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PRELIMINARY STATEMENT

Petitioner, ERNESTO AMADO, was the defendant in the trial court and the appellant in appeal to the Second District Court of Appeal. Respondent, the State of Florida, was the appellee in this appeal. The appendix to this brief contains a copy of the decision rendered January 19, 1990.

STATEMENT OF THE CASE

In the Circuit Court for Hillsborough County, the State filed an information charging Petitioner, ERNESTO AMADO, with trafficking in cocaine, count one, and delivery of cocaine, count two.

[R373-374] Count one of the information charged:

[Petitioner] did knowingly sell, manufacture, deliver, or bring into this State, or was/were knowingly in actual or constructive possession of Cocaine, a controlled substance as described in F.S. 893.03 (2)(a)4, or of any mixture containing cocaine, in an amount of twenty-eight (28) grams or more, but less than two hundred (200) grams. [R373]

Petitioner appeared for a jury trial on May 13, 1987. [R1] Over Petitioner's objections, the trial court declined to instruct the jury on any lesser included offenses of trafficking, including simple possession. [R255] The jury returned verdicts of guilty for both of the charged offenses. [R345,428]

The trial court adjudicated Petitioner guilty. [439-440] The court sentenced Petitioner to thirty years imprisonment for count one and fifteen years imprisonment for count two, the sentences to run consecutive with credit for time served. [R362,441-443] Petitioner filed a timely notice of appeal. [R446] In an opinion filed on June 8, 1990, the Second District Court of Appeal reversed Petitioner's sentence. However, the court held the trial court did not err in failing to instruct the jury on simple possession of cocaine.

STATEMENT OF THE FACTS

On October 16, 1985, Detective Blaine Defreitas was informed that a suspect Miguel was selling cocaine at 1213 East Columbus Avenue. [R16-17] This residence was similar to a rooming house. [R110] Harry Enos, a confidential informant, provided this information. [R17] Enos did not mention Petitioner. [R85] Defreitas and Enos proceeded to the above address in order to make a control purchase of cocaine. [R20] Enos entered the residence and returned with a half-gram of cocaine. [R21-22] This purchase did not involve Petitioner. [R86]

Defreitas attempted to arrange a purchase that evening of two ounces of cocaine. [R22] When Defreitas and Enos returned to the residence, a small group of Latin males said that Miguel was not available. [R24]

On October 17, 1985 at about 6:00 p.m., Defreitas and Enos again went to the residence. [R26] Hernandez and Delgado, two Latin males, were at the house. [R27-28] About five minutes after Defreitas arrived, Miguel arrived. [R27] An agreement was made for the purchase of cocaine. [R27,31] Miguel said that he would not be present for the transaction. [R32] However, Miguel, pointing to Hernandez, said that someone would be present. [R32] Miguel told Defreitas to return at about 8:30 p.m. [R33]

Defreitas and Enos arrived at the residence at the arranged time. [R36] They came in contact with Hernandez and Petitioner. [R37] No one else was present. [R37] Either Hernandez or

Petitioner said that the cocaine was being packaged at that time. [R37] The word cocaine was used. [R37] Defreitas testified that Hernandez was doing most of the speaking and Petitioner was agreeing with what was said. [R38] According to Defreitas, Petitioner spoke English. [R38,40] However, Petitioner testified that he knew little English. [R218]

Defreitas testified that Petitioner told him that he would inquire as to what Miguel was doing. [R39] Petitioner went across the street and returned shortly thereafter. [R39] According to Defreitas, Petitioner said that Miguel was making the package and it would soon be ready. [R39-40] Defreitas, Enos, and Hernandez entered the residence; Petitioner left the residence. [R40] While the three waited in the kitchen, Petitioner arrived with a brown paper bag. [R41] Defreitas did not know where the bag came from. [R134] The bag was closed. [R135] Defreitas testified that Petitioner handed the bag to Hernandez who handed it to Defreitas. [R41]

Defreitas opened the bag and observed what he thought were three packages of cocaine. [R41] Defreitas pulled the packages out of the bag. [R42] Petitioner observed the cocaine being pulled out of the bag, Defreitas testified. [R42] Defreitas placed the packages on the kitchen table. [R42] According to Defreitas, Petitioner began pacing about as if nervous. [R43,44] Defreitas informed Hernandez that Enos would obtain the money from the car. [R43]

Defreitas testified that Petitioner and Hernandez began speaking Spanish. [R44] Shortly thereafter, Hernandez turned on the faucet to the sink. [R44] A State witness testified that the running water could have been a method of disposing of the cocaine if law enforcement arrived. [R198] However, the witness admitted that the water could have been turned on for other reasons. [R202]

