C/A 9-22-86

IN THE SUPREME COURT OF FLORIDA

RICKY JARADE PAYNE,

Petitioner,

v. CASE NO. 68,180

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FIRST
DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER ON THE MERITS

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v.	:	CASE NO. 68,180
STATE OF FLORIDA,	:	
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	:	

REPLY BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner will rely upon the same record designations that were utilized in the initial brief. Respondent's brief on the merits will be referred to as "RB", followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the statement of the case and facts as set forth in his initial brief at 2-4.

III SUMMARY OF ARGUMENT

Petitioner continues to maintain that the stop of his automobile and the subsequent seizure of the pellet gun was illegal because it was not supported by founded suspicion that criminal activity was afoot.

Petitioner also continues to maintain that the finding of habitual offender status cannot, in and of itself, serve as a valid reason for departure from the presumptive sentencing guidelines recommended sentence.

IV ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THIS COURT SHOULD HOLD THAT THE PRESENCE OF TWO BLACK MALES OUTSIDE OF AN OPEN CONVENIENCE STORE IN AN ALL WHITE NEIGHBORHOOD DOES NOT GIVE RISE TO A REASONABLE SUSPICION THAT WOULD JUSTIFY A STOP AND SUBSEQUENT DETENTION.

Respondent accurately states the law with regard to the requirement that a temporary stop be founded upon a reasonable suspicion that criminal activity is either occurring, has occurred, or is about to occur. However, respondent has totally failed to explain to this Court how the stop of petitioner was proper, aside from the fact that he and another black male were observed approaching an open convenience store in an all white neighborhood.

Two recent cases not discussed in petitioner's initial brief will demonstrate the lack of reasonable suspicion in the instant case. One which approves a stop is Tamer v. State, 484 So.2d 583 (Fla. 1986). There the defendant was driving down a street through an office plaza which contained 35 doctors' offices at 1:05 a.m. There had been a rash of fires in the plaza recently. When the defendant saw the police following, he squealed his tires and made a quick u-turn and parked at a closed restaurant. This Court agreed with the Fourth District's conclusion that there was a founded suspicion for the stop on authority of

the factors previously announced in State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978) (discussed in petitioner's initial brief at 9).

Here, there was no report of a rash of crimes in the area, or that the particular convenience store was ever a target of robbers or shoplifters. The store was open, and presumably would have traded with black customers as well as whites. It is simply too dangerous to agree with respondent's argument, setting thereby a precedent to allow the police to stop black folks who have the misfortune to be passing through an all white neighborhood. The Florida and Federal Constitutions are supposed to be color blind and protect all citizens. This Court must reject any finding of reasonable suspicion and reverse the instant case.

The second case not discussed in the initial brief is McCloud v. State, 11 FLW 1351 (Fla. 2d DCA June 13, 1986). There the defendant's car was backed up to a boarded up building in a high crime area at 1:20 a.m. As the police approached the car, the defendant started the engine and started to drive off. The police officer ordered the defendant to stop and he did. Another police officer found no evidence of a burglary in the building. The Second District applied the Stevens factors and held:

> Applying these factors to the case at bar, it is clear that O'Mara and

> Byrus were basing their stop merely upon the "time" of day and the "location" of the appellant's car. "Physical appearance" was not considered; it was dark. "Behavior" was not considered; appellant was just sitting in a parked car. Nothing is unusual about that. "Appearance and manner of operation" of the car could not have been a factor. The car was parked and appellant merely started it when he decided to proceed on his way. Lastly, there was nothing "incongruous or unusual" suggesting "possible illegal activity." Though it may have been imprudent to park his car next to a boarded-up building, under a "No Trespassing" sign, late at night, such innocuous activity by the appellant did not create the requisite "well-founded suspicion" that criminal activity was "afoot." Furthermore, the reputation of the Henderson and Anderson intersection cannot be imputed, in this situation and to this appellant, in order to support an officer's "hunch" that a crime may be in progress.

Id. at 1352.

The same is true in the instant case. It might be imprudent for two black males to park a car in a space not directly in front of an open convenience store in an all white neighborhood. But such innocuous activity does not create the constitutionally required reasonable suspicion for the stop.

