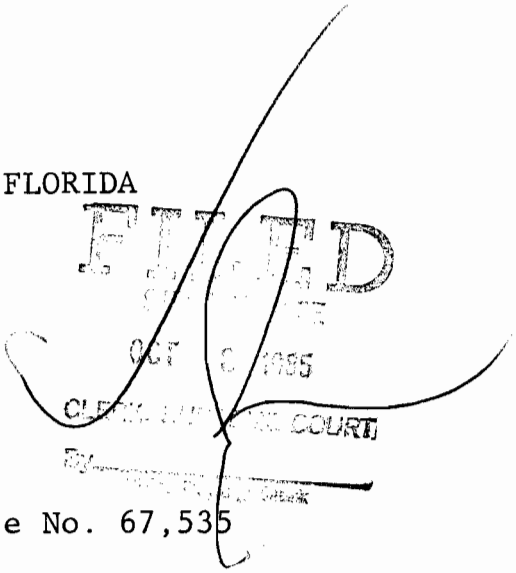
IN THE SUPREME COURT OF FLORIDA



VICKIE L. BERNIE AND
BRUCE J. BERNIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent,

Case No. 67,535

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

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioners, VICKIE L. BERNIE AND BRUCE J. BERNIE, were the defendants before the trial court and the "Appellee" in the Second District Court of Appeal; they will be referred to in this brief as the "Petitioners."

The respondent, the STATE OF FLORIDA was the prosecution at trial and the Appellant in the Second District Court of Appeal. The State of Florida will be referred to herein as the respondent.

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

SUMMARY OF THE ARGUMENT

The court below, in accordance with United States v. Leon, 468 U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), ruled that although the search warrant was improperly issued, the Exclusionary Rule did not apply to prevent the introduction of the cocaine seized as evidence in this case. Such a holding cannot reasonably be interpreted as authorizing Magistrates to ignore the law. In fact, the court specifically ruled that the affidavit at bar was legally inadequate and should not have been issued. The opinion below agreed with the conclusion of the Fourth District in Gerardi v. State, 307 So.2d 853 (Fla. 4th DCA 1975), that a search warrant may only be issued for the search of a home in which the narcotics laws are presently being violated. Lastly, the court's holding does not diminish the validity of §933.18, Florida Statutes, in that the Second District specifically held that the warrant should not have been issued; but suppression of the evidence at bar was not warranted under the particular facts of this case. The Court stressed that exclusion may be justified where, for example, the " officer's actions were not taken in good faith or were not objectively reasonable." (Appendix, Slip Opinion at 9, citing Leon, 104 S.Ct. 3419, 3420.)

STATEMENT OF CASE AND FACTS

The opinion of the Second District Court sets forth the facts pertinent to this case, to wit:

Dr. Bruce Bernie and his wife Vickie reside at Apartment 608-C in the Gulf To Bay Club on Siesta Key in Sarasota. Emery Air Freight of Tampa received an envelope addressed to Vickie Bernie at the couple's residence. The envelope, which had been shipped from Dayton, Ohio, and was marked "urgent . . . deliver immediately," accidentally broke open in transit, revealing a suspicious substance. Emery officials contacted a drug enforcement agent who field-tested the substance. The test was positive for cocaine. The agent re-sealed the envelope and notified Detective Steven Matosky, a Sarasota County Deputy Sheriff. Detective Matosky then confirmed information supplied to him that Dr. and Mrs. Bernie were from Dayton, Ohio, were co-owners of the apartment together with two other physicians, were presently residing in the apartment, and had advised the asisstant manager of the Club that they were expecting an express package. Emery officials said that Dr. Bernie came to their Tampa office to check on the package. At that time he was advised that the package would be delivered on the following day, October 14, 1983.

On the morning of October 14, 1983 Detective Matosky requested a circuit judge to issue a search warrant for the Bernies' residence relative to the prospective controlled delivery of the package of cocaine. The circuit judge issued the search warrant based on Detective Matosky's supporting affidavit. The affidavit recited in part:

13. That based upon your Affiant's experience as a law enforcement officer, and narcotics detective, and further upon the events described above, 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 Road, 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. [Emphasis supplied.]

After obtaining the warrant, police officers met with an Emery agent and arranged for the controlled delivery. The Emery agent then delivered the package to Mrs. Bernie at the couple's residence.

After a few minutes had passed, the officers knocked and announced their presence and purpose, displayed their badges, and waited for Mrs. Bernie to open the door. When she opened the door and let them in, Detective Matosky headed toward the bedroom and bathroom area where Dr. Bernie was exiting. At this point the Bernies were advised to sit down in the living room while the search warrant was read in its entirety. 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.

The Bernies were then arrested and later charged with possession of cocaine in violation of section 893.13, Florida Statutes (1983). The Bernies filed a motion to suppress the evidence on the grounds that it was seized as a result of an unreasonable search and seizure. At the hearing on the motion the Bernies relied on Gerardi v. State,

307 So. 2d 853 (Fla. 4th DCA 1975), and section 933.18, Florida Statutes (1983), to support their proposition that the warrant was invalid for lack of probable cause; i.e., when the warrant was issued there was no reason to believe that narcotics laws were presently being violated inside the residence. (Appendix, slip opinion at 2-3).

ARGUMENT

ISSUE

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL WHICH RULED THAT THE EXCLUSIONARY RULE DID NOT PREVENT THE INTRODUCTION OF EVIDENCE SEIZED BY OFFICERS ACTING IN GOOD FAITH ON A WARRANT ULTIMATELY FOUND TO BE INVALID.

