IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,945

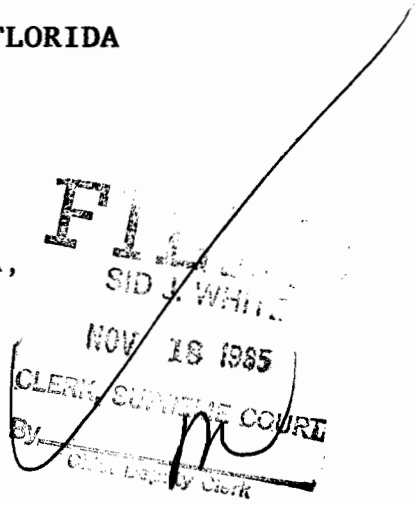
THE STATE OF FLORIDA,

Petitioner,

vs.

R. A., a CHILD,

Respondent.



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ON CONFLICT JURISDICTION FROM THE DISTRICT COURT

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PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The State of Florida, Petitioner, was the Petitioner-Prosecution, and the child, R. A., the Respondent in the trial court. The parties shall be referred to as they stood below. The symbol "V.___Tr.___" will designate the volume and page of the transcript on the hearings in the trial court. "Volume I" refers to the proceedings of February 7, 1983. "Volume II" refers to the proceedings of February 9, 1983.

Emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE

R. A., a child, was charged by Petition in the Family Division of the Circuit Court of Dade County, Florida, with three violations of the Laws of the State of Florida. Specifically, he was charged with grand theft (Firearm), Section 812.014 F.S., possession of less than twenty grams of cannabis, Section 893.13 F.S., and unlawfully carrying or manually possessing an unlicensed firearm, Section 790.05, F.S. (F. 1, 2).

All three crimes allegedly occurred November 4, 1982. The petition was filed December 5, 1982. On January 7,

1983, a written plea of not guilty was entered, by counsel, on behalf of the child. (R. 4).

On February 3, 1983 the child filed a Motion to Dismiss Count I (grand theft), a Motion to Dismiss Count II (possession of cannabis), a Motion to Dismiss Count III (carrying an unlicensed firearm), and a Motion to Suppress the cannabis and firearm. (R. 7-13).

These motions were heard February 7 and 9, 1983, by the Honorable Sydney Shapiro, Circuit Judge. After testimony and legal argument the trial court denied the Motion to Dismiss Count I and granted the Motions to Suppress and the Motion to Dismiss Count III and ruled the Motion to Dismiss Count II was moot since the marijuana was suppressed.

Pursuant to Rule 9.140 (c)(1)(A) and (B), F.R.App.P. (1983), the State filed a Notice of Appeal on February 25, 1983. This appeal was ultimately dismissed by the District Court on authority of State v. C. C., 449 So.2d 280 (Fla. 3d DCA 1983) en banc, approved (Fla. Case No. 64,354). This court accepted conflict jurisdiction and ordered this brief on October 21, 1985.

STATEMENT OF THE FACTS

On November 4, 1982 the child, R. A., was the driver of a car containing four passengers which was stopped by Metro-police for a traffic violation. (Vol. II, TR. 37-38). Officer Dworak, General Investigation Unit, responded as a back-up. Although in plain clothes, Dworak wore a police I.D. badge and a pistol. (Vol. II, TR. 38). Dworak testified that he recognized R. A. as the driver of the car. He and the traffic cop had all persons exit the vehicle. (Vol. II, TR. 39). As Dworak testified, he next looked in the car and saw what "appeared to be a marijuana cigarette," lying in open view on the console of the car. (Vol. II, TR. 40). Dworak asked R. A. if he could look in the car. He testified his reason for asking was, "Because I suspected the item lying on the console was contraband." When asked why he was suspicious the officer explained the cigarette was rolled up at the ends and that in his eight years as a police officer he had never seen "regular cigarettes" like these, but that such cigarettes "normally contain suspected marijuana." (Vol. II, TR. 42, 43).

Dworak continued by stating that he advised R. A. of his right to refuse consent to search, (Vol. II, TR. 43), but that R. A. verbally consented to a search and later gave his car keys to Dworak. (Vol. II, TR. 43). Dworak

opened the glove box and found a pistol with holster. (Vol. II, TR. 46). Dworak stated he then exited the car and asked, "...who the gun belonged to."[1] R. A. stated "Well, it's my gun." (Vol. II, TR. 50). According to R. A. he had found the gun inside a purse in a Burger King parking lot.

Officer Dworak subsequently checked the I.D. numbers on the gun and discovered it was reported as stolen. (Vol. II, TR. 51).

After confronting R. A. with this information, Dworak "Mirandized" the child and transported him to the police station. (Vol. II, TR. 53).

On cross-examination, Dworak admitted that he never asked permission to look inside the glove box specifically. (Vol. II, TR. 64). He further admitted that he wanted to look in the glove box prior to seizing the subject marijuana.

