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IN THE SUPREME COURT OF FLORIDA

ROBERT ARTHUR DELANA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,365

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF OF THE MERITS

PRELIMINARY STATEMENT

Petitioner, RobertArthur Delana, was the defendant in the trial court and the appellant in the District Court of Appeal, First District. Respondent, the State of Florida, was the prosecution in the trial court and appellee in the court below. References to the parties will be as they appear before this Court.

References to the Record on Appeal, Volume I, which contain the legal documents filed in this cause, will be designated "(R-)." References to the Record on Appeal, Volume II, which contains the transcript of testimony and proceedings at trial, will be designated "(T-)." References to the Appendix attached hereto will be designated "(A-)."

All emphasis is supplied by respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's Statement of the Case and Facts.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT OF APPEAL INCORRECTLY HELD THAT THE TESTIMONY FROM THE STORE EMPLOYEE REGARDING PETITIONER'S REFUSAL TO SIGN THE RIGHTS FORM DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE TESTIMONY FROM THE STORE EMPLOYEE REGARDING PETITIONER'S REFUSAL TO SIGN THE RIGHTS FORM DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

Petitioner argues that employees of a grocery store are, for purposes of the Fifth Amendment[1], law enforcement agents of the government. The Florida District Court of Appeal, First District, rejected this argument but certified the question as being in conflict with Jones v. State, 434 So.2d 337 (Fla. 3rd DCA 1983)(disc. rev. granted August 10, 1983). The decision in Jones is in direct conflict with Williams v. State, 347 So.2d 472 (Fla. 1st DCA 1977), cert. discharged, 476 So.2d 846 (Fla. 1979), and was also certified for review by this Court.

Respondent submits that the lower court's reliance upon Williams v. State, supra, was correct because petitioner's argument is contrary to the plain language of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Burdeau v. McDowell, 265 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); and the subsequent case law. Petitioner contends

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[1] The Fifth and Fourteenth Amendments, United States Constitution; Article I §9 and §16, Florida Declaration of Rights. For purposes of this brief the term "Fifth Amendment" will conotate both federal and Florida standards.

that the creation of §812.015, Fla. Stat. (1981), was an attempt by the legislature to vest merchants and farmers with police powers. Respondent submits that the right to silence applies only in the face of police or government custodial interrogation and, that a merchant is not a government agent although Florida law allows them to briefly detain suspected shoplifters.

The privilege against self-incrimination in the face of government accusation has been established under the United States and Florida Constitutions. Miranda, supra; Bennett v. State, 316 So.2d 41 (Fla. 1975). The nation's highest court has long maintained that the Fourth and Fifth Amendments protect the accused in federal court only from actions of the government. Burdeau v. McDowell, supra. The primary tool of enforcement of those rights is the Exclusionary Rule which is "a restraint upon the activities of sovereign authority," and not, as suggested by petitioner, "a limitation upon other than governmental agencies." Burdeau 256 U.S. 475. See also, United States v. Goldberg, 330 F.2d 30, 35 (3rd Cir. 1964); United States v. Ashby, 245 F.2d 684, 686 (5th Cir. 1957); Compare Evalt v. United States, 359 F.2d 534, 542 (9th Cir. 1966).

Under Miranda a police officer is required to give certain warnings to a suspect he has taken into custody, 384 U.S. at 439, 86 S.Ct. 1609, however, neither Miranda

nor subsequent federal or state law has extended the requirement of giving such warnings to embrace actions of private citizens. In United States v. Antonelli, 434 F.2d 335 (2nd Cir. 1970), the defendant confessed his crime to a private security guard who had searched the trunk of defendant's car and discovered recently stolen property. The defendant sought to have his confession suppressed because he had not been given his Miranda warnings, but the court found no connection between the guard and any law enforcement agency. Addressing the merits the court stated:

