O/a 5-10-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,711

FILED
SID J. WHITE
APR 18 1984
CLERK, SUPREME COURT.
By _____ Chief Deputy Clerk

NATHANIEL DEAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON ~~JURISIDICTION~~ The Merits

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INTRODUCTION

Petitioner, Nathaniel Dean, was Appellant in the court below and defendant in the trial court. Respondent, State of Florida, was the Appellee below and prosecuted Nathaniel Dean in the trial court. The following symbols will be used in Respondents brief:

"RA"- will refer to the record on appeal;

"TR" - will refer to the transcript of the trial proceedings; and

"A" - will refer to Petitioner's appendix.

ISSUES PRESENTED FOR REVIEW

I

WHETHER THE DISTRICT COURT OF APPEAL ERRONEOUSLY FOUND THAT PETITIONER LACKED STANDING TO SUPPRESS DOCUMENTS ILLEGALLY SEIZED BY THE STATE.

II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR SEVERANCE.

III

WHETHER THE DISTRICT COURT OF APPEAL MISTAKENLY APPLIED THE HARMLESS ERROR RULE TO A VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.250.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Facts with the following additions or clarifications.

On January 8, 1979, the trial court entertained Petitioner's motion to suppress the seizure of records of Edison Little River Self-Help Community Council, Inc. During the course of that proceeding, the State asserted that Petitioner had no standing to challenge the seizure of said records. Specifically, Respondent argued to the court:

> MR. ADORNO: Nathaniel Dean is president of that corporation, not present.
>
> The case law is quite clear that the state or federal government may subpoena records of a corporation. The corporation might have standing to come in and object to the introduction of those documents, but the president or any other officers would not have such standing to do that.
>
> The items seized pursuant to that subpoena, which is Exhibit 1-A for identification, I assume, for the purposes of this hearing...are documents of Edison Little River and all of the Exhibits the State will seek to introduce in this case as it applies to the defendants Nathaniel Dean and Nimrod Harmon will be documents from Edison Little River Self-Help, Inc., pursuant to the documentcy (sic) of that subpoena.

> Until such time the defendant has a (sic) standing, he really has no grounds to suppress any of the documents the State is seeking to introduce.
>
> I will cite Britt, which is a Supreme Court case, 1975.
>
> (A-PT31-32).

In response to Respondent's argument, Petitioner's counsel argued that the subpoena duces tecum was facially deficient and that the materials obtained via the subpoena was not obtained by the State Attorney's Office but rather by a third party. Again, the State contended that prior to reaching any substantive issues, the court was required to consider whether Petitioner had standing to make such a challenge. Specifically, Respondent argued:

> MR. ADORNO: My argument now is that he doesn't even have standing to bring that witness. Assume, which is not the case, but assume that the police went with that subpoena and gave it to a janitor. So what. They are not his records, the defendant's records. They are the records of Edison Little River Corporation, Inc. He has no standing. He has no possessory interests. We are not trying to introduce his personal checks. We are trying to introduce documents of Edison Little River. The most abuse that could be imagined, knocking the door down, he still has no standing. He only has a Fourth Amendment right from unlawful search and seizure or Fifth Amendment right that they might

incriminate from the documents that are his. There is no evidence he is Edison Little River Self-Help Corporation. He is only an officer. Until he can establish he has an interest in documents, statements, which he can't because they are not his, he has no standing.

MR. HUTCHINSON: I would submit by being a chief officer he has possessory interest in anything and everything in that corporation. He can utilize it. He can possess it. He can possess of it. He clearly does have a possessory interest. He can authorize persons to have possessory interest, and if he has the authority for someone else to have possessory interest, then he certainly does have possessory interest. The custodian of records, the janitor, the financial officer, the accountants, he has the authority to hire and fire them and he thereby is authorizing that particular person to have them on their particular desk or in their particular file cabinet.

THE COURT: The law does not appear to agree with your position, Mr. Hutchinson. The Britt case, the court ruled contrary to your position, although it did admit there are some circumstances when a corporate officer may have standing, but it has not been shown to the court that this defendant falls within that.

