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

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Baron Greenwade was the Appellant and Defendant below in the First District Court of Appeal and in the Circuit Court of the Fourth Judicial Circuit in and for Duval County. He will be referred to in this brief as "Petitioner" or as "Mr. Greenwade". Respondent, the State of Florida, was both the Appellee and prosecution below, and will be referred to herein as "the State" or "Respondent".

The record on appeal consists of four sequentially numbered volumes and shall be referred to by the letter "R" followed by the appropriate volume and page number. A supplemental record consisting of one volume was filed, but will not be referenced herein. An appendix is attached containing the First District Court of Appeal's opinion in this case.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

In the circuit court, the State charged Mr. Greenwade with trafficking in cocaine: 200 grams or more but less than 400 grams, pursuant to section 893.135 (1) (b)lb, Florida Statutes; possession of a firearm by a convicted felon; possession of controlled substance paraphernalia; and resisting officer without violence to his or her person. (RI-10). Defense counsel filed a motion to suppress statements, admissions, and confessions (RI-48-49), and a motion to suppress physical evidence (RI-50-52) , both of which were denied after a hearing. (RI-63; RI-56).

Defense counsel also filed a motion for severance of counts (RI-44-45) , and the case proceeded to jury trial only on the charge of trafficking in cocaine. The jury found Mr. Greenwade guilty as charged. (RI-72; RIV-351). The trial court adjudicated him guilty and sentenced him to fifteen (15) years prison, with a minimum-mandatory sentence of seven (7) years, and fine of one-hundred thousand dollars, pursuant statute. (RII-15-16). Mr. Greenwade timely appealed his case to the First District Court of Appeal ("First District"). (RII-212).

In the First District, Mr. Greenwade argued that the trial court should have granted his motion for judgment of acquittal as the State failed to prove a prima facie case that he possessed an amount of cocaine sufficient to prove trafficking. Greenwade v. State, 80 So. 3d 371 (Fla. 1st DCA 2012). Specifically, because

the State commingled nine bags of white-powdery substance prior to chemical testing, there was no way of proving that each of the nine bags actually contained cocaine or a mixture of such controlled substance. Id. The First District disagreed, finding that the State presented sufficient evidence to establish trafficking, because in addition to the laboratory test performed on a portion of commingled powder, all nine bags were also field tested before their contents were combined and sent to the Florida Department of Law Enforcement ("FDLE"). Id. at 374. The First District certified conflict with Ross v. State. 528 So. 2d 1237 (Fla. 3d DCA 1988), Safford v. State. 708 So. 2d 676 (Fla. 2d DCA 1998), and Sheridan v. State. 850 So. 2d 638 (Fla. 2d DCA 2003), "to the extent those cases hold that the lab's failure to test each package before commingling to determine weight renders insufficient the State's evidence of trafficking, notwithstanding other circumstantial evidence of the offense." Id.

STATEMENT OF THE FACTS

At trial, the State called Detective Donald Bishop of the Jacksonville Sheriff's Office ("JSO"). (RIV-237). On April 29, 2009, Detective Bishop executed a search warrant at an address located in Jacksonville, Florida. (RIV-238). He was part of the entry team, meaning he was "part of the group going inside." (RIV-239). The entry team announced very loudly "police, search warrant, everybody get down." (RIV-242) . While executing the search warrant, the detective came into contact with Mr. Greenwade, who he identified in court. (RIV-242-243).

Detective Bishop testified that he entered the garage and saw Mr. Greenwade sitting in a chair behind a table; Mr. Greenwade fled into the house through a side door. (RIV-243-244). The detective next came into contact with Mr. Greenwade at the top of a stairwell within the residence. (RIV-244). According to Detective Bishop, when Mr. Greenwade was being escorted down the stairs by other officers, he stated "I know why you're here. I have been set up. What you are looking for is in the garage." (RIV-245) . Detective Bishop further testified that Mr. Greenwade told him that there was cocaine in a green bag in the garage where he was seated. (RIV-245) . Mr. Greenwade then showed him where it was located. (RIV-245) . The detective explained that the green bag contained individual one ounce bags of cocaine, and on top of the bag was a

spoon containing cocaine residue[1]. (RIV-246-247). A digital scale was also found in the garage on top of the table. (RIV-249) .

