IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,711

THEODORE S. TAMER,

Petitioner

vs.

STATE OF FLORIDA

Respondent

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The defendant, Theodore S. Tamer, was originally charged by information with three counts of possession of a firearm while engaged in a criminal offense, one count of possession of cocaine, and a misdemeanor count of possession of cannabis. (R. 334). Pursuant to negotiations, the defendant entered a plea to one count of possession of a firearm and to possession of cocaine. Adjudication was withheld, and the defendant received concurrent terms of three years probation. (R. 335-7).

An Affidavit of Violation of Probation (R. 338) and an Amended Affidavit of Violation of Probation (R. 340) were filed, charging the defendant with having committed on May 14, 1983: (1, 2) arson; (3, 4) burglary; and (5) possession of a stolen auto tag.

An evidentiary hearing was held on July 6, 1983 (Vol. 1) upon defendant's Motion to Suppress Physical Evidence (R. 344). Said Motion to Suppress was orally denied by the Court, (R. 51) reduced to writing on August 31, 1983, nunc pro tunc to July 6, 1983 (R. 363).

Based upon the evidence and testimony presented at the probation revocation hearing, the Court ruled that insufficient evidence existed to warrant a revocation of probation on allegations 3, 4 and 5; that the State did not present evidence beyond a reasonable doubt of the defendant's guilt on allegations 1 and 2; but that sufficient evidence was presented on

allegations 1 and 2 to satisfy the conscience of the Court that revocation should be ordered. (R. 176-8). The defendant was sentenced to 15 years incarceration on count 2 of the information and to 5 years concurrent incarceration on count 4 of the information. (R. 359-60). Revocation was affirmed by the District Court of Appeal of Florida, Fourth District, on February 20, 1985. (Appendix). Jurisdiction was then invoked in this Court by certified question.

At the hearing on the Motion to Suppress heard July 6, 1983, Hialeah Police Officer Dwight Snyder testified that he observed the defendant at 1:05 a.m. on May 14, 1983 in the parking lot of the Westland Executive Plaza, 1575 West 49th Street, Hialeah, Florida, (R. 6-7), a two-story building which houses 35 doctors offices. (R. 8). The building was closed, and no traffic was in the area other than the defendant's white station wagon, which was observed driving through the parking lot, with its tailgate open. (R. 9-10).

Upon exiting the parking lot onto 49th Place, the defendant entered the Sears Auto Center parking lot across the street. (R. 10). Officer Snyder's marked patrol car approached the defendant's vehicle from the opposite side of the Sears store. Apparently, upon observing the police vehicle, the defendant made a sharp U-turn with tires squealing, (R. 11), and proceeded to a nearby Lum's. (R. 12-13).

As the patrol car approached, the defendant exited his car, closed the tailgate, and proceeded to walk toward the

restaurant. (R. 14-15). When asked to do so, the defendant produced his driver's license and a rental agreement/vehicle registration. (R. 15). The defendant, when questioned, explained that he was looking for an open restaurant. (R. 15). Officer Snyder was advised by police radio that the defendant's vehicle tag had been reported stolen. After the defendant was arrested, (R. 16-17), Officer Snyder was advised by police radio that a fire had been discovered at the Westland Executive Plaza. (R. 17).

On cross-examination, Officer Snyder acknowledged that the defendant's headlights were properly illuminated, that he did not observe the defendant commit any traffic offense, (R. 20-1), and that he did not observe any unusual manner of driving when the defendant exited the office complex. (R. 24). Upon seeing the defendant at the Westland Executive Plaza, Snyder's suspicions were subjectively aroused, although he could point to no facts indicating that the defendant had committed or was about to commit any crime. (R. 21). Based upon these subjective suspicions and the defendant's subsequent apparent evasiveness in making the U-turn in the Sears parking lot, (R. 28-9), Snyder admitted that the defendant would have been physically detained if he had attempted to leave when approached in the Lum's parking lot. (R. 28).

Hialeah Police dispatcher Kathleen Kinsman, riding with Officer Snyder, (R. 32-3), observed the defendant stopped at the Westland Executive Plaza with an open tailgate, make a

sharp U-turn in the Sears parking lot upon approaching the police vehicle, park in the Lum's parking lot, and, upon exiting his vehicle, close the hatchback. (R. 33-4). A records check of the vehicle revealed that its license tag had been reported stolen. (R. 34).

After Hialeah Police Officer William Valle testified that he was called as a back-up unit and that he first discovered the fire at the Westland Executive Plaza, (R. 35-6), the Court found the defendant's detention to be lawful, denying defendant's Motion to Suppress. (R. 51-3).

At trial, Officers Snyder and Kinsman testified consistent with their pre-trial testimony, Officer Kinsman adding that the defendant had indicated that he was going to eat at Lum's. (R. 247).

Fire Investigator Jim Goldman testified that the fires at the offices of Doctors Meyerson and Rodriguez were caused by gasoline (R. 269) no earlier than 1:05 a.m. (R. 267). Hialeah Police Officer Jeffrey Hirko testified that he found a white bucket in the parking lot of the Westland Executive Plaza, that the matching lid was found in the hallway outside Suite 206, and that a fluid sample was taken from the bucket. (R. 276-8, 284-5). Criminalist Miguel Palmer identified the fluid found in the bucket as gasoline, (R. 86-7, 325-6), and further identified gasoline in the fire debris analyzed. (R. 85).

I.D. technicians Richard Gallagher and Herbert Patterson testified that they collected and took samples from rubber

gloves found in the defendant's vehicle and scrapings taken from the cargo area of the station wagon. (R. 289, 307). A white, chalky substance was found on the defendant's shoes, (R. 330, 90-1), on the gloves found in the defendant's vehicle, (R. 329, 89-90), and on the bucket found in the Westland Executive Plaza parking lot. (R. 87). Gopinath Rao, an electron microscopist testified that although he did not know the nature of the white substances, (R. 128), physical observation and elemental analysis indicated that all four white substances were the same. (R. 117).

Based upon the foregoing testimony and evidence, the trial court found insufficient evidence on which to base a revocation of allegations 3, 4 and 5. (R. 178). Although the Court was not convinced beyond a reasonable doubt as to the defendant's guilt on the two charged arsons, (R. 182-3), the Court's conscience was satisfied as to the truth of the allegations contained in paragraphs 1 and 2, (R. 176-7), the defendant's probation was revoked. Following affirmance by the District Court of Appeal of Florida, Fourth District, the jurisdiction was invoked in this Court by certified question.

SUMMARY OF ARGUMENT

The exclusionary rule has been applied in Florida to probation revocation hearings. State v. Dodd, 419 So.2d 333 (Fla. 1982) and Grubbs v. State, 373 So.2d 905 (Fla. 1979). Since then, Article I Section 12 of the Florida Constitution has been amended to conform the search and seizure principles of the Florida Constitution with those contained in the Fourth Amendment to the United States Constitution "as interpreted by the United States Supreme Court". Since the United States Supreme Court has not yet ruled upon the applicability of the exclusionary rule to probation revocation hearings and moreover, since there is a conflict among the Federal Circuit Courts of Appeal as to a resolution of this issue, State v. Dodd, supra, and Grubbs v. State, supra, should remain the law of the State for the reasons cited therein.

In the event that this Court were to determine that the exclusionary rule should no longer apply to probation revocation proceedings, such a ruling should have prospective and not retrospective application. A defendant's substantive rights cannot be altered after said right is vested in the absence of violating the doctrine of ex post facto.

In the absence of being called to the scene by a concerned citizen, law enforcement officers lack articulable suspicion upon which to base an investigatory stop wherein the defendant is found driving his vehicle early in the morning in a business district known for recent criminal activity, wherein

the defendant drives the vehicle from the scene without violating any laws, wherein the defendant lawfully parks his vehicle at an open restaurant, and wherein the defendant is stopped as he walks toward said restaurant.

ARGUMENT

ISSUE I

ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION PROHIBITS THE STATE FROM RELYING UPON ILLEGALLY OBTAINED EVIDENCE AT A PROBATION REVOCATION HEARING.

An Affidavit of Violation of Probation (R. 338) and an Amended Affidavit of Violation of Probation (R. 340) were filed, charging the defendant, Theodore S. Tamer, with having committed on May 14, 1983: (1, 2) arson; (3, 4) burglary; and (5) possession of a stolen auto tag. An evidentiary hearing was held on July 6, 1983 (Vol. 1) upon defendant's Motion to Suppress Physical Evidence (R. 344). Said Motion to Suppress was orally denied by the Court, (R. 51) reduced to writing on August 31, 1983, nunc pro tunc to July 6, 1983 (R. 363).

In order to review on appeal the failure of the trial court to grant defendant's Motion to Suppress Physical Evidence, it is first necessary to evaluate the applicability of the exclusionary rule to probation revocation hearings in Florida.

It is beyond dispute, at least prior to January 4, 1983, that the exclusionary rule applied to probation revocation hearings under Article I, Section 12 of the Florida Constitution as it then existed. Evidence which was illegally seized in violation of the Fourth Amendment to the United States Constitution and/or in violation of Article I, Section 12 of the Florida Constitution was required to be excluded from

evidence; "Articles or information obtained in violation of this right shall not be admissible in evidence". (Article I, Section 12 of the Florida Constitution [1968]). State v. Dodd, 419 So.2d 333 (Fla. 1982) and Grubbs v. State, 373 So.2d 905 (Fla. 1979).

Article I, Section 12 of the Florida Constitution was amended January 4, 1983 to read as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Thus, in evaluating the admissibility of evidence under Article I, Section 12, the courts of Florida are bound by the interpretations of the Fourth Amendment to the United States Constitution as enunciated and interpreted by the United States Supreme Court. The reason for limiting the announcement of Federal law to the pronouncements of the United States Supreme Court as binding authority is evident in this case.

To date, the United States Supreme Court has never ruled on the issue of the applicability of the exclusionary rule to probation revocation hearings, having denied certiorari review upon this issue whenever requested. Moreover, the Federal Circuit Courts of Appeal are not totally consistent on this issue.

For example, five Federal Circuit Courts of Appeal have ruled that the exclusionary rule does not apply to probation revocation hearings based upon judicial considerations. United States v. Wiygul, 578 F.2d 577 (5th Cir. 1978); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Farmer, 512 F.2d 160 (6th Cir. 1975); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975); and United States v. Winsett, 518 F.2d 51 (9th Cir. 1975). Two Federal Circuit Courts of Appeal have ruled that the exclusionary rule does apply to probation revocation hearings. United States v. Workman, 585 F.2d 1205 (4th Cir. 1978) and United States v. Hallman, 365 F.2d 289 (3rd Cir. 1966). And one Federal Circuit Court of Appeal has ruled that the exclusionary rule does not apply to police officers, United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2nd Cir. 1970), but does apply to probation officers. United States v. Rea, 678 F.2d 382 (2nd Cir. 1982).

Thus, it would appear evident that the reason for including the limitation in Article I, Section 12 of the Florida

Constitution to following the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court was to eliminate the necessity of Florida courts having either to interpret Federal law or to reconcile the decisions of the various Federal Circuit Courts of Appeal.

Since Article I, Section 12 of the Florida Constitution as amended only requires evidence to be excluded if deemed "inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution", and since the United States Supreme Court has not yet been called upon to evaluate the applicability of the exclusionary rule under the Fourth Amendment to probation revocation hearings, the suppression of illegally obtained evidence at a probation revocation hearing as previously guaranteed in State v. Dodd, supra, and Grubbs v. State, supra, has not been modified by any contravening decisions of the United States or Florida Supreme Courts.[1] Thus, even under the amended Article I, Section 12 of the Florida Constitution the exclusionary rule prohibiting the admission of illegally obtained evidence applies to probation revocation hearings in Florida.

1. This Court in State v. Lavazzoli, 434 So.2d 321 (Fla. July 7, 1983) declared that amended Article I, Section 12 of the Florida Constitution should not be applied retroactively to crimes committed prior to the effective date of January 4, 1983. Although the respective parties briefed the issue of the applicability of the exclusionary rule to probation revocation hearings under the amended constitutional provision, this Court did not rule on this issue; State v. Dodd, supra, and Grubbs v. State, supra, are still controlling law. See also, Copeland v. State, 435 So.2d 842 (Fla. 2nd DCA 1983).

ISSUE II

ASSUMING ARGUENDO THAT AMENDED ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION PERMITS THE STATE TO INTRODUCE ILLEGALLY OBTAINED EVIDENCE AT A PROBATION REVOCATION HEARING, SAID RULE SHOULD ONLY BE APPLIED PROSPECTIVELY.

The amendment to Article I, Section 12 of the Florida Constitution cited in Issue I took effect on January 4, 1983. As noted in Issue I, the amendment on its face neither eliminated nor put probationers on notice that probation revocation hearings would no longer be subject to motions to suppress illegally obtained evidence since the United States Supreme Court never made such a Fourth Amendment determination. Thus, if the law of State v. Dodd, supra and Grubbs v. State, supra, has been overruled, it was not the amendment of Article I, Section 12 which effected the change, but rather subsequent case law and judicial decisions.

Since the allegations upon which the probation revocation were based occurred on May 14, 1983, the defendant's "crime" pre-dates any appellate decision which could even arguably be interpreted as amending the rule of exclusion. (Both State v. Lavazzoli, supra, and Copeland v. State, supra, were decided after May 14, 1983.)

This Court has recognized that amended Article I, Section 12 should be given prospective treatment only and should not be applied retroactively to violations of probation factually occurring before the change in the law, assuming said

change to have been made. State v. Lavazzoli, supra. A substantive right, such as the right to file a motion to suppress illegally obtained evidence, should be protected from retroactive changes in the absence of an express contrary legislative intent. Myers v. Hawkins, 362 So.2d 926 (Fla. 1978); State ex rel. Judicial Qualifications Commission v. Rose, 286 So.2d 562 (Fla. 1973); State ex rel. Reynolds v. Roan, 213 So.2d 425 (Fla. 1968); and other cases cited in State v. Lavazzoli, supra.

Furthermore, modifications of substantial criminal rights cannot be applied retroactively without violating the due process clause of the United States and Florida Constitutions under the prohibition of enacting ex post facto laws.

If a Florida Court, having jurisdiction to do so, were to interpret Amended Article I, Section 12 of the Florida Constitution to eliminate a probationer's right to file a pre-hearing motion to suppress illegally obtained evidence at a probation revocation hearing, said interpretation eliminating a pre-existing constitutional right would violate the ex post facto doctrine. Wilson v. State, 288 So.2d 480 (Fla. 1974); Rhodes v. State, 283 So.2d 351 (Fla. 1973) and Higginbatham v. State, 88 Fla. 26, 101 So. 233 (1924).

As held by the United States Supreme Court in Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964):

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language, but also

> from an unforseeable and retroactive judicial expansion of narrow and precise statutory language....If a state legislature is barred by the ex post facto clause from passing such a law, it must follow that a state Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction.

Thus, assuming the exclusionary rule to no longer apply to probation revocation hearings, the mere amendment of Article I, Section 12 of the Florida Constitution did not adequately place probationers on notice of said modification, since the United States Supreme Court had never interpreted the Fourth Amendment's applicability to probation revocation proceedings. Rather, the elimination of motions to suppress would have been declared by Court decision. Since any such appellate decision was or would have been rendered subsequent to the date upon which it was alleged the defendant violated his probation, any such decision, to avoid the ex post facto doctrine, must be applied prospectively and not retroactively. As such, the defendant's right to file a motion to suppress illegally obtained evidence in this case is preserved.

ISSUE III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS IN THAT LAW ENFORCEMENT AUTHORITIES LACKED REASONABLE SUSPICION UPON WHICH TO BASE AN INVESTIGATORY STOP.

In denying defendant's Motion to Suppress, the trial court ruled that, "This Court finds that this officer was justified in detaining the Defendant for that short period of time based upon a 'founded suspicion' which had a factual foundation in the circumstances observed by the officer, and which circumstances were interpreted in the light of the officer's knowledge." (R. 365).

The standard to apply in evaluating the legality of an investigatory stop has been clearly stated:

> The right of law enforcement officers to stop and temporarily detain individuals under certain circumstances is specifically granted by Florida Stop and Frisk Law, Section 901.151, Florida Statutes (1976)....To justify temporary detention, only "founded suspicion" in the mind of the detaining officer is required. Lewis v. State, 337 So.2d 1031 (Fla. 2 DCA 1976); State v. Othen, 300 So.2d 732 (Fla. 2 DCA 1974); State v. Ebert, 251 So.2d 38 (Fla. 2 DCA 1971). A "founded suspicion" is a suspicion which has some factual foundation in the circumstances observed by the officer when those circumstances are observed in the light of the officer's knowledge. "Mere" or "bare" suspicion, on the other hand, cannot support detention. Coleman v. State, 333 So.2d 503 (Fla. 4 DCA 1976). Mere suspicion is no better than random selection, sheer guesswork or hunch, and has no objective justification. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and Thomas v. State, 250 So.2d 15 (Fla. 1st DCA 1971).

State v. Stevens, 354 So.2d 1244 (Fla. 4 DCA 1978).

At the hearing on the Motion to Suppress heard July 6, 1983, Hialeah Police Officer Dwight Snyder testified that he observed the defendant at 1:05 a.m. on May 14, 1983 in the parking lot of the Westland Executive Plaza, 1575 West 49th Street, Hialeah, Florida, (R. 6-7), a two-story building which houses 35 doctors offices. (R. 8). The building was closed, and no traffic was in the area other than the defendant's white station wagon, which was observed driving through the parking lot, with its tailgate open. (R. 9-10).

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As the patrol car approached, the defendant exited his car, closed the tailgate, and proceeded to walk toward the restaurant. (R. 14-15). When asked to do so, the defendant produced his driver's license and a rental agreement/vehicle registration. (R. 15). The defendant, when questioned, explained that he was looking for an open restaurant. (R. 15). Officer Snyder was advised by police radio that the defendant's vehicle tag had been reported stolen. After the defendant was arrested, (R. 16-17), Officer Snyder was advised by police radio that a fire had been discovered at the Westland Executive

Plaza. (R. 17).

On cross-examination, Officer Snyder acknowledged that the defendant's headlights were properly illuminated, that he did not observe the defendant commit any traffic offense, (R. 20-1), and that he did not observe any unusual manner of driving when the defendant exited the office complex. (R. 24). Upon seeing the defendant at the Westland Executive Plaza, Snyder's suspicions were subjectively aroused, although he could point to no facts indicating that the defendant had committed or was about to commit any crime. (R. 21). Based upon these subjective suspicions and the defendant's subsequent apparent evasiveness in making the U-turn in the Sears parking lot, (R. 28-9), Snyder admitted that the defendant would have been physically detained if he had attempted to leave when approached in the Lum's parking lot. (R. 28).

Hialeah Police dispatcher Kathleen Kinsman, riding with Officer Snyder, (R. 32-3), observed the defendant stopped at the Westland Executive Plaza with an open tailgate, make a sharp U-turn in the Sears parking lot upon approaching the police vehicle, park in the Lum's parking lot, and, upon exiting his vehicle, close the hatchback. (R. 33-4). A records check of the vehicle revealed that its license tag had been reported stolen. (R. 34).

Thus, the objective facts presented were (1) that Officer Snyder was advised by his sergeant at shift briefing that there had been a recent rash of fires at doctors' offices

in the area; (2) that the defendant's vehicle was observed at the Westland Executive Plaza at 1:05 a.m.; (3) that said doctors' building was closed; (4) that the vehicle's tailgate was open; (5) that the vehicle exited the parking lot and proceeded to the Sears Auto Center across the street; (6) that upon observing the police vehicle, the defendant made a sharp U-turn with tires squealing; (7) that the defendant lawfully parked at the Lum's Restaurant; and (8) that he exited his car, closed the tailgate, and proceeded to walk toward the restaurant when detained by officers.

It is important to note that the observations of Officers Snyder and Kinsman were made during a routine patrol, and not pursuant to a tip or confidential information. Said additional factor could very well transform an illegal stop into a proper detention based upon sufficient reasonable suspicion. (See Lightbourne v. State, 438 So.2d 380 (Fla. 1983). "The officers were responding to a call and were not acting on their own 'hunch' as in the 'roving patrol' cases.")

Merely being observed by patrolling police officers in the late night or early morning hours, in the absence of a specific reported crime, does not constitute reasonable suspicion upon which an investigatory stop may be based. Lewis v. State, supra, (walking down a public street) Keenan v. State, 372 So.2d 1012 (Fla. 1st DCA 1979) (driving down the street), and State v. Beja, 451 So.2d 882 (Fla. 4th DCA 1984) (parked behind a drug store).

Nor, in the absence of a specific complaint, does a history of crime in the area permit a detention of individuals observed therein during early morning hours. Freeman v. State, 433 So.2d 9 (Fla. 2nd DCA 1983) ("Although carrying a lit flashlight in the early morning hours through a parking lot which has suffered a rash of vehicle burglaries may give rise to a "bare" suspicion of illegal activity, it does not, without more, give rise to a "founded" suspicion of illegal activity".)

> It has long been recognized in this state that being out on the public street during late and unusual hours cannot constitute a valid basis to temporarily detain and frisk an individual under the stop and frisk law. See, e.g., Mullins v. State, [366 So.2d 1162 (Fla. 1978)]; State v. Stevens, 354 So.2d 1244, 1247 (Fla. 4th DCA 1978) and cases collected; Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976); Riley v. State, 266 So.2d 173 (Fla. 4th DCA 1972). Moreover, this result is not changed by the fact that the area in which the individual is traveling is one which has experienced crime in the past. Jackson v. State, 319 So.2d 617 (Fla. 1st DCA 1975).

Levin v. State, 449 So.2d 288 (Fla. 3rd DCA 1983), affirmed 452 So.2d 562 (Fla. 1984). See also, Ward v. State, 453 So.2d 517 (Fla. 2nd DCA 1984).

Other than subjective suspicion, the major factor considered by Officer Snyder in attempting to justify the defendant's detention was the defendant's apparent evasiveness in making the U-turn in the Sears parking lot. (R. 28-29). However, mere evasiveness toward law enforcement officers in a high-crime area in the early morning hours does not justify an

investigatory stop. Vollmer v. State, supra. For example, the fact that a parked vehicle, in the early morning hours in an area troubled by previous burglaries, hurriedly departed with its lights out, and that the driver looked suspiciously at law enforcement officers was held to be insufficient grounds upon which to base an investigatory stop. Delp v. State, 364 So.2d 542 (Fla. 4th DCA 1978).

Even physically attempting to avoid police by driving, Chermak v. State, 427 So.2d 1113 (Fla. 3rd DCA 1983); or walking away, Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980), Wilson v. State, 433 So.2d 1301 (Fla. 2nd DCA 1983), and In the Interest of R.B. v. State, 429 So.2d 815 (Fla. 2nd DCA 1983); does not create sufficient articulable and objective facts upon which to base an investigatory stop. "The officer said this action 'gave me the impression they were avoiding me' and that 'at this time I really thought they were up to something'.... McClain's behavior which, taken for its most insidious implications, indicated only that he wanted to avoid police, could not give rise to a reasonable suspicion that he was engaged in criminal activity." McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982).

The detaining officer herein relied upon nearly identical insufficient considerations. "The manner in which he was driving, it appeared to me that he was avoiding any contact with me, whatsoever. Under those circumstances I felt that there might be a possibility that he was up to some type of

criminal activity." (R. 28-29).

It is respectfully submitted that defendant's presence in a business area in the early morning hours and his apparent attempt to avoid the marked police vehicle, along with his having lawfully parked at an open Lum's Restaurant does not constitute reasonable suspicion upon which to base an investigatory stop. The case of Lower v. State, 348 So.2d 410 (Fla. 2nd DCA 1977) is particularly controlling:

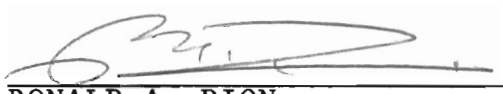
> At approximately 12:52 a.m. on July 4, 1976, Deputy Dixon observed an automobile parked in the parking lot of a business area in Sarasota. All of the businesses in the area were closed; none had remained open past midnight. As Dixon drove by in his police cruiser, the automobile backed out of its parking place and pulled away, at what he testified was "a faster than average rate of speed". Dixon followed the vehicle for a short distance and stopped it. The driver had committed no traffic infraction, and no "lookouts" had been issued for the vehicle....The circumstances of this case, that is, the automobile was parked in a parking lot, the businesses surrounding it were closed, and the car left the lot when Deputy Dixon drove by, were insufficient to justify a reasonable conclusion that the occupants of the car were involved in any criminal activity.

In the case at bar, there were even less objective facts upon which to base a stop since, when approached, the defendant was legitimately walking toward an open Lum's Restaurant at which he was lawfully parked.

Thus, based upon the above-cited controlling case law, Officers Snyder and Kinsman lacked sufficient articulable and objective facts upon which to base an investigatory stop. Defendant's Motion to Suppress should have been granted.

CONCLUSION

Based upon the foregoing cases, authorities, reasons and theories, the defendant would respectfully request this Honorable Court to affirm the opinion of the Fourth District Court of Appeals, applying the exclusionary rule to probation revocation hearings, to reverse the ruling on defendant's Motion to Suppress Illegally Obtained Evidence, and to reverse the judgment and sentence entered below.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, 111 Georgia Avenue, Room 284, West Palm Beach, Florida, 33401, this 29th day of MARCH, 1985.

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