W00A

IN THE SUPREME COURT

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY DEAN IAFORNARO,

Respondent.

CASE NO. 65,127

RESPONDENT'S BRIEF ON MERITS

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Pursuant to telephone call 3-4-85
an appendix will not be filed.

TOPICAL INDEX

AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On or about November 12, 1982, the Appellee filed a Motion to Dismiss under Rule 3.190(b). (AP 1). On December 27, 1982, the Court heard said Motion in Chambers, without a court Reporter. (AP 1). The Court reserved ruling at that time. (AP 1).

The facts of the case stipulated to pursuant to Rule 9.200 (a)(3), Florida Rules of Appellate Proecedure, were as follows:

On September 6, 1982, the Appellee was stopped by a police officer for running a red light. After obtaining the Appellee's driver's license and registration, the police officer requested that the Appellee submit to a field sobriety test. The police officer was not satisfied with the results of the field sobriety test and advised the Appellee to place his hands on the car so that a pat down could be conducted. The Appellee backed up and fled. (AP 1).

The reason for the difference between the officer's report (SR. 21) and the Stipulated Facts contained in AP 1 was due to the Assistant State Attorney's supplemental knowledge that an arrest had not been perfected because the officer had not "placed the Appellee under arrest", but had merely told him "to place his hands on the car. . . " (AP 1). This is substantiated

by the Assistant State Attorney's handwritten acceptance of the Stipulation of Facts of the Case filed April 18, 1983. (AP 1).

Throughout this brief, the abbreviation (R) shall represent the Record on Appeal; the abbreviation to represent the Supplemental Index shall be (SI), and the abbreviation for the Appendix shall be (AP).

ISSUE

THE APPELLEE, UNDER THE FACTS OF THIS CASE, WAS IMPROPERLY CHARGED WITH ESCAPE SINCE HE WAS NOT UNDER ARREST, NOT IN LAWFUL CUSTODY, NOR WAS HE BEING TRANSPORTED TO OR CONFINED WITHIN ANY PENAL INSTITUTION.

The State begins their brief assuming the correctness of Officer Albert's assumption that he had "placed the Defendant under arrest." (State's Brief Page 2). This assumption is refuted by the same Assistant State Attorney charged with the responsibility of prosecuting this case. The term "placed under arrest" is more than a statement of words. It is a legal term requiring certain elements which were lacking in this particular case.

In order to perfect a "lawful arrest", the following elements must be present:

> "(a) a purpose or intention to effect an arrest under real or pretended authority; (b) an actual or constructive seizure or detention of any one person by another having present power to control the person arrested; (c) a communication by the person making the arrest to the person whose arrest is sought of an intention or purpose then and there to effect an arrest; and (d) an understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him." 14 Fla. Jur. 2d, Criminal Law, Section 371.

In this situation, the Stipulated Facts of the Case, filed April 18, 1983, clearly leave out any reference to an existing "lawful arrest" or "lawful custody". (AP 1). Since the Stiuplated Facts of the Case do not reflect an arrest or custody, the Appellee could not be a "prisoner" as suggested by the State. (State's Brief Page 2).

Assuming arguendo, the officer had used the words "you are under arrest", the facts clearly show that the officer did not have the present power to either actually or constructively control the Appellee.

If the State's theory were upheld in this case, it would effectively judicially legislate out of existence the current Resisting Arrest Without Violence Statute, Chapter 843.01, Florida Statutes. It is clear that the legislature intended Chapter 944.40, Florida Statutes, to apply to those situations where a citizen's liberty has been clearly curtailed, not in a situation where an "on the street apprehension" is being attempted.

The State contends that as recently as last year, the United States Supreme Court distinguished the concepts of actual physical restraint and lawful custody in the Fourth Amendment Case of Florida v. Royer, ____ U.S. _____, 103 S.Ct. 1319 (1983). This case had nothing to do with distinguishing the concepts of actual physical restraint and lawful custody,

but was in fact a Fourth Amendment case involving the legality of a search. Royer had been taken into a tiny room after his driver's license and air line ticket had been taken from him and it was clear that he neither had the ability nor the opportunity to flee because he was in custody.

In the case sub judice, the Appellee was neither restrained, in custody, nor was his ability to leave the area curtailed. (SI 1).

