OA 11-6.84



IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

ROBERT EARL DILYERD,
Respondent.

CASE NO. 64,956

# PETITIONER'S REPLY BRIEF ON MERITS

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## PRELIMINARY STATEMENT

The symbol "R.B." will be utilized by Petitioner to refer to Respondent's Brief on the Merits.

## POINT

THE TRIAL COURT WAS CORRECT IN SUSTAINING THE SEARCH CONDUCTED BY THE OFFICER PURSUANT TO SECTION 901.151(5), FLA. STAT. (1981) AND THE FIFTH DISTRICT COURT OF APPEAL'S OPINION OVERTURNING THAT FINDING WAS ERRONEOUS AS A MATTER OF LAW AND SHOULD BE OVERRULED.

Respondent maintains that the ruling of the Fifth District Court of Appeal in Dilyerd v. State, 444 So.2d 577 (Fla. 5th DCA 1984) should be upheld based upon Deputy Harper's actions. Specifically Respondent contends:

> Given the ambiguous gesture of the passengers (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. (R.B. 11).

Respondent's argument is essentially that if the deputy was not concerned with the detainees retrieving a weapon then he would, likewise, not have a reasoable apprehension that the Respondent placed a weapon under the seat. The inference from this argument is that if the deputy were really concerned for his safety he would have frisked the detainees after they were removed from the car as well as check underneath the passenger seat. Petititioner submits that the deputy's search was reasonable because it would be more likely that one would want to hide some-

thing from a deputy inside a car rather than carry it on his person. But, more importantly, the Fifth District Court in Dilyerd did not examine this argument. Rather the Fifth District reached the opposite conclusion and maintained:

> The safety of the officers was established when the persons were required to move outside the car and away from the supposed danger zone. (444 So.2d at 579).

In any event the facts belie this argument. Deputy Harper summoned an assistant deputy before he approached the car. He obtained identification from the two persons in the car and waited for Deputy Harrison to get to the scene (R 13). The two boys were not asked to exit the vehicle until Deputy Harrison had arrived. Deputy Harrison arrived to assist only thirty seconds after Deputy Harper had asked the boys for identification (R 14). It was only after Deputy Harrison arrived that the boys were required to exit the vehicle (R 14). During the period that Deputy Harper checked under the seat, Deputy Harrison was watching the two boys (R 15).

In McDaniel v. Wainwright, 226 So.2d 857 (Fla. 1st DCA 1969) the First District held that a trial court's judgment comes clothed with a presumption of correctness (where the trial court denied a motion for judgment of acquittal and was affirmed). In the case at bar the trial

court's finding that the officer was acting to ensure his safety is likewise clothed with a presumption of correctness. The fact that the deputy called for assistance and had Deputy Harrison watch the two young men while he searched the car would certainly support the finding of the trial court that indeed Deputy Harrison was searching the car to ensure his safety, especially since the search was limited to underneath the seat where he saw the passenger make the furtive movement (R 14).

Respondent also argues that the search should not be justified on the basis that the two young men were going to be allowed to return to the car, since the search took place just before the deputy made a teletype check to determine if there were any outstanding warrants on either of the detainees. (R.B. 12-13). Again, Petitioner would reiterate that the Fifth District did not address this question because the safety of the deputies was established as soon as the two detainees were removed from the automobile. 444 So.2d at 579. Respondent would emphasize that no full custodial arrest had occurred nor would it be necessary for the deputy to weigh the probability of whether both these detainees would have outstanding warrants before he made his cursory search underneath the automobile seat. The deputy testified that it generally was his practice to check the identification

of trespassors on this property and then order them off the property. This action is what the deputy intended to do with Respondent and the other young man. (R 19,21). It certainly would not be unreasonable for an officer to assume that there would not be two outstanding warrants or more for each of the detainees. The search is predicated upon the furtive gesture of the passenger when the deputy approached the vehicle; not the potential of whether both of these young men had outstanding warrants for each of them.

