O/G 5-6-86

IN THE SUPREME COURT OF FLORIDA

VICKIE L. BERNIE and
BRUCE J. BERNIE,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,535

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

The District Court found in the instant case that the search warrant issued by the lower court was wrongfully and illegally issued in violation of Florida Statute 933.18 (1983). However, instead of suppressing the evidence that was obtained as a result of said unlawful search and seizure in accordance with the dictates of Girardi V. State, 307 So.2d 853 (4th D.C.A. Fla., 1975), the District Court authorized the admission of said evidence into the trial of Petitioners' case utilizing the good faith exception to the exclusionary rule established in the case of United States v. Leon, 468 U.S. _____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and Massachusetts v. Sheppard, 468 U.S. ____, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984).

The Petitioners would argue that the District Court erred in permitting the fruits of this unlawful search to be admitted in evidence in accordance with the actual decision of Massachusetts v. Sheppard, and its reliance upon Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Justice White who was the author of all three opinions stated in the Gates decision that he would not permit into evidence items seized as a result of a warrant when it was plainly evident that a magistrate had no business issuing the warrant. 76 L.Ed.2d 527, 565.

Further, Justice White stated in his opinion in Leon, that law enforcement officers must have a reasonable knowledge of what the law prohibits. 104 S.Ct. 3405, 3420. Petitioners contend that since Florida has had statutes similar in wording to Florida Statute 933.18 since the year 1923, that the officers and magistrate must be presumed to have knowledge of the restrictions existent in this state as to the issuance of a search warrant for a private dwelling.

Based on these and other authorities, the Petitioners urge this court to enter its order and opinion excluding the wrongfully seized evidence from use against the Petitioners in any subsequent trial.

PRELIMINARY STATEMENT

The STATE OF FLORIDA was the Plaintiff in the trial court, Appellant in the District Court, and will be referred to as "Respondent" in this brief. VICKIE L. BERNIE and BRUCE J. BERNIE were the Defendants in the trial court, Appellees in the District Court, and will be referred to as "Petitioners" herein. The record on appeal consists of one volume, and will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

On October 31, 1983, Petitioners, VICKIE L. BERNIE and BRUCE J. BERNIE, were charged by Information with Possession of Cocaine in violation of Florida Statute Section 893.13. (R 20-21). Petitioners filed a Motion to Suppress Evidence seized as a result of an unreasonable search and seizure. (R 30-34, 35-39). A hearing on Petitioners' Motion to Suppress was held on January 30, 1984, at which time a stipulated set of facts of the case was utilized by the parties. (R 43-54). The trial court granted the Petitioners' Motion to Suppress on February 7, 1984. (R 56-57). On February 15, 1984, the Respondent filed its Notice of Appeal to the District Court of Appeal, Second District of Florida. (R-79)

On June 21, 1985, the District Court of Appeal, Second District of Florida, entered its Opinion reversing the Suppression of evidence in the lower court. (A copy of said Opinion is attached to Petitioners' Corrected Brief on Jurisdiction). On July 1, 1985, the Petitioners filed their Motion for Rehearing in the District Court, and said Motion for Rehearing was denied by said Court on July 29, 1985. (A copy of the Order Denying the Motion for Rehearing is attached to Petitioners' Corrected Brief on Jurisdiction).

On August 16, 1985, the District Court entered its Mandate regarding this case, and on August 19, 1985, the Petitioners filed their Notice to Invoke Discretionary Jurisdiction of the District Court Opinion. On January 16, 1986, this Court entered its Order Accepting Jurisdiction and Setting Oral Argument. This appeal follows.

STATEMENT OF THE FACTS

Emery Air Freight in Tampa received an envelope addressed to Vickie Bernie, 5770 Midnight Pass Road, No. 608-C, Sarasota, Florida, which had been shipped from Dayton, Ohio. The envelope apparently broke open in the mail and a suspicious substance was observed. (R.59, 60, 31, 15) Drug Enforcement Agent Jim Borden tested the substance which was positive for cocaine; and notified Deputy Steven Matosky of the Sarasota County Sheriff's Office who confirmed that Petitioners were from Dayton, Ohio, were co-owners of Apartment 608-C, and were presently residing in Apartment 608-C. (R.15, 16, 32, 37, 56, 60-61) The detective further confirmed that both Petitioners had advised the assistant manager of their condominium complex that they were expecting an express package. (R. 62, 56, 31, 17) Additionally, Emery Air Freight advised that Bruce Bernie came to their office in Tampa to check on a package and had been advised that it would be delivered the following day, October 14, 1983. (R. 32, 56, 17)

