IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,082

FILED

OCT 25 1983

SID J. WHITE
CLERK SUPREME COURT

By _____ Chief Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

JENNY JONES,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

Reply BRIEF OF PETITIONER ON MERITS

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INTRODUCTION

Petitioner, State of Florida, was the prosecution in the trial court and Appellee in the Third District Court of Appeal. Respondent, Jenny Jones, was the Defendant and the Appellant. The parties shall be referred to in these terms. All emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on its initial brief for a Statement of the Case and Facts.

QUESTION PRESENTED

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 RESTRAINT ON THE USE OF SILENCE IN THE FACE OF ACCUSATION BY GOVERNMENT 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 THE CONSTITUTIONAL RESTRAINT ON THE USE OF SILENCE IN THE FACE OF ACCUSATION BY GOVERNMENT AUTHORITY.

Respondent urges this Honorable Court to accept and adopt the position that the silence of an individual in possession of recently stolen property may not be introduced at trial as circumstantial evidence of guilt because such silence is protected by the Fifth Amendment to the United States Constitution. This position is alleged to be the correct law of this state in light of the decisions of this Court in Bennett v. State, 316 So.2d 41 (Fla. 1975); Simpson v. State, 418 So.2d 984 (Fla. 1982); Willinsky v. State, 360 So.2d 760 (Fla. 1978); and other lower court decisions. Respondent asserts such a rule exists even while admitting that actual statements or confessions made in leiu of silence would not be barred from trial by the Fifth Amendment.[1] In order to justify this position, the Respondent ignores the very essence of the priviledge against self-information in favor of a review which focuses on any accusation,

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[1] Respondent's brief, p.6., see also, United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970).

private or governmental, tied to a custodial situation which is mistakenly compared to a police custodial situation.

In rebuttal, Petitioner asserts the following: (1) Evidence of one's silence when confronted with possession of recently stolen property has long been acknowledge as relevant and probative in theft cases. (2) Respondent's claim that silence in the face of accusation by a private citizen is inadmissible regardless of the surrounding circumstances is contrary to prevailing legal authority and could only be justified by treating retail merchants and their employees as law enforcement officers or other governmental agents. (3) The idea that a shoplifter who is detained, voluntarily or otherwise, by a merchant, is immediately afforded Fifth Amendment protection is contrary to established notions as to the purpose and scope of Fifth Amendment protection.

In State v. Young, 217 So.2d 567 (Fla. 1968), cert. den. 396 U.S. 853 (1969), this Court upheld a jury instruction which allowed a jury to infer guilt from the unexplained possession of recently stolen goods.[2] The Defendant, Mr. Young, had convinced the appellate court that this type of charge violated the Fifth Amendment priviledge by requiring an explanation, "under penalty of

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[2] This inference is now codified at Section 812.022 (2). The law has passed constitutional muster, Edwards v. State, 381 So.2d 696 (Fla. 1981).

an inference of guilt if he failed to do so . . .". P. 569 supra. On Petition for Writ of Certiorari, the Supreme Court of Florida reversed that decision. In speaking of the role of this type of evidence in theft cases the court held:

> . . . The rule does not create a presumption of law under which the burden is shifted to the accused to produce evidence to rebut the legal presumption of the existence of the operative facts. It is simply a rule relating to circumstantial evidence from which the jury has the right to infer guilt of larcency or of breaking and entering with the intent to steal. . See Young v. State, 1888, 24 Fla. 147, 3 So. 881.
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> Moreover, the inference of guilt that the jury may infer from the unexplained possession of recently stolen goods does not arise from the possessor's failure to explain or demonstrate by evidence of exculpatory facts and circumstances that his possession of the recently stolen goods is innocent. It is the fact of possession that provides the basis for an inference of guilt.[3]
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> P. 570 supra.

The silence of Respondent while in possession of recently stolen property is for this specific type of crime, a probative fact. As noted in Young:

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[3] See also, Chavers v. State, 380 So.2d 1180, 1181 (Fla. 5th DCA 1980) ("such inquires are proper when the purpose is to permit the jury to consider the inference of guilt. . .); Whiteside v. State, 366 So.2d 1232 (Fla. 2d DCA 1979) (this type of inquiry not a comment on silence).

