IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,082

THE STATE OF FLORIDA,

Petitioner,

vs.

JENNY JONES,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON MERITS

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INTRODUCTION

The respondent, Jenny Jones, was the appellant in the District Court of Florida, Third District, and the defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. The petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, respondent will be referred to as defendant and petitioner as the State.

The symbol "R" will be utilized to designate the record on appeal and the symbol "Tr" the transcript of trial proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

An information charging defendant with second-degree grand theft was filed on January 18, 1982 (R. 1-1A). Defendant was arraigned on January 19, 1982, and stood mute; the trial court directed the entry of a not guilty plea (R. 2).

Trial commenced on June 29, 1982 (R. 6). The jury returned a guilty verdict on June 30, 1982, and the trial court entered judgment on that date and imposed a three-year sentence of imprisonment (R. 11-13, 21, 22-25). Notice of appeal was filed on July 30, 1982 (R. 29).

The District Court of Appeal issued its decision reversing the judgment and ordering a new trial on July 5, 1983, and denied a motion for rehearing on August 3, 1983. Jones v. State, 434 So.2d 337 (Fla. 3d DCA 1983). The court certified that its decision conflicted with the decision in Williams v. State, 347 So.2d 472 (Fla. 1st DCA 1977), cert. discharged, 376 So.2d 846 (Fla. 1979).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE INTRODUCTION INTO EVIDENCE OF DEFENDANT'S SILENCE AT THE TIME OF HER APPREHENSION BY A RETAIL STORE DETECTIVE PURSUANT TO SECTION 812.015(3)(a), FLORIDA STATUTES (1981), IS REVERSIBLE ERROR.

STATEMENT OF THE FACTS

The only witness presented by the State was Terry White, a store detective employed by Jefferson Stores, who testified that defendant and another woman (the co-defendant, Wilmazetta

Witherspoon), had entered the store, located at 1500 Biscayne Boulevard, proceeded to the ladies wear department, and placed numerous items of clothing into two paper bags (Tr. 126-32; see R. 1, Tr. 3-20). Mr. White, who had been observing these events from an observation tower on the ceiling (Tr. 127), testified that defendant and Witherspoon had then walked toward the door, and that he and other store personnel had apprehended them as they were attempting to leave the store (Tr. 133).

The prosecutor questioned Mr. White as follows concerning the apprehension:

> Q. They were physically just inside the store?
> A. Yes.
> Q. What happened then?
> A. Well, myself and a Mr. Roland Bullard followed them out of the door and I identified myself and asked them -- I identified myself and explained to them why they had been stopped and asked them to return to the security office with me.
> Q. Did they offer any explanation for their conduct?
> A. No, none. (Tr. 133-34).

Counsel for defendant then moved for a mistrial, on the ground that the witness had testified to defendant's silence at the time of her apprehension (Tr. 134). The court denied the motion, finding as follows:

> The issue is post arrest or prior [to] arrest. I think it is prior to arrest. I will deny your motion on that ground. (Tr. 134).

The District Court of Appeal held that the trial court had erred in denying the motion for mistrial:

> . . . The defendant Jenny Jones contends that the trial court committed reversible error in denying her contemporaneous motion for a mistrial when the state elicited from a

> witness in the jury's presence that the defendant Jones remained silent after she was apprehended by a retail store detective for shoplifting pursuant to Section 812.015(3)(a), Florida Statutes (1981) and accused of shoplifting by the said detective. We entirely agree, and, therefore, reverse and remand for a new trial, based on the authorities and reasoning contained in Judge Rawls' dissent in Williams v. State, 347 So.2d 472, 473-74 (Fla. 1st DCA 1977), cert. discharged, 376 So.2d 846 (Fla. 1979). We also rely on the subsequent authority of Clark v. State, 363 So.2d 331, 334 (Fla. 1978); Lee v. State, 422 So.2d 928, 930-31 (Fla. 3d DCA 1982); and Brownlee v. State, 361 So.2d 724, 725 (Fla. 4th DCA 1978), which fully support Judge Rawls' analysis herein. . . . Jones v. State, 434 So.2d 337 (Fla. 3d DCA 1983).

