

IN THE SUPREME COURT OF FLORIDA

077  
FILED  
SID J. WHITE  
SEP 17 1990  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

STATE OF FLORIDA, :  
Petitioner, :  
vs. :  
DEONA EMBRY, :  
Respondent. :  
\_\_\_\_\_ :

Case No. 76,199

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT  
FLORIDA BAR NO. 0143265

ANDREA NORGARD  
ASSISTANT PUBLIC DEFENDER

Public Defender's Office  
Polk County Courthouse  
P. O. Box 9000--Drawer PD  
Bartow, FL 33830  
(813) 534-4200

ATTORNEYS FOR RESPONDENT

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
PRELIMINARY STATEMENT AND NOTICE OF SIMILAR ISSUE	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
ISSUE	
WHETHER THE DUE PROCESS RIGHTS OF RESPONDENT WHERE VIOLATED UNDER THE HOLDING OF <u>STATE V. GLOSSEN</u> , 462 So.2d 1082, 1084 (FLA. 1985), WHEN A CONVICTED DRUG TRAFFICKER RECEIVED A REDUCED SENTENCE AS PART OF A SUB- STANTIAL ASSISTANCE AGREEMENT FOR SETTING UP NEW DRUG DEALS AND TESTI- FYING FOR THE STATE?	5
CONCLUSION	9
APPENDIX	
1. MARK D. EVANS, Brief of the Merits filed June 15, 1989	A1
2. VERNON D. MESSIER filed May 19, 1989.	A2
3. DAVID WILLIAM HUNTER, Brief of the Merits filed Febuary 19, 1989	A3
4. KELLY CONKLIN, Brief of the Merits filed Janaury 9, 1989	A4
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Cruz v. State,</u> 465 So.2d 576 (Fla. 1985)	4, 7
<u>Marrero v. State,</u> 493 So.2d 463 (Fla. 3d DCA 1983)	7
<u>Pezzella v. State,</u> 573 So.2d 1328 (Fla. 3d DCA 1987)	7
<u>Rounskey v. State,</u> 520 So.2d 333 (Fla. 4th DCA 1988)	7
<u>State v. Anders,</u> 15 F.L.W. D10069 (Fla. 4th DCA April 10, 1990)	6
<u>State v. Evans,</u> 537 So.2d 638 (Fla. 2d DCA 1988)	1, 3
<u>State v. Glossen,</u> 462 So.2d 1082 (Fla. 1985)	5
<u>State v. Hunter,</u> 531 So.2d 239 (Fla. 4th DCA 1988)	1, 3
 <u>OTHER AUTHORITIES</u>	
Fla. R. Crim. P. 3.190(c)(4)	2
§ 893.135, Fla. Stat. (1988)	2

PRELIMINARY STATEMENT AND NOTICE OF SIMILAR ISSUE

The Respondent/Appellee, DEONA EMBRY, adopts those arguments as already before this Court in the cases of State v. Hunter, 531 So.2d 239 (Fla. 4th DCA 1988), rev.pending Case No. 73,230, State v. Evans, 537 So.2d 638 (Fla. 2d DCA 1988), rev.pend-  
ing Case No. 73,779, and gives notice that similar issues are presented to this Court in those briefs.

STATEMENT OF THE CASE AND FACTS

Respondent, DEONA EMBRY, was charged with trafficking in cocaine on November 7, 1988, pursuant to section 893.135, Florida Statutes (1988). (R5)

On April 14, Respondent filed a motion to dismiss and memorandum of law in support thereof in the trial court in Sarasota County. (R11-16) Respondent argued that because of an informant who had received substantial assistance resulting in his own reduced sentence in violation of section 893.135(3), Florida Statute (1988), that his own due process rights were violated and dismissal under Florida Rule of Criminal Procedure 3.190(c)(4) was warranted. (R11,14-16)

The motion was neither traversed nor was any demur filed by the State. The facts set forth in the motion were that a Frank Gammichia had been arrested in Tampa for trafficking in cocaine and faced a three-year minimum/mandatory. (R11) Mr. Gammichia entered into a substantial assistance agreement with the Hillsborough County State Attorney's Office which required him to make cases against two people. (R11) In return, if successful, Mr. Gammichia would receive a sentence of probation as opposed to prison.

When Gammichia was unable to make good with two targeted people, he offered to make a deal with Respondent, Mr. Embry. (R11) Gammichia had never purchased drugs from Respondent nor had he ever seen Respondent in possession of any controlled substance. (R11) Mr. Embry was in no way a suspect in any drug transaction or in any

way believed by law enforcement to be involved in narcotics in any fashion. (R12)

Mr. Gammichia was the sole source of communication with Respondent and ultimately convinced Mr. Embry to deliver 116 grams of cocaine to undercover officers. (R12)

Mr. Gammichia, having successfully entrapped Mr. Embry, entered pleas to reduced charges and was sentenced to probation. (R12) Mr. Gammichia testified under oath at deposition to the facts contained in the motion. (R20)

Following a hearing during which no testimony was presented, the State asserted that Mr. Embry had been known only to Gammichia and that Gammichia had some information that Mr. Embry had been involved in drug sales previously. (R34,36)

Based upon the decisions of State v. Hunter, 531 So.2d 239 (Fla. 4th DCA 1988), rev.pending, Case No. 73,230, and State v. Evans, 537 So.2d 639 (Fla. 2d DCA 1988), rev.pending, Case No. 73,779, the trial court granted the motion to dismiss. (R44,59) The State appealed to the Second District Court of Appeal, which issued its opinion on June 1, 1990, affirming the dismissal and certifying the question previously certified in Hunter, supra:

Does an Agreement Whereby A Convicted Drug Trafficker Will Receive A Substantially Reduced Sentence In Exchange For Setting Up New Drug Deals And Testifying For The State Violate The Holding In State v. Glossen?

