Florida House of Representatives

Committee on Judiciary

Johnnie Byrd
Speaker

Jeffrey Kottkamp
Chair

July 15, 2003

The Honorable Harry Lee Anstead
Chief Justice
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Dear Mr. Chief Justice and Associate Justices of the Court:

We write to comment upon Proposal 1 offered by the Supreme Court Committee on Standard Jury Instructions (Criminal) revising standard instructions on drug abuse offenses. Specifically, we believe that the proposed revised instruction relating to knowledge of a controlled substance's illicit nature under s. 893.101, F.S., appears to be an incomplete and inaccurate statement of the law.

Initially, we would note that it was the express intent of the Legislature, as stated in s. 893.101(1), F.S., to overrule Scott v. State, 808 So.2d 166 (Fla. 2002), and Chicone v. State, 684 So.2d 736 (Fla. 1996), two cases holding that knowledge of the illicit nature of a controlled substance is an element of the crime of possession. While the proposed instruction correctly states that absence of such knowledge is not an element of the crime, but is a defense to it, see s. 893.101(2), F.S., the proposed instruction then obscures this distinction by requiring that the State prove lack of knowledge beyond a reasonable doubt.

Thus the proposed rule essentially restates what the law was under Scott and Chicone, i.e., prior to the adoption of s. 893.101, F.S. Unlike longstanding defenses such as insanity, alibi or self-defense, which may actually speak directly to the negation of some element of the offense charged, absence of knowledge was intended to be a narrow affirmative defense to what is otherwise a strict-liability crime, a defense wherein the defendant carries the burden of proof. An affirmative defense does not concern itself with the elements of an offense, which it concedes,

see Herrera v. State, 594 So.2d 275 (Fla. 1992); State v. Cohen, 568 So.2d 49 (Fla. 1990); rather, it "assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question." Cohen, 568 So.2d at 51. Both the federal and state constitutions permit the creation of affirmative defenses wherein the defendant bears the burden of proof. *See* Walton v. Arizona, 497 U.S. 639 (1990); Patterson v. New York, 432 U.S. 197 (1977); Herrera; Cohen. It was exactly that which the Legislature intended to do in enacting s. 893.101, F.S., and jury instructions premised on that statute should reflect this intent.

In addition, s. 893.101(3), F.S., provides for a permissive presumption that the possessor of a controlled substance knew of the substance's illicit nature. Yet, in attempting to describe this presumption, the proposed instruction again makes such knowledge an element of the crime rather than an affirmative defense by requiring the State to prove such knowledge beyond a reasonable doubt, thus effectively eliminating the presumption upon the mere assertion of the very defense it was meant to qualify.

For these reasons, we believe the proposed instruction needs revision. We respectfully request that the Court further consider the legislative intent in s. 893.101.(3), F.S., in finalizing any jury instruction on this matter.

Sincerely,

Jeff Kottkamp
Chairman
House Judiciary Committee

Gus M. Bilirakis
Chairman
House Subcommittee on
Public Safety Appropriations

JK/DJ/th

Enclosure