(A-PT35-36).

In Dean v. State, 430 So.2d 491 (Fla. 3d DCA 1983), the court, in its majority opinion, affirmed the trial court's conclusion that Petitioner was without standing to challenge

the propriety of the subpoena duces tecum in a motion to suppress. The court further concluded that the pretrial motion to suppress was patently defective on its face and therefore was subject to the summary denial and that the issue was not preserved for appellate review in that coupled with the inadequate pretrial motion to suppress, Petitioner's trial counsel failed to object to the admission of evidence during the course of the trial. 430 So.2d at 493.

ARGUMENT

I

THE DISTRICT COURT OF APPEAL DID NOT ERR IN CONCLUDING THAT PETITIONER LACKED STANDING TO SUPPRESS DOCUMENTS SEIZED BY THE STATE'S SUBPOENA DUCAS TECUM.

The Third District Court of Appeal in Dean v. State, 430 So.2d 491 (Fla. 3d DCA 1983) concluded that Petitioner was not entitled to relief on this claim based on three procedural grounds. The court concluded that Petitioner motion to suppress was defective on its face and therefore subject to summary denial. Specifically, the court found that the motion to suppress failed to state with any particularity the legal grounds upon which the motion was based as required pursuant to Florida Rule of Criminal Procedure 3.190(h)(1)(2). The court found:

> The motion merely alleges in conclusory terms that 'the form and manner of (s)ervice of said subpoena were contrary to law, therefore the aforesaid seizure was illegal' (R.99), a ground or reason so general and vague as to constitute no ground or reason at all, even when combined with the motions bare boned factual recital. As such, the trial court was authorized under Florida Rule of Criminal Procedure 3.190(h)(3) to deny summarily the motion to suppress. Herring v. State, 394 So.2d 433 (Fla. 3d DCA

1980); State v.Butterfield, 285 So.2d 626 (Fla. 4th 1973).

430 So.2d at 493.

Moreover, the Third District Court of Appeal after reviewing the record found that this issue had not been properly preserved for appellate review. The court observed:

> As previously stated, a vague, conclusory and totally inadequate pretrial motion to suppress was filed below; this was followed, in turn, by a series of short, vague and sporadic defense objections at trial to some of the items of evidence when offered below by the state--objections which mirrored the patently defective nature of the motion to suppress. At no time did the defendant argue with any specificity or case authority, as he does now, that his rights were violated below because the subject subpoena was unconstitutionally overbroad and was used as a ruse to conduct a general exploratory search for evidence. Based on a long and well settled line of authority, we are precluded by law from considering the search and seizure contentions raised herein as they were never clearly presented to the trial court and, in essence, are urged here for the first time on appeal. (cites omitted).

437 So.2d at 493.

Respondent would submit that because the Third District Court of Appeal concluded that the two aforementioned

procedural grounds existed sub judice, this court must resolve those findings adversely to Respondent before considering the third and terminal finding by the Third District Court of Appeal, that, Petitioner had no standing to object to the fruits of the subject subpoena via a motion to suppress. Clearly, the instant cause is distinguishable from each of the cases cited by Petitioner in that in State v. Tsavaris, 394 So.2d 418 (Fla. 1981); Mancusi v. DeForte, 392 U.S. 364 (1968) and other cases, the issue was squarely before the court and did not suffer from a preservation deficiency.

The Third District, in great detail, discussed the main point argued by Petitioner to this court. Specifically, the court ratified the trial court's conclusion that Petitioner had no standing to move to suppress the evidence herein. The Third District Court of Appeal observed:

> ...When the State challenged the lack of such 'standing' at the hearing below on the motion to suppress, defendant orally argued to the court that his 'standing' herein was based entirely on the fact that he was the chief executive officer of the non-profit corporation against which the subpoena was issued; no other basis for 'standing' was urged below. [R43-45]. Plainly, the trial court was correct in rejecting this showing of 'standing' because a corporate official can never, by virtue of his office alone, derive 'standing' to object to a subpoena which directs, as

> here, the production of corporate books and records. (cites omitted). Moreover, the defendant made this contention below and, in essence, makes no contention now that his 'standing' rests on some other valid legal basis. The trial court, then, had no alternative but to deny the motion to suppress, for lack of 'standing,' and was not required to take testimony on the legal merits of the motion to suppress.
>
> 430 So.2d at 493.

