OA 6-4-87

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO.: 69,363

MARTIN LESLIE WELLS,

Respondent.
_____/

BRIEF OF AMICUS CURIAE

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

In this brief the following references will be used:

Amicus Curiae, State of Florida Department of Highway Safety and Motor Vehicles, will be referred to herein as "the Department".

Respondent Martin Leslie Wells will be referred to herein as either "the Respondent" or "Wells".

References to the Appendix will be indicated by the letter "A" followed by the appropriate page number or numbers.

STATEMENT OF THE CASE

Amicus Curiae adopts and incorporates by reference herein the Statement of the Case set forth in the Initial Brief of the Petitioner.

STATEMENT OF THE FACTS

Amicus Curiae adopts and incorporates by reference herein the Statement of the Facts set forth in the Initial Brief of the Petitioner.

SUMMARY OF ARGUMENT

The Department of Highway Safety and Motor Vehicles appears as amicus curiae before this Court to present arguments in support of the State's position that the impoundment and inventory search conducted in the instant case were reasonable. In view of Department policies, procedures, and legal guidelines followed by Trooper Adams, the search and seizure of the Respondent's vehicle satisfy the Fourth Amendment reasonableness test articulated by the United States Supreme Court in South Dakota v. Opperman, 428 So.2d 364 (1976), and, most recently, in Colorado v. Bertine, 40 CrL 3175 (January 14, 1987).

By impounding the Respondent's vehicle, Trooper Adams protected the vehicle from damage and safely secured the vehicle's contents, including the large amount of currency found within. Impounding the vehicle also served to protect the public by preventing Wells from operating his vehicle in an impaired condition if he was subsequently released after posting bond. Finally, by impounding the vehicle, Trooper Adams protected the Department from claims of lost, stolen or vandalized property. This caretaking function performed by the trooper with regard to the property is consistent with the purpose of an impoundment and inventory search recognized by the United States Supreme Court in Opperman, supra, and the decision of this Court in Miller v. State, 403 So.2d 1307 (Fla. 1981).

The Department also requests this court to revisit its opinions in Miller, supra, and Sanders v. State, 403 So.2d 973 (1981), which hold that an impoundment must be reasonable and necessary. In view of Bertine, supra, the constitutionality of an impoundment and inventory search should turn on the issue of reasonableness only. By imposing a separate standard upon the Department that the impoundment must be necessary, such that a trooper must consult with the driver to determine if other reasonable alternatives are available, an impractical burden has been placed upon the Department which is inconsistent with the reasonableness test expressed in Opperman, supra, and Bertine, supra.

The present case, therefore, presents an opportunity for this Court to reconsider Miller and Sanders, and hold that the only issue to be resolved in a case involving an impoundment and inventory search, such as in the case sub judice, is whether or not the impoundment and inventory were reasonable. In view of the record before this Court, the search and seizure of the Respondent's vehicle by Trooper Adams meet the test of reasonableness.

ARGUMENT

IN LIGHT OF COLORADO V. BERTINE, 40 CrL 3175 (JANUARY 14, 1987), THIS COURT SHOULD RECONSIDER ITS DECISION IN MILLER V. STATE, 403 So.2d 1307 (Fla. 1981), AND REVERSE THE DECISION OF THE DISTRICT COURT ON THE GROUNDS THAT THE SEARCH IN THIS CASE IS A VALID INVENTORY SEARCH.

The case before this Court involves an issue of great interest to the Department and other law enforcement agencies of this state: impoundment and inventory searches. The present case concerns an impoundment and inventory search conducted by a trooper of the Florida Highway Patrol, a division of this Department, which has promulgated policies and procedures governing impoundment and inventory searches (A 1-14). The Department contends that in view of the Department's policies and procedures, and the administration of the impoundment and inventory search by the trooper in the instant case pursuant to such policies and procedures, the search and seizure of the Respondent's vehicle were reasonable pursuant to the Fourth Amendment of the United States Constitution and Article I, Section 12 of the Florida Constitution.

Chapter 11.04.02 of the Florida Highway Patrol Policy Manual (A 2) requires the trooper to determine if it is necessary to tow (impound) a vehicle. The procedures to be followed by a trooper conducting an inventory search are detailed in the Florida Highway Patrol Forms and Procedures Manual (A 3-12). Chapter

16.00.00 of the Procedures Manual emphasizes the caretaking function of the inventory search, which is conducted for the protection of the property and the Department. (A 4)

Although a trooper is afforded considerable discretion to determine if an impoundment is necessary, Legal Bulletin 83-03 (A 13-14) provides guidelines to troopers to determine when it is reasonable and necessary to impound a vehicle. Essentially, the trooper shall consider such factors as whether a licensed passenger can drive the vehicle, whether the location of the automobile presents a traffic hazard, and whether it is safe to leave the automobile in its present location. The legal bulletin, which follows this Court's decisions in Miller v. State, 403 So.2d 1307 (1981) and Sanders v. State, 403 So.2d 973 (1981), does not itemize each and every instance in which a vehicle should be impounded but rather emphasizes the importance of determining that the impoundment is in fact reasonable and necessary.

In line with this Court's holdings in Miller, supra, and Sanders, supra, the legal bulletin also advises troopers to consult with the driver if the trooper determines that the vehicle should be impounded. In a case involving an impaired driver, the bulletin suggests that in most cases, that driver is likely to be too impaired to decide what should be done with his vehicle. The Office of General Counsel cautioned troopers against relying upon a preference expressed by an impaired driver

to leave the vehicle at roadside, notwithstanding the Sanders decision, supra. The problem raised by Miller, supra, and Sanders, supra, which is brought to the attention of the troopers by the legal bulletin, is that a trooper who decides to leave the vehicle at roadside at the request of the driver who has been arrested for driving under the influence (DUI), runs the risk of subsequent vandalism, damage, or theft of the vehicle. The Department may ultimately be responsible if the driver, or an injured third party, successfully challenges the trooper's decision on the ground that the trooper was negligent by relying upon the judgment of such an impaired driver to leave the vehicle at roadside. In other words, by following the preference of the impaired driver, the trooper ignores his primary responsibility of protecting the vehicle and its contents. See Miller, supra, at 1313.

Similar problems are raised in the event that the driver, who was arrested for DUI, is released after posting bond. If the vehicle has not been impounded, he may return to his vehicle and once again drive while under the influence of alcohol. If the vehicle was not impounded, the trooper has created an opportunity for the driver to kill or injure an innocent motorist. The Department cannot afford to trust a driver who has been arrested for DUI, regardless of his coherent appearance, to operate his vehicle safely if he returns to his vehicle following the posting of bond.

In the interest of public safety, and to protect the Department against claims arising from damage or theft of the vehicle, the Office of General Counsel stressed the importance of impounding the vehicle following an arrest for DUI. See Legal Bulletin 83-03 (A 14). By scrutinizing the necessity of an impoundment and inventory search and requiring the driver to be consulted prior to impoundment, this Court has saddled the Department with a burden that is clearly inconsistent with the caretaking function of this search and seizure as enunciated by the United States Supreme Court.

The Court recognized in South Dakota v. Opperman, 428 US 364 (1976) that an inventory search is consistent with Fourth Amendment principles. The inventory search is an exception to the warrant requirement. Illinois v. Lafayette, 462 US 640 (1983). It is important to note that the policies behind the warrant requirement are not implicated in an inventory search. Opperman, supra, at 370, n.5. An inventory search is not based upon probable cause or otherwise related to criminal investigations. Rather, the inventory search is characterized by its administrative caretaking function. Id. at 369; Miller, supra, at 1311. Accordingly, an impoundment and a subsequent inventory search must stand or fall on the reasonableness of the impoundment. Opperman, supra, at 373.

