O/a 5-6-86

IN THE SUPREME COURT OF FLORIDA

VICKIE L. BERNIE and BRUCE J. BERNIE,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

Case No. 67,535

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

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

In determining the admissibility of evidence seized during a search based on a subsequently invalidated warrant, the reviewing court must apply the standards set forth by the Supreme Court in United States v. Leon, ____ U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The primary purpose of the exclusionary rule is the deterrence of police misconduct. Sub judice, although the appellate court determined that the warrant was improperly issued based upon the prospective controlled delivery of the package of cocaine, the exclusionary rule did not apply to prevent the use of the cocaine found during the search, as there was (1) no police illegality, (2) the officers acted with objective good faith, (3) the search warrant was facially valid, and (4) the officers had reasonable grounds for relying on the judge's assurances that the warrant authorized the search they requested. State v. Bernie, 472 So.2d at 1247, 1248 (Fla. 2d DCA 1985).

ISSUE

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY FOLLOWED THE PRECEDENT OF THE UNITED STATES SUPREME COURT, AS MANDATED BY THE 1983 AMENDMENT TO ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION, IN RULING THAT THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIED TO ALLOW THE INTRODUCTION OF THE SEIZED COCAINE AS EVIDENCE IN THE INSTANT CASE.

The search of the Bernie's residence took place after the Amendment to Article I, Section 12 of the Florida Constitution became effective. By this Amendment, Florida's Exclusionary Rule is now in accord with the Federal Exclusionary Rule and decisions of the United States Supreme Court construing the Fourth Amendment. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). As amended, Article I, Section 12 of the Florida Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communciations by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or 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. 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 4th Amendment to the United States Constitution."

In the instant case, the trial court issued a search warrant premised on the controlled delivery of the contraband to the Bernie's residence. Courts in other jurisdictions have concluded that a search warrant can be prospective; and, when law enforcement officials know that the object of the warrant will be at a particular place at a certain time, probable cause exists to issue a warrant for a search at that time. See, e.g., United States v. Goff, 681 F.2d 1238 (9th Cir. 1982) [Warrant validly issued to search a person who was on a non-stop airplane to the District where the warrant was to be executed]; United States v. Lowe, 575 F.2d 1193, 1194 (6th Cir.), cert. denied, 439 U.S. 869, 99 S.Ct. 198, 58 L.Ed.2d 180 (1978) [Controlled delivery by Post Office of package opened by customes officials - "It is not unreasonable for the magistrate to believe that certain controllable events will occur in the near future"]; United States ex rel. Beal v. Skaff, 418 F.2d 430 (7th Cir. 1969) [Controlled delivery from Post Office of package containing marijuana]. United States v. Feldman, 366 F.Supp. 356 (D.C. Hawaii, 1973) [Search warrant validly issued in anticipation of mail package known to contain marijuana - No unreasonable passage of time

occurred between the issuance and delivery or between the delivery and the execution of the warrant.]

Notwithstanding the approval of "anticipatory" search warrants in controlled delivery cases, §933.18(5), Florida Statutes (1983), prohibits the issuance of a search warrant for a private dwelling for violations of the law relating to narcotics or drug abuse unless the law is being violated within the private dwelling. Gerardi v. State, 307 So.2d 853 (Fla. 4th DCA 1975). Sub judice, time was of the essence in executing the warrant after the controlled delivery of the cocaine to the Bernie residence. In the absence of a magistrate waiting just outside the door of a suspect's residence or utilization of a telephonic warrant[1/], the police officers' fears that incriminating evidence may be destroyed often come true. In the instant case, only trace amounts of cocaine remained and were recovered near the rim of the toilet in the Bernie residence. Since the suspects successfully used a readily accessible means of disposing of the contraband, the fear of destruction of the evidence proved well-founded.

Although the search warrant at bar was improperly issued according to Gerardi and the court's strict

1/ The use of telephone technology to facilitate the issuance of a search warrant enables the magistrate to make the determination whether probable cause exists after confirmation that the contraband is inside the premises. See, e.g., Note 2, United States v. Hendricks, 743 F.2d 653, 655 (9th Cir. 1984); and "Telephone Search Warrants: A Proposal for Florida", by Geoffrey P. Alpert and Judge J. Allison DeFoor, II, Vol. LX, No. 3, Fla. Bar J., p.61; March, 1986.

construction of §933.18, exclusion of the cocaine was not warranted in light of the United States Supreme Court decisions announcing a "Good-Faith" exception to the Exclusionary Rule. In accordance with the Supreme Court decision in United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984), the Second District Court concluded that the Exclusionary Rule did not apply to prevent the use of cocaine found during the search of the Bernies' residence. Detective Matosky did everything that was asked of him and, as the district court properly concluded, he acted with "objective good faith; he conducted an independent investigation, submitted all information to the circuit judge for a probable cause determination, and obtained a facially valid warrant authorizing the search of the Bernie's residence." State v. Bernie, 472 So.2d 1243, 1247 (Fla. 2d DCA 1985). The Fourth Amendment Exclusionary Rule does not bar the use of evidence obtained by officers acting in "objectively reasonable reliance" on a search warrant issued by a "detached and neutral magistrate" but which is ultimately found to be unsupported by probable cause.

Leon recognized that the determination of probable cause necessary for the issuance of a search warrant is left to the "detached scrutiny of a neutral magistrate" and not to the judgment of a law enforcement officer "'engaged in the often competitive enterprise of ferreting out crime'". 104 S.Ct. at 3416, (quotations omitted). A law enforcement officer must present sufficient information to the magistrate

so that the magistrate can make an informed determination of probable cause, Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983).

The Supreme Court in Leon stated that the Exclusionary Rule would still apply in cases involving a search warrant only if

> (1) The issuing magistrate wholly abandoned his judicial role and failed to perform his neutral and detached function
>
> (2) the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit.
>
> (3) the warrant was based on an affidavit "so lacking indicia of probable cause as to render official belief in its existence entirely unreasonable."
>
> (4) the warrant was so facially deficient that it failed to particularize the place to be searched or things to be seized.
>
> See, Leon, 82 L.Ed.2d at 699.

Though the affidavit in Leon was insufficient to establish probable cause, 82 L.Ed.2d at 677, the Court concluded that suppression of evidence obtained pursuant to a warrant should be ordered only "on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule," i.e., the deterrence of police misconduct. 82 L.Ed.2d at 695.

In United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984), the Ninth Circuit Court of Appeals concluded that a

warrant for the search of a house was invalid for lack of probable cause. The search warrant in Hendricks included a requirement that it was to be executed only upon the condition that the evidence sought "is brought to the aforesaid premises". At the time the warrant was issued, the magistrate in Hendricks knew that the suitcase containing the contraband was in the possession of DEA agents, and not at the Hendricks' home. The Hendricks court determined that at the time the warrant was issued there was no certainty that the contraband would ever be brought there. However, notwithstanding the lack of probable cause for the issuance of the warrant in Hendricks, the application of the Exclusionary Rule was not warranted where the officer's reliance on the warrant was not unreasonable. In Hendricks, the defendant suggested that the "magistrate wholly abandoned his judicial role. . ." 743 F.2d at 656. In rejecting this argument, the Ninth Circuit Court of Appeals stated:

> "Although the magistrate impermissibly delegated an element of probable cause determination to the DEA agents, i.e., whether the suitcase was at the house, it appears from the record that he did so in an effort to limit official conduct, not expand it. The magistrate did not abandon his judicial role to the officers, and the officer's reliance on the warrant was not unreasonable."
>
> 743 F.2d at 656.

Justice White, in his concurring opinion in Illinois v. Gates, advised considerations that reviewing court should take into account in deciding the objective good faith issue without addressing the question of whether a Fourth Amendment violation has occurred:

> ". . .When a Fourth Amendment case presents a novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates, there is sufficient reason for the court to decide the violation issue before turning to the good faith question. Indeed, it may be difficult to determine whether the officers acted reasonably until the Fourth Amendment issue is resolved. In other circumstances however, a suppression motion poses no Fourth Amendment question of broad import -- the issue is simply whether the facts in a given case amounted to probable cause -- in these cases, it would be prudent for a reviewing court to immediately turn to the question of whether the officers acted in good faith. Upon finding that they had, there would generally be no need to consider the probable-cause question.
>
> 462 U.S. at 264-265, 103 S.Ct. at 2346, 76 L.Ed.2d at 565-566
> (White, J., concurring in the judgment)
> (emphasis supplied)

This court's inquiry is not whether the trial judge made a proper determination of probable cause, but whether the police officers reasonably relied on the judge's determination in light of the information set forth in the affidavit and the process by which the warrant was issued. Detective Matosky promptly investigated the circumstances involved in the

instant case and confirmed that (1) the package contained cocaine, (2) the Bernies were expecting the express package, (3) Bruce Bernie was anxiously awaiting the delivery and even made an effort to obtain the package from the Air Freight Office in Tampa; and (4) a controlled delivery was arranged for October 14, 1983. On the morning of October 14, 1983, Detecitve Matosky requested a circuit judge to issue a search warrant grounded on the prospective controlled delivery of cocaine. After obtaining the warrant, the police officers met with an Emery Air Freight agent and arranged for the delivery. Shortly after the Emery Agent delivered the package to Mrs. Bernie, the officers complied with §933.09, Florida Statutes (1983), knocked and announced their presence and purpose, displayed their badges, and waited for Mrs. Bernie to open the door. The Second District Court found especially applicable the Supreme Court's explanation in Leon that:

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." [Citation omitted.] Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.
> 104 S.Ct. at 3420, 472 So.2d at 1247, 1248

Detective Matosky's reliance on the trial court's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate. Courts have consistently encouraged law enforcement officers to obtain warrants before conducting searches; and "Leon intended that such encouragement should not be undermined by requiring officials to second guess the magistrate's determination or by encouraging them to forego a warrant in reliance on exigent circumstances." United States v. Gant, 759 F.2d at 484 (5th Cir.), cert. denied, ___ U.S. __ 106 S.Ct. 149, 88 L.Ed.2d 123 (1985). The Second District Court properly applied the "Good-Faith" exception to the Exclusionary Rule in determining that the prosecution may introduce, during its case-in-chief, evidence seized pursuant to a warrant despite the fact that the warrant was ultimately declared invalid.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, the decision of the District Court of Appeal, Second District should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to R. John Cole, II, Esquire, Stevas, Busch & Cole, Suite 1110, 1605 Main Street, Sarasota, Florida 33577, this 27 day of February, 1986.

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