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neg App.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO.: 66,691

ROBERT WILLIAM HUME,

Respondent.

CONSOLIDATED

ROBERT WILLIAM HUME,

Petitioner,

vs. CASE NO.: 66,704

STATE OF FLORIDA,

Respondent.

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Chief Deputy Clerk

PETITIONER'S INITIAL BRIEF ON THE MERITS

CASE NO. 66,691

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TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	
ISSUE	
THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S SUPPRESSION OF EVIDENCE PREDICATED UPON POLICE NONCOMPLIANCE WITH FLORIDA STATUTES § 109.19(1).	6
CONCLUSION	13
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

CASES:	PAGE(S)
Griffin v. State, 419 So.2d 320 (Fla. 1982)	5,6,7,12
Illinois v. Gates, 462 U.S. 213, 130 S.Ct.____, 76 L.Ed.2d 527 (1983)	11
Koptyra v. State, 172 So.2d 628 (Fla. 2d DCA 1965)	5,6,7,12
State v. Cantrell, 426 So.2d 1035 (Fla. 2d DCA 1983), pet. for rev. den., 434 So.2d 886 (Fla. 1983), U.S. cert. den., 79 L.Ed.2d 182 (1984), U.S. reh. den., 80 L.Ed.2d 191 (1984)	5,6,7,11,12
State v. Hume, 463 So.2d 499 (Fla. 1st DCA 1985)	1,4,10
State v. Perry, 398 So.2d 959 (Fla. 4th DCA 1981)	5,6,9,12
State v. Schwartz, 398 So.2d 460 (Fla. 4th DCA 1981)	5,6,9,11,12
State v. Steffani, 398 So.2d 475 (Fla. 3d DCA 1981), approved 419 So.2d 323 (Fla. 1982)	5,6,8,12
United States v. Leon, 468 U.S.____, 104 S.Ct. ____, 82 L.Ed.2d 677 (1984)	12

STATUTES:	
Section 901.19(1), Florida Statutes	4,5,6,7,13

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PRELIMINARY STATEMENT

Robert William Hume, the criminal defendant and apellee below will be referred to herein as Respondent. The State of Florida, the prosecution and appellant below will be referred to herein as Petitioner.

The record on appeal consists of two sequentially numbered bound volumes. Citations to the record will be indicated parenthetically as "R" with the appropriate page number(s).

The decision of the lower tribunal is reported as State v. Hume, 463 So.2d 499 (Fla. 1st DCA 1985).

STATEMENT OF THE CASE AND FACTS

Respondent was charged, in Alachua County, Florida, by information dated January 24, 1983, with unlawful sale/ delivery of a controlled substance, to-wit: cocaine; trafficking in cocaine; and unlawful possession with intent to distribute a controlled substance, to-wit: cannabis (R 1-3).

On November 23, 1983, the trial court entered its order suppressing evidence seized from Respondent's apartment predicated upon the law enforcement officers' noncompliance with the "knock and announce" statute and the failure of the State to show that there was any exception authorizing the warrantless seizure of contraband from Respondent's bedroom closet. The order also provided for suppression of certain intercepted oral communications (R 127-132).

The pertinent facts relied upon by the trial court in suppressing the evidence seized from Respondent's apartment are as follows:

As a result of a narcotics investigation, a warrant for Respondent's arrest was issued on January 10, 1983. On or about January 17, 1983, it was determined that undercover agent Acevedo accompanied by other members of the Narcotics and Organized Crime Unit (NOCU) would go to Respondent's residence and that Acevedo would enter the residence and attempt to make a drug purchase. Acevedo was to be wired

with a "body bug" enabling transmission of his conversation to officers outside the residence. He was to verify the presence of cocaine in Respondent's apartment and communicate this fact to the other NOCU officers by use of a code word transmitted through his "body bug". Acevedo was then to proceed to the front door of the apartment, on the pretext of getting money from his car, open the door, and allow the officers waiting outside to enter.

Pursuant to the plan, Acevedo went to Respondent's apartment and was afforded entry. Thereafter, he proceeded with Respondent to the bedroom where Respondent displayed to him plastic bags containing approximately one-half pound of sensemilla buds along with a bag containing approximately 114 grams of suspected cocaine. Acevedo signaled the other officers that the cocaine was present and proceeded with Respondent to the front door of the apartment. Acevedo opened the door and the other officers came through the open door and placed Respondent under arrest. Subsequent to Respondent's being arrested and given Miranda warnings, Acevedo returned to the bedroom and seized the cocaine, sensemilla, and other drug paraphernalia (R 128-129).[1]

In its opinion filed February 11, 1985, the First

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[1]While neither the trial court nor the lower court made mention of the fact, the record reflects that Acevedo testified that members of the arrest team wearing police "raid jackets", hollered "police officers" as they entered the residence and placed Respondent under arrest (R 357).

District reversed the trial court's suppression order as to the intercepted oral communications, but, affirmed that portion of the order suppressing the evidence seized from Respondent's apartment holding that since the officers' noncompliance with Florida Statutes § 901.19(1) rendered Respondent's arrest unlawful, the seizure subsequent to the arrest was unlawful. State v. Hume, supra at 502. In so ruling, the court noted that but for the unlawful arrest, the seizure would have been lawful because Respondent's Fourth Amendment expectation of privacy was waived by his actions in granting the undercover officer access to the area and displaying the contraband to him. Id. at 502 n.5.

On March 7, 1985, Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction on the ground that the portion of the lower court's decision affirming the suppression of evidence seized from Respondent's apartment was in express and direct conflict with a decision of this Court and decisions of other District Courts of Appeal on the same question of law. This Court accepted jurisdiction and Petitioner's Brief on the Merits follows.

SUMMARY OF ARGUMENT

Petitioner argues that the portion of the lower court's decision herein affirming the trial court's suppression of evidence predicated upon police noncompliance with Florida Statutes § 901.19(1) is erroneous on the authority of Griffin v. State, infra, Koptyra v. State, infra, State v. Cantrell, infra, State v. Steffani, infra, State v. Schwartz, infra, and State v. Perry, infra, wherein the respective courts either affirmed the admission of evidence seized or reversed orders suppressing such evidence notwithstanding the presence of police conduct similar to that complained of sub judice. In so arguing Petitioner submits that disposition of this case turns upon whether or not the distinction employed by the lower court to avoid the mandate of the foregoing authority is valid and concomitantly contends that said distinction, as the lower court itself suggested, is clearly a distinction without a difference therefore rendering the above-cited cases apposite to and controlling of the case at bar.

ARGUMENT

ISSUE

THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S SUPPRESSION OF EVIDENCE PREDICATED UPON POLICE NONCOMPLIANCE WITH FLORIDA STATUTES § 109.19(1).

Petitioner, in arguing this cause in the lower court relied upon Griffin v. State, 419 So.2d 320 (Fla. 1982), Koptyra v. State, 172 So.2d 628 (Fla. 2d DCA 1965), State v. Cantrell, 426 So.2d 1035 (Fla. 2d DCA 1983), pet. for rev. den., 434 So.2d 886 (Fla. 1983), U.S. cert. den., 79 L.Ed.2d 182 (1984), U.S. reh. den., 80 L.Ed.2d 191 (1984), State v. Steffani, 398 So.2d 475 (Fla. 3d DCA 1981), approved, 419 So.2d 323 (Fla. 1982), State v. Schwartz, 398 So.2d 460 (Fla. 4th DCA 1981), and State v. Perry, 398 So.2d 959 (Fla. 4th DCA 1981), for the proposition that the police conduct sub judice did not warrant suppression of the evidence in question pursuant to Florida Statutes § 901.19(1). Each of the foregoing cases involved police conduct similar to that complained of herein. In each case the reviewing courts either affirmed the admission of the evidence seized or reversed orders of the trial courts suppressing such evidence notwithstanding the police officers' noncompliance with the "knock and announce" law, Florida Statutes § 901.19(1).