The detective then identified "State's 18" stating that it was "actually the powder cocaine that was inside the little plastic baggies. . ." (RIV-247) . The detective explained that "we removed it from the baggy so it [could] be sent off [to FDLE] ." (RIV-247) . The prosecutor then asked if the substance in State's 18 was "in the same or substantially the same condition aside from the fact it ha[d] been repackaged?" The detective replied "yes." (RIV-247).

Detective Bishop spoke to Mr. Greenwade that evening, after reading him his Miranda[2] warnings. (RIV-250) . The detective testified that Mr. Greenwade stated that the cocaine was his and that he wished to cooperate in further investigations. (RIV-251) . The detective testified that all of the evidence seized at the residence was transported to JSO's property room. (RIV-251).

Upon cross-examination, Detective Bishop acknowledged that he did not find drugs on Mr. Greenwade's person, or inside the residence. (RIV-2 60) . He further confirmed that it was standard procedure to commingle separate packages of substances for testing purposes. (RIV-260) . He testified that each baggy was field tested, but did not testify as to the results. (RIV-260).

[1] The detective testified that spoons are sometimes used to test out a product before buying it, and to cook cocaine into crack. (RIV-248).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

The State's next witness was Detective C.W. Brown, whom was also part of the entry team. He entered the residence through the garage and testified that there were several people inside the garage, but noted that one of them stood out. (RIV-264-267). He identified Mr. Greenwade in court as that person. (RIV-268). Detective Brown stated that Mr. Greenwade ran into the residence and slammed the door. (RIV-268) . The detective, with other officers, entered the residence. (RIV-269). He went to the bottom of the staircase and called out for Mr. Greenwade to come down, which he did. (RIV-269) . The detective observed as other officers detained Mr. Greenwade, and this ended his involvement in the case. (RIV-270). During cross-examination, Detective Brown testified that he did not hear Mr. Greenwade make any statements. (RIV-271) .

Detective Robert Moodispaw, who was also part of the entry team, testified next. (RIV-274). When he entered the garage he observed Mr. Greenwade, who he identified in court, seated at a table. (RIV-275-276). According to Detective Moodispaw, upon entry, Mr. Greenwade immediately stood up, ran, entered the residence, and slammed and locked the door. (RIV-2 77). The detective kicked in the door and entered the residence. (RIV-277). He searched the residence, including the master bedroom, and found money on a night stand and within a drawer, totaling $1,087.00. (RIV-278-280) . He also spoke to Mr. Greenwade, who admitted the money was his. (RIV-281).

The State's last witness was Katherine Warniment, a forensic chemist with FDLE. (RIV-285). Defense counsel stipulated to her credentials and her testimony was received as an expert in forensic chemistry. (RIV-286-287). She testified that she received State's 18, and tested the item to determine whether or not it contained any controlled substances. (RIV-288) . First she examined the item to determine its physical form and to determine whether it appeared to be uniform and consistent throughout. (RIV-290). She determined that the sample was comprised of an off-white powder, aggregates of powder, and it appeared relatively uniform to the eye. (RIV-291). She sampled the entire item twice, determined that it contained cocaine, and weighed 234.5 grams. (RIV-291-293) .

Upon cross-examination, Warniment admitted that she did not test the item 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-2 95) . 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) .

The State then rested its case. (RIV-299) . Relying on Smith v. State and Safford v. State, defense counsel moved for a judgment of acquittal as to the trafficking charge. (RIV-299-301).

Specifically, defense counsel argued that the State failed to prove that all nine baggies seized contained cocaine or a mixture thereof. (RIV-301-304). The trial court denied this motion. (RIV-305). The case went to the jury, which found Mr. Greenwade guilty as charged. (RIV-3 51).