Detective Matosky called upon the trial court to issue a search warrant for the Petitioners' residence relative to the prospective delivery of cocaine. (R. 14-19; 32; 63-65) The trial court issued a search warrant prior to the controlled delivery of the package to the Petitioners' residence. (R. 65, 30; 11-13) Investigating detectives had no reason to believe that the narcotics laws of the State of Florida were being violated

inside the Petitioners' residence prior to delivery of the substance by Emery Air Freight. (R. 63) Specifically, the affidavit in support of the issuance of the warrant recites:

> ". . . your Affiant believes that BRUCE and VICKIE BERNIE are in fact expecting this package to be delivered at their residence (apartment) at 608-C, 5770 Midnight Pass Roads, Sarasota, Florida. Your Affiant was advised that the package would be delivered to the residence on the afternoon of October 14, 1983. Your Affiant therefore believes that the suspect cocaine will be inside the residence of #608-C, Midnight Pass Road, Sarasota, Florida with the full knowledge of BRUCE and VICKIE BERNIE." (R. 18)

After obtaining the warrant, the police officers met with an agent of Emery Air Freight and arranged for a controlled delivery of the package to Petitioners. (R. 33, 66, 67)

The police officers then knocked and announced their presence and purpose. (R. 68, 69, 70, 33) The officers, dressed in plain clothes, displayed their badges and waited for Vickie Bernie to open the door. (R. 69, 70) Detective Matosky headed toward the bedroom and bathroom area from which Bruce Bernie was exiting. (R. 67, 72)

The Petitioners were advised to sit down in their living room while the search warrant was read in its entirety. (R. 72) The following items were found in the apartment and seized:

> hollow pen body with cocaine residue, knife and small mirror, cocaine residue from rim of toilet seat, Emery envelope and wrapping. (R. 72, 30)

Petitioners were then arrested for possession of cocaine. (R. 1-8)

The Petitioners filed a Motion to suppress the evidence seized during the execution of the warrant. (R. 35-39) At the hearing on the Motion to Suppress, Petitioners relied on the case of Gerardi v. State, 307 So.2d 853 (Fla. 4th DCA 1975) and Florida Statute Section 933.18 for the proposition that inasmuch as there was no reason to believe that narcotics laws were being violated inside the residence at the time the warrant was issued, the warrant could not stand. (R. 45-47) The trial court granted Petitioners' Motion to Suppress on February 7, 1984. (R. 56-57)

The Respondent filed its Notice of Appeal to the District Court of Appeal, Second District of Florida, on February 15, 1984. (R. 79) On June 21, 1985, the District Court entered its opinion reversing the Order of the Trial Court.

Its opinion commenced by analyzing Section 933.18, Florida Statutes (1983), which states that a search warrant for a private dwelling which is being occupied as such shall not issue unless the law relating to narcotics or drug abuse is presently being violated therein. The Court stated that there must be a present, known violation of the narcotics laws in order to permit a warrant to issue for the search of a home, and that this fact must be alleged in a supporting affidavit. The Court stated that there would only be an in futuro violation of the law based on the supporting affidavit in the instant case, and therefore the affidavit was legally inadequate for purposes of permitting the warrant to issue. In reaching this decision it relied upon Gerardi v. State, 307 So.2d 853 (4th DCA Fla, 1975).

Instead of sustaining the suppression granted in the lower court as required by Gerardi, the Second District continued its Opinion by stating that the Florida Constitution as it existed at the time of the search in the instant case mandated a different result. Ignoring the decision in Gerardi and the result mandated by Section 933.18, Florida Statutes (1983), the District Court relied upon United States v. Leon, 468 U.S. _____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and held that the evidence obtained in violation of the Petitioners' statutory rights was admissible under the good faith exception set forth in Leon.

By implication, the Second District held that a magistrate had no obligation to follow the statutory law of this State in exercising its judgment in the issuance of a search warrant for a private home. By relying on the good faith exception established in Leon, the District Court authorized magistrates to ignore the basic statutory law of this state. Having so held, the District Court entered its Opinion reversing the suppression of the evidence.

ARGUMENT

ISSUE

THAT THE OPINION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA, REVERSING THE TRIAL COURT'S ORDER OF SUPPRESSION IS INCORRECT, AND SHOULD BE ORDERED VACATED BY THIS COURT.

