IN THE SUPREME COURT OF FLORIDA

ALAN MAX JACOBSON,

Petitioner,

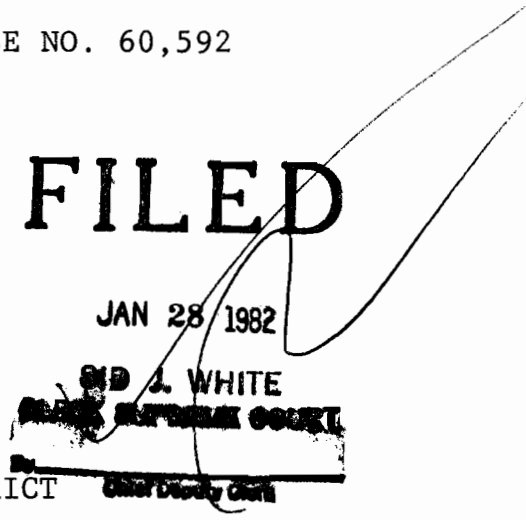
vs.

THE STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 60,592



ON APPEAL FROM THE THIRD DISTRICT
COURT OF APPEAL OF FLORIDA

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BRIEF OF PETITIONER

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INTRODUCTION

Appellant, ALAN MAX JACOBSON, was the defendant in the trial court. Appellee, THE STATE OF FLORIDA, was the prosecution. In this Brief, the parties will be referred to by their proper names or as they appear before this Court. The symbol "R" will be used to designate the record on appeal and the symbol "T" will refer to the separately bound transcript of the hearing on the Motion to Suppress. All emphasis supplied is ours unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Alan Jacobson was charged by the State of Florida with one count of trafficking in cocaine and one count of possession with intent to sell a controlled substance. (R. 3-4A). Appellant Jacobson, defendant in the trial court, filed a Motion to Suppress with accompanying Memorandum of Law alleging that the cocaine which he allegedly possessed was seized by virtue of an illegal search and seizure. (R.9-9A; 33-48). Hearings were held on appellant's motion on January 4 and 5, 1980. Detectives William Johnson and William Pearson of the Dade County Public Safety Department testified at the hearings. (R.51-57; T.1-80).

Testimony of the police officers revealed that they were employed by the Narcotics Detail at Miami International Airport. (T.4-5). They were narcotics investigators. (T.6; 42). The officers, casually dressed in civilian clothes, hid their firearms from view. (T.9). At approximately 12:45 P.M. on July 31, 1979, they observed the appellant, accompanied by a male traveling companion named Baker, approach the National Airlines counter to inquire as to the time the National Airlines flight was bound for Los Angeles. Both appellant and Baker carried ticket folders from Western Airlines. The National ticket agent advised them that the flight for Los Angeles had already departed. The police officers testified that based on their "experience", Los Angeles was a known "Narcotics source" city. (T.11-13; 17; 43-44).

According to the testimony of Johnson and Pearson, both appellant and Baker carried tote bags, which the officers felt

was minimal luggage for a flight to California. (T.13;38;46). Testimony indicated that the officers surmised that since each traveler had a Western Airlines ticket, it was unlikely that they checked their baggage with National Airlines curb service prior to entering the airport. (T.46). Other testimony regarding the defendants included that,1) they were "nervous", 2) had arrived "late" at the airport for the flight to Los Angeles and 3) were "young", which the officers believed consistent with drug traffickers. (T.12-13; 47).

After leaving the National ticket counter, appellant and Baker were approached by Officers Pearson and Johnson respectively. (T.4; 49). Detective Johnson stood directly in front of Baker. (T.15). Appellant Jacobson and Baker at this point were only a few feet away from each other. (T.16). Officer Pearson identified himself as a police officer and appellant agreed to talk with him briefly. At the request of Pearson, appellant then showed him a one-way airline ticket from Miami to Los Angeles. The ticket was returned to appellant who was then asked to produce more identification and did so, showing the officer a Florida driver's license. (T.51). Baker was now visibly shaken after the officer's questions. (T.18).

The police officers apparently grasped a discrepancy in appellant Jacobson's answers regarding his residency. (T.51). Pearson then asked appellant if he could have permission to search his tote bag and advised appellant that he had the right to withhold consent. Jacobson responded, "Go ahead and search my fucking bag." (T.54). At the request of Officer Pearson, he picked up his tote bag and moved approximately 10 to 15 feet

from where he was originally stopped. (T.55-66). Both Jacobson and the officer knelt on the floor and began going through the luggage. (T.56). Officer Johnson had patted Baker's ankles and found what he thought to be cocaine. (T.21). Shortly thereafter, according to Officer Pearson, appellant noticed handcuffs being placed on Baker by Officer Johnson and at this point, Jacobson ran out of the terminal (T.57). Officer Johnson testified further that he never asked appellant Jacobson for permission to search him after Pearson had brought him back to the terminal. (T.34). Pearson pursued appellant with the aid of two uniformed police officers. Possibly ten minutes had elapsed from the beginning of questioning of Jacobson until the time he departed. (T.60). The appellant was then placed under arrest and taken back to the terminal where a continued search of his tote bag revealed nothing, but a frisk revealed cocaine attached to each of his legs. Detective Johnson testified that it would have made a difference to him had the appellant walked away rather than run from the terminal prior to his being searched and cocaine having been found. (T.40). Appellant Jacobson did not testify at the hearings on the Motion to Suppress. Baker, however, did testify. (T.69-77).

