IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1331

THE STATE OF FLORIDA,

Petitioner,

vs.

EUSEBIO HERNANDEZ,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Answer Brief of Respondent, p. 2, at n. 1, asserts that the State's Initial Brief included four pages of facts from the sworn statement of Henry Cuesta for "no purpose other than to unfairly prejudice Mr. Hernandez by presenting this court with only the version of the facts which is most incriminating to him." Contrary to the Appellee's belief, the facts contained in that sworn statement are relevant to the instant proceeding.

The issue before this Court is the admissibility of subsequent statements made during a conversation between Cuesta and Eusebio Hernandez. The prior sworn statement of Cuesta provides the background and context for the subsequent conversation, reflecting the State's theory of the case and the reasons why subsequent statements, acquiescence or silence, on the part of Hernandez constitute adoptive admissions. The subsequent conversation between the two does not exist in a vacuum.

SUMMARY OF ARGUMENT

The Petitioner relies on the Summary of Argument set forth in its Initial Brief of Petitioner on the Merits.

ARGUMENT

I. THE LOWER COURT ERRED IN HOLDING THAT AN ORDER SUPPRESSING A STATEMENT MADE BY A CODEFENDANT IS REVIEWABLE BY CERTIORARI RATHER THAN APPEAL.

The order of the trial court suppressed "the subject tape recorded phone call. . . ." (R. 449). The Respondent argues that the order of the trial court was not appealable under Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure, as an order "suppressing . . . admissions," because "the statements excluded in the instant case were made by someone who was acting as an informant in concert with the police. . . ." Brief of Respondent, p. 13. The Respondent's argument ignores the fact that the conversation was a two-party conversation, and the suppression order extends to the entire recording, not just to Cuesta's portion of the recording.

Thus, the order suppressed the defendant Hernandez's own statements as well, statements which, as part of a two-party conversation, are inextricably interwoven with Cuesta's statements. The defendant Hernandez's own statements constitute admissions, even if they do not rise to the level of a confession. Therefore, regardless of whether the order suppressed adoptive admissions, the order does suppress admissions of Hernandez, as any statements made by a party defendant are deemed admissions. State v. Elkin, 595 So. 2d 119,

120 (Fla. 3d DCA 1992). Although this argument was set forth in the Initial Brief of Respondent on the Merits, the Respondent has failed to address it. At an absolute minimum, the suppression order suppresses admissions of the defendant, as well as statements by Cuesta, regardless of whether Cuesta's statements are ultimately deemed to be adoptive admissions by the defendant.

The Respondent also attempts to argue, on the basis of State v. Brea, 530 So. 2d 924, 926 (Fla. 1988), that the State would have the right to appeal the suppression of admissions made by someone acting in concern with the defendant, whereas an "informant" is not someone who is acting in concert with the defendant. Brief of Respondent, pp. 13-14 and n. 5. The Respondent bolsters this argument with reliance on this Court's opinion in McPhadder v. State, 475 So. 2d 1215 (Fla. 1985).[1]

The Respondent's reliance on the foregoing point is misplaced. First, as noted above, the suppression order herein suppresses the defendant's own statements as well as Cuesta's. In McPhadder, the suppression order struck only the statements of the "informant" on the electronic recording. 475 So. 2d at 1216.

[1] The Respondent correctly points out that the State's Initial Brief mixed up the opinions of this Court and the First District Court of Appeal.

Second, while not entirely clear from the facts set forth in McPhadder, it appears as though the informant in McPhadder is a true "informant," one who was cooperating with law enforcement authorities when the drug deal was being set up and one who, in the capacity of the informant, helped plan the deal with the defendant. See, State v. McPhadder, 452 So. 2d 1017, 1018 (Fla. 1st DCA 1984). By contrast, in the instant case, Cuesta was not cooperating with law enforcement officers during the commission of the crimes herein; his cooperation commenced only after he was apprehended by the police and after he confessed as to his own involvement in the crimes.

Furthermore, based on Cuesta's sworn statement, he was acting in concert with the defendant Hernandez, as Hernandez hired him to commit these crimes. Separate and apart from that, even in the recorded conversation, Hernandez, albeit reluctantly, acts in concert with Cuesta when Hernandez agrees to try to provide Cuesta with some additional financial assistance to effect Cuesta's escape from the previously committed offenses. Thus, while Cuesta furnished information to the police after-the-fact, and was cooperating with them during the recorded phone call, he was not doing so in the capacity of the typical informant, but was doing so in his professed capacity as Hernandez's partner in crime.