The crux of the argument before this court therefore is whether the trial court's conclusion that Petitioner had no standing, is contrary to this court's decision in the State v. Tsavaris, supra. It is not.

It is beyond dispute that the sole basis Petitioner asserted for supporting his standing argument was that he was a corporate officer of Edison Little River Self-Help Community Council, Inc. The subpoena which was styled "State of Florida v. Nathaniel Dean and Nimrod Harmon, Investigation Witness Subpoena Duces Tecum," commanded with particularity that the custodian of records of Edison Little River was to produce:

> All books and all records of Edison Little River Self-Help Community Council, Inc., a Corporation, from January 1, 1975 through October 31, 1977, including general ledgers, accounts receivable ledgers, check stubs, cancelled

> checks, bank statements, receipts, invoices, all other records and documents, correspondence and memos relating to receipt of money, property and funds from Dade County, Florida, or any agency of the U.S. Government or State of Florida, directly or indirectly, and the disbursements or expenditures of said funds during the aforesaid time.
>
> (A-PT28-29).

In State v. Tsavaris, 394 So.2d at 425, this court opined:

> Although Tsavaris did not have standing to challenge the form or service of process of the subpoenas, he did have standing to object to the subpoenas on the basis that they violated his Fourth Amendment rights. Considering Tsavaris' claim that his rights were violated because the subpoenaed records were the product of a warrantless search and seizure, the District Court found no violation of the Fourth Amendment. Relying upon In Re Horowitz, 42 F.2d 72 (2nd Cir. 1973) cert. denied, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973), which traced the development of the United States Supreme Court's position on the application of the Fourth Amendment to a subpoena duces tecum and which was cited with approval by the United States Supreme Court in Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), the District Court accurately determined that as far as the Fourth Amendment is concerned, the only requirements are that the subpoena must not be unduly burdensome and

> and that the subpoenaed documents must be relevant in purpose....
>
> (Emphasis added).

The court in discussing the distinction between searches and seizures and subpoenas insofar as the Fourth Amendment's application, concluded that the Fourth Amendment protects against seizures without warrant or probable cause and against subpoenas which suffer from too much indefiniteness or breadth in the things required to be particularly described. 394 So.2d at 426. Sub judice the issue of whether Petitioner had standing to challenge the form or service the process of the subpoenas is clearly decided adversely to him. State v. Tsavaris, 394 So.2d at 425. The issue boils down to whether the Petitioner has a Fourth Amendment interest in the information gathered pursuant to subpoena duces tecum issued to the custodian of the Edison Little River Corporation. State v. Tsavaris cannot answer the question herein because the facts therein and the legal positions taken therein are different from the facts and legal positions present sub judice.

In State v. Tsavaris, the Defendant's office records were obtained when the State Attorney's Office issued a subpoena duces tecum on Tsavaris' full time secretary.

> ...Each subpoena was addressed to 'Custodian of Records, 4600 Havana Suite 28, Tampa, Fla. (Office of

> Dr. Luis Tsavaris).' Each commanded the 'Custodian of Records' to appear before the State Attorney instanter. One subpoena directed that she bring with her all medical records relating to Cassandra Burton aka Sally Burton, aka Sandra Burton. The other subpoena directed the custodian to bring with her the personal appointment book of Dr. Tsavaris for the month of April, 1975.
>
> Jean Jones thereupon went with two detectives to the office of the State Attorney and there turned over to the State Attorney four sets of records from Dr. Tsavaris' office. Personnel at the State Attorney's Office made copies of those records and returned the original to Jean Jones....
>
> With the exception of Sally Burton's medical records, Jean Jones maintained all of these records for Dr. Tsavaris in her capacity as his secretary. Both the appointment and the telephone ledger were kept at her desk. After a group session, either Jean Jones or Chris Carlton made a record of attendance and put the sign-in sheets in a file for that particular group. (cite omitted).
>
> 394 So.2d at 424.

