DIG 5-6-86

IN THE SUPREME COURT OF FLORIDA

VICKIE L. BERNIE and
BRUCE J. BERNIE,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

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CASE NO. 67,535

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

PETITIONERS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

The Petitioners, in response to the arguments of the Respondent concerning anticipatory search warrants, would state that the rules of statutory construction lead to the conclusion that Florida Statute 933.18 (1983) was not made ineffective by the passage of the amendment to Article I Section 12 of the Constitution of the State of Florida in 1983. Petitioners suggest that said Statute is the controlling authority in this case, and that the only appropriate remedy available to the Petitioners as a result of the issuance of the search warrant in the case sub judice is the suppression of all evidence wrongfully seized during the search of their residence.

Petitioners further contend that this is not a case involving the good faith exception established by the Supreme Court of the United States, but rather is controlled by the decision in Illinois v. Gates 76 L.Ed. 2d 527 (1983) in which Justice White stated "... [W]hen it is plainly evident that a magistrate or judge has no business issuing a warrant...", then the exclusionary rule would still apply. Id. at 565.

Additionally, Petitioners suggest that the opinion of the District Court of Appeal in the Bernie decision permits judges to ignore statutes existent in this State creating an appearance of lawlessness among the issuing magistrates that could not logically be contemplated by any Court ruling on the propriety of the issuance of a search warrant.

Therefore, the decision of the Second District Court of Appeal in the instant case is incorrect, and should be overruled by this Court.

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.

Recognizing that Article I Section 12 of the Declaration of Rights of the Constitution of the State of Florida as amended on January 4, 1983, obviated previous state decisional law decided under the previous Article I Section 12, the amendment did not by wording or implication modify the clear meaning of the statutes of this state as they existed on its effective date.

The amendment merely required the Courts of this state to interpret Florida's exclusionary rule by adhering, where possible, to the decisions of the Supreme Court of the United States construing the Fourth Amendment to the Constitution of the United States. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983).

However, this Court has a long history of protecting the home against unreasonable intrusions by the state, and in the case sub judice it is evident that the search was of the Petitioners' residence based on the issuance of a search warrant for a prospective narcotics law violation, and not for a presently existing violation of said law. In the instant case, the magistrate issued his search warrant based on the information provided to him by law enforcement, but clearly, as admitted in his Order of Suppression, the magistrate did not

consider the effect of Florida Statute Section 933.18 (1971), which had been in effect in this state for many years prior to the issuance of the search warrant sub judice.

The Respondent in its Brief on the Merits fails to deal with the issues raised by the Petitioners, and the Petitioners suggest to this Court that this case is not one falling with the good faith exception engrafted into the Fourth Amendment of the Constitution of the United States of America or into Article 1 Section 12 of the Constitution of the State of Florida. Rather, this is a case where a warrant should not have issued, and the exclusionary rule as interpreted by the Supreme Court of the United States still mandates the exclusion of evidence obtained as a result of this illegally issued warrant.

Justice White, the author of Leon, Sheppard and Gates, has stated in his concurring opinion in Gates, that the exclusionary rule should still apply "...[W]hen it is plainly evident that a magistrate or judge had no business issuing a warrant...." Illinois v. Gates, 462 U.S. 213, 263; 763 L.Ed 2d 527, 565. This reasoning was clearly carried over in the decisions in Leon and Sheppard by Justice White as he was citing from the Gates decision in both cases. (See Petitioners initial Brief on the Merits at pages 9 through 12).

Both the District Court in the instant case and the Court in Gerardi v. State, 307 So.2d 853 (4th DCA Fla. 1975), acknowledged that anticipatory search warrants were permissible in other jurisdictions, particularly in the federal sphere under the Fourth Amendment to the Constitution of the United States of

America but, that such warrants were not permitted under Florida Statute Section 933.18 (1971). 307 So.2d at 855; State v. Bernie, 472 So.2d 1243, 1245.

The Gerardi Court in arriving at its decision cited with approval the decision in Leveson v. State, 138 So.2d 361 (3rd DCA Fla. 1962) that held, in accordance with previous case law, that statutes authorizing searches and search warrants should be strictly construed. Id. at 365.

The decision in Leveson, requiring strict construction of criminal statutes, is the law of this state. This is further seen in Kiesel v. Graham, 388 So.2d 594 (1st DCA Fla. 1980) which states that a general rule of statutory construction is that a more specific statute covering a particular subject is controlling over a general statutory provision regarding the same subject. Id. at 595.

The trial court entered its Order suppressing the evidence in this case based on a statute that is far more restrictive than the broad general declaration contained in Article I Section 12 of the Constitution of the State of Florida. Nothing in the present Article I Section 12 holds that Florida Statutes that are more restrictive than it are unconstitutional.

Further, it is permissible to consider the legislative intent of a statute based on its continued existence in its present form based on legislative actively or inactively relating to statutory revision. Watson v. Holland, 20 So.2d 388 (Fla. 1944). In the Watson decision, this Court held that the

intent of a valid statute is the law, and this is ascertained by a consideration of the language and purpose of the enactment. Id. at 393. In the instant case Florida Statute Section 933.18(5) (1971) states clearly that a present violation of law must exist in a home prior to the issuance of a search warrant therefore.

It is generally held in this state that the failure of the legislature to amend or repeal an act or law at a subsequent legislative session shows its intent that the law exist in its present form for all purposes. In the instant case, the legislature has met twice since January 4, 1983, and in neither session has Florida Statute Section 933.18 (1971) been amended to permit the issuance of anticipatory search warrants. Therefore, the legislature of this state continues to hold that a private dwelling enjoys certain protections from search that may not be available to other entities or persons.

Considering Florida's continual observance of additional protections for the private dwelling, in the Fourth Amendment area, the Petitioners would suggest that Florida Statute 933.18 (1971) is consistent with the constitutional amendment argued as controlling by the Respondent.

This is particularly true when the statement by Justice White in his decision in Gates concerning the viability of the exclusionary rule when it is plainly evident that a magistrate or judge had no business issuing a warrant is considered by this Court. Clearly, Justice White's view leads to the inescapable conclusion that a clear violation of our state law by an issuing magistrate leaves exclusion of the wrongfully seized evidence as

the appropriate remedy in protecting individuals from the issuance of illegal search warrants.

The case sub judice is not a case where the good faith exception set forth in Leon and Sheppard applies, but rather is a case where the only remedy that is properly afforded to the Petitioners is the exclusion of the wrongfully seized evidence from the trial of this cause.

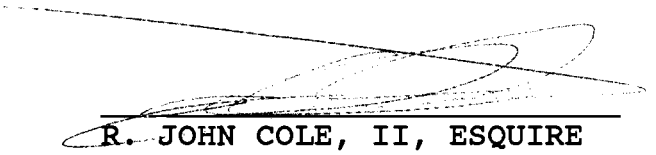
Any other result would lead to consequences that are detrimental to the societal purposes of controlling lawless activity in that it would permit issuing magistrates to ignore not only Florida Statute 933.18 (1971), but any other law that a magistrate believed to be unfair, ridiculous, or not worthy of being followed. This is not a result that could possibly be intended by any court considering that it would appear to authorize a form of judicial disregard for the law not contemplated in the previous decisions of this Court of the United States Supreme Court.

On the foregoing argument in this brief and the Petitioner's Original Brief on the Merits, the decision of the District Court should be vacated and the evidence seized in this case ordered suppressed.

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; 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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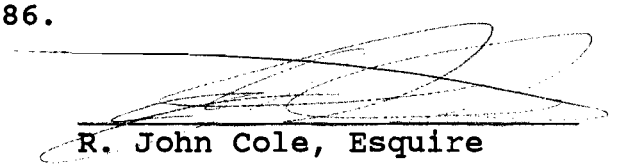
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Reply 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 on this the 17th day of March, 1986.



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