Robert SMITH and Michael Patterson, Appellants,

v.

STATE of Florida, Appellee.

Nos. 90-929, 90-1397.

District Court of Appeal of Florida, Third District.

April 9, 1991.

Rehearing Denied May 9, 1991.

Defendants were convicted in the Circuit Court, Dade County, Ellen J. Morphonios, J., of trafficking in cocaine and conspiracy to traffic in cocaine, and they appealed. The District Court of Appeal held that: (1) the refusal to grant a continuance when the State announced, after the jury had been selected and sworn, that a codefendant had entered into a plea bargain and would be testifying as a prosecution witness was reversible error, and (2) the defendants could be convicted of attempted drug trafficking, but not of drug trafficking, where they were arrested before they had taken possession of drugs that undercover police officers were in the process of selling to them during a "reverse sting" operation.

Reversed and remanded.

1. Criminal Law ⇐590(1), 599, 1166(7)

Refusal to grant continuance when State announced, after jury had been selected and sworn, that codefendant had entered into plea bargain and would testify as prosecution witness was reversible error; although defendants were allowed to depose codefendant after opening statements were made and other witnesses had testified, deposition could not be completed and incomplete deposition could not be transcribed before codefendant was called as witness, and codefendant gave devastating, noncumulative testimony about alleged agreement to purchase cocaine.

2. Drugs and Narcotics ⇐69

Defendants could be convicted of attempted drug trafficking, but not of drug trafficking, where defendants had not yet assumed legal possession of drugs that undercover officers were in process of selling to them during "reverse sting" operation; at time of arrest, one defendant was inspecting cocaine for testing purposes and no money had actually changed hands.

3. Drugs and Narcotics ⇐69

Temporary, preliminary inspection of drugs being purchased from undercover police officers in "reverse sting" operation was not "possession" of drugs that would support conviction for drug trafficking.

See publication Words and Phrases for other judicial constructions and definitions.

Don S. Cohn, Weiner, Robbins, Tunkey & Ross and Benjamin S. Waxman, for appellants.

Robert A. Butterworth, Atty. Gen., and Ivy R. Ginsberg, Asst. Atty. Gen., for appellee.

Before HUBBART, BASKIN and GODERICH, JJ.

PER CURIAM.

This is an appeal by the defendants Robert Smith and Michael Patterson from judgments of conviction for (1) trafficking in cocaine, and (2) conspiracy to traffic in cocaine, based on an adverse jury verdict. We reverse and remand for a new trial.

[1] First, we conclude that the trial court erred in denying the defendants' motion for a continuance when the state announced, after the jury had been selected and sworn, that a codefendant, Bobby Monroe, had entered into a plea bargain with the state and would be testifying as a state witness. Although the defendants were allowed to depose Monroe the next day after opening statements had been made and several state witnesses had testified, the deposition could not be completed and the incomplete deposition could not be transcribed before the state called Monroe as a

witness. In our view, the defendants were severely prejudiced because (1) they had insufficient time to depose or investigate Monroe and did not have the benefit of a written deposition with which to cross-examine him, an absolute essential in order to impeach the witness by his prior testimony; and (2) Monroe gave devastating, non-cumulative testimony in this case concerning an agreement made among the defendants in North Carolina to come to Miami and purchase a quantity of cocaine, testimony which could not have failed to have had a decisive impact on the jury. At the very least, the trial court should have allowed the defendants a brief recess of a few days to allow them to conduct a complete deposition of Monroe and have the transcript of same prepared for their study *before* pressing forward with opening statements and testimony in the case; indeed, the state below commendably requested the trial court to do substantially just that "to protect the record," (T. 32), but the trial court declined. Given these circumstances, the convictions herein must be reversed and the cause remanded for a new trial. *See, e.g., Smith v. State,* 525 So.2d 477 (Fla. 1st DCA 1988); *Brown v. State,* 426 So.2d 76 (Fla. 1st DCA 1983), *disapproved on other grounds, Bundy v. State,* 471 So.2d 9 (Fla. 1985); *Anderson v. State,* 314 So.2d 803 (Fla. 3d DCA 1975), *cert. denied,* 330 So.2d 21 (Fla.1976).

[2, 3] Second, we conclude that the trial court erred in denying the defendants' motion for judgment of acquittal on the drug trafficking charge in that said charge should have been reduced to *attempted* drug trafficking. This is so because the evidence adduced below established that, in this "reverse-sting" operation, the defendants had not yet assumed legal possession of the illicit drugs which the undercover police officers were in the process of selling to them before the arrests were effected. At the time of such arrests, the defendant Patterson was inspecting the cocaine for testing purposes and no money had actually changed hands; temporary, preliminary inspection does not, as urged, constitute legal possession of such drugs for purposes of convicting the defendants of drug trafficking. Accordingly, the trial court should have reduced the subject charge to attempted drug trafficking. *Garces v. State,* 485 So.2d 847 (Fla. 3d DCA 1986); *see Roberts v. State,* 505 So.2d 547 (Fla. 3d DCA 1987); *see also Campbell v. State,* 577 So.2d 932 (Fla.1991).

The final judgments of conviction under review are reversed and the cause is remanded to the trial court for a new trial on charges of (1) attempted drug trafficking, and (2) conspiracy to traffic in drugs.

Reversed and remanded.

John J. BOYLE, Appellant,

v.

Louise SCHMITT, individually and as Ancillary Personal Representative of the Estate of Blanche E. Boyle, deceased, and Louise Schmitt, individually, Appellees.

Nos. 90-1646, 90-2124.

District Court of Appeal of Florida, Third District.

April 9, 1991.

Rehearing Denied May 6, 1991.

Son of decedent brought action against personal representative of his mother's estate to impose constructive trust to carry out terms of contract to make a will, and to set aside inter vivos transfer. Complaint was dismissed by the Circuit Court, Dade County, Jon I. Gordon, J., and appeal was taken. The District Court of Appeal held that: (1) mutual promises provide sufficient consideration to support contract to make a will; (2) donee beneficiary of contract is entitled to enforce its terms; and (3) inter vivos transfer of property by party to contract to make a will may be set aside by donee beneficiary where transfer is made with fraudulent intent to defeat the donee beneficiary's rights.

Reversed and remanded.

1. Wills ⇐59

Mutual promises exchanged between father and mother to leave all of their