IN THE SUPREME COURT OF FLORIDA

THEODORE S. TAMER, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO. 66,711

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the Appellant in the Fourth District Court of Appeal. The Respondent was the Prosecution and the Appellee, respectively, in the lower courts. In the brief, the parties will be referred to as they appeared before the trial court.

The symbol "R" will be used to designate the record.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's Statement of the Case and Facts as generally accurate, subject to the following additions:

The trial court entered a written order denying the motion to suppress (R 363-365). The order contains the following written findings of fact:

1. At approximately 1:08 a.m. on May 14, 1983, Officer Dwight Snyder, a veteran officer of the Hialeah, Florida Police Department for seven and one-half (7½) years, pulled into Lum's Restaurant in the City of Hialeah behind a white 1983 station wagon driven by the Defendant, Theodore Samuel Tamer.

2. Neither Officer Snyder, nor his riding companion that night, Officer Kathy Kinsman, effectuated a stop of the Defendant's vehicle, but rather they had followed it for several blocks, having observed it for the past several minutes.

3. After the Defendant stopped his vehicle on his own, Officer Snyder detained the Defendant for approximately thirty (30) seconds.

4. The detention was from the time the Defendant got out of his vehicle, headed toward Lum's and was called over by Officer Snyder until approximately thirty (30) seconds later when Officer Snyder was advised that the tag

on the Defendant's station wagon was stolen.

5. During the thirty (30) second detention the Defendant was asked what he was doing in the area, and was asked to produce his driver's license and registration. He stated that he was going to Lum's to eat.

6. When advised that the vehicle's tag was stolen, Officer Snyder placed the Defendant under arrest for possession of a stolen tag.

7. Within minutes Officers Snyder and Kinsman were further advised by radio that there was a fire at Westland Executive Plaza, which was a few blocks away and was the location where they first observed the Defendant's vehicle.

8. Earlier that night before coming on duty, Officer Snyder was advised by his sergeant at shift briefing to be alerted that: (a) there had been a recent rash of fires in the area, (b) the fires were at office buildings and (c) the offices concerned were doctors' offices.

9. Once on duty, at approximately 1:05 a.m. Officer Snyder and Officer Kinsman observed the white station wagon at the Westland Executive Plaza.

10. When Officer Kinsman first saw it, it was stopped about twenty (20) feet from the building. When Officer Snyder first saw it, it was moving slowly.

11. There was one person in the station wagon--the driver.

12. The building was closed.

13. The building was an office building.

14. The building housed thirty-five (35) doctors.

15. The rear tailgate hatch of the station wagon hatch was open for no apparent reason.

16. The station wagon moved to the empty parking lot of a closed Sears across the street.

17. The officers circled around in their marked police cruiser and approached the station wagon from the front.

18. As they drove toward to the station wagon which was now facing in their direction, it made a sharp U-turn, squealed its tires, and left quickly in the opposite direction.

19. It was within several blocks that the station wagon pulled into the Lum's and the officers followed.

20. The first thing that the Defendant did upon getting out of his station wagon was to immediately go around and close the rear tailgate hatch.

21. He then walked toward Lum's at which time Officer Snyder exited his police cruiser and called the Defendant over.

2. This detention lasted approximately thirty (30) seconds until the officer learned the tag on the station wagon was stolen and the Defendant then arrested (R 363-365).

The trial court thereupon concluded:

> It is this Court's belief that these facts must be viewed in their totality as they would be viewed by a trained officer who sees them at the time. This Court finds that this officer was justified in detaining the Defendant for that short period of time based upon a "founded suspicion" which had a factual foundation in the circumstances observed by the officer, and which circumstances were interpreted in the light of the officer's knowledge. State v. Goodman, 399 So.2d 1120 (4DCA Fla. 1981) and State v. Stevens, 354 So.2d 1244 (4DCA Fla. 1978).

(R 365)

On appeal, the Fourth District affirmed, citing the factors enumerated in State v. Stevens, 354 So.2d 1244 (4DCA Fla. 1978), a case which was relied on by the trial court. The court's opinion states, "Considering those [Stevens] factors in the context of this case, we conclude that the initial detention of Mr. Tamer was founded upon a reasonable, articulable suspicion of criminal activity, and therefore, affirm the denial of his motion to suppress." Tamer v. State, 10 FLW 473 (4DCA Fla., 2-20-85)(slip op. at 6).

SUMMARY OF ARGUMENT

The Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution (1983), do not require application of the exclusionary rule to probation revocation proceedings. The rule's deterrent purpose is adequately served by excluding illegally-seized evidence in substantive criminal prosecutions. The Defendant's acts giving rise to the revocation of his probation occurred on May 14, 1983. The amendment to Article I, Section 12, became effective on January 4, 1983. Thus, the amended provision is applicable to this case.

If the court reviews this case on the merits, the record establishes there was ample founded suspicion to justify the stop. The Defendant's operation of his vehicle at 1:00 a.m. at the rear of a medical office building, the fact that there had been a series of arsons at physicians' offices, and his evasive action upon seeing the police officer, in combination justified the stop.

