IN THE SUPREME COURT OF FLORIDA

BARON GREENWADE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC12-598
DCA NO. 1D10-4330
L.T. NO. 2009-5804-CFA

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This brief is submitted in reply to the Respondent's Answer Brief. Petitioner relies on the arguments in his Initial Brief, and submits this brief only to reply to arguments made by Respondent in its Answer Brief. Respondent's Answer Brief will be referenced as "A.B.", followed by the corresponding page number. All other references will be as designated in Petitioner's Initial Brief.

ViBpy

REBUTTAL AND ARGUMENT

THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENT OF WEIGHT REQUIRED TO FIND MR. GREENWADE GUILTY OF TRAFFICKING IN COCAINE, AND THUS HIS MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

The State failed to present competent, substantial evidence to support every element of the offense of trafficking in cocaine, thus judgment of acquittal was the proper remedy in this case. In its answer brief, Respondent argues that "the First District correctly found that the surrounding circumstances can be taken into account by the jury to decide if the State established beyond a reasonable doubt that a defendant committed the crime of trafficking in cocaine. (A.B. 12-13). Respondent, citing to Pama v. State, 552 So. 2d 309, 311 (Fla. 2d DCA 1989), argues:

> when determining the character of a substance, the state may prove the identity of a controlled substance by circumstantial evidence such as the substance's appearance, odor, and packaging, by the circumstances under which the substance was seized, the manner by which the substance was being transported, a person's on-the-scene remarks identifying the substance, and circumstances surrounding the sale or use of the substance.

(A.B. 12) . Respondent heavily relies on Pama to support its assertion that a totality of the circumstances test should be used to prove the elements of the crime of trafficking in cocaine. However, Respondent's reliance on Pama is counterfactual and flawed. First, Pama is factually distinguishable from the instant

case because it deals with the controlled substance of marijuana or cannabis. 552 So. 2d at 311. It is well established law that an officer's testimony regarding his or her training and experience can be sufficient evidence to prove that a substance is marijuana. See S.C.S. v. State, 831 So. 2d 264 (Fla. 1st DCA 2002), Dean v. State, 406 So. 2d 1162 (Fla. 2d DCA 1981), A.A. v. State, 461 So. 2d 165 (Fla. 3d DCA 1984) , State v. Raulerson, 403 So. 2d 1102 (Fla. 5th DCA 1981).

To the contrary, a substance alleged to be cocaine must be chemically tested. See L.R. v. State, 557 So. 2d 121 (Fla. 3d DCA 1990), Johnson v. State, 929 So. 2d 4 (Fla. 2d DCA 2005) , and Smith v. State, 835 So. 2d 387, 388 (Fla. 2d DCA 2003). The reason for this bright line rule is because it is well settled that "[^]any white powdery substances . . . can resemble cocaine." Purvis v. State, 43 So. 3d 734 (Fla. 2d DCA 2010). See also State v. Clark, 538 So. 2d 500 (Fla. 3d DCA 1989), Ross, 528 So. 2d at 1239-1240.

Second, the Respondent's reliance on Pama is flawed in that the totality of the circumstances test used by the Second District only determines whether the evidence presented was sufficient to prove that a substance was marijuana, but is not used to determine whether the evidence is sufficient to prove the element of weight for a trafficking conviction. Pama, 552 So. 2d at 311.

Respondent also argues that "the rule in Ross ignores the proper rule for sufficiency of the evidence which contemplates

whether a rationale (sic) jury could conclude a substance to be an illegal controlled substance when considering the totality of the circumstances. . ." (A.B. 13-14). However, this argument suggests a lay person can determine whether a white-powdery substance is in fact a controlled substance. As argued above, this is contrary to Florida case law. See L.R. , 557 So. 2d 121, Johnson, 929 So. 2d 4, and Smith, 835 So. 2d 387.

Respondent further relies on Lyons v. State, 807 So. 2d 709 (Fla. 5th DCA 2002), asserting that it "illustrates a sufficiency of the evidence analysis and its consistency with established judgment of acquittal jurisprudence." (A.B. 14). However, in Lyons, the Fifth District did not follow a totality of the circumstances test to determine whether the substance was a controlled substance, but in fact, considered the Second District's opinion in Ross, 528 So. 2d 1237. Lyons, 807 So. 2d at 711. However, the Fifth District determined that the cases were distinguishable. Id. This case too is distinguishable from Lyons. In Lyons, the State charged the defendant with trafficking in cocaine of 4 00 grams or more. The aggregate weight of two (2) individually packaged bricks of suspected cocaine was 813.4 grams. Id. at 710. Although only one brick was laboratory tested, the evidence established that the bricks "were of approximately the same size", thus the jury could have concluded that each brick individually weighed just over 4 00 grams. Id. at 711. Therefore,

the State did not have to prove the substance and weight of the second brick in order to procure a conviction as charged.

In this case, the State's expert witness Warniment admitted that she did not test the substance to determine purity of the sample. (RIV-295) . She testified that she was not given the original baggies for testing, but only received one sealed Ziplock bag of powdered substance. (RIV-295). She confirmed that "if a number of different bags of powder were dumped together, [she] would not be able to determine whether all of them were of exactly the same composition." (RIV-295). She testified that she received three exhibits, but tested only one of the three. (RIV-296-298). Furthermore, although the officer testified that he field tested each baggie, he never told the jury the results of said field testing. As such, this Court should find that Lyons is distinguishable from the instant case.

CONCLUSION

For the above asserted reasons, this Court should reduce Mr. Greenwade's conviction of trafficking in cocaine to simple possession of cocaine, and remand for resentencing. This Court should also approve the decisions in Ross, 528 So. 2d 1237, Safford, 708 So. 2d 676, Sheridan, 850 So. 2d 638, and Jackson, 76 So. 3d 1130, and quash the decision rendered in Greenwade, 8 0 So. 3d 371 (Fla. 1st DCA 2012). The First District's rationale

encourages law enforcement to commingle bags of suspected substances and fails to acknowledge the legislature's reason for enacting sections 831.31 and 817.563, Florida Statutes.

CERTIFICATE OF SERVICE I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Therese A. Savona, Office of the Attorney General, the Capitol, at criminalappealsintake@mvf loridalegal. com, as agreed by the parties, and to Appellant, Mr. Baron Greenwade,. DOC# J12616, Columbia Correctional Institution - Annex, 216 SE Corrections Way, Lake City, FL 32025-2013, on this 19th day of November, 2012.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

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