In all other respects, the State relies on its prior argument.

II. THE LOWER COURT ERRED IN HOLDING THAT STATEMENTS MADE BY THE CODEFENDANT, IN A MONITORED CONVERSATION WITH THE DEFENDANT, WERE NOT ADOPTIVE ADMISSIONS.

In arguing that the statements in the instant case are not adoptive admissions, the Respondent relies, in large part, on the case of Commonwealth v. Dravecz, 227 A. 2d 904 (Pa. 1967). That case is considerably different than the instant case. There, the defendant was already being questioned by the police when the police brought in Stockley and read Stockley's statement to the police. That statement incriminated Dravecz, who did not respond to it. There, Dravecz was being questioned by the police and reasonably knew that he was suspected of involvement in the offense. Silence, in response to what was tantamount to police questioning, with the knowledge that it is police questioning, is considerably different from the situation involving a phone call from an acquaintance, with no reason for believing that the acquaintance is working for the police. The motivation to remain silent exists in Dravecz; it does not in the instant case. Each case comes down to the question of whether, under the circumstances of each case, an individual would reasonably be expected to negate an accusation of a criminal offense.

The other case on which the Respondent relies substantially is Holmes v. United States, 580 A. 2d 1259 (D.C. App. 1990). An adoptive admission was not found in Holmes because the statements were ambiguous. Hood, who had participated in the shooting, subsequently cooperated with the police and then participated in a controlled phone call to Holmes. The only significant portion of the recorded call which might have constituted an allegation of criminal wrongdoing against Holmes, and which Holmes might have been expected to deny, was the following: "Hood: Uh, you, you n3 hit him in the head man, but he ain't die. Holmes: Huh, he did. n4." 580 A. 2d at 1262. In footnote 3, the court further notes that at trial, Holmes testified he did not hear the word "you." Id. Thus, the only accusatory portion of the phone call was something for which the court could conclude that Holmes did not hear that he was being accused. For the reasons set forth in the Initial Brief of Petitioner herein, pp. 20-32, the statements and responses in the recorded call in the instant case go far beyond those in the recorded call in Holmes.

Lastly, at pp. 29-31 of the Respondent's Answer Brief, the Respondent attempts to distinguish the cases on which the State relies by asserting that they do not involve an alleged accomplice of the defendant who was working with the police. That distinction is utterly irrelevant. The focus of the test

for adoptive admissions is whether the defendant should reasonably have responded to the statement. The defendant was unaware that Cuesta was then working with the police. Absent such knowledge on the part of the defendant, the defendant would have no reason for treating Cuesta as an agent of the police and would reasonably be expected to treat Cuesta exactly the same as if Cuesta were not cooperating with the police.

In all other respects, the Petitioner relies on the Initial Brief, pp. 20-32, for the arguments regarding the admissibility of the evidence as adoptive admissions.

III. THE LOWER COURT ERRED IN HOLDING THAT STATEMENTS MADE BY THE CODEFENDANT, IN A MONITORED CONVERSATION WITH THE DEFENDANT, VIOLATED THE CONFRONTATION CLAUSE.

The State's primary argument regarding the Confrontation Clause and the impact of Crawford v. Washington, 541 U.S. 36 (2004), is that if the statements made by Cuesta, by adoption, become the statements of the defendant, Hernandez, the admissibility of those statements does not violate the Confrontation Clause, as the statements are then the same as any direct admissions made by a defendant. That is the basis of this Court's decision in Globe v. State, 877 So. 2d 663 (Fla. 2004), and nothing in the Respondent's argument compels a contrary conclusion. With an adoptive admission, Cuesta's initial statement becomes the defendant's and the defendant then

stands in the shoes of Cuesta. Thus, as to any adoptive admissions, the fact of the adoptive admission compels the conclusion that there is no violation of the Confrontation Clause, just as the admission of a defendant's own statements does not violate the Confrontation Clause. The reason for this is that a defendant has no constitutional right to confront himself when the statements at issue are his own.

The Respondent again structures arguments around the fact that Cuesta was making this call for the police. That, however, is irrelevant, as the defendant adopts those statements and makes them his own. The Respondent's own analysis of this Court's decision in Globe belies the Respondent's attempted distinction, as the police were involved, from beginning to end, in the questioning process in Globe, and the defendant, in Globe, was fully aware of the police involvement when he adopted the statements made by Busby in the presence of both Globe and the officers.

