IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Case No. 67,137
	:	
KEVIN RICHARD CROSS	:	
	:	
Respondent.	:	
	:	

PETITIONER'S INITIAL BRIEF ON THE MERITS

DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

KVB/cww

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the Criminal Division of the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, and the Appellee in the Second District Court of Appeal.

The Respondent, Kevin Richard Cross, was the Defendant in the Trial Court and the Appellant before the Second District Court. In the instant case, the parties will be referred to by their proper names or as they stood before the trial court.

The Record on Appeal consists of (1) volume which will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

In 1983, Kevin Richard Cross was charged in Polk County, Florida with the felony offense of Resisting an Officer with Force and Violence and with Disorderly Intoxication. (R 3-5) Pursuant to a plea agreement, Cross pled guilty to the lesser included misdemeaner offense of Resisting an Officer Without Violence and the State agreed to "nolle pros" the Disorderly Intoxication charge. (R 6) The court withheld adjudication and Cross was placed on one year probation beginning on July 18, 1983. (R 8, 9)

In October of 1983, Cross was charged with violating his probation by 1) failing to submit written monthly reports for August and September, 1983; 2) failing to pay costs of supervision in August, September, and October 1983, and 3) changing his residence in September of 1983, without advising his probation officer. (R 11)

On June 26, 1984, Cross was charged with violating his probation by virtue or his arrest on April 15, 1984, for the offense of exposure of his sexual organs. (R 15)

On July 13, 1984, Cross was restored to his original probation. (R 16)

On July 25, 1984, Cross was again charged with violating his probation, this time by virtue of his arrest on July 16, 1984 for Grand Theft. (R 17)

On October 18, 1984, Cross filed a Motion to Suppress

evidence, to wit: 1) a .38 caliber colt firearm seized from his residence and 2) statements made by Cross to Sheriff's personnel about the firearm. (R 22)

Following a hearing on December 6, 1984, Circuit Judge Oliver L. Green, denied Cross' Motion to Suppress. (R 37)

On December 6, 1984, Judge Green found Cross in violation of his probation and sentenced him to serve six months in jail. (R 58)

On December 6, 1984, Cross filed a Notice of Appeal to the District Court of Appeal, Second District. (R 61) The Second District Court reversed the Order revoking Cross' probation and vacated his sentence. In so doing, the Second District Court certified the following question as one of great public importance:

> WHETHER AMENDED ARTICLE ONE, SECTION 12, OF THE FLORIDA CONSTITUTION PROHIBITS ILLEGALLY OBTAINED ARTICLES AND INFORMATION FROM BEING ADMITTED IN EVIDENCE IN PROBATION REVOCATION PROCEEDING?
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> Cross v. State, ___So.2d___ (Fla. 2d DCA, 1985), Case No. 84-2688, Opinion filed May 24, 1985 [10 F.L.W. 1308]

The following cases are pending before this Honorable court which raise the same issue as the present appeal:

Theodore Tamer v. State - Fla. S.Ct. Case No. 66,711

State v. Cabbagestalk - Fla. S.Ct. Case No. 66,993

STATEMENT OF THE FACTS

In its opinion, the Second District Court set forth the facts pertinent to the issues raised on appeal:

At the hearing, it was disclosed that on March 24, 1984, Deputy Jimmie Carter of the Polk County Sheriff's Department investigated a report of a shooting. She interviewed the defendant and the victim, Cynthia Lanning, at the Heart of Florida Hospital in Haines City. They explained to the Deputy that when the defendant picked up the handgun at his residence, it accidentially discharged wounding Lanning. At that point Deputy Carter told the defendant that she was going to his home to investigate the "crime scene." The deputy said that defendant seemed extremely upset but did not tell that she could not do so.

Deputy Carter did not secure a warrant. Rather, she traveled directly to defendant's home.[1] Entering the bedroom, she found a handgun on the bed and observed what appeared to be a bullet hole in the wall. She seized the gun, which appeared to have been fired recently. The Sheriff's Department retained the gun in its custody.

In April, Susan Baker reported to the sheriff that a handgun was missing from her home in Polk County. While checking out her complaint, sheriffs investigator Whatley compared serial numbers and concluded that the firearm seized by Deputy Carter was Baker's handgun. Thereafter, Whatley contacted the defendant,

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[1] The scene had not been secured -- the door of the mobile home was open and some neighbors were inside the residence. (R 31)

who admitted having the gun in his home; however, he denied stealing it.

The trial court denied defendant's motion to suppress the handgun seized by Deputy Carter and the statement he made concerning it to Investigator Whatley. The trial judge concluded that while the defendant did not consent to have his residence searched, the warrantless search and seizure came within the emergency doctrine exception to the warrant requirement.

(Appendix, slip opinion at 2-3)

SUMMARY OF THE ARGUMENT

The State maintains that the 1983 Amendment to Article I, Section 12, of the Florida Constitution which modified the State's exclusionary rule, now permits the introduction of evidence in a probation revocation proceeding without regard to the exclusionary rule.

