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 PETITIONER ON MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

RICHARD E. DORAN, Esquire
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Respondent/Appellant, Jenny Jones, was the defendant in the trial court and the Petitioner/Appellee, the State of Florida, was the prosecution. The parties shall be referred to in these terms. Emphasis is supplied unless otherwise noted.

The symbol "R" will be utilized to designate the record on appeal and the symbol "TR" the trial transcript.

STATEMENT OF THE CASE

Jenny Jones was charged, by information, with second degree grand theft. She was arraigned on January 19, 1982. A not guilty plea was entered by the trial court, as Jones stood mute. (R. 1, 1A, 2).

Jones was tried by jury and convicted of grand theft on June 30, 1982. The trial court that same day entered judgment and sentenced Jones to three years in prison. (R. 11-13, 21, 22-25). Notice of Appeal was filed July 30, 1982. (R. 29).

On July 5, 1983, the Third District Court of Appeal reversed and remanded the case for a new trial. In doing so,

the court certified that its decision was in direct conflict with the opinion of the First District Court of Appeals in Williams v. State, 347 So.2d 472 (Fla. 1st DCA 1977), cert. discharged, 376 So.2d 846 (Fla. 1979).

Notice invoking the Discretionary Review Jurisdiction of this Court was timely filed August 5, 1983.

STATEMENT OF THE FACTS

The State called only one witness in this case, Terry White. Mr. White testified that his occupation was "Store Detective" for Jefferson's Department Stores. (TR. 126). It was Mr. White who testified as to his questioning the defendant and her subsequent silence prior to the arrest.

According to Mr. White, the Defendant and another woman entered the Jefferson's Store on Biscayne Boulevard, in Miami, and walked to the ladies wear department. (TR. 126-132). As White observed them from an observation tower, the women stuffed a number of clothing items into two bags and walked towards an exit. Mr. White and another store employee stopped the women near the door just as they were about to exit the store. (TR. 132-133).

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. 133-134).

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).

No testimony was elicited on direct or cross-examination concerning the point in time when the Defendant was turned over to the police or arrested. The State introduced the stolen items into evidence and established a value of more than one hundred dollars. (TR. 128, 141-142, 155-157).

The State then rested its case. The Defendant did not testify or call witnesses.

POINT ON APPEAL

WHETHER THE IN COURT COMMENT OF A RETAIL STORE DETECTIVE ON THE SILENCE OF A STORE CUSTOMER IN THE FACE OF AN ACCUSATION OF SHOPLIFTING VIOLATES THE CONSTITUTIONAL RESTRAINTS ON THE RIGHT TO REMAIN SILENT IN THE FACE OF ACCUSATION BY GOVERNMENTAL AUTHORITY?

ARGUMENT

THE IN COURT COMMENT OF A RETAIL STORE DETECTIVE ON THE SILENCE OF A STORE CUSTOMER IN THE FACE OF AN ACCUSATION OF SHOPLIFTING DOES NOT VIOLATE CONSTITUTIONAL RESTRAINTS ON THE RIGHT TO REMAIN SILENT IN THE FACE OF ACCUSATION BY GOVERNMENTAL AUTHORITY.

The Respondent successfully convinced the Third District Court of Appeals that Mr. White, the Store Detective, was, for purposes of Fifth Amendment[1] application, a police officer or similar-type government agent. The appellate court's decision to approve this argument, and certify its conflict with Williams v. State, 347 So.2d 472 (Fla. 1st DCA 1977) cert. discharged 476 So.2d 846 (Fla. 1979), is contrary to the plain language of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Burdeau v. McDowell, 265 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); and the subsequent federal and Florida case law on the issue. It likewise assumes a non-existent legislative intent to create, via Section 812.015, Florida Statutes (1981), an auxillary State Police Force of merchants and farmers. It is the contention of the State of Florida that the right to silence applies only in the face of police

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[1] Fifth and Fourteenth Amendments, United States constitution; Article I Sections 9 and 16, Florida Declaration of Rights. For purposes of this discussion the general term "Fifth Amendment" will connotate both Federal and Florida Standards. Respondent did not allege a stricter state standard in the lower court.

custodial interrogation or similar government accusation and, that a merchant or his agent does not constitute such a government actor although Florida law allows them to briefly detain suspected theives. These points merit separate discussions.

