

IN THE SUPREME COURT OF FLORIDA

ROBERT ARGUELLES,)
)
 Petitioner,)
)
 vs.) CASE NO. SC01-1569
) 4TH DCA NO. 4D00-1602
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S BRIEF ON THE MERITS

On review from the Circuit Court
of the Seventeenth Judicial Circuit,
In and For Broward County, Florida
[Criminal Division].

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of trafficking in cocaine and conspiracy to traffic in cocaine, and his convictions were affirmed on appeal. *Arguelles v. State*, 791 So. 2d 500 (Fla. 4th DCA 2001). The Fourth District described the facts in some detail, but petitioner has provided additional relevant facts and record cites in the footnotes below which were not included in the Fourth District's opinion:

While working as a confidential informant ("CI")¹, Harold Gomez was paged by an old acquaintance, Gajate, who inquired about buying a kilo of cocaine with the possibility of buying nine more. Gomez advised his controlling agent of the page, and they set up a meeting between Gomez and Gajate the next day to conduct the sale.²

¹ The informant was working off a charge stemming from a 24 kilo sale for which he could have been sentenced to over twenty years. This is one of nine cases in which his assistance resulted in a reduction of his sentence to a year and a day based on recommendations of a prosecutor. Also, because of this assistance, the DEA continued to assist the CI and his wife in avoiding deportation. T271-278; 300-301; 316-321; 341-47.

² There were two phone calls over two days. Over hearsay objection, the informant testified that Gajate called him October 19, 1998, and asked if he was still in the cocaine business. He said yes, and Gajate asked if they could meet because the informant had something he needed. The informant said if he wanted to meet, they would meet, but put him off so he could contact his agent, as instructed. T325. After speaking with his control agent, Gajate called him the next morning. T327. Gajate said he was ready, that he had someone who wanted to buy one kilo, and if it was good he was going to buy another nine. T327. Gajate said they needed to talk or touch base so the informant set up a meeting at the bakery to "clear everything up." T327. Gajate asked what the price was and the

Gajate and Gomez met as planned in a parking lot.³ They talked about the quantity, price, and location of the deal. Gajate told Gomez that the money belonged to his "buddy" who would accompany him later when the transaction was conducted.⁴ Once Gajate purchased the first kilo, he said the "other people" would then have to approve the purchase of the other nine kilos.⁵ During their conversation, Gajate's "buddy" paged him, and Gajate used Gomez's cellular phone to return the page. Gomez overheard Gajate advise the caller that everything was ready for the transaction, and that they should all meet at the caller's house to return and complete the deal. After finishing the call, Gajate told Gomez that his "buddy" (appellant) was the middleman (like Gajate) and another guy (Michael Green) was their client who owned the money.⁶ A

informant told him 14,000, and the two set up the meet. T328.

³ The informant was wearing a wire by this time, but the recorder malfunctioned and the tape was inaudible. T281-82, 366-67. However, both the informant Gomez and Detective Chirino, who was monitoring the conversations, testified at trial to the details of this conversation and to the one at the time of the transfer. T324-40 (Gajate); T369-78 (detective).

⁴ The CI testified Gajate said that his buddy and the other person would not let him come up alone with the money. T331.

⁵ That was the CI's testimony. T329-331. Over objection the monitoring detective also testified Gajate mentioned his childhood buddy was someone who would be conducting the transaction with him. This buddy had a black male who was the person with the money. T369. Gajate also said the black man dealt cocaine in the northeast and has been a client of his buddy. T370.

⁶ The informant testified that on the phone, Gajate "said everything was ready for the transaction. For him to be ready and to call the black dude so he could go up to his house and not to take a long ride," that he was going to pick him up. T332. After the conversation Gajate repeated there was not going to be any problem with the people who were coming up, this in response to a concern of the informant. The informant told

BellSouth records custodian verified that the number Gajate dialed on Gomez's phone belonged to Olga Arguelles at 1001 Northwest 25th Avenue in Miami.

Gajate then traveled to a residence at 1001 Northwest 25th Avenue in Miami. After twenty minutes inside, Gajate exited the residence with appellant; neither man carried anything. Gajate eventually returned to the previous parking lot with Green in the passenger seat and appellant in the backseat, parking on the right side of Gomez's SUV.

Gajate informed Gomez that he had the money for the deal. Gomez then told Gajate that the others had to remain behind, and Gajate agreed, stating that he could not have brought the money alone.⁷ Gajate returned to his car and leaned into the back seat where appellant handed him a bag full of groceries

him no one was allowed to go with Gajate to where the merchandise was, and he said no problem, that one was someone he was raised with and the other was a client and that was the guy who owned the money. T333.

The monitoring detective elaborated on the conversation, testifying that he overheard Gajate tell the person, "listen, I'm ready, I'm here with my cousin, in Spanish `Primo,' which means cousin," as slang. T370. He was telling the third party (presumably petitioner) they were ready to go. "Tell the black guy to meet you over at your house. I'll pick you up and we'll all three come back." T371. After that conversation, Gajate continued discussing the details of the cocaine transaction with the informant, T371, then left to pick up his childhood buddy and the black guy. T375.

⁷ The monitoring detective testified that when Gajate returned shortly after and said here's the money, he also said he had convinced his buddies to stay in the car, T375, and that they needed to go and do this because one had a dental appointment. T375. As the two drove to the apartment parking lot in the informant's vehicle, Gajate was saying if the cocaine was good they were going to come back and purchase another nine. T376.

containing an open box with the money inside.⁸ It appeared to one of the surveillance agents that Gajate directed appellant to give him the bag.

After Gajate showed Gomez the money, the two men traveled across the street to a different location where the cocaine was located. Meanwhile, Green and appellant drove up and down several aisles in a nearby mall parking lot, passing several open spaces, and then returned to the original parking lot; the whole drive took five to seven minutes.⁹ One of the agents opined that "they were checking the area to see if anybody was watching them."¹⁰

Upon arriving at a residential area close to the parking lot, Gomez and a second CI showed Gajate the kilo of cocaine. After testing the cocaine, Gajate said that it was good, but needed to show the kilo to his "buddy" and Green because they were the ones that had the last word on it.¹¹ Gajate took possession of the cocaine and began walking back to Gomez's vehicle. Law enforcement agents then moved in, capturing Gajate after he attempted to flee over a wall.

Other agents arrested Green and appellant after

⁸ It is not clear whether the money could be seen in the cereal box, and the extent to which the flaps were open. See T350-53; 404-406; 408; 416-17.

⁹ There is no dispute that it was Green, not appellant who was driving, and that appellant was not directing the driver. T290-91; 306.

¹⁰ And one of the agents testified it would have been physically impossible for appellant to have seen the transaction during this time: "Mr. Arguelles would not have been able to see what was happening across the road." T308.

¹¹ The monitoring detective testified that Gajate and the CI parked, and went to a second vehicle, at which time Gajate put the money in the trunk, was given a bag containing one kilo of cocaine. After testing it and saying it looked good, Gajate said to leave the money there while he went back to where his buddies were so they could examine it. T378.

receiving word that the transaction had occurred and Gajate was in custody. Without anyone mentioning drugs, appellant said "why am I being arrested, I don't have anything to do with drugs." The officers found \$3,000 in cash on appellant, and at the police station, appellant gave his address as 1001 Northwest 25th Avenue, Miami. While in the holding cell, appellant told Green, "[t]hen why didn't you leave. We should have run." He later asked Green, "Mike, how much do you think they'll give us for conspiracy."¹²

Arguelles, 791 So. 2d at 500-502.

The Fourth District affirmed the convictions, the petitioner timely invoked discretionary review, and this court accepted jurisdiction of this case.

¹² There was no interaction between appellant and the informant at any time, and appellant was never near the cocaine. T305; 251.

SUMMARY OF THE ARGUMENT

Point 1.

The Fourth District relied on a codefendant's statements as "verbal acts" sufficient to provide independent evidence of petitioner's participation in the conspiracy. Because these statements incriminated petitioner and were considered for the truth of the matter, reliance on them is improper. Without consideration of the "verbal act" statements of the codefendant, the state did not prove a conspiracy independent of the hearsay, so the numerous statements of the nontestifying codefendant which incriminated petitioner, as related through an informant and the detective who overheard the conversations, should have been excluded. This court should reverse or discharge on both counts.

Point 2.

The evidence, including the coconspirator hearsay, does not support a conviction for conspiracy to traffic in cocaine.

Point 3.

The evidence of trafficking in cocaine is insufficient. The principals and constructive possession theories of guilt were improper and insufficient.

ARGUMENT

Point 1.

**ADMISSION OF HEARSAY STATEMENTS OF THE
CODEFENDANT PURSUANT TO THE COCONSPIRATOR
EXCEPTION TO THE HEARSAY RULE WAS ERROR AND
REVERSAL OR DISCHARGE IS REQUIRED**

The case against petitioner rests primarily on statements made during the cocaine transaction by the nontestifying codefendant Gajate, as related at trial both by the government informant and a detective who monitored their conversations. Petitioner contended on direct appeal, as he did in the trial court,¹³ that the state had not proven a conspiracy independent of the hearsay statements to support their admission under the coconspirator exception to the hearsay rule.

But the Fourth District found some of Gajate's out of court statements were admissible as nonhearsay "verbal acts." *Arguelles*, 791 So. 2d at 503-04. The court concluded Gajate's statement that petitioner had to approve of the deal was sufficient independent evidence of a conspiracy to support

¹³ Petitioner filed a pretrial motion to exclude the hearsay statements of the codefendants Green and Gajate, and that motion was denied. R25-28; T215-218. This motion was brought to the attention of the court by renewal of the motion in the midst of testimony, T357-360, and by objection at the beginning of the testimony of both the informant and the agent who overheard the conversations, T321-323, 368-69. The court stated there was a continuing objection. The state did not raise a waiver issue on appeal, AB3-7, and the Fourth District found none. This issue is preserved.

admission of Gajate's remaining inculpatory hearsay statements under the coconspirator hearsay exception. The Fourth District recognized this meant Gajate's statements were being admitted for the truth of the matter asserted, but found this use permissible under the "verbal act" theory, based primarily on *Banks v. State*, 755 So. 2d 142, 144 (Fla. 4th DCA), *reversed*, 790 So. 2d 1094 (Fla. 2001). This court has since reversed *Banks* and disapproved of the use of testimony characterized as "verbal acts" for the truth of the matter asserted.¹⁴ The Fourth District's decision here must be reversed as well.

Excluding Gajate's statements identified by the Fourth District as "verbal acts", there is insufficient independent nonhearsay evidence to support introduction of his remaining inculpatory statements under the coconspirator hearsay exception. Since there is otherwise only limited circumstantial evidence to prove petitioner committed trafficking and conspiracy to traffic in cocaine, petitioner should be discharged on both counts.

¹⁴ This Court has jurisdiction of this case under Article V, §3(b)(3), *Fla. Const.* and Rule 9.030(a)(2)(iv), *Fla. R. App. P.*, because the decision below expressly and directly conflicts with *Banks v. State*, 755 So. 2d 142 (Fla. 4th DCA), *rev. granted*, 779 So. 2d 269, *reversed*, 790 So. 2d 1094 (Fla. 2001), and other decisions cited therein. This Court also has jurisdiction of this case under *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

The most incriminating testimony offered against petitioner in this trial consists of conversations between the informant and Gajate. Over objection, the informant (and the monitoring detective) described in detail his conversations with Gajate, from the time he was beeped by Gajate and the negotiations for the purchase of cocaine began, T321-325, through the specifics of the transaction, T325-27, their first meeting at the bakery, T328, and later that afternoon when the exchange took place. T335-340. It was through these conversations that incriminating evidence was introduced that petitioner was a buddy of Gajate who had a client who dealt in the northeast and who had the money to purchase the cocaine. T330-331; 333; 370. The informant related that Gajate said petitioner was the middleman just like him. T357. According to the conversations, petitioner and codefendant Green were the ones who had to approve the purchase and quality of the cocaine. T331.

Petitioner was further incriminated at trial by the informant's testimony (backed by the monitoring detective) that Gajate told him it was petitioner (identified as his buddy) who beeped him, and attested to Gajate's conversation with the person purported to be the petitioner over the informant's cell phone, in which Gajate told this "buddy" that the transaction was ready to go, to meet at the house, and the three would come

up. T332. The informant testified Gajate vouched for petitioner's behavior as a childhood friend who would be coming up for the transaction, then left for Miami to pick up petitioner and the "black guy." T333. At the second meeting when the transaction was undertaken, the informant again testified Gajate identified petitioner and "the black guy" as the ones with the money and ultimate authority to accept or reject the cocaine. T336, 340. The Spanish-speaking detective who overheard these conversations testified to a similar content. T368-378. These incriminating hearsay statements are discussed in more detail in the Fourth District's decision below *Arguelles*, 791 So. 2d at 501-02, and *Statement of Facts*.

This is the testimony that convicted petitioner, the contents of which came from the nontestifying codefendant Gajate. It was all inadmissible hearsay, and its admission violated Florida law and the confrontation clauses because there was insufficient proof independent of the hearsay that a conspiracy even existed. The Fourth District found the testimony admissible under the coconspirator exception to the hearsay rule, but it is not.

This court should review the decision of the Fourth District *de novo* on this point as a question of law, since the admission of the coconspirator hearsay is founded on an incorrect

application of the law of "verbal acts" by the appellate court. "If the ruling consists of a pure question of law, the ruling is subject to *de novo* review. See, e.g., Philip J. Padovano, *Florida Appellate Practice* § 9.4 (2nd ed.1997)." *State v. Glatzmayer*, 789 So.2d 297, 301 n.7 (Fla. 2001).