Detective Pearson testified that he did not recall the method of payment used by the appellant to purchase the ticket. (T.50). He further testified that appellant told him he was going to visit friends and that he was from the Los Angeles area. He

noticed that Jacobson's physical condition changed during the questioning and that he, Jacobson, became nervous. (T.50). According to Pearson, after Jacobson had been returned to the terminal, Jacobson was arrested, then searched, and subsequently charged with resisting arrest. (T.58-59). He added, however, that appellant was under arrest for resisting arrest, but not for the commission of any particular crime. (T.67; R.1-1a). Pearson further added that Jacobson was free to leave at any time up to and including the time of his departure, but, "He was no longer free to leave when I had to chase him through the airport." (T.61-62).

At the conclusion of the hearing on the Motion to Suppress and after consideration of argument of counsel and applicable law, the court granted the motion as to both defendants, finding that the initial stop was illegal and that, based on the totality of the circumstances, there was no voluntary consent. On January 17, 1980, the trial court's written order specifically found as follows:

> 1. The observations by the police officers giving rise to the initial stop are not sufficient to constitute an articulable suspicion that defendants had committed, were committing, or were about to commit a crime.
>
> 2. After considering the totality of the circumstances as required by Taylor v. State, 355 So.2d 180 (1978), it most certainly does not appear that there was voluntary consent to search which would attentuate the initial illegality.
>
> 3. The defendants were "seized" without probable cause for the purpose of finding some evidence of a crime, thus all of which followed the illegal search and seizure and is tainted. Wong Sun v. United States, 371 U.S. 471 (1963).

The State did not appeal the circuit court's order as to Baker. With regard to appellant, however, the State appealed to the Third District Court of Appeal which filed its opinion on April 28, 1981. (R. 62-65). In its decision, the appellate court reversed the trial court and found that although the initial stop was illegal, there was a break in the causal chain of events by the defendant's attempt to flee. The court felt there was no showing of any evidence being produced as the result of the initial stop and subsequent search, and that the temporal proximity of the initial illegality at the subsequent seizure was immaterial as a result of the appellant's flight. Petition for Rehearing was filed with the Third District Court of Appeal. (R.66-67). The Third District Court of Appeal denied the petition. (R.68). This Court accepted jurisdiction on January 13, 1982.

ISSUE

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN REVERSING THE SUPPRESSION ORDER OF THE TRIAL COURT WHERE AN ILLEGAL STOP OF DEFENDANT, MADE WITHOUT PROBABLE CAUSE OR ARTICULABLE FACTS, RENDERED INADMISSABLE AS FRUIT OF THE POISONOUS TREE, EVIDENCE FOUND DURING A LATER SEARCH OF DEFENDANT WITHOUT CONSENT, FOLLOWING HIS IMMEDIATE ARREST, AFTER HE FLED FROM POLICE WHILE ILLEGALLY DETAINED.

ARGUMENT

I. DEFENDANT'S FLIGHT

A. Florida Cases

This State's highest court has recently held that the district courts of this State have the power of final and absolute review, with the Supreme Court exercising appellate power only to settle issues of public importance and to preserve uniformity of principle and practice. Sanchez v. Wimpey, ____So.2d _____, Case No. 59, 762 (Fla. 1982) [7 FLW 21]. As noted in Sanchez, a party will not have a second appeal ordinarily on the merits of an issue decided by the District Court of Appeal. In the case at bar, the majority opinion of the court of appeal noted that the initial stop of the defendant was illegal. The defendants therefor proceed in this Brief to discuss the immediate point upon which this Honorable Court extended its Conflict Certiorari Jurisdiction. Any discussion regarding the legality of the initial stop of defendant is offered for a clarity of presentation and to assist the Court. In Vollmer v. State, 337 So.2d 1024 (2nd DCA 1976), the appellate court considered the question of defendant's arrest for resisting an officer without violence after

he fled during questioning following an admittedly illegal stop. The officer had no reason to believe that a crime had been committed when he noticed defendant walking in the early morning on a Lakeland city street. As the officer drove by, the defendant apparently looked at his patrol car which aroused the police suspicions and led to an "on the street" confrontation. As the officer was checking a discrepancy between what the defendant had said was his name and what was on his driver's license, the defendant "took off running" and the officer gave chase on foot. The defendant was finally arrested for resisting an officer with violence following a struggle which resulted from his apprehension. The court in Vollmer, as in the case at bar, noted that "In this instance the initial stop by the officer was not justified." Without more, the fact that appellant was walking along a main public thoroughfare at 3:00 A.M. and turned to look at a police car is an insufficient basis to justify a stop under Terry v. Ohio, 392 US 1, 88 S.Ct. 1868, 20 L.Ed 2d 889 (other citations omitted). The Second District Court of Appeal further held at Page 1026:

> We recognize that a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. (Citations omitted). And where the public safety's engdangered, identification may be properly requested. Cf.,Hardie v. State,(Fla. 1976),333 So.2d 13. But here, there no evidence of any danger to the public safety and there was no circumstances to justify the police to suspect the appellant of being involved in any criminal activity. Cf., Maruca v. State, Fla. App. 3d 1976, 329 So.2d 427.