The Supreme Court observed that Tsavaris had argued to the district court that the state attorney had obtained the subpoenaed office records in violation of his rights to be free from unreasonable searches and seizures. Tsavaris also contended that the record should have been suppressed because the subpoenas were defective and improperly served.

Tsavaris further argued that his Fifth Amendment rights were violated by the production of these records, (this argument was not presented to the Florida Supreme Court), and Tsavaris challenged the district court's holding as to whether he had standing to complain and whether his Fourth Amendment rights had been violated. State v. Tsavaris, 394 So.2d at 424, 425.

In the instant case, Petitioner maintained to the trial court, the district court and for that matter, to this court, that he had standing to challenge the propriety of the use of the subpoena duces tecum and the use of the information obtained therefrom because he was a corporate officer. As observed by the Third District, he argued general and, rather vague grounds upon which he sought relief in his motion to suppress and failed to argue during the course of the trial adequate grounds to support the "sporadic objections" made during the course of the trial to the admission of said evidence. The subpoena duces tecum which issued sub judice was directed to the custodian of a corporate entity, the Custodian of Records of the Edison Little River Self-Help Community Counsel, Inc. (A-PT28-29). Petitioner's legal argument throughout was:

> In reference to the issues that the Defendant lacked standing, I would like to place in the record another case in reference to that, the general announced by the United

States Supreme Court with respect to standing. The court has outlined three standards, and it says that:

'The defendant must be lawfully present on the premises at the time the search was made or have a possessory proprietary interest in the search to the premises or be charged with an offense which include as an essential element of the offense possession of the evidence or contraband.'

That is Brown v. United States, which is cited at 411 U.S. 223, which is a 1973.

We would contend that under provisions, about the second provision that I stated, that Mr. Dean as Chairman of the Board of the corporation in question did have a reasonable expectation that there would be no governmental intrusion. I think those blended together. 1, he would get standing because of the tasks that's outlined in the Mancusi case that you don't necessarily--your right does not depend upon the property right but, according to the language itself, "whether the area was one in which there was a reasonable expectation of freedom from government intrusion."

Here is a gentleman who is gentleman who is Chairman of the Board of a particular non-profit corporation. That in and of itself we put in the record would give him standing as the court recognized the standing of an employee who merely worked at a corporation, at a office."

(A-PT. 40-41).

(Emphasis added).

The Third District Court was not incorrect in concluding that petitioner had no standing. The reason being petitioner was not a "person agrieved" as a result of the sub poena duces tectum." For example in State v. Barreiro, 432 So.2d 138 (Fla. 3d DCA 1983), cert. den. 441 So.2d 631 (1983) the Third District Court quashed an order granting a Motion to Suppress based on the following facts:

> On January 26, 1983, two days after the State had filed an information charging Barreiro with the crime of manslaughter, unlawful termination of pregnancy, practicing medicine without a license, and tampering with a witness, the clerk of the circuit court, at the State's request, issued a subpoena duce tectum to be served upon the custodian of records of Women's Care Center, Inc., a Florida corporation. The subpoena called for the corporation to produce in the Office of the State Attorney all records of medical examinations and abortions occuring between certain specified dates in 1982. Barreiro, alleging that he is the president and director of the subpoenaed corporation and that the shareholder of such corporation are he and his immediate family, moved to quash the subpoena on the ground that its issuance after the filing of an information is in disregard of the discovery provisions of the Florida Rules of Criminal Procedure and thus contrary to this court's decision in Able Builders Sanitation Company v. State, 368 So.2d 130 (Fla. 3d DCA, dismissed, 373 So.2d 461 (Fla. 1979). . . "
>
> 432 So.2d at 139.

