IN THE SUPREME COURT OF FLORIDA

ANTHONY B. BRYAN,

Appellant,

v. CASE NO. 68,803

STATE OF FLORIDA,

Appellee.

_____/

APPELLEE'S SUPPLEMENTAL ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(CONT)

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PRELIMINARY STATEMENT

Appellee's supplemental brief is filed pursuant to this Court's order of October 20, 1987 setting out a supplemental briefing schedule for the parties.

Appellee's statement of the case and the facts set out on page three of Appellee's answer brief are adopted by reference. Where references are made to the supplemental transcript or record, they will be designated by the symbol "S" followed by the appropriate page number in parenthesis and references to the original transcript of record will be by the symbol "T" followed by the appropriate page number in parenthesis.

SUMMARY OF ARGUMENT

ISSUE I When a police officer is advised by his dispatcher pursuant to N.C.I.C. computer information, that a motor vehicle which he is observing stationary in a place open to the public has been reported as stolen, it is both his right and duty, pursuant to department policy, to impound the vehicle and its contents for safekeeping pending notification of the owner. Persons driving or in custody or control of such vehicle who can produce neither driver licenses, registration slip, title, bill of sale nor any other evidence of ownership may be lawfully arrested for auto theft pending further investigation. The inventory of the impounded vehicle which produced the shotgun which killed the murder victim sub judice was standard police practice and department policy in order to protect department members and the agency from unjust lawsuits alleging loss of property while same is in the custody of the police agency. That is precisely what happened here and Appellant's complaint that the subject shotgun was unlawfully seized is without merit. In addition, Appellant was never able to demonstrate legal standing to object to the impoundment of the car or the inventory search.

ISSUE II When a defendant in a criminal case takes the witness stand in his own defense and proceeds to detail his activities over a specific period of time or his activities covering a specified period of time, it is the prosecutor's right, on cross-examination, to question him in detail respecting all of his activities during the period covered by his testimony. In other words, if the defendant opens the door, the prosecutor has the right to inquire concerning activities, including unlawful activities, that might not ordinarily be properly an area of inquiry on cross-examination.

At no time did the prosecutor comment on lack of evidence produced by Appellant other than evidence boasted of by Appellant during opening statement which, during the course of the trial, he failed to produce as promised.

ISSUE III Appellant's statements that the body recovered from Juniper Creek was never properly identified as that of George Wilson of Pascagoula, Mississippii, the victim is erroneous. Appellant is aware, or should be aware, that fingerprint comparisons were made between latent prints lifted from personal items found in Mr. Wilson's house trailer in Pascagoula, fingerprints rolled from the body taken from Juniper Creek and those inked prints found on an old police identification card issued to George Wilson at Pascagoula, Mississippi in connection with his duties as a night watchman.

The fingerprints from all three sources matched. Proof of the identity of the victim in a homicide case need not be shown beyond a reasonable doubt. In any case, Appellant's assertions are unsupported by the facts and evidence presented.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN EITHER DENYING APPELLANT'S MOTION TO SUPPRESS NOR IN ADMITTING INTO EVIDENCE THE ITEMS THAT WERE THE SUBJECT OF THE MOTION. (Restated)

Appellant's argument under this point is nothing more than a dissertation on familiar search and seizure case law, none of which has any direct relevance here.

The testimonies of the Madison, Florida police chief Everett B. Odom and Madison police officer Chuck Craddock describe in detain what was the routine seizure and impoundment of what the N.C.I.C. computer said was a vehicle stolen from out of state and spotted in Florida pursuant to information received from a suspicious merchant. Obviously, under the circumstances, the occupants or persons having custody of the vehicle would be questioned by the concerned police officer. In the case sub judice neither Appellant nor his female companion could produce either a drivers license or bill of sale or other document indicating ownership of the automobile. They were in possession of a stolen, undocumented vehicle and so they were arrested. Appellee is puzzled as to how Appellant can find illegality on the part of the police under such circumstances.