THE RIGHT TO REMAIN SILENT

The priviledge against self-incrimination in the face of government accusation is an established right under the federal and Florida constitutions. Miranda supra; Bennett v. State, 316 So.2d 41 (Fla. 1975).

The United States Supreme Court has long adhered to the idea that the Fourth and Fifth Amendments protect Defendants in Federal Court only from actions of government agents. Burdeau v. McDowell, supra. The exclusionary rule which is the key tool in enforcing those rights is "a restraint upon the activities of sovereign authority" not, as Respondent suggests, "a limitation upon other than governmental agencies." Burdeau 256 U.S. at 475. See also, United States v. Goldberg; 330 F.2d 30, 35 (3d Cir. 1964); United States v. Ashby, 245 F.2d 684, 686 (5th Cir. 1957); compare Evalt v. United States, 359 F.2d 534, 542 (9th Cir. 1966).

The method for protecting citizens against compelled self-incrimination was spelled out in Miranda v. Arizona,

supra. At its most basic level, Miranda requires a police officer to give certain warnings to individuals he has taken into custody. 384 U.S. at 439, 86 S.Ct. at 1609. Contrary to Respondent's argument and the opinion of the Third District, neither Miranda nor subsequent federal or State law has extended the requirement of giving a Miranda warning to embrace actions of private citizens. A good analysis of this question appeared in the case of United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970). Mr. Antonelli worked on the New York City Docks. One day he was stopped, as he left work, by a private security guard employed by the Italian Line. The guard made a routine search of the trunk of Antonelli's car and discovered thousands of dollars worth of recently stolen, imported goods. Antonelli confessed to the security guard on the spot. These statements were used against him and he was convicted of unlawful possession of stolen goods. On appeal the Second Circuit prefaced its opinion; distilling the issue:

> We are asked on this appeal to contrue Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as extending to inculpatory statements made by appellant while in the custody of private security guards, who admittedly gave appellant none of the so-called Miranda warnings.
>
> at 336 supra.

The court assumed arguendo the facts of custodial interrogation and lack of spontaneous utterance. The court then reviewed the record and found no "pertinant official or De Facto connection "between the guard and any law enforcement agency. Their primary task and their employment was to protect the private property on the docks." p. 336. Turning to the merits of the argument, the court offered the following analysis:

> It is suggested that certain language in Miranda bespeaks an expansive reading to be given the rules promulgated by the Supreme Court to protect criminal defendants' Fifth and Sixth Amendment rights. See, e.g., 384 U.S. at 467, 86 S.Ct. 1602. However, the Fifth Amendment privilege against self-incrimination does not require the giving of constitutional warnings by private citizens or security personnel employed thereby who take a suspect into custody. Beyond that, the discussion in parts I and II of the Miranda opinion, 384 U.S. at 445-466, 86 S.Ct. 1602, which leads up to the passage relied upon and was designed to demonstrate that interrogation may be compulsive even when there is no legal power to require answer was concerned solely with activity by the police or other "law enforcement officers," 384 U.S. at 461, 86 S.Ct. 1602, or government agencies. A private security guard stands no differently from the private citizen who has employed him. It would be a strange doctrine that would so condition the privilege of a citizen to question another whom he suspects of stealing his property that in-criminating answers would be excluded as evidence in a criminal trial unless the citizen had warned the marauder that he need not answer.
>
> P. 337.

Turning next to a discussion of the exclusionary rule, the Court again emphasized a constitutional purpose of limiting government action, citing Burdeau v. McDowell, supra and approximately twenty more federal and State Supreme Court Rulings. P. 337. In conclusion, the Court, held: ". . . since Appellant's statements were made to persons not law enforcement officers or their agents, there was no police or 'custodial interrogation' within the meaning of Miranda and no warnings need have been given." P. 337-338.