In distinguishing the Able case from Barreiro's, the Third District Court held:

> "It is by now obvious that neither the body nor spirit of Able can be relied on to justify quashing the State's subpoena to a non-defendant to produce its records. Able preclude the State from circumventing the discovery rules by subpoenaing records in the defendant's possession and control which the defendant is under no obligation to produce unless he invokes his own right to discover like items. But the records of the Women's Care Center, Inc. are simply not records in the possession and control of the defendant. (cites omitted). The record sought are instead in the possession and control of the corperate custodian, who, even if the defendant, is unprotected by any discovery rule although Barreiro claims that because of his ownership and control position in the corporation, a subpoena on the corporation is in effect an subpoena on him. It is well settled that when a man chooses to avail himself of the privilege of doing business as a corporation, even where he is its sole shareholder, he forfeits his right to claim that he is the alter ego of the corporation. (cites omitted)."
>
> 432 So.2d at 140.
>
> (Emphasis added).

In maintaining that his status as a corporate officer vested standing to challenge the materials obtained by the subpoena duces tecum, petitioner eliminated himself as a

"person aggrieved" for any Fourth Amendment attack. See United States v. Britt, 508 F.2d 1052 (5th Cir. 1975); United States v. Bush, 582 F.2d 1016 (5th Cir. 1978); United States v. Vicknair, 610 F.2d 372 (5th Cir. 1980) and Hair Industry, Ltd. v. United States, 340 F.2d 510 (2d Cir. 1965).

For example in United States v. Britt, F.B.I. agents had obtained a warrant to search for all business records of the Fitts Cotton Goods, Co. and named the officers of the company to suites of offices at 3379 Peachtree Road, Atlanta as the place to be searched. The F.B.I. agent served the warrants at said address and met Mr. Brewer, comptroller of Fitts Cotton Goods. The agents after searching the premises then proceeded to a second address 1819 Peachtree which was not contained in the search warrant. Mr. Britt moved to suppress all records discovered at 1819 Peachtree claiming that the search there was not consentual and not part of the warrant. The trial court agreed and suppressed. The court observed:

> ". . .First, appellant moved to suppress on Fourth Amendment grounds. The court granted this motion but suggested that the subpoenaing of the same evidence might be possible. Then the government subpoenaed both the invoices and numbered distributor list. Appellant moved to quash. This motion was denied. . .The evidence was admitted at trial over objection only

after the court was convinced of the bona fides of the governments asserted independent basis for subpoenaing of the invoices and distributor's list. . ."

508 F.2d at 1054.

The court in Britt went on to observe:

". . .we are concerned only with the ultimate question of whether the court erred when, at trial, it admitted evidence over appellant's objections."

508 F.2d at 1055.

The court after discussing the pro's and con's of admitting said evidence concluded:

"We nevertheless hold that the evidence was properly admitted because we are of the opinion that Mr. Britt did not have standing to challenge the validity of the search and seizure at 1819 Peachtree Road."

508 F.2d at 1055.

In reaching this conclusion, the court held:

"Only a 'person aggrieved' by an unlawful search and seizure may move for the return of the seized property and insist that it be suppressed. (cite omitted). We have held that under certain circumstances a corporation officer or employee can be a person aggrieved by a search of corporate premises

and a seizure of corporate property. Henzel v. United States, 296 F.2d. 650 (5th Cir. 1961). The facts of this case, however, are much different from those of Henzel. . .

Here, although Britt was president of Fitts, he was not its sole stockholder, the document seized were normal corporate records not prepared personally by him, and the area searched at 1819 Peachtree Road was described as a 'storage area.' Furthermore, there is no evidence that Britt spend any of his time working in the storage area--or in any other space at 1819 Peachtree for that matter--or that any of the materials seized there was taken from his personal desk or briefcase or files. . .Furthermore, there is nothing in the record which would indicate that the searches either at 3379 or 1819, were directed at him rather than at corporate activity generally. Under such circumstances, we conclude that we should apply the normal rule which is that,

When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment: documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity. Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946), cert. den. 331 U.S. 858, 67 S.Ct. 1750, 91 L.Ed.1865 (1947). This rule, of course, has been tempered by the holding of the Supreme Court in

> Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), as we explained in Henzel, supra. But it remains applicable in situations similar to the one which we here face in which a corporate officer seeks to suppress illegally-seized corporate records and claims standing essentially simply because he is a corporate officer. Neither Henzel nor Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968) are contra. In both of these cases there was a demonstrated nexus between the area searched and the work space of the defendant. The nexus is absent here."
>
> 508 F.2d at 1055-1056.
>
> (Emphasis added).