The next thing that happened was also a matter of routine police work. Based on the foregoing information, the officers

had seized a stolen, out-of-state vehicle. Pending notification of the true owner, standard police procedure requires impoundment and inventory. It is routine police procedure utilized for the protection of the impounding agency in order to prevent improper accusations of theft of property that might have been transported in a vehicle operated by a person arrested. The inventory in the case sub judice included the shotgun in question. Thus, the Madison police had lawful custody of the shotgun. It goes without saying that it became their duty to locate the owner of the stolen automobile and ascertain ownership as to the contents of the vehicle. What could be more commonplace police procedure? An appellant's attempt to characterize these routine police procedures, long-approved by every state and federal court system in the land, as an illegal search and seizure presumes too much credulity on the part of the reader.

This case is not about auto theft. It matters not whether Appellant's story about purchasing the vehicle for three hundred dollars somewhere in the state of Louisiana was believable. What does matter is that neither Appellant nor his companion had any documentation for the car and the car was still carried in the N.C.I.C. computer as being stolen. Therefore, the Madison police had no real choice in the matter. Whether they elected to believe Appellant's story about the purchase or to arrest him or not is irrelevant. They had a clear duty to impound the vehicle,

investigate further and return the vehicle to its true owner which, in the case sub judice, was accomplished.

> [W]e note that there was no intent to discover evidence of crime. Rather this was responsible, indeed laudable, police conduct to protect the property of the owner of a lawfully impounded car. If valuable property had been left on the seat and floor of the car, plainly visible to anyone peering through the window, the danger of theft would have been substantial. Not surprisingly, it appears that the locking and securing of impounded cars, and the removal and inventory of valuable property in plain sight, are standard procedures. They certainly should be.

United States v. Mitchell, 458 F.2d 960, 961 (9th Cir. 1972)

It is Appellee's position that once Officer Craddock learned from his dispatcher that the vehicle was still on the N.C.I.C. "hot sheet" he had a duty to proceed further and determine who might be the true owner. This alone, would justify at least a limited entry for hat purpose:

> (If) [a] officer has probable cause to believe that a vehicle has been the subject or burglary, tampering, of theft, he may make a limited entry and investigation, without a search warrant, of those areas he reasonably believes to have been affected and of those areas he reasonably believes

might contain evidence of ownership.[1]

In the case sub judice, it was the automobile itself that the officer had good reason to believe was stolen. He observed the shotgun from a lawful vantage point and arrested Appellant and his companion for auto theft within close proximity of the subject vehicle. While the record is not clear as to the exact sequence of events, the prudent thing for the officer to have done would be to take custody of the shotgun before Appellant or his companion attempted to use it on him. An officer making an arrest may search the area immediately surrounding the arrestee both for his own protection and to recover any evidence that might be destroyed. Such a search and/or seizure is not violative of the Fourth Amendment or any provision of the Florida constitution. Chimel v. California, 395 U.S. 752 (1965). See also State v. McLendon, Case no. BJ-331 (Fla. 1st DCA, June 24, 1986), 11 F.L.W. 1406.

Even though persons arrested who are occupants of a vehicle may have already exited the vehicle, the United States Supreme Court has held that police may search the entire passenger compartment of the vehicle and may also examine the contents of any containers found in the passenger compartment. Lawful arrest

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[1] Model Rules For Law Enforcement, Searches, Seizures and Inventories of Motor Vehicles Rule 302(A) (1974).

justifies the infringment of any privacy interests the arrestee may have. New York v. Belton, 450 U.S. 454 (1981) Article 1, Section 12, Florida constitution, concerning unreasonable searches and seizures reads in part:

> This right shall be construed in conformity with the 4th Amendment of 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 4th Amendment of the United States Constitution.

Applying the rationale of New York v. Belton, supra, the passenger compartment area, including all space reachable, i.e., within lunging distance, may be searched incidental to lawful arrest. United States v. Russell, 670 Fed.2d 323 (D.C. Cir. 1982), cert. denied, 457 U.S. 1108 (1982).