This proposition has nearly become black letter law in the federal system. United States v. Bagaric, 706 F.2d 42, 69 (2d Cir. 1983)(statements made to Canadian Police properly investigating unrelated crimes not inadmissible due to lack of Miranda warning); United States v. Soloman, 509 F.2d 863, 868 (2d Cir. 1975)(Defendant's comments to Investigatory Branch of New York Stock Exchange not inadmissible in criminal case although such information is routinely given to securties exchange commission); United States v. Bolden, 461 F.2d 998 (8th Cir. 1972)(per curium) (confession to security guard); United States v. Veatch, 674 F.2d 1217 (9th Cir. 1981); United States v. Franklin, 704 F.2d 1183, 1190 (10th Cir. 1983)(statement to ex-wife); McAllister v. Brown, 555 F.2d 1277 (5th Cir. 1977), (informant reported a confession by Defendant to police).

The same is true in the State courts. Truex v. Alabama, 210 So.2d 424 (Ala. 1968); People v. Moorehead, 45 Ill.2d 326, 259 N.E.2d 8 cert. den., 400 U.S. 945 (1970); Leaver v. State, 250 Ind. 523, 237 N.E.2d 368, cert. den., 393 U.S. 1059 (1969); State v. Peabody, 320 A.2d 242 (ME. 1974); In re Simmons, 24 N.C.App. 28, 210 S.E.2d 84 (1974); State v. Watson, 20 Ohio App. 115, 252 N.W.2d 305 (1969); and People v. Frank, 52 Misc.2d 266, 275 N.Y.S.2d 570 (1966). Prior to the case now before this Court, there were only two opinions issued by Florida courts on the issue of admissions made to non-police officers. Each merits discussion.

The first case is Williams v. State, supra. The facts in Williams are nearly identical to the instant case. A possible shoplifter was confronted by a merchant who took her into custody and "asked her to step down back to the office, we needed to talk to her." The prosecutor asked the merchant if the accused said anything to him at that point. The merchant replied, "she neither denied nor admitted the charge." A motion for mistrial was denied and Miss Williams convicted. On appeal, the First District made quick work of William's claim that the comment on her silence violated Miranda and infused her trial with fundamental error:

> Miranda deals only with police custodial interrogation. We do not consider that the doctrine pronounced in Miranda by the United States Supreme Court in relation to police custodial interrogation should be broadened and extended to include circumstances such as those present in the case sub judice which does not involve police custodial interrogation. The manager's testimony that "she neither denied nor admitted the charge" means only that she did not volunteer any information one way or the other and properly relates to her unexplained possession of recently stolen property. Such testimony was admissible since appellant's silence was not silence in the face of police custodial interrogation. Affirmed.
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> P. 473

However, Chief Judge Rawls dissented:

> The majority has agreed with the State's argument that appellant was not under arrest by a law enforcement officer, and Miranda's "custodial interrogation" principle refers to "police custodial interrogation" and thus is not applicable. By enactment of Section 901.34, Florida Statutes (1975), the Florida legislature conferred the authority of the sovereign upon:
>
> ". . . a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody, may for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner. . . ." (emphasis supplied)
>
> 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 police-like atmosphere pursuant to the sovereign's grant of such power. Under the circumstances reflected by this record, it is my opinion that the trial court committed fundamental error in denying appellant's motion for mistrial. (Footnotes omitted).
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> P. 473-474.

Although the thrust of Rawls dissent seems to focus on the "grant of sovereign authority", theory, he closed his opinion with a footnote in which he cited three cases, Bennett v. State, 316 So.2d 41 (Fla. 1975)(holding that a comment on the Defendant's silence in the face of police interrogation constitutes fundamental error); Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967)(comment on Defendant's silence while in police custody violates protection against self-incrimination) and Peak v. State, 342 So.2d 98 (Fla. 3d DCA 1977).

Peak is factually, a nearly identical companion to Williams. In Peak a young man attempted to buy some shoes with a stolen credit card. After a security guard arrived and took the charge plate, Peak ran from the store. He was captured by store employees and detained while the police were called. Peak confessed while in store custody but prior to the arrival of the police. The issue on appeal was, again, the introduction of Peak's statement to the store

detectives. Ignoring a Fifth Amendment analysis, the appellate court reversed the conviction on a due process basis, citing Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed 716 (1940), and holding the confession of Mr. Peak was not voluntary:

> We hold that an involuntary confession, whether made to law enforcement officers or private persons is inadmissible. People v. Haydel, 12 Cal.3d 190, 115 Cal.R.PTR. 394, 524 P.2d 866 (1974). Also see Commonwealth v. Mahnke, 335 N.E.2d 660 Mass. 1975) and People v. Frank, 52 Misc.2d 266, 275 N.Y.S.2d 570 (1966). supra.[2]
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> P. 99