SUMMARY OF THE ARGUMENT

When a person is charged with trafficking in cocaine, the weight of the substance is an essential element of the crime and must be proven beyond a reasonable doubt. In this case, the State failed to prove the substance seized, in each of the nine separate bags, was cocaine or a mixture thereof. The nine bags were seized, commingled into three larger bags, and only one of those commingled larger bags was laboratory tested. Field testing is insufficient evidence to prove that the substance was cocaine. As such, this Court should discharge Mr. Greenwade's conviction and sentence for trafficking, and remand with instructions for the trial court to enter a verdict of possession of cocaine and resentence accordingly. In doing so, this Court should approve the decisions in Ross v. State, 528 So. 2d 1237 (Fla. 3d DCA 1988), Safford v. State, 708 So. 2d 676 (Fla. 2d DCA 1998), Sheridan v. State, 850 So. 2d 638 (Fla. 2d DCA 2003), and Jackson v. State, 76 So. 3d 1130 (Fla. 4th DCA 2012), and quash the decision rendered in Greenwade v. State, 80 So. 3d 371 (Fla. 1st DCA 2012) .

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.

STANDARD OF REVIEW AND PRESERVATION

In reviewing a trial court's ruling on a motion for judgment of acquittal, appellate courts apply the *de novo* standard of review. Baugh v. State, 961 So. 2d 198, 204 (Fla. 2007) . See also Durousseau v. State, 55 So. 3d 543 (Fla. 2010) . In order to prove a prima facie case, the State is required to prove each and every element of the offense charged beyond a reasonable doubt. Baugh, 961 So. 2d at 203-204. This issue was preserved as Petitioner argued it in his motion for judgment of acquittal, which the trial court denied.

MERITS

The State failed to present sufficient evidence that Mr, Greenwade possessed a mixture of cocaine that weighed 2 00 grams or more. In order to convict Mr. Greenwade of trafficking in cocaine, pursuant to section 893.135 (1) (b)lb, Florida Statutes, the State had to prove that he possessed cocaine, or any mixture containing cocaine, *and that the quantity involved weighed 200 grams or more.* § 893.135(1) (b) lb, Fla. Stat. (2009). See also Fla. Std. Jury Instr. (Crim.) 25.10.

"That the government must prove each element of a criminal offense beyond a reasonable doubt is a bedrock principle of our criminal justice system and one that guides the review of any criminal conviction in this state." State v. Barnum, 921 So. 2d 513, 519 (Fla. 2005); D.J, v. State, 67 So. 3d 1029, 1035 (Fla. 2011). The weight of a controlled substance is an element of the crime of trafficking. Richards v. State. 37 So. 3d 925, 927 (Fla. 4th DCA 2010); Ross v. State. 528 So. 2d 1237, 1239 (Fla. 3d DCA 1988); Fla. Std. Jury Instr. (Crim.) 25.10. As such, the State not only had to prove that Mr. Greenwade possessed cocaine, but it also had to establish that the weight of the substance weighed more than 200 grams, as charged in the information. This, the State failed to do.

First, the record evidence established that JSO provided the FDLE chemist with three (3) large bags containing a powdery substance. Of these three large bags, the chemist merely tested one (1) . She determined that one bag contained a mixture of cocaine, as she did not test for purity. (RIV-296-297) . The chemist did not receive the seized substances in their original form and packaging because they were commingled, pursuant to "standard procedure" by the detectives at Jacksonville Sheriff's Office. (RIV-260); Greenwade v. State, 80 So. 3d 371, 372 (Fla. 1st DCA 2012) . She testified that she would have no way of determining individual constituents of purity thereof in bags that

she did not receive. (RIV-296). Therefore, she could neither test the nine individual bags seized, nor could she look at each of the bags to determine whether the substances were similar in nature, packaging, or texture. As such, it was merely speculation that *each* of the bags seized by JSO contained cocaine or a mixture thereof, but not evidence.

