IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO. 67,280
RAMON R. PINA, Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R"	Transcript
"RA"	Record referring to Case No. 84-1487 (VOP)
"RB"	Record referring to Case No. 84-1488 (Substantive charge)
"RC"	Record referring to Case No. 84-1489 (VOP)

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with trafficking in cocaine (RB 245) and also with violating two separate probations (RA 248, RC 247).

Respondent filed a motion to suppress the cocaine found in the search at the train station (RB246-248). Before the hearing, Respondent pled nolo contendere to the two violations of probation when the trial judge ruled that, even though Respondent's probations were imposed in 1982, State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), required that the evidence be admissible in violations of probation hearings despite any illegality (R 3-8).

At the hearing, held on June 1, 1984 (RB 258), the State presented evidence from three witnesses - police officers Nutt, Green and Gaffney. These officers testified to the following sequence of events: Detective Green saw Respondent buy a one-way ticket to New York with cash (R 51) and noticed that Respondent kept staring at him (R 52). Detective Green and Detective Nutt were seated on a bench in the station and became more suspicious of Respondent when he walked behind them, out of his way, to get to the water fountain (R 54). Detective Nutt testified that Respondent walked around where he and Detective Green were sitting to go to the water fountain. "[I]t was very obvious he was trying to figure out what we were talking about" (R 23). Respondent was acting nervous (R 24). Detective Nutt

stated that the attention Respondent was paying to the detective was "one of the most extreme cases I've seen there - he was pretty occupied with us, where we were all the time. He was sweating, just overall nervousness" (R 25).

Next Respondent was seen walking out of the station towards the phones. Detective Gaffney, paged to the telephone, followed. As Detective Gaffney neared the phone booth, Respondent handed him the phone he was using. The phone had a dial tone although Respondent had appeared to be talking on it (R 107-112). Respondent approached Detective Green (who was now outside) with a question regarding whether the trains were always on time (R 55-56). Detective Green directed him to the ticket agent but Respondent did not seek out the ticket agent (R 56). Detective Green observed Respondent at this point and described him as "acting very nervous" (R 56). At that point, Detective Green and Detective Nutt decided to stop Appellant (R 57).

Upon approaching Respondent the officers informed him of their mission to control the drug traffic and solicited his cooperation (R 28). Respondent exhibited a ticket in the name of "John Diaz" but stated that he could not produce any other identification (R 27-28, 57). The officers immediately handed the ticket back to Respondent after looking at it (R 27).

Detective Nutt asked Respondent if he could make a hand check of his luggage, and told him he had the right to refuse the search (R 28, 47, 59). Respondent consented, and indicated which bag should be searched first, and which one

second (R 28-29). In the second bag the officers found two (2) tennis ball cans, which Detective Nutt knew from his experience were places drugs could be concealed. Detective Nutt shook the cans, and they did not "feel right." Both cans were unopened on the top, and "appeared to be new cans, yet I heard maybe one ball in one and a strange object in the bottom of it, and the other felt completely different" (R 29). One of the containers had the seal broken and pry marks on the bottom (R 60-61). The cans contained cocaine (R 30).

Detective Green also stated that when Detective Nutt asked Respondent for consent to search his luggage Respondent became more nervous than he was earlier. He was sweating heavily, his hands were shaking and he was having trouble staying still (R 58). Respondent told Detective Nutt which bag to look at first, and which bag to look at second (R 59).

When Detective Nutt was looking at Respondent's second bag, Respondent was staring at Detective Nutt very intently. He was sweating even heavier. Detective Green asked Respondent something, and Respondent did not hear him (R 60).

Respondent corroborated the officers' testimony with the following exceptions: the reason he walked indirectly around Detectives Green and Nutt was because he was seeking to examine the computerized passenger list in their hands (R 140). Also, Respondent testified that when he was confronted by Detectives Green and Nutt, Respondent tried to stand up and leave but was accosted by one of the officers (R 146). Respondent testified that he consented to the search only because he felt he had no

choice (R 148). Respondent also testified that he was aware of Gaffney standing guard at the exit door of the station with a pistol in an ankle holster (R 155). Respondent's other witness, Grover Seymour, was the black male who dropped Respondent at the station (R 116). He corroborated that Respondent protested in a loud manner when the officers tried to search him and that Respondent tried to stand up and leave but was restrained by one of the officers (R 123). On this evidence, the motion was denied (RB 262).

Respondent subsequently entered a plea of nolo contendere to the substantive charge. Defense counsel specifically reserved his right to appeal (R 189-193). While the state attorney refused to stipulate to the dispositive nature of the motion, nonetheless the trial judge found that, indeed, the motion was dispositive (R 193) and took the plea (R 194-198).

On June 20, 1984, the trial judge adjudged Respondent guilty of the substantive offense (R 249-260) and sentenced him to eleven (11) years imprisonment, with the three-year mandatory minimum applicable (R 240). This exceeded the recommended guidelines sentence of seven (7) to nine (9) years (R 236). The judge also adjudged Respondent guilty of the two violations of probation (RA 250, RC 249) and sentenced Respondent to five (5) years imprisonment on each violation (RA 251-252, RC 250-251), all sentences to run concurrently.