Once Peak is viewed in its proper legal context, a decision involving fundamental due process protections and not centered on violation of the Fifth Amendment Right of silence, the muddled waters of the instant case begin to clear. The Third District reversed the conviction of Jenny Jones based mainly on the authorities and reasoning of Judge Rawls in his Williams dissent. As this Court previously noted in discharging the writ of certiorari issued in Williams, the cited decisions[3] presented no direct

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[2] People v. Frank, as noted above, allows such admissions to be used in trial.

[3] Bennett and Jones according to the dissenting opinion in Williams of Justice Adkins. 376 So.2d at 847.

conflict as required under the Florida constitution.[4]

The Bennett, Jones and latter decisions, forbidding comment on a Defendant's silence involve police custodial interrogation. Lee v. State, 422 So.2d 928, 930 (Fla.3d DCA 1982) ("why didn't the Defendant report all this to the police" -- Defendant was arrested and taken to a hospital where he remained silent concerning his injury); Clark v. State, 363 So.2d 331, 332 (Fla. 1978)(police officer testified as to Defendant's silence in face of his arrest); Brownlee v. State, 361 So.2d 724, 725 (Fla. 4th DCA 1978) (police officer testifies Defendant remained silent after arrest). There is nothing in the language of these decisions to support an extension of the Miranda doctrine to action by private citizens. The same is true of any attempt to extend the Peak theory of fundamental due process violation. No claim of a Fourteenth Amendment violation was raised in either Williams or the instant case.[5] It follows that Peak is clearly inapplicable and not in conflict with Williams or Jones. See Edwards and Cridland, 338 So.2d at 31.

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[4] Article V. Section 3(b)(3).

[5] The reason is clear. In Peak a "confession" was obtained in a manner shocking the conscious of the court. See Jackson v. Denno supra. No confession was taken from Jenny Jones. The prosecution merely sought to establish her unexplained possession of recently stolen property by use of her silence. Florida allows an inference of guilty knowledge to be drawn from such silence. §812.022(2); State v. Young, 217 So.2d 567 (Fla. 1968) cert. den. 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969); State v. Cridland, 338 So.2d 30 (Fla. 3d DCA 1976); Chavers v. State, 380 So.2d 1180 (Fla. 5th DCA 1980). Such inference does not violate due process. Edwards v. State, 381 So.2d 696(Fla.1980).

MERCHANTS, FARMERS AND POLICE

What remains is the bottom line to this case. Does the enactment of the retail theft law, Section 812.015 provide, "a grant of sovereign authority", Williams p. 474 (Rawls dissenting), to merchants, farmers or merchant employees? Most courts say "no!". See Truex and Leaver, supra.

Section 812.015 is a reworking and expansion of former Section 901.34 Fla.Stat, (1977) which held:

> . . . A merchant or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner. . . .

It was this Section which Judge Rawls cited to in Williams. In 1978 the legislative re-worked the law and placed it within the theft Chapter, §812, Fla.Stat (1979). See Florida Session Laws s.2 ch.78-348. In 1981 the legislature revised and expanded the scope of the law to include a provision allowing farmers to detain suspected theives in the same manner as a merchant. See, Fla. Session Laws ch. 81-108. The preamble to the act, which became law on October 1, 1981, declared that certain individuals causing the arrest of a person for shoplifting or farm theft shall

be exerpt from certain criminal or civil liability. See §812.015(3)(c), and (5). Nowhere is there evidence of a legislative intent to empower merchants or farmers with sovereign authority. As clearly stated in the Chapter, police, merchants and farmers may, for purpose of recovering their property or for prosecution, detain a person but only for a reasonable amount of time until police arrive. The police must be called immediately! §812.015(3)(a). Significantly the statute allows detention for a recovery of property by police, merchants and farmers, but only allows police to arrest a person. §812.015(4). As additional evidence of the limits placed on the acts of merchants and farmers, §812.015(6) makes it a crime to resist a merchant or farmer who has detained a person for purposes of recoverying his property. No mention is made of resisting arrest by a merchant or farmer.