In Segura v. United States, ___ U.S. ___ (1984) (35 Cr.L.R. 3298, case no. 82-5298, 7/5/84) it was held that an illegal entry to a dwelling, where there was probable cause to enter the dwelling but a search warrant was not obtained until after the dwelling was secure, would not require suppression of the evidence found within the dwelling. The Supreme Court held that the action of the police officers was so attenuated as to dissipate the taint of the initial illegal entry. Assuming for the sake of argument in the present case that it was incumbent upon the deputy to determine that there were no outstanding warrants before searching underneath the automobile seat, Appellee would submit that the deputy would have had a right to search the automobile whether or not there were outstanding warrants against both detainees. Therefore,

the doctrine of "fruit of the poisonous tree" would not apply. In New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d. 768 (1981) it was held that a search of an automobile incident to the lawful arrest may include a complete search of the passenger compartment including examination of contents of any containers found therein. So if both detainees were arrested for outstanding warrants the deputy under the authority of Belton, supra would have had a right to search the passenger compartment of the automobile.

Respondent distinguishes Dilyerd from Brown v. State, 358 So.2d 596 (Fla. 2d DCA 1976) and State v. Brown, 395 So.2d 1202 (Fla. 3d DCA 1981) based upon the reason for the stop; suspicion of robbery in Brown v. State and grand theft in State v. Brown. In Michigan v. Long, ___ U.S. ___ 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) the initial traffic stop was based upon a suspicion that the defendant was driving while intoxicated. In Cheatem v. State, 416 So.2d 35 (Fla. 4th DCA 1982) the initial Terry stop was based upon a traffic infraction. In State v. Patrick, 437 So.2d 217 (Fla. 4th DCA 1983) the Terry stop was again based upon a motor vehicle infraction. The degree or seriousness of an offense may be a factor but certainly is not a distinguishing factor as to when a police officer may make a Terry search.

Respondent attempts to distinguish the case of Cheatem from the case at bar because the police officer in Cheatem saw the defendant pushing an object down in the automobile where it could not be seen (R.B. 13). Petitioner submits that the police officer actually seeing the object that is being concealed is not a prerequisite to the reasonableness of his belief of whether the detainee is armed and dangerous. In State v. Brooks, 281 So.2d 55 (Fla. 2d DCA 1973) the police officer's frisking of two Terry suspects was upheld even though the police officer never saw any object. The stop and search was based upon the facts that the officer heard a gun shot at four a.m. in a high crime area and the two suspects were the only persons in the area and denied hearing a gun shot. The reasonableness of a frisk is based upon the totality of the circumstances and not just certain delineated facts. It must be remembered in the case at bar that this incident occurred at night time (R 11). The specific area involved was described as an area with a few paved streets surrounded by orange groves. The streets were mostly dead ends. The area was going to be developed but had not been developed as of yet. (R 11-12). Petitioner submits that these latter factors along with the fact that the deputy saw the passenger lean forward and appear to do something with his hand on the floor board

of the car as the deputy approached would, under the totality of the circumstances, certainly give the officer reason to suspect that the detainees were armed and dangerous.

Petitioner submits that Respondent's reliance upon Clements v. State, 396 So.2d 217, 218-219 (Fla. 4th DCA 1981) is also misplaced. The facts in the case at bar are predicated upon the furtive gesture of the detainee underneath the automobile seat; not on any prior information received by the deputy. In Clements the evidence was suppressed because under the totality of the circumstances the police officer had no reliable information nor did he see any furtive gestures indicating the presence of a weapon in a particular and accessible area of the vehicle.

Petitioner submits that the distinctions made by Respondent between the case at bar and other cases are not the distinctions that the Fifth District Court of Appeal based their opinion on in Dilyerd. In any event the distinctions are based on singular facts rather than the totality of the circumstances. Viewing the present case from the latter standard, it is clear that the Fifth District Court of Appeal opinion in Dilyerd should be overruled.

## CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery to David A. Henson, Esquire, Assistant Public Defender for Respondent, this 15th day of August, 1984

W. BRIAN BAYLY
Of Counsel for Appellee.