POINTS INVOLVED

POINT I

WHETHER THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT, UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION, IS INAPPLICABLE TO A PROBATION REVOCATION PROCEEDING, THUS PRECLUDING THE DEFENDANT'S CHALLENGE TO THE SEARCH AND SEIZURE?

(Defendant's Points I and II)

POINT II

WHETHER, IF THE EXCLUSIONARY RULE IS APPLICABLE, THE TRIAL AND APPELLATE COURTS ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS?

(Defendant's Point III)

ARGUMENT

POINT I

THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT, UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION, AS AMENDED, IS INAPPLICABLE TO A PROBATION REVOCATION PROCEEDING, AND THE DEFENDANT'S CHALLENGE TO THE SEARCH AND SEIZURE IS PRECLUDED.

(Defendant's Points I and II consolidated)

The Defendant was charged with having violated his probation on May 14, 1983. At his subsequent revocation hearing, he moved to suppress evidence which was obtained as the result of an allegedly illegal search and seizure. On appeal, the State argued that the court need not review the merits of the trial court's ruling, for the exclusionary rule does not apply to probation revocation proceedings. The appellate court certified the issue to this Court as "being one of great public interest." Tamer v. State, 10 FLW 473 (4DCA Fla., 2-20-85) (slip op. at 4).

In 1982, the voters of this state approved an amendment to Article I, Section 12, of the Florida Constitution. The amendment became effective on January 4, 1983. The purpose of the amendment was to amend the Florida constitutional Search and Seizure Clause to bring it into conformity with the United States Supreme Court's interpretation of the United States Constitution. The effect of the amendment is to eliminate the more strict construction of

Florida law that has been given in previous cases. See, e.g., State v. Sarmiento, 397 So.2d 643 (Fla. 1981).

The prior language of Article I, Section 12, stated:

> The right of the people to be secure in their persons, houses, papers and effect against unreasonable searches and seizures shall not be violated--articles or information obtained in violation of this right shall not be admissible in evidence.

As amended, the provision now includes language that:

> . . . This right shall be construed in conformity with the Fourth 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 Fourth Amendment to the United States Constitution.

Therefore, under the amendment, only evidence which would be inadmissible under United States constitutional principles is inadmissible in Florida.

The premise upon which this Court relied in its decisions in State v. Dodd, 419 So.2d 333 (Fla. 1982) and Grubbs v. State, 373 So.2d 905 (Fla. 1979), where it held the exclusionary rule applicable to probation revocation proceedings, was the Florida constitutional rule is more restrictive than its federal counterpart and evidence seized in violation thereof, was inadmissible in any proceeding.

The Florida constitutional rule having been modified, this restriction has now been lifted.

In State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), the court implicitly recognized that under the new amendment, the exclusionary rule does not apply to probation revocation proceedings. See also, Copeland v. State, 435 So.2d 832 (2DCA Fla. 1983). However, because Lavazzoli's violations occurred prior to the amendment's effective date, this Court declined to give the amendment retroactive application and so did not explicitly decide the issue. The Defendant sub judice violated his probation on May 14, 1983, over four months after the effective date of the amendment, so the issue is squarely presented.

The Defendant's argument that the amendment cannot be interpreted to hold the exclusionary rule inapplicable to probation revocation proceedings until it is so held by case law, lacks merit. In both State v. Dodd, supra, and Grubbs v. State, supra, this Court cited the state constitution and distinguished it from federal authority construing the Fourth Amendment, as the basis for holding the state exclusionary rule applied to probation revocation proceedings. The amended constitutional provision became effective on January 4, 1983, so as of that date the Defendant and all others similarly situated were on notice they could no longer rely on the more restrictive Florida exclusionary rule. The acts which led to the revocation in this case

occurred on May 14, 1983, so the state constitution as amended is the applicable law.

Turning to the merits, although there is no United States Supreme Court decision which specifically holds the exclusionary rule applicable to probation revocations, the court has made it clear that a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed a defendant in a criminal proceeding. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). Moreover, as the court below observed, the Supreme Court has recently curtailed the Fourth Amendment's exclusionary rule and unequivocally asserted the rule is not constitutionally required, but rather is a judicial remedy designed to curtail police misconduct. Tamer v. State, supra (slip op. at 3), citing United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984).

In view of the deterrence rationale underlying the rule, the State submits it is adequately served by excluding any illegally-seized evidence from the substantive criminal prosecution, while permitting its use at the probation revocation proceeding. As this Court has long recognized, a probation revocation hearing is an informal proceeding and not a criminal trial. The purpose of the hearing is to satisfy the conscience of the court as to whether the conditions of probation have been violated and to give the probationer a chance to explain the accusations.

Brill v. State, 32 So.2d 607, 159 Fla. 682 (1947). The reason for the distinction between a trial and a revocation hearing is that the probationer has already been convicted of a crime and he is at liberty because of judicial grace, so he is not entitled to remain at large if he persists in criminal activity. Bernhardt v. State, 288 So.2d 496 (Fla. 1974).