> The identification furnished the officer by appellant was the product of the stop. Since the initial stop of the appellant by the officer was illegal, the fact that appellant produced an identification contrary to the name he had given and then fled, does not validate the policeman's actions. The appellant here was not required to explain his presence and conduct. Cf., State v. Ecker (Fla. 1975), 311 So.2d 104.

The court went on to hold that the evidence found on the appellant should be suppressed, and cited Wong Sun v. U.S., 371 U.S. 471, 9 L.Ed 2nd 441, 83 S.Ct. 407 (1963). In the case at bar, as in Vollmer, the District Court of Appeal noted that the initial stop was illegal. And, as in the case at bar, each defendant was placed under arrest for resisting arrest and presumptively searched incident thereto. The court in Vollmer, however, noted that the identification furnished the officer by appellant was the product of the stop and was the fruit of the poisonous tree. It is submitted that in the case at bar, as in Vollmer, the defendant's flight was the product of illegal police activity which went beyond the permissible bounds of any justifiable detention for interrogation or investigation. The trial court specifically noted in Paragraph 4 of its order suppressing the evidence (R.49) that the defendant's acquiessence was to an apparent authority for the limit purpose of searching the luggage. No contraband was found in that item by either Officer Pearson or Officer Johnson.

The cases of Burgess v. State, 313 So.2d 479 (1st DCA 1975) and State v. Ecker, 311 So.2d 104 (Fla. 1975) cited in the Vollmer case, deserve attention. In Burgess, the suspicions of a St. Petersburg police officer were aroused when the defendant and another man separated and cut through a yard upon observation of the police officer, came together again, and then separated upon defendant seeing the police officer's vehicle and yelling to his companion. Upon ultimately stopping the defendant, who refused to identify himself, the officer attempted to place the defendant under arrest for obstructing a police officer without violence and a fight ensued. Defendant's arrest for resisting with violence was subsequently overturned by the appellate court which noted that, although the defendant may have been very uncooperative in attitude, it was unaware of any requirement of law that an individual citizen had to disclose his identity under the particular factual situation. The court further noted at Page 481, "Since the evidence did not show any lawful basis for the appellant's arrest, he could not be found guilty of resisting arrest." The court further felt compelled to cite from the landmark case of Terry v. Ohio, supra:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the street. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way...Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. Terry at page 913.

In State v. Ecker, 311 So.2d 104 (Fla. 1975), this Court in passing on the constitutionality of Florida's loitering statute from consolidated appeals, issued the following warning despite the sufficiency of the facts in that case to support the charge:

> Although the circumstances justified an arrest under (citations omitted), the testimony of the arresting officer who stated, 'I arrested him for loitering because we could not prove anything else', is disturbing...Under the circumstances of this case we affirm the conviction but caution law enforcement officers that this statute contains separate, distinct elements that must be established in the same manner as those of any other criminal offense. At page 111.

The language of the police officer in Ecker is of course not unlike the testimony of Officer Pearson in the case at bar referable to the sufficiency of the defendant's actions which ultimately led to his arrest and the subsequent search that revealed contraband.

The Burgess case is important in the court's noting that the Florida view and the common law rule hold that one who resists an unlawful arrest may not be found guilty of resisting arrest. The search of defendant Jacobson could therefor not be upheld incident to any lawful arrest which took place in this case. The record here, however, establishes that the State attempts to do just that. (T.67). [1]

[1] Q. You're telling me that he was under arrest for resisting arrest?
A. Yes, sir.
Q. He was under arrest for resisting arrest for what?
A. I believe that the statute says resisting a police officer.
Q. He was---if I understand your testimony correctly---he was under arrest for resisting arrest, but not for the commission of any particular crime?
A. No, sir.

In Isham v. State, 369 So.2d 103, 4th DCA 1979, an anonymous telephone call led officers to the scene of an alleged attempted drug sale. Upon exiting his vehicle and asking to speak to the defendant the suspect attempted to flee and the officer detained him. A later search of his person revealed cocaine exactly as described during the original anonymous tip. In evaluating the legality of the arrest in that case, the court of appeal noted that:

> Adapting this rationale to the case at bar, the police had a perfect right, and perhaps a duty, to investigate the call. When they then saw the, described in detail, appellant at the very location, we believe they also had the right to talk to him. As they attempted to do so, the appellant ran away which reaction in our view, coupled with all that had gone before, created a founded suspicion sufficient to justify a stop...
>
> The problem remains as to whether an immediate search without arrest, or further investigation, was authorized and we think it was not. There was no information to suggest that appellant may be armed with a dangerous weapon...nor was there probable cause for arrest for possession of cocaine BEFORE the search. Furthermore, the record does not reflect any consent to the search conducted...We are therefor of the opinion that the officers moved too fast and that the search was illegal. We are also of the opinion, however, that had the anonymous tip included information that the appellant was armed, a frisk would have been justified.

In the Isham case, unlike the case at bar, the court even noted that there existed a founded suspicion sufficient to justify a stop. The record in Isham did not reflect any consent to search and noted no probable cause for arrest before the search, similar to the record in this case. Assuming the defendant, Jacobson, reluctantly consented to the search of his tote bag, there is

nothing in the record to suggest that he ever consented to any body search. In Taylor v. State, 355 So.2d 180, 3d DCA 1978, the appellate court discussed the issue of the problem of the legality of evidence obtained following an illegal arrest or an illegal search. Citing the famous United States Supreme Court decisions of Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963) and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed 2d 416 (1975), the Court reaffirmed that an illegal arrest or search presumptively taints evidence seized thereafter. The only exception recognized is where there is a clear and unequivocable break in the chain of illegality sufficient to dissapate the taint of the prior legal action. The court further noted that such cases would be "rare". In the Taylor case, referred to by the trial judge in the case at bar in his order suppressing the cocaine (R.55), one Officer Tucker stopped a vessel which he knew in past years had been suspected of bringing in undersized lobsters from outside the territorial waters of the United States. The officer then noticed a visible expired commercial registration certificate on the boat and proceeded to investigate further. Officer Tucker asked questions of the defendant for the purpose of determining if the defendant had any undersized lobsters on the boat. The court then noted the following additional facts:

> As the officer asked, he opened and looked into the cooler. Nothing incriminating was discovered. The officer then pointed and asked if a certain part of the boat was the fishhold. The defendant replied that it was and the officer then asked 'Can I look inside, I would just like to look inside'. The defendant made no response but pulled the tarpaulin cover aside and lifted up the hatch because, as he testified, he thought the officer had a right to look therein. The officer at no time advised the defendant that he had a right to refuse the police request to look in the hold or search the boat. The officer looked inside the hold for short lobsters and discovered a large quantity of marijuana which was eventually seized. Taylor at page 183.

The court in that case went on to note the legal distinction between submission to apparent authority of a law enforcement officer and unqualified consent. It further noted that it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search. Bailey v. State, 319 So.2d 22 (Fla. 1975). The Third District examined the consent search noting that it must be determined from a "totality of the circumstances" as to whether the consent was in fact voluntarily given by the defendant or was the product of duress or coercion, express or implied. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973). In the Taylor cases and the case at bar, no direct consent was ever given to a search where the contraband was ultimately found. In Taylor it was the hold of the boat, and in the case at bar of course, the defendant's body.

As did the appellate court in Taylor, the trial judge in the case at bar found that Officer Pearson's purpose was to perfect a search of the defendant. With no consent and after defendant Jacobson's return with the officers to the airport, a search revealed contraband. Putting aside for the moment any

further discussion of the fact of the defendant's flight during questioning, the following language from the Taylor decision strikes a familiar chord:

> The officer's purpose in boarding the boat, as he testified, was to determine if the boat contained undersized lobsters as previously suspected...Under the circumstances, it is our view that the defendant's silent consent was tainted by the prior illegal search of the icebox cooler and therefor represents an acquiescence to authority rather than a free and voluntary consent to search...The fact that the prior illegal search yielded no contraband in no way dissipates the admitted illegality of such search nor its obvious coercive effect on the defendant.

Inasmuch as the defendant in the case at bar did not specifically consent to a search of his person, but rather previously merely to a search of his tote bag, it cannot be seriously contended that the search which revealed the contraband was one conducted with his free and voluntary consent. In the familiar Florida airport search case of State v. Frost, 374 So.2d 593, 3d DCA 1979, the court noted what defendant herein submits was the status of his freedom of movement at the time he quickly exited the airport terminal:

> It (the State) contends that, until he was arrested for cannibis in the briefcase, Frost was entirely free simply to walk away from the officers and to decline either to speak with them or to accede to their request. At page 596.

We agree with this statement of the law. The record in fact supports this view:

> A. He could have left at anytime up to when he he decided to leave on his own. (T.61).
>
> Q. I'll try to rephrase it. Since Mr. Jacobson was free to leave up until the point that he took off running what was it that made Mr. Jacobson no longer free to leave?

A. Well he was no longer free to leave when I had to chase him through the airport.

I got him over to the brick wall or prior to that when I saw Detective Johnson place Mr. Baker---I saw Detective Johnson place Mr. Baker up against the wall and place him in handcuffs.

I believe with everything else on that particular point, had he not left I would not have allowed him to leave. (T.61-62).

The defendant, Jacobson, clearly through his actions withheld any consent to a physical search of his person which under the circumstances would invaribly have taken place. Indeed, as Judge Nesbitt boldly noted in his dissenting opinion, "The defendant was free to terminate that cooperation at anytime, as he did by his swift departure from the terminal." (R.66).