SUMMARY OF THE ARGUMENT

The certified question should be answered in the affirmative. The ruling of State v. Glossen, 462 So.2d 1082 (Fla. 1985), applies to the instant case; however, dismissal is also warranted under the objective entrapment test of Cruz v. State, 465 So.2d 576 (Fla. 1985).

## ARGUMENT

### ISSUE

WHETHER THE DUE PROCESS RIGHTS OF RESPONDENT WERE VIOLATED UNDER THE HOLDING OF STATE V. GLOSSEN, 462 So.2d 1082, 1084 (FLA. 1985), WHEN A CONVICTED DRUG TRAFFICKER RECEIVED A REDUCED SENTENCE AS PART OF A SUBSTANTIAL ASSISTANCE AGREEMENT FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE?

In ruling that the charges against Respondent were correctly dismissed, the Second District clearly recognized the danger in allowing a confidential informant under the threat of prison, to go forth and manufacture crime in order to escape the punishment his own drug dealing has subjected himself to. Quite correctly, the Second District recognized that when an unsupervised criminal is allowed on the streets and told only to engage in further narcotics activities, his primary concern is not the constitutional rights of his victims, but his own very precious right of freedom. The Mr. Gammichia the mathematics were simple: two drug deals equal freedom, zero deals equal three years behind bars.

This court has already recognized that improper motivations by the agents of law enforcement because of the possibility of great benefits carries with it such a potential for abuse that the due process rights of those facing criminal prosecution as a result of the agents' actions are violated. This Court held in State v. Glossen, 462 So.2d 1082, 1085 (Fla. 1985), that constitu-

tional due process standards warrant dismissal of those cases in which the confidential informant stands to "gain the benefit of reduced punishment conditioned by cooperation and testimony in the criminal prosecutor when that testimony is critical to a successful prosecution." As stated by the Fourth District Court of Appeal in State v. Anders, 15 F.L.W. D1069 (Fla. 4th DCA April 10, 1990): "Glossen forbids prosecutions predicated upon improper contingent fee arrangements with unsupervised informants." Mr. Gammachia was unsupervised and his "fee" was freedom. It takes little imagination to conclude that one's freedom is any less incentive or any less a valuable commodity than the cash fee of Glossen.

The State incorrectly argues that the testimony of Gammichia was immaterial. Only Gammichia had contact with Respondent. All negotiations and arrangements were made exclusively through Gammichia. In order to defeat a defense of entrapment, Gammachia's testimony is critical -- in fact, only his testimony can rebut the defense. While the State argues that Respondent may have a motivation to lie, such argument is irrelevant to the issue of due process violations by the government. A government informant hardly may be equated with a murder accomplice -- what the State seems to miss in its analogy is who sanctioned and approved the conduct which is questionable is the same force which now seeks to use that conduct in a criminal prosecution. Here, the State creates the crime -- a much different scenario from offers of immunity for favorable testimony of a codefendant who acted alone without government approval.

Petitioner also asserts that the case at hand is not subject to dismissal under Cruz v. State, 465 So.2d 516 (Fla. 1985), cert.denied, 473 U.S. 905 (1985). The first prong of the Cruz test requires that, in order to defeat an objective test of entrapment, the police activity interrupt a specific ongoing criminal activity. The State cannot show that in this case. Respondent Embry was completely unknown to law enforcement. Gammichia had never purchased nor seen Respondent with any narcotics, although he said he had heard something somewhere that he (Respondent) was involved with drugs. This, however, was not firsthand information and, at this stage, is mere conjecture. That, however, does not establish an "ongoing" criminal enterprise. Dismissal is appropriate when the State fails to satisfy the first prong of Cruz. See Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1983); Pezzella v. State, 573 So.2d 1328 (Fla. 3d DCA 1987); Rounskey v. State, 520 So.2d 333 (Fla. 4th DCA 1988).

Lastly, Petitioner argues that, because a deal was set up, the use of an illegal substantial assistance agreement to procure that deal is immaterial and the method was reasonable. This "ends-justifies-the-means" rationale has no place in other areas of criminal law, such as the operation of the exclusionary rule and the whole concept of suppression, and no place here.

Respondent does not contend that society should not have as a goal the elimination of illegal drug activity; yet, we have also decided that we wish our society to operate under certain constitutional principals, and that a violation of those principals

of due process is, at times, more dangerous to our society than the substantive offense. In this instance, those due process considerations, the very real threat that the confidential informant has an enormous incentive to color his testimony and an invaluable stake in making the case, and the pure illegality of the actions by law enforcement compels this Court to affirm the dismissal of the charges against Respondent.

CONCLUSION

Based upon the foregoing arguments, this Honorable Court should conclude that the due process rights of Respondent Embry were violated and affirm the orders of both the trial court and the Second District Court of Appeal, in the charges against Respondent.

Respectfully submitted,

*Andrea Norgard*

---

ANDREA NOROARD  
Assistant Public Defender  
P. O. Box 9000 - Drawer PD  
Bartow, FL 33830  
(813) 534-4200

APPENDIX

PAGE NO.

1. MARK D. EVANS, Brief of the Merits  
filed June 15, 1989 A1
2. VERNON D. MESSIER  
filed May 19, 1989. A2
3. DAVID WILLIAM HUNTER, Brief of the Merits  
filed Febuary 19, 1989 A3
4. KELLY CONKLIN, Brief of the Merits  
filed Janaury 9, 1989 A4