Petitioners, Vickie and Bruce Bernie, seek to invoke this Court's discretionary jurisdiction to review the decision of the Second District Court which ruled, in accordance with United States v. Leon, 468 U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), that although the search warrant was improperly issued, the exclusionary rule did not apply to prevent the use of the cocaine as evidence in this case. (Appendix, Slip Opinion at 10).

A. WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS BY AUTHORIZING THE JUDGES OF THIS STATE, WHEN SITTING AS A MAGISTRATE, TO IGNORE OR ACT INDEPENDENTLY OF THE DECISIONAL OR STATUTORY LAW OF THIS COUNTRY AND STATE.

Contrary to Petitioner's claim, the Opinion in Bernie does not authorize judges of this State to ignore the law. The Second District Court strictly construed §993.18, Florida Statutes, and determined that, without an allegation of a present violation of the law, a warrant would not be issued in accordance with the statute and would be invalid. The affidavit here, like the

affidavit in Gerardi v. State, 307 So.2d 853 (Fla. 4th DCA 1975) was found to be legally inadequate; and, according to the Second District Court, the warrant should not have been issued. (Appendix, Slip Opinion at 4-5).

B. WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN GERARDI v. STATE.

The Court in Gerardi concluded that a search warrant may only be issued for the search of a home in which the narcotics and drug laws of this State are presently being violated. The Second District Court in Bernie reached the same conclusion.

In the instant case, the Second District Court recognized that, in 1975, the Gerardi court, finding that the warrant was invalid and that no warrant exceptions recognized by the Florida Courts were applicable, had no choice but to exclude the evidence. (Appendix, Slip Opinion at 5).

However, the Second District Court did not find it necessary to suppress the evidence at bar in light of the 1983 Amendment to Article I, §12 of the Florida Constitution tying Florida's exclusionary rule to the Fourth Amendment as construed by the United States Supreme Court and the Supreme Court's decisions announcing a "good faith" exception to the warrant requirement. (Appendix, Slip Opinion at 6, citing United States v. Leon, 468 U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 737 (1984), Massachusetts v. Sheppard, 468 U.S. ____, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984); United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976).

The District Courts of Appeal are intended to be Courts of final appellate jurisdiction. Jenkins v. State, 385 So.2d 1356 (fla. 1980). The fact that the Petitioners are adversely affected by the decision of the Second District Court does not entitle them to a "second" appeal. The Bernie decision allows the introduction of the seized evidence based upon the Amendment to Article I, Section 12, and the "good faith" exception announced by the United States Supreme Court. Nothing in Bernie disagrees with the result reached in 1975 in Gerardi; to the contrary, it is clear that absent the 1983 Amendment, the court in Bernie would have affimred the order of suppression. (Appendix, Slip Opinion at 5).

C. WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DIRECTLY CONSTRUED ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION IN THAT IT HELD THAT BY THE AMENDMENT TO ARTICLE I, SECTION 12, THAT FLORIDA STATUTE §933.18 WAS PRESENTLY UNENFORCEABLE IN THIS STATE.

The Petitioner claims that the Second District Court directly construed Article I, Section 12 of the Florida Constitution "in that it held that by its mere amendment by the voters, that Florida Statute, Section 933.18 was presently unenforceable in this State. (Petitioner's corrected Brief on Jurisdiction at page 8) Such a claim ignores the plain language of the court's opinion.

The Second District Court found the Amendment to Article I, Section 12 applicable to the instant case because the search took place after the effective date of the amendment, and the

Second District followed the precedent from this Court recognizing that the amendment linked Florida's exclusionary rule to the federal exclusionary rule which mandated conformity with the United States Supreme Court decisions. (Appendix, Slip Opinion at 5-6, citing State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). The court below concluded that the affidavit at bar was legally inadequate and the warrant should not have been issued, and stated that "... Prior to January 4, 1983, our determination that the warrant was invalid would have ended our task and we would have affirmed the order of suppression." (Appendix, Slip Opinion at 5) However, in light of the United States Supreme Court's pronouncement in Leon, although the warrant was improperly issued, the exclusionary rule did not apply to prevent the introduction of the cocaine as evidence in the instant case. Such a holding does not mean that §933.18, Florida Statutes is presently unenforceable in this State. To the contrary, the Second District specifically ruled that the requirements of §933.18 are clear--"(a) a present or known violation of a narcotics law must exist in the home to be searched prior to the issuance of the warrant for the search of that home, and (b) this fact must be alleged in the supporting affidavit." These requirements are necessary in order to insure that a warrant is valid. The Second District made it abundantly clear that its ruling was limited to the factual basis facing the court and specifically stated:

> "By this holding, we do not mean to suggest that exclusion of the evidence is always inappropriate

> whenever an officer has obtained a warrant regular on its face and has acted within its scope. Exclusion is justified where the officer's actions were not taken in good faith or were not objectively reasonable. Leon, 104 S.Ct. 3419, 3420.
>
> Appendix, Slip Opinion at 9.

The Second District did not depart from the precedent set by this Honorable Court and the United States Supreme Court in finding that §933.18 must be strictly followed in order to insure that a search warrant is valid and in ruling that the Exclusionary Rule did not apply to prevent the use of the cocaine as evidence in this particular case.

CONCLUSION

Based on the foregoing arguments, citations, and authorities, this Honorable Court should decline to exercise its discretionary jurisdiction in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoin was furnished by regular U.S. Mail to R. John Cole, Esquire, Suite 1110-1605 Main Street, Sarasota, Florida 33577, this 1st day of October, 1985.

K Blanco

Of Counsel for Respondent.