B. Federal Cases

Numerous cases from the Federal system, factually similar to the case sub judice, indicate in no uncertain terms that the seizure and subsequent search and arrest of the defendant here was unlawful. In United States v. Pope, 561 F.2d 663, 6th Cir. 1977, a Federal DEA agent observed the defendant among passengers disembarking from a Los Angeles flight. One month earlier he had observed the defendant as one of two men, purchase one-way tickets in cash using money taken from a large roll of bills. He then investigated. Two days later he noticed the defendant who appeared nervous and looked about several times. He then approached defendant, displayed his credentials, and

immediately appellant bolted past the agent and ran into a nearby construction site where he swung or threw his briefcase as the pursuing officer. He was placed under arrest. Later, evidence in a bag which the defendant tried to throw away was retrieved, found to contain contraband and appellant was placed under arrest. The court upheld the conviction on the particular facts of that case which are patently distinguishable and in direct contract to the facts sub judice. The applicable law cited in the Pope case, however, is instrutive:

> As we stated in United States v. McCaleb, 555 F.2d 717, 720 (6th Cir. 1977), the satisfaction of a drug courier profile in itself does not establish probable cause. (Citations omitted). The agents must be able to point to additional articulable facts which indicate that the suspect is engaged in criminal activity...The officer may not rely on 'mere suspicion' or a 'hunch' to justify the stop, but due consideration is afforded specific reasonable inferences the officer is entitled to draw in light of his law enforcement experience. (Citing Terry v. Ohio, 392 U.S. at 29, supra).

The court in Pope further noted, refering to the Terry case, supra, that reasonable suspicion cases sought to strike a balance between the public interest behind the investigation and the individual's right to personal security free from arbitrary interference from law officers:

> Where the public interest served by the officer's investigation is great and the intrusion on the individual privacy is small, investigative stops of limited duration and 'reasonably related in scope to the justification of their intention' have been upheld. United States v. Brignoni-Ponce, 422 U.S. at 881, 95 S.Ct. at 2580, citing Terry v. Ohio, 392 U.S. at 29, 88 S.Ct. 1868.

The following language from the Pope decision, which distinguishes that case from the case at bar, indicates why the actions of Officers Johnson and Pearson were illegal:

> Here, agent Johnson was obviously intending to make a Terry stop when he approached appellant to 'talk' with him. This intention was thwarted, however, by appellant's flight at the moment the agent displayed his credentials. If the agent had actually succeeded in effecting an investigatory stop by detaining appellant for questioning at the time of the initial intrusion, the stop would have been invalid because the facts then known to the agent did not amount to 'reasonable suspicion' that appellant was involved in criminal activity. Pope, supra at 668.

The Court further cited the factual distinction which controls the case at bar from its decision:

> If agent Johnson had carried out his intentions and had stopped appellant, any evidence obtained thereby would have had to be suppressed at the fruit of an invalid Terry stop. (Citations omitted) ...From that point, appellant no longer conducted himself as would an innocent passerby...We wish to emphasize the narrowness of this holding. We do not condone, nor do we wish to encourage, investigative stops of citizens on a public street on facts which do not meet the standards in Terry. All that we hold today is that flight from a clearly identified law enforcement officer may furnish sufficient grounds for a limited investigative stop. (Citations omitted)...However flight from a law enforcement officer alone does not establish probable case although it is a relevant factor to consider. Citing United States v. Vasquez, 534 F.2d at 1145.

Obviously in the case at bar, the defendant's exit from the terminal was merely a withholding of further consent to a body search which would have violated his constitutional rights under the facts then known to the officers. He had already given the

officers his identification and allowed them to examine his tote bag. The police "hunch" or suspicion that there was a discrepancy in Jacobson's story based upon his testimony that he was going to visit friends and that he was from the Los Angeles area, is unimpressive. (T.50). He never denied being from Miami, inasmuch as he held a Florida driver's license, but merely said that he was "from the Los Angeles area." The two statements are hardly mutually inconsistent. Obviously, a person can be "from" one area, and "originally" from another area, depending on how he perceives the question. The police in the case sub judice did not pursue the point, which might have led to an evaporation of this particular "suspicion".

In United States v. Hill, 626 F.2d 429 (5th Cir. 1980), an anonymous telephone tip describing in detail the defendant led to a license check of a car and the realization by officers that the man described had twice been charged with drug violations. The defendant was also traveling under an alias. A federal agent noticed the defendant disembark from a Los Angeles flight, learned he had check one piece of luggage, and that he had bought his ticket at the Los Angeles airport 31 minutes prior to departure. The agent approached the defendant Hill who agreed to talk with the agent. Hill refused, without a search warrant, a request by the agent for a search. The agent then asked him to accompany him to an office where there is a telephone, and with that the defendant fled down the concourse. He had never been told that he could not leave or that he was under arrest, nor was he advised that he was free to leave if he desired. The defendant was subsequently restrained. A search revealed narcotics. The court,

in reversing the defendant's conviction, noted the applicable law and facts similar to those in the case at bar:

> Though this case is factually distinguishable from Dunaway, we are confident that, under the reasoning employed in Dunaway, Markonni's request for Hill to accompany him to the Delta office constituted a significantly greater intrusion than a brief Terry stop and, thus, must be classified as an arrest requiring probable cause...The record reveals that, at the time Markonni requested Hill to accompany him to the Delta office, Markonni had already briefly interrogated Hill. At that point, Markonni asked Hill if he would consent to a search and Hill told him 'not without a search warrant'... In our view when Markonni requested Hill to come with him to the Delta office, the interrogation could no longer be characterized as 'brief' or 'on the spot'...Rather the request signaled the beginning of a more extended interrogation which was to occur in a place other than where it began... Hill was never informed that he was 'free to go' and the circumstances surrounding the request indicate that Hill would have been physically restrained if he had refused to accompany Markonni or had tried to escape his custody. Third, as in Dunaway, the circumstances indicate that the detention involved here was for the purpose of interrogation. In some, the scope of the intrusion involved in Markonni's request for Hill to accompany him to the Delta office was significantly greater than that involved in a brief Terry stop, and therefor amounted to an arrest. At pages 435 and 436.