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE INTRODUCTION INTO EVIDENCE OF DEFENDANT'S SILENCE AT THE TIME OF HER APPREHENSION BY A RETAIL STORE DETECTIVE PURSUANT TO SECTION 812.015(3)(a), FLORIDA STATUTES (1981), IS REVERSIBLE ERROR.

The issue presented in this case is not whether retail store detectives are law enforcement officers when exercising the authority granted by Section 812.015(3)(a), Florida Statutes (1981).[1] The District Court of Appeal did not so hold; the basis

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1 The statute provides in pertinent part:

> A law enforcement officer, a merchant, a merchant's employee, or a farmer who has probable cause to believe that merchandise or farm produce has been unlawfully taken by a person and that he can recover it by taking the person into custody may, for the purpose of attempting to effect such recovery or for prosecution, take the person into custody and detain him in a reasonable manner for a reasonable length of time. §812.015(3)(a), Fla.Stat. (1981).

(Cont.)

of its decision is that defendant's silence "after she was apprehended by a retail store detective" acting pursuant to Seciton 812.015(3)(a) is inadmissible under Florida law. Jones v. State, 434 So.2d 337 (Fla. 3d DCA 1983).

That defendant was "apprehended" is not in dispute, and the record establishes that the store detectives had approached defendant and her companion, identified themselves, "explained to them why they had been stopped and asked them to return to the security office" (Tr. 133-34). The statute authorizes retail store employees to take suspected shoplifters "into custody" and to "detain" such persons, § 812.015(3)(a), Fla.Stat. (1981), and Florida cases which have addressed this statutory authority speak in such terms. See Silvia v. Zayre Corporation, 233 So.2d 856, 858 (Fla. 3d DCA 1970)(addressing merchant's rights and duties with regard to "the person apprehended" under predecessor statute); Rothstein v. Jackson's of Coral Gables, Inc., 133 So.2d 331, 332 (Fla. 3d DCA 1961)(holding that statute establishes right of merchant to take suspected shoplifter "into custody"). Accordingly, no question is raised in this case as to whether a person detained pursuant to Section 812.105(3)(a) is "in

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Retail merchants and their employees have had such authority in this State since 1955, when the first version of this statute was enacted, see Ch. 29668, Laws of Florida (1955), and similar provisions have been previously codified as Section 811.022, Florida Statutes (1955), and Section 901.34, Florida Statutes (1975).

Numerous other states have also enacted similar statutes. See, e.g., Ariz.Rev.Stat. § 13-1805; Cal.Penal Code § 490.5(e); Ill.Rev.Stat. ch. 38, § 16A-5; Mont.Rev. Codes § 46-6-502; Neb.Rev.Stat. § 29-402.01; N.Y.Gen.Bus. Law § 218; Ohio Rev. Code § 2935.041; Okla.Stat. tit. 22, § 1343; 18 Pa.Cons.Stat. § 3929(d); Wash.Rev.Code § 4.24.220; Wis.Stat. § 943.50(3).

custody", or as to whether defendant was in fact "apprehended", as found by the court below.

The State correctly asserts that statutes such as Section 812.105(3)(a) grant merchants limited police authority to assist them in combatting shoplifting. See, e.g., Washington County Kennel Club v. Edge, 216 So.2d 512, 416 (Fla. 1st DCA 1968). To achieve that goal, retail-theft detention statutes accord merchants broader rights than those generally conferred upon the citizenry at large to make private arrests. See, e.g., Jacques v. Sears, Roebuck & Company, 30 N.Y.2d 466, 334 N.Y.S.2d 632, 285 N.E.2d 871, 874-75 (1972).[2] Nonetheless, it is generally held that store detectives or security guards acting pursuant to such statutes are not the functional equivalents of police officers for the purpose of constitutional exclusionary rules under the Fourth and Fifth Amendments. See, e.g., State v. Lombardo, 104 Ariz. 598, 457 P.2d 275 (1969); People v. Horman, 22 N.Y.2d 378, 22 N.Y.S.2d 874, 239 N.E.2d 625 (1968), cert. denied, 393 U.S. 1057 (1968); State v. McDaniel, 73 O.O.2d 189, 44 Ohio App.2d

