IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,172

THE STATE OF FLORIDA,

Petitioner,

-vs-

ALEJANDRO MENDIOLA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The petitioner was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The respondent was the defendant and the appellant, respectively, in the lower court. In this brief, the parties will be referred to as they stood in the trial court.

STATEMENT OF THE CASE AND FACTS

The only relevant fact is that the trial court refused to exclude from the defendant's probation violation hearing the same evidence it had suppressed in the substantive cases which formed the sole basis for the affidavit of violation and consequent revocation of probation. The Third District Court of Appeal reversed and held that the search and seizure exclusionary rule is applicable to probation revocation hearing. In so doing, the District Court certified the following question to this Court:

> "Under the 1983 Amendments to Article I, Section 12 of the Florida Constitution, does the exclusionary rule apply in probation revocation hearing?"

POINT INVOLVED ON APPEAL

WHETHER UNDER THE 1983 AMENDMENTS TO ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION, DOES THE EXCLUSIONARY RULE APPLY IN PROBATION REVOCATION HEARINGS?

SUMMARY OF ARGUMENT

Since a probationer has a constitutional right to effective assistance of counsel at a revocation hearing, there is no cogent reason why he should not also be afforded his right against unreasonable search and seizure.

This Court has already ruled that the exclusionary rule applies to probation revocation proceedings, and the United States Supreme Court has not decided otherwise.

ARGUMENT

UNDER THE 1983 AMENDMENTS TO ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION, THE EXCLUSIONARY RULE DOES APPLY IN PROBATION REVOCATION HEARINGS.

The defendant's contention is supported by the recent decision in the case of Tamer v. State, 463 So.2d 1236 (Fla. 4th DCA 1985), where the Court held as follows:

> Despite the absence of a Supreme Court ruling on the precise issue before us, the state urges us to hold that the exclusionary rule is not applicable in this context, in accordance with the majority view among federal appellate courts. We decline to do so. Under the amended version of Article I, Section 12, we are required to construe an individual's right to be secure against unreasonable searches and seizures under the Florida Constitution "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." In the absence of a definitive ruling by that court, we believe that we are bound to construe the Florida Constitution consistently with opinions issued by the Florida Supreme Court. See Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982). Thus, in this case, we hold under the authority of State v. Dodd, supra, that the Florida exclusionary rule is applicable to Tamer's probation revocation proceedings. Although our Supreme Court recently issued an opinion suggesting that Dodd may no longer be viable under the amendment to section 12, see State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), it has never expressly receded from Dodd. Therefore, we must assume that the pronouncement in that case is still the law of this state.

The prosecution offers no cogent reasons why this Court should recede from its holding in Dodd. It is interesting to note that one of the cases relied upon by the prosecution offers several persuasive reasons why the exclusionary rule should apply

in probation revocation hearings. In United States v. Bazzano, 712 F.2d 826 (3d Cir. 1983), listed in the prosecution's Notice to Rely on Supplemental Authority, the Court said:

> Despite the substantial weight of authority against the application of the rule, we acknowledge that the question is a close one. Those who had argued in favor of the rule's applicability to probation revocation proceedings have stressed that since prosecutors frequently use a revocation proceeding as an alternative to trying the probationer on the new criminal charges, the same exclusionary practice should apply in revocation proceedings as does in a criminal trial. They assert that the Supreme Court has consistently applied the exclusionary rule to affirmative proof offered by the government in state and federal criminal trials, and has never exempted from the operation of the rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment.
>
> In addition, proponents of the exclusionary rule argue that probationers, despite their probationary status, still retain the basic constitutional right to be free from unreasonable searches and seizures, and that unbridled police intrusions into probationer's lives would disrupt any effort being made to rehabilitate them. They contend that as the courts create more and more exceptions to the exclusionary rule, the rule will no longer be an effective deterrent to police misconduct because the police will soon come to believe that, notwithstanding the general rule of exclusion, some exception will nearly always be available under which the seized evidence will be admissible. Finally, they assert that application of the exclusionary rule in the probation context is required to prevent the integrity of the legal system from being tainted by the use of illegally obtained evidence.

712 F.2d 826, at 831.

In Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336

(1967), the Supreme Court held that a probationer must be afforded counsel at a probation revocation proceeding. This ruling was followed by Florida's Fourth District Court in Gargan v. State, 217 So.2d 579 (Fla. 4th DCA 1969), where the Court said:

> Moreover, it is clear that the right to counsel exists at every stage of a criminal proceeding where substantial rights of a defendant may be affected.

And in Cuciar v. State, 410 So.2d 916 (Fla. 1982) this Court held that

> Fair play and justice require that a defendant in a probation revocation hearing be entitled to reasonable discovery pursuant to Rule 3.220.

Certainly, the Sixth Amendment right to counsel is of no greater importance then the Fourth Amendment right against unreasonable search and seizure. And does not the same "fair play and justice" in Cuciar require that a defendant in a probation revocation hearing be afforded the protection of the exclusionary rule?

The prosecution would contend that the latter question be answered in the negative because the exclusionary rule is not constitutionally required, but is rather a judicial remedy designed to curtail police misconduct. If this reasoning is carred to the extreme, then the Bill of Rights will become a "Bill of Warnings." It is submitted that it would require a Machiavelian mind to suggest that Thomas Jefferson and James Madison had the latter in mind when they formulated this document so vital to a free socity.

CONCLUSION

Unless and until the United States Supreme Court rules to the contrary, this Court should adhere to its holding in Dodd that the exclusionary rule does apply in probation revocation hearings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 6th day of February, 1986.

N. Joseph Durant, Jr.
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