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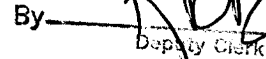

IN THE SUPREME COURT OF FLORIDA

ERNESTO AMADO,

Petitioner,

v.

Case No. 76,209
2DCA No.87-1859

STATE OF FLORIDA,

Respondent.
_______________________________/

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

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

As for Issue I, the Second District correctly held that simple possession is not a necessarily lesser-included offense of trafficking in cocaine where, as here, the state alleged alternative means of committing the greater offense. The court was also correct in holding that simple possession is not a permissive lesser-included offense as the uncontraverted evidence demonstrated that the cocaine in question weighed more than 28 grams.

As for Issue II, the Second District correctly found a hearsay exception as there was substantial, competent evidence in the record of the existence of a conspiracy, member participation, and that the statements complained of were made in the course of and in the furtherance of the conspiracy.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SIMPLE POSSESSION AS A NECESSARILY LESSER-INCLUDED OFFENSE OF TRAFFICKING IN COCAINE?

Petitioner contends that the trial court erred in denying his requested instruction on simple possession of cocaine on the bases that simple possession is either a necessarily lesser-included offense of trafficking in cocaine, or that it is a permissive lesser offense of trafficking where, as alleged here, it is supported by the evidence. The state disagrees.

Petitioner was charged with singular counts of trafficking and delivery of cocaine. The trafficking count alleged that petitioner either knowingly sold, manufactured, delivered or brought into the state, or was in the actual or constructive possession of cocaine in excess of 28 grams but less than 200 grams (R. 373).

The proof adduced at trial reveals that an undercover detective and a confidential informant made a controlled buy of a small amount of cocaine from a person named Miguel. The detective and the confidential informant returned the next evening and made a deal with Miguel to purchase a larger quantity of cocaine later that evening. Miguel stated that he would not be present for the transaction, but that someone else would be.

When the detective returned, he was greeted by petitioner and his co-defendant, Horacio Hernandez. Petitioner left to check on Miguel; he returned saying that Miguel was preparing

their package. Petitioner left again, and he returned shortly thereafter with a package. Petitioner gave the package to Hernandez who handed it to the detective. The detective opened the package. It contained cocaine. Petitioner and Hernandez were subsequently arrested.

In petitioner's trafficking conviction, the Second District held that where, as here, the state charges the offense of trafficking in cocaine[1] by alternative methods, then simple possession is not a necessarily lesser-included offense of the greater crime, but is merely a permissive lesser-included offense which should be instructed on only when it is requested, and where the pleadings and evidence demonstrate that it is included in the charged offense. Opinion at p. 5. The court, citing Munroe v. State, 514 So.2d 397 (Fla. 1st DCA 1987), went on to hold that the trial court did not err by failing to give the category two instruction, as the evidence showed that the cocaine weighed more than 28 grams. (*Id.* at p. 6). In so holding, the Second District recognized a contrary decision by the Fourth District Court of Appeal in Essex v. State, 539 So.3d 559 (Fla. 4th DCA 1989), which held that simple possession is a permissive lesser-included offense of trafficking because of the doctrine of a jury pardon despite the fact that the party's stipulated that the cocaine in question was more than 28 grams.

The state submits that the Second District's decision *sub judice* is correct, and that the Fourth District's decision in Essex is wrong.

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[1] §893.135(1)(b), Fla. Stat. (1985).

Regarding the so-called doctrine of jury pardon which was relied upon by the Essex Court, this Court, to the contrary, has stated, "[t]he accusatory pleading must appraise the defendant of the offense of which he may be convicted. This simply means that when the state makes a charge, it is asserting that the defendant is guilty of that offense, all degrees thereunder, ... , and any lesser offense which is an essential ingredient of the major crime charged. The gist is not what the defendant would like to persuade a jury he may be guilty of, but that the accusatory pleadings appraise him of all offenses of which he may be convicted." State v. Anderson, 270 So.2d 353, 356 (Fla. 1973).

The state also asserts that it sought to limit its charges below to trafficking and delivery without resorting to any accusation of possession; accordingly, appellant was not entitled an instruction on simple possession. *See* State v. Daophin, 533 So.2d 761, 762 (Fla. 1988).

Petitioner's conviction must, therefore, be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT HEARSAY STATEMENTS ON THE BASIS OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE?

Petitioner seeks review of the trial court's adverse ruling on his hearsay objection by bootstrapping this issue to the conflict issue over which this Court exercised its discretionary jurisdiction. Although this Court apparently countenances this procedure, petitioner's claim here is, nevertheless, without merit.

§90.803(18)(e), Fla. Stat. (1985), allows for the admission of hearsay statements made by a co-conspirator if the statement was made during the course, and in the furtherance of the conspiracy. As a predicate for admission, the state must prove by a preponderance of the evidence independent of the statement itself the existence of a conspiracy, member participation, and that the statement was made during the course and in the furtherance of the conspiracy. State v. Morales, 460 So.2d 410, 414 (Fla. 2d DCA 1984). The fact that a conspiracy is not charged is irrelevant to admission under this exception. Tresvant v. State, 396 So.2d 733 (Fla. 3d DCA 1981).

In holding against petitioner, the Second District found substantial, competent evidence of the existence of a conspiracy in the record, and that petitioner's actions evidenced "an active participation in furthering the purchase [of cocaine]" which amounted to more than "mere presence." Opinion at p. 4. The record supports both the Second District and the trial court as

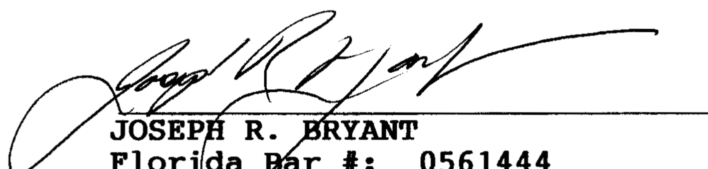
it is replete with evidence that petitioner discussed the transaction and actually delivered the cocaine while acting as a lookout (R. 37-45). Clearly, the state proved, by a preponderance of the evidence, that petitioner participated in a conspiracy with the others to sell and deliver cocaine. It cannot therefore be said that the trial court erred by denying petitioner's hearsay objection.

CONCLUSION

Based on the foregoing arguments and citations of authority, the Respondent respectfully requests this Honorable Court to affirm the opinion of the Second District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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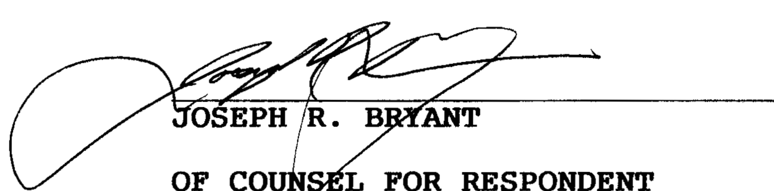
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to KEVIN BRIGGS, ESQUIRE, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, on this 10th day of January, 1991.



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