The District Court decision in State v. Bernie, 472 So.2d 1243 (2nd D.C.A. Fla., 1985) incorrectly failed to exclude the evidence obtained as a result of the search of the Petitioners' residence by attempting to rely on the decision of the Supreme Court of the United States in United States v. Leon, 468 U.S. _____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), which created a good faith exception to the exclusionary rule. Initially, the District Court held that the search warrant issued in this cause was invalid, and should not have been issued as it violated Section 933.18, Florida Statutes (1983). Said Statute provides in pertinent part:

> No search warrant shall issue under this chapter or under any other law of this State to search any private dwelling occupied as such unless:
>
> . . . .
>
> (5) The law relating to narcotics or drug abuse is being violated therein;
>
> . . . .
>
> . . . . No warrant shall be issued for the search of any private dwelling under any of the conditions herein above mentioned except on sworn proof

> by Affidavit of some credible witness that he has reason to believe that one of said conditions exists, which Affidavit shall set forth the facts on which such reason for belief is based. (Emphasis supplied)

The District Court strictly construed said Statute in accordance with a long line of case authority beginning with this Court's decision in Gildri v. State, 94 Fla. 134, 113 So. 704 (1927) and its progeny decided by the various courts of this State. The District Court held that a warrant could not issue for an in futuro violation of the narcotics laws. Said holding was in accordance with the above cited statute and the decision in Gerardi v. State, 307 So.2d 853 (4th D.C.A. Fla., 1975). Having arrived at the conclusion that the warrant was illegal and should not have issued, the District Court commenced to analyze the recent amendment to Article I Section 12 of the Florida Constitution.

Specifically, in November 1982 the Florida Constitution was amended to require that rights under Article I, Section 12 were to be construed in conformity with the Fourth Amendment to the Constitution of the United States as interpreted by the United States Supreme Court. Based on this amendment, the District Court applied the decision in United States v. Leon, supra. It held that the decisions in Leon and Massachusetts v. Sheppard, 468 U.S. _____, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) required that a different result be reached than in the decision in Girardi, supra. It ordered that the evidence obtained as a result of the wrongful issuance of the search warrant in the instant case be admitted at the trial of the Petitioners in the

trial court. In reaching this decision the District Court adhered to the reasoning of State v. Lavazzoli, 434 So.2d 321 (Fla., 1983) which reasoned that the amendment to the Florida Constitution had made the exclusionary rule of this State identical to the Federal law. Thereby, it held that the exclusionary rule was a creature of judicial policy which permitted the evidence to be introduced in the trial of this case. Bernie, 472 So.2d at 1246.

However, the District Court failed to consider the full opinions of Leon, Sheppard and the cases cited in each of those opinions in arriving at its conclusion as to the admissibility of this evidence. Despite the holding in Leon, the Supreme Court of the United States has never held that evidence was admissible when it was plainly evident that a magistrate or judge had no right to issue a warrant. The holding in Leon and Sheppard merely permits admissibility of illegally obtained evidence when a warrant has been applied for by a police officer in good faith. However, the Petitioners would submit that no good faith exception is available when a warrant is issued in violation of state law as in the instant case.

First, it is significant that the opinions in both Leon and Sheppard were written by Justice White. In the decision in Sheppard, the Supreme Court found that the good faith exception applied where certain technical defects had not been corrected by the issuing magistrate of a search warrant. 104 S.Ct. 3424, 3429. In that case, Justice White stated that:

> In sum, the police conduct in this case clearly was objectively reasonable and error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers who made the critical mistake. "(T)he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges. "Illinois v. Gates, 462 U.S. _____, ____, 103 S.Ct. 2317, 2345, 76 L.Ed.2d 527 (1983) (WHITE, J., concurring in the judgment).7 Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes that such changes would be made, will not serve the deterrent function that the exclusionary rule was designed to achieve. Accordingly, federal law does not require the exclusion of the disputed evidence in this case.Id. (Emphasis supplied)

Footnote 7 cited in the above quote is a reference to the decision in Illinois v. Gates, supra, which essentially holds this is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant." 462 U.S. 263, 76 L.Ed.2d 527, 565. In the Gates decision, Justice White wrote a concurring opinion to that issued by the court, which urged the entire Supreme Court to address the good faith exception to the Fourth Amendment. 462 U.S. 213, 246, 76 L.Ed.2d 527, 553. In his concurring opinion Justice White stated that:

> "(O)ponents of the proposed "reasonable belief" exception suggest that such a modification would allow magistrates and judges to flout the probable-cause requirements in issuing warrants. This is a novel concept: the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges. Magistrates must be neutral and detached from law enforcement operations and I would not presume that a modification of the exclusionary rule will lead magistrates to abdicate their responsibility to apply the law. In any event, I would apply the exclusionary rule when it is plainly evident that a magistrate or judge had no business issuing a warrant. See, e.g.: Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); Nathanson v. United States, 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11 (1983).
> Id at 263, 76 L.Ed.2d 565. (Emphasis supplied)

The Petitioners would suggest to this Court that as Justice White cited to his concurring opinion in Gates while authoring the decision in Massachusetts v. Sheppard, supra, that clearly the section of the opinion cited to in Footnote 7 of Sheppard is intended to be considered as part of the holding of the decision in Sheppard. As Justice White continues his Footnote he states that the judge's error was not in concluding that a warrant should issue but in failing to make the necessary changes on the form. In fact he notes that Sheppard admitted that had the judge made the necessary corrections then the

warrant itself would have been valid, and no analysis of the good faith exception would have been required. 104 S.Ct. 3424, 3429.

