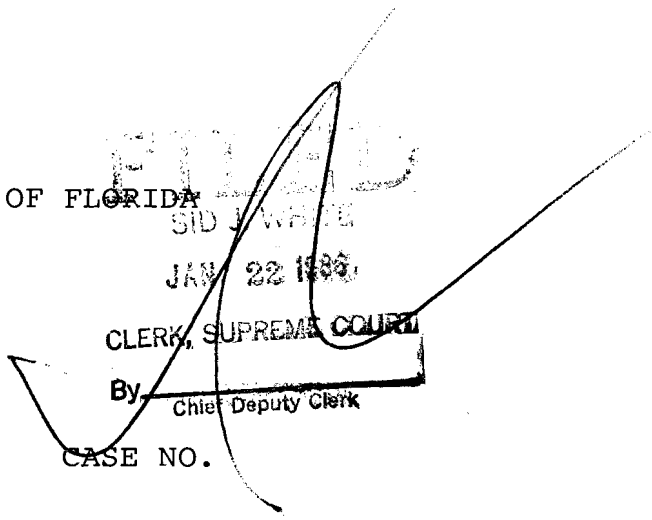
IN THE SUPREME COURT OF FLORIDA



RICKY JARADE PAYNE,

Petitioner,

v. CASE NO.

STATE OF FLORIDA,

Respondent.

68,180

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A three volume transcript will be referred to as "T". Attached hereto as Appendix A is the opinion of the lower tribunal dated September 18, 1985. Appendix B contains petitioner's motion for rehearing. Appendix C contains the opinion on rehearing filed December 19, 1985. Appendix D contains petitioner's judgment and sentence.

II STATEMENT OF THE CASE

By information filed November 3, 1983, petitioner was charged with armed robbery with a firearm (R-5). Petitioner's motion to suppress evidence and motion to suppress identification testimony (R-17-22) were disposed of before trial (R-58-60). On April 19, 1984, the state filed an amended information, charging robbery with a BB gun (R-47). The state filed a second amended information on May 1, charging robbery with a pellet gun (R-68).

The cause proceeded to jury trial on May 2-3, and at the conclusion thereof petitioner was found guilty of robbery with a non-deadly weapon (R-79). On July 12, 1984, petitioner was adjudicated guilty and sentenced in excess of the recommended guideline sentence to 21 years in state prison, with the court retaining jurisdiction over parole for seven years (R-113-27; Appendix D).

On July 25, 1984, a timely notice of appeal was filed (R-129). On appeal, petitioner argued that the motion to suppress should have been granted, and that his guidelines departure sentence was illegal. The First District disagreed with the former and partially agreed with the latter (Appendix A and C). On January 16, 1986, a timely notice of discretionary review was filed.

III STATEMENT OF THE FACTS

The facts relevant to the suppression issue are contained in the lower tribunal's opinion:

The robbery, involving the clerk of a convenience store, occurred on October 22, 1983. The stop in question, which occurred on October 26, 1983, was made by Officer Skie. At the suppression hearing Skie testified that at about five minutes before eleven p.m. on Wednesday, October 26, he observed a car with its lights off parked next to a business and two black males approaching the front of the business from the direction of the car. This took place at a small shopping center where all of the stores were closed except the convenience store, but the car was parked next to a closed laundry at the end of the shopping center farthest away from the convenience store. The car was pulled up several car lengths beyond the laundry. Skie said he thought he saw either brake lights or parking lights of the car on. He saw the two men walking past the laundry toward the convenience store. He turned his patrol car around and as he did so, he noticed one of the men going back toward the car, and he lost sight of the other man. The car began driving off hurriedly without its lights being turned on, and Officer Skie made the stop. Officer Skie also stated he associated the two black men with the parked car because the neighborhood was all white. He had no calls or BOLO (be on the look out) reports for this type of car or these suspects. There were no cars parked in the parking spaces directly in front of the convenience store, and the car in question was parked beyond the last store in the shopping center and to the side of the building. From the record there is no indication that at the time of the stop Officer Skie knew of the October 22 robbery which had occurred about one-and-a-half miles away.