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[1] Defense counsel objected to R. A.'s statements to Dworak being admitted as evidence at the time Dworak first began testifying about the consent to search the car. (Vol. II, TR. 40). No pre-trial motion to suppress statements existed and the trial court said he would allow cross-examination on the issue of the voluntariness of the statements. Defense counsel agreed to this. (Vol. II, TR. 41). The trial court later explained he would not suppress any statement by R. A. since no motions to suppress had been filed (Vol. II, TR. 59).

At this point in time no further evidence was presented because the trial court decided to supress the evidence of the firearm on the basis of Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978). This concluded the February 9th hearing. (Vol. II, TR. 71).

The trial court had previously granted the child's motion to suppress the marijuana. (Vol. II, TR. 16). The court refused to hear testimony from the State on the events preceeding seizure of the cigarettes and the State had not proffered testimony on this point. (Vol. II, TR. 13, 14). Carr held that a policeman could not make a warrantless seizure of two cigarettes with twisted ends when the officer's only justification for the warrantless search was that he "knew they were marijuana cigarettes." Citing the general definition of probable cause the court held the facts known to the officer did not meet this standard. p. 959, supra.

On February 7, 1983 the Court dismissed the charge of carrying or manually possessing an unlicensed firearm, Section 790.05, Fla.Stat. (1981). Because of the amendments to the gun laws effective April 6, 1983, the State accepts the court's ruling as correct and does not appeal

the dismissal of Count III, carrying or manually possessing an unlicensed firearm. See 1982 Supplement to Florida Statutes 790.001(16); 790.25(3)(4)(5) and State v. Swoveland, 413 So.2d 166 (Fla. 2d DCA 1982)(footnote 3).

This appeal of the granting of the Motion to Suppress Evidence and the Dismissal of Counts I and II follows.

SUMMARY OF ARGUMENT

The State of Florida contends the actions of the trial court in refusing to allow the prosecutor to establish a basis supporting its opposition to R.A.'s motion to suppress evidence constituted a departure from the essential requirements of law. The trial judge prevented the prosecutor from producing evidence, via testimony from the arresting officers, which could have distinguished the case law relied upon by the child (and utimately the court) to argue lack of probable cause to arrest/search. Furthermore, the prosecutor was precluded from producing evidence tending to show the search and seizure was conducted under two distinct exceptions to the warrant requirement: (1) consent and 2) the New York v. Belton rule.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUPPRESSION OF TWO MARIJUANA CIGARETTES SEIZED FROM APPELLANT'S AUTOMOBILE, PURSUANT TO CARR V. STATE, 353 So.2d 958 (FLA. 2d DCA 1978), WITHOUT FIRST PERMITTING THE STATE OF FLORIDA TO ESTABLISH A FACTUAL BASIS UPON WHICH TO DISTINGUISH CARR AND SHOW IT TO BE NON-DISPOSITIVE OF THE ISSUE?

II

WHETHER THE TRIAL COURT ERRED IN GRANTING SUPPRESSION OF A FIREARM SEIZED FROM THE GLOVE BOX OF APPELLANT'S AUTOMOBILE ON THE THEORY THAT IT WAS FRUIT OF THE ILLEGAL SEARCH AND SEIZURE OF THE ABOVE-MENTIONED MARIJUANA WITHOUT FIRST ALLOWING THE STATE OF FLORIDA THE OPPORTUNITY TO PRESENT EVIDENCE TENDING TO SHOW:

(1) THE APPELLANT CONSENTED TO THE SEARCH OF THE AUTO AND

(2) THE SEARCH WAS INDEPENDENTLY VALID UNDER NEW YORK V. BELTON, BECAUSE THE OFFICERS HAD LEGALLY DETAINED THE APPELLANT FOR POSSESSION OF THE ABOVE-MENTIONED MARIJUANA?

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO HEAR TESTIMONY FROM THE STATE'S KEY WITNESS, OFFICER DWORAK, CONCERNING THE CIRCUMSTANCES GIVING RISE TO HIS BELIEF THAT HE HAD PROBABLE CAUSE TO SEIZE TWO CIGARETTES FROM APPELLANT'S AUTOMOBILE.

The State contends the trial court departed from the essential requirements of law in not considering the circumstances beyond the officer's observation of the cigarettes prior to suppressing the marijuana as evidence. The record reflects the court's belief that Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978) was controlling. The prosecutor disagreed and made the following proffer:

> MS. RIFKIN: It is factually similar. However, the other case law that also interprets Carr versus State says, there has to be some-- if that's all you see, there's no other corroborating evidence to determine that what you see in the car is marijuana, or contraband, then, of course, Carr versus State must stand. But, that is for your Honor to determine whether or not there are any corroborating circumstances. If I could proffer, in this case, the Police Officer looked inside, said, "What's that"? And, the child said, "That's mine." And, then, went on to say, "I don't want to get anybody else in trouble." But, then, the Officer said, "Can I search your car?" He said, "Yes." And, the Officer said, "Is there anything else I'm going to find? He said, "Well,

just a few roaches in the ashtray."

The State would contend that that is corroborating evidence, or other evidence to determine that the seizure of the marijuana at that point, was corroborated to be marijuana. In addition, the Police Officer's been on the force for quite a few years. He knows what marijuana cigarettes look like.