> ". . .whether an arrest has occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved. When an arrest occurs depends in each case upon an evaluation of all the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers. United States v. Johnson, 627 F.2d 753, 755 (1980).

Next, the State cites State v. Williams, 444 So.2d 13 (Fla. 1984). This case has absolutely no relevance to the case at bar since it concerns someone who was clearly a prisoner, having been convicted and incarcerated in the State Penal System.

The State next argues about the process of transporting a prisoner to a place of lawful confinement. Assuming, arguendo, that the Appellee had been told he was under arrest, the officer was obviously too far away from the Appellee to perfect any such arrest.

I believe this Court can take judicial notice of the fact that when a prisoner is being forced to "assume the position" for a pat down, the officer is normally in close proximity to the arrestee. On the other hand, if a police officer is far enough away from a potential arrestee to where he is chasing him while commanding the arrestee to "Stop, you are under arrest!", he can hardly be said to have the power to actually or constructively seize, detain or control the person to be arrested.

The State cites numerous cases where the arrestee's freedom has been clearly curtailed. In Estep v. State, 318 So.2d 521 (Fla. 1st DCA 1975), the defendant was already in jail; Johnson v. State, 357 So.2d 203 (Fla. 1st DCA 1978), the defendant had already been transported to jail facilities and therefore had been in lawful custody prior to his escape from a hospital emergency room; Watford v. State, 353 So.2d 1263 (Fla. 1st DCA 1978), the defendant was already being confined, and Brochu v. State, 258 So.2d 286 (Fla. 1st DCA 1972), the defendant was being confined in a county convict camp. All of these cases are clearly distinguishable since each arrestee was either being transported to or was confined in a penal institution.

On the other hand, in State v. Akers, 367 So.2d 700 (Fla. 2nd DCA 1979), a third party obstructed the arresting officer after he had handcuffed Akers. This case is obviously distinguishable because in Akers, supra, the arrest had clearly been completed and at least, momentarily, the officer prossessed the prsent power to control Akers prior to being distracted.

The State seeks an iron-clad rule which would establish at which point a prisoner commences to be transported to a place of confinement.

This may be an amicable goal. But, common sense dictates that before you can transport something or someone, you must have that something or someone within your custody.

In the case of Ramsey v. State, 442 So. 2d 303 (Fla. 5th DCA 1983), three of the most astute judges in the Fifth District Court of Appeal unanimously concluded that even when an arrestee had been told that he was under arrest, but had not been handcuffed or in any other way confined, and the arrestee still chose to run, his conduct did not violate Section 944.40, Florida Statutes.

As the State concedes, the escape statute is subject to strict construction. United States v. Standard Oil Company, 384 U.S. 224, 16 L.Ed.2d 492, 86 S.Ct. 1427 (1966). (State's Brief - Page 8). The State has chosen to utilize dicta from

this case and to take said dicta out of context. A careful reading of Standard Oil, supra, reveals that it is a case dealing with refuse matter discharged into navigable rivers. One thing the Supreme Court did in Standard Oil supra, was to trace the legislative history of the Act involved. The Act was the Rivers and Harbors Act which has nothing to do with arrests and/or escape.

Since the State did not obtain the services of a Court Reporter, there is no record available for this Court to rule upon other than the Stipulated Facts. Rule 9.200(b)(3), Florida Rules of Appellate Procedure. The record before this Court totally substantiates the Appellee's position "The burden to insure that the record is prepared and transmitted in accordance with these Rules shall be on the Petitioner or Appellant." Rule 9.200(c), Florida Rules of Appellate Procedure.

CONCLUSION

Based upon the facts contained in the Stipulated Facts of the Case prepared pursuant to Rule 9.200(b)(3), Florida Rules of Appellate Procedure, there can be no question that the Appellee was not under lawful arrest, was not in lawful custody, and was not being transported to any police facility at the time he fled. As such, none of his conduct constituted a violation of any of the provisions of Section 944.40, Florida Statutes. To the contrary, the Appellee clearly resisted arrest without violence and to find this conduct in violation of Section 944.40, Florida Statutes would amount to judicial legislation eliminating the Resisting Arrest Statute, Chapter 843.01, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Merits has been furnished, by mail, to MARK C. MENSER, Assistant Attorney General, Fourth Floor, Daytona Beach, Florida 32014, this 7 day of August, 1984.

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