This case is also reversible if the court views the issues as an evidentiary in nature. Although a trial court has discretion in making evidentiary rulings, it may not depart from the law and make rulings contrary to the evidence code. See *Nardone v. State*, 798 So.2d 870, 874 (Fla. 4th DCA 2001)(the standard of review for admissibility of evidence is abuse of discretion; however, a trial court's discretion is limited by the rules of evidence); *Taylor v. State*, 601 So.2d 1304, 1305 (Fla. 4th DCA 1992)("As to abuse of discretion, we cannot agree, since the trial court's discretion here was narrowly limited by the rules of evidence."). See also

Padavano, *Florida Appellate Practice* (2d ed. 1997) § 9.5 at 152-153 (footnote omitted)(abuse of discretion standard should only apply to evidentiary rulings based on relevance, but "many other evidence issues are not. For example, trial judges clearly do not have discretion to admit evidence in violation of a privilege or some other definitive provision of the evidence code. Some of these evidence issues are more like questions of

law than questions of discretion").

The coconspirator exception to the hearsay rule is contained in section 90.803(18), *Fla. Stat.* (1998) and provides:

The provision of Section 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

* * *

(18) Admissions. A statement that is offered against a party and is:

* * *

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

Precise compliance with the statute is required for admissibility: "Hearsay statements made by one member of the conspiracy are admissible against another member of the conspiracy when it is shown: (1) that both the person making the statement and the person against whom it is offered are members of a conspiracy; (2) that the statement was made during the course of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy." **Ehrhardt**, *Florida Evidence*

Section 803.18(3), pp. 769-770 (2000 edition)(footnotes omitted). "The trustworthiness and rationale behind the co-conspirator hearsay exception is `that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not.' *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir.1976)." *Brooks v. State*, 787 So. 2d 765, 772-73 (Fla. 2001).

A coconspirator's hearsay statement is not admissible unless the state can show the existence of a conspiracy, and each member's participation in it, by a preponderance of the evidence apart from the hearsay sought to be admitted. *Brooks*, 787 So. 2d at 778 ("The State must prove the existence of the conspiracy and each member's participation in it by a preponderance of the evidence *independent* of the hearsay statements sought to be admitted")(emphasis in original); *Foster v. State*, 679 So. 2d 747, 753 (Fla. 1996)("In determining the existence of a conspiracy, the court must rely upon evidence independent of the hearsay statements to prove the conspiracy before the coconspirator's hearsay statements are admissible"); *Romani v. State*, 542 So. 2d 984, 985 n. 3 (Fla. 1989); *State v. Duarte*, 681 So. 2d 1187, 1189 (Fla. 2d DCA 1996)(specifically requiring independent proof of defendant's participation in

conspiracy); *Christie v. State*, 652 So. 2d 932, 933 (Fla. 4th DCA 1995)(same).

Consistent with this rule, this court has expressly held that an alleged coconspirator's out of court statement cannot be used to support the admission of coconspirator hearsay. *Romani*, 542 So. 2d at 986 (declining to adopt federal approach permitting the use of such hearsay as independent evidence as expressed in *Bourjilay v. United States*, 483 U.S. 171 (1987)). Yet the Fourth District concluded that out of court statements by the codefendant Gajate were admissible at trial as "verbal acts" to prove the transaction. The court also held, consistent with its own (since reversed) decision in *Banks*, that these "verbal act" statements could be used for their truth as independent evidence of the conspiracy:

If out-of-court statements are offered to prove the making or terms of a conspiratorial agreement, then they are "verbal acts" not excluded under the hearsay rule. See Charles W. Ehrhardt, **Florida Evidence** § 801.6 n. 4 (2001 ed.). These verbal acts prove the nature of the act, as opposed to proving the truth of the alleged statements. See *Harris v. State*, 544 So. 2d 322, 323 (Fla. 4th DCA 1989)(*en banc*); *Decile v. State*, 516 So. 2d 1139, 1140 (Fla. 4th DCA 1987). For example, the statements "I need eight" followed by the response "[n]o problem, come inside, I get you rocks," were verbal acts because they constituted part of the underlying transaction. See *id.* at 1139-40; *Stevens v. State*, 642 So. 2d 828, 829 (Fla. 2d DCA 1994)("I need a dime."). **Even if the statement is ultimately used to prove the truth of the matter, it is still admissible as a verbal act. See *Banks v. State*, 755 So. 2d 142,**

144 (Fla. 4th DCA 2000), *rev. granted*, 779 So. 2d 269 (Fla.2000). On the other hand, a statement to a police officer that a specific person is dealing cocaine at a specific place is not a verbal act because it is not part of the transaction. See *Harris*, 544 So. 2d at 323-24.

Here, some of the admitted hearsay statements were verbal acts, and some were not. Appellant objected on hearsay ground to Gajate's statements concerning (1) the initial set up of the drug deal at the first meeting with Gomez, (2) that he had the money at the second meeting, and (3) that he needed to show the cocaine to Green and appellant before the transaction was completed because they had the last word. These statements were all part of the transaction and thus verbal acts, not inadmissible hearsay. However, some of Gajate's statements were not verbal acts and were offered for the truth of the matter asserted: (1) appellant was the middleman, and (2) the money belonged to appellant or Green and he could not have brought it alone. Admission of these latter hearsay statements is justified under a different theory.

Arguelles, 790 So. 2d at 503-04. (emphasis supplied).

The Fourth District then found this "verbal act" testimony was sufficient independent evidence of conspiracy to admit the co-perpetrator's other hearsay statements under the coconspirator exception to the hearsay rule of Section 90.803(13)(e), *Fla. Stat.* (2000):

The non-hearsay evidence, including Gajate's verbal acts, established the existence of the conspiracy and appellant's participation in it by a preponderance of the evidence. **Gajate's statement that appellant and Green needed to approve of the deal before it was complete, a verbal act, provided competent evidence from which the trial court could have concluded that appellant participated in the conspiracy.** Admitting Gajate's remaining co-conspirator statements was thus

justified pursuant to section 90.803(13)(e)."

Arguelles, 791 So. 2d at 504. (emphasis supplied).

The Fourth District thus permitted use of "verbal act" statements here not just to prove the transaction occurred, but to prove petitioner was a participant in the transaction.¹⁵ This reasoning is directly at odds with several decisions of this court and another district, as this court so held when it reversed the Fourth District in *Banks v. State*, 790 So. 2d 1094 (Fla. 2001), on this very issue. This Court reversed in *Banks* because, as here, "verbal act" statements were improperly used to implicate the defendant in the crime: "These statements by Goodman to Roaden did not serve to explain the nature of the act or transaction, but rather directly implicated Banks in the transaction." And here, as in *Banks*,

the state simply cannot point to any purpose for the admission of these statements other than for the truth of the matter asserted therein, i.e., that Goodman had stated that Banks was part of the deal. As we recently stated in *Keen v. State*, 775 So. 2d 263 (Fla. 2000), "[w]hen the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a non-

¹⁵ The Fourth District agrees that without independent proof of petitioner's participation in the conspiracy, the additional hearsay statements were inadmissible. *Arguelles*, 791 So. 2d at 503 (quoting *Christie v. State*, 652 So. 2d 932, 933 (Fla. 4th DCA 1995)).

hearsay label.' Id. at 274.

Banks, 790 So. 2d at 1098-99.

This court's decision in *Banks* finds the Fourth District's use of "verbal acts" evidence for any purpose to be in conflict with *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996) ("it is error to take the position that once material is `received in evidence, it will be received for any probative value it may have on any issues before the court'"), *Breedlove v. State*, 413 So. 2d 1, 6 (Fla. 1982) ("The hearsay objection is unavailing when the inquiry is **not** directed to the truth of the words spoken, but, rather, to whether they were in fact spoken")(emphasis added), and *Stevens v. State*, 642 So. 2d 828 (Fla. 2d DCA 1994). See also *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000). The Fourth District's decision in the case at bar is in error in precisely the same way. Plainly, Gajate's out of court statements that petitioner and the third codefendant had to approve of the transaction cannot be used as independent evidence of the conspiracy.

While not relying on the statements to independently prove the existence of the conspiracy, the Fourth District identified two other "verbal acts" which could be independent evidence of conspiracy: "(1) the initial set up of the drug deal at the first meeting with Gomez, (2) that he had the money at the

second meeting, and (3) that he needed to show the cocaine to Green and appellant before the transaction was completed because they had the last word. These statements were all part of the transaction and thus verbal acts, not inadmissible hearsay." *Arguelles*, 791 So. 2d at 503. But "verbal act" (1) and (2) suffer from the same infirmity as the third one discussed above: they are hearsay because they are being used for the truth of the matter asserted to implicate petitioner in the crime.

The initial set up of the drug deal between the CI and the codefendant contained an incriminating reference to petitioner which is hearsay and inadmissible as verbal acts under *Banks*: Gajate said he was ready, *that he had someone who wanted to buy one kilo*, and if it was good he was going to buy another nine. T327. "Verbal act" (2) is much more incriminating hearsay. As the Fourth District describes it: "Gajate told Gomez that the money belonged to his "buddy" who would accompany him later when the transaction was conducted." *Arguelles*, 791 So. 2d at 501. This hearsay statement incriminating petitioner is also improperly considered as a "verbal act" under *Banks*, and cannot be used to independently establish the existence of the conspiracy. *Brooks; Romani*.

There is otherwise insufficient independent, nonhearsay evidence of conspiracy to support admission of Gajate's

remaining statements under the coconspirator exception when Gajate's hearsay statements are eliminated from the equation.

Under the rule, for hearsay statements to be admissible, the state must prove the existence of a conspiracy by evidence independent of the hearsay. In this case, the state may contend the following was nonhearsay evidence showing a conspiracy: (See T440, AB 9-10): the number dialed by Gajate on the informant's cell phone is subscribed to a person with petitioner's last name, and to the address where Gajate picked up petitioner; T374, 364, 389; petitioner got into the car with petitioner and rode with him back to the location of the cocaine transaction with another man at the appointed time; petitioner handed Gajate the bag which contained the cereal box which contained the money which was used to buy the cocaine; T397, 337; petitioner was a passenger in the car while the other codefendant Green drove them around a parking lot during the transaction, even passing open parking spaces; T290, 312; petitioner said he had nothing to do with drugs when arrested though police had not told him the arrest was for drugs, that he had \$3000 dollars in his back pocket, T292, and made statements while in custody about what they could get for conspiracy and indicating that they should have run. T428-29.

However, the monitoring detective testified Gajate told the

CI they had to hurry with the transaction because one of the people in the car had a dental appointment. T375. This is evidence petitioner was simply along for a ride, and Gajate was bluffing the CI about petitioner's participation to show he had backup in case of trouble. This view is consistent with a reasonable hypothesis of innocence.

The informant never even spoke with petitioner. T349-50. Government witnesses also testified that petitioner could not possibly have seen the transaction taking place while it occurred, as the two drove around another parking lot; "Mr Arguelles would not have been able to see what was happening across the road." T308. The agent testified it appeared petitioner was directed by Gajate to hand him the bag containing the box containing the money T409; and there was inconclusive evidence that the money could even be seen within the otherwise innocent cereal box within a grocery bag which also contained other grocery items. T396. Compare T351 T398 T405-06, T416. In any event, the agent who observed Gajate pick up petitioner at his house testified neither man brought the grocery bag to the car. T392.

This evidence does not meet the burden of proving the existence of a conspiracy which included the petitioner by a preponderance of independent nonhearsay. The Fourth District

recounted the governing law:

This court explained the review of co-conspirator hearsay statements in *Christie v. State*, 652 So.2d 932, 933 (Fla. 4th DCA 1995):

The threshold question to address is whether there was competent, independent evidence, without consideration of any hearsay statements of co-conspirators, to establish defendant as a participant in a conspiracy to traffic in cocaine. Before the jury could consider any hearsay evidence of the co-conspirators, the state must have established, by a preponderance of the evidence, through defendant's actions or his statements or through other competent, independent evidence that defendant participated in a conspiracy. This court must examine whether there was `substantial evidence, free from the taint of hearsay, upon which the court could find, at least preliminarily, that a conspiracy existed and the person objecting to the hearsay statements was an active participant.'

(Citations omitted)(emphasis added)(quoting *Verni v. State*, 536 So.2d 1162, 1164 (Fla. 2d DCA 1988)).

To establish a conspiracy and appellant's participation in it, the state must prove `an express or implied agreement or understanding between two or more persons to commit a criminal offense,' and an intention to commit that offense. *Sheriff v. State*, 780 So.2d 920, 921 (Fla. 4th DCA 2001). Direct proof of the agreement is not necessary; it may be inferred from the circumstances. See *Harris v. State*, 450 So.2d 512, 513-14 (Fla. 4th DCA 1984). However, this circumstantial evidence must be consistent with a hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence. See *McClain v. State*, 709 So.2d 136, 138 (Fla. 1st DCA 1998). Thus, a defendant cannot be a conspirator by merely being present at the scene of the offense, driving to the scene knowing the purpose of the journey, or aiding

and abetting in the commission of the offense. See *Sheriff*, 780 So.2d at 921; *Mickenberg v. State*, 640 So.2d 1210, 1211 (Fla. 2d DCA 1994)(reversed conspiracy conviction where defendant merely aided and abetted); *Pennington v. State*, 526 So.2d 87 (Fla. 4th DCA 1987)(reversed conspiracy conviction where defendant was merely present at the scene and aided in its commission without knowing the nature of the contraband transferred).

Arguelles, 791 So. 2d at 503-04.

In *Guiets v. State*, 566 So. 2d 829 (Fla. 4th DCA 1990), the court found insufficient independent evidence of a conspiracy to permit introduction of coconspirator hearsay statements. In *Guiets*, the appellant was in the parked car which contained a sealed package of cocaine in the locked trunk. The state contended the additional circumstantial evidence showed Mr. Guiets' participation in the conspiracy: the coconspirator called a person named "Carlos," which was also Mr. Guiets' last name, and the undercover officer spoke with him to arrange the deal over a number of calls. "When the police officer arrived at the designated sale site, the alleged coconspirator gestured to a parked car and said 'that's Carlos and his cousin.' The alleged coconspirator then opened the trunk of the parked car with a key he had in his possession, retrieved the cocaine, and handed it to the police officer. The defendant did not do or say anything at any time at the sale site. He was merely seated behind the steering wheel of the car." *Guiets*, 566 So. 2d at

830.

The court rejected the linkage of Carlos Guiets to the transaction by name only, because the officer only testified it was the same voice in all calls initially introduced as Carlos; there was no evidence the voice of the Carlos on the phone was Carlos Guiets. Other evidence was hearsay. *Compare Christie v. State*, 652 So. 2d 932 (Fla. 4th DCA 1995)(sufficient independent evidence by appellant's conduct, including circling car with a gun, to show participation in conspiracy).

In the case at bar, petitioner was not even at the scene of the transaction while it was occurring; he was only a passenger in the car. Under *Guiets*, petitioner's accompanying Gajate to the scene at a prearranged time for the transaction is not sufficient independent evidence of a conspiracy. Petitioner was not present at all at the earlier meeting where the deal was arranged. His only act at the 3 o'clock meeting was to hand the bag to Gajate at his direction, and it is not clear he could even see there was money in it. The cell phone call was made to a phone subscribed to the same address where the surveillance team saw Gajate pick up petitioner, but though he was under observation, no one saw petitioner or the third codefendant put the bag of groceries in the car. Petitioner's statement after the offense that he was not involved in drugs, and overheard

statement at the jail about how much they could get for conspiracy, are not sufficiently inculpatory.¹⁶ see *Sheriff v. State*, 780 So. 2d at 920 (evidence that appellant present at scene of another's drug transaction, that the person conducting the transaction let appellant drive her car to scene, coupled with post-arrest statement that the codefendant "knew what was going on" insufficient to establish conspiracy); *Mickenberg v. State*, 640 So. 2d at 88 (presence at scene of drug transaction coupled with appellant's statement that "it's in the white car (a Buick) over there," and the drugs were, insufficient to establish conspiracy).

The \$3000 dollars in petitioner's pocket is also totally circumstantial evidence, and there is an innocent explanation. Gajate said one of the men in the car had a dental appointment, which can be expensive. While cash is relevant to the issue of drug trafficking, "someone can have a relatively large sum of money on him and not be a drug dealer." . . . "If one buys or sell drugs, one might expect that some cash would be present.

¹⁶ Those statements also should not be considered since the corpus of the crime of conspiracy must be proven without regard to petitioner's statements. See *Ras v. State*, 610 So. 2d 24, 25 (Fla. 2d DCA 1992)(admission of defendant "cannot be the sole evidence to support the element of possession; the state was required to present prima facie evidence establishing all elements of trafficking by possession independent of Ras's statements").

The existence of cash is not decisive nor does it create an inference. But it is a fact and it is admissible and may be considered by the jury." *Brown v. State*, 766 So.2d 485 & n.2 (Fla 5th DCA 2000).

This circumstantial evidence is insufficient to show conspiracy. See *Taylor v. State*, 747 So. 2d 393 (Fla. 2d DCA 1996)(where defendant was present at scene of robbery, was the driver of the car, and engaged in other suspicious behavior, evidence of aiding and abetting insufficient: "Neither presence at the scene nor mere knowledge that an offense is being committed can be construed as participation in the crime. *Christie*. Additionally, driving the perpetrator to and from the scene or a display of questionable behavior after the fact is not sufficient to establish participation")¹⁷.

Admission of the extensive hearsay was harmful error. *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999). That determination remains controlled by the standard articulated in *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986), that "...the state, as beneficiary of the error, [must] prove beyond a reasonable

¹⁷ *Taylor* is convincing on this issue, because the evidence was found insufficient to prove petitioner was a principal, which requires less proof than that required to establish a conspiracy: "Conduct that aids and abets an offense is insufficient to prove conspiracy. *McCants v. State*, 587 So. 2d 673 (Fla. 1st DCA 1991)." *McClain*, 709 So. 2d at 137.

doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *Goodwin*, 721 So. 2d at 540 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). See *Schaffer v. State*, 769 So. 2d 406 (Fla. 4th DCA 2000)(harmful admission of hearsay informant testimony).

The harmfulness of the admission of the out of court statements of Gajate cannot be doubted. Neither codefendant testified at this trial, yet the state presented extensive testimony relating the arrangement and consummation of this cocaine transaction in the form of conversations between Gajate (the nontestifying codefendant) and the informant. T321-340; 368-378, discussed above. All the testimony about the arrangements for the deal came from the government's participating informant and the DEA agent who overheard the conversations between the codefendant Gajate and the informant. The state relied on these statements extensively in its closing argument. T466-483.

Without Gajate's out of court statements, there is insufficient evidence of trafficking and conspiracy to traffic. The arrangements were made exclusively between the informant and the codefendant Gajate. The informant admitted he never had any

conversations with petitioner, and before this time, the informant had never seen petitioner in the company of the codefendant Gajate. T349. All the informant knew about petitioner was what the codefendant told him; the informant never even met petitioner. T349-50. The informant specifically admitted he did not negotiate a cocaine transaction with petitioner, and petitioner did not contact him with any offer to buy or sell cocaine. T350. Admission of Gajate's statements through both the CI and the detective who monitored the conversations was harmful error. This court must reverse, or determine that without consideration of the extensive hearsay testimony, petitioner must be discharged on both counts. *Quiets.*

The convictions violate petitioner's rights to due process, equal protection, effective counsel, a fair trial, confrontation and cross examination of witnesses, presentation of a defense, to be free from cruel and unusual punishment, and other rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22, Florida Constitution, and Florida law.

Point 2.

**THE EVIDENCE OF CONSPIRACY TO TRAFFIC IN
COCAINE IS INSUFFICIENT**

The entirety of the evidence, including the coconspirator hearsay statements, does not support a conviction for conspiracy to traffic in cocaine.¹⁸

At no time did the government informant discuss this transaction with petitioner. He never met with him or spoke with him. T349-50. As set forth in the preceding section, the transaction was arranged with Gajate, the codefendant. Gajate told the informant he was calling his "buddy" who was a broker in the transaction, and the number called on the informant's cell phone shows a person with petitioner's last name at the address of the subscriber. Gajate picked up petitioner at that address (though not the grocery bag containing the cereal box with the money, T392), and petitioner was present at the scene. At most while at the scene, petitioner handed the bag of groceries containing the box containing the money to Gajate (at

¹⁸ While this point, and point 3, are not directly governed by the conflict with *Banks*, this court can, and should, decide them: "[o]nce we have conflict jurisdiction, we have jurisdiction to decide all issues necessary to a full and final resolution. See *Jacobson v. State*, 476 So. 2d 1282, 1284 (Fla. 1985); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982)." *Hall v. State*, 752 So. 2d 575 (Fla. 2000). The Fourth District rejected this claim, finding "competent, substantial evidence supports the jury's verdict on each count." *Arguelles*, 791 So. 2d at 504.

his direction), then rode elsewhere as a passenger. Gajate's statements do incriminate petitioner as the middleman, and petitioner had \$3000 dollars on him and made statements which are not necessarily incriminating. The facts, taken in the light most favorable to the state, do not show petitioner's participation in a conspiracy to traffic in cocaine beyond a reasonable doubt.

The elements of the offense are well known:

To establish a conspiracy and appellant's participation in it, the state must prove 'an express or implied agreement or understanding between two or more persons to commit a criminal offense,' and an intention to commit that offense. *Sheriff v. State*, 780 So.2d 920, 921 (Fla. 4th DCA 2001). Direct proof of the agreement is not necessary; it may be inferred from the circumstances. See *Harris v. State*, 450 So.2d 512, 513-14 (Fla. 4th DCA 1984). However, this circumstantial evidence must be consistent with a hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence. See *McClain v. State*, 709 So.2d 136, 138 (Fla. 1st DCA 1998). Thus, a defendant cannot be a conspirator by merely being present at the scene of the offense, driving to the scene knowing the purpose of the journey, or aiding and abetting in the commission of the offense. See *Sheriff*, 780 So.2d at 921; *Mickenberg v. State*, 640 So.2d 1210, 1211 (Fla. 2d DCA 1994)(reversed conspiracy conviction where defendant merely aided and abetted); *Pennington v. State*, 526 So.2d 87 (Fla. 4th DCA 1987)(reversed conspiracy conviction where defendant was merely present at the scene and aided in its commission without knowing the nature of the contraband transferred).

Arguelles, 791 So. 2d at 503-04. *Accord*, *McClain v. State*, 709 So. 2d 136, 137 (Fla. 1st DCA 1998). The state must prove these

elements beyond a reasonable doubt. *Ashenoff v. State*, 391 So. 2d 289 (Fla. 3d DCA 1980). Petitioner's involvement in the conspiracy must be proven beyond a reasonable doubt, and mere presence at the scene is insufficient to establish participation in the conspiracy. *Gonzalez v. State*, 455 So. 2d 1131 (Fla. 2d DCA 1984).

A motion for judgment of acquittal is designed to challenge the legal sufficiency of the evidence. The test is whether the state has presented competent substantial evidence to establish every element of the crime. *Peacock v. State*, 498 So. 2d 545 (Fla. 1st DCA 1986). A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974); *Boyce v. State*, 638 So.2d 98 (Fla. 4th DCA 1994). The standard of appellate review on a motion for judgment of acquittal is *de novo*. *State v. Williams*, 742 So.2d 509 (Fla. 1st DCA 1999) ("We have *de novo* review of the record to determine whether sufficient evidence supports the jury's verdict"); *see also D.R. v. State*, 734 So. 2d 455 (Fla. 1st DCA 1999). The trial court and the appellate court are equally capable of determining whether it is proper to grant a judgment of acquittal. *State v.*

Smyly, 646 So. 2d 238 (Fla. 4th DCA 1994). It is the appellate court's function "to determine sufficiency as a matter of law." *Tibbs v. State*, 397 So. 2d 1120, 1123, n. 10 (Fla. 1981). In the instant case, there is not much more evidence of petitioner's involvement than his "mere presence," and it is still insufficient. Petitioner's presence at the scene (though not while the transaction was occurring), his handing up the bag to Gajate, and his later statements, taken together with Gajate's representations that his "buddy" was the broker, and arrangements over the cell phone to pick up petitioner is the only evidence the state produced to prove that petitioner, Gajate and Green¹⁹ had entered an agreement to traffic in cocaine. This is not enough to establish the separate crime of conspiracy to traffic in cocaine.

In *Ashenoff*, *supra*, the defendants had knowledge of what was transpiring because they were present when the purchase of 500 pounds of marijuana and cocaine was discussed. Moreover, they assisted in selecting and weighing the bales of marijuana and in handing them to other defendants outside the truck. But the third district held that their presence and participation at the

¹⁹ The conspiracy cannot be shown by reference to the informant's involvement in the transaction, since there can be no conspiracy with a government agent. *Edwards v. State*, 516 So. 2d 285 (Fla. 2d DCA 1987).

scene of the offense was insufficient to establish a conspiracy, although the evidence did present a prima facie case of aiding and abetting.

In *Pennington v. State*, 526 So. 2d 87 (Fla. 4th DCA 1987), *affd.*, 534 So. 2d 393 (Fla. 1988), the court found the evidence of conspiracy insufficient under similar facts:

The state established the following facts during its case. A detective with the Hollywood Police Department made contact with a confidential informant who indicated he knew a person who could sell a large quantity of cocaine. The confidential informant introduced the detective to Steffey for the purpose of setting up a cocaine purchase. The detective discussed the purchase with the confidential informant and Steffey on several occasions. Appellant did not participate in any of those discussions. The detective's only contact with appellant occurred at the supermarket parking lot where the drug transaction took place.

The detective met Steffey in the parking lot. Defendant Voto was standing near a Dodge automobile. The detective could not identify another individual who was seated in the driver's seat. After a discussion between Steffey and Voto the automobile left the parking lot with Voto and the other individual. The automobile returned a short time later and Steffey again walked over to it. It left again. When it returned the second time, appellant got out of the driver's seat. Appellant told the detective, "It's in the white car (a Buick) over there." Appellant left and returned to the Dodge while the detective and Steffey approached the Buick. Defendant Daophon was sitting inside the Buick with a pink pillowcase containing a large quantity of cocaine. The state presented no other evidence concerning appellant during its case.

Pennington, Ibid. The court found this evidence of conspiracy

insufficient. Similarly, in *Voto v. State*, 509 So. 2d 1291 (Fla. 4th DCA 1987), the court found the evidence insufficient under the following facts:

Several meetings between an undercover officer, Detective Nickmeyer, and co-defendant Steffey, culminated in an arrangement to purchase cocaine. Detective Nickmeyer met Steffey in a Publix parking lot. Shortly thereafter a Dodge pulled up and appellant Voto got out. The driver, Pennington, also left the car. Steffey then walked over to Voto. After they spoke, Voto stood for awhile and looked around the lot. Voto and Pennington subsequently reentered the Dodge. Steffey, standing next to the Dodge, appeared to be talking with the occupants. The Dodge then drove off. Police officers in a surveillance vehicle followed the Dodge to another location where Voto was dropped off. The Dodge returned to Publix and Pennington spoke with Steffey. After waiting at the second location, Voto was met by a white Buick. Voto talked to the occupants of the Buick through the car window on the driver's side. At one point, Voto was seen leaning into the Buick through the window. The Dodge then returned and picked up Voto. Followed by the Buick, the Dodge returned to Publix. When the cars returned from the second location, Steffey spoke to Pennington. Steffey then told Detective Nickmeyer that the cocaine was in the Buick, which had parked next to the Dodge. Detective Nickmeyer was shown the cocaine and all participants were arrested.

The jury had the benefit of a videotape of the transaction revealing Voto's conduct and demeanor. The jury also heard an audio tape of everything said to Detective Nickmeyer. Detective Nickmeyer never talked directly to Voto. The detectives did not overhear any of the conversations Voto had during the transaction. Voto was never seen in possession of the cocaine. Voto denied any knowledge of what had taken place. Defendant Steffey testified that Voto had been present earlier that day at a meeting in a room where the deal was discussed and the cocaine sampled. Steffey could not, however, recall in detail the extent of Voto's participation in the meeting. During the deal,

Detective Nickmeyer had expressed concern about the unexpected additional people involved. In response, Steffey told Detective Nickmeyer not to worry because Voto was only a "lookout".

Voto, Ibid. The court found sufficient evidence of aiding and abetting, but not of conspiracy.

As in both *Pennington* and *Voto*, petitioner never spoke with the informant, but did engage in some suspicious conduct, and was present at the scene of the transaction (though not while the transaction occurred). In other cases the courts have found more direct proof of involvement in the transaction insufficient to establish participation in a conspiracy. In *Mickenberg v. State*, 640 So. 2d 1210 (Fla. 2d DCA 1994), the defendant *delivered* cocaine for his roommate Ruiz (the supplier). The defendant, however, did not arrange or negotiate Ruiz's sales. This was done by Ruiz himself. The second district held that this evidence was insufficient to establish conspiracy to traffic in cocaine:

A review of the record shows that the state did not prove beyond a reasonable doubt that Mickenberg entered into an agreement with Ruiz or the other coconspirators to traffic in cocaine. Clearly, Mickenberg was aiding and abetting Ruiz in trafficking in cocaine. His participation, however, does not reach the level of the separate crime of conspiracy. We conclude, therefore, that the evidence was insufficient to withstand the appellant's motion for judgment of

acquittal.

Mickenberg, 640 So.2d at 1211.

In *Jimenez v. State*, 535 So.2d 343 (Fla. 2d DCA 1988), the defendant was present *in his own home* when the trafficking in cocaine transaction occurred and there was evidence that he "relayed information concerning the amount of cocaine to be obtained, and requested a telephone number to contact the undercover detective when the cocaine arrived." 535 So.2d at 344. Relying on *Ashenoff*, the second district reversed the conspiracy conviction:

The state presented hearsay testimony that the appellant took the detective's telephone number to give to his brother when he arrived. The detective to whom these remarks were addressed was the only one who remembers them. Such actions still fall short of the participation of the appellants in *Ashenoff*, who actually handled the contraband and participated in numerous discussions regarding the transaction. As were the defendants in *Ashenoff*, appellant was acquitted of trafficking in cocaine, possession of cocaine, and delivery of cocaine. We thus find the state's evidence insufficient to satisfy the basic elements of conspiracy, an agreement and an intent to commit the criminal offense.

Jimenez, 535 So.2d at 344. See also *Sheriff v. State*, 780 So. 2d at 920 (evidence that appellant present at scene of another's drug transaction, that the person conducting the transaction let appellant drive her car to scene, coupled with post-arrest

statement that the codefendant "knew what was going on" insufficient to establish conspiracy).

Here, the informant admitted everything he knew about petitioner came from what Gajate had told him. There is only circumstantial evidence of petitioner's participation in the conspiracy; Gajate never even mentioned petitioner by name, and the informant only surmised petitioner was the "buddy" Gajate was referring to. See *Gueits v. State*, 566 So. 2d 829 (Fla. 4th DCA 1990)(officer spoke over coconspirator's phone with person having same last name as Gueits, and coconspirator pointed him out at scene as participant; evidence of conspiracy insufficient). The circumstantial evidence standard requires the evidence be inconsistent with any reasonable hypothesis of innocence, *McArthur v. State*, 351 So. 2d 972 (Fla. 1977), and it is not. The circumstances of this case are just as susceptible of showing petitioner was along for the ride²⁰ and Gajate was bluffing the informant as to petitioner's and Green's participation for negotiating purposes, and to make the informant believe he had people to back him up.

There is insufficient evidence of an agreement between petitioner and Gajate (and Green) to prove conspiracy to traffic

²⁰ The listening agent testified Gajate had said to get on with the deal because one of the two people in the car had a dental appointment. T375.

in cocaine beyond a reasonable doubt, and petitioner should be discharged on Count 2. Conviction on insufficient evidence violates due process. *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The convictions violate petitioner's rights to due process, equal protection, effective counsel, a fair trial, confrontation and cross examination of witnesses, presentation of a defense, to be free from cruel and unusual punishment, and other rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22, Florida Constitution, and Florida law.

Point 3.

**THERE IS INSUFFICIENT EVIDENCE TO PROVE
TRAFFICKING IN COCAINE**

The evidence of the substantive offense is also insufficient. The state had to reach to both principals and constructive possession to show trafficking in cocaine by purchase or possession, and the evidence fell short.²¹

The state alleged trafficking by purchase and/or possession, R4, and the court instructed on these alternative theories. T492-94 . By its proof, the state showed petitioner did not personally purchase or possess the cocaine. To meet its evidentiary burden the state had to rely on the principals theory and constructive possession and the evidence of both is insufficient.

A motion for judgment of acquittal is designed to challenge the legal sufficiency of the evidence. The test is whether the state has presented competent substantial evidence to establish every element of the crime. *Peacock v. State*, 498 So. 2d 545 (Fla. 1st DCA 1986). A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence

²¹ This court has jurisdiction to decide this issue, and should exercise its discretion to do so. *Jacobson*, 476 So. 2d at 1284); *Savoie*, 422 So. 2d at 310; *Hall*, 752 So. 2d 575. The Fourth District rejected this claim, finding "competent, substantial evidence supports the jury's verdict on each count." *Arguelles*, 791 So. 2d at 504.

adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. *Lynch v. State*, 293 So.2d 44, 45 (Fla. 1974); *Boyce v. State*, 638 So.2d 98 (Fla. 4th DCA 1994). The standard of appellate review on a motion for judgment of acquittal is *de novo*. *State v. Williams*, 742 So.2d 509 (Fla. 1st DCA 1999) ("We have *de novo* review of the record to determine whether sufficient evidence supports the jury's verdict"); see also *D.R. v. State*, 734 So.2d 455 (Fla. 1st DCA 1999). The trial court and the appellate court are equally capable of determining whether it is proper to grant a judgment of acquittal. *State v. Smyly*, 646 So. 2d 238 (Fla. 4th DCA 1994). It is the appellate court's function "to determine sufficiency as a matter of law." *Tibbs v. State*, 397 So. 2d 1120, 1123, n. 10 (Fla. 1981). *Trafficking by possession*.

The state's evidence does not show petitioner was in actual or constructive possession of the cocaine, or a principal to Gajate's possession of the cocaine. *Gueits v. State*, 566 So. 2d 829 (Fla. 4th DCA 1990). It shows little more than mere presence. The actual transaction occurred in a public area in petitioner's absence, as described in more detail the preceding point, and the other evidence does not make petitioner liable as a principal to the possession. It was Gajate who had exclusive

possession of the cocaine, not petitioner, and constructive possession principles cannot apply because petitioner was not in control of the area, and there was no showing of his ability to maintain control over the cocaine or reduce it to his own possession. *Brown v. State*, 428 So. 2d 250, 252 (Fla. 1983)(defining constructive possession). *Dupree v. State*, 705 So. 2d 90, 94 (Fla. 4th DCA)(*en banc*), review dismissed, 725 So. 2d 1107 (Fla. 1998)(discussing constructive possession law). "This is a circumstantial evidence case governed by *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989), and the State was required to present evidence inconsistent with appellant's theory of events." *Span v. State*, 732 So. 2d 1196, 1198 (Fla. 4th DCA 1999)(reversing constructive possession conviction). See *Earle v. State*, 745 So. 2d 1087 (Fla. 4th DCA 1999). In fact, the state's theory was that petitioner was the broker, and that Gajate was obtaining the cocaine for Green, not petitioner.

This case is similar to *Ras v. State*, 610 So. 2d 24 (Fla. 2d DCA 1992). There, Ras was present at the purchase and provided a knife to the codefendant to test the cocaine, though it was the codefendant who gave the undercover officer the money and took possession of the cocaine in the undercover officer's motel room. The court found insufficient evidence of aiding and abetting a possession: "Because Ras did not have exclusive

control of the area, it may not be inferred that he had control of the cocaine without other incriminating statements or circumstances to support that inference." *Id.* at 25. While finding the evidence sufficient to convict Ras of aiding and abetting a purchase, he had not been charged with that offense, and the court held that "[a]n aider and abettor of a purchase does not necessarily aid and abet the possession. *Cf. Stephenson v. State*, 371 So. 2d 554 (Fla. 2d DCA 1979); *Daudt v. State*, 368 So. 2d 52 (Fla. 2d DCA), *cert. denied*, 376 So. 2d 76 (Fla. 1979); *Kickasola v. State*, 405 So. 2d 200 (Fla. 3d DCA 1981)(aiding and abetting a sale does not constitute aiding and abetting possession)." Since the three cases cited by the *Ras* court involved aiding abetting a sale instead of a purchase, the court noted the distinction made no difference: "We recognize the difference between aiding a seller in the divestiture of a drug, as in *Stephenson*, *Daudt*, and *Kickasola*, and aiding a purchaser in the acquisition of a drug, as in the instant case, but conclude that neither situation encompasses aiding in the possession of a drug." *Ras*, 610 So. 2d 26, n.2. See also *St. Clair v. State*, 575 So. 2d 243, 245 (Fla. 2d DCA 1991)(*en banc*)(" . . . we conclude that it is necessary to recede from the language in *Gordon* quoted earlier in this opinion which states that a defendant must be guilty of possession of an illegal drug

if he is guilty of sale or delivery of that drug"). There was insufficient evidence here of actual or constructive possession, or aiding and abetting the possession. *But see J.V. v. State*, 745 So. 2d 1110 (Fla. 1st DCA 1999)(juvenile guilty of cannabis possession as principal for telling confederate to "hide the weed," citing out of state and federal cases).

Alternatively, the evidence does not show Gajate took final possession of the cocaine. Both the informant and the listening agent testified Gajate put the money in informant 2's trunk, took the cocaine and advised the informant to come with him so his buddies could examine the cocaine. T340, 378. It was at this point he was arrested. Because the transaction was not completed until Gajate showed the cocaine to the others, the proof of possession is insufficient: "Temporary control of the contraband in the presence of its actual owner, for the purpose of verifying that it is what it purports to be or to conduct a sensory test for quality, prior to consummation of the completed transaction, without more, does not constitute legal possession." *Garces v. State*, 485 So. 2d 847, 848-49 (Fla. 3d DCA 1986). *Accord, Roberts v. State*, 505 So. 2d 547 (Fla. 3d DCA 1987). *See Campbell v. State*, 577 So. 2d 932 (Fla. 1991)(approving *Garces*, holding "a judgment of acquittal is proper where there is no evidence from which dominion or control

can be inferred").

The evidence is at most circumstantial, and "circumstantial evidence of defendant's knowledge of the presence of contraband must be consistent with the accused's guilt, inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt." *Murphy v. State*, 511 So. 2d 397, 399 (Fla. 4th DCA 1987)(citing cases); *Accord, Span v. State*, 732 So. 2d 1196, 1198 (Fla. 4th DCA 1999)(reversing constructive possession conviction). There is insufficient evidence of trafficking by possession.

Trafficking by Purchase.

The state charged trafficking by purchase in the alternative. R4. As with the possession charge, since the evidence was that petitioner was not the actual purchaser, the state can only prove this by application of the principals theory. The evidence is not sufficient to show that petitioner "(1) assisted the actual perpetrators by doing or saying something that caused, encouraged, assisted, or incited the perpetrators to actually commit the crime; and (2) intended to participate in the crime." *K.O. v. State*, 673 So. 2d 47, 48 (Fla. 4th DCA 1995). The informant never even spoke with petitioner, and Gajate's secondhand recounting of petitioner's participation in the purchase is slim and circumstantial, and

does not rule out a reasonable hypothesis of innocence. Also, under *Garces*, the purchase was not completed.

Conviction by insufficient evidence violates due process. *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The convictions violate petitioner's rights to due process, equal protection, effective counsel, a fair trial, confrontation and cross examination of witnesses, presentation of a defense, to be free from cruel and unusual punishment, and other rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22, Florida Constitution, and Florida law.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, petitioner respectfully requests this Court reverse the convictions and sentences on both counts or order discharge.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Celia Terenzio and Heidi L. Bettendorf, Assistant Attorneys General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299 this _____ day of February, 2002.

Counsel for Robert Arguelles

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this _____ day of February, 2002.