> It is suggested that certain language in Miranda bespeaks an expansive reading to be given the rules promulgated by the Supreme Court to protect criminal defendants' Fifth and Sixth Amendment rights. See, e.g., 384 U.S. at 467, 86 S.Ct. 1602. However, the Fifth Amendment privilege against self-incrimination does not require the giving of constitutional warnings by private citizens or security personnel employed thereby who take a suspect into custody. Beyond that, the discussion in parts I and II of the Miranda opinion, 384 U.S. at 445-466, 86 S.Ct. 1602, which leads up to the passage relied upon and was designed to demonstrate that interrogation may be compulsive even when there is no legal power to require an answer was concerned solely with activity by the police or other "law enforcement officers," 384 U.S. at 461, 86 S.Ct. 1602, or government agencies. A private security guard stands no differently from the

> private citizen who has employed him. It would be a strange doctrine that would so condition the privilege of a citizen to question another whom he suspects of stealing his property that incriminating answers would be excluded as evidence in a criminal trial unless the citizen had warned the marauder that he need not answer.

434 F.2d at 337. Thus, the Court held that where there is no police or custodial interrogation, no Miranda warnings need be given. 434 F.2d at 337-338.

The federal courts have consistently followed Antonelli; United States v. Bagaric, 706 F.2d 42, 69 (2nd Cir. 1983); United States v. Soloman, 509 F.2d 863, 868 (2nd Cir. 1975); United States v. Bolden, 461 F.2d 998 (8th Cir. 1972)(per curiam); United States v. Veatch, 674 F.2d 1217 (9th Cir. 1981); United States v. Franklin, 704 F.2d 1183, 1190 (10th Cir. 1983); McAllister v. Brown, 555 F.2d 1277 (5th Cir. 1977), and state courts have followed suit: Truex v. Alabama, 210 So.2d 424 (Ala. 1968); People v. Moorehead, 259 N.E.2d 8, cert. den., 400 U.S. 945 (1970); Leaver v. State, 237 N.E.2d 368, cert. den., 393 U.S. 1059 (1969); State v. Peabody, 320 A.2d 242, (ME. 1974); In re Simmons, 210 S.E.2d 84 (1974); State v. Watson, 252 N.W.2d 305 (1969); and People v. Frank, 275 N.Y.S.2d 570 (1966).

In Williams v. State, supra, the District Court of Appeal, First District, was presented with a situation where a possible shoplifter was confronted by a merchant who took her into custody and asked to talk to her in his office. At trial, the merchant testified that the defendant "neither denied nor admitted the charge." The First District affirmed the trial court's denial of defendant's Motion for Mistrial which was based on the claim that her Miranda rights had been violated:

> Miranda deals only with police custodial interrogation. We do not consider that the doctrine pronounced in Miranda by the United States Supreme Court in relation to police custodial interrogation should be broadened and extended to include the circumstances such as those present in the case sub judice which does not involve police custodial interrogation. The manager's testimony that "she neither denied nor admitted the charge" means only that she did not volunteer any information one way or the other and properly relates to her unexplained possession of recently stolen property. Such testimony was admissible since appellant's silence was not silence in the face of police custodial interrogation. Affirmed.

347 So.2d at 473. However, in Jones, supra, the Third District relied on Chief Judge Rawls' dissent in Williams:

> The majority has agreed with the State's argument that appellant was not under arrest by a law enforcement officer, and Miranda's "custodial interrogation" principle refers to "police custodial interrogation" and thus is not applicable. By enactment of §901.34, Fla. Stat. (1975), the Florida legislature conferred the authority of the sovereign upon:
>
> "...a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody, may for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner...." (emphasis supplied)
>
> Here, the "merchant", acting with this grant of sovereign authority, took appellant into his custody and interrogated her; thus, the custodial interrogation was conducted in a police-like atmosphere pursuant to the sovereign's grant of such power. Under the circumstances reflected by this record, it is my opinion that the trial court committed fundamental error in denying appellant's motion for mistrial. (Footnotes omitted).

347 So.2d at 473-474. Judge Rawls cited three cases, two of which dealt with police custodial situations. Bennett v. State, 316 So.2d 41 (Fla. 1975); Jones v. State, 200 So.2d 574 (Fla. 3rd DCA 1967). The third case, Peak v. State, 342 So.2d 98 (Fla. 3rd DCA 1977), concerns the voluntariness of a confession made to store employees and did not deal with a Fifth Amendment claim. Relying on Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and Chambers v. Florida, 309 U.S. 227, 60 S.Ct.

472, 84 L.Ed. 1716 (1940), the Third District Court held that all involuntary confessions are inadmissible. Of course, neither Ms. Williams nor petitioner claimed that they were victims of duress. Thus, Peak is inapplicable as involving only fundamental due process protections and not Fifth Amendment violations. It follows that the Third District's reliance upon Judge Rawls' dissent in Williams was ill advised, especially in light of this Court's discharge of the Writ of Certiorari issued in Williams. It must also be noted there is no language of the Bennett and Jones decisions cited by Judge Rawls which would support an extension of the Miranda doctrine to action by private citizens, and the same is true of any attempt to extend Peak. Therefore, Peak is clearly inapplicable and not in conflict with Williams, Jones, or Delana. See Edwards v. State, 381 So.2d 696 (Fla. 1980) and State v. Cridland, 338 So.2d 30 (Fla. 3rd DCA 1976).

Petitioner's reliance upon §812.015 as being a grant of sovereign authority to merchants, farmers and their employees is faulty because the real purpose of the provision is to exempt the victims of shoplifting and thievery from certain criminal or civil liability.

§812.015 is an expanded replacement of §901.34, Fla. Stat. (1977) which held:

> ...a merchant or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner...

In 1978 this statute was placed within the theft chapter, §812, Fla. Stat. (1979). See Florida Session Laws s.2 ch. 78-348. The scope of the law was revised and expanded in 1981 to allow farmers to detain suspected thieves in the same manner. See, Flordia Session Laws ch. 81-108. The preamble to the act declared that those persons effecting such an arrest for shoplifting or farm theft will be exempt from criminal or civil liabilites. See §812.015(3)(c), and (5). There is no indication whatsoever the legislature wanted to empower merchants or farmers with sovereign authority. The chapter's language clearly states that merchants and farmers may, for the purpose of recovering their property or for prosecution, detain a person but only for a reasonable amount of time until police arrive. The police must be called immediately. §§812.015(3)(a). While the statute allows detention for a recovery of property by police, merchants and farmers, only the police are allowed to arrest a suspect. §§812.015(4). Furthermore, §812.015(6) makes it a crime to resist a merchant who has

detained a person for the recovery of property, but makes no mention of resisting arrest. Clearly, a merchant's power to detain is limited to the protection of his own property. Thus, if a merchant apprehended a suspected shoplifter in another merchant's store he would be protected only by the common law right to make a citizen's arrest, but would still be subject to criminal and civil liabilities.

Moreover, there is certainly a distinction in the statutory language between merchants and policemen. See, Note 1 to §812.015, Fla. Stat. (1981), which refers to policemen as law enforcement agents. It seems that if the legislature had meant for merchants to have arrest powers they would have included them in the definition of law enforcement officers as set out in §943.10(1),(5), or (6), Fla. Stat. (1981).

In the instant case, the manager, a private citizen, did not have the authority to arrest or interrogate appellant and in fact, he did not perform either of these official functions. It is only at the point where police custodial interrogation begins that the defendant's right against self-incrimination is activated. Miranda, supra. The merchants of this state are not its law enforcers. And while they may have protections against claims of false arrests caused by their attempts to recover their own property, they do not have the power to arrest suspects.

In fact, they must immediately call the police if they wish to detain a person for a period longer than necessary to recover their goods. §812.015(3)(a).

Except for State v. Jones, supra, which is pending before this Court, the cases cited by petitioner are inapplicable to the instant case because they deal with 1) police custodial situations, 2) involuntary confessions, or 3) store policies designed to deprive suspects of their Fifth Amendment rights. In People v. Ray, ___ N.Y.2d ___ (New York Sup. Ct., App. Div. 1st Dept. Case No. 82-412, opinion published January 20, 1984) [34 Cr.L. 2318], the suspect was apprehended by a store detective and questioned until he signed a confession. He was then taken to a special patrolman who, though employed by the store, was a government official for Fourth Amendment purposes. The court determined that the store policy revealed "a course of conduct calculated to circumvent defendant's constitutional rights." That court cited the case of People v. Glenn, 106 Misc.2d 806 (Crim. Ct. Queens County 1981), where the store policy provided that a policeman would wait outside during the questioning of the suspect by store detectives. In the case at bar, the store manager called the police immediately and merely asked petitioner if he would sign a rights form. There was no continuous interrogation and certainly no "store policy" by which the employees could

deny petitioner his constitutional rights. Indeed the employees who detained petitioner took the unnecessary precaution of presenting him with a rights form. Respondent submits that the giving of Miranda warnings or the use of a rights form by citizens does not automatically bestow them with police powers. In another case cited by petitioner, People v. Zelinski, 594 P.2d 1000 (Calif. 1979), private security personnel actually arrested the suspect and conducted a full search of her person. The search disclosed a small vial which had not come from the store. The detectives opened the container and removed a baloon filled with a powdery substance later determined to be heroin. The court found that the search went beyond the scope of a private citizen's rights to arrest a suspected theft and thus, this case is also inapplicable.

Finally, respondent would maintain that the testimony in question does not concern petitioner's silence in the face of accusations, but rather a statement by him that he would not sign the rights form:

Q. You said that you presented him with a rights form?

A. Yes, we did.

Q. Did you ask him to read the rights form?

A. Yes, we did.

Q. Did he in fact read it?

A. He glanced at it and said that he wasn't going to sign anything, or he refused to sign it.

MR. BICKNER:

I have no further questions of that rights form.

(T-42). Therefore, there was no comment upon petitioner's exercise of his right to remain silent. Had petitioner remained silent after a policeman had read him his Miranda rights, such evidence could not be used at trial because it presents the fact finder with an "insoluble ambiguity." (See Jenkins v. Anderson, 447 U.S. 231, 241 (1980), where the United States Supreme Court held that the use of a defendant's pre-arrest silence to impeach his credibility does not violate the Constitution.) Here, the inquiry concerning petitioner's refusal to sign a rights form was not meant to penalize him for refusing to sign it. The purpose was to permit the jury to consider the "inference that guilty knowledge may be drawn from the fact of unexplained possession of recently stolen goods." Cridland v. State, supra; Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380.

Neither the state courts nor the federal courts of this country have seen fit to expand the protection of the Fifth

Amendment to a point where private citizens are required to inform suspected thieves of their right to remain silent. (See also: United States v. Jacobsen, 82-1167, 35 Cr.L. 3001 (April 4, 1984), where the United States Supreme Court has refused to extend the Fourth Amendment protection against unreasonable searches and seizures to private citizens; and Roberts v. State, (Case No. AQ-270, Fla. 1st DCA, January 20, 1984, 9 F.L.W. 221), in which the court determined that state employees who searched defendant's desk at work for evidence of embezzlement were private citizens and not subject to the Exclusionary Rule.) Of course, such a determination would be ludicrous except for those situations where private citizens are working in cooperation with law enforcement and are, in effect, agents of the government. However, if a merchant who detains a suspected shoplifter for purposes of possible prosecution through the legal system is an agent of the government, then it follows that anyone who apprehends a felon under the common law authority to make a citizen's arrest and detains that felon until the police arrive is a government agent. As surely as a layman in this situation is not a government agent, it is equally certain that the private businessmen of Florida do not constitute a quasi-police force. §812.015 of the Florida Statutes merely removes the fear harbored by merchants and farmers that they will be liable

for false imprisonment in cases where their detention of suspected thieves upon probable cause is mistaken. The District Court of Appeal, First District, found nothing in the language of the statute which invokes the victims of shoplifting and thievery with sovereign authority, and properly affirmed the trial court's ruling.

CONCLUSION

WHEREFORE, respondent submits that the judgment appealed from must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been forwarded to Charlene V. Edwards, Post Office Box 671, Tallahassee, Florida 32302, by hand delivery this 13th day of July, 1984.

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