In reversing the conviction, the court held that the evidence was inadmissable as the tainted fruit of an unlawful arrest. Similarly, in the case at bar, the defendant indicated his refusal to consent to a search of his person, which was obviously forthcoming based on his observations of Baker, by fleeing the terminal. He had in fact been previously specifically told by the officers that he could in fact withhold consent. The facts belie any possible State

that
assertion/a brief or on the spot interrogation was taking place. Nowhere is this more evident than the testimony of Officer Pearson who stated "I believe with everything else on that particular point, had he not left I would have not allowed him to leave." (T.62).

Another Federal case, United v. Tookes, 633 F.2d 712,(5th Cir. 1980), is again factually similar to the instant case referable to issues of detention and subsequent fruits of an illegal search. In Tookes, the court noted that Dunaway v. New York, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2nd 824,(1979) and the Hill and Terry cases, supra created only a very narrow exception to the broad general rule that the seizure of a person must be supported by the "long prevailing standards of probable cause." Tookes at page 715. In Tookes, federal agents and a local police officer were conducting routine surveillance for narcotics trafficking when defendant, known by Officer Sproat, as a convicted felon, appeared at the scene. Sproat drove up beside the defendant, who saw the other officers in "casual" attire get out of the car, gave a wild frightened look and started to run behind the duplex toward a recreational area. The defendant was subsequently apprehended, placed in a police vehicle and not told he was under arrest. The officer then found a pistol allegedly thrown down by the defendant. The court held that although the initial detention here was not accomplished by formal words of arrest or stationhouse booking, the defendant was arrested at the time he was placed in the police car.

Referring to United States v. Cole, 628 F.2d 897, 899 (5th Cir. 1980), the Court rejected the Magistrate's recommendation that the initial encounter between the defendant and the officers was merely a contact and therefor not unlawful. "The apprehension of defendant after he fell was found to be merely investigatory detention" while the officers attempted to ascertain the reasons for defendant's flight and was legal under (citations omitted) a conclusion which may be questionable in light of our holding in United States v. Cole, 628 F.2d 897, 899 (5th Cir. 1980). The court went on to note that although the defendant's flight may have justified the officer's decision to take the action of chasing him and asking further questions, it did not give rise to the level of probable cause which is a constitutional prerequisite to a valid arrest. The court therefor invalidated the arrest. The court further specifically went on to reject the "attenuation" doctrine referable to the gun subsequently found and offered as evidence:

> Judged by this standard, the connection between the arrest and the discovery of the gun was not so attenuated as to dissapate the taint of the illegal arrest. The discovery of the gun occurred only a few minutes after the illegal arrest and only 20-25 years away...Thus the taint cannot be easily removed. While the gun was in plain view and conceivably could have been discovered even without the arrest, the temporal and spatial proximity of the arrest and the finding of the gun make it clear that the two are interrelated. At page 716.

Indeed, in the instant case, Jacobson withheld consent to a body search as his flight from the terminal indicates. It cannot

be seriously contended that the ultimate search yielding cocaine was therefore justified by the flight of defendant which "attenuated" somehow the initial action of Officers Johnson and Pearson. Jacobson's observation of Baker being arrested was part and partial of the stop which the Third District Court of Appeal has admitted was illegal. The whole episode took only 5 to 10 minutes between the initial stop and Jacobson's flight, occurred in the same general area, and was the direct result of the interrogation and prior consentual search of the tote bag. (T.60). The language of Tookes at page 716 citing Phelper v. Ecker, 401 F.2d 232, 237-238 (5th Cir. 1968), is helpful:

> In considering the totality of the circumstances under which the arrest was made, 'the arrest... amounted to a gross violation of legal proceeses,' and was not merely 'a matter of failure to comply with technical requirements.'

In fact, the U.S. v. Homburg, 546 F.2d 1350, 9th Cir. 1976 at page 1352, the court noted.

> A party may invoke his consent to be searched at anytime prior to boarding the plane even where he has passed beyond the initial screening point, if he agrees to leave the boarding area. Other decisions of this court have also recognized that a passenger always maintains the opinion of leaving. (Citations omitted).

And further, the case of U.S. v. Cole, 628 F.2d 897 (5th Cir. 1980) cited in Tookes, supra, held that the conviction of a defendant would be reversed where officers, searching a premises pursuant to a valid search warrant, observed the defendant drive up, recognized him from prior information given about him, and then immediately frisked him and found weapons on him. The court held that the pistol obtained from the frisk should have been suppressed.