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A private citizen only has a common-law right to "arrest a person who commits a felony in his presence, or to arrest a person where a felony has been committed, and where the arresting citizen has probable cause to believe, and does believe, the person arrested to be guilty", but has no right to temporarily detain an individual suspected of committing a crime. State v. Chapman, 376 So.2d 262, 264 (Fla. 3d DCA 1979)(citation omitted); accord State v. Schuyler, 390 So.2d 458, 460 (Fla. 3d DCA 1980). Since "[t]he probable cause to support a temporary detention of a suspected shoplifter by a merchant or the merchant's employee is less than the probable cause required to support a later prosecution", Gatto v. Publix Supermarket, Inc., 387 So.2d 377, 379 n.3 (Fla. 3d DCA 1980)(citations omitted), the right to detain conferred by the statute is patently broader than that permitted by the common law.

163, 337 N.E.2d 173 (1975); Stanfield v. State, 666 P.2d 1294 (Okla.Crim.App. 1983); State v. Gonzales, 24 Wash.App. 437, 604 P.2d 168 (1979).

From this principle, and particularly the authority holding that the warning requirements of Miranda v. Arizona, 384 U.S. 436 (1966), do not apply to retail-theft detentions, see, e.g., State v. Lombardo, supra, the State reasons that silence upon apprehension by a store detective acting under Section 812.015(3)(a) is not silence "in the face of police custodial interrogation or similar government accusation", Brief of Petitioner at 6-7, and is therefore admissible in a criminal prosecution. This conclusion does not flow from the admittedly-correct predicate therefor.

Prior to Miranda, Florida law provided that the silence of an accused at the time of arrest could be considered by the jury "in connection with other facts and circumstances as some evidence of guilt." State v. Albano, 89 So.2d 342, 344 (Fla. 1956), Miranda, in addition to holding the Fifth Amendment applicable to police interrogations and prescribing the requisite warnings, held that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege". 384 U.S. at 468 n.37. The Third District held in Jones v. State, 200 So.2d 574, 576 (Fla. 3d DCA 1967), that this proscription barred the introduction into evidence of an accused's silence in the face of accusation, and this Court subsequently adopted that principle in Bennett v. State, 316 So.2d 41, 43-44 (Fla. 1975).

Bennett established the rule that the silence of an accused

in a custodial setting is inadmissible at trial, and that the introduction of such evidence is per se reversible error if properly preserved for review. See also Clark v. State, 363 So.2d 331 (Fla. 1978); Willinsky v. State, 360 So.2d 760 (Fla. 1978). "Indisputably, evidence of post-arrest silence is improper" under this rule, Clark v. State, supra at 333, and the Florida courts have uniformly held that the post-arrest silence of an accused who has been warned as required by Miranda is inadmissible, either as substantive evidence or to impeach the accused at trial. See, e.g., Ford v. State, 431 So.2d 349 (Fla. 5th DCA 1983); Torrence v. State, 430 So.2d 489 (Fla. 1st DCA 1983); Turner v. State, 414 So.2d 1161 (Fla. 3d DCA 1982); Burwick v. State, 408 So.2d 722 (Fla. 1st DCA 1982); Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981); Marshall v. State, 393 So.2d 584 (Fla. 1st DCA 1981); Davis v. State, 356 So.2d 1252 (Fla. 4th DCA 1978); Smith v. State, 342 So.2d 990 (Fla. 3d DCA 1977); Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976).

