ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TERRY McMILLON,

Petitioner/Appellant,

v. CASE NO. SC99-201

STATE OF FLORIDA,

Respondent/Appellee.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Any error in failing to give the scienter instruction is harmless under the facts of this case. Petitioner's defenses were inconsistent to the extent that one disproved the other. He was therefore not entitled to the instruction. Additionally, there was no evidence to support the instruction; said instruction would therefore have likely confused the jury. Petitioner has completely failed to prove the requisite prejudice for reversal under the statute because his defense did not touch upon the scienter issue. The trial judge followed the notes applicable to the scienter instruction and clearly did not abuse his discretion.

ARGUMENT

PETITIONER WAS CHARGED WITH SALE AND DELIVERY OF A CONTROLLED SUBSTANCE. HIS DEFENSE WAS THAT HE DID NOT SELL ANYTHING. IT WAS NEITHER AN ABUSE OF DISCRETION NOR HARMFUL ERROR TO DENY A JURY INSTRUCTION ON SCIENTER.

The District Court opinion (Appendix A) cites both Chicone v. State, 684 So.2d 736 (Fla. 1996) and State v. Medlin, 273 So.2d 394 (Fla. 1973) as authority for its holding. The court noted that Petitioner's defense was that he sold nothing to the undercover officer. The only defense witness at trial was a codefendant who testified that he, and not Petitioner, sold the substances to the police.

Scienter was therefore not an issue. This is not a possession case; Chicone is distinguishable because its facts concerned constructive or non-exclusive possession and a simple possession charge. Petitioner herein was charged with sale or delivery of a controlled substance and there was eyewitness testimony that Petitioner sold and delivered the crack cocaine. However, Petitioner's entire defense was that the codefendant sold the drugs and Petitioner sold nothing.

Nevertheless, it certainly can be argued that this Court's opinion in Chicone, supra, may hold that the failure to give a scienter instruction under the facts of this case is error. If so, can that error be harmless?

Initially, it must be noted that the scienter element is a judicial creation; it is not an essential element found in the

statute. Additionally, the jury instructions are a judicial compilation albeit based generally upon statutory language. As stated by the trial judge below, the standard jury instructions require that the jury be instructed on the scienter element "if possession is charged." (Appendix B) Possession was neither instructed nor charged in this case.

Several district courts have held that the lack of a scienter instruction is subject to a harmless error analysis. Although Chicone does not discuss harmless error, in Leaks v. State, 748 So.2d 285, 287 (Fla. 2d DCA 1998) the court saw "no reason why a harmless error analysis should not be applied in determining whether a trial court's refusal to give the requested instruction requires reversal." In Leaks, the defense was that the disputed item was never possessed at all; thus the failure to give a special instruction on guilty knowledge constituted harmless error.

The Leaks court distinguished cases such as Jenkins v. State, 694 So.2d 78 (Fla. 1st DCA 1997), where the defendant raised an issue as to the nature of the substance he admitted possessing, and Oliver v. State, 707 So.2d 771 (Fla. 2d DCA 1998), where the principal defense was lack of guilty knowledge. But it is noteworthy that both of the latter cases applied the harmless error test. In Leaks and in the Petitioner's case, proof of knowledge of the illicit nature of the item had no relevance to the contention that the defendant never had possession of the contraband. Consequently, neither Petitioner nor Leaks was prejudiced in their ability to defend or to present a defense by the absence of the

requested instruction.

As a practical matter, a proof of knowledge instruction should not be given to the jury where the defendant claims that he never had possession of the substance. And even if the failure to give said instruction is error, it should be deemed harmless. At a minimum, Petitioner must be required to prove prejudice. This is properly his burden under section 924.051(7), Florida Statutes (Supp. 1996)("A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.") See Goodwin v. State, 721 So.2d 728 (Fla. 4th DCA 1998); Ryals v. State, 716 So.2d 313, 314 (Fla. 4th DCA 1998).

It is obvious that Petitioner finds it difficult to postulate a scenario wherein he could argue that he did not sell the crack, but if he did, he did not know he was selling cocaine. The main thrust of this argument appears to be that even though the codefendant admitted that he, not Petitioner, sold the crack, Petitioner could "presumably" be convicted as a principal to the sale of cocaine. (Petitioner's merits brief at 6) This is incorrect for the simple reason that the jury was not instructed as to the law on principals. This was an "all or nothing" case. Petitioner either personally sold and delivered crack to the officer or he did not. He claimed (through his sole defense witness) that he did not sell anything. His attorney argued during closing that the codefendant committed this crime. (Appendix C) Proof that Petitioner did not sell the crack cocaine (the codefendant's testimony) is in direct conflict with proof that

Petitioner did not know that what he was selling was cocaine. Wright v. State, 681 So.2d 852, 853 (Fla. 5th DCA 1996)(Inconsistent defense are permitted as long as proof of one does not disprove the other).

There must be some proof supporting a special jury instruction. The trial court followed the notes found in the instructions which mandated that scienter should be given in possession cases. This case is a sale and delivery case and therefore it does not fall squarely within the ambit of Chicone. Nonetheless, if Chicone's reasoning is applicable to the facts of this case, any error is harmless. Even if the proper test is an abuse of discretion standard, the trial court and the district court should be affirmed. See Pozo v. State, 682 So.2d 1124, 1126 (Fla. 1st DCA 1996), rev. denied, 691 So.2d 1081 (Fla. 1997)(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).

Any error in failing to give the scienter instruction is harmless under the facts of this case. Petitioner's defenses were inconsistent to the extent that one disproved the other. He was therefore not entitled to the instruction. Additionally, there was no evidence to support the instruction; said instruction would therefore have likely confused the jury. Petitioner has completely failed to prove the requisite prejudice for reversal under the statute because his defense did not touch upon the scienter issue. The trial judge followed the notes applicable to the scienter

instruction and clearly did not abuse his discretion.

And finally, it is the State's position that the district court was correct in its conclusion that *had* Petitioner argued in the alternative, he would surely have been convicted. Thus the error would still be harmless. It is possible that this Court does not wish to affirm a decision which concludes that even where scienter is raised as a defense and the scienter instruction is requested, the failure to give said instruction can be harmless. Nevertheless, it must be remembered that the facts of this case are distinct from that scenario. Petitioner did not allege that he did sell the substance but did not know what it was. Therefore, in any event, the district court's holding should be affirmed.

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court to affirm the district court's decision in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on the merits in case number SC99-201 has been furnished by delivery to Noel A. Pelella, Assistant Appellate Public Defender, Seventh Judicial Circuit, this 12th day of June, 2000.

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IN THE SUPREME COURT OF FLORIDA

TERRY MCMILLON,
Petitioner/Appellant,

CASE NO. SC99-210

STATE OF FLORIDA
Respondent/Appellee.

_____/

APPENDIX

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Appendix A