Notice of Appeal to the Fourth District Court of Appeal was filed on July 6, 1984 (RA 253, RB 263, RC 253). On July 12, 1985, the Fourth District Court of Appeal issued its opinion

reversing Respondent's convictions and sentences, and certified the following question:

> Under the 1983 amendment to Article 1, Section 12 of the Florida Constitution, does the exclusionary rule apply in probation revocation proceedings?

(Appendix).

On June 24, 1985, the State filed its Notice to Invoke Discretionary Review. This brief follows.

POINTS INVOLVED

POINT I

WHETHER 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, AND WHETHER THE RESPONDENT'S CHALLENGE TO THE SEARCH AND SEIZURE IS PRECLUDED AS TO HIS VIOLATION OF PROBATION CASES?

POINT II

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE RESPONDNET FREELY AND VOLUNTARILY CONSENTED TO A SEARCH OF HIS SUITCASES, AND THE COCAINE WAS SEIZED AS A RESULT OF THAT SEARCH?

SUMMARY OF THE ARGUMENT

I. The Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution (1983), do not require application of the exclusionary rule to probation revocation proceedings. The rule's deterrent purpose is adequately served by excluding illegally-seized evidence in substantive criminal prosecutions. Respondent's acts giving rise to the revocation of his probation occurred on January 26, 1984. The amendment to Article I, Section 12, became effective on January 4, 1983. Thus, the amended provision is applicable to the two violation of probation cases herein.

II. If the court reviews this case on the merits, the record establishes there was a police-citizen encounter at the train station. Respondent was not seized in the meaning of the Fourth Amendment. Moreover, Respondent voluntarily consented to the search of his suitcases, and even indicated which suitcase should be searched first.

ARGUMENT

POINT I

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, AND THE RESPONDENT'S CHALLENGE TO THE SEARCH AND SEIZURE IS PRECLUDED AS TO HIS VIOLATION OF PROBATION CASES.

Respondent was charged with violation of two probations based upon his possession of cocaine on January 26, 1984. He subsequently filed a motion to suppress evidence, but the trial court found that a motion to suppress was improper in probation revocation cases, and that he would not exclude any evidence. Petitioner maintains that the trial court, and not the District Court of Appeal, was correct in its ruling.

In 1982, the voters of this state approved an amendment to Article I, Section 12, of the Florida Constitution. The amendment became effective on January 4, 1983. The purpose of the amendment was to amend the Florida constitutional Search and Seizure Clause to bring it into conformity with the United States Supreme Court's interpretation of the United States Constitution. The effect of the amendment is to eliminate the more strict construction of Florida law that has been given in previous cases. See, e.g., State v. Sarmiento, 397 So.2d 643 (Fla. 1981).

The prior language of Article I, Section 12, stated:

> The right of the people to be secure in their persons, houses, papers and effect against unreasonable searches and seizures shall not be violated--articles or information obtained in violation of this right shall not be admissible in evidence.

As amended, the provision now includes language that:

> . . . This right shall be construed in conformity with the Fourth 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 Fourth Amendment to the United States Constitution.

Therefore, under the amendment, only evidence which would be inadmissible under United States constitutional priciples is inadmissible in Florida.

The premise upon which this Court relied in its decisions 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 to probation revocation proceedings, was the Florida constitutional rule is more restrictive than its federal counterpart and evidence seized in violation thereof, was inadmissible in any proceeding. The Florida constitutional rule having been modified, this restriction has now been lifted.

In State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), this Court implicitly recognized that under the new amendment, the

exclusionary rule does not apply to probation revocation proceedings. See also, Copeland v. State, 435 So.2d 832 (Fla. 2d DCA 1983). However, because Lavazzoli's violations occurred prior to the amendment's effective date, this Court declined to give the amendment retroactive application and so did not explicitly decide the issue. The defendant sub judice violated his probation on January 26, 1984 well-after the effective date of the amendment, so the issue is squarely presented.

Although there is no United States Supreme Court decision which specifically holds the exclusionary rule applicable to probation revocations, that court has made it clear that a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed a defendant in a criminal proceeding. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). Moreover, the Supreme Court has recently curtailed the Fourth Amendment's exclusionary rule and unequivocally asserted the rule is not constitutionally required, but rather is a judicial remedy designed to curtail police misconduct. United States v. Leon, ___U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

In view of the deterrence rationale underlying the rule, the State submits it is adequately served by excluding any illegally-seized evidence from the substantive criminal prosecution, while permitting its use at the probation revocation proceeding. As this Court has long recognized, a probation revocation hearing is an informal proceeding and not a criminal trial. The purpose of the hearing is to satsify

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 (Fla. 1947). The reason for the distinction between a trial and a revocation hearing is that the probationer has already been convicted of a crime and he is at liberty because of judicial grace, so he 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 fairly balances the rights of probationers and society's interest in justice. It provides a probationer will not have evidence seized in contravention of the Fourth Amendment introduced in evidence in a substantive prosecution, while at the same time ensuring that a probationer who has been given by judicial grace an opportunity to live at liberty, cannot continue on probation if he flouts the law.