In Griffin, two undercover agents met with several men, including the defendants, at the home of one of the defendants to complete a previously arranged cocaine purchase. During the transaction one of the agents left the home under a pretext and returned accompanied by several other officers. The agent and policemen did not knock or in any other way announce their presence before entering the house and arresting those involved in the sale, nor did they have arrest or search warrants. This Court approved the decision of the district court upholding the trial court's denial of the defendants' motion to suppress physical evidence.

In Koptyra, a consensually present undercover agent temporarily excused himself from the defendant's residence after viewing contraband. Upon his return with other officers, the agent was admitted to the residence by one of the defendants who did not notice the presence of the other officers until they walked through the open door. None of the officers announced their purpose before entering. The district court held that the method of entry did not involve a breaking within the meaning of Florida Statutes § 901.19, and that the evidence seized was properly admitted. Id. at 631,632.

Similarly, in State v. Cantrell, the defendant invited an undercover agent and confidential informant into her apartment, for purposes of consummating a cocaine sale, and displayed two bags of cocaine. The informant left the apartment on a pretext. While making an inspection of the apartment,

with the defendant's consent, the agent, out of sight of the defendant, pressed a hidden beeper which by pre-arrangement with other officers outside, signaled that he had observed the commission of a felony. Subsequently, the informant returned to the apartment but did not lock the door as he was requested to do. The informant then gave money to the agent who began to count out the sum for the purchase. At this point, the outside officers, without announcing their purpose, opened the door, entered the apartment, placed the defendant under arrest, and seized the contraband as well as a loaded handgun located on the floor near where the defendant was sitting. The district court reversed the trial court's suppression order which had been based upon a violation of the "knock and announce" law.

In State v. Steffani, two undercover agents were invited by the defendant to his home for the purpose of consummating an illegal drug sale. The defendant escorted the agents to a bedroom where he displayed various controlled substances. After agreeing upon a price, one of the agents went outside, ostensibly to obtain money for payment. When the agent returned, he was followed, on a pre-arranged signal, by various back-up teams of officers with guns drawn. None of these officers knocked, or announced their presence, or performed the requirements of the "knock and announce" law. The back-up officers arrested the defendant and seized the contraband. The district court reversed the trial court's

suppression order.

In State v. Schwartz, an undercover agent and a confidential informant entered the defendant's home at the latter's invitation to arrange a purshase of illegal drugs. After setting the terms, the agent and the informant went to the agent's automobile to get the money for the purchase. The door to the residence was left ajar. Utilizing a pre-arranged signal, the agent and two other officers returned to the residence to arrest the defendant and a co-defendant, whereupon the defendant attempted to stop their entry. The defendants were arrested and the contraband was seized. The trial court found that this conduct violated the Florida "knock and announce" statute. The district court reversed.

Lastly, in State v. Perry, a consensually present undercover agent, after verifying the presence of marijuana, exited the residence purportedly to obtain money from his car for the purchase. By pre-arrangement this was a signal, to a number of back-up officers staked out in the neighborhood, that the agent had seen the marijuana and that it was time to move in and make the arrest. The other officers moved in, arrested all the individuals involved, including the agent, and seized the contraband. Both the arrests and the seizure occurred inside the residence, without either arrest or search warrants. The district court reversed the trial court's suppression order holding that both the arrests and the seizure were proper.

While noting that the arresting officers possessed a warrant for Respondent's arrest and performed no act to gain entry to his residence because the undercover officer opened the door for them, State v. Hume, supra at 501, the lower court circumvented the foregoing authority holding:

> We find, however, the cases alluded to by the state all involve a factual nuance not present in this case: namely, reentry into a defendant's residence by the undercover officer. Here, the undercover officer never left appellee's residence; rather, he allowed entry of the arresting officers by opening the front door. While it is arguable that this fact constitutes a distinction without a difference, with respect to the rationale identified in Steffani, we are not prepared to so hold as a matter of law, . . . [Emphasis added.]

