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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 19 1984
CLERK, SUPREME COURT
By Chief Deputy Clerk

ROBERT ARTHUR DELANA,

Petitioner,

v.

CASE NO. 65,365

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

ROBERT ARTHUR DELANA, :

Petitioner, :

v. : CASE NO. 65,365

STATE OF FLORIDA, :

Respondent. :

______________________________ :

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, ROBERT ARTHUR 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.

The record on appeal consists of one volume of pleadings and one volume of transcript of the trial proceedings. References to the volume of pleadings will be by the symbol "R"; references to the transcript volume will be by the symbol "T". All symbols will be followed by the appropriate page number in parentheses.

An appendix containing a copy of the decision of the District Court of Appeal is attached hereto. References to the

appendix will be by the symbol "A", followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE

Petitioner was charged by amended information filed July 25, 1983, in the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, with one count of grand theft (R-17). The information alleged that petitioner knowingly obtained or used or endeavored to obtain or use merchandise valued at $100.00 or more belonging to Albertson Southco, a corporation (R-17).

Petitioner proceeded to a jury trial on July 26, 1983, before Circuit Judge Henry Adams, Jr. (T-1). The jury returned a verdict finding petitioner guilty as charged of grand theft (R-24; T-148).

Petitioner filed a motion for new trial on August 23, 1983, alleging that the court erred in not granting petitioner's motions for judgment of acquittal, that the jury's verdict is contrary to the evidence and the law, that the court erred in denying petitioner's motion for mistrial, that the court erred in not giving defense requested jury instructions, and that the court erred in allowing the issue of value to go to the jury (R-25). Defense counsel argued these grounds at a hearing held September 16, 1983 (R-151-156). The motion for new trial was denied (R-25; T-155-156). Thereafter, petitioner was adjudicated guilty of grand theft and sentenced to five years imprisonment (R-28-31; T-179).

The Court of Appeal, First District, issued its opinion Delana v. State, __So.2d__ (Fla. 1st DCA Case No. AV-131,

opinion filed April 25, 1984) [9 FLW 964], affirming petitioner's conviction based on Williams v. State, 347 So.2d 472 (Fla. 1st DCA 1977), cert.discharged, 376 So.2d 846 (Fla. 1979), which held that a store manager's testimony that the defendant neither admitted nor denied the theft charge did not violate the defendant's Fifth Amendment rights since her detention by the store manager did not constitute police custody (A-1-2). The First District certified the instant decision as being in direct conflict with Jones v. State, 434 So.2d 337 (Fla. 3d DCA 1983).

Notice to invoke the discretionary jurisdiction of this Court, pursuant to Article V, Section 3(b)(4), Florida Constitution and Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, was filed on May 25, 1984. This initial brief on the merits follows.

III STATEMENT OF THE FACTS

The evidence produced at trial indicated that petitioner entered Albertson's store on Blanding Boulevard in Jacksonville, Florida, on the morning of April 23, 1982 (T-17-18). One of the store's employees, Cora Jose, a drug clerk, became suspicious after observing petitioner placing tubes of oil paint in the baby section of his shopping cart (T-22-23). Ms. Jose got the attention of the drug manager, Richard Miller, who also observed petitioner place the tubes of paint in his cart (T-24,34). Both employees saw petitioner walk over to another aisle and begin to place oil paint inside his shirt (T-25,35-36). Petitioner then proceeded to a cash register (T-25,37).

Mr. Miller notified Lance Gruny, the store manager, as to what was happening (T-37,54-55). Miller then walked to the front of the checkout line where petitioner stood and began to bag groceries (T-37). As Miller was bagging grocery, he looked up and made eye contact with petitioner (T-38). Meanwhile, Mr. Gruny had walked around behind petitioner in the checkout line to see if he could observe the paint (T-56). Gruny observed a protrusion through the back of petitioner's jacket (T-57).

Petitioner left the cash register line, walked up an aisle and started fumbling with his shirt (T-38,39,59), removing the property from his clothing (T-80). At this point, Miller and Gruny approached appellant (T-39,59). After several questions by Miller, petitioner removed all

of the oil paint from his shirt and placed them in the top part of the shopping cart (T-39,59). Miller and Gruny then escorted petitioner to the store's office (T-40,60).