ISSUE II

ARGUMENT IN REPLY TO STATE AND IN SUPPORT OF THE PROPOSITION THAT THIS COURT MUST HOLD THAT A FINDING OF HABITUAL OFFENDER STATUS DOES NOT CONSTITUTE, IN AND OF ITSELF, A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE GUIDELINES.

Since this Court accepted jurisdiction over the instant case, the Fifth District has consistently adhered to Vicknair v. State, 483 So.2d 896 (Fla. 5th DCA 1985), pending, No. 68,536, in holding that the habitual offender finding, in and of itself, is not a sufficient reason for departure from the guidelines. See Bouthner v. State, 11 FLW 1069 (Fla. 5th DCA May 8, 1986); and Moultrie v. State, 11 FLW 913 (Fla. 5th DCA April 17, 1986). On the other hand, the First District has consistently ruled to the contrary, adhering to its previous opinion in Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985), pending, No. 67,053. See, e.g., Anderson v. State, 11 FLW 1279 (Fla. 1st DCA June 6, 1986). The Second, Third, and Fourth Districts agree with the First. See the cases collected in footnote 4, RB, at 17.

To resolve this controversy, this Court needs to look no further than its recently-ratified amendment to the guidelines rule. In The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines), 482 So.2d 311, 317 (Fla. 1985), this Court recommended the following

amendment to the committee note to Florida Rule of Criminal Procedure 3.701(d)(10) (underscored language new):

> If an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category. <u>If the offender is sentenced under Section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by the operation of that statute. If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply</u>.

(d)(11), of course refers to the requirement of written reasons for departure in Florida Rule of Criminal Procedure 3.701(d)(11). If this Court or the guidelines commission had intended for a finding of habitual offender status to automatically justify departure, then the last sentence of the amended committee note would have been unnecessary. By the adoption of this amendment, which has been ratified by the 1986 Legislature through the passage of House Bill 868 (copy attached as appendix), this Court has already found that there must be some valid reason for departure in addition to the habitual offender finding.

Compare this subsection with Florida Rule of Criminal Procedure 3.701(d)(14), which was added in 1984, to allow elevation to the next higher cell on a violation of probation without stating a different reason for departure:

> The sentence imposed after revocation of probation may be included with the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

When subsection (d)(14) is compared with the committee note to subsection (d)(10), it is obvious that this Court intended for something other than the habitual offender status to be required as a reason for departure; if this Court had intended for habitual offender status to suffice, it would have amended the committee note to subsection (d)(10) to say something like the following:

> The sentence imposed after a finding of habitual offender status may be increased to any higher cell without requiring a reason for departure.

This construction of the Rule is consistent with this Court's opinions in Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and State v. Mischler, 11 FLW 139 (Fla. April 3, 1986) which prohibit any factor already scored from being used again as a reason for departure.

In the alternative, petitioner will accept the following statement in respondent's brief as true, withdraw his challenge to his sentence, and accept his 21 year sentence, with parole eligibility, since respondent seems to indicate that because a habitual offender sentence is imposed without regard to the guidelines, then such a sentence is subject to parole consideration:

> Once habitual offender status is determined, the guidelines are not applicable, and sentence must be imposed without reference to the

sentencing guidelines.

(RB at 14). If a statutory sentencing scheme is not subject to the guidelines, then one sentenced thereunder is eligible for parole consideration pursuant to Chapter 947, Florida Statutes. Dorman v. State, 457 So.2d 503 (Fla. 1st DCA 1984) (on rehearing).

This Court must vacate the 21 year sentence in favor of one within the recommended guidelines range of 4 1/2 - 5 1/2 years, or, in the alternative, direct that he be eligible for parole.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that presented in the initial brief, as to Issue I, petitioner requests that this Court reverse the judgment and sentence and remand with directions that the motion to suppress be granted. As to Issue II, petitioner requests that this Court vacate his 21 year sentence and remand for further proceedings.

Respectfully submitted,

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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, Ricky Jarade Payne, #279058, C-62, Post Office Box 500, Olustee, Florida, 32072, this 10 day of July, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER