IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

MICHAEL CHAPARRO, JR.	**Appeal: 2D03-1804** **L.T. Case No: CRC01-11978CFANO**
Appellant;	

vs.

STATE OF FLORIDA,

Appellee.

______________________________ /

ON APPEAL FROM THE CIRCUIT COURT OF

THE SIXTH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT, MICHAEL CHAPARRO

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STATEMENT OF THE CASE AND FACTS

Appellant, Michael Chaparro, was charged in the trial court by a two count information with the offenses of trafficking in cocaine and conspiracy to traffic in cocaine. (R. 72, 73). Appellant will be referred to in this brief as the "defendant," his posture in the trial court. All matters referred to herein will be cited "(T. xx, L. xx) for matters appearing in the transcript of the proceedings, or "(R. xx) for matters that otherwise appear in the record.

Defendant proceeded to trial in this case. The state sought by motion to preclude the defendant from being allowed to argue during opening statements that the state had filed a "No-Information" in the case of the alleged co-conspirator. (T. 156, L. 23 - T. 161, L. 4). That motion was granted. During the presentation of the defendant's case, defendant sought leave of court by motion to introduce evidence that the State Attorney had filed a "No-Information" after its investigation of the alleged co-conspirator's case and to elicit testimony from the alleged co-conspirator that his charges had been dropped. (T. 411, L. 22 - T. 412, L. 5). That motion was denied.

During the course of the trial, the defendant raised several objections to testimony, including a motion to preclude the state from introducing evidence of the defendant's statements, including those made to police shortly after his arrest (T. 202,

L. 16 - T. 204, L. 8). That objection, based upon the state's inability to prove corpus delicti, was denied. (T.204, L. 7). The trial proceeded, and over the contemporaneous objections of counsel, (T. 222, L. 13; T. 225, L. 16; T. 227, L. 11), statements made by the defendant after his arrest were admitted into evidence.

Defendant moved for judgments of acquittal at the close of the state's case, (T. 404, L. 22, et seq.), and at the conclusion of the full trial, (T.448, L. 4, et seq.), based upon the state's failure to produce competent substantial evidence and *corpus delicti* of the alleged conspiracy. Despite the lack of such evidence, those motions were denied. (T. 410, L. 3; T. 450, L. 25). The jury convicted the defendant of the lesser included offense of Attempted Trafficking in Cocaine and of the offense of Conspiracy to Traffic in Cocaine. (T. 525, L. 6 - 24). Upon the jury's verdict, the trial court adjudicated the defendant guilty of the offenses and after determining that there was a pending Failure to Appear charge remaining, offered to sentence the defendant at that time to a term of twenty years in the Florida State Prison on all matters. (T.527 - 538). Trial counsel sought a separate sentencing date to allow the defendant to bring in witnesses in to testify as to the defendant's character, which was granted. (T. 538, L. 23).

At the sentencing hearing, the court heard from witnesses as to the defendant's good character, but sentenced the defendant on the conspiracy count to thirty years, suspending ten years, with ten years of probation to follow. (R. 103). A minimum mandatory sentence of fifteen years was imposed on both the attempted trafficking (R. 102), and the conspiracy to traffic counts. (R. 103). The defendant moved for a

new trial, based upon the matters previously set forth in the motions for judgment of acquittal, (R. 108), which was denied. (R. 174; T. 9, L. 11).

SUMMARY OF THE ARGUMENT

A predicate to the admissibility into evidence of admissions made by a criminal defendant is proof adduced by the state that there exists the *corpus delicti* of the offense at issue. In the case at bar, there was no such evidence introduced in the trial. The sole evidence of any conspiracy is the admission made by the defendant to the police after the arrest. Such admissions were contemporaneously objected to, and erroneously admitted by the trial court in the absence of proof of the *corpus delicti*. In the absence of those admissions, the trial court would have been compelled to grant the motions for judgment of acquittal as to the conspiracy count.

The jury was erroneously deprived of relevant information as to the fact that the alleged co-conspirator had not been charged by the State Attorney. This is especially true in this case because the State Attorney sought to bolster its case by introducing evidence that it, alone, was the entity to determine whether and what

charges would be appropriate for the jury's consideration in this case.

Where a judge determines at the close of a criminal trial what an appropriate sentence is, a defendant is deprived of the right under the fifth and sixth amendments of the United States Constitution to a fair sentencing where a greater sentence is actually imposed at a separate sentencing hearing, apparently based solely upon the request for such hearing. Further, in this case the Defendant was erroneously sentenced to a minimum mandatory term of years when he was convicted of a lesser included offense of Attempted Trafficking in Cocaine, which carries no minimum mandatory sentence.

ISSUE ONE

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS IN LIMINE AND CONTEMPORANEOUS OBJECTIONS REGARDING THE ADMISSION OF DEFENDANT'S POST ARREST STATEMENTS PRIOR TO THE STATE HAVING ESTABLISHED CORPUS DELICTI.

Florida law is firmly established that a defendant's confession to a crime cannot form the sole basis for that defendant's conviction for that crime; there must be prima facie evidence of the crime charged (i.e., the *corpus delicti*) independent of the defendant's confession. *State v. Wallace*, 734 So.2d 1126 (Fla. 3DCA 1999); *Burks v. State, 613 So. 2d 441 (Fla. 1993); Johnson v. State,* 569 So. 2d 872 (Fla. 2d DCA 1990; *Jordan v. State,* 560 So.2d 318 (Fla. 1st DCA 1990). *Corpus delicti* has been

defined as " 'the fact that a crime has actually been committed, that someone is criminally responsible.' " *Burks,* 613 So. 2d at 443 (quoting *Ballentine's Law Dictionary* 276 (3d ed.1969)) (footnote omitted). The underlying policy reasons for the *corpus delicti* rule is to ensure that no person is convicted out of derangement, mistake or official fabrication. *Burks*, 613 So.2d at 443; Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 1.4(b) (2d ed.1986). The state is charged with the burden of proving by substantial evidence that a crime has been committed and such proof may be in the form of circumstantial evidence. *See Wallace v. State,* 734 So.2d 1126 (Fla. 3DCA 1999). The general order of proof is to show that a crime has been committed and then that the defendant committed it. *Spanish v. State* 45 So.2d 735 (Fla. 1950); *State v Allen*, 335 So.2d 823 (Fla. 1976). A defendant's confession or statement "may be considered in connection with the other evidence," but the *corpus delicti* cannot rest upon the confession or admission alone." *Cross v. State*, 96 Fla. 768, 119 So. 380 at 384 (Fla. 1928).

The state is not required to prove the elements of the *corpus delicti* beyond a reasonable doubt. Instead, the state must merely present some evidence that "tends to show that the crime has been committed." *Baxter v. State*, 586 So. 2d 1196 (Fla. 2nd DCA 1994). The state's corroborating evidence, however, must be "substantial." *Id*. at 1199, 1200. *See also*, *Allen*, 335 So.2d at 825.

In this case, the state adduced no evidence, other than the defendant's confession, to show even a prima facie case of conspiracy. The sole evidence at trial was that the defendant was a friend of Edwin Soto, the alleged co-conspirator, that the defendant went to Mr. Soto's residence shortly before the transaction took place and that Mr. Soto drove to the MacDonald's restaurant in his pick up truck shortly after the defendant drove there. There record reflects no evidence of any conversations between the defendant and Mr. Soto, no transaction involving Mr. Soto, no transfer of funds to the defendant by Mr. Soto, or from Mr. Soto to the defendant, no tape recordings mentioning Mr. Soto, and, in fact, no mention by the defendant or the confidential informant whatever of Mr. Soto. There is no evidence that Mr. Soto sought to engage in any counter-surveillance activity or that he took any rapid or evasive action at the scene or anywhere else. There is no testimony that any act, action or statement by or on the part of Mr. Soto is in any way susceptible to the inference that Mr. Soto was in any way involved with this purported conspiracy.

There is simply no record evidence whatsoever to establish that Mr. Soto was even aware of any ongoing drug deal or the intent of the defendant to participate in it in any way.

In *Baxter*, supra, the court cited *Jimenez v. State*, 535 So.2d 343 (Fla. 2d DCA 1988) for the proposition that:

> The crime of conspiracy involves an express or implied agreement between two or more people to commit a criminal offense. Both an agreement and an intent to commit the offense are necessary elements. It has been well settled that mere presence at the scene of an offense coupled with knowledge of the offense is insufficient to establish a conspiracy. *Id.*at 344 (citations omitted).

In *Baxter*, *supra*, this court further cautioned that "Conspiracy involves more than merely aiding and abetting and should not be allowed to become 'so elastic' as to defy definition." *Id*. at 1199. (citations omitted). Further, "While presence at the scene of an offense or an attempted offense by itself is insufficient to establish participation in a conspiracy, presence is a factor which the jury may consider in addition to other evidence," *Id*. at 1199. (citations omitted).

The *Baxter* court found that where the state had established by competent substantial evidence the presence of the co-conspirator at the scene, coupled with the identity of the co-conspirator, and that the co-conspirator had engaged in counter-surveillance activity shortly before the scheduled transaction and his rapid and evasive departure from the scene was sufficient to establish *corpus delicti* and therefore the defendant's statements were properly admitted against him in that case. In the instant case, there simply is no "other evidence." In contrast to the facts in

Baxter, in the case at bar there is only evidence that Mr. Soto arrived at the scene at some time after the defendant, and no more. The state elicited evidence of a purported "money man," but never established that Soto was, indeed, that person,[1] or that the purported "money man" even had any knowledge of the deal, or whether he simply lent funds to the defendant.

Thus, the state's circumstantial evidence of the *corpus delicti* of any alleged conspiracy is, at best, insubstantial and subject to widely differing interpretations, and at worst simply a construct utterly lacking in substance. There is no evidence of "an express or implied agreement between two or more people to commit a criminal offense."[2] Because there is such a lack of independent corroborative evidence as to the crime of conspiracy, the state failed to prove *corpus delicti*, and the statements of the defendant relating to any conspiracy should have been excluded at the trial of this cause.

ISSUE TWO

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[1] In response to a motion for statement of particulars filed by defendant (R. 71, 72), the state filed a statement of particulars (R. 74), setting forth the "Other person involved - Edwin Soto, W/M, DOB: 02/03/68, Social Security #225-56-6422." It is hard to imagine a more particular description of the alleged co-conspirator than that, and it cannot therefore be argued by the state that there might have been some unknown co-conspirator.

[2] As this court stated in *Baxter* at 1198, FN1, "We note that this conspiracy is not based upon an agreement between the defendant and the confidential informant. Such an agreement does not provide the basis for a conspiracy." (citations omitted).

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE CONSPIRACY TO TRAFFIC COUNT WHERE THE SOLE ADMISSIBLE EVIDENCE FAILED TO ESTABLISH ANY EVIDENCE OF CONSPIRACY.

At the close of the state's presentation of its case, and at the close of the trial, the defendant moved the court for entry of a judgment of acquittal on the conspiracy offense,(T. 405, L. 14), arguing the lack of competent evidence to support the matter going to the jury. The court erroneously denied that motion. In this case, as has been demonstrated, the entirety of the admissible evidence directed toward the conspiracy count was circumstantial in nature. As previously set forth, this court has stated:

> The crime of conspiracy involves an express or implied agreement between two or more people to commit a criminal offense. Both an agreement and an intent to commit the offense are necessary elements. It has been well settled that mere presence at the scene of an offense coupled with knowledge of the offense is insufficient to establish a conspiracy. *Baxter v. State,* 586 So. 2d at 344 (citations omitted).

The standard of proof required of the state in surviving a motion for judgement of acquittal in a circumstantial evidence case is well settled in Florida jurisprudence.

"(A) conviction cannot be sustained when only proof of guilt is circumstantial, no matter how strongly evidence may suggest guilt, unless evidence is inconsistent with any reasonable hypothesis of innocence; question of whether evidence fails to exclude all reasonable hypotheses of innocence is for jury to determine. *St. v. Law* 559 So.2d 187 (Fla. 1987). "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless evidence is inconsistent with any reasonable hypothesis of innocence." *Thorpe v. State*, 777 So.2d 385 (Fla. 2000). *See also*, *Bradford v. State*, 460 So.2d 926 (Fla. 2d DCA 1984); *Davis v. State*, 761 So.2d 1154 (Fla. 2d DCA 2000); *Porter v. State*, 752 So.2d 673 (Fla. 2DCA 2000).

In the case at bar, there simply is no admissible evidence at all that Edwin Soto, the alleged co-conspirator, did or said *anything* which would even suggest guilt of conspiracy, strongly or otherwise. Every act or action by Mr. Soto, admitted into evidence, is entirely consistent with complete innocence. The barest inference of guilt comes from the mere fact that Mr. Soto and the defendant spent some time together at Mr. Soto's apartment in the hours preceding the transaction, and that Mr. Soto traveled to the MacDonald's restaurant shortly after the defendant did. Upon this foundation the state will have to claim that the circumstantial evidence in this case surmounted the legal standard of proof. However, because the evidence of

conspiracy between the defendant and Mr. Soto was so tenuous, it would require an impermissible leap of evidentiary faith to determine that the actions of Mr. Soto were "inconsistent with any reasonable hypothesis of innocence." Such a leap stretches the thread of admissible evidence beyond the breaking point of the law, and thus the trial court's denial of the defendant's motion for judgment of acquittal on the conspiracy count must be reversed.

ISSUE THREE

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE TO ALLOW HIM TO ADMIT INTO EVIDENCE THE FACT THAT THE ALLEGED CO-CONSPIRATOR HAD NOT BEEN CHARGED.

In the trial of this cause, defendant sought to admit into evidence a certified copy of the "No Information," a document that reflects the State Attorney's official determination that a case brought to the state for investigation does not warrant prosecution. Normally, the fact that a co-conspirator has not been charged does not preclude the state from charging a defendant with the alleged conspiracy. *See State v. Brea*, 545 So.2d 954 (Fla. 3d DCA 1993). In this instance, however, the issue is not whether the state can properly charge the defendant with the conspiracy, but rather, whether the fact that the co-conspirator's case has been determined by the prosecutor to not warrant prosecution. The trial court ruled that the evidence of the

"No Information" was not relevant, and thus denied defendant's request.

The test of evidentiary "relevance" is set forth in §90.401, Florida Statutes. "Relevant evidence is evidence tending to prove or disprove a material fact."

In the case at bar, the state sought to prove that the defendant conspired with Edwin Soto to commit trafficking in cocaine. Thus, any evidence which would tend to disprove the allegation would be legally relevant. Legally relevant evidence is admissible unless there is a reason for not allowing the jury to consider it. *State v. Taylor*, 648 So.2d 701, 704 (Fla. 1995); Ehrhardt, *Florida Evidence* §§401.1, 402.1 (2002 Edition).

At the trial of this cause, the state itself elicited testimony that the State Attorney's Office was the entity solely responsible to determine the proper charge before the court. (T. 385, L. 12 - T. 386, L. 3; T. 422, l. 2 - 20). Thus, the jury was informed that it was the prosecution who determined whether a particular charge had merit. In this case, the defendant sought to show that the prosecution had determined that the conspiracy charge against the co-conspirator did not warrant prosecution and thus had no merit. Because "The crime of conspiracy involves an express or implied agreement between two or more people to commit a criminal offense. Both an agreement and an intent to commit the offense are necessary elements," *Baxter, supra* at 344, the fact that the state had determined that Mr. Soto should not be prosecuted

became totally relevant to whether there existed the requisite agreement and intent between the two people alleged in the conspiracy. If the state, having introduced evidence that it was the sole arbiter of what should and should not be prosecuted, determined that Soto should not be prosecuted, that would certainly "tend to . . . disprove a material fact." If the state felt that it could not prove Soto was a conspirator, how could they show the conspiracy at all? This was certainly a legally relevant issue, and the trial court erred in denying defendant's request to admit the evidence.

ISSUE FOUR

THE TRIAL COURT ERRED IN SENTENCING DEFENDANT AT A SEPARATE SENTENCING HEARING TO A TERM OF YEARS GREATER THAN THAT OFFERED BY THE COURT AT THE CLOSE OF THE TRIAL.

At the end of the trial, and after significant colloquy between the court and counsel, the trial court offered to sentence the defendant to a period of twenty years in Florida State Prison if he would enter a guilty plea to a pending charge of Failure to Appear. (T. 535, L. 6). Defendant's trial counsel sought a separate sentencing hearing to allow the defendant to bring in witnesses to testify as to character and hardship. (T. 538, L. 13-22). The court allowed a brief continuance to allow such witnesses to be brought to court. At the subsequent sentencing hearing, the court

sentenced defendant to a thirty year sentence, with ten years suspended, followed by ten years probation and a fifteen year minimum mandatory on the conspiracy count and fifteen years with a fifteen year minimum mandatory on the attempt to traffic count, to run concurrently. There is no basis on the record for such an increase in the sentence from the offer some two weeks earlier at the conclusion of the trial. Because of the disparity in the sentence imposed from the initial offer, the fact that the trial court participated in plea negotiations[3], coupled with the lack of any facts on the record to support the disparity, give rise to a presumption of vindictiveness. *See Wilson v. State* 845 So.2d 142 (Fla. 2003). As such, the matter should be remanded for re-sentencing before a different judge.

ISSUE FIVE

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO A FIFTEEN YEAR MINIMUM MANDATORY TERM OF YEARS ON THE ATTEMPT TO TRAFFIC CONVICTIONS.

In this case, the trial court imposed a fifteen year minimum mandatory sentence on the attempted trafficking count. Because the attempt count falls under the purview of §777.04(4), and §893.135 contains no provision that a person convicted of the

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[3] The negotiations related to sentencing after trial, but included a requirement for the imposition of the offered sentence that the defendant tender his plea on the pending Failure to Appear charge.

lesser included offense of attempt be sentenced to a minimum mandatory term, the trial court erred in sentencing the defendant to that minimum mandatory term for the offense of Attempted Trafficking in Cocaine. *See, Suarez v. State*, 635 So.2d 154 (Fla. 2DCA 1994).

CONCLUSION

The defendant's conviction for Conspiracy to Traffic in Cocaine should be reversed because the trial court erred in allowing the defendant's admissions into evidence in the absence of sufficient evidence of corpus delicti to corroborate the conspiracy. The trial court further erred in denying the defendant's motion for judgment of acquittal where the admissible evidence failed to show a prima facie case of conspiracy where there was no showing that the co-conspirator agreed to the commission of the offense, intended that the offense be committed, or even had knowledge of the offense. The trial court erred in failing to allow the defendant to admit evidence that the state had determined that the co-conspirator's case did not warrant prosecution, and thereafter in sentencing the defendant to a term greater than first offered at the close of the trial and to a minimum mandatory term that is not provided for by law.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Initial Brief was sent by U.S. Mail to the Office of the Attorney General, 2002 N. Lois Avenue, Tampa, Florida 33607, this _____day of October, 2003.

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CERTIFICATION OF COMPLIANCE

I HEREBY CERTIFY that the forgoing Answer Brief is set in Times New Roman typeface and complies with the provisions of Fl. R. App. P. 9.210.

____

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