Due process requires that the State introduce *evidence* of the element of weight, and not speculation and conjecture. See Ross v. State, 528 So. 2d 1237 (Fla. 3d DCA 1988); Sheridan v. State, 850 So. 2d 638, 640-642 (Fla. 2d DCA 2003); Safford v. State, 708 So. 2d 676 (Fla. 2d DCA 1998) (holding that "the chemist's failure to test each individual packet [of alleged cocaine] before the contents were combined and weighed mandate[d] reversal [of the defendant's conviction for trafficking in cocaine]"); Jackson v. State, 76 So. 3d 1130 (Fla. 4th DCA 2012) (holding that the State presented insufficient evidence to prove the defendant guilty of trafficking in 200 or more grams of cocaine when only one (1) of eight (8) bags seized were laboratory tested prior to commingling the substances to determine an aggregate weight) . The case of Lyons v. State, 807 So. 2d 709 (Fla. 5th DCA 2002) is distinguishable from the above-cited cases, as well as the instant case because 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 400 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 its opinion in Greenwade, the First District "decline[d] to follow Ross, Safford, and Sheridan because . . . their apparent bright line rule creates an untenable distinction between cases involving multiple packages of suspicious white powder and cases involving just one package." Id. at 373. The First District hypothesized that:

> if in this case [the detective] had found one large [] bagful of powder inside the green bag. . . there would be no question that testing a sample and weighing the powder would yield sufficient evidence to prove [Petitioner] possessed more than 2 00 grams of cocaine or a mixture of cocaine. But *take that same bagful of powder and split it into nine small saleable packets, and Ross et al. hold that to prove the weight element of trafficking, the State now must test a sample from each packet, determine which contain cocaine, and weigh only those- even if presumptive field testing detects cocaine in every packet.* . .

Id. at 373 (emphasis added).

Petitioner respectfully disagrees with the First District's illustration, hypothesis, and conclusion. First, there is

absolutely no record evidence that one large bagful of powder was found. Further, there is no evidence that the packages were being split by Petitioner. The evidence established that nine baggies were found, that those baggies contained some type of white powdery substance, and that the officers field tested each bag. Second, while the detective testified that each of the nine bags seized were field tested, he did not testify as to the results of the field test. Therefore, the jury could not have based its verdict upon field testing.

Moreover, field testing is insufficient evidence. In L.R. v. State, 557 So. 2d 121 (Fla. 3d DCA 1990), the Third District held that evidence was insufficient to prove L.R. possessed cocaine when the sole evidence was that "based on [an officer's] past experience, it appeared to be rock cocaine, and that it had field tested positive for cocaine." Id. at 122. The Third District reasoned that because the officer was unable to testify as to the reliability of the field test, and because there was no laboratory report or chemist called to testify, the evidence was insufficient. Id. at 122. Relying on the Third District's opinion, the Second District, in Johnson v. State, 929 So. 2d (Fla. 2d DCA 2005), held that "presumptive tests conducted by a field officer alone are not sufficient to establish a prima facie case." See also Smith v. State, 835 So. 2d 387, 388 (Fla. 2d DCA 2003). Here, the First District improperly relied upon any field testing conducted, as

such evidence is insufficient to prove that a substance is cocaine.

The First District also heavily focused upon the language of section 893.135(1)(b)1, Florida Statutes, punishing a defendant from possessing *any mixture containing cocaine.* 80 So. 3d at 372. In doing so, the First District cited language from this Court's opinion in State v. Yu. 400 So. 2d 762, 765 (Fla. 1981), indicating that "the legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine and thus could pose greater potential for harm to the public." Greenwade, 80 So. 3d at 372. The First District further stated that "the legislature's policy reason for penalizing possession of mixtures or compounds containing cocaine . . . legitimizes the practice of commingling multiple packets for chemical testing and weighing. . ." Id. at 374. However, this rationale is flawed.

First, the First District merely assumes that each of the nine bags seized were a mixture or compound containing cocaine, although there is no evidence of such. It is well settled that " [m] 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. In fact, look-alike substances or counterfeit narcotics are possessed and sold with such regularity that our legislature drafted criminal statutes proscribing such behavior. See § 831.31,

Fla. Stat. (2009) (making it illegal to posses with intent to sell a counterfeit controlled substance); and § 817.563, Fla. Stat. (2009) (making it illegal to offer to sell a person a controlled substance, and in lieu of said substance, sell them any other substance). Therefore, while logic and testing establish that one of the nine seized bags commingled, and tested contained a mixture of cocaine, neither logic nor testing establish that all commingled bags contained cocaine.

Second, the First District's rationale encourages law enforcement to commingle bags of suspected substances. As the detective testified, it is JSO's policy to commingle all substances before sending them to FDLE for proper testing. The First District's opinion in Greenwade allows officers to seize substances, commingle them, all-the-while, never knowing if one package contains purely a counterfeit substance, and another contains a controlled substance. If one bag contains a counterfeit substance, as the legislature realizes is a regular occurrence in our State, the counterfeit substance is not a mixture.

Furthermore, the First District skimmed past the issue regarding the element of weight required to prove the charge of trafficking, merely stating that "the State now must test a sample from each packet, determine which contain cocaine, and weigh only those. . ." Greenwade, 80 So. 3d at 373. As established above, weight is an element of the crime of trafficking. As such, the

State has always, not "now must", but has always had the burden of testing each packet of a substance to determine the content of the package. If, and only if, the substance contains a mixture of cocaine can the State commingle the substances together to determine the weight. This is required to satisfy due process. As such, the evidence was insufficient to prove the element of weight to secure a trafficking conviction.

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, 80 So. 3d 371.

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@mvfloridaleqal.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 22nd day of August, 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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District Court of Appeal of Florida,
First District.
Baron GREEN WADE, Appellant,
v.
STATE of Florida, Appellee.

No. 1D10-4330.
Jan. 24, 2012.
Rehearing Denied March 2, 2012.

Background: Defendant was convicted in the Circuit Court, Duval County, David M. Gooding, J., of trafficking in cocaine in amount more than 200 grams, but less than 400 grams. Defendant appealed.

Holding: The District Court of Appeal, Marstiller, J., held that evidence supported conviction, even though the state combined, tested and weighed the contents of nine small bags found in defendant's possession instead of testing each bag for cocaine before commingling and weighing their contents. Affirmed; conflict certified.

West Headnotes

Controlled Substances 96H €^>82

96H Controlled Substances
96HIII Prosecutions
96Hk70 Weight and Sufficiency of Evidence
96Hk82 k. Sale, distribution, delivery, transfer or trafficking. Most Cited Cases

Evidence supported conviction for trafficking in cocaine in amount more than 200 grams, but less than 400 grams, even though the state combined, tested and weighed the contents of nine small bags found in defendant's possession instead of testing each bag for cocaine before commingling and weighing their contents; defendant told officers executing residential search warrant, "What you are looking for is in the garage," officers found nine individual bags of white powder stored together in a green bag, defendant admitted the green bag contained cocaine, a spoon with cocaine residue found on top of the bag, digital scale was found on a table beside the bag, and seized bags of white power were field tested before their contents were combined and sent to laboratory. West's F.S.A. § 893.135(l)(b)l.

***371** Nancy A. Daniels, Public Defender, and M. Gene Stephens, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Therese A. Savona, Assistant Attorney General, Tallahassee, for Appellee.

MARSTILLER, J.

Appellant pled guilty to possession of a firearm by a convicted felon, possession of controlled substance paraphernalia, and resisting an officer without violence. A jury found him guilty of trafficking in cocaine in amount more than 200 grams, but less than 400 grams. The sole issue Appellant raises is whether'the trial court should have granted his motion for judgment of acquittal on the cocaine trafficking charge because the state combined, tested and weighed the contents of nine small bags found in his possession instead of testing each bag for cocaine before commingling and weighing their contents. We affirm the conviction.

Detective Donald Bishop and other officers from the Jacksonville Sheriffs Office ***372** executed a search warrant at a residence in Jacksonville. There, they found Appellant sitting behind a table in the garage and, after thwarting his attempt to escape, they placed him in custody. Once detained, Appellant told Detective Bishop, "What you are looking for is in the garage." He directed the detective back to the garage and to the table behind which he had been sitting. On the table was a digital scale, and beside the table was a green bag. Appellant admitted the bag contained cocaine. Lying

atop the bag was a spoon with cocaine residue on it. And inside the bag Detective Bishop found nine powder-filled one-ounce plastic baggies. After Detective Bishop read Appellant his *Miranda* rights, Appellant admitted the cocaine was his.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Every baggie was field tested before transfer to the Sheriffs Office property room. Once there, they were emptied and each baggie put in its own envelope. According to Detective Bishop, it is standard procedure to combine the contents of individual packets for subsequent lab testing.

FDLE [FN2] forensic chemist, Dr. Katherine Warniment, received one sealed Ziploc bag containing an amount of off-white powder for testing to identify any controlled substances in the powder. Chemical tests she performed confirmed the powder contained cocaine. She also determined the substance in the Ziploc bag weighed 234.5 grams. Dr. Warniment did not—and does not—test for purity because the law does not require the lab to quantify the amount of cocaine in a given sample.

FN2. Florida Department of Law Enforcement

Indeed, under section 893.135(l)(b)l, Florida Statutes (2009):

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a) 4., *or of any mixture containing cocaine,* but less than 150 kilograms of cocaine *or any such mixture,* commits a felony of the first degree, which felony shall be known as "trafficking in cocaine,".... If the quantity involved:
>
> * * *
>
> b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

(emphasis added). The Florida Supreme Court has said that in deciding to penalize possession of mixtures or compounds containing cocaine, "the legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine and thus could pose a greater potential for harm to the public." *State* v. *Yu,* 400 So.2d 762, 765 (Fla. 1981). Keeping in mind this policy decision by the legislature, we consider whether the State produced evidence that Appellant possessed between 200 and 400 grams of cocaine sufficient to survive a motion for judgment of acquittal.

The Third District first held in *Ross* v. *State,* 528 So.2d 1237, 1239 (Fla. 3d DCA 1988), that where "the subject cocaine or mixture [is] contained ... in a series of separately wrapped packets," the State must "establish that each of the subject packets contains cocaine or a mixture thereof which in the aggregate satisfies the above statutory weight." In that case, law enforcement officers seized from the appellant a brown paper bag holding two bundles of plastic packets containing white ***373** powder. One bundle contained 36 packets; the other contained 56 packets. The crime lab chemically tested two of the 92 packets, one from each bundle, and determined both contained cocaine. The lab technician then combined the contents of all 92 packets and obtained a total weight for the contents of 38.8 grams. On that evidence, a jury found the appellant guilty of trafficking in cocaine. The Third District reversed the conviction, concluding that the State failed to prove the appellant possessed 28 grams or more of cocaine or a mixture of cocaine because only two of the seized packets were tested. *Id.* The court reasoned:

> [T]he fact that one or two packets containing cocaine are found among other packets containing

similar-looking white powder is no assurance that the latter untested packets also contain cocaine in view of (1) the vast number of other chemical compounds which have a similar white powdery appearance, and (2) the fact that the material in the untested packets was not commingled with the material in the tested packets.

Id. at 1239-40. The Third District later employed this reasoning to affirm an order reducing heroin trafficking charges to simple possession where the white powder was contained in capsules, but only a random sample of capsules were chemically tested before commingling the contents of all capsules for weighing. *See Slate* v. *Clark,* 538 So.2d 500, 501 (Fla. 3d DC A 1989).

Applying the rationale in *Ross,* the Second District in *Saffordv. State,* 708 So.2d 676, 677 (Fla. 2d DCA 1998), reversed a cocaine trafficking conviction and reduced it to simple possession where the contents of 40 foil packets containing white powder were combined into one mixture before chemical testing. In *Sheridan* v. *State,* 850 So.2d 638 (Fla. 2d DCA 2003), the court ruled similarly on an amphetamine trafficking conviction. There, sheriffs deputies found two bags containing white powder in the car the appellant was driving. One or both field tested positive for methamphetamine, leading the appellant to admit he was planning to trade one ounce of methamphetamine for two pounds of marijuana. The contents of the bags were combined and sent to the lab where chemical tests confirmed the field test results. The combined contents weighed 23 grams, exceeding the 14 gram statutory threshold for trafficking in amphetamine. The court condemned the commingling procedure and opined that it "created an assumption as to the amount without the necessaiy proof. Thus, the evidence of trafficking was legally insufficient and should not have gone to the jury." *Id.* at 640. *See also Smith* v. *State,* 835 So.2d 387 (Fla. 2d DCA 2003).

We respectfully decline to follow *Ross, Safford* and *Sheridan* because, in our view, their apparent bright line rule creates an untenable distinction between cases involving multiple packages of suspicious white powder and cases involving just one package. To illustrate, if in this case Detective Bishop had found one large plastic bagful of powder inside the green bag Appellant led him to, there would be no question that testing a sample and weighing the powder would yield sufficient evidence to prove Appellant possessed more than 200 grams of cocaine or a mixture of cocaine. But take that same bagful of powder and split it into nine small saleable packets, and *Ross* et al. hold that to prove the weight element of trafficking, the State now must test a sample from each packet, determine which contain cocaine, and weigh only those—even if presumptive field testing detects cocaine in every packet, see *Smith* at 388, and other circumstances, such as the way the packets are bundled together *(Ross*) or an admission by the defendant *(Sheridan*), would permit a jury to reasonably infer all the packets contain an illegal substance.

*374 The rationale underlying the so-called rule against commingling, see *Lyons* v. *State,* 807 So.2d 709, 710 (Fla. 5th DCA 2002), is that where several individual packets contain suspected cocaine (or some other contraband in powder form), one or more of the packets might contain some "other chemical compoundf] which [has] a similar white powdery appearance." *Ross,* 528 So.2d at 1239-40. But we go back to *Yu* and the Legislature's policy reason for penalizing possession of mixtures or compounds containing cocaine: pure cocaine can be (and assuredly is) diluted with other substances to facilitate broader distribution. This policy,, we believe, legitimizes the practice of commingling multiple packets for chemical testing and weighing, where the circumstances attending the discovery and seizure of the packets permit the reasonable conclusion that they contained contraband, and perhaps other substances, to be used in illegal drug distribution.

We find such circumstances present in the instant case. Appellant, whom officers apprehended

after executing a residential search warrant, told Detective Bishop, "What you are looking for is in the garage." There, stored together inside a green bag were the nine individual baggies of white powder. Appellant admitted the bag contained cocaine. On top of the bag was a spoon with cocaine residue on it, and on the table beside the bag was a digital scale—tools of the drug trade. All the seized baggies were field tested before their contents were combined and sent to the FDLE lab. This evidence, together with the positive chemical test performed on the commingled powder, was sufficient for the jury to find Appellant had more than 200 grams of cocaine or a mixture of cocaine in his possession. As Judge Schwartz reasoned in his dissent in *Ross:*

It seems to me, as it must have to the jury, eminently reasonable to conclude that the material in the packet randomly selected from each of the two bundles was representative and characteristic of the other ones, which were otherwise identical in every way.... [A] reasonable person could conclude beyond a reasonable doubt that all of the packages in the two bundles contained cocaine. Since both bundles were possessed at the same time by the same person, the defendant Ross, I believe that they were properly added together in . order to reach the trafficking threshold....

Ross, 528 So.2d at 1241 (Schwartz, C.J., dissenting in part) (citations omitted); *cf. Lyons,* 807 So.2d at 711 (affirming trafficking conviction because, although contents of two "bricks" of powder were commingled before testing and weighing, they were approximately the same size, otherwise similar in appearance, and hidden together in single taped-up Cornflakes box, allowing reasonable inference they both contained mixtures of cocaine).

In sum, for the reasons stated above, we affirm Appellant's conviction for trafficking in cocaine. We certify conflict with *Ross v. State,* 528 So.2d 1237 (Fla. 3d DC A 1988), *Sajford* v. *State,* 708 So.2d 676 (Fla. 2d DCA 1998), and *Sheridan v. State,* 850 So.2d 638 (Fla. 2d DCA 2003), to the extent those cases hold that the lab's failure to test each package before commingling to determine weight renders insufficient the State's evidence of trafficking, notwithstanding other circumstantial evidence of the offense.

AFFIRMED; CONFLICT CERTIFIED.

WETHERELL and SWANSON, JJ., concur.

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