The circumstances sub judice are identical to those found in United States v. Britt, supra. Clearly petitioner, in asserting that his standing evolved from his position as a corporate officer, removed himself as a "person aggrieved". Thus the trial court properly concluded no standing existed.

In United States v. Bush, supra, a similar result obtained. The court concluded that:

> "The interest of a stockholder and corporate officer in the property of the corporation is not sufficient to provide that stockholding in his individual capacity, withstanding. United States v. Britt, 508 F.2d 1052 (5th Cir. 1975). Although it is clear that the defendant's standing is not controlled by property interest, (cite omitted)

> defendant Sanders has failed to establish any interest in the films. Nor was he charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. (cites omitted). There is nothing in the record even remotely suggesting that the search was directed at Sanders, as distinguished from corporate activity generally; therefore, it cannot be said that Sanders was the victim of the search. (cites omitted). Finally, despite Sanders protestations to the contrary, his mere status as a corporate officer is insufficient to establish standing."
>
> 582 F.2d at 1018-1019.

Similarly, in United States v. Vicknair, the court observed:

> "To justify exclusion the of evidence seized in December each defendant must establish that he had a reasonable expectation of privacy in a boat and the house in November before we can conclude that there was an unconstitutional invasion of their privacy and extend that to infect the December events. . ."
>
> 610 F.2d at 379.

The court following a detailed discussion of the rights of individuals to assert an expectation of privacy concluded:

> "We decline to hold that these individuals who had no direct authority from the corporate owner to use its property and no reasonable expectation of real privacy from other individuals have some how shown those efforts to maintain privacy and the protected use of the area necessary to give them an expection reasonable in a constitutional sense. We, therefore, conclude that none of the defendants was personally aggrieved by the illegal search of the "Sky Top II". (cites omitted)."
>
> 610 F.2d at 381.

Petitioner was not a person aggrieved. Moreover he has not shown any connection between the corporate records seized and his own personal interest. As such he had no standing in his motion to suppress to challenge the Fourth Amendment proprieties of the State's subpoena duces tecum.

Petitioner in support of his position seeks comfort in the Supreme Court's decision in State v. Tsarvaris, supra and Mancusi v. DeForte, supra. As previously argued this court's decision in State v. Tsavaris is distinguishable both factually and legally. With regard to Mancusi v. DeForte, supra Respondent would submit that the decision in United States v. Britt, succinctly distinguishes that circumstance from the facts in this case and in Britt. Moreover a review of the Mancusi case reflects that United States Supreme Court relied heavily on its earlier decision in Jones v. United States, 362 U.S. 257 (1960). The

continuing vitality of Mancusi v. DeForte, is suspect in light of the court's reliance on Jones, supra and later decisions by the United States Supreme Court overruling Jones, in United States v. Salvucci, 448 U.S. 82 (1980) and Rawlings v. Kentucky, 448 U.S. 98 (1980). It is also interesting to note that petitioner has made no claim that his Fifth Amendment rights have been violated (which was part of the attack in State v. Tsavaris, supra).

Terminally, respondent would argue that whether the subpoena duces tecum was overbroad and/or relevant pursuant to Imparato v. Spicola, 238 So.2d 503 (Fla. 2d DCA 1970) is not at issue sub judice. The Third District Court's opinion and the trial court's ruling as to standing solely addressed the issue of standing and did not review the validity of the subpoena duces tecum. As such to venture into an area which has not been addressed by either the trial court or the Third District Court of Appeal, requires this court to make an assessment of the propriety of the sub poena duces tecum in a vacuum. Since neither the Third District Court nor the trial court entertained whether the scope of the subpoena duces tecum complied with Fisher v. United States, 425 U.S. 391 (1976) this court should remand the cause to the trial court for such a finding upon a determination that petitioner had standing originally. Absent a finding that petitioner had standing to challenge the motion to suppress,

whether the subpoena was unreasonable and oppressive and in violation of the Fourth Amendment United States Constitution is not an issue at bar.