With this caretaking purpose in mind, the Court cited with approval cases involving the impoundment and inventory search of vehicles for the protection of the owner's property; the protection of police against claims or disputes over lost or stolen property; the protection of police from potential danger; and to protect the community's safety. Id. at 369, 374, citing United States v. Mitchell, 458 F.2d 960, 961 (9th Cir. 1972); Cooper v. California, 386 US 58, 61-62 (1967); Cady v. Dombrowski, 413 US 433, 436 (1973). In Opperman, the inventory was initiated following the discovery of valuables in plain view inside the car. 428 US at 375, 376. Again, the reasonableness of the standard police procedures was emphasized by the Court in upholding the search. Id. at 376.

In Miller, supra, however, this Court strayed beyond the reasonableness test set forth in Opperman, supra, and added an additional requirement that the impoundment be necessary. 403 So.2d at 1313. To this point the Court ruled that an impoundment is unnecessary if the defendant offers reasonable alternatives. Id. Upon examining the necessity of the impoundment in Miller, supra, and Sanders, supra, this Court held that the officer's failure to consult with the driver prior to impoundment invalidated the seizure and subsequent inventory search. 403 So.2d at 1314; 403 So.2d at 974, 975.

As a result of the Court's holdings in Miller, supra, and Sanders, supra, a reasonable basis for impoundment may exist, but if the Court finds that less intrusive means are presented, the impoundment would be unlawful. In the case sub judice, for example, the impoundment is reasonable for the purpose of protecting the property, protecting the public, and protecting the Department from claims of lost, stolen, or damaged property. However, following Miller, supra, and Sanders, supra, if the Court finds that the impoundment was not necessary for the reason that the driver was not consulted or that the vehicle could have been left at roadside, the impoundment would be unlawful. By so ruling, however, the Court would be avoiding the reasonableness test in Opperman, supra.

In Bertine, supra, the Court speaks directly to this issue. According to the Court, the sole question to be answered in determining the constitutionality of an impoundment and inventory search is whether or not the search and seizure are reasonable. 40 CrL at 3177. Giving the driver an opportunity to make other arrangements may be possible, observed the Court, but the reasonableness of the impoundment does not turn on whether alternative, less intrusive means are available. Id.

Under Bertine, supra, therefore, this Court must examine the reasonableness of the impoundment and inventory search conducted by Trooper Adams. The Court stated in Miller, supra, that, as in all Fourth Amendment issues, the Court must balance the state's

interest in the impoundment against the owner's right to be secure against an unlawful seizure. 403 So.2d at 1313. When the respective interests of the Department and the Respondent are balanced, the reasonableness of the impoundment by Trooper Adams is readily apparent.

In Miller, supra, this Court outlined five examples of reasonable and necessary impoundments. In one example, the Court suggested that impounding an unattended vehicle at the scene of an accident is reasonable if the driver, because of intoxication, is incapable of deciding what should be done with his vehicle Id. at 1313. In a separate example, the Court remarked that an officer could reasonably impound a mechanically defective vehicle which, if operated, would threaten others on the highway. Id. These situations exemplify the overriding interest of the state in protecting the driver's property or the safety of the public, notwithstanding the rights of the driver.

The impoundment by Trooper Adams in the present case falls within the underlying public policy concerns of these examples. It is inconsistent for a driver on the one hand to be prohibited from operating a motor vehicle because his normal faculties are impaired and on the other hand to have the ability to determine the disposition of his vehicle following his arrest for DUI. By impounding the driver's vehicle in this case, the trooper was asserting a caretaker function on behalf of the driver by protecting his property.

In addition, the trooper protected the public by removing the possibility that the Respondent could again operate his vehicle in an impaired condition following his release from jail on the night that he was arrested. In this sense, the trooper's actions are consistent with removing a mechanically defective vehicle from the highway. These considerations are legitimate concerns that justify the impoundment of the vehicle in the present case.