Finally, it remains Appellee's position that Appellant never had any standing to contest the search, inventory or seizure involved sub judice. Some demonstration of standing beyond mere presence on the premises is required under both the United States and Florida constitutions. Inchaustegui v. State, 392 So.2d 319 (Fla. 4th DCA 1980) See also Mixon v. State, 54 So.2d 190 (Fla. 1951). No such demonstration was made here. Appellant had no vehicle registration, no certificate of title, no bill of sale,

no receipt - he did not even have a driver's license. Merely being in possession of an automobile, even with the permission of the owner, is not determinative of whether one has a legitimate expectation of privacy for purposes of the Fourth Amendment.

United States v. Lochan, 674 F.2d 960 (1st Cir. 1982) held that certain factors, at least, are relevant to a privacy expectation: legitimate presence in the area searched, possession or ownership of the area searched or the property seized, prior use of the area searched or the property seized, ability to control or exclude others' use of the property and a subjective expectation of privacy. The burden of proof is on the defendant. In the case at bar, Appellee presented no such proof. In Rakas v. Illinois, 439 U.S. 128 (1978), the United States Supreme Court expressly rejected the "legitimately on premises" test coined in Jones v. United States, 362 U.S. 257 (1960) as creating "too broad a gauge" for measuring Fourth Amendment rights. In the case at bar, Appellant was never able to make out any kind of case for his claimed proprietary interests in the subject vehicle. In a proceeding on a motion to suppress evidence, the trial court is trier of both fact and law and unless the ruling of the trial court is clearly unsupported by the evidence, its exercise of sound discretion on the question of admissibility should not be disturbed by the reviewing court. Cameron v. State, 112 So.2d 864, 869 (Fla. 1st DCA 1959).

Appellant is attempting here to create an issue out of whole cloth. Appellant's statement in his brief that the arresting officer never saw who was driving the subject vehicle is incorrect. The officer had ample opportunity to observe who was driving the vehicle and who was in it and he so testified. (T 342) However, it is of little consequence as the officer learned through an independent source, i.e., his dispatcher, that the vehicle's license number and description was currently being carried on the N.C.I.C. computer as a stolen vehicle. (ST 16) Even if Appellant and his companion had been miles away at the time, the officer would have still had a lawful right to impound the vehicle and endeavor to see that it was returned to its lawful owner.

ISSUE II

THE ASSISTANT STATE ATTORNEY WAS NOT GUILTY OF PROSECUTORIAL MISCONDUCT. (Restated)

In desperation, Appellant has presented a laundry list of every petty transgression he would attribute to the prosecutor during the entire course of the trial. In some respects, it borders on drivel. Appellant is trying to convince this court that he was entitled to a perfect trial. Appellee concedes no error whatsoever in this regard and submits that the prosecutor's cross-examination and the areas it covered were totally justified in consideration of Appellant's direct testimony. He opened the door himself to cross-examination concerning certain prior questionable activity which was not only part and parcel of the res gestae but was also before the court through the testimony of Sharon Cooper, who accompanied Appellant throughout his odyssey of theft and murder that covered several states.

During part of the cross-examination the prosecutor asked Appellant a question about his activities commencing from the time he left his home in Mississippii leading up to the time he met Sharon Cooper in a Jacksonville bar:

> Q. Mr. Bryan, what did you do when you left the home?
>
> A. I was told that I robbed a bank.
>
> Q. You were told you robbed a bank?

A. Yes, sir.

Q. Well, did you rob it?

A. I must have because they had, you know, a lot of things.

Q. You must have?

A. Yes, sir.

Obviously, Appellant opened the door concerning the bank robbery of which he had been convicted in federal court. The cross-examination, along these lines, proceeded without objection until finally counsel for Appellant did raise an objection. The court wisely ruled that it was the Defendant who opened the door and that he cannot be selective in what the jury hears about his past that he himself chose to reveal. (T. 650)

What happened here was that the defendant took the stand in his own defnse and testified about a particular time frame. He conveniently omitted certain parts or things that the prosecutor wanted included to complete the picture of Appellant's activities during that particular period. This was not Williams Rule material as the prosecutor was not attempting to bring in similar fact material but only to inform the jury concerning Appellant's omitted details, again which the jury had already heard about from Sharon Cooper.

