ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TERRY MCMILLON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Supreme Court Case No. SC 99-201

DCA Case No. 5D 99-1139

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S REPLY 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

TABLE OF CONTENTS

SUMMARY OF ARGUMENT

Petitioner offers the following argument in response to the Respondent's Brief on the Merits:

The jury in this case was instructed that the definition of delivery of cocaine is as follows:

Delivery means ***the actual, constructive, or attempt*** to transfer cocaine from one person to another. The jury was also instructed that the State has the burden to prove that the charged crime was committed, and that ***the defendant is the person who committed the crime.*** The jury heard the sworn testimony of officer Oakley that the defendant, and not Mr. Pride, had delivered a rock of real cocaine. The jury also heard the sworn testimony of Mr. Pride, who testified with equal certainty that the defendant never delivered any substance to Officer Oakley, real or counterfeit. The jury, in deliberation, asked for a re-reading of the portion of Officer Oakley's testimony regarding which of the two men - McMillon or Pride, had actually delivered real cocaine. Thus, the defendant's alternative theories had merit, and that the jury may have acquitted the defendant if they had been instructed that knowledge of the nature of the substance at issue was an essential element of the charged offense.

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.

The Respondent claims the Petitioner's argument is without merit because the jury was not instructed on the principal theory, and because the Petitioner has not offered "a scenario wherein he could argue that he did not sell crack". (Respondent's Brief, Pg. 4) The Respondent's contentions are refuted by the record.

Specifically, the jury heard the sworn testimony of Officer Oakley. Oakley said that he received two rocks; one real, and one counterfeit. Officer Oakley also stated, with what he claimed was absolute certainty, that the defendant, and not Mr. Pride, had delivered a rock of real cocaine. The jury also heard the sworn testimony of Mr. Pride, who testified with equal certainty that the defendant never delivered any substance to Officer Oakley, real or counterfeit. If they believed Officer Oakley, the jury, by law, could not convict the Petitioner without a finding that the Petitioner knew the rock he delivered was real cocaine. That is one "scenario" arising from the record evidence - a scenario the State claims to have been absent. Not only was it a reasonable scenario, but it is a scenario which, if

accepted by the jury, required the scienter instruction that was denied. In addition, there is record evidence of the prejudice to the Petitioner which arose from the denial of his requested instruction is also in the record.

That is, the jury, in deliberation, asked for a re-reading of the portion of Officer Oakley's testimony regarding which of the two men - McMillon or Pride, had actually delivered real cocaine. This shows the jury was willing to accept Officer Oakley's version of events - i.e., that two men had supplied a substance - one counterfeit, and one real. Thus, without the scienter instruction, the jury was unaware that the defendant could be acquitted if they believed he thought he was delivering counterfeit cocaine. This leads to the second infirmity in the State's argument.

The jury here may not have been instructed on the principal theory, but they were instructed on the agency theory, and the theory of actual versus constructive possession. (See Appendix to this brief - hereinafter "A" - at Pp. 1, 2) The jurors were told:

Delivery means ***the actual, constructive, or attempt*** to transfer cocaine from one person to another. The jury was also instructed that the State has the burden to prove that the charged crime was committed, and that ***the defendant is the person who committed the crime.*** The jurors were thus informed that they could find the

defendant guilty even if they believed Mr. Pride, and not Officer Oakley; i.e., even if they believed that Pride delivered both rocks as an agent of the defendant. But that is not a complete statement of the law, because even if the jury accepted this second scenario, they could still not find the defendant guilty without finding that the defendant knew that Pride was delivering at least one rock of real cocaine. Thus, in this second of two scenarios suggested by the evidence, a scienter instruction was essential if the defendant was to receive a fair trial. Or, stated another way, the Petitioner should not have been forced to forfeit his right to an instruction on an element of the charged offense in order to preserve the right to make alternative arguments - arguments supported by the evidence.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioner respectfully requests that this Court overturn the Maddox and Seccia Opinions of the lower courts, and remand this case to the District Court for a decision on the merits.

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 PETITIONER

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 16th day of June, 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