The patdown was insufficient even though the defendant had been on the premises covered by a warrant. The court noted at page 899:

> A person's mere propinquity to others, independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Citing Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed. 2d 238, 245 (1979)...Mere presence neither obviates nor satisfies the requirement of Terry v. Ohio, that specific articulable facts support an inference that the suspect might be armed and dangerous. U.S. v. Tharpe, 536 F.2d 1098 (5th Cir. 1976).... Nor does the fact that the officers testified that they had previously received information of an undisclosed nature about appellant constitute reason to search under Terry. Without knowledge of the content of that information, the court cannot assess the reasonableness of the inference of dangerousness.

In the case at bar, the defendant was entitled to leave the terminal at anytime prior to consenting to a search of his person. The fact that he was in the presence of someone who had been searched (illegally) and where contraband was found did not establish probable cause or articulable facts to excuse the consent requirement as to his physical person. His flight from the terminal was as strong a statement of a desire not to be further intruded upon as anyone could imagine.

Other federal cases reinforce this line of federal authority. Citing Terry, supra, Pope, supra, Dunaway, supra, Brignoni-Ponce, supra, and Wong-Sun, supra, the Ninth Circuit in United States v. Chamberlin, 644 F.2d 1262 (9th Cir. 1980) reversed a conviction based on facts legally controlling the case at bar. In Chamberlin,

San Diego police on routine patrol observed defendant Chamberlin and a companion walking from a park and recognized them as individuals with extensive criminal records. The officer felt the defendants look worried and that their pace quickened as he passed by. He later saw one subject dart between two houses and begin to run. The defendant Chamberlin also attempted to flee but was subdued. Upon his capture the defendant denied knowing the other person seen with him by the officer and was placed in the back of a patrol car for detenion for further investigation. The defendant became nervous, began to sweat, and responded to certain of the officer's questions which ultimately led to his arrest for possession of a check stolen from the mail. The Sixth Circuit, in reversing the conviction, noted that the trial court had relied upon United States v. Pope, supra, in which the flight of the accused upon approach of an officer to question Pope was a major factor in the court's determination that reasonable suspicion for a Terry stop existed. Noting further that the police in Chamberlin were justified in making an investigative stop, the court, citing Dunaway, supra and Brignoni-Ponce, supra, held that:

> As we have noted, there were sufficiently specific articulable facts upon which to base a reasonable suspicion that criminal activity was afoot when Chamberlin was stopped. This would be sufficient to justify a brief stop and a few brief questions. However there was not probable cause then or after the brief questioning suggested by a more extensive detention period. At page 1266.

The court further explained that the defendant was never informed that he was free to leave the car, that the officer admitted that once he had detained defendant Chamberlin, that Chamberlin was not

free to go, and that his detention was for the purpose of finding out what was going on. Finally, rejecting the government argument under Wong-Sun of attenuation, the court noted that the burden showing admissibility rests on the prosecution, and that the test was whether the illegal activity tended to significantly direct the investigation to the evidence in question.

> There is no doubt that the obversation of Chamberlin's excited condition and nervousness, together with his statement that he had not previously mentioned the furniture store, added considerable impetus to the investigation, intended significantly to direct the investigation to the furniture store. Thus we hold that the identification evidence must be excluded as fruit of the unlawful detention. At page 1268.

The opportunity to observe the defendant's demeanor was brought about, said the court, only because of the illegal detention, and would therefor be excluded as exploitation of his illegal arrest. Further,

> When there is a close causal connection between the illegal siezure and the confession, not only is the exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts. At page 1268.

In the case at bar, Jacobson's detention, his ability to view the intrusive treatment being given his companion Baker in the general area of the illegal stop, during only a 5 to 10 minute period, and his (we submit) justified denial of consent by flight from the terminal were all intertwined and lack the "independent source" as found by the Third District Court of Appeal so necessary to establish the attenuation by a clear break in the causal chain of events, sought by the State of Florida.

Finally, in United States v. Coleman, 450 F.Supp. 433 (Eastern Dist. Mich. 1978), the court dealt with a case factually similar to that sub judice and supressed evidence as unlawfully seized. In Colemen, agent Markonni observing passengers disembarking from a Los Angeles flight, saw a young black man without luggage walking through the terminal. Markonni approached the defendant and his companion and stopped them. Defendant handed over a driver's license with a trembling hand and the agent noticed no baggage tag stapled to the ticket folder. The defendant agreed to accompany the agent to a more private place, and then turned abruptly and bolted off in the opposite direction. The defendant was observed throwing a white envelope over a guard rail and was formally arrested. The envelope was then found to contain cocaine. The court found it necessary to examine the legality of arrest and found that there was a strong nexus between the agent's conduct and the defendant's throwing the envelope away. The court felt that the government's suggestion that this nexus had been broken or at least sufficiently attenuated did not survive under the "penetrating light of clear statement." The government's argument that the property had been abandoned regardless of the legality of the arrest was rejected. The court said further:

> The fact that defendant's flight cannot be taken into account, for he did not flee until after the stop had been effectuated. Had he fled upon Markonni's approach or upon his display of credentials, i.e., before the agent had the opportunity to complete the stop, his flight would properly be considered in weighing the sufficiency of the articulable facts on which Markonni acted. At page 440, citing U.S. v. Pope, supra

The court further discussed the principles of Terry, supra, Pope, supra, and McCaleb, supra, and responded to the prosecution arguments in the following manner:

> The government makes much of the skill, training experience, and record of agent Markonni and urges that in the light of these considerations the facts articulated in justification of the intrusion here at issue are to be imbued with a particular, added significance...[The] court is not persuaded that those accomplishments and qualities of agent Markonni, even taking the government's characterization of them at face value, are sufficient to elevate the impulse which led to make the stop here in issue from a mere, albeit educated hunch to the level of a prudent, reflective, ratiocination.