Based on the foregoing respondent would urge this court to either deny petitioner relief as to his first point on appeal or conclude that the jurisdiction of this court has been improvidently granted in light of a total lack of direct and express conflict.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PETITIONER'S MOTION FOR SEVERANCE.

Petitioner asserts that the trial court abused its discretion in failing to grant a severance pursuant to Fla.R.Crim.P. 3.152. Specifically, he argues that a Motion for Severance was necessary because 1) his co-defendant sought to place the blame for the alleged crime on petitioner; 2) the co-defendant testified in his own defense and defendant did not testify; and 3) petitioner had no opportunity to rebut the co-defendant's final argument.

The Third District Court in Dean v. State, 437 So.2d at 492 observed that the evidence of guilt against Dean was so overwhelming that the otherwise proper joinder with the co-defendant Harmon pursuant to the rule had no real impact as to the outcome of the case and therefore a severance of the defendants was not required pursuant to Fla.R.Crim.P. 3.152 (b). The court acknowledged that:

> ". . .the co-defendant's counsel did assert the defendant Dean's guilt in the co-defendant's opening statement and closing argument to the jury, but this added little or nothing to the already powerful case against the defendant Dean, a case so strong that no real defense was ever marshalled below against.

> As such, we are unwilling to upset these convictions based on the subject severance issue. Menendez v. State, 368 So.2d 1278 (Fla. 1979). . . ."

Citing to this court's decision in Crum v. State, 398 So.2d 810 (Fla. 1981) and the Fourth District Court's opinion in Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974), Petitioner argues that the circumstances sub judice when compared with Crum and Thomas demonstrate an abuse of discretion by the trial court that cannot be tolerated. Respondent would disagree.

For example in Crum v. State, supra, this court speaking through Justice Alderman distinguished that case from the Menendez case relied on by the Third District Court of Appeals. Recognizing that the granting or denial of a motion for severance is normally within the discretion of the trial court, Justice Alderman concluded in Crum, supra that by denying the motion, "the trial court forced Preston to stand trial before two accusers: the State and his co-defendant. This case, then, is unlike Menendez v. State, because Marvin not only accused Preston of the murder, but also, during the trial, introduced evidence to prove his accusations." 398 So.2d at 811-812. Justice Alderman further observed:

> In Menendez, counsel for Menendez' co-defendant, in his opening statement, announced that he would prove that Menendez, not the co-defendant, committed the crime for which they were charged. Menendez' counsel promptly moved for a mistrial and the severance. Both motions were denied; however, the jury was expressly instructed to base its verdict solely on the evidence and to disregard this statement. The co-defendant offered no evidence to support his accusations against Menendez but in closing argument stated that the evidence against Menendez was overwhelming and that 'the opposite is true as to the co-defendant." 368 So.2d at 1280. Menendez was found guilty, and the co-defendant was acquitted. We review the record in that case to determine if these two statements so prejudiced Menendez that the jury might have decided differently had they not been made. We found that this was "not a case in which the conviction was based solely on circumstantial evidence or inconclusive evidence, or where there (was) any possibility of misidentification between two perpetrators," 368 So.2d at 1281, and we concluded that the trial court's denial of the severance motion was not an abuse of discretion."
>
> 398 So.2d at 812.

Similarly in the instant cause the facts and circumstances more closely resemble the decision rendered in Menendez v. State, 368 So.2d 1278 (Fla. 1979) then those facts as set forth by Justice Alderman in Crum v. State, supra.

In McCrae v. State, 416 So.2d 804 (Fla. 1982) this court again had an occasion to revisit its decision in Menendez v. State, supra and Crum v. State, supra. The court observed:

> ". . .the object of the rule is not to provide the defendant's with an absolute right, upon request, to separate trial's when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocense. This fair determination may be achieved when all the relevant evidence regarding the criminal offenses presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusing to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or if properly influenced by evidence which applies to only one of several defendant's..."
>
> 416 So.2d at 806.