But reading the Miranda warnings or, for that matter, the existence of a constitutional requirement that the warnings be given in the first instance, is not and never has been the predicate for applying the rule announced in Bennett. Indeed, the decision in Jones v. State, supra, did not involve a Miranda situation, and the court specifically held that "testimony that the accused, while in custody, remained silent in the face of an accusation of guilt of the crime for which he was arrested and charged" is inadmissible. 200 So.2d at 576. The controlling rule in this state is that "[r]eversible error occurs in a jury

trial when a prosecutor improperly comments upon or elicits an improper comment from a witness concerning the defendant's exercise of his right to remain silent in the face of accusation." Thompson v. State, 386 So.2d 264, 266 (Fla. 3d DCA 1980)(citation omitted).

Thus, the admissibility of an accused's silence does not turn upon whether the silence was preceded by Miranda warnings;

> . . . [W]hile Miranda warnings make it even more offensive to use a person's silence upon arrest against him, the absence of such warnings does not add to nor detract from an individual's Fifth Amendment right to remain silent. If one has a right upon arrest not to speak for fear of self-incrimination, then the mere fact that the police call his attention to that right does not elevate it to any higher level. . . . Webb v. State, 347 So.2d 1054, 1056 (Fla. 4th DCA 1977), cert. denied, 354 So.2d 986 (Fla. 1977).

Accord Lee v. State, 422 So.2d 928, 930 (Fla. 3d DCA 1982), review denied, 431 So.2d 989 (Fla. 1983).[3]

Cases which have applied the Florida rule have accordingly found the introduction into evidence of the accused's silence

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The Supreme Court of the United States has addressed the permissibility of impeaching a testifying defendant with his or her silence, and has limited the applicability of the Fifth Amendment to post-arrest silence impelled by Miranda warnings. See Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 1311-12 (1982). Jenkins v. Anderson, 447 U.S. 231, 239 (1980); Doyle v. Ohio, 426 U.S. 610, 619-20 (1976). While this line of authority is of dubious application to a case such as the present one, where a defendant's silence is affirmatively introduced into evidence during the state's case-in-chief, Lee specifically holds that Florida law, which places "greater restrictions on the use of post-arrest silence than the Doyle-Jenkins-Fletcher trilogy requires", forbids reference to a defendant's post-arrest silence, "whether or not that silence is induced by Miranda warnings." 422 So.2d at 930-31 (citation omitted).

reversible error, regardless of whether the situation required Miranda warnings or whether such warnings were given. See Simpson v. State, 418 So.2d 984, 985 (Fla. 1982)(defendant's "failure to testify before the grand jury" held improperly introduced); Willinsky v. State, 360 So.2d 760, 763 (Fla. 1978)("disclosure of accused's silence at the preliminary hearing is error"); Cooper v. State, 413 So.2d 1244, 1245 (Fla. 1st DCA 1982), review denied, 421 So.2d 518 (Fla. 1982)(cross-examination of accused "on his silence at his previous trial" held reversible error); Brownlee v. State, 361 So.2d 724, 726 (Fla. 4th DCA 1978)(silence of accused "prior to the receipt of his warnings or his arrest" improperly introduced); Flynn v. State, 351 So.2d 377, 379 (Fla. 4th DCA 1977)("questions and comments about a defendant's not having told 'officially' . . . of his entrapment" defense prior to trial held reversible error); Webb v. State, supra at 1055-56 (cross-examination of defendant regarding his silence at the time of arrest improper despite absence of Miranda warnings); Brooks v. State, 347 So.2d 444, 445 (Fla. 3d DCA 1977)(pre-arrest silence held inadmissible); Weiss v. State, 341 So.2d 528, 530 (Fla. 3d DCA 1977)(cross-examination of defendant regarding his failure to "give an account of the events that occurred that evening to anyone other than your counsel" prior to trial held improper).