The trial court denied the motion to suppress based on the position in which the car was parked -- off to the side of the building rather than someplace where it could be seen, even though no cars were parked in front of the convenience store -- because of the all white makeup of the neighborhood, because when the officer drove up, the men turned around and walked back towards the car and drove away

> without turning on the driving lights, and because a convenience store was involved, which "probably only a newly arrived Martian would not know [is] subject to probably more robberies than any other type of institution in the city."

(Appendix C at 2-3).

Petitioner's recommended guideline sentence was 4 1/2 - 5 1/2 years (Appendix D at 5). He was sentenced to 21 years, and the court retained jurisdiction over parole for 1/3 of this sentence (Appendix D at 3). The court entered a nine page order justifying retention and departure from the guidelines, because petitioner was a habitual offender (Appendix D at 6-14).

On appeal, petitioner argued that both the retention and the departure were illegal. The First District's initial opinion merely struck the retention provision (Appendix A at 1). Petitioner argued on rehearing that the entire sentence should be vacated because the judge erroneously believed that petitioner was eligible for parole and because the departure was not justified (Appendix B). The First District's opinion on rehearing vacated the sentence but found the departure was justified because petitioner was a habitual offender (Appendix C at 2).

Petitioner seeks review of the suppression issue and the departure issue.

IV SUMMARY OF ARGUMENT

Petitioner will argue in the first issue that this Court should accept jurisdiction over the suppression issue because

the trial court's decision, which was subsequently approved by the First District, would allow the police to stop any black male any time he is seen outside of a convenience store in an all white neighborhood. The First District's holding on this point conflicts with several other cases on the question of what constitutes reasonable suspicion.

In the second issue, petitioner will argue that this Court should accept jurisdiction over the question of whether a sentencing guidelines departure can be justified by a finding that the defendant is a habitual offender. This issue is currently pending before this Court in other cases, and is an important one in the development of guidelines case law.

V ARGUMENT

ISSUE I

THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE WHETHER THE PRESENCE OF TWO BLACK MALES OUTSIDE OF AN OPEN CONVENIENCE STORE IN AN ALL WHITE NEIGHBORHOOD GIVES RISE TO REASONABLE SUSPICION.

The trial court's findings are quoted above and will not be repeated here. The First District approved the denial of the motion to suppress:

> We have[1] examined the cases relied upon by appellant to support his argument that there was not a founded suspicion for the stop, in particular the criteria set forth in State v. Stevens, 354 So.2d 1244, 1247 (Fla. 4th DCA 1978), and conclude that the trial court did not err in finding that a founded suspicion existed for the stop in this case.

[1] Mullins v. State, 366 So.2d 1162 (Fla. 1978); Colodonato v. State, 348 So.2d 326 (Fla. 1977);

> Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983); McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982); Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980); State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978); Lower v. State, 348 So.2d 410 (Fla. 2d DCA 1977).

(Appendix C at 3-4).

Thus, the First District, without saying why, has rejected the test for reasonable suspicion as enunciated by the cases cited in the footnote. The First District's holding is thus in express and direct conflict with those cases.

Section 901.151, Florida Statutes, gives police officers the right to temporarily detain a person only when the circumstances "reasonably indicate that such person has committed, is committing, or is about to commit" a crime.

In Lower v. State, 348 So.2d 410 (Fla. 2d DCA 1977), the court suppressed marijuana found in the possession of the defendant after a stop of the automobile in which he was a passenger. At 12:52 a.m. a deputy observed an automobile parked in the parking lot of a business area in Sarasota. All of the businesses were closed. As the officer drove by, the automobile backed out of its parking place and pulled away at what the officer testified was a faster than average rate of speed. The officer followed the vehicle for a short distance and stopped it. The officer walked over to the car and asked the driver for his license and registration. As he did so, the officer noticed a slight odor of marijuana. He asked the driver to get out of the vehicle and searched him. The officer placed the driver under arrest and asked the

passenger, who was Lower, whether he had any marijuana. Lower produced marijuana from his pocket and handed it to the officer. The Second District held that the stop of a vehicle must be predicated upon a founded or reasonable suspicion of criminal activity. Under the circumstances of that case, which are strikingly similar to the facts of the case at bar, the Second District held that there was no reasonable suspicion to stop the car.

