IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JAMES A. CABBAGESTALK,

Respondent.

CASE NO.66,993

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Respondent was the Defendant in the Criminal Division if the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County, and the Appellant in the District Court of Appeal, Fourth District. The Petitioner was the Prosecution and Appellee in the lower courts. In the brief the parties will be referred to by name.

The symbol "R" will denote the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent, Mr. Cabbagestalk, accepts the Statement of Case and Facts submitted by the State of Florida, but adds that:

The trial court granted the Motion to Suppress as to the substantive charge, but denied the identical Motion as to the violation of probation (R44, 49, 68). The court stated that "... the same law doesn't apply when you're on probation. You live in a different world." (R49-50).

SUMMARY OF THE ARGUMENT

Respondent maintains that the Fourth District Court of Appeal properly applied the exclusionary rule to the instant probation revocation proceeding. This decision is wholly consistent with the amended version of Article I, Section 12 of the Florida Constitution and this Court's existing opinions. This is particularly so in light the absence of a decision on the present issue by the United States Supreme Court. Respondent's argument furthers the purpose if deterrence embodied in the exclusionary rule, and furthers the constitutional guarantees upon which the rule is based.

ARGUMENT

THE EXCLUSIONARY RULE APPLIES TO PROBATION REVOCATION HEARINGS IN CONFORMITY WITH ARTICLE I, §12 OF THE FLORIDA CONSTITUTION AND THE FOURTH AND THE FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE TRIAL COURT'S DENIAL OF RESPONDENT'S MOTION TO SUPPRESS WAS ERROR (Restated).

The present issue involves the application of the exclusionary rule to a probation revocation proceeding. Respondent's suppression motion was granted as to the substantive offense (R49-50) but denied as to the probation violation. The lower court cited State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), basing its denial on the sole ground that a probation revocation proceeding was involved (R49-50, 68). Respondent maintains that the decision of the Fourth District Court of appeal reversing the revocation of probation upon the authority of Tamer v. State, 10 FLW 473 (Fla. 4th DCA February 20, 1985) was proper.

As the Fourth District Court of Appeal noted in Tamer, supra, this Court, in State v. Dodd, 419 So.2d 333 (Fla. 1982) held that the exclusionary rule embodied in Article I, Section 12 of the Florida Constitution applies in probation revocation proceedings. Tamer v. State, supra, 10 FLW at 473. Article I, Section 12 has subsequently been amended to be

> ".. construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court." [1]

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[1] The state constitutional amendment, effective January 4, 1983, follows (the new language is underlined):

ARTICLE I
DECLARATION OF RIGHTS

SECTION 12. Searches and seizures--The right of the people to be secure in their persons,

As the Fourth District Court of Appeal in Tamer, supra, aptly noted, the United States Supreme Court has not passed on the issue of whether evidence obtained in violation of the Fourth Amendment is admissible in probation revocation hearings. Tamer v. State, supra, 10 FLW at 474. Indeed, Petitioner concedes this point [Petitioner's Brief on the Merits at 6], but submits that this Court should hold that the exclusionary rule is not applicable in probation proceedings, in accordance with federal authority. Petitioner further suggests that this Court recede from its existing case law regarding the application of the exclusionary rule based upon this Court's limited holding in State v. Lavazzoli, 434 So.2d 321 (Fla. 1983).[2]

> 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 of 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. Article 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.

[2] Respondent takes issue with Petitioner's interpretation of this Court's decision in Lavazzoli, supra [Petitioner's Brief on the Merits at 6]. As this Court stated:

> "The narrow question that confronts us is whether the [1983] amendment [Article I Section 12] applies to this pending case."

State v. Lavazzoli, supra, 434 So.2d 323.

The fact remains that the issue sub judice involves the application of the exclusionary rule to probation revocation cases in light of the amended version of Article I, Section 12. Article I Section 12 as amended requires that on individual's right to be secure against unreasonable searches and seizures under the Florida Constitution be construed "in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court." Since there is no ruling by the United States Supreme Court on the issue sub judice, section 12 can be consistently construed with the existing opinions of this Court. See: Tamer v. State, 10 FLW at 474 [citing Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982)]. Otherwise put, Dodd continues to control. See also: Grubbs v. State, 373 So.2d 905 (Fla. 1979).

Additionally, Respondent maintains that the application of the exclusionary rule to probation revocation proceedings furthers the purpose of the rule - to deter unlawful police conduct so that Fourth Amendment guarantees are effectuated. E.g. Elkins v. United States (1960), 364 U.S. 207, 80 S.Ct. 1437, 4 L.Ed.2d 1669. As the Elkins Court stated, the purpose of the exclusionary rule

> "... is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it."

Elkins, supra, 344 U.S. at 217, 80 S.Ct. at 1444. The application of the exclusionary rule to probation revocation proceedings furthers this purpose by removing incentives for police misconduct.

Petitioner's claim that the purpose of the exclusionary rule is satisfied by suppressing illegally seized evidence at trial and that this purpose is not furthered by applying the rule to probation revocation proceedings is short-sighted at best. Police officers and probation officers at times work together; the police have access to criminal records and the potential for abuse exists. See: State v. Burkholder, 12 Ohio St.3d 205, 466 N.E.2d 176, 178 (1984). Such potential for abuse must therefore be deterred in order to engender the constitutional rights supporting the exclusionary rule. Id.

Finally, while a probationer's rights may be limited, e.g. Morrissey v. Brewer, (1972) 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484; Gagnon v. Scarpelli (1983) 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, the means to supervise him already exist. It is simply unnecessary to curtail the constitutional guarantees against unreasonable searches and seizures on the basis that the probationer requires close observation. State v. Burkholder, supra.

Based upon the foregoing, Respondent contends that the application of the exclusionary rule to probation revocation cases is consistent with the amended version of Article I, Section 12 of the Florida Constitution and with this Court's existing opinions. Accordingly, the decision of the Fourth District Court of Appeal reversing the trial court's order of revocation must be approved.

CONCLUSION

Wherefore, based in the foregoing reasons and authorities, the Respondent respectfully requests that this court affirm the opinion of the Fourth District Court of Appeal which reverses the trial court's order of revocation.

Respectfully submitted,

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BY _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 29th day of May, 1985.

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Of Counsel