say that if the jury determined that Mr. Pride supplied both rocks, the defendant is not entitled to an instruction on the scienter

element of the charged offense. However, that is not entirely correct. Mr. Pride did not testify that the defendant was absent during the sale of cocaine. However, Pride's testimony, together with that of the undercover agent, did leave room for the possibility that the defendant did not knowingly sell cocaine; and that is what defense counsel argued[3].(A 3,4) That is, assuming the jury had concluded Mr. Pride had physically delivered both rocks, the undercover officer testified that the Petitioner actively participated in the sale, and had claimed entitlement to half of the proceeds. The evidence would presumably be sufficient to convict the Petitioner as a principal to the sale of cocaine; provided that he knew and intended the substance conveyed by Mr. Pride would be real cocaine, not a counterfeit substance. Thus, the Petitioner's knowledge of the nature of the substance was still an issue, and still an element the State had to prove. The Petitioner's alternate theories of the case were not mutually exclusive, and he was thus entitled to raise them:

> A criminal defendant may present inconsistent defenses as long as proof of one does not disprove the other. Wright v. State, 681 So.2d 852,853 (Fla. 5th DCA 1996)

Having presented alternate theories of defense, the Petitioner was entitled to a jury instruction relating to his theories:

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[3] Excerpt from trial transcript/charge conference.

> In short, the defense was premised simply on a general plea of not guilty and the incomplete defense of voluntary intoxication. A plea of not guilty should not preclude the defense of voluntary intoxication anymore than it precludes a defense of entrapment. (Citations Omitted). Pope v. State, 458 So.2d 327,329 (Fla. 1st DCA 1984)

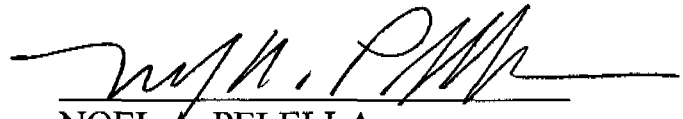
The defendant's right to a jury instruction on an element of the charged offense is not conditioned, as the District Court suggests, upon the trial court's opinion as to the viability of the defendant's theory of the case. See, Kolaric v. State, 616 So. 2d 117,119 (Fla. 2nd DCA 1993), (Even when weight of evidence overwhelmingly favors the State's charge, defendant is entitled to instruction on any lesser for which some evidence exists.), and See, Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981), (Argument of counsel alone is insufficient, because the jury is admonished to take the law from the court's instruction, not from argument of counsel.) If the evidence, as here, supports the instruction, the instruction should be given. Curington v. State, 704 So.2d 1137 (Fla. 5th DCA 1998); Keys v. State, 606 So.2d 669 (Fla. 1st DCA 1992); Garramone v. State, 636 So. 2d 869 (Fla. 4th DCA 1994). Petitioner therefore submits that it was error to deny his request for an instruction on the scienter element of the charged offense.

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



NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904/252-3367

COUNSEL FOR RESPONDENT

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: Mr. Terry McMillon, 386 Bethune Village, Daytona Beach, Florida 32114, on this 22ND day of May, 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

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APPENDIX