The approach suggested by the State fairly balances the rights of probationers and society's interest in justice. It provides a probationer will not have evidence seized in contravention of the Fourth Amendment introduced in evidence in a substantive prosecution, while at the same time ensuring that a probationer who has been given by judicial grace an opportunity to live at liberty, cannot continue on probation if he flouts the law. As the court below observed:

> The United States Supreme Court has indicated that whether the exclusionary rule should apply in a particular type of proceeding depends on whether the likely social benefits of excluding unlawfully-seized evidence outweigh the likely costs, or more specifically, whether the likely incremental deterrent effect on police misconduct is great enough to justify the social costs attendant to the loss of probative evidence. See United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). Under that balancing approach, it has found the rule inapplicable in grand jury proceedings, see United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), federal civil tax assessment proceedings, United States v. Janis, supra, and civil deportation proceedings. I.N.S. v. Lopez-Mendoza, 468 U.S. ___, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984).

The State therefore maintains, in accordance with the majority view in the Federal Circuits[1], that the Fourth Amendment to the United States Constitution, and likewise Article I, Section 12, of the Florida Constitution (1983), do not require application of the exclusionary rule in probation revocation proceedings.

[1] See United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); contra, United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

POINT II

THE STOP OF THE DEFENDANT WAS BASED ON FOUNDED SUSPICION; THEREFORE, IF THE EXCLUSIONARY RULE IS APPLICABLE, THE MOTION TO SUPPRESS WAS PROPERLY DENIED.

(Defendant's Point III)

If this Court holds the exclusionary rule is inapplicable to probation revocation proceedings, then the propriety of the denial of the motion to suppress is a moot issue. However, the State will address the merits, assuming, for purposes of argument only, that the court may reach the issue.

The Court of Appeal and the trial court each concluded the stop of the Defendant was based on founded suspicion, and thus permitted by Florida's Stop and Frisk law, Fla. Stat. §901.151. Both courts cited the decision in State v. Stevens, 354 So.2d 1244 (4DCA Fla. 1978), which sets forth relevant factors to assess in determining whether the circumstances witnessed by an officer reasonably suggest a suspect's possible involvement in criminal activity:

> The time; the day of the week, the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge.

In the instant case, Officer Snyder was aware there had been a series of arsons at doctors' offices, the Appellant was observed in a car at the parking lot of a doctors' office complex at 1:00 a.m. when the offices

were closed, the tailgate of his car, a station wagon, was open, and upon seeing the police car, Appellant took evasive action. Officer Snyder followed the car for a few blocks until the Appellant independently stopped it outside a restaurant. The officer simply called the Appellant over to his car for approximately thirty seconds to ask for his identification and meanwhile, it was discovered the license tag on his vehicle was stolen so he was arrested.

Thus, the factors of State v. Stevens, supra, applicable to this case are as follows:

1. Time--the time was 1:00 a.m.

2. Day of week--not applicable

3. Location--the Appellant was seen in a parking lot of a closed medical office complex and there had recently been a series of arsons at such places

4. Appearance and behavior of the suspect--the Appellant took evasive action upon seeing the police cruiser

5. Appearance and manner of operation of any vehicle involved--the tailgate of the station wagon was open when it was observed by the officer and when the Appellant exited from the car at the restaurant he closed it

Taken together, these circumstances were sufficient to reasonably suggest that the Appellant might be involved in criminal activity. Compare, Clements v. State, 396 So.2d 214 (4DCA Fla. 1981); State v. Spurling, 385 So.2d 672 (2DCA Fla. 1980); Goodman v. State, 399 So.2d 1120 (4DCA Fla. 1981);

State v. Lewis, 406 So.2d 79 (2DCA Fla. 1981). In fact, the trial court in the substantive prosecution in Dade County ruled to the contrary. The Third District reversed, holding the ruling was "plainly erroneous." State v. Tamer, 449 So.2d 890 (3DCA Fla.), rev. denied, 455 So.2d 1033 (Fla. 1984). The Third District's opinion states:

> . . . the Defendant's operation of his vehicle at 1:00 a.m., first very slowly at the rear of an office building with many physicians' offices which, as the apprehending officer had been informed that day, had been the subject of several arsons in the area; and then very quickly in an apparent attempt to evade the officer, provided ample 'founded suspicion' to justify his stop and temporary detention.

Id. The trial court in the instant case properly denied the Defendant's motion to suppress and the Court of Appeal's affirmance of the order was correct.

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities, the State respectfully requests that this Court:

1. Hold that Article I, Section 12, of the Florida Constitution (1983), does not require application of the exclusionary rule to probation revocation proceedings; or, alternatively:

2. Uphold the opinion of the Court of Appeal which affirmed the judgment and sentence entered by the trial court on the basis that the motion to suppress was properly denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been mailed to Ronald A. Dion, Esq., of ENTIN, SCHWARTZ, DION & SCLAFANI, 1500 Northeast 162nd Street, North Miami Beach, FL 33162, this 11th day of April, 1985.

Of Counsel