In Brown v. Illinois, 422 U.S. 592, 45 L.Ed 2d 416 95 S.Ct. 2254 (1975), the United States Supreme Court rejected a voluntary confession obtained after an illegal arrest because of the taint. The Brown case would seem to control sub judice. A factor in Brown, the "temporal proximity of the arrest and the confession" in this case, the search, yields to the sole conclusion that Officer Pearson intended a complete search of both Jacobson's tote bag and physical person. The closeness of time and space between the illegal stop and subsequent arrest of Baker, viewed by Jacobson shortly after the stop, led to withholding of consent by Jacobson characterized by his flight from the terminal. These factors bear heavily on the tainted narcotics subsequently found. Brown, supra, also considered the purposefulness and flagrancy of the official conduct. Here, Jacobson was seized without articulable suspicion or probable cause for the purpose of finding some evidence of a crime and searched without consent.

The surprise, fright, and confusion of Jacobson, intended by the officers to yield a search following an illegal stop, were examined by the court under a totality of the circumstances. The flight caused by fright and confusion is clearly foreseeable under these circumstances and not an intervening event of significance which would amount to attenuation, making admissible contraband otherwise illegally seized pursuant to Wong-Sun, and Dunaway, supra. It is important to note that all the cases dealing with the seizure of contraband or other evidence by means sufficiently distinguishable to be purged of the primary taint of an illegal arrest or search, note the fundamental purpose of depriving the government of any benefit from their illegal actions. In this case, the main and perhaps singular purpose of the presence of Officers Pearson and Johnson at the airport was the interdiction of narcotics. It cannot be seriously contended that the search of defendant, illegally stopped, told he could refuse to talk to the officers, searched reluctantly after police prodding, "No, go ahead and search my fucking bag." (T.54), and finally watching his companion handcuffed which led to, "the look of shear fright...on his face." (T.56), was anything but the direct, proximate and natural result of the causal chain of events.

C. Policy Involved

We are asking the Supreme Court of Florida to consider the extent of government intrusion into the personal liberty of Alan Jacobson. The United States Supreme Court is vigilant in its care of the Fourth Amendment:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to 'safeguard the privacy and security of individuals against arbitrary invasions...' (citations omitted). Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual Fourth Amendment interest against the promition of legitimate governmental interest. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement by an 'objective standard', whether this be probable cause or a less stringent test. Delaware v. Prouse, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 1396, 59 L.Ed. 2d 660 (1979).

Nothing strikes one as more abhorrant than to be accosted by police officers in a public concourse, physically moved with "consent" and then pressured for an affirmative nod, signalling that strangers may browse curiously through personal possessions with the resolution of a bloodhound. Webster, New Twentieth Century Dictionary of the English Language, (unabridged), page 1980 (Second Edition, 1966) defines Tyranny as "very cruel and unjust use of power or authority...harshness; rigor; severity."

The author is concerned that these airport search cases have reached proportions lethal to the serach and seizure protections of the Constitution of this State and the Nation. As the district courts judicially chip away at the Fourth Amendment when "airport narcotic

interdiction" is involved, the boundary between freedom and slavery becomes fuzzier and less acute. This must not happen. This Honorable Court of last resort, must end these invasions into privacy. This case presents an excellent opportunity to do just that.

CONCLUSION

The majority of the Third District Court of Appeals has agreed that the defendants were initially stopped illegally. The evidence of contraband found on the defendant was the result of an arrest and search without probable cause or articulable facts establishing a founded suspicion to justify an investigatory stop. In any event, the defendant's flight was merely his withdrawal of consent to a body search, which was his right. The actions set in motion by the illegal stop led to the eventual seizure of contraband and there was no break in the causal chain of events sufficient to purge the primary taint of illegality. There was no consent to search and the action of the police officers was illegal. Based on the foregoing reasons and citations of authority it is respectfully submitted that this Honorable Court should reverse the decision of the Third District Court of Appeal denying the Motion to Suppress and reinstate the Circuit Court's order granting said Motion.

Respectfully submitted,

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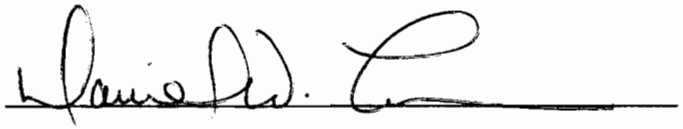

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the original and seven (7) copies of the foregoing Appellant's Brief with Appendix was mailed this 27th day of January, 1982 to Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301 and true and correct copies mailed to THEDA R. JAMES, Assistant State Attorney, 1351 N.W. 12th Street, 6th Floor, Miami, Florida, 33125; and HONORABLE JIM SMITH, Attorney General of Florida, 401 N.W. 2nd Avenue, Room 820, Miami, Florida 33128.

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