IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
ROBERT EARL DILYERD,
Respondent.

5DCA CASE NO. 82-1127
FSC CASE NO. 64,956



# PETITIONER'S JURISDICTIONAL BRIEF

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## TOPICAL INDEX

## AUTHORITIES CITED

## STATEMENT OF THE CASE AND FACTS

The defendant, Robert Dilyerd, (hereinafter referred to as Respondent) along with Robert Chappell (hereinafter referred to as co-defendant) was charged with possession of cocaine pursuant to §893.13(1)(a)(1) Fla. Stat. (1981) (R 55). Respondent filed a motion to suppress which was denied by the circuit court after a hearing (R 1-35, 115). Thereafter Respondent entered a plea of no contest, specifically reserving his right to appeal the denial of his motion to suppress (R 47-48). Respondent then took a timely appeal after being sentenced (R 120). The Fifth District Court of Appeal in Dilyerd v. State, ___ So.2d ___, (Fla. 5th DCA 1984) (Case No. 82-1120) held that the trial court erred in denying the motion to suppress the controlled substance, reversed the conviction, and ordered Respondent discharged.

The facts were as follows: Deputy Harper, in his marked patrol cruiser approached a blue Ford automobile which was parked on private property owned by the Doctor Phillips Company (R 11, 12, 19). This company had requested the police to patrol the area because it had prior problems with teenage trespassers (R 12).

As Deputy Harper approached the parked vehicle, he observed the front passenger lean forward and he "appeared to be doing something with his hand on the floorboard of the car." (R 13). Deputy Harper called for a backup deputy at this point (R 13). Identification was obtained from the two individuals

in the vehcile; the driver was the Respondent and the passenger was the co-defendant (R 13, 14). Both individuals were asked to and did exit the vehicle after Deputy Harrison arrived (R 14). At this point, Harper looked under the front passenger seat where he had seen the furtive movements to check for weapons (R 15). The deputy found the cocaine which was the subject of the motion to suppress (R 14). During this search and seizure, the Respondent, as well as the co-defendant, was outside of the car and being watched by the other deputy (R 15). Deputy Harper testified that normally he would not arrest teenagers who were trespassing and would have let them go and would have done so in this case but for the search revealing a controlled substance (R 20).

## POINT

THERE IS DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION OF DILYERD V. STATE, ___ SO.2D ____, (FLA. 5TH DCA 1984) (CASE NO. 82-1127) AND THE DECISIONS OF STATE V. BROWN, 395 SO.2d 1202 (FLA. 3D DCA 1981) AND STATE V. STEPHENS, 354 SO.2D 110 (FLA. 3D DCA 1978) ON THE SAME QUESTION OF LAW.

## ARGUMENT

This Honorable Court in Jollie v. State, 405 So.2d 418 (Fla. 1981) acknowledged that the case of Lake v. Lake, 103 So.2d 639 (Fla. 1958) applied to the 1980 amendment of Florida Rule of Appellate Procedure 9.030(2)(A)(iv). The rule as amended in 1980 states:

> The discretionary jurisdiction of the Supreme Court may be sought to review decisions of district courts of appeal that: ...expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law; ...

The Supreme Court in Lake, supra, maintained that discretionary review in this instance would be granted not as a second appeal or to appease the individual litigants but only where a question of policy and precedent would be the concern. The court held that the polestar is uniformity of decisions. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958) dealt with the same issue of discretionary review where there was direct conflict with a decision of another district court of appeal. The Supreme Court in Ansin noted that:

> A limitation of review to decisions in "direct conflict" clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.

The court went on to explain that the Supreme Court's function in exercising this discretionary review was to settle issues of public importance and preserve the uniformity of principle and practice in certain specified areas. The Supreme Court continued that decisions that would be accepted for review under this policy must also be based practically on the same state of facts and announce antagonistic conclusions. Based upon the aforementioned policies, Petitioner submits that the decision of the Fifth District Court of Appeal in Dilyerd v. State, ___ So.2d ___ (Fla. 5th DCA 1984) (Case No. 82-1127) has the same state of facts and announces antagonistic conclusions under §901.151 Fla. Stat. (1981) as opposed to the decisions in State v. Brown, 395 So.2d 1202 (Fla. 3d DCA 1981) and State v. Stephens, 354 So.2d 110 (Fla. 3d DCA 1978). Furthermore, Petitioner submits and will demonstrate that this conflict creates a disparity in precedents and a lack of uniformity which will have serious ramifications for trial judges attempting to apply the law on the same set of facts.

In State v. Brown, 395 So.2d 1202 (Fla. 3d DCA 1981) the state appealed from an order suppressing evidence. The Third District reversed the trial court and remanded the case back to the circuit court. The facts were: The defendant was

lawfully stopped by a policeman and subjected to a valid temporary detention based upon an articulable suspicion of auto theft and driving with an expired license plate pursuant to §901.151 Fla. Stat. (1981). There were furtive movements of both defendants under the car seat during the police investigation. The Third District held that these movements were tantamount to an articulable suspicion that the defendants in the car were armed and dangerous which in turn justified the subsequent search by the police officers under the seat where the movements had been seen. Pursuant to this search the police officers seized two guns. Significantly, these guns were seized after the police officers had removed both defendants from the car which is exactly what happened in the Dilyerd, supra case. The Third District held that the search was reasonable under the Florida "stop and frisk statute" (§901.151 Fla. Stat. (1981)).

In State v. Stephens, 354 So.2d 110 (Fla. 3d DCA 1978), the defendant appealed from an order denying his motion to suppress evidence. The Third District affirmed the trial court's order denying the motion. The facts were: The defendant was stopped by a police officer as the defendant was getting into his car in an apparent intoxicated condition in a high crime area in the early morning hours. While the defendant was checking and searching for his driver's license, the police officer observed the defendant making motions toward an object wrapped in a towel and concealed in the front seat of

his car. At the direction of the first police officer, another police officer went to the other side of the car and saw that the object under the towel was a short barreled shotgun. The officer did not articulate that he was fearful that the defendant had a weapon. The Third District held that the facts are such that the police officer was reasonably justified in conducting a search to protect his person.

The Fifth District in Dilyerd stated the following in relation to the conflict with Brown, supra.

> We recognize a conflict with State v. Brown, 395 So.2d 1202 (Fla. 3d DCA 1981), but suggest that the authorities cited therein do not squarely support the Court's holding.

In addition, the Fifth District Court acknowledged direct conflict with the decision in Stephens, supra, by stating:

> The Court declared in Stephens: "While the officer did not articulate that he was fearful that the defendant had a weapon, the facts of this case are such that he was reasonably justified in conducting the search to protect his person." Since the officer was not concerned about the defendant's having a weapon, and the other facts set out in the opinion do not lead to any probable cause regarding a crime or contraband or weapon, we must assume that there were other facts. If not, then we are also in conflict with Stephens.

There are no other facts in the Stephens decision enumerated in the opinion. Furthermore, the doctrine under Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965) has been abolished by the 1980 amendment to Fla. R. App. P. 9.030(2)(A)(iv). Since

the polestar of discretionary jurisdiction in review of conflicting cases is uniformity and this Honorable Court will no longer delve into the "record proper" to determine if there is conflict, it would not be proper to go underneath the decision in Stephens and look for facts on the "record proper".

By virtue that these decisions are based practically on the same state of facts and announce antagonistic conclusions regarding whether or not police officers who have made a valid stop pursuant to §901.151 Fla. Stat. (1981) can validly search or not, it is clear that these conflicting decisions must be reviewed to maintain uniformity in the law of Florida.

## CONCLUSION

Based on the argument and authorities cited herein, Petitioner respectfully prays this Honorable Court exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to David A. Henson, Esquire, Assistant Public Defender, 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014-6183, this 27th day of February, 1984.

W. Brian Bayly

Of Counsel for Respondent
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