> A witness may "open-the-door" during his testimony to impeachment concerning matters that would not otherwise be permissible. Under this concept, the adverse party may be able to introduce

> extrinsic evidence to contradict a specific factual ascertion made during the testimony of a witness, even if it pertains to an otherwise collateral matter.

Ehrhardt, Florida Evidence, Second Edition, Section 608.1, p. 296

Appellant's argument rambles on and on, nit-picking here and nit-picking there but presenting nothing substantial, nothing that transcends that area of discretion that is the province of the trial judge with respect to the conduct of a trial.

Section 924.33, Florida Statutes provides that harmless error analysis is applicable to all judgments regardless of the type of error allegedly involved. Second, it explicitly provides that there shall be no presumption that errors are reversible unless it can be shown that they are harmful. State v. DiGuilio, 491 So.2d 1129, 1133-1134 (Fla. 1986) "Per se, reversible errors are limited to those errors which are 'so basic to a fair trial that their infraction can never be treated as harmless error'." Id at 1135, citing Chapman v. California, 386 U.S. 18, 23 (1967). Justice Shaw wrote further: "We have eschewed the draconian measure of automatically reversing convictions as a means of punishing prosecutorial misbehavior". Id. at 1139

What Appellant is attempting here is something that he scrupulously avoided in his initial brief, and that is the shotgun approach, desperately hoping that this court will be

influenced by the sum total effect which Appellant perceives as transgressions on the part of the prosecutor but which are, in reality, nothing more than procedural matters ably ruled upon by the trial court as they presented themselves. Appellant is attempting to sell the notion that a whole is greater than the sum of its parts, i.e, synergism in the courtroom. This is utter nonsense and deserves no further comment.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL. (Restated)

Appellant's argument under Issue III is another hodge-podge of comparatively minor features of the trial which Appellant now, as an afterthought, has collected together in hopes of making an impression on the court that he fears his initial brief failed to do. There is only one of Appellant's points tha Appellee feels is worthy of even passing comment and that is the matter of identifying the body of the deceased, George Wilson. Identity of the deceased is one aspect of proving the corpus delicti in a murder case and it is not necessary that the proof be beyond a reasonable doubt, it being sufficient if prima facie proof of the corpus delicti is made. The corpus delicti itself may be proved by circumstantial evidence. State v. Snowden, 345 So.2d 856, 858 (Fla. 1st DCA 1977).

In any case, Appellant misstates the evidence relied upon by the state to show that the fingerprints taken from the body removed from Juniper Creek were those of George Wilson of Pascagoula, Mississippi. Appellant conveniently forgets that fingerprints lifted from an ashtray found in Mr. Wilson's trailer and also from a racing form found in the trailer were compared with the fingerprints that were taken from the hands of the man that was murdered. These fingerprints were compared with George

Wilson's old Pascagoula, Mississippii police I.D. card. There may be many George Wilsons but there was only one that lived in a trailer as nightwatchman at Cook's seafood plant in Pascagoula, Mississippi, who handled the ashtray and the racing form found in the trailer, whose fingerprints from the I.D. card matched both those from the ashtray and racing form and those of the dead man whose body was recovered in the creek very near where Sharon Cooper testified Appellant had blasted him with a shotgun. (T. 561, Vol. 3; T. 795, Vol. 4)

CONCLUSION

The trial court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Ted. A. Stokes, Post Office Box 84, Milton, Florida 32572, this 15th day of December, 1987.

ROYALL P. TERRY, JR.
ASSISTANT ATTORNEY GENERAL

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