After arriving in the office, petitioner presented his driver's license to Miller and Gruny for identification (T-40). Miller then went into another office to get a shoplifting report and "rights form" (T-40,61). At the trial, defense counsel objected to any testimony regarding the rights form on relevancy and Fifth Amendment grounds (T-40-42). The trial court overruled the objection (T-42). The jury was then informed that petitioner glanced at the rights form, but refused to sign it (T-42,61).

Approximately five minutes later, Officer Paul Woolard arrived in response to the shoplifting call from Albertson's (T-43,61). Woolard arrested petitioner for grand theft and read petitioner his constitutional rights from a pre-printed rights card (T-76). Petitioner was then transported to the jail (T-76).

IV 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.

V ARGUMENT

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.[1]

The Fifth Amendment to the Constitution of the United States provides:

> No person...shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law;....

See also Article I, Section 9, Florida Constitution.

In Miranda v. Arizona, 384 U.S. 436 (1966) the Supreme Court of the United States extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police. New York v. Quarles, __U.S.__ (Case No. 82-1213, opinion filed June 12, 1984)[35 Cr.L.Rptr 3135, 3137]. The Miranda court further construed this Fifth Amendment right to mean that the prosecution may not use at trial the fact that the defendant claimed his privilege to remain silent in the face of accusation.

During the direct examination of Richard Miller, Albertson's Drug Manager, Miller testified that petitioner was taken into custody and escorted to the store's office (T-40).

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[1] The words "the Fifth Amendment right to remain silent" will be used throughout this brief to refer to the right as found in both the Florida and United States Constitutions.

Miller further testified:

> A We got up to the office, we went to a desk, asked him to sit down, asked him for his I.D., he gave us his driver's license and I then went into another office and got a shoplifting report and rights forms.
>
> MRS. PRESCOD: Objection, Your Honor. May we approach the bench?
>
> THE COURT: Come up.
>
> (At side bar:)
>
> MR. PRESCOD: Your Honor, I am going to object as to relevancy of this. This is after the fact, but in addition I think that at this point the witness may say something that cannot be taken back and that is the presentation of my client with the form as to his rights and his signing. I think that that coming before the jury would definitely be commenting on his right to remain silent.
>
> MR. BICKNER: You are objecting to him not signing it? I don't understand.
>
> THE COURT: What, now?
>
> MRS. PRESCOD: I am objecting to relevance first of all.
>
> THE COURT: I understand the objection, the basis is relevancy. Tell me about what you interpret as a comment on his right to remain silent.
>
> MRS. PRESCOD: Your Honor, when Mr. Delana apparently according to this witness, when he took Mr. Delana upstairs the forms that he is referring to were presented to Mr. Delana for his signature. One of them say rights form that advised him of his rights and I think that number one it has no bearing as to whether or not Mr. Delana is guilty of theft, but number two, it comments on his right to remain silent and the defendant knows that if you want to exercise your right you don't say anything and you don't sign anything and I think to bring it before the jury is unfair comment on his right to remain silent.

> All he did was exercise the right not to sign it and I don't think it should come before the jury.
>
> MR. BICKNER: Your Honor, I think his attitude when he went up there was relevant. I think the fact that he even refused to read the form is relevant.
>
> MRS. PRESCOD: Your Honor, I'd ask relevant to what? Certainly not relevant to whether or not he took the paint.
>
> THE COURT: How far do you plan on going with this?
>
> MR. BICKNER: How far do you want me to go? I would just ask him what he did and ask him to read the rights form and if he refused to sign it and that's about it.
>
> THE COURT: I am going to overrule your objection.

(T-40-42). Mr. Miller was then allowed to testify in the presence of the jury that petitioner "glanced at it [the rights form] and said he wasn't going to sign anything, or he refused to sign it." (T-42).

Lance Gruny, the store manager, was also permitted to testify before the jury regarding the rights form: "...there was a rights form that he was required to fill out and I think he refused to sign it" (T-61).

