IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,859

THE STATE OF FLORIDA

Petitioner

vs.

LEORY PEARSON

Respondent

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Appellant, State of Florida, was the prosecution in the trial court. Appellee, Leroy Pearson, was the defendant below. The symbol "R" will be used to refer to the Record-on-Appeal. The symbol "T" refers to the transcript of the hearing held on February 15, 1984 at 12:00 p.m. The symbol "2T" refers to the transcript of the hearing held on February 15, 1984 at 3:00 p.m. The symbol "3T" refers to the transcript of February 16, 1984. The Motion to Suppress Evidence and Order on Motion to Suppress evidence are referred to by their titles. All emphasis is supplied unless otherwise indicated.

The Appellant, State of Florida, adopted the brief and Notice of Supplemental Authority filed in Tamer v. State, Case No. 66,711, Supreme Court of Florida, as its brief in this Court. Tamer was consolidated with this case because of the similarity in certified questions.

STATEMENT OF THE CASE AND FACTS

The defendant, on August 29, 1983, was placed on 12 months probation in Case No. 83-16217 (R.4). He was charged by an affidavit of Violation of Probation with violating conditions numbered 5 and 6 of his probation by committing the offense of possession of a controlled substance, by committing the offense of possession of drug paraphernalia, and by visiting places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used unlawfully (R.5).

The defendant, on January 18, 1984, filed a Motion to Suppress Evidence requesting the suppression of four propane torches, four cans of propane gas, four glass pipes, One Hundred Six ($106) Dollars U.S. Currency, and four unknown white tablets, in both the substantive and the probation violation cases (Motion to Suppress Evidence). A hearing was held on the motion on February 15, 1984 (T.2T), and the motion was granted, as to both cases (Order on Motion to Suppress Evidence, 2T, 4-8). The State argued, at the hearing, that the exclusionary rule should not apply to the probation violation hearing (2T, 5-8). The court signed the written order on February 16, 1984 (Order on Motion to Suppress Evidence, 3T, 4-5), and the State announced its nolle prosse of the substantive case and intention to appeal on the probation violation (3T, 5). The Notice of Appeal was filed on February 23, 1984 (R.10).

At the hearing, the defense witness, Clifford Lowe, testified that he didn't hear anybody knock on the door and announce their authority prior to the time that the police officers

entered the house (T.25). No witness testified that there was an announcement of authority (T.4-29). The court granted the Motion to Suppress Evidence (Order on Motion to Suppress Evidence (Order of Motion to Suppress Evidence, 2T, 4) and applied its ruling to both the substantive and probation violation cases (2T, 8).

The motion to suppress evidence was grounded on the absence of compliance with the Florida "knock and announce law" § 933.09 Fla. Stat. (Motion to Suppress Evidence). In fact, the testimony revealed that a "SWAT team" of combat-ready officers came to the door of the premises and immediately--without knocking or announcing their purpose--commenced to strike the door with sledge hammers in order to knock the door down and gain entry. There was no evidence or testimony that compliance with the knock and announce law was excused by any known or even assumed fact that contraband would be destroyed or escape would be facilitated. (T.25; 2T-3)

SUMMARY OF ARGUMENT

The knock and announce Statute (§ 933.09 Fla. Stat.) is an independent limitation on searches which mandates exclusion of illegally seized evidence in probation revocation proceedings. This exclusion must take place regardless of what effect the Amendment to Article I, Section 12 has on State v. Dodd, 419 So.2d 333 (Fla. 1982).

State v. Dodd, supra, (holding that the exclusionary rule applies to probation revocation) is still the controlling case on exclusion of illegally seized evidence in probation revocation proceedings because there is no United States Supreme Court case on the issue and the Circuit Courts of Appeal are in conflict. The benefits of deterrence far outweights the potential impact on the proceedings in a probation proceeding when illegally seized evidence is offered as direct proof that could result in imprisonment.

POINT INVOLVED

WHETHER FAILURE TO COMPLY WITH THE KNOCK AND ANNOUNCE LAW (933.09 FLA. STAT.) RENDERS EVIDENCE INADMISSIBLE IN A PROBATION VIOLATION HEARING.

ARGUMENT

FAILURE TO COMPLY WITH THE KNOCK AND ANNOUNCE LAW (933.09 FLA. STAT.) RENDERS EVIDENCE INADMISSIBLE IN A PROBATION VIOLATION HEARING.

At issue in this appeal is the validity of a search of a probationer's home where the law enforcement officers failed to comply with the "knock and announce" Statute. The State in the court below conceded non-compliance with the knock and announce Statute.

A. **The "Knock and Announce" Statute Mandates Exclusion.**

The statutory provisions of § 933.09, Florida Statutes (1983) provides:

> The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of his authority and purpose he is refused admittance to said house or access to anything therein.

Section 933.09 is the statutory embodiment of a common law rule which has its roots in a tradition of respect and privacy afforded a man in his own home. Such a concept, that the sanctity of a man's home is inviolate, can be traced back as early as Thirteenth Century England. In commenting on the federal counterpart[1] to Section 933.09, the United States Supreme Court stated in Miller v. United States: "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in

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1 18 U.S.C. § 3109

our heritage and should not be given grudging application." 357 U.S. 301, 313, 78 S.Ct. 1190, 1197, 2 L.Ed.2d 1332 (1958). The "knock and announce" provision is designed to protect the rights of a citizen in his own home. State v. Clark, 387 So.2d 980 (2nd DCA, 1980); Benefield v. State, 160 So.2d 706 (Fla. 1964).

The Statute imposes certain obligations on law enforcement officers preliminary to their forcible entry into a private residence. The Statute seems to operate separately from the Florida Constitution prohibition against unreasonable searches and requirements of probable cause and particularity in warrants. It makes no mention of the knock and announce rule; therefore the amendment to Article I, Section 12 has no effect on the rule requiring exclusion of evidence seized in violation of § 933.09, Fla. Stat. As a result of the failure of the officers to comply with the statute, the evidence seized under the warrant was seized illegally, was not admissible in evidence, and was, therefore, subject to suppression. State v. Collier, 270 So.2d 451 (4th DCA, 1972); Benefield v. State, 160 So.2d 706 (Fla. 1964); and McLendon v. State, 176 So.2d 568 (Fla. 1965).

The Supreme Court of Florida in State v. Kelly, 287 So.2d 13 (Fla. 1973) laid to rest any doubts about the circumstances which give rise to the "knock and announce" provision:

> It has been recognized that generally where a police officer fails to announce his authority and purpose prior to a forceable [sic] entry into a home to make an arrest or to execute a warrant, the arrest or execution is illegal and the fruits of any attendant search are

subject to suppression.
287 So.2d at 15[1].

The United States Supreme Court in Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968), has strictly construed the federal statute, substantially similar in form to F.S. § 933.09. The Court held:

> An unannounced intrusion into a dwelling--what § 3109 basically proscribes--is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially opened door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door.
> 391 U.S. at 589, 88 S.Ct. at 1757.

B. **The Exclusionary Rule in Probation Revocation**

Additionally, the State is mistaken in its contention that the 1983 change in Article I, Section 12 removed the exclusionary rule from probation hearings. The Supreme Court of Florida in State v. Dodd, 419 So.2d 333 (Fla. 1982) held in accordance with the constitutional language of Article I, Section 12 and the rule in the case of Grubbs v. State, 373 So.2d 905 (Fla. 1979) that the exclusionary rule applies in probation revocation proceedings.

The Supreme Court decision in Grubbs, supra mandates the conclusion that the exclusionary rule does apply in Florida probation hearings. The statement in Croteau v. State, 334 So.2d 577 (Fla. 1976) relied on by the Appellant was mere dicta to the holding and thus not controlling on this issue. This analysis of the Croteau dicta was made by the Supreme Court in State v. Dodd, 419 So.2d 333, 335 n.2 (Fla.1982).

The Amendment to Article I, Section 12 of the Florida Constitution provides that the right secured thereby "shall be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court." The Appellant has conceded that the United States Supreme Court has never ruled that the exclusionary rule should not apply in probation revocation proceedings. In fact, the Supreme Court specifically declined to grant certiorari on the issue. Mollica v. United States, 79 L.Ed.2d 760, 104 S.Ct. _____, denying certiorari in appeal from United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983). The United States Supreme Court has apparently never held that § 933.09, Fla. Stat. or any similar statute should not apply in probation revocation proceedings. Since there are no United States Supreme Court decisions in conflict with Dodd and Grubbs, it is evident that Dodd and Grubbs is still the law of Florida and requires the suppression of the evidence in this case.

This Court in Cross v. State, 432 So.2d 780 (3d DCA, 1983), noted in June, 1983, after the January, 1983 effective date of Amendment of Article I, Section 12, that the exclusionary rule applies in probation revocation proceedings. Cross, 432 So.2d at 783, n.2.

It should be noted that the exclusionary rule has been held to apply in probation revocation hearings in the 2nd, 4th, and most significantly, the 11th Circuit Courts of Appeal. United States v. Rea, 678 F.2d 382 (2nd Cir. 1982); United States v. Workman, 585 F.2d 1205 (4th Cir. 1978), and Owens v. Kelly, 681 F.2d 1362, 1367 (11th Cir. 1982).

In United States v. Rea, supra, the Second Circuit flatly held that the exclusionary rule barred introduction of illegally seized evidence in a probation revocation hearing.

In Owen v. Kelly, supra, the Court of Appeals held that while a special condition of probation allowing a probation officer to search him for probationary purposes was valid, "there is no question that the Fourth Amendment's protection against unreasonable searches and seizures applies to probationers." 681 F.2d at 1367. The Court went on to note that probationary searches "cannot be conducted as a subterfuge for criminal investigations." Id. at 1369.

The Workman opinion, supra, which was an appeal brought by the venerable constitutionalist, former Senator Sam Ervin, is truly instructive. The analysis begins with the test established in United States v. Callandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) which denied extension of the exclusionary rule to grand jury proceedings. Callandra established a balancing test for the exclusionary rule: the potential injury to the role and function of the proceeding is to be weighed against the potential benefits of applying the rule. The Workman court noted that a probation hearing is very similar to a crimnal trial, i.e. it is adjudicative and could directly result in a loss of liberty. An analysis of the cases reveals that it has not been applied when it would have only a marginal or incremental deterrent effect. United States v. Calandra, supra (grand jury proceedings); United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)(civil tax cases); Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954)(impeachment of defendant after testimony); Alderman

v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (where defendant wasn't a victim of the search).

However, the exclusionary rule has been consistently applied to bar illegally seized evidence when it is offered as affirmative proof in criminal trials. It has been extended to forfeitures based upon criminal offenses because the forfeiture operates as a penalty. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701, 702, 85 S.Ct. S.Ct. 1246, 14 L.Ed.2d 170 (1965). The Workman Court concluded its analysis by noting:

> As this brief survey discloses, the Supreme Court has never exempted from the operation of the exclusionary rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of the search to imprisonment. Indeed, the Court has observed that standing to invoke the exclusionary rule "is premised on a recognition that the need for deterence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."

585 F.2d at 1211 (4th Cir. 1978)

The Petitioner argues the **dissent** in State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) as controlling precedent in this case. It is clear that the majority opinion decided a very limited issue of "retroactivity" of the Amendment to Article I, Section 12, Florida Consititution and not the issue presented to this Court in this case.

The case of State v. Ridenour, 453 So.2d 193, 194 (3d DCA, 1984), can be distinguished because it involved a holding that was

in direct conflict with decisions of the United States Supreme Court interpreting the exclusionary rule and was thus struck down under the Amendment to Article I, Section 12. In Ridenour this Court held:

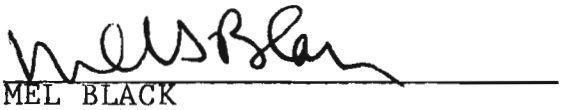
> We hold that Sarmiento does not survive these amendments to Article I, Section 12 of the Florida Constitution inasmuch as there . . . are United States Supreme Court decisions in conflict with Sarmiento. U.S. v. White, 401 U.S. 745, 91 S.Ct. 1122 . . . .

In the case at bar, the obverse is true. There is no reason to declare the holding in Dodd v. State, supra, a dead rule merely because of the passage of an amendment to Article I, Section. The United States Supreme Court has not ruled on the issue and there is a clear conflict among the Circuit Courts of Appeal. The drafters of the Amendment to Article I, Section 12 wisely limited the applicability of federal interpretation of those search and search warrant rights to rulings of the United States Supreme Court and not the Circuit Courts of Appeal. To have allowed the Circuit Court ruling to control when the United States Supreme Court had not ruled would have invited unending confusion. According, the rule in Dodd and Grubbs is still the law of Florida.

CONCLUSION

Based upon the above-cited cases and other authorities, it is respectfully submitted that the order of the trial court granting the defendant's Motion to Suppress Evidence should be affirmed.

Respectfully submitted,



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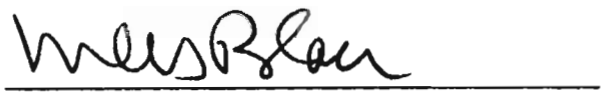
CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the foregoing Respondent's Brief on the Merits was furnished by mail to CHARLES M. FAHLBUSCH, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128, this 15 day of January, 1986.



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