By implication, the Supreme Court of the United States has held that where a warrant should not have issued then exclusion of the evidence is appropriate. Under any analysis of the facts in the instant case, the warrant issued by the lower court should not have been issued. In fact, the District Court has held in its opinion that said warrant was invalid and should not have been issued. Bernie, 472 So.2d at 1246. Considering that in the instant case the issuing court clearly ignored state law and issued a warrant in contravention thereof, the only remedy available to the Petitioners is exclusion of the illegally and wrongfully obtained evidence.

This is not a case where the good faith exception can be applied as a clear violation of state law should never be labeled a good faith action on the part of the police officers or the issuing magistrate. Both the officers and the magistrate are expected to be knowledgeable in the basic laws of this state, and their ignorance of or refusal to follow said law should not give rise to a good faith exception to the exclusionary rule.

To permit the introduction of this evidence at the trial of the Petitioners would violate their rights under the Fourth Amendment to the Constitution of the United States of America and under Article I, Section 12 of the Florida Constitution.

Further, no good faith exception could be found as the officers in this case violated the mandates of United States v. Leon, supra, in that opinion in Footnote 20 the court held:

> "we emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. "Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment. "Illinois v. Gates, 462 U.S. at _____, n. 15, 103 S.Ct. at 2344, n. 15 (WHITE, J., concurring in the judgment); see: Dunaway v. New York, 442 U.S., at 221, 99 S.Ct., at 2261 (STEVENS, J., concurring). The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits.
>
> Leon, 104 S.Ct. at 3420. (Emphasis supplied)

The officers in the instant case were required to be trained and knowledgeable in the law relating to the issuance of a search warrant for a home. If they were not knowledgeable, that is misconduct on the part of their individual employers, and this evidence should not be admitted against the Petitioners. Assuming arguendo, that the officers knew of the proscriptions of Florida Statute 933.18 and ignored them, then

clearly the evidence obtained was a result of an illegal search and seizure, and does not fall within the good faith exception established by Leon and Sheppard.

As to both the officers and the issuing magistrate, the law relating to the issuance of search warrants for a residence in this State has long been constant and not in a state of flux. The forerunner of Florida Statute 933.18 was first enacted in the year 1923, and minimal revisions have been made to the relevant parts of the statute since then. Further, this Court has long afforded special protections to the home, see, e.g.: Benefield v. State, 160 So.2d 706 (Fla., 1964), and it is difficult to accept that both officers and judge should not be charged by this Court with knowledge of the most basic rights of the residents of this State that right includes a protection from the issuance of a search warrant for the search of a man's home for an act that has not occurred.

Under any set of circumstances, the evidence seized in the instant case should have been excluded for any use against the Petitioners in the trial of their cause in the lower court. Clearly the decision in Girardi, supra, Gates, supra, Leon, supra, and Sheppard, supra, require that the evidence seized from the Petitioners be excluded as it violated their rights against unreasonable searches under the Fourth Amendment of the Constitution of the United States of America and the Florida Constitution. Therefore, this Court should enter its order excluding the evidence obtained in the instant case from the trial of this cause, and remand this cause to the District Court to enter its opinion in accordance with the law of this State and the United States as set forth in the citation of authorities above.

CONCLUSION

That the decision of the District Court does not comply with the laws of the United States of America and the laws of the State of Florida in that the fruits of the search complained of in the instant case should be excluded from evidence at the trial of the Petitioners in the court below. Wherefore the Petitioners pray that this Honorable Court enter its opinion in accordance with the arguments and citations of authority set forth by the Petitioners herein; quash those portions of the opinion of the District Court permitting the introduction of the illegally seized evidence into the trial of this cause; and to order said evidence suppressed and excluded from the trial of this cause in the lower court.

Respectfully submitted,

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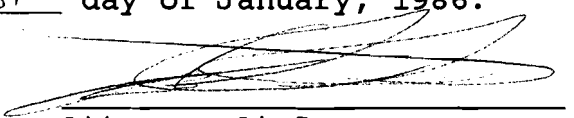
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Brief on the Merits has been provided to Katherine V. Blanco, Assistant Attorney General, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, counsel for Respondent by U.S. Mail, the the 31st day of January, 1986.



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