> Some circumstantial evidence e.g., flight or concealment -- is not sufficient, standing alone, to warrant the jury in returning a verdict of guilty. See Freeman v. State, Fla.App.1958, 101 So.2d 887, relying on Blackwell v. State, supra, 86 So. 224, 226. In the case of possession of recently stolen goods, however, the inference that the possessor is the guilty taker is so strong that the rules of evidence permit the jury to return a verdict of guilty on this one circumstance alone if the defendant allows it to go to the jury either unexplained or with an explanation that is so palpably unreasonable and incredible that the jury rejects it entirely. Leslie v. State, supra, 17 So. 555. This is not a rule of recent vintage. As pointed out in the decision here reviewed, it was developed, from the reason and experience and common understanding of men, as a part of the common law of England, Regina v. Langmead, 169 Eng.Repr. 1459, from which we derived it.
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> Since the appellate court's decision was premised on the erroneous assumption that the jury instruction in question demanded that the defendant explain his possession of the stolen goods and required the jury to return a verdict of guilty if he failed to do so, its conclusion must fall with ts premises. Whether such assumptions, if true, would bring the jury instruction into collision with the footnote in Miranda is not decided, since it is unnecessary.
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> P. 570-91 supra.

The continued vitality of the Young's decision as evidenced in Whiteside, Chavers and State v. Crideland, 338 So.2d 30 (Fla. 3d DCA 1976), clearly refutes any claim of non-probative value.

The second point raised by Respondent concerns the idea that the questioning of a person by a merchant constitutes

a criminal accusation worthy of constitutional protection. This argument is predicated on a claim that merchants have limited police authority under the section. The State of Florida rejects this claim and directs this Court to the numerous decisions cited in it's initial brief which state the prevailing opinion on this issue. Private security guards who confront suspected theives do not by their actions initiate interrogation by law enforcement officers in a custodial setting. United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970); and People v. Raitand, 401 N.E. 2d 278, (Ill. 2d DCA 1980). (Evidence of Defendant's statement, "Oh, I must have forgot to pay for it", when asked to show receipt and later inquiry asking if merchant would, " . . . send her away to jail for a $1.50 scarf?", among other statements, ruled admissible).[4] Since merchants are not the equivalant of law enforcement officers, the issue is narrowed down. Is silence in the face of accusation by a private citizen, acting on his own or in concert with a state law sufficient to trigger constitutional protections? The answer is a resounding no. First, a private citizen acting on his own independent of government is never limited by this priviledge. In State v. McAlvain, 454 P.2d 987, 104 Arz. 445, (1968), cert. den., 396 U.S. 1023, 90 S.Ct. 597, 24 L.Ed.2d 516 (1969).

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[4] The opinion sets out Illinois Retail Theft Act, §16 A-5(c) which is very similar to Florida Law and which allows for brief detention by a merchant.

The Arizona Supreme Court rejected exactly such a proposition. The Defendant had remained silent when accused by the vicitm and this fact was introduced at trial. Rejecting the idea of a violation of the Fifth and Fourteenth Amendments right to silence the Arizona court held:

> We hold that it is not error for the state to elicit testimony to the effect that a Defendant was silent when accused by a person not associated with law enforcement if the Defendant has not been charged nor is he in custody for the crime of which he is accused. State v. Lounsbery, 445 P.2d 1017 (Wash. 1968).
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> The purpose of the Fifth Amendment to the United States Constitution is to protect persons against inducements and compulsions exerted by the government which might compel self-incrimination.
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> P. 989 supra.

Respondent conceeds the store detective is not a law enforcement officer.[5] It must logically follow that the "Accusation" is neither governmental in nature nor a charge made while under arrest. It is merely a merchant's request to examine a bag in an attempt to recover his property. If the merchant seeks to remove the shopper to a more discreet area or briefly detain a person for the police, he may do so not because he is given special powers of law enforcement but, rather, because the statute affords him extra protection. He is protected from claims of false arrest, §812.015

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[5] Respondent's brief p. 6.

(3)(c) and (5); Weisman v. K-Mart, 396 So.2d 1164 (Fla. 3d DCA 1981), and he is protected from loss of property by the provisions of §812.015(6), which informs the public of the penalty for resisting the recovery of merchandise. Respondent has attempted to color this limited detention as "custody" equal to police custody. In doing so Respondent ignores the specific command of §812.015(3)(a):

> In the event this merchant . . . takes the person into custody, a law enforcement officer shall be called to the scene immediately after the person has been taken into custody.

Respondent has ignored the difference between accusations made by private citizens with private concerns related to recovery of property and accusations made by law enforcement officers interested in criminal prosecution. Not a single case cited by Respondent supports her position that the nature of this accusation is unimportant for our current consideration.

Instead, Respondent focuses on the combination of an accusation and a brief detention -- "custody" in her terminology -- in attempting to show governmental involvement sufficient to involve the Fifth Amendmant. However, Respondent has not provided this Court a single case in support of her proposition that brief detention by a merchant establishes

"custody" under and by operation of state law.[6] The position of the United States Supreme Court and at least one state court is that a statutory priviledge to detain a person for a private reason does not constitute "state action" requiring involvement of constitutional safeguards. Flagg Brothers v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185.

In Flagg Brothers v. Brooks, the high court rejected an argument that a warehouseman's proposed sale of household goods, held for a woman who had not paid the storage bill, in accord with a New York State Law Provision, to cover the cost of storage, was an action attributable to the State of New York, and as such, subject to attack under the Fourteenth Amendment. The woman alleged that the New York Law, allowing such action by the warehouseman, was a means for the warehouseman to deny her due process of law. In effect she alleged a state hand in the sale. Reviewing previous examples of potential state infringement, via private parties, on constitutional guarantees in the areas of elections, creditor remedies and distribution of religious literature the court concluded:

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6 Brownlee v. State, 361 So.2d 724 (Fla. 4th DCA 1978) is cited by Respondent and was cited with approval by the Third District. Brownlee is clearly inapplicable as it involved testimony by a police officer who was accusing the Defendant and holding him in custody pending criminal charges.

> . . . Our cases state: "That a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." Adickes, 398 U.S. at 170, 90 S.Ct. at 1615. This Court has never held that a State's mere acquiescence in a private action converts that action into an action of this State.
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> * * *
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> Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State has acted, but that it has refused to act. This statutory refusal to act is not different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.
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> P. 1737-38 supra.

This decision was cited with approval in People v. Raitand, supra. and should likewise guide this Court in rejecting the idea that because a person might be convicted of resisting a merchant if he is first convicted of theft, he is in custody under color of state law. The statutory language does not compel a merchant to question anyone or detain them for prosecution. The law merely allows such action and protects those merchants who take such action from false arrest claims.

In conclusion, the Petitioner asserts that evidence of silence has probative value in theft cases. As long as the

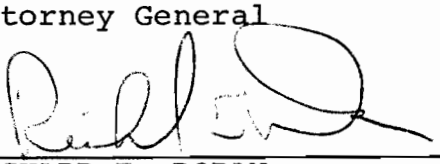
evidence of silence is not tied to silence in the face of governmental accusation or governmental custody such evidence is not inadmissible as violative of the Fifth Amendment. The witness in this case was concerned with a private matter, he is not a law enforcement officer and his ability to stop, question and detain suspected theives, in order to recovery private property or, hold a person for the police, is not a compulsive under state law. Accordingly the Fifth Amendment does not guarantee a right to silence when a merchant asks one to explain her possession of unsold or recently stolen goods.

CONCLUSION

Petitioner respectfully urges this Honorable Court to reverse the decision of the Third District Court and remand the case with directions to affirm the conviction of Jenny Jones.

Respectfully submitted,

JIM SMITH
Attorney General



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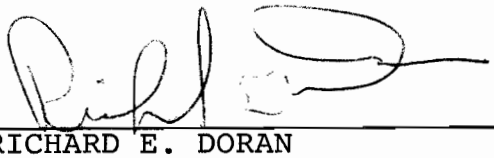
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 24th day of October, 1983.



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