Enos returned with the money. [R44] Defreitas counted the money in front of Petitioner and Hernandez. [R51] Meanwhile, law enforcement officers were signaled. [R45] Officers arrived and announced their presence in both Spanish and English. [R52] R. L. Alvarez, one of the officers, testified that Petitioner ran out the front door when the officers announced their presence. [R175,-176-177] Officer Robert Holland testified that he apprehended Petitioner. [R188] However, Holland stated in a deposition that he was not sure if Petitioner or Hernandez was the one chased. [R191] Michael George and W.J. Hill, two officers who entered the home with Alvarez, testified that they did not see Petitioner in the residence. [R210,212,213,215]

Patricia Pattee, a crime lab analyst, testified that the substance obtained from the packages was cocaine and weighed 58.1 grams. [R169,170-172] On the other hand, Defreitas testified that the substance weighed 56 grams. [R57]

Petitioner testified that he lived at the residence on Columbus Avenue. [R216] Miguel was in charge of the house. [R216] Petitioner denied having participated in any drug transaction. [R220] When Defreitas and Enos arrived and began speaking,

Petitioner testified that he crossed the street in order to pickup his dinner. [R219] Petitioner returned with a yellow plastic box that contained his food. [R219] Petitioner said that he went into the kitchen with the food. [R220]

Petitioner testified that he told Hernandez in Spanish that he should look for work instead of selling drugs. [R221] Petitioner then left the kitchen. [R221] According to Petitioner, Delgado was the one who brought the cocaine into the kitchen. [R222] Explaining why he ran when he knew the police were coming, Petitioner stated that he was scared because the police had mistreated him during an unrelated search. [R222-223]

SUMMARY OF THE ARGUMENT

The opinion of the Second District Court of Appeal on the issue regarding a jury instruction on simple possession of cocaine conflicts with decisions of the Fourth and Third District Courts of Appeal. The Second District Court of Appeal held that a defendant who is charged with trafficking in cocaine is not entitled to a jury instruction on simple possession of cocaine where the evidence does not support the charge. [App. at 6] This holding conflicts with Essex v. State, 539 So.2d 559 (Fla. 4th DCA 1989), and Carvalho v. State, 513 So.2d 1321 (Fla. 3d DCA 1987), where the courts held the failure to give such an instruction was reversible error even though the evidence did not support the instruction. This court should exercise its discretionary jurisdiction and resolve this conflict.

ARGUMENT

ISSUE

DOES THE DECISION IN AMADO V. STATE, Case No. 87-01859 (Fla. 2d DCA June 8, 1990), CONFLICT WITH DECISIONS OF THE FOURTH AND THIRD DISTRICT COURTS OF APPEAL WHICH HOLD THAT A DEFENDANT CHARGED WITH TRAFFICKING IN COCAINE IS ENTITLED TO A JURY INSTRUCTION ON SIMPLE POSSESSION OF COCAINE EVEN THOUGH THE EVIDENCE MAY NOT SUPPORT THE CHARGE?

The state filed an information charging Petitioner with trafficking in cocaine, count one, and delivery of cocaine, count two. [R373-374] Over Petitioner's objections, the trial court declined to instruct the jury on any lesser included offenses of trafficking, including simple possession. [R255] On appeal of this issue, Petitioner argued the failure to instruct the jury on simple possession of cocaine was reversible error. [App. at 5] The Second District Court of Appeal held that the failure to instruct was not reversible error because the evidence did not support the charge. [App. at 6] The court noted conflict with Essex v. State, 539 So.2d 559 (Fla. 4th DCA 1989). [App. at 6]

The court in Essex held the failure to instruct the jury on simple possession of cocaine was reversible error even though counsel stipulated that the amount of cocaine was more than twenty-eight grams. The court stated the doctrine of jury pardon required the instruction. The court in Carvalho v. State, 513 So.2d 1321 (Fla. 3d DCA 1987), reached the same result saying the failure to

instruct the jury on simple possession of cocaine was per se reversible error.

The Second District Court of Appeal's decision in the instant case expressly and directly conflicts with the decisions of two other district courts of appeal. This court should resolve this conflict by exercising its discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2).

CONCLUSION

In light of the foregoing reasons, arguments and authorities, petitioner had demonstrated that conflict does exist with the instant decision and other district courts of appeal so as to invoke discretionary review of this Court.

APPENDIX

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1. Ernesto Amado v. State, Case No. 87-01859
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