The preceding authority establishes both the governing principles for disposition of this case and the flaw in the State's position: while retail merchants and their employees are not necessarily law enforcement officers by virtue of Section

812.015(3)(a) and need not advise suspected shoplifters pursuant to Miranda, Florida law on this issue does not require a Miranda-controlled situation to render a defendant's pretrial silence inadmissible. Rather, an accused's silence "in the face of accusation" is inadmissible in this State. Simpson v. State, supra; Willinsky v. State, supra; Lee v. State, supra; Cooper v. State, supra; Brownlee v. State, supra; Webb v. State, supra; Jones v. State, supra. This principle is, as held by the court below, readily applicable to this case.

First, as noted earlier, defendant was "in custody" under Section 812.015(3)(a) at the time that she remained silent; while she was not in the grasp of a "law enforcement officer", she was being detained pursuant to state law. See Williams v. State, 376 So.2d 846, 847-48 (Fla. 1979)(Adkins, J. dissenting from discharge of certiorari). As the court held in Brownlee v. State, supra, the question of whether a custodial situation exists is a practical one:

> . . . A determination of whether an interrogation is custodial or pre-custodial should focus on whether the interrogation imposes any restrictions on the defendant's liberty. The practical question should whether the defendant was free to walk away from the interrogation. . . . 361 So.2d at 726.

Defendant was obviously not "free to walk away" at the time of the detention (Tr. 133-34). Indeed, had she attempted to do so, she would have been in violation of Section 812.015(6), Florida Statutes (1981), which provides that an individual "who resists the reasonable efforts" of a merchant acting under Section 912.015(3) is guilty of a first-degree misdemeanor. That

criminal sanctions may be imposed upon one who resists a retail store employee acting under Section 812.015(3) establishes the actuality of "custody" by operation of state law, albeit not by the functional equivalent of a law enforcement officer. Further, it is beyond question that the custodial situation was accusatory (Tr. 133-34). Silence in such a situation, as is the case where an accused is in the custody of police officers, is simply not of probative value. See United States v. Hale, 422 U.S. 171, 177-80 (1975).

Thus, the legal principles upon which the District Court of Appeal relied, and the application of those principles to the present case, are soundly based. Williams v. State, 347 So.2d 472 (Fla. 1st DCA 1977), cert. discharged, 376 So.2d 846 (Fla. 1979), the decision as to which the court certified a conflict of decisions, and upon which the State relies, rests upon the now-discredited notion that because Miranda is limited to "police custodial interrogation", the prohibition against introducing an accused's silence into evidence is similarly limited, and holds that silence when confronted and detained by a retail store employee is "not silence in the face of police custodial interrogation." Id. at 473.[4]

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The dissenting opinion in Williams, upon which the court below relied, rested upon the grant of authority in Section 812.015(3), then codified as Section 901.34, Florida Statutes (1975), and concluded:

> . . . Here, the "merchant", acting with this grant of sovereign authority, took appellant into his custody and interrogated her; thus, the custodial interrogation was conducted in a

(Cont.)

As the court below held, Williams rests upon a fundamentally-erroneous legal basis, turning as it does upon a finding that "police custodial interrogation" such as will invoke the Miranda rule is an essential predicate for excluding evidence of an accused's silence in the face of accusation. The decisions of this Court and of the district courts of appeal subsequent to Williams have established the parameters of the prohibition against penalizing an accused for exercising his privilege against self-incrimination, and the evidence of defendant's silence at the time of her apprehension in this case is well within the proper scope of that bar. The decision of the District Court of Appeal, properly applying Florida law to the facts of this case, is eminently sound and correct.

> police-like atmosphere pursuant to the sovereign's grant of such power. . . . 347 So.2d at 474 (Rawls, J. dissenting).

See also Williams v. State, 376 So.2d 846, 847-48 (Fla. 1979)(Adkins, J. dissenting from discharge of certiorari).

CONCLUSION

Based upon the foregoing, defendant requests this Court to approve the decision of the District Court of Appeal of Florida, Third District, in this cause.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of respondent was forwarded by mail to RICHARD E. DORAN, Assistant Attorney General, Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128 this 30th day of September, 1983.

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