IN THE SUPREME COURT OF FLORIDA

CASE NO: 64,945

THE STATE OF FLORIDA

Petitioner,

vs.

R.A., a Child

Respondent,

ON CONFLICT JURISDICTION FROM THE DISTRICT COURT

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The State of Florida, Petitioner, was the Petitioner-Prosecution in the Trial Court and, although mislabeled in the Petitioner's Brief to the Supreme Court of Florida, the State was the appellant below. The child, R.A., was the Respondent in the trial court and here, and again although he was mislabeled in Petitioner's brief, he was the appellee below.

The symbol "V.____ P._____" designates the volume and page of the transcript on the two hearings in the trial court. Volume I refers to the proceedings of February 9, 1983. The words "the officer" refers to the arresting officer in this case, Officer Robert J. Dworak. The designation "The State" refers to the State of Florida and the designations "the child" or "appellee" refer to R.A. the Respondent here.

Emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE

The child concurs with the Statement of the Case as provided in the State's Brief to this Honorable Court.

STATEMENT OF THE FACTS

The Statement of the Facts are provided by the child since there are areas of disagreement with the State's version.

On November 4, 1982 at ten thirty in the morning a uniform unit (Officer Galindo) routinely pulled over the child, R.A., for running a stop sign. The arresting officer in this case, Officer Robert Dworak was travelling behind the uniform unit in an unmarked police vehicle and he was not dressed in uniform. Officer Dworak witnessed the traffic infraction and decided Officer Galindo needed back up. Officer Dworak walked up to the car behind Officer Galindo and approached the passenger's side of the vehicle. Officer Dworak did not identify himself verbally as a police officer; he was wearing his identification badge and had a gun. (V. II P. 36-39)

The child, R.A., of own accord exited the vehicle and stood outside. The other three passengers were told to exit the car on the passenger side of the vehicle and they immediately complied with the offier's request. (V. II, P. 39-40)

Officer Dworak noticed something lying on the console of the vehicle which "appeared to be a marijuana cigarette" (V. II, P. 40) which he "suspected was contraband" (V. II, P. 42). The cigarette was hand rolled and the officer became suspicious it contained marijuana because he had never seen regular cigarettes like these - hand rolled and rolled up at the ends. (V. II P. 42-43)

Officer Dworak then asked the child if he could look in his car. The child answered "Okay. Go ahead." (V. II, P. 43). The officer searched the interior compartment of the car and realized that the glove box was locked and could not be opened without a key; he then asked the child, R.A., for the keys which R.A. immediately handed over to the policeman. Officer Dworak admittedly never asked permission to look inside the glove box and he further admitted that he wanted to look in the glove box prior to seizing the subject marijuana (V. II, P. 63-64).

Without asking permission to search inside the glove box, Officer Dworak opened the glove box and found a firearm. According to the officer, the child claimed it was his gun as he had found it in a Burger King parking lot (V. II, P. 50); the police computer, however, showed it as a stolen firearm. (All the statements allegedly made by the child here come from the testimony of Officer Dworak and none of the alleged statements made by the child were suppressed by the Court since no motion to suppress was filed by the Defense).

The trial court granted the child's motion to suppress the marijuana cigarette since it was a product of an illegal search and since the precedent of Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978) was controlling. Carr, like the case at bar, concerned an officer who seized a cigarette which "appeared" to be marijuana because it was hand rolled. Absent sufficient corroborating evidence to amount to

probable cause, the search and seizure was an illegal one and the evidence obtained therefrom must be suppressed. This includes evidence subsequently obtained - the firearm in the present case - which was obtained as a result of the original illegal seizure and as such must be suppressed as well.

