DA 11-6-84

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT EARL DILYERD,

Respondent.

CASE NO. 64,956

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts, but would add the following:

Neither the Respondent (the driver of the car), or his companion, were frisked by Deputy Harper before the deputy made a "bee-line" for the interior of Respondent's car. (R15-19,22-24).[1/]

1/ (R) refers to the record on appeal.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY REVERSED RESPONDENT'S CONVICTION AND SENTENCE AFTER DETERMINING THERE WAS NO BASIS UPON WHICH TO SUSTAIN THIS SEARCH AND SEIZURE, AS EITHER A PROTECTIVE SEARCH FOR WEAPONS OR A SEARCH BASED UPON PROBABLE CAUSE.

While it may seem basic to the point of absurdity, it bears mentioning that curiousity or suspicion alone does not give the police the right to make an unauthorized, warrantless search of a detainee's automobile. The opinion of the court below rests upon these five conclusions: One, the state and federal constitutions are paramount over the drug laws. Second, Florida's stop and frisk statute is not applicable because no probable cause existed to believe the Respondent or his companion had a weapon. Third, nor can the warrantless search of Respondent's vehicle be upheld as a search based on probable cause to believe it contained contraband, etc. Fourth, not every movement made by an occupant of a vehicle, in response to the approach of an officer, can serve as a predicate for a subsequent search. Fifth, this particular search has all the characteristics of a "hunting expedition"; notwithstanding the officer's assertion at the motion hearing.

The Fourth Amendment to the United States Constitution[2/] provides, in pertinent part:

[2/] Applicable to the states through the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

> The right to the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Florida Constitution contains a similar provision in Article I, Section 12, which sets forth not only the requirements to be observed in searches and seizures, but also the sanction to be imposed when there requirements are not met:

> [A]rticles of information obtained in violation of the right shall not be admissible in evidence.

The Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution are the private citizen's basic guarantees against unreasonable governmental searches and seizures.

Warrantless searches are per se unreasonable, subject only to a limited number of exceptions. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Hornblower v. State, 351 So.2d 716 (Fla. 1977). These exceptions are based on the proposition that a search is not "unreasonable" when it is:

> (1) based upon consent;
>
> (2) incident to a lawful arrest;

(3) based upon probable cause coupled with exigent circumstances;

(4) in connection with the seizure of an automobile for the purpose of a forfeiture proceeding;

(5) a bona fide inventory search;

(6) a protective "frisk" for weapons incident to an investigatory "stop". [3]

The State/Petitioner argues that Deputy Harper's search of the car was justified as a protective search for weapons, and that the same was based upon a well-founded concern that the Respondent and his companion were armed. Specifically, the Petitioner relies upon a certain movement by the companion to furnish the probable cause necessary to uphold the search under Florida's stop and frisk statute. [4] The Respondent contends that

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[3] For case authority on these exceptions, see Savoie v. State 422 So.2d 308,313 (Fla. 1982); Ulesky v. State, 379 So.2d 121,124 (Fla. 5th DCA 1979).

[4] Section 901.151, Florida Statutes (1981) provides:

(1) This section may be known and cited as the "Florida Stop and Frisk Law".

(2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, he may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding his presence abroad which led the officer to believe that he had committed, was committing, or was about to commit a criminal offense.

(Footnote continued)

the probable-cause conclusion argued by Petitioner is not supported by either Harper's investigative behavior on the night of September 5, 1981; or his testimony at the suppression hearing. The Respondent contends that the search of his car was not made by an officer possessing a reasonable belief, based on specific and articulable facts, that the detainees were dangerous.

(Footnote continued)

(3) No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purpose of that subsection. Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.

(4) If at any time after the onset of the temporary detention authorized by subsection (2), probable cause for arrest of person shall appear, the person shall be arrested. If, after an inquiry into the circumstances which prompted the temporary detention, no probable cause for the arrest of the person shall appear, he shall be released.

(5) Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of subsection (2) has probable cause to believe that any person whom he has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, he may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses such a weapon or any evidence of a criminal offense it may be seized.

(6) No evidence seized by a law enforcement officer in any search under this section shall be admissible against any person in any court of this state or political subdivision thereof unless the search which disclosed its existence was authorized by and conducted in compliance with the provisions of subsections (2)-(5).

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, the United States Supreme Court addressed the "quite narrow question" of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest". The Terry holding went as follows:

> "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encourter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him". U.S. at 30.

Florida has codified the Terry decision in Section 901.151, Florida Statutes (1981). Pursuant to Section 901.151, an investigative officer's right to search does not automatically follow once the right to detain is established. Schnick v. State, 362 So.2d 423 (Fla. 4th DCA 1978); Sanders v. State, 385

So.2d 735 (Fla. 2d DCA 1980). Instead, any subsequent search must be based on probable cause to believe that the detainee is armed with a dangerous weapon. Schnick, supra, at 425. The search of a detainee permitted by this statute is a "carefully limited" one. Brown v. State, 358 So.2d 596,601 (Fla. 2d DCA 1978).

As the Petitioner has correctly noted, the Supreme Court has recently expanded the scope of a legitimate Terry search to emcompass the passenger compartment of a suspect's car during an investigative detention. Michigan v. Long, ___ U.S. ____, 103 S.Ct. ____, 77 L.Ed.2d 1201,1220 (1983). However, the Court qualified this expansion by stressing that its decision did not mean that the police could conduct automobile searches automatically, or in the absence of "specific and articulable facts which taken together with the rational inferences from those facts, reasonably warrant the officers in believing the suspect is dangerous and may gain immediate control of weapons". Id. at 1220. The primary reason that Harper's search of Respondent's car cannot be upheld under Michigan v. Long, supra, is that an officer cannot magically turn a pretextual search into a protective search for weapons merely by his after-the-fact assertion that he was searching for weapons. Stated in a more colloquial manner, Harper's actions speak louder than his words.

The salient facts are that when Harper approached Respondent's parked vehicle, for the purpose of running its

occupants off private property, he saw that the passenger "appeared to be doing something with his hand on the floorboard of the car". Harper became suspicious. He ordered the occupants out of the car. When they complied, he made no effort to protect himself by performing a frisk of either occupant. Instead, he immediately went to the car and conducted a search of the passenger area. At the suppression hearing, Deputy Harper testified he searched the vehicle's interior to check for weapons. (R15) Yet on cross-examination he testified to the following:

> Q. At that point in time that you looked under the seat, had you checked on telteype to see if there were any warrants for their arrest?
>
> A. No, not at that time.
>
> Q. At the point that you looked under the, under the seat, had you made any decision as to whether they were going to be placed under arrest?
>
> A. Prior to looking under the seat?
>
> Q. Yes, sir.
>
> A. No.
>
> Q. Not made that decision as of yet?
>
> A. No, I had not.
>
> Q. When you approached the vehicle to obtain IB, waiting for Harrison to arrive,

did you approach the vehicle with your service revolver drawn?

A. No, I didn't.

Q. You did not have your weapon out at that time?

A. Right.

Q. All right. At the time you asked the individuals to exit the vehicle Harrison was there, correct?

A. Correct.

Q. Did you search either Mr. Dilyerd or Chappell before or after Deputy Harrison arrived?

A. I can't recall specifically, but as a general rule when I bring somebody out, I do a cursory pat-down.

Q. You don't, don't recall whether you did or not, because these were a couple of young boys?

A. It's a long time. I don't specifically recall whether I did or didn't.

Q. Do you recall whether Deputy Harrison did?

A. I wasn't paying attention.

* * * *

Q. When the other deputy was watching over him for you while you went inside the car, isn't it true they were far enough away from the interior of the vehicle they could not have reached inside?

A. I couldn't have reached inside, no.

Q. Your recollection now, you're not sure whether you searched or patted down Mr. Chappell either before or after you looked inside the car?

A. It's been a long time, And usually I do though. So I probably did.

Q. Do you recall, if you did, whether you would have found anything on Chappell's person?

A. I would have remembered if I had have, but I didn't.

(R15-19)

The passenger, Robert Chappell, Jr., also testified at the motion hearing held on April 23, 1982, to-wit:

Q. All right. Where were you when he started looking in the car?

A. I was standing behind him toward the rear of the car.

Q. But you specifically remeber the officer did not search you or put you down or frisk you before he looked in the car?

A. Yes, sir.

Q. Did you have a pocket knife or anything on you at the time?

A. Yes, I did.

Q. You were worried he might

find that and think it was a weapon, weren't you?

A. I really didn't know what to think.

Q. But he didn't find that, did he? Did you see whether or not the officer patted down or searched Mr. Dilyerd prior prior to going into the car?

A. Almost positive he didn't.

* * * *

(R22-24).

As the court below pointed out, a sudden gesture or movement on the part of a citizen does not necessarily give the police a right to stop and/or search based on probable cause. Even when the movement is a direct and obvious response to the appearance of a policeman, the mere fact that the officer becomes suspicious or curious is not sufficient. See, Stanley v. State, 327 So.2d 243 (Fla. 2d DCA 1976); Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974); Currens v. State, 363 So.2d 1116 (Fla. 4th DCA 1978). Consequently, the proper inquiry in the case sub judice is not whether Harper became suspicious, but whether he became suspicious that the detainees were armed and dangerous. Given the ambiguous gesture of the passenger (which was equally consistent with the possibility that a weapon was being reached for, rather than discarded), and Harper's failure to even frisk the passenger, it is highly unlikely that Harper was concerned the detainees were dangerous. (R23,24) Nor can this search be justified on the basis that the detainees were going to be

allowed to return to the car, since the search took place before the teletype check was made. (R15,16) Clements v. State, 396 So.2d 217 (Fla. 4th DCA 1981).

In support of its position that the hand movement by Respondent's companion necessarily raised an articulable suspicion that the detainees were armed and dangerous, the Petitioner relies heavily upon Brown v. State, 358 So.2d 596 (Fla. 2d DCA 1978); State v. Brown, 395 So.2d 1202 (Fla. 3d DCA 1981); Cheatem v. State, 416 So.2d 35 (Fla. 4th DCA 1982); State v. Patrick, 437 So.2d 217 (Fla. 4th DCA 1983); and Lyles v. State, 312 So.2d 495 (Fla. 1st DCA 1975). The Respondent initially contends that one vital distinction between these cases and the one sub judice is that only in his case does the record provide reason to question and reject the officer's testimony based upon examination of that officer's investigative actions.

In Brown v. State, supra, a convenience store clerk called the police to report that two men had been parked outside the store for over an hour. When officers responded to the scene the suspects became very nervous. Furthermore, the officers noticed a pronounced bulge in the waistline of one of the men. Upon approach, the passenger was seen to shove his hand under the armrest of the car. A pat-down of the passenger produced nothing, however officers retrieved a plastic bag containing heroin from underneath the armrest. Unlike the present case, in Brown v. State, the officers were dispatched to the scene of a potential robbery. And, once there, they conducted an

investigation in a fashion consistent with a concern for their safety based upon the location, the clerk's tip, observed nervousness, the waistline bulge, the frisk, and the furtive stuffing movement. This type of cautious police work is entirely lacking in the present case.

Also cited by the Petitioner, and relied upon by the trial court as well is State v. Brown, supra. There, the Third District held that furtive hand movements by both occupants of a car lawfully stopped, raised an articulable suspicion that the detainees were armed and dangerous. Two differences are worth noting. First, in Brown, the car was stopped and the subjects detained based on possible auto theft -- a serious offense. Second, because the opinion is silent on the matter, it can only be assumed that the investigating officer's stated "probable cause" was never questioned on the ground that his investigative technique was so casual or sloppy that it undermined the purported rationale the search was predicated upon.

In Cheatem v. State, supra, the defendant was properly stopped. While the officer was conducting a license investigation he noticed the defendant push a towel-wrapped object between the console and front seats. The officer ordered the defendant out of the car and discovered the towel was concealing a firearm. Unlike the present case, the defendant in Cheatem, was making a specific gesture toward a particular object and was seen pushing that object down to where it could not be seen.

In Stevens v. State, 354 So.2d 110 (Fla. 3d DCA 1978), the defendant ws similarly seen making repeated motions toward an object wrapped in a towel. The stop occurred during the early pre-dawn hours in a high crime area and the defendant appeared intoxicated. While these facts are distinquishable, and point toward the reasonable need for a probable cause weapons search, the court's willingness to infer that the officer was concerned for his safety is disturbing.

The case of State v. Patrick, likewise involves a situation where a sudden move of a detainee toward the glove compartment and to the middle of his seat prompted a search. Here, however, the officer conducted a frisk of the detainee before checking the armrest area of the car. In other words, the officer's actions are consistent with his assertion that he was concerned for his safety. Although supporting the search as one reasonable, under the facts, the Patrick Court noted:

> We realize that every sudden movement made by an occupant of a vehicle cannot serve as a predicate for a frisk and subsequent search. Here, however, the motion involved could have reasonably been considered by the officer to conceal or retrieve a weapon; and the officer's reaction thereto was therefore reasonable. Id. at 218.

In Lyles v. State, supra, an officer approached a parked car because it matched the basic description of a car reported stolen the day before. While the vehicle identification number of the car was being matched with that of the stolen car

the officer noticed the passenger make a motion with his left arm as if to conceal something under the armrest. The officer responded by reaching under the armrest where he retrieved a small plastic baggie of quinine and an envelope containing heroin. The First District upheld this search as a reasonable, protective reaction by the officer but expressed that an entirely different result would have been warranted had the record revealed the search to be pretextual in nature, to-wit:

> [1,2] Had the facts as presented in the record before us been slightly different, we would be forced to disagree with the State. If, for instance, the officers had no reason whatsoever to approach the parked car before initiating the search, the search would not be justified. But the record sub judice reveals that the description of the stolen car substantially matched the description of the car in which the appellant was sitting. Nor could we uphold a search where an officer observes a "suspicious movement" around the armrest and subsequently attempts to justify an extensive search of the entire automobile as a search for weapons as permitted by Terry v. Ohio, supra. Yet, the record before us indicates that Officer Kinard merely observed a movement by the appellant around the back seat armrest and immediately reached under the armrest (and only the armrest) in an attempt to discover weapons. Even though no weapon was discovered, it is the reasonableness of the officer's belief that governs and not the actual existence of the weapon. (Webster v. State,

> Fla.App. 4th 1967, 201 So.2d 789). The record, therefore, supports the trial court's denial of the motion to suppress. (emphasis supplied).

Id., at 496.

Based on the record sub judice, the Respondent submits this search was conducted without probable cause to believe he and his companion were armed and dangerous. Consequently, no basis existed to justify this search. Sanders v. State, supra.

CONCLUSION

BASED UPON the argument and authorities presented here, the Respondent requests this Honorable Court to affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32015; and mailed to Robert Earl Dilyerd, 709 Vandergrift Drive, Ocoee, Florida 32761, on this 6th day of August, 1984.

David A. Henson

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