Finally, and perhaps most significantly is the distinction in the statutory language between merchants/farmers and the police, who are now referred to as law enforcement agents. See, Note 1 to §812.015 Fla.Stat (1981). Clearly, if the legislature meant for merchants and farmers to have arrest powers on their properties they would have included them in the definition of law enforcement officers as set out in Section 943.10(1),(5)or(6), Fla.Stat. (1981).

It defies common sense to argue that a merchant or farmer is thinking about anything except recovery of his property in the first instance of confrontation. The same is true of a merchant's employee. As stated in Antonelli v. United States, supra, "their primary task and their employment was to protect the private property on the docks." at p. 336. See also, Solomon, 509 F.2d at 871 in its discussion of "state action":[6]

> Nothing in Burton remotely suggests that, if the proprietor of the eagle coffee shoppe had interrogated a waiter suspected of snatching a patron't purse, under the same kind of threat, that refusal to answer would lead to discharge. . ., the answer (or silence) could not be used in a criminal trial.

No merchant or farmer, however, upset he might be about theft could hold the person in his custody, "to answer for a capitol or otherwise infamous crime", without an indictment or information or subject a person to jeopardy of loss of life, limb or freedom. As stated in Murphy v. Waterfront Commission, 378 U.S. 52, 55, 84 S.Ct. 1594 12 L.Ed.2d 453 (1968):

> The priviledge contributes toward a fair State-individual balance by

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[6] As described in Burton v. Willmington Parking Authority, 365 U.S. 715 81 S.Ct. 856, L.Ed.2d 45 (1981).

> requiring government to leave the individual alone until good cause is shown to better him and by requiring the government in its contest with the individual to should the entire load.

This Court recognized this distinction when it discharged the writ of certiorari in Williams supra. Peak is a due process decision. It is silent on the issue now before this Court. Bennett, Jones, Lee, Clark and Brownlee are police custodial interrogation cases. Williams and Jones are neither. Florida's farmers and merchants are not Florida's law enforcers. They may have protection against claims of false arrest caused by their attempts to recover their property[7] but, they cannot arrest a man. They must immediately call the police, if they wish to detain a person for a period longer than necessary to recover their goods. §812.015(3)(a).

The farmers and merchants who built this county ratified the Fifth Amendment and the Bill of Rights in part to protect themselves from the evil and tyrannous practices of such sovereign authorities as the star chamber; practices which led to loss of life or property. Two hundred years later, the farmer and merchant still face loss of property

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[7] See, Weisman v. K-Mart, 396 So.2d 1164, 1166 (Fla. 3d DCA 1981); Food Fair v. Kinkaid, 335 So.2d 560, 562 (Fla. 2d DCA 1979).

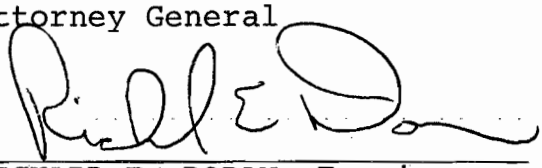
but now it is blatant acts of thievery which draw their concern more often than government action. Through their duly elected legislature they have sought to protect themselves and their prosperity by enactment of laws which allow them, upon probable cause, to detain suspected shoplifters, recovery their goods and if they desire, hold the thief until the police arrive. In tandem with this provision of self-help is a shield against suit for false arrest should they be wrong in thinking someone has taken their goods. Jenny Jones would have this Court deliver this shield to her and allow her to use it in a seperate battle waged between her and law enforcement. A struggle centered on criminal sanctions, not return of property. If this Court were disposed to so rule, it would extend the right against self-incrimination beyond its historical and constitutional limits. The court would place Florida in a minority of one- a State where any man who loses property becomes a constable when he seeks to regain what he has lost.

CONCLUSION

Based upon the above-cited legal authorities the State of Florida respectfully urges this Honorable Court to reverse the decision of the Third District Court of Appeals and affirm the judgment and sentence rendered in the trial court.

Respectfully submitted,

JIM SMITH
Attorney General



RICHARD E. DORAN, Esquire
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Merits was served by mail upon Elliot Scherker, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 31st day of August, 1983.

RICHARD E. DORAN, Esquire
Assistant Attorney General

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