(Vol. II, TR. 13, 14).

If the State had been permitted to introduce such testimony it could have distinguished Carr.

The child's admission of ownership, his comment about "roaches in the ashtray" and the officer's status as a veteran who finds that most hand rolled cigarettes possessed by young people contain marijuana, would have shown this case to be more in line with the following: P.L.R. v. State, 435 So.2d 850, (Fla. 4th DCA 1983) approved 455 So.2d 363 (Fla. 1984); (Officer seizes a manila envelope from pocket of child's shirt because after seeing such envelopes one hundred times he has never seen them contain anything except marijuana. Held: sufficient probable cause); Albo v. State, 379 So.2d 648 (Fla. 1980) (Officers observation of thirty five square bales wrapped in burlap and black plastic inside rear of motor home combined with his experience in narcotices investigation equatedto probable cause to seize bales); State v. Redding,

362 So.2d 170 (2d DCA 1978) (Officer's training and experience coupled with his observation of small tin-foil packet inside defendant's discarded shoe gave probable cause to search packet for heroin or cocaine when discovered near individual who is dancing nude in the street) and Texas v. Brown, 103 S.Ct. 1535, 51 U.S.L.W. 4361 (U.S. April 19, 1983) (No. 81-419)(plurality opinion upholding seizure of balloons tied together in manner frequently utilized by drug smugglers when officer tied this observation to earlier sighting of vial of white powder near open package of balloons).

As stated in P.L.R. supra, "Hence as is true in virtually all of the cases that have approved seizures, the supporting circumstances beyond the officer's experience with the container in question appeared to play an important role in the appellate court's decision." p. 853. The actions of the trial judge in this case constitute an abuse of procedures set forth in case law for determination of probable cause. It is the failure of the trial court to allow the State of Florida to have its day in court - to allow the prosecution the chance to prove its case - which mandates reversal. The Petitioner is confident that the quashing of the District Court's Order of Dismissal with instruction to grant the writ will afford the State the opportunity to convince the trial judge that his reliance upon Carr v. State is in error.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SUPPRESSING AS EVIDENCE THE FIREARM SEIZED FROM THE GLOVE BOX OF APPELLANT'S CAR IN THAT: (1) THE SEARCH AND SEIZURE WAS MADE ONLY AFTER APPELLANT GAVE HIS VOLUNTARY CONSENT TO THE SEARCH AND (2) THE OFFICER'S PROBABLE CAUSE TO ARREST APPELLANT FOR POSSESSION OF MARIJUANA GAVE HIM AUTHORITY TO CONTINUE HIS SEARCH OF THE INTERIOR OF THE VEHICLE: NEW YORK V. BELTON.

The trial court's order suppressing the firearm was based on a finding that it was tainted fruit gathered after the seizure of the marijuana. (Vol. II, TR. 65, 66, 71). According to the trial court, Carr was the proper law for this situation. The trial court therefore ignored the pleas of the prosecutor to be permitted to continue examining the witness.[2]

As was argued above, the trial court's action in limiting the State's presentation of evidence and its application of Carr v. State, constitute a departure from the essential requirements of law.

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2 (Vol. II, TR. 68-71). This sets out what everyone thinks the facts are but never really allows the officer to testify as to what he saw and did.

First, the trial court ignored the State's evidence and supporting argument on the issue of consent to search. The State contends that it has sufficient facts on the issue of R. A.'s consent to meet its burden of showing clear and convincing evidence of voluntary consent from the totality of the circumstances. Taylor v. State, 355 So.2d 180 (Fla. 3d DCA 1978); State v. Mitchell, 377 So.2d 1006 (Fla. 3d DCA 1978). The trial court's refusal to address this issue on legal or factual grounds constitutes abuse of legal process. This order should be reversed and remanded for further hearings on the issue of voluntary consent. The Petitioner simply seeks a fair and full hearing on the merits of its case.

A second ground for reversing the trial court exists under the rule of New York v. Belton, __U.S.___, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). The facts indicate the officers had removed R. A. and the others from the car and that Officer Dworak had probable cause to arrest R. A. for possession of less than twenty grams of cannibas. The glove box was therefore fair game for search. (See Footnote 4 of Belton, 101 S.Ct. 2864). These errors are of a magnitude constituting a departure from the fair and orderly pursuit of justice. The orders should be reversed and remanded with instructions to the trial court to reinstate

Counts I and II, to allow the State to present a factual basis for its arguments prior to the court's ruling on the motions to suppress the firearm.

CONCLUSION

Based upon the above cited legal authorities, the State of Florida urges this Honorable Court to quash the order of the District Court and remand this case with instruction to grant the writ pursuant to above-stated arguments.

Respectfully submitted,

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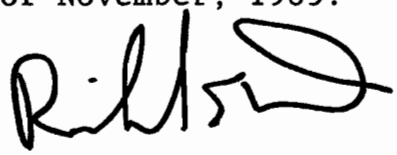
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was furnished by mail to **CESAR DE LE PUETE, Esq.**, 1040 S.W. 27th Avenue, Miami, Florida 33135, on this 14th day of November, 1985.



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