As the Fourth District Court of Appeal has observed in its opinion in Tamer v. State, 463 So.2d 1236 (Fla. 4th DCA 1985):

> The United States Supreme Court has indicated that whether the exclusionary rule should apply in a particular type of proceeding depends on whether the likely social benefits of excluding unlawfully-seized evidence outweigh the likely costs, or more specifically, whether the likely incremental deterrent effect on police misconduct is great enough to justify the social costs attendant to the loss of probative evidence. See United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). Under that

> balancing approach, it has found the rule inapplicable in grand jury proceedings, see United States v. California, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), federal civil tax assessment proceedings, United States v. Janis, supra, and civil deportation proceedings. I.N.S. v. Lopez-Mendoza, 468 U.S. ___, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984).
>
> Id. 463 So.2d at 1238.

The State therefore maintains, in accordance with the majority view in the Federal Circuits[1], that the Fourth Amendment to the United States Constitution, and likewise Article I, Section 12, of the Florida Constitution (1983), do not require application of the exclusionary rule in probation revocation proceedings.

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[1] 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 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); contra, United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

POINT II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE RESPONDENT FREELY AND VOLUNTARILY CONSENTED TO A SEARCH OF HIS SUITCASES, AND THE COCAINE WAS SEIZED AS A RESULT OF THAT SEARCH.

Respondent was the subject of a citizen contact at the Fort Lauderdale train station. He was not the subject of a "seizure".

The Supreme Court of the United States has addressed this issue in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The court in Terry differentiated between seizures and other types of citizen contacts which are not prohibited by constitutional restraints.

> Obviously, not all personal intercourses between policemen and citizens involve seizures of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.
> Terry v. Ohio, 392 U.S. at 20, n. 16.

Again, in United States v. Mendenhall, 446 U.S. 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the United States Supreme Court addressed the difference between seizure of a person and mere citizen contact. Mendenhall was cited with approval by this district court of appeal in a case factually similar to the instant case. State v. Grant, 392 So.2d 1362 (Fla. 4th DCA 1981). In Grant, the deputy sheriff (Glover) approached the defendant because he observed that the defendant was "nervous". The Fourth District Court of Appeal stated:

> [W]e hold that the contact made by Glover with Grant was not a seizure or stop which would require probable cause or a well-grounded suspicion. Glover had the same right as any other citizen to approach Grant. He was not in uniform; he did not display a gun; he did not order Grant to comply with his requests. Grant at 1365.

In the instant case, Respondent was initially questioned only briefly by Detectives Nutt and Green. His train ticket was returned to him immediately, and prior to the request to search his suitcases (R 26-27, 57). Respondent could have left the officers at any time. He could not have had a reasonable impression otherwise.

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), states that the voluntariness of a consent to search is a question of fact which must be determined by the trial judge from a review of all the surrounding circumstances. Under Schneckloth, factors to consider in this case are:

1. Was there any coercion of Respondent - either express or implied?

2. Was Respondent's capacity limited in any way?

3. Was Respondent advised that he had the right to refuse to consent to the search?

4. Did the officers threaten to obtain a search warrant?

5. Was Respondent's conduct and/or statements consistent with valid consent to the search?

It is obvious from the record that the detectives in no way coerced Respondent. From his own testimony, it

appears that Respondent does not have limited capacity (R 136 et seq.). Detective Nutt informed Respondent of his right to refuse the search (R 28, 47, 59). The detectives testified that they made no threats of a warrant or of using a narcotic sniffing dog (R 32, 62). Although Respondent claims coercion and involuntary consent, these claims are rebutted by the detectives' testimony. A trial court's order on a motion to suppress comes to the appellate court clothed with the presumption of correctness, and the reviewing court should interpret the evidence in the light most favorable to sustain the trial court's ruling. Johnson v. State, 438 So.2d 774 (Fla. 1983). In the instant case, not only did Respondent consent to the search of his two suitcases, he indicated which suitcase should be searched first (R 28, 59). From the above factors, it is clear that Respondent's consent to the search of his suitcases was voluntarily given. Consent to search luggage extends to containers within. See, State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982) and United States v. Ross, ___U.S. ___, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

The trial court properly denied Respondent's motion to suppress, and the opinion of the Fourth District Court of Appeal should be quashed.

CONCLUSION

THEREFORE, based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that the judgments and sentences of the trial court be AFFIRMED and the decision of the Fourth District Court of Appeal to reverse and remand the case be QUASHED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on the Merits has been furnished, by courier/mail, to THOMAS F. BALL, III, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 17th day of July, 1985.

Joan Fowler Rossin
Of Counsel