Petitioner contends that the First 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 because: (1) the enactment of the retail theft statute, Section 812.015, Florida Statutes, provides a grant

of sovereign authority to merchants, merchant's employees, or farmers; and (2) under Florida law an accused's silence in the face of accusation is inadmissible, regardless of whether a Miranda-controlled setting is involved.

Section 812.015(3)(a), Florida Statutes (1983)[2] provides:

> (3)(a) A law enforcement officer, a merchant, a merchant's employee, or a farmer who has probable cause to believe that merchandise or farm produce has been unlawfully taken by a person and that he can recover it by taking the person into custody may, for the purpose of attempting to effect such recovery or for prosecution, take the person into custody and detain him in a reasonable manner for a reasonable length of time. In the case of a farmer, taking into custody shall be effectuated only on property owned or leased by the farmer. In the event the merchant, merchant's employee, or farmer takes the person into custody, a law enforcement officer shall be called to the scene immediately after the person has been taken into custody.

This statute, similar to the concept of sovereign immunity, also insulates law enforcement officers, merchants, merchant's employees, or farmers from criminal or civil liability for false arrest, false imprisonment, or unlawful detention. See Sections 812.015(3)(c) and (5), Florida Statutes (1983). Moreover, an individual who resists the reasonable efforts of

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[2] Numerous other states have enacted similar statutes. See, e.g., Ariz.Rev.Stat. § 13-1805; Cal.Penal Code § 490.5(e); Ill.Rev.Stat. ch. 38, § 16A-5; Mont.Rev. Codes § 46-6-502; Neb.Rev.Stat. § 29-402.01; N.Y.Gen.Bus. Law § 218; Ohio Rev. Code § 2935.041; Okla.Stat. tit. 22, § 1343; 18 Pa.Cons.Stat. § 3929(d); Wash.Rev. Code § 4.24.220; Wis.Stat. § 943.50(3).

a merchant, merchant's employee or farmer, as with a law enforcement officer, to recover merchandise and who is found guilty of theft of merchandise shall be guilty of a first degree misdemeanor. Section 812.015(6), Florida Statutes (1983).

That petitioner was "apprehended" is not in dispute. The record clearly establishes that two of Albertson's employees, Miller and Gruny, approached petitioner, questioned him, and escorted him to the store's office, whereupon petitioner refused to sign a rights form (T-39-40). Section 812.015(3)(a) authorizes retail store employees to take suspected shoplifters "into custody" and to "detain" such persons. Florida cases which have addressed this statutory authority speak in terms of taking into custody and detention. See Silvia v. Zayre Corporation, 233 So.2d 856, 858 (Fla. 3d DCA 1970) (addressing merchant's rights and duties with regard to "the person apprehended" under predecessor statute); Rothstein v. Jackson's of Coral Gables, Inc., 133 So.2d 331, 332 (Fla. 3d DCA 1961) (holding that statute establishes right of merchants to take suspected shoplifter "into custody"). Thus, no question is raised in this case as to whether a person detained pursuant to Section 812.015(3)(a) is "in custody".

In Florida, retail merchants and their employees have had the authority to take suspected shoplifters "into custody" and "detain" them since 1955, when the first version of this statute was enacted. See Chapter 29668, Laws of

Florida (1955).[3] A review of the legislative history indicates that this statute granting merchants authority to detain suspects was enacted to curtail the great financial loss suffered by retail merchants at the hands of shoplifters and to aid merchants in securing arrests and prosecutions for shoplifting. See Chapter 29668, Laws of Florida (1955), preamble to the Act. Section 812.015 grants merchants limited police authority to assist them "in the reduction of the proliferation of shoplifting crimes". Washington County Kennel Club v. Edge, 216 So.2d 512, 516 (Fla. 1st DCA 1968).

To achieve the goal of combatting shoplifting, this statute undoubtedly accords merchants and merchant's employees broader rights than those generally conferred upon private citizens. See, e.g., Jacques v. Sears, Roebuck & Co., 285 N.E. 2d 871, 874-75 (N.Y. 1972). Private citizens are not authorized to temporarily detain individuals suspected of committing a crime pursuant to the Florida Stop and Frisk Law, Section 901.151, Florida Statutes. State v. Chapman, 376 So.2d 262, 264 (Fla. 3d DCA 1979). A private citizen only has a common-law right to "arrest a person who commits a felony in his presence, or to arrest a person where a felony has been committed, and where the

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[3] Similar provisions of this retail theft statute have been codified as Section 811.022, Florida Statutes (1955) and Section 901.34, Florida Statutes (1975).

arresting citizen has probable cause to believe, and does believe, the person arrested to be guilty". Collins v. State, 143 So.2d 700, 703 (Fla. 2d DCA 1962); accord, State v. Schuyler, 390 So.2d 458, 460 (Fla. 3d DCA 1980); State v. Chapman, supra, at 264. Moreover, "[t]he probable cause to support a temporary detention of a suspected shoplifter by a merchant or the merchant's employee is less than the probable cause required to support a later prosecution". Gatto v. Publix Supermarket, Inc., 387 So.2d 377, 379 n.3 (Fla. 3d DCA 1980) (citations omitted); accord, Weissman v. K-Mart Corp., 396 So.2d 1164 (Fla. 3d DCA 1981). Therefore, the right to detain conferred by the statute is patently broader than that permitted by common law.

To be certain, petitioner is not asserting that retail store merchants, merchant's employees, or farmers, are law enforcement officers when exercising the authority granted by Section 812.015(3)(a). Rather, petitioner asserts that the statute cloaks merchants, merchant's employees, or farmers, with the authority of the sovereign. Acting under this authority, Mr. Miller and Mr. Gruny, questioned petitioner, took him into custody, asked him to sign a rights form, and turned him over to a law enforcement officer.

Petitioner acknowledges that it is generally held that store detectives or security guards acting pursuant to statutes such as Section 812.015 are not the equivalent of police officers for the purpose of constitutional exclusionary

rules under the Fourth Amendment (search and seizure) and Fifth Amendment (self-incrimination). The rationale of the cases involving the Fifth Amendment is that the duty of giving Miranda warnings is limited to employees of governmental agencies whose function is to enforce law, or to those acting for such law enforcement agencies by direction of the agencies. State v. Bolan, 271 N.E.2d 839 (Ohio 1971). See, e.g., State v. Lombardo, 457 P.2d 275 (Ariz. 1969); People v. Horman, 239 N.E.2d 625 (N.Y. 1968), cert.denied, 393 U.S. 1057 (1968); State v. McDaniel, 337 N.E.2d 173 (Ohio 1975); Stanfield v. State, 666 P.2d 1294 (Okla.Crim.App. 1983); State v. Gonzales, 604 P.2d 168 (Wash. 1979).

However, it has recently been held that the rule that private individuals need not administer Miranda warnings before interrogating a person whom they have taken into custody does not apply to store detectives whose employer has a policy designed to deny shoplifting suspects their constitutional rights. People v. Ray, __N.Y.2d__ (N.Y. Sup.Ct., App.Div., 1st Dept. Case No. 82-412, opinion published January 20, 1984)[34 Cr.L.Rptr. 2318]. There, defendant Ray was apprehended by a store detective and questioned until he signed a confession. For purposes of prosecution, the detective's supervisor, had Ray taken to a special patrolman who, though employed by the store, was a government official for Fourth Amendment purposes. The

New York Supreme Court, Appellate Division, was of the opinion that the case represented "a course of conduct calculated to circumvent defendant's constitutional rights and as such cannot be countenanced". [34 Cr.L.Rptr. 2319]. See also People v. Jones, 393 N.E.2d 443 (N.Y. 1979) (where, although alleged shoplifter was taken into custody by a private store detective and questioned in store's security office, county police officers participated in such arrest in manner which was sufficient to create custodial atmosphere which Miranda rule was intended to alleviate, confession obtained by store detectives, as well as signed photographs of stolen merchandise, were inadmissible in defendant's subsequent prosecution and should have been suppressed; government cannot avoid constitutional restrictions by using private individual as its agent, nor can it claim only private act is involved where government officers, subject to constitutional limitations,have participated in the act); People v. Glenn, 106 Misc.2d 806 (Crim.Ct. Queens County 1981) (incriminating statements made by defendants to private store detectives in the absence of Miranda warnings, such warnings having only been given by a police officer who arrived on the scene five minutes after the statements were signed after being called by the store supervisor, are suppressed since the questionable "store policy" of having a police officer hovering in the wings while store detectives questioned shoplifting suspects in locked rooms without the benefit of

Miranda warnings controvenes defendants' constitutional rights); cf., People v. Zelinski, 594 P.2d 1000 (Cal. 1979) (in any case where private security personnel assert the power of the state to make an arrest or to detain another person for transfer to custody to the state, the state involvement is sufficient for the court to enforce the proper exercise of that power by excluding the fruits of illegal abuse thereof).

In Florida, two District Courts of Appeal have addressed the issue presented herein. In Williams v. State, 347 So.2d 472 (Fla. 1st DCA 1977), cert.discharged, 376 So.2d 846 (Fla. 1979), the First District held that the store manager's testimony that the defendant neither denied nor admitted the charge was admissible at trial since the defendant's silence was not silence in the face of police custodial interrogation. There, the defendant was observed walking out the door of Montgomery Ward wearing a hat which she had not paid for. Upon re-entering the store to return the hat, defendant Williams was approached by the manager. The manager asked the defendant to follow him to the store's office and then threatened to forcibly take Williams there. The defendant accompanied the manager to the office. During the trial, in response to a prosecutor's question, the manager testified, "She [defendant] neither denied nor admitted the charge". Id. at 473. The defendant was subsequently taken to the mall's police security office. The majority of the panel of the First District did not believe

that the Miranda-doctrine should be broadened and extended to include circumstances which do not involve police custodial interrogation. Id.

However, Judge Rawls, in a dissenting opinion, stated that by enacting Section 901.34, Florida Statutes (1975),[4] the Florida Legislature conferred the authority of the sovereign upon a merchant or a merchant's employee. Judge Rawls then reasoned:

> Here, the "merchant", acting with this grant of sovereign authority, took appellant into his custody and interrogated him; thus, the custodial interrogation was conducted in a police-like atmosphere pursuant to the sovereign's grant of such power.

Id. at 474. Cf., Peak v. State, 342 So.2d 98 (Fla. 3d DCA 1977) (involuntary confession, whether made to law enforcement officers or private persons, is inadmissible).

In a four to three decision, this Court discharged the writ of certiorari, finding that the First District's decision did not conflict with any prior decisions. Williams, 376 So.2d at 846. The dissenting opinion, Justice Adkins, agreed with Judge Rawls that Section 901.34, Florida Statutes (1975) conferred the authority of the sovereign upon a merchant or a merchant's employee.

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[4]Section 901.34, Florida Statutes (1975) was the predecessor statute to the current retail theft statute, Section 812.015, Florida Statutes.

> By the same token, evidence of the silence of an accused while in custody is subject to the guidelines set out in Miranda regardless of whether the accused was under arrest or whether he was held in custody by virtue of the authority granted by Section 901.34, Florida Statutes (1975), quoted above.
>
> * * *
>
> The guidelines set forth in Miranda, supra, are applicable if the accused is in custody. When this predicate is shown it is error for the prosecution to use at trial the fact that the accused stood mute or claimed the 5th Amendment privilege in the face of accusation.

Id. at 848.

In Jones v. State, 434 So.2d 337 (Fla. 3d DCA 1983), the Third District adopted Judge Rawls' dissenting opinion in Williams v. State, supra, and held that the trial court committed reversible error in denying the defendant's motion for mistrial when the state elicited from a witness in the jury's presence that the defendant remained silent after she was apprehended by a retail store detective for shoplifting pursuant to Section 812.015(3)(a), Florida Statutes. This decision is currently pending before this Court in State v. Jones, Case No. 64,082.

In the instant decision, in affirming the trial court's decision to admit the testimony regarding the rights form, the First District merely found that this case was controlled by Williams v. State, supra (A-2). However, the First District did recognize that the opinion was in direct conflict with Jones v. State, supra.

Petitioner urges this Court to follow the opinion of the Third District in Jones v. State, supra. Acting under the authority granted them by the legislature in Section 812.015, Mr. Miller and Mr. Gruny approached petitioner, whereupon Mr. Miller asked petitioner "if he had anything in his shirt that belonged to us" (T-39). Petitioner responded affirmatively, and removed the items from his shirt. Mr. Miller and Mr. Gruny then escorted petitioner to the store's office, where petitioner refused to sign a form, which advised him of his rights (T-41). This custodial detention of petitioner was conducted in a police-like atmosphere pursuant to the sovereign's grant of power. It is interesting that these store employees, private citizens, as respondent would have this Court believe, were that concerned about petitioner's rights, such as to request that he sign a rights form. Why would someone acting only as a private citizen require a suspect to sign a rights form? Petitioner submits that the merchants' possession and use of a rights form as store procedure with respect to shoplifting suspects is further indication that the merchants were acting under the authority of the sovereign, not as mere private citizens. See People v. Glenn, supra (a "store policy" by which a store detective causes statements to be taken in locked rooms while a special patrolman hovers in the wings and comes in only after the statement is taken to give Miranda warnings is an absurdity which will no longer be permitted). The state cannot avoid constitutional restrictions by using private individuals as

its agents. People v. Jones, supra.

Sub judice, the store employees took petitioner into custody and detained him for prosecution pursuant to authorization granted by the Florida Legislature. These acts, engaged in pursuant to Section 812.015(3)(a), were not those of a private citizen acting in a purely private capacity. In taking petitioner into custody and detaining him for delivery to a law enforcement officer, the store employees were utilizing the coercive power of the state to further a state interest, prosecution of those committing violations of the laws of the state - bringing offenders to public accounting. As stated by the Supreme Court of California:

> Had the security guards sought only the vindication of the merchant's private interests they would have simply exercised self-help and demanded the return of the stolen merchandise. Upon satisfaction of the merchant's interests, the offender would have been released. By holding defendant for criminal process and searching her, they went beyond their employer's private interests.

People v. Zelinski, 594 P.2d at 1006.

As Mr. Miller and Mr. Gruny were acting pursuant to authority granted by the state, and not in a purely private capacity, they must be subject to the constitutional proscriptions regarding an individual's right to remain silent. It is error for the prosecution to use at trial the fact that an accused stood mute or claimed the Fifth Amendment privilege in the face of accusation. Bennett v.

State, 316 So.2d 41 (Fla. 1975). Accordingly, 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.

There is yet another reason why the District Court's opinion, Delana v. State, supra, is incorrect. Under Florida law, an accused's silence in the face of accusation is inadmissible, regardless of whether a Miranda-controlled setting is involved. A state court is free to place greater restrictions on the use of post-arrest silence than required by cases construing the federal constitution since to do so merely expands, but is consistent with, the minimal due process those cases announce. Lee v. State, 422 So.2d 928 (Fla. 3d DCA 1982). The right to remain silent is entitled to greater protection in Florida than that required by the United States Supreme Court. Lee v. State, supra.

Prior to Miranda, Florida law provided that the silence of an accused in the face of accusation of guilt, when in custody, could be considered by the jury "in connection with other facts and circumstances as some evidence of guilt". Albano v. State, 89 So.2d 342,344 (Fla. 1956). In addition to holding the Fifth Amendment applicable to police interrogations and prescribing the requisite warnings, Miranda held that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege". 394 U.S. at 468 n.37. In Jones v. State, 200

So.2d 574, 576 (Fla. 3d DCA 1967), the Third District held that this proscription against penalizing an individual for exercising his Fifth Amendment right barred the introduction into evidence of an accused's silence in the face of accusation. This Court subsequently adopted that principle in Bennett v. State, 316 So.2d 41, 43-44 (Fla. 1975).

Bennett established the rule that the silence of an accused in a custodial setting is inadmissible at trial, and that the introduction of such evidence is per se reversible error if properly preserved for review. There, the defendant moved for a mistrial because one of the state's witnesses, a fire marshal, testified before the jury that Bennett refused to sign a waiver of his rights form. The trial court denied the motion for mistrial but instructed the jury to disregard that part of the testimony. This Court determined that the testimony of the fire marshal was reversible error and was not one which could be cured by an instruction to disregard. See also Clark v. State, 363 So.2d 331 (Fla. 1978); Willinsky v. State, 360 So.2d 760 (Fla. 1978).

Unquestionably, evidence of post-arrest silence is improper because it violates the defendant's right against self-incrimination. Clark v. State, supra at 333. Florida courts have uniformly held that the post-arrest silence of an accused who has been warned as required by Miranda is inadmissible, either as substantive evidence or to impeach

the accused at trial. See, e.g., Ford v. State, 431 So.2d 349 (Fla. 5th DCA 1983); Torrence v. State, 430 So.2d 489 (Fla. 1st DCA 1983); Turner v. State, 414 So.2d 1161 (Fla. 3d DCA 1982); Burwick v. State, 408 So.2d 722 (Fla. 1st DCA 1982); Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981); Marshall v. State, 393 So.2d 584 (Fla. 1st DCA 1981); Davis v. State, 356 So.2d 1252 (Fla. 4th DCA 1978); Smith v. State, 342 So.2d 990 (Fla. 3d DCA 1977); Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976).

However, reading the Miranda warnings or the existence of a constitutional requirement that the warnings be given in the first instance, is not and never has been the predicate for applying the rule announced in Bennett. Indeed, the decision in Jones v. State, supra, did not involve a Miranda situation, and the court specifically held that "testimony that the accused, while in custody, remained silent in the face of an accusation of guilt of the crime for which he was arrested and charged" is inadmissible. 200 So.2d at 576. The controlling rule in this state is that "[r]eversible error occurs in a jury trial when a prosecutor improperly comments upon or elicits an improper comment from a witness concerning the defendant's exercise of his right to remain silent in the face of accusation". Thompson v. State, 386 So.2d 264, 266 (Fla. 3d DCA 1980) (citation omitted).

Accordingly, the admissibility of an accused's silence does not turn upon whether the silence was preceded by

Miranda warnings:

> ...[W]hile Miranda warnings make it even more offensive to use a person's silence upon arrest against him, the absence of such warnings does not add to nor detract from an individual's Fifth Amendment right to remain silent. If one has a right upon arrest not to speak for fear of self-incrimination, then the mere fact that the police call his attention to that right does not elevate it to any higher level.... [footnote omitted].

Webb v. State, 347 So.2d 1054, 1056 (Fla. 4th DCA 1977), cert. denied, 354 So.2d 986 (Fla. 1977). Accord Lee v. State, 422 So.2d 928, 930 (Fla. 3d DCA 1982), review denied, 431 So.2d 989 (Fla. 1983).[5]

Cases which have applied the Florida rule have found the introduction into evidence of the accused's silence reversible error, regardless of whether the situation required Miranda warnings or whether such warnings were given. See Simpson v. State, 418 So.2d 984, 985 (Fla. 1982) (defendant's "failure to testify before the grand jury" held improperly introduced);

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[5] The Supreme Court of the United States has addressed the permissibility of impeaching a testifying defendant with his or her silence, and has limited the applicability of the Fifth Amendment to post-arrest silence impelled by Miranda warnings. See Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 1311-12 (1982). Jenkins v. Anderson, 447 U.S. 231, 239 (1980); Doyle v. Ohio, 426 U.S. 610, 619-20 (1976). While this line of authority is of dubious application to a case such as the present one, where a defendant's silence is affirmatively introduced into evidence during the state's case-in-chief, Lee specifically holds that Florida constitutional law, which places "greater restrictions on the use of post-arrest silence than the Doyle-Jenkins-Fletcher trilogy requires", forbids reference to a defendant's post-arrest silence, "whether or not that silence is induced by Miranda warnings." 422 So.2d at 930-31 (citation omitted).

Willinsky v. State, 360 So.2d 760, 763 (Fla. 1978) ("disclosure of accused's silence at the preliminary hearing is error"); Cooper v. State, 413 So.2d 1244, 1245 (Fla. 1st DCA 1982), review denied, 421 So.2d 518 (Fla. 1982) (cross-examination of accused "on his silence at his previous trial" held reversible error); Brownlee v. State, 361 So.2d 724, 726 (Fla. 4th DCA 1978)(silence of accused "prior to the receipt of his warnings or his arrest" improperly introduced); Flynn v. State, 351 So.2d 377, 379 (Fla. 4th DCA 1977) ("questions and comments about a defendant's not having told 'officially' . . . of his entrapment" defense prior to trial held reversible error); Webb v. State, supra at 1055-56 (cross-examination of defendant regarding his silence at the time of arrest improper despite absence of Miranda warnings); Brooks v. State, 347 So.2d 444, 445 (Fla. 3d DCA 1977) (pre-arrest silence held inadmissible); Weiss v. State, 341 So.2d 528, 530 (Fla. 3d DCA 1977)(cross-examination of defendant regarding his failure to "give an account of the events that occurred that evening to anyone other than your counsel" prior to trial held improper).

These cases establish the governing principles for disposition of this case: while retail merchants and their employees are not the equivalent of law enforcement officers by virtue of Section 812.015(3)(a), Florida law on this issue does not require a Miranda-controlled situation to render a defendant's pretrial silence inadmissible. Rather, an accused's silence "in the face of accusation" is inadmissible

in this state. Simpson v. State, supra; Willinsky v. State, supra; Lee v. State, supra; Cooper v. State, supra; Brownlee v. State, supra; Webb v. State, supra; Jones v. State, supra. This principle is readily applicable to the instant case.

First, as previously noted, petitioner was "in custody" under Section 812.015(3)(a) at the time that he refused to sign the rights form; while he was not in the grasp of a "law enforcement officer", he was being detained pursuant to state law. Williams v. State, 376 So.2d 846, 847-48 (Fla. 1979)(Adkins, J. dissenting from discharge of certiorari). As the court held in Brownlee v. State, supra, the question of whether a custodial situation exists is a practical one:

> ...A determination of whether an interrogation is custodial or pre-custodial should focus on whether the interrogation imposes any restrictions on the defendant's liberty. The practical question should be whether the defendant was free to walk away from the interrogation.

361 So.2d at 726.

Petitioner was obviously not "free to walk away" at the time of the detention. Indeed, had petitioner attempted to do so, he would have been in violation of Section 812.015(6), Florida Statutes (1983). That criminal sanctions may be imposed upon one who resists a retail store employee acting under Section 812.015(3) establishes the actuality of "custody" by operation of state law, albeit not by the functional equivalent of a law enforcement officer. Further,

it is beyond question that the custodial situation was accusatory. _See_ _Bennett v. State_, _supra_. Silence in such a situation, as is the case where an accused is in the custody of police officers, is simply not of probative value. _See_ _United States v. Hale_, 422 U.S. 171, 177-80 (1975).

Thus, the legal principles upon which the District Court of Appeal relied are not soundly based. _Williams_ rests upon a fundamentally-erroneous legal basis, turning upon a finding that "police custodial interrogation" such as will invoke the _Miranda_ rule is an essential predicate for excluding evidence of an accused's silence in the face of accusation. The decisions of this Court and of the District Courts of Appeal subsequent to _Williams_ have established the boundaries of the prohibition against penalizing an accused for exercising his privilege against self-incrimination. The evidence of petitioner's silence at the time of his apprehension in this case is well within the proper scope of that bar. The decision of the District Court of Appeal, First District, improperly applied Florida law to the facts of this case, and is therefore incorrect.

VI CONCLUSION

WHEREFORE, based upon the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests that this Honorable Court, disapprove the decision of the District Court of Appeal of Florida, First District, in this cause, and reverse petitioner's judgment and sentence and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand to Mr. Henri C. Cawthon, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Respondent; and, a copy has been mailed to petitioner, Mr. Robert Arthur Delana, #003167, Reception and Medical Center, Post Office Box 628, Lake Butler, Florida, 32054, this 19th day of June, 1984.

Charlene V. Edwards

CHARLENE V. EDWARDS