The State, in its Initial Brief, relied, in part, on the Supreme Court's reaffirmation, in Crawford, of Bourjaily v. United States, 483 U.S. 171 (1987). Bourjaily involved the coconspirator exception to the hearsay rule and involved statements made by a coconspirator to a government informant. Bourjaily, which has been deemed consistent with Crawford, thus negates the broad assertion by the Respondent that government

involvement in questioning renders statements testimonial for purposes of Confrontation Clause analysis under Crawford.

The Respondent's Brief, pp. 21-22, attempts to negate the significance of Bourjaily by arguing that it was only the coconspirator's statements that were at issue in Bourjaily, and not the informant's statements. That distinction misses the significance of Bourjaily. First, the statements of the coconspirator in Bourjaily do not exist in a vacuum; they exist in conjunction with the statements of the informant, as the statements were the negotiations for drug deals, neither side of the conversation stands on its own without reference to the other; the coconspirator's statements are intelligible only in conjunction with the informant's part of the conversation. For example, a coconspirator could say "two kilos." If the informant, prior to the reference to "two kilos," had asked the defendant, "How much was your brother convicted for selling?", the reference to "two kilos" would have one meaning. If the informant had inquired, "How much can you sell me?", it has an obviously different meaning. The two sides of the conversation can not be divorced.

Furthermore, the coconspirator exception, for purposes of the Confrontation Clause, would not require the in-court testimony of an informant to whom a conspirator made statements. As a government informant, who is participating with those who

are setting up a drug deal, is not a coconspirator himself, the informant's statements during the negotiations are not being made for the purpose of proving the truth of the matter asserted. The informant may refer to quantities of drugs or prices and locations, but the informant, who is not a true participant in the deal, is not referring to such matters for the purpose of proving the truth of them. The informant is not truly buying or selling drugs. Under such circumstances, the informant's statements would not be introduced for the purpose of proving the truth of the matter asserted in them. That means that they would not be subject to the Confrontation Clause themselves, as recognized in Crawford. See, United States v. Hendricks, 395 F. 3d 173 (3d Cir. 2005); United States v. Sexton, 2005 U.S. App. LEXIS 361 (6th Cir. Jan. 6, 2005); Crawford, 541 U.S. at 38 ("The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

Similarly, while the Respondent quotes Crawford as rendering testimonial statements obtained as a result of "[i]nvolvement of government officers in the production of testimony with an eye toward trial," 124 S.Ct. at 2367, n. 7, that footnote expressly accompanied text which referenced an accomplice's confession that inculpated the defendant. 124 S.Ct. at 1367. Crawford was not making reference to a noncustodial,

informal telephone conversation, where the defendant does not know that the caller, an acquaintance, is cooperating with the authorities.

Lastly, in the Initial Brief, the State asserted that some of the statements by Cuesta during the phone call were not admitted to prove the truth of the matter asserted and were thus not hearsay and were, additionally, not violative of the Confrontation Clause because Crawford notes that the Confrontation Clause is inapplicable to statements admitted for purposes other than proving the truth of the matter asserted. The Respondent correctly notes that this was not argued by the State in the lower courts.

However, this Court should still consider this for several reasons. First, the entire phone conversation is currently before this Court and it has to be properly evaluated. Second, preservation issues typically arise in the context of appellate review of final decisions of trial courts. Where the decision is non-final, variations of the issue and different legal theories may still be raised in the trial court and the trial court would still have the inherent authority to revisit any of its prior decisions based on new theories. Thus, if this Court does not consider the issue and leaves it unaddressed, the possibility of several more years of pretrial litigation of the issue remains a distinct possibility. Third, the issue is one

which does not require any further factual development, as it is based on the phone conversation itself, and no credibility determinations need to be made. Finally, although the Respondent quotes the prosecutor, in the trial court, as stating that the statements are being submitted to prove the truth of the matter asserted, the only reasonable construction of that is that the prosecutor was thinking solely in terms of those portions of the recorded conversation which become the adoptive admissions. It can not be seriously maintained by anyone, and the Respondent herein does not attempt to maintain, that statements by Cuesta, to the effect that he is attempting to effect his escape from Miami, were proffered to prove the truth of the matter. Since Cuesta was in police custody already, he obviously was not attempting to escape with the defendant's assistance. It is thus blatantly obvious that such statements were not proffered to prove the truth of the matter asserted.

In all other respects, the Petitioner relies on its Initial Brief.

CONCLUSION

Based on the foregoing, the decision of the lower court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed this ___ day of April, 2005 to HOWARD K. BLUMBERG, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing brief has been typed in Courier New, 12-point type, in compliance with the Florida Rules of Appellate Procedure.

_____

RICHARD L. POLIN