IN THE SUPREME COURT OF FLORIDA

BARON GREENWADE,

Petitioner,

v. CASE NO. SC12-598

STATE OF FLORIDA, First DCA No. 1D10-4330

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal certified interdistrict conflict on an issue that will guide police practice in drug prosecutions: whether an accused may be convicted of possession of drugs in an amount corresponding to the combined weight of the contents of several packages which were combined before laboratory testing proved the presence of an illicit substance. Greenwade v. State, 80 So. 2d 371 (Fla. 1st DCA 2012). Following are facts from the district court opinion pertinent to the conflict determination.

Executing a search warrant at a residence, police officers found Greenwade sitting at a table in the garage. On the table was a digital scale. Beside the table was a green bag, which Greenwade admitted contained cocaine. On top of the bag was a spoon. Inside the bag were nine one-ounce plastic baggies containing powder. "Appellant admitted the cocaine was his."

> Every baggie was field tested before transfer to the Sheriff's 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.

An FDLE chemist received one Ziploc bag weighing 234.5 grams (8.27 ounces), which tested positive for the presence of cocaine. Id. at 372.

The appellate court addressed "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."

The court discussed but rejected the rule against commingling from decisions by other district courts which disapproved combining the contents of separate packages of a suspected illicit substance to reach a particular weight threshold for drug trafficking without first ensuring that each package contained the illicit substance.

> We respectfully decline to follow [those decisions] 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.

Id. at 374. The court certified interdistrict 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.

SUMMARY OF THE ARGUMENT

The certification of conflict identifies an important interdistrict split of authority in cocaine trafficking prosecutions on the rule of commingling the alleged illicit substance before laboratory testing. The First District permits cocaine trafficking convictions based on the weight of the commingled substance; the Second and Third districts require testing of the contents of separate packages before the defendant may be held responsible for the entire weight. Until the split is resolved, defendants may face cocaine trafficking convictions and long, mandatory sentences and fines in the First District on facts which yield only third-degree felony convictions, short sentences, and no fines in the other districts. The split may also yield different practices in different parts of the state by police agencies who interdict suspected cocaine in separate packages.

This Court should grant review based on the certified conflict with Ross v. State, 528 So.2d 1237 (Fla. 3d DCA 1988), and Safford v. State, 708 So.2d 676 (Fla. 2d DCA 1998), as well as the express and direct conflict with Jackson v. State, 76 So. 3d 1130 (Fla. 5th DCA 2012).

ARGUMENT

CERTIFIED INTERDISTRICT CONFLICT ON THE EFFECT OF COMMINGLING COCAINE BEFORE TESTING ON THE WEIGHT ELEMENT OF A TRAFFICKING OFFENSE JUSTIFIES DISCRETIONARY REVIEW.

In this case, the First District unsettled Florida jurisprudence on whether the state may combine the contents of separate packages of alleged powder cocaine before laboratory testing and then hold the defendant responsible for the aggregate weight of the combined contents. As the First District acknowledged, the Second and Third districts have ruled that commingling suspected cocaine in this manner yields insufficient evidence of trafficking in cocaine in the aggregate weight of the combined substance. See Safford v. State, 708 So. 2d 676 (Fla. 2d DCA 1998); Ross v. State, 528 So. 2d 1237 (Fla. 3d DCA 1988). The First District rejected "the so-called rule against commingling" in Safford, Ross, and Sheridan v. State, 850 So. 2d 638 (Fla. 2d DCA 2003), which involved methamphetamine. Greenwade v. State, 80 So. 3d 371, 374 (Fla. 1st DCA 2012). The First District concluded that these decisions' "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.

In Ross, the Third District explained the rationale for the distinction found untenable by the First District:

> It is essential in order to sustain a cocaine trafficking conviction that each packet of white powder be chemically tested, by random sample, to contain cocaine, and that the total weight of the material in the tested packets equal or exceed twenty-eight (28) grams; a visual examination of untested packets of this weight is insufficient to convict because the white powder

> contained therein may be milk sugar or any one of a vast variety of other white powdery chemical compounds not containing cocaine. Moreover, the 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.

528 So. 2d at 1239-40. In rejecting the similarity of cocaine to other substances as justification for the rule against commingling, the First District relied on field testing, the bundling of the packages, and Greenwade's admission that the cocaine was his. As the court noted, similar circumstances were not deemed sufficient to hold the defendants accountable for all of the commingled substance in Ross and Sheridan. Greenwade, 80 So. 3d at 373. Accordingly, the court certified conflict with Ross, Safford, and Sheridan "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.

The somewhat pejorative qualifier aside, the certification of conflict identifies an important split of authority on the rule of commingling. Jackson v. State, 76 So. 3d 1130 (Fla. 5th DCA 2012), decided thirteen days before the district court decision in this case, sharpens the division. There the Fifth District, relying on Safford and Ross, reduced a cocaine trafficking conviction from the 200-gram to the 28-gram level of the offense because a chemist tested only one of eight bags of suspected powder cocaine which,

when aggregated and combined with cocaine rocks, surpassed the 200-gram threshold. Id. at 1131-32.

Unless it is resolved, the split of authority among the district courts may yield different practices in different parts of the state by police agencies who interdict suspected cocaine in separate packages. A police agency in the First District may as a matter of policy rely on the decision in this case as authority to aggregate the contents of suspected powder cocaine, leading to conviction of an individual such as Greenwade for trafficking in the First District but only felony possession in the Second, Third, and Fifth districts.

This Court should grant review based on the certified conflict with Ross, Safford, and Sheridan, as well as the express and direct conflict with Jackson. Discretionary review will resolve the split and unify the state's jurisprudence on the effects of the failure to subject separate packages of suspected powder cocaine to laboratory testing before the combined contents could be aggregated for purposes of prosecution and conviction under section 893.135, Florida Statutes.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Court grant discretionary review.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Therese A. Savona, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this 9th day of April, 2012. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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80 So.3d 371
District Court of Appeal of Florida,
First District.

Baron **GREENWADE**, Appellant,
v.
STATE of Florida, Appellee.
No. 1D10–4330. | Jan. 24, 2012. | Rehearing Denied March 2, 2012.

Synopsis

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 (1)

1 **Controlled Substances**
Sale, distribution, delivery, transfer or trafficking

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(1)(b) 1.

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

Opinion

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 Sheriff's 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*[1] rights, Appellant admitted the cocaine was his.

Every baggie was field tested before transfer to the Sheriff's 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[2] 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.

Indeed, under section 893.135(1)(b) 1, 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:
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> * * *
>
> 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 State v. Clark*, 538 So.2d 500, 501 (Fla. 3d DCA 1989).

Applying the rationale in *Ross*, the Second District in *Safford v. 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, sheriff's 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 necessary 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 compound[ ] 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 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.

AFFIRMED; CONFLICT CERTIFIED.

WETHERELL and SWANSON, JJ., concur.

Parallel Citations
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Footnotes

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

2 Florida Department of Law Enforcement