The State accepted as correct the Court's ruling to dismiss the charge of carrying or manually possessing an unlicensed firearm. (Petitioner's brief, P.5)

ARGUMENT

I

THE TRIAL COURT WAS CORRECT IN ADHERING TO THE DISPOSITIVE PRECEDENT, CARR V. STATE, 353 So2d 958 (FLA. 2d DCA 1978), SINCE THAT CASE AND THE CASE AT BAR ARE NEARLY FACTUALLY IDENTICAL AND BOTH CASES TURNED ON THE FACT THAT ABSENT SUFFICIENT "CORROBORATING EVIDENCE", SEEING A HAND-ROLLED CIGARETTE DOES NOT CONSTITUTE "KNOWLEDGE" THAT IT IS A MARIJUANA CIGARETTE.

The State contends that the trial court erred in not considering the circumstances beyond the officer's observations of the cigarette on the automobile console of appellee's car. However, the court did not "refuse" to hear testimony, as the State contends, from Officer Dworak concerning the circumstances giving rise to his belief that he had probable cause to seize the cigarette from appellee's automobile. Instead, the court heard testimony from Officer Dworak both on direct and cross examination as to what transpired on the date of the arrest of the appellee.

The officer testified that the item lying on the console was "rolled up paper that appeared to be a marijuana cigarette." (V. II, P. 42). The officer testified that he had been a police officer for about eight years (V. II, P. 42). There was testimony that the officer had a conversation with the appellee at the time of the search where Officer Dworak looked inside the car and asked "What's that?" And the child said "That's mine". Later, and most importantly, after

Officer Dworak had already decided the cigarette contained marijuana and that he was going to seize it, the officer asked "Is there anything else I'm going to find." The child allegedly said "Well, just a few roaches in the ashtray". (V. II, P. 13-14)

As the record below indicates, the trial court did not "refuse" to hear testimony concerning the circumstances of appellee's arrest, instead, the court heard and considered the aforementioned testimony and found that it lacked the weight that is necessary to make it "corroborating evidence" sufficient to show probable cause.

The trial court did not fail to hear such testimony, indeed, it heard considerable testimony and nevertheless found the evidence was insufficient to support the officer's testimony that he "knew" the cigarette contained marijuana.

The Court was correct in adhering to the precedent of Carr v. State, 353 So2d 958 (2nd DCA 1978) which is directly on point with the instant case.

In Carr, when the Defendant was stopped and questioned regarding his presence in the neighborhood, the police officer shined his flashlight into the car and observed a hand-rolled cigarette. The officer seized the cigarette which "appeared" to contain marijuana and arrested the Defendant for possession of marijuana.

The officer stated when he saw the cigarette through the window he "knew" it was a marijuana cigarette because it was unevenly rolled and twisted at the end, although he did not actually see any marijuana. Carr held the seizure at the cigarette was improper and any subsequent search and seizure thereto unreasonable.

Likewise, in the case at bar, the officer saw a cigarette which "appeared" to contain marijuana because it was made of "rolled up paper" (V. II, P. 40). At no time did the officer actually see any marijuana or other contraband; his conclusions were admittedly formed merely on the basis of seeing the hand rolled cigarette lying on the automobile console. It cannot be said under any circumstances that most hand rolled cigarettes contain marijuana; Many smokers even today prefer to roll their own rather than pay higher prices for manufactured cigarettes. Here, Officer Dworak's "knowledge" that the cigarette contained marijuana amounted to no more than "suspicion". Probable cause cannot be based on mere suspicion even though such suspicion is later proved to be well founded; it must be based on facts known to exist.

The State admittedly agrees that Carr must stand if there is no other corroborating evidence to determine that what the officer saw in the car is marijuana or contraband (V. II P. 13). Here, there was no such "corroborating evidence".

The State, however, attempts to distinguish this case from Carr, although it is virtually indistinguishable as to the facts, and to align it with those cases which find a police officer does have probable cause to seize what he believes to be contraband only if certain "corroborating evidence" is present.

The State purports to show this "corroborating evidence" by offering the aforementioned dialogue which allegedly took place bet-

ween the officer and the child, where, apart from the entire alleged dialogue being uncorroborated hearsay, the child was obviously intimidated by the police officers into making an unwilling and coerced statement against his best interests.

None of the cases cited by the State find a Defendant's statements to constitute "corroborating evidence" sufficient to find probable cause especially since these alleged statements were made after the officer formed his belief that the cigarettes contained marijuana. The State's attempt at labelling Defendant's out of court statements at "corroborating evidence" must therefore fail as they lack the evidentiary value that is required for a finding of probable cause.

The State cites various cases to support its contention that Officer Dworak has "corroborating evidence" to believe the cigarette he saw was marijuana. However, not one of these cases deals with hand-rolled cigarettes as does the case at bar and as does Carr. Not one of the cases cited by the State considers statements made by Defendant to the police officers to be "corroborating evidence". Instead, as defined by the cases the State cites, "corroborating evidence" sufficient to sustain a finding of probable cause has been found to include circumstacnes with great evidentiary value such as: Where an officer was patrolling in a high narcotics trafficking area in which many street sales of small amounts of marijuana took place and the officer had seen use of small manilla envelopes as marijuana containers in excess of one hundred times and it was the only use he

had ever seen these envelopes put to, and furthermore, the officer recognized the Defendant as a regular on that corner who is usually on that street in order to sell marijuana to passerbys. P.L.R. v. State, 435 So2d 850 (Fla. 4th DCA 1983); where the Defendant committed various traffic violations as he was driving a motor home and the Defendant informed the officer he had no vehicle registration and the officer spotted 35-40 square bales wrapped in burlap and black plastic and in the officer's 2 1/2 years experience in narcotics investigations and undercover purchases, every bale of marijuana he had ever purchased or seized has been packaged in an identical manner and there was absolutely no question that marijuana was involved. Albo v. State, 379 So2nd 648 (Fla. 1980); where the Defendant was naked and running around a car parked on the street, and when the officers arrived the Defendant was lying on the front seat of the car, fully exposed, and when the interior light came on, the officer saw several small inch by 1/4 inch flat tinfoil packets inside Defendant's shoes and based upon his long experience with drug arrests as an undercover officer in narcotics the officer believed the packets contained heroin or cocaine and most importantly, in this case, further detention was contemplated and in fact, the Defendant was arrested for indecent exposure, so the search could have been a valid one as incident to a lawful arrest. State v. Redding, 362 So2d 170 (2nd DCA 1978).

Again, Officer Dworak's belief that the subject cigarette was marijuana was admittedly based on his seeing one hand-rolled cigarette

lying on the automobile console although there was no visible trace of marijuana or any other indication which would corroborate that this cigarette was, in fact, marijuana. In light of the substantial testimony heard by the Court in two hearings, and in light of the factual similarity between Carr and this case, and the absence of sufficient "corroborating evidence", the precedent set by Carr must be followed and the illegally obtained evidence must be supressed as the trial court correctly held below.

ARGUMENT

II

THE TRIAL COURT DID NOT ERR IN GRANTING SUPPRESSION OF A FIREARM ILLEGALLY SEIZED FROM THE GLOVE BOX OF APPELLEE'S AUTOMOBILE SINCE THE FIREARM WAS FRUIT OF AN ILLEGAL SEARCH AND SIEZURE AND THERE WAS NEVER A VOLUNTARY CONSENT BY THE CHILD TO SEARCH HIS CAR

Again, the State claims the trial court ignored the State's evidence on the issue of consent to search. However, there is sufficient testimony in the record below (V. II, P. 14, 17, 43-48, 57-70) to show that the trial judge, in fact, heard much testimony on the issue of consent and decided the child had not given his voluntary consent to the search of his car.

The witness, Officer Dworak, gave the following testimony at one point in the hearing:

> Officer Dworak: I said, "Do you mind if I look through your car?"
> Mr. de la Puente: And, what did he say?
> Officer Dworak: He said, "Yes. Go ahead."
> Mr. de la Puente: And, you looked through the car. Is that the --
> Officer Dworak: No, I told him, he could refuse.
> Mr. de la Puente: Is that all you told him?
> Officer Dworak: I told -- I --
> Mr. de la Puente: That he could refuse? He didn't refuse?
> Officer Dworak: No. I advised him, he could refuse to let me look through the car.

Mr. de la Puente: Okay. And, you started looking through the car.
Officer Dworak: Right
Mr. de la Puente: Okay. And, where did you take the marijuana from?
Officer Dworak: From the console, laying right next to the driver's seat.

(V. II, P. 61)

Additional testimony on the issue of whether or not the child voluntarily consented to the search was entertained by the trial court at a later point in the hearing:

Mr. de la Puente: And, you continued searching for the -- in the car?
Officer Dworak: Correct.
Mr. de la Puente: Okay. At that time, did you take the keys, and open the glove box?
Officer Dworak: No, I asked Mr. Avila for the keys.
Mr. de la Puente: You asked Mr. Avila for the keys?
Officer Dworak: Yes.
Mr. de la Puente: Who -- weren't the keys still in the wheel of the car?
Officer Dworak: No, they were right in his hand.
Mr. de la Puente: They were in his hand. Mr. Avila gave you the keys?
Officer Dworak: He specifically gave me the key that opened the glove box.
Mr. de la Puente: You asked him for the keys, and he gave you the keys to open the glove box.
Officer Dworak: Well, I asked him for the keys. I didn't tell him what I was looking in the glove box. He handed me a key.
Mr. de la Puente: Okay.
Officer Dworak: It just so happens that that key --
Mr. de la Puente: You didn't tell him -- you didn't tell him that you were looking in the glove box. Okay. So, he gave you the keys. And, what did you do, next?

Ms. Rifkin:	Objection. Counsel's just testified, "So, you didn't tell him, you were looking in the glove box", and went on to another question. I would like the Officer to be given a chance to answer that.
The Court:	Did you ask him -- did you tell him, you were looking in the glove box?
The Witness:	No, I didn't. No.
Mr. de la Puente:	So, when you got the keys, what did you do?
Officer Dworak:	I opened the glove box.
Mr. de la Puente:	So, you just asked him for the keys. You didn't tell him you were going to look in the glove box.
Officer Dworak:	No, I had already asked him, if I could look through the car.
Mr. de la Puente:	That was before? That was at the time before you searched and found the marijuana; correct?
Officer Dworak:	Correct.

(V. II, P. 63-64)

The trial court held the firearm had to be suppressed because the evidence was obtained from a Fourth and Fourteenth Amendment violation and as such could not be used at trial. The Child did not voluntarily waive his consitutional rights as he did not knowingly and willingly consent to the search of his automobile.

A search of private property conducted by the State without a duly issued search warrant is per se "unreasonable" subject only to a

few specifically established and well-delineated exceptions justified by absolute necessity. After hearing testimony, including but not limited to the aforementioned portions of the record below, the trial court did not find that the "consent exception" applied to the subject search.

There is a distinction between submission to the apparent authority of a law enforcement officer and unqualified consent. Mere acquiescense in a search is not necessarily a waiver. Rather, for a person to waive his search and seizure rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search. Bailey v. State, 319 So2nd 22 (Fla. 1975), Talavera v. State, 186 So2d 811 (Fla. 2d DCA 1966). There is even a higher burden on the State to show a voluntary, knowing and willing consent when the Defendant is a child, as is the case here. The Trial Court did hear substantial testimony as to the consent issue yet in its judgment found that this exception to the constitutional requirements of the Fourth and Fourteenth Amendments did not apply to make valid the evidence obtained through the illegal search.

As was stated above, the Trial Court did not "refuse" to hear testimony from Officer Dworak concerning the circumstances of appellee's arrest, instead, the Court heard and considered the aforementioned testimony and concluded that the consent exception was not applicable to the case at bar.

The State further claims that the search was independently valid under New York v. Belton, __US__, 101 S.CT. 2860,69 L.Ed 2d 768 (1981), because the officers had "legally detained" the Appellant for possession of the marijuana. However, as stated above, under Carr the search was illegal as there was not sufficient probable cause to make the arrest based on the officer's thought that this was a marijuana cigarette.

The State contends that Belton applies here to make this search independently valid. Belton dealt with a search incident to a valid arrest where the officers in fact saw and smelled marijuana. Belton validated the search of a jacket which was placed on the seat of the car; the jacket may have contained a readily accessible weapon which might have endangered the safety of the arresting officer.

The case at bar does not parallel Belton factually - at the time of the arrest, the appellee was standing outside and at a distance from the car, and most importantly, the arresting officer had to take the appellee's keys in order to open the locked glove box. The arresting officer unlocked and opened a glove box which he knew was locked. The weapon was no threat to his safety as it was certainly not within appellee's reach nor was the search of the locked glove box based on the need to disarm, as the appellee was not armed.

Belton extends the allowable scope of a search to include containers found within the passenger compartment and further defines container to include "closed or open glove compartments:. Belton, 101

S. Ct. at 2864. Belton, however, does not extend the scope to locked glove boxes. A closed glove box is easily accessible to an arrestee, a locked glove box is not - especially if the keys are already in the hands of the Officer. Belton does not apply here.

The trial court, as mentioned above, did hold two separate hearings with the parties and did hear substantial testimony as to the facts of the arrest. The trial court, with its first hand knowledge of the case, did not feel this arrest warranted a full-blown trial as from the hearings it was clearly determined that Carr was factually controlling and, as such, the illegally obtained evidence - the marijuana cigarette-must be suppressed.

Once the trial court found that there had been an illegal search and seizure of the marijuana cigarette under Carr, the subsequent search of a locked glove box in appellee's automobile is a direct fruit of the original illegal search and seizure and as such must be suppressed as well.

In ruling that the firearm was inadmissable the Court impliedly found that there was no consent given by the child to a search of the locked glove compartment in the car along with the fact that it was the fruit of the poisonous tree. Although the officer originally asked for permission to enter the automobile, the child was not knowingly aware he could refuse, and further, when the officer took the keys to the car, he admittedly never asked permission to open the glove box. (V. II, P. 63-64) These facts, and many others were made known to the court at the two hearings before the judge formed his opinion. The

Court below did not depart from the fair and orderly pursuit of justice as the State claims. Instead, the trial court held two hearings, heard the pertinent facts, and was factually and correctly bound by the Carr precedent to suppress the evidence obtained from the illegal search and seizure.

Further, it is important to note here the language used in a Third District opinion:

> "We are not unmindful of the rule that a trial court's decision on a motion to suppress the fruits of an unreasonable search and seizure comes to the appellate court with a presumption of correctness, and that in testing the correctness of the trial court's conclusions, we should interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in a light most favorable to sustain these conclusions." Taylor v. State, 355 So2d 180 (Fla. 3d DCA 1978) quoting Rodriguez v. State, 189 So2d 656 (Fla. 3d DCA 1966).

CONCLUSION

Based upon the abovementioned facts of this case which were determined at two hearings and the controlling law and precedent, the trial court was correct in following Carr v. State, 353 So2d 958 (Fla. 2d DCA 1978), and holding that the marijuana cigarette must be suppressed as it was seized in an illegal search and that the firearm must also be suppressed as it was a fruit of this illegal search.

The granting of the motion to suppress evidence and the dismissal of Counts I and II (Grand theft and possession of cannabis) by the trial court should not be reversed or remanded and the child urges this Honorable Court to affirm the holding of the court below

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was on this 16th day of December, 1985, mailed to: RICHARD E. DORAN, Asst Attorney General, Dept. of Legal Affairs, 401 N.W. 2nd Avenue, #820, Miami, Florida 33128.

César de la Puente

CESAR DE LA PUENTE, ESQ.