IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v. CASE NO. 66,373

RONALD DEAN JONES,

Respondent.

# PETITIONER'S BRIEF ON MERITS

JIM SMITH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

/ech

TABLE OF CONTENTS

## TABLE OF CITATIONS

OTHER AUTHORITIES:

## STATEMENT OF THE CASE

Respondent was charged on Fourth of July, 1982, with DWI [a violation of Section 316.193, Florida Statutes (1983)]. (R 4) Respondent entered a plea of not guilty. Thereafter, he filed a Motion to Suppress (R 10, 11) which was denied by county court judge, Susan Bucklew. (R 16, 17) Respondent then entered a plea of nolo contendere specifically reserving the right to appeal the denial of the suppression motion. (R 18)

Respondent prosecuted his direct appeal to the Circuit Court. There, Judge Graybill affirmed the judgment and sentence. (R 1, 2)

Respondent then filed a Petition for Common Law Certiorari in the District Court of Appeal, Second District. On September 6, 1984, the court issued its writ. The court also certified a question to this Court as one of great public importance. Petitioner filed a Motion to Stay Mandate and Motion for Rehearing, En Banc. Petitioner urged on Rehearing that intra-district uniformity was disturbed as this is a conceded case of first impression in Florida. Thus, how could the Circuit Court affirmance be either a "departure from the essential requirements of law" or "...a violation of a clearly established principle of law resulting in a miscarriage of justice?" Combs v. State, 436 So.2d 93 (Fla. 1983). On December 5, 1984, the Second District denied Rehearing En Banc. A second Motion to Stay Mandate was filed in the Second District and it too was denied on December 26, 1984. On January 2, 1985, Florida filed

a Motion to Review Order denying Stay of Mandate in this Court and on that same date Florida filed a Notice to Invoke Jurisdiction of this Court. On January 22, 1985, this Court entered an Order denying the Motion to Review Order Denying Stay of Mandate. This appeal continues.

## STATEMENT OF THE FACTS

The facts of this case flow from deposition of Officer Rohan, Tampa Police Department (R 21-40) which was introduced into evidence at the suppression hearing on the county court level. In Jones v. State, 9 FLW 1902, __So.2d__ (Fla. 2d DCA 1984)(Case No. 83-2547, Opinion filed September 5, 1984) rehearing en banc denied December 5, 1984 sets forth the salient facts:

> On July 4, 1982, at about 2:30 a.m., the City of Tampa Police Department established a roadblock near the intersection of Dale Mabry Highway and Columbus Drive. The undisputed purpose of the roadblock was to apprehend DUI drivers. The three northbound lanes of Dale Mabry were blocked off to form a "funnel" requiring all traffic to travel in one lane and to pass by a police officer stationed on the roadway. That officer was instructed to stop every fifth automobile when traffic was heavy and to stop every third automobile when traffic was light. The stopped cars were directed off the roadway into an otherwise unused parking lot.
>
> Waiting in the parking lot were five police officers who were to determine if the drivers were DUI. The only specific instruction given to those officers was to request the driver's licenses of the drivers of cars diverted from Dale Mabry into the parking lot. Each officer was left to his own method to determine whether he believed a driver was DUI.
>
> Petitioner was the driver of a car that was diverted into the parking lot. The arresting officer requested petitioner's driver's license and began his investigation of petitioner's sobriety. The officer decided petitioner was DUI and arrested him.

(text of __So.2d at __ 9 FLW at 1902)

## CERTIFIED QUESTION

CAN A WARRANTLESS TEMPORARY ROADBLOCK WHICH IS ESTABLISHED TO APPREHEND PERSONS DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL AND STOPS AUTOMOBILES WITHOUT ANY ARTICULABLE SUSPICION OF ILLEGAL ACTIVITY PRODUCE CONSTITUTIONALLY PERMISSIBLE ARRESTS?

The above question was one of first impression in County Court; Circuit Court; District Court of Appeal, Second District; and this Court. There exists a split of authority among Florida's sister-states as to resolution. Compare State v. Deskins, 673 P3d 1174 (Kan. 1983) with one dissent; State v. Coccomo, 427 A2d 131 (N.J. Superior Court Law Div. 1980); Stark v. Perpich, 35 CrL 2398, __F.Supp.__ (U.S.D.C. Minn., 4th Div.)(Case No. Civil 4-84-656, Opinion filed August 2, 1984)[1]; and, Little v. Maryland, 35 CrL 2396, 479 A2d 903 (Md. Ct. App.) (Case No. 158, Opinion filed August 21, 1984)[2] with one dissent (all indicating "sobriety checkpoints" pass master under the Fourth Amendment with Commonwealth v. McGreoghegan, 449 N.E.2d 349 (Mass. 1983) with one dissent; State v. Olgaard, 248 N.W.2d 392 (S.D. 1976); and, State ex rel. Ekstrom v. Justice Court, 663 P2d 992 (Ariz. 1983) indicating "sobriety checkpoints" to be violative of the Fourth Amendment.

---

[1] Slip opinion attached as Appendix to Motion for Rehearing En Banc filed in the Second District.

[2] Slip opinion attached as Appendix to Motion for Rehearing En Banc filed in the Second District.

As rapidly as this case comes to this Court, opinions on this topic continue to pepper the reporters. On November 20, 1984, New York upheld the constitutionality of temporary drunk driving roadblocks in People v. Scott, __A2d__, 36 CrL 2181 (N.Y. Ct. App.)(Case No. 542, Opinion filed 11/20/84; and, on November 21, 1984, Arizona upheld the constitutionality of drunk driving checkpoints in State v. Superior Court, __P2d__, 36 CrL 2182 (Ariz. Sup. Ct.)(Case No. 17679-SA, Opinion filed 11/21/84).[3]

The "State" sees this case as basically a Fourth Amendment one in which this Court is asked to balance Florida's strong interest in deterring drunk driving against the minimal intrusion occasioned by roadblocks. The Florida Constitution specifically states that this Court is bound to follow the Supreme Court of the United States. Article 1, Section 12 of the Florida Constitution was amended effective January 4, 1983, to read:

> Florida Courts no longer afford greater protection from searches and seizures than the protection afforded under the Fourth Amendment to the United States Constitution, as interpreted in the decisions of this Court. The Florida Constitution is contrued in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court.

Turning to the Fourth Amendment decisional law of the Court, it becomes increasingly clear that Fourth Amendment questions are

---

[3] Slip Opinion attached as Appendix

being analyzed on the basis of reasonableness. What the opinion of the Second District overlooks is that co-operative or investigative encounters do not fall within the Fourth Amendment. Any citizen who drives on Florida's streets, roads, and highways does so under the guise of privilege bestowed by either Florida or a sister-state. There is no right to drive. Thus, what reasonable expectations of privacy does a citizen have when police are checking for the limited purpose of identifying inebriated/intoxicated drivers?[4]

It is beyond dispute that stopping a motor vehicle and detaining its occupants a seizure (even though the detention is brief and limited in scope). See, Delaware v. Prouse, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979) and United States v. Brignoni-Ponce, 442 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975). However, as evolved, the reasonableness of the detention hinges on the balance between the people's interest in public safety and the individual's right to privacy. See, Brown v. Texas, 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979). Obviously, in a DWI roadblock situation there exists neither probable cause to arrest nor reason suspicion (based on articulable facts) to detain.

---

[4] Attached as Appendix to this brief is a copy of Operation Waltz on which all Hillsborough County, Florida roadblocks are based. This is the baseline protocol followed by the Tampa Policd Department.

This past term, the Court has rendered five (5) doctrinal expectation of privacy decisions which have a bearing on the case at hand. United States v. Jacobsen, __U.S.___, 80 L.Ed.2d 85 (1984); Oliver v. United States, __U.S.__, 80 L.Ed.2d 214 (1984); United States v. Karo, 468 U.S.___, 82 L.Ed.2d 530 (1984); United States v. Hensley, __U.S.__, 36 CrL 3085 (U.S. Case No. 83-1330, opinion filed January 8, 1985); and, New Jersey v. TLO, __U.S.__, 36 CrL 3091 (U.S. Case No. 83-712, opinion filed January 15, 1985).

In Oliver, internal reliance was placed on principles regarding privacy rights expressed in Katz v. United States, 389 U.S. 347 (1967). Not all an individual's subjective expectations of privacy are protected. Rather, only "those expectations that society is prepared to recognize as 'reasonable'."

Prior to Oliver, the court in Jacobsen held constitutional the warrantless "chemical field test" of suspected narcotics. Contraband had been discovered by Federal Express employees when examining a damaged package for insurance purposes. Justice Stevens explained that the Fourth Amendment is implicated in such a situation when the governmental intrusion exceeds the scope of the antecedent private search. Justice Stevens defined expectations involving both a "search" and "seizure": "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." On this score, it is not unreasonable to suggest Floridians have

a diminished expectation of privacy when temporarily detained to stop drunk driving.

In United States v. Karo, 468 U.S.__, 82 L.Ed.2d 530 (1984), the Court held that the warrantless monitoring of a "beeper" in a container of chemicals after it had been inadvertently taken into a residence constituted a Fourth Amendment deprivation. There was no expectation of privacy in following the vehicle; however, from a doctrinal stance, the Karo decision stresses the Court's continuing view that society has a reasonable expectation of privacy in residences.

On January 8, 1985, Justice O'Connor delivered the opinion of the Court in United States v. Hensley, __U.S.__, 36 CrL 3085 (U.S. Case No. 83-1330) where the Court held police officers may stop and briefly detain a person who is the subject of a "Wanted flyer" while they attempt to find out whether an arrest warrant has been issued. These stops are held to be consistent with the Fourth Amendment under appropriate circumstances. Justice O'Connor recognized that law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity. See, United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). Concededly, stopping a car and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment, there is a governmental interest in investigating an officer's reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers.

Subsequently, on January 15, 1984, New Jersey v. T.L.O., __U.S.__, 36 CrL 3091 (U.S. Case No. 83-712), Justice White in writing for a five-member majority recognized that while the Fourth Amendment's prohibition against unreasonable searches and seizures applies to searches of students by public school officials, such searches may be conducted without a warrant or probable cause. In rejecting an argument that school officials serve "in loco parentis" thus making the Fourth Amendment inapplicable, the Court holds "...the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." A two-part inquiry is posed: First, there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the laws or the rules of the school." Second, the search will be permissible in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Clearly, the underpinning TLO is emphasized by Justice Rehnquist, joined in concurrence by Justice O'Connor, focuses on the lessened expectation of privacy of students within the school environment. With TLO as foundation, there is no dispute that DWI is important (not trivial) misconduct. In constitutional analysis, there is a lessened expectation of drivers on Florida streets, roads, and highways. Statistically, there are reasonable grounds to believe drunk drivers will be apprehended at roadblocks; and, the detention is reasonable as drivers are

"waved through" once it is determined they are not under the influence of alcohol or drugs. This takes but seconds in the encounter for police to note blurry eyes; slurred speech; or, the odor of alcohol.

In light of TLO, more credence is found in addressing roadblocks as administrative searches. The roadblock at hand was carefully conceived and implemented. In an administrative search, there is no requirement for individualized suspicion because the governmental interest in safety outweighs the limited invasion of individual privacy. Searches at airports, courthouses, and highly regulated industries fall into this category. See, United States v. Davis, 482 F.2d 893 (9th Cir. 1973)(airport searches); McMorris v. Alisto, 567 F.2d 897 (9th Cir. 1978)(Courthouse search); Camera v. Municipal Court, 387 U.S. 523 (1967)(building code inspection/intrusions); and, See v. City of Seattle, 387 U.S. 541 (1967)(fire code inspection/ intrusion). Also Compare, Florida v. Royer, __U.S.__, 75 L.Ed.2d 229 (1983) with United States v. Place, __U.S.__, 77 L.Ed.2d 110 (1983) and Florida v. Rodriquez, __U.S.__, 36 CrL 4086 (U.S. Nov. 13, 1984). Justice Rehnquist (writing for the majority) in Immigration and Naturalization Service v. Delgado, __U.S.__, 80 L.Ed.2d 247 (1984) held "factory surveys" where illegal aliens sometimes comprise a work force pass Fourth Amendment standards. The same question continues to emerge. When does an "encounter" with law enforcement become a detentional seizure? There exists three factors to be weighed in concluding highway safety against individual privacy rights.

In developing and implementing a DWI roadblock, the Tampa Police Department used Operation Waltz as its historical baseline. See, Appendix attached hereto. There are three prongs to an administrative search:

A) The gravity of the public interest at stake;

B) The efficiency of the procedure in reaching its desired goals; and,

C) The severity of intrusion with individual liberty.

The traditional approach to apprehending those who violate the alcohol-related driving laws of this state is totally inadequate as the grim statistics attest. It is estimated that for each and every driver arrested for an alcohol-related driving offense, approximately 2,000 go undetected. See generally for documentation of the prosecutorial representation, 71 Georgetown Law Review 1457, fn 1 which states: "Estimates place the annual death toll caused by drunk drivers at over 25,000. H.R. Rep. No. 867, 97th Cong., 2d Sess. 7, reprinted in 1982 U.S. Code Cong. & Ad. News 3367, 3367. Drunk drivers also cause nearly one million injuries and more than $5 billion in property damage each year. Lanter, The Drunk Driver Blitz, Nat'l L.J., March 22, 1982, at 1, col. 2." As recognized by Justice O'Connor in South Dakota v. Neville, __U.S.__, 103 S.Ct. 916, 920, 74 L.Ed.2d 748, 755 (1983):

> The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the

> problem that the state courts have, has repeatedly lamented the tragedy. See Breithaupt v. Abram, 352 US 432, 439, 1 L Ed 2d 448, 77 S.Ct. 408 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); Tate v. Short, 401 US 395, 401, 28 L Ed 2d 130, 91 S Ct 668 (1971)(Blackmun, J., concurring)(deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); Perez v. Campbell, 402 US 637, 657 and 672, 29 L Ed 2d 233, 91 S Ct 1704 (1971)(Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); Mackey v. Montrym, 443 US 1, 17-18, 61 L Ed2d 321, 99 S Ct 2612 (1979)(recognizing the "compelling interest in highway safety").
>
> (text of 74 L Ed 2d at 755)

The second prong of an administrative search analysis focuses on the efficiency of the procedure. Here, the Tampa Police Department has undertaken a professional approach to deter drunk driving through a structured, operational plan implementing roadblocks. Operation Waltz, the baseline of Tampa Police Department roadblocks, contains:

A. Statement of the Problem

B. Plan of Action
   1. Legal Aspects
   2. Roadblocks Logistics
   3. Site Selection
   4. Mass Communication
   5. Liasson Activity

C. Evaluation

An epilogue to Operation Waltz addresses

A. Public Response

B. Accident Data

C. Arrest Data

The third consideration in the administrative search analysis must address the severity of the intrusion with individual liberty. In assessing this factor, the Supreme Court has outlined certain considerations it finds important. First, there is the degree of "objective intrusion": the stop itself; the questioning; and, the visual inspection. United States v. Martinez-Fuerte, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976). In the case at bar, the officer "...just asked him a few questions to make sure he was all right." (R 24) The cars were designated for stop on a random basis. (R 26) After an automobile was stopped, identification was solicited. (R 27) The purpose of the roadblock was to investigate DWI offenses. (R 27) The stop in question was made at 2:30 a.m. (R 27) The intrusion consisted of talking to the subject; viewing the subject; and, smelling the subject. (R 30) In reference to Mr. Jones, the officer smelled alcohol upon the stop. (R 31) Jones, after being requested to step out the car, was "uneasy" on his feet. (R 31) Mr. Jones passenger uttered an admission against interest. (R 31) Jones then failed a road-side Alco-sensor examination; and, he also failed field-tests. (R 31) Jones was then arrested. (R 31) After being arrested, Jones was detained at the roadblock scene 30-40 minutes. (R 34) Here, the car was neither searched nor impounded. (R 32) Questioning was minimal. On the basis of the county court deposition, the objective intrusion was minimal and there in no Fourth Amendment Constitutional deprivation whatsoever in this case.

Perhaps the most influential opinion on the Second District opinion is State v. Deskins, 673 P.2d 1174 (Kan. 1983). In Deskins, a basis on which police can design a roadblock program is set forth. The conditions are:

(1) Advance notice to the public at large through media publicity

(2) Location selected and procedure developed by superior officers

(3) Degree of discretion left to the officer in the field

(4) Method of warning to individual motorists approaching the roadblocks

(5) Reason for the location designated for the roadblock

(6) Time and duration of the roadblocks

(7) Maintenance of safety conditions

(8) Average length of time each motorist is detained.

(9) Physical factors surrounding the location, type, and method of operation

(10) Degree of fear or anxiety generated by the mode of operation; and

(11) Any relevant circumstances which might bear on the test.

The Second District opinion is in agreement with the majority result in State ex rel. Ekstrom v. Justice Court, 663 P.2d 992 (Ariz. 1983) which advocates advance publicity in the media and on the highway. Therein lies the dichotomy. It is contradictory to logic and reason to require law enforcement to disseminate roadblock information or warnings to the news media so that drunk drivers are given a full and fair opportunity to

avoid the sobriety checkpoint. Florida is entitled in the interest of public safety to implement sobriety checkpoint techniques without having to disseminate advance notice to the public. Why? Because there is a diminished expectation of privacy in an automobile and individualized suspicion is not a prerequisite to a constitutional seizure of an automobile "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." See, Brown v. Texas, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979); and, Delaware v. Prouse, 440 U.S. 648, 663, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979). Granted a sobriety checkpoint has a deterrence function; but, as a matter of public policy, its detection function must not be ignored. To the extent that the Second District's opinion encourages public information release of time, date, and place of sobriety checkpoints, ignores this purpose.

The "State" would ask this Court to find that: (1) no Fourth Amendment deprivation occurred where Ronald Dean Jones was stopped at a sobriety checkpoint in view of the fact of the local government's compelling interest in controlling drunk driving and in view of the fact that all local roadblocks are operated under the aegis of "Operation Waltz" the master/baseline directive for all roadblocks which restricts the discretion of law enforcement so that motorists are not singled at discriminatorily. See, Appendix.

## CONCLUSION

Wherefore, based on the foregoing reasons, argument, and authority, Petitioner would pray that this Court, reverse both the judgment of the Second District finding the arrest of Ronald Dean Jones at the DWI roadblock was an improper seizure in violation of the Fourth Amendment and discharge of Ronald Dean Jones.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on Merits has been furnished by U.S. Mail to Walter O. Hobbs, II, Esquire, Harry M. Hobbs, P.A., 725 E. Kennedy Blvd., Tampa, Florida 33602 on this 23rd day of January, 1985.

OF COUNSEL FOR RESPONDENT