In further reviewing this area the court summarized the general rules which have been established concerning whether a severance should be granted. Specifically the court found that the fact that a given defendant might have a better chance of acquittal or a strategy advantage if tried separately would not establish the right to a severance. Moreover, hostility among defendants', or an attempt by one

defendant to escape punishment by throwing the blame on a co-defendant was insufficient as a basis to require severance. Even where the defendants' engage in a swearing match as to who did what, it was concluded that the jury should resolve the conflicts and determine the true of the matter. Petitioner sub judice fails into these categories.

In McCrae, supra, the court observed:

> ". . .the problem in Crum was not simply that a co-defendant had antagonistic defenses. The problem was that one co-defendant induced the other two believe that their defenses would be completely consistent and then, after jeopardy attached, decided to change his story, thereby prejudicing the proper preparation of the case for trial. The circumstances could would have been different had their been no prior statement or had their been sufficient notice before trial of the change in Marvin's position.
>
> We reiterate that hostility among defendants or the desire of one defendant to exculpate himself by inculpating a co-defendant or insufficient grounds, in and of themselves, to require separate trials. In the instant case, the trial judge correctly denied the motion for severance."
>
> 416 So.2d at 807.

See also, O'Callaghan v. State, 429 So.2d 691 (Fla. 1983).

Based on the foregoing respondent would submit that the trial court did not abuse his discretion sub judice and petitioner is not entitled to relief pursuant to second point on appeal.

III

THE THIRD DISTRICT COURT OF APPEAL DID NOT MISTAKENLY APPLY THE HARMLESS ERROR DOCTRINE TO AN ALLEGED VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.250.

Petitioner lastly argues that the trial court as well as the Third District Court erred in not permitting petitioner's counsel final closing argument after the prosecutor stood up in open court and stated "I think I can save the court some time. The evidence speaks for itself. We rest."

In Menard v. State, 427 So.2d 399 (Fla. 4th DCA 1983), cert. den. 434 So.2d 888 (1983), the Fourth District in a similarily circumstanced case resolved the claim exactly as did the Third District Court. In Menard the court amused:

> "Every now and again, in the tragic world of criminal appeals, comes a case that brings involuntary smile to otherwise grim lips. This is one of those, though it cannot be expected to afford any amusement to the defendant."
>
> At the end of the initial final argument presented by the defense, the State's entire response was:
>
> "The State of Florida is going to rely on the evidence and testimony before the court and juror's common sense, and we will waive our argument.

> The defense, discomforted by this tactic, pressed for the right to conclude on the basis that the comment relying on the evidence and common sense" did not constitute a waiver and actually was final argument. (Cite omitted). We disagree. The remark did address the evidence in particular nor any other testimony. Nor did they dwell unnecessarily on the level of intelligent consideration to be extended by the jury. Moreover, unlike the discourse in Andrews, supra, the comments were but a very few words and in our opinion did not rise to the level of final argument."
>
> 427 So.2d at 400.

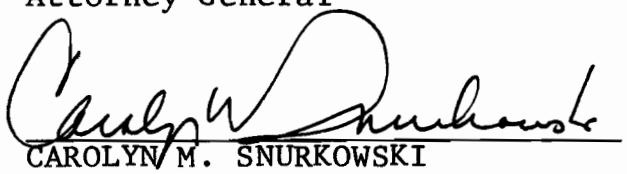
Similarly the prosecution's waiver of final argument providedd no reason for defense counsel's further argument to the jury. There was no error in the instant case.

CONCLUSION

Based on the foregoing arguments and authorities presented, respondent would urge this court to either affirm the Third District's decision in Dean v. State, supra, or dismiss the petition finding that discretionary review has been improvidently granted.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to MICHAEL A. ROSEN, Esq., Special Assistant Public Defender, Suite 306, 1401 Brickell Avenue, Miami, Florida 33131, on this 16th day of April, 1984.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

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