Id. at 501,502. Distinction without a difference indeed. Disposition of the instant issue boils down to one basic query. Is this Court going to permit the enterprising employment of dubious distinctions to render nugatory established legal principles and thwart the legitimate ends of justice?

The essence of the lower court's ruling is that had Dectective Acevedo, upon opening the apartment door, stepped across the threshold, turned, and re-entered the apartment with the back-up officers, the arrest as well as the seizure would have been lawful. But, since the undercover officer's choreography was found wanting, to-wit: his failure to perform the "Acevedo Two-Step", the State must suffer the harsh sanction of suppression. Such super-technical hair-splitting has

no place in the resolution of issues grounded upon Fourth Amendment protections. See generally Illinois v. Gates, 462 U.S. 213, 103 S.Ct.___, 76 L.Ed.2d 527 (1983), where the high Court forthrightly dismantled the nit-picking analytical framework of Aguilar-Spinelli, instead looking to the totality of the circumstances.

The unsoundness of such reasoning has been addressed by other district courts and their analysis is particularly enlightening when applied here. "To admit that Dial [the undercover agent] could have arrested the defendant on the spot, and yet if he did so, to deny him the ability to obtain back-up support, flies in the face of logic." State v. Cantrell, supra at 1038. "The fact that one officer left and returned on a ruse may have benefited the officers by allowing them the added protection of other armed officers to assist in the arrest, but such conduct did not constitute an additional intrusion into the defendant's premises since such intrusion had already been lawfully accomplished by the undercover officers." State v. Schwartz, supra at 462. "In sum, we think, with the fourth district, that the consensual relinquishment of the defendant's privacy involved in inviting the undercover officers into his home extends not only to their own contemplated reentry but also to the causally and temporally closely-related actions of other officers who act at their direction and must therefore be deemed to stand in

their shoes." State v. Steffani, supra at 478.

Put simply, these courts have recognized that applying the strict remedial measures of an exclusionary rule on reasoning such as that utilized by the lower court serves not to deter objectionable police conduct but, instead operates to place at risk the life and limb of those to whom society has delegated the often-times thankless task of ferreting out crime and bringing malefactors to justice. A similar view was expressed by the United States Supreme Court in United States v. Leon, 468 U.S. ___, 104 S.Ct.____, 82 L.Ed.2d 677 (1984), where the Court stated:

> But even assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

Id. at 82 L.Ed.2d 696.

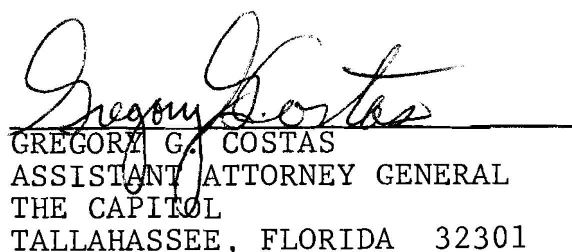
In sum, the distinction employed by the lower court is unquestionably a "distinction without a difference" and its decision affirming the trial court's suppression of evidence herein is clearly erroneous on the authority of Griffin v. State, supra, Koptyra v. State, supra, State v. Cantrell, supra, State v. Steffani, supra, State v. Schwartz, supra, and State v. Perry, supra.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, that portion of the lower court's decision affirming the trial court's suppression of evidence predicated upon police noncompliance with Florida Statutes § 901.19(1) should be quashed.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL



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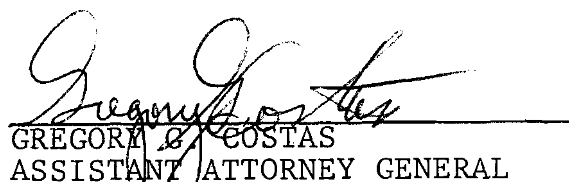
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioner's Initial Brief on the Merits was forwarded by U.S. Mail to Thomas W. Kurrus and Larry G. Turner, Suite 6, 204 West University Avenue, Gainesville, Florida, 32602, on this 13th day of September, 1985.



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