The State maintains that exclusion of illegally seized evidence from substantive prosecutions while allowing its admission in probation revocation hearings adequately serves the deterrence purpose of the rule.

ISSUE

ARGUMENT

THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION, AS AMENDED, IS INAPPLICABLE TO A PROBATION REVOCATION PROCEEDING.

Kevin Cross was charged with having violated his probation on July 16, 1984. In his probation revocation proceedings, he moved to suppress evidence which he alleged was obtained as a result of an illegal search and seizure. The Second District Court of Appeal, agreeing with Cross' contention that the evidence was obtained as a result as a illegal search and seizure, certified to this court a question of great public importance:

> WHETHER AMENDED ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION PROHIBITS ILLEGALLY OBTAINED ARTICLES AND INFORMATION FROM BEING ADMITTED IN EVIDENCE IN PROBATION REVOCATION PROCEEDINGS?

In State v. Dodd, 419 So.2d 333 (Fla. 1982) this court held that the exclusionary rule applied to probation revocation proceedings. However, effective January 4, 1983, Article I, Section 12, the Florida Constitution was amended; and now protection against unreasonable searches and seizures under the Florida Constitution is construed in conformity with the Fourth

Amendement to the United States Constitution as interpreted by the United States Supreme Court.

The premise upon which this court relied in State v. Dodd, 419 So.2d 333 (Fla. 1982) and Grubbs v. State, 373 So.2d 905 (Fla. 1979), where it held the exclusionary rule applicable the probation revocation proceedings, was that the Florida Constitutional Rule was more restrictive than its Federal counterpart and evidence seized in violation thereof was inadmissible in any proceeding. With the amendment of the Florida Constitution, this restriction has now been lifted.

In State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), this court implicity recognized that under the new amendment, the exclusionary rule does not apply to probation revocation proceedings. However, since Lavazzoli's revocations occurred prior to the amendment's effective date, this court declined to give the amendment retroactive application.

Sub judice, Kevin Cross violated his probation in July of 1984, well after the effective date of the amendment, therefore there is no retroactive application of the amendment.

No United States Supreme Court decision specifically holds the exclusionary rule inapplicable to probation revocation proceedings; however, the court has made it clear that a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed to a defendant in a criminal proceeding. Gagnon v. Scarpelli, 411 U.S. 778, 93

probation revocation hearing is an informal proceeding and not a criminal trial. The purpose of the hearing is to satisfy the conscience of the court as to whether the conditions of probation have been violated and to give the probationer a chance to explain the accusations. Brill v. State, 32 So.2d 607, 159 Fla. 682 (1947) The reason for the distinction between a trial and revocation hearing is that the probationer has already been convicted of a crime and he is at liberty because of judicial grace; and a probationer is not entitled to remain at large if he persists in criminal activity. Bernhardt v. State, 288 So.2d 496 (Fla. 1974).

The approach suggested by the State provides that a probationer will not have evidence seized in contravention of the Fourth Amendment introduced in a substantive prosecution, while insuring that a probationer, who has been given by judicial grace an opportunity to live at liberty, cannot continue probation if he flouts the law. In accordance with the majority view among the Federal Circuits[2], this court should hold that the exclusionary rule is inapplicable to probation revocation proceedings.

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[2] See United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), cert. denied, 423 U.S. 987, 96 S.Ct. 397, 46 L.Ed.2d 305 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971). In contrast, the exclusionary rule was held applicable in United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

S.Ct. 1756, 36 L.Ed.2d 656 (1973), Morrisey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) As recognized by the Second District Court in the instant case, there is a division of opinion among the lower Federal Courts as to whether the exclusionary rule applies in probation revocation proceedings. Cross v. State, 10 F.L.W. 1308; See, e.g., Annot., 30 A.L.R. Fed. 824 (1976); N. Cohen and J. Gobert, The Law of Probation and Parole, §9.13 (1983).

The exclusionary rule has not been constitutionally required, but it is rather a judicial remedy designed to curtail police misconduct. The court has previously balanced the social benefits of excluding evidence against the cost to society resulting from such exclusion. See e.g., United States v. Leon, 468 U.S. 677, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) (Rule inapplicable in federal civil tax assessment proceedings); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (Rule inapplicable in grand jury proceedings), I.N.S v. Lopez Mendoza, 468 U.S.___ 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) (Rule inapplicable in deportation proceedings).

In light of the deterrence rationale underlying the exclusionary rule, the State submits that it is adequately served by excluding any illegally seized evidence from substantive criminal prosecution, while permitting its use at a probation revocation proceeding. This court has long recognized that a

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Petitioner respectfully requests that this Court hold the exclusionary rule inapplicable to probation revocation proceedings, and thereby reverse the opinion of the Second District with the directions to affirm the trial court's order of revocation.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Katherine Blanco

KATHERINE V. BLANCO
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Joel Grigsby, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830-3798 this 2nd day of July, 1985.

K Blanco

OF COUNSEL FOR PETITIONER.