The facts in the present case also support a separate justification for the impoundment and the inventory search of the Respondent's vehicle. After arresting the Respondent for driving under the influence of alcohol, Trooper Adams observed a large sum of money on the floorboard on the driver's side of the vehicle. Wells v. State, 492 So.2d 1375, 1376 (Fla. 5th DCA 1985). It was only reasonable, after discovering a large amount of currency, for the trooper to impound the vehicle and conduct an inventory search to determine if any additional currency was located in the vehicle. If the primary purpose of an impoundment and an inventory search is for the security and protection of the vehicle's contents, it should follow that the trooper was justified in the impoundment and inventory search of the Respondent's vehicle for the protection of the Respondent's currency and to protect the Department against any claims that might arise out of missing currency. See Opperman, supra, at 375, 376; Miller, supra, at 1313.

Balanced against the Department's interests in the impoundment are the rights of the Respondent. Can it be said that the rights of a driver who has been arrested for DUI outweigh the right of the Department to protect his property, to protect the public and to be protected from subsequent claims? In this case, given the record before the court, the Fourth Amendment balancing test must favor the Department.

Equally important to the Court's determination in this case is the fact that Trooper Adams acted in good faith at all times material to the impoundment and inventory search. The significance of good faith conduct by the officer has been recognized consistently by the United States Supreme Court and by this Court. See Bertine, supra, at 3177, and Miller, supra, at 1312. Addressing the conduct of Trooper Adams, the Fifth District Court of Appeal found that

> The officer testified that while he wondered about the money, he had no reason to believe that there was any contraband in the car, but because he believed he had to impound the car he asked for permission to look in its trunk. 492 So.2d at 1376 (emphasis supplied)

Thee trooper obviously relied upon Department policy and procedures to impound and inventory the vehicle for the protection of the vehicle, the public, and the Department. In view of the fact that he arrested the driver, who was the sole

occupant of the vehicle, for driving under the influence, the trooper acted reasonably by impounding the vehicle and conducting an inventory search.

Significantly, the Fifth District Court of Appeal did not hold that the impoundment and inventory search were performed by the trooper as a subterfuge to conduct a warrantless search for incriminating evidence. The instant case closely resembles Opperman, supra, Lafayette, supra, and Bertine, supra, on this issue of good faith. The absence of bad faith or evidence of a pretext for an investigative search argues for the reasonableness of the impoundment and inventory search conducted by Trooper Adams. See Bertine, supra, at 3177.

The impoundment of the Respondent's vehicle and the subsequent inventory search, therefore, meet the reasonableness test of Bertine, supra, and Opperman, supra. The impoundment and inventory followed standardized Department procedures which authorized securing the vehicle and its contents for the protection of the property, the Department, and the public. The absence of bad faith re-enforces the fact that the search and seizure in this case were not unreasonable.

The Department requests this Court to recede from its prior opinions in Miller, supra, and Sanders, supra, which require the impoundment to be necessary. By receding from Miller, supra, and Sanders, supra, this Court would allow the Department to establish a policy that reasonably allows a trooper to impound

the vehicle for the purpose of protecting the vehicle and its contents, protecting the Department from claims relating to lost, damaged or vandalized property, or protecting the public. The present case well illustrates the problems manifested by requiring a trooper to consult with a driver to determine if other arrangements additionally can be made or to otherwise determine if less intrusive, alternate means are available.

In view of the inventory procedures administered in good faith by Trooper Adams pursuant to reasonable Department policies and procedures, the inventory search and impoundment satisfy the Fourth Amendment. This Court should recede from its prior decision in Miller v. State, therefore, and affirm the judgment and sentence of the lower court.

CONCLUSION

In view of the authorities cited in this brief, the Department respectfully requests this Court to reconsider and to recede from its decisions in Miller v. State, 403 So.2d 1307 (Fla. 1981) and Sanders v. State, 403 So.2d 973 (1981). The Court should find that the record as viewed in the light of Colorado v. Bertine, 40 CrL 3175 (January 14, 1987) demonstrates that the impoundment and inventory search were reasonable. The decision of the district court, therefore, should be quashed and the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States mail to Joseph N. D'Achille, Jr., Assistant Attorney General, 125 N. Ridgwood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and Sharon W. Ehrenreich, Esquire, Law Firm of Huntley Johnson, Esquire, 14 East University Avenue, Gainesville, Florida 32602, this 16th day of March, 1987.

R. W. EVANS