In Coladonato v. State, 348 So.2d 326 (Fla. 1977), an officer saw a U-haul van in a business district and thought that it was unusual for such a vehicle to be in that area at that time of night. He eventually stopped the van, based upon his personal suspicion that a crime had been committed or was about to be committed. This Court held that the officer only had a bare suspicion of the illegal activity, and therefore the stop was improper.

In Mullins v. State, 366 So.2d 1162 (Fla. 1978), an officer observed the defendant riding a bicycle slowly through a residential area during the night time. The officer stopped the defendant and asked what he was doing. Upon observing a bag of marijuana, the officer arrested the defendant. This Court held that there was only a bare suspicion of illegal activity, which did not justify stopping Mullins on his bicycle.

In Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980), the defendant was observed leaning into the passenger side of a vehicle which was parked at a service station. When he saw the police, Kearse walked briskly away. The Fourth District, citing its earlier decision in State v. Stevens, 354 So.2d 1244

(Fla. 4th DCA 1978), held that the defendant's behavior did not give rise to a founded suspicion of criminal activity, and therefore, the stop was improper. The defendant's behavior in avoiding the officers and walking away briskly gave rise only to a bare suspicion. The same is true in the instant case.

In Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983), a police officer saw three people walking through an apartment parking lot at 2:20 a.m. One was carrying a flashlight. The police were aware that there had been previous automobile burglaries in that parking lot. The three were eventually stopped by the police. The trial court had denied a motion to suppress, primarily because one of the three had been carrying a flashlight. The Second District held that the presence of a flashlight might have given rise to a bare suspicion of criminal activity, but it did not give rise to the required reasonable or founded suspicion of criminal activity.

Thus, the cases cited above expressly and directly conflict with the instant case. The officer here had no reasonable suspicion to stop petitioner. Petitioner's activities in walking down the street past businesses which were closed toward one which was open does not give rise to a reasonable suspicion. Nor does his return to the parked car. Nor does the car's exit from the parking lot. The pellet gun, which was the direct fruit of the illegal stop, should have been suppressed, this Court must accept jurisdiction and proceed to decide this important question.

ISSUE II

THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE WHETHER A GUIDELINES DEPARTURE CAN BE JUSTIFIED BY A FINDING THAT THE DEFENDANT IS A HABITUAL OFFENDER.

The First District made no reference to this issue in its initial opinion (Appendix A). Petitioner's motion for rehearing pointed out that the decisions of this Court in Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and Albritton v. State, 476 So.2d 158 (Fla. 1985) would seem to have overruled prior case law which held that a habitual offender finding was a sufficient justification for departure from the recommended guideline sentence (Appendix B at 1-2).

The First District's opinion on rehearing did not discuss Hendrix or Albritton, but merely affirmed on authority of Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985) (Appendix C at 2).

Whitehead is currently pending review before this Court in Case No. 67,053. The issue has also recently been certified to this Court by the Second District in Ferguson v. State, No. 85-108 (Fla. 2d DCA Oct. 25, 1985), question certified by opinion on rehearing filed January 3, 1986, and is pending review under Case No. 68,146.

This Court should grant review to address the question when it decides Whitehead and Ferguson. Cf. Jollie v. State, 405 So.2d 418 (Fla. 1981).

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner urges this Court to accept review over both issues.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Ms. Barbara Ann Butler, Assistant Attorney General, Duval County Courthouse, Suite 513, Jacksonville, Florida, 32202; and to petitioner, Mr. Ricky J. Payne, #279058, C-62, Post Office Box 500, Olustee, Florida, 32072, this 22 day of January, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER