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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent

_____/

CASE NO: 69,363

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The Respondent, MARTIN LESLIE WELLS, was the Defendant in the Circuit Court and will be referred to as the Respondent or Defendant. The Petitioner, the State of Florida, will be referred to as Petitioner or the State. Amicus Curiae, the Florida Department of Highway Safety & Motor Vehicles, will be referred to as Amicus Curiae or the Department.

The symbol 'R' designates the record transcript on appeal and will be followed by the appropriate page numbers(s) in parenthesis. Volume designations will not be utilized.

STATEMENT OF THE CASE

On February 11, 1985, MARTIN LESLIE WELLS was stopped for exceeding the speed limit, (R27). During this routine stop for excess speed (R215), the Appellant was subsequently arrested for Driving Under The Influence Of Alcohol, (R31,53). An Inventory Search of the vehicle BMW Tag No. YVY660 was conducted by the Florida Highway Patrol (R66-70). Marijuana was discovered in a locked suitcase in the locked trunk of the vehicle (R152-156).

MARTIN LESLIE WELLS, the Appellant, was charged with Possession of Cannabis With Intent To Deliver.

An Amended Motion To Suppress all evidence seized pursuant to the Inventory Search was filed on August 2, 1985 (R1-17).

A Hearing on the Motion To Suppress was held on August 8, 1985, (R210-266). On August 9, 1985, the Honorable E. L. Eastmoore signed an Order denying the Motion To Suppress (R18).

On August 12, 1985, MARTIN LESLIE WELLS, pled Nolo Contendere to the charge of Possession of more than 20 grams of Cannabis, specifically reserving the right to appeal the Trial Court's denial of the Amended Motion To Suppress.

On October 29, 1985, the Appellant was sentenced to five (5) years probation, with a special condition that he serve fifty-one

(51) weeks in the Putnam County Jail (R267-274).

The Respondent appealed to the District Court of Appeal, Fifth District of Florida (R19).

On August 21, 1986, the Respondent's conviction for possession of a controlled substance was reversed, the Court concluding that the warrantless search was unreasonable and unlawful. Wells v State, 492 So.2d 1375 (Fla 5th DCA 1986).

The Petitioner, the State of Florida, filed notice to invoke the discretionary jurisdiction of the Supreme Court of Florida. On January 22, 1987, the Supreme Court accepted jurisdiction. Petitioner filed its Initial Brief on March 2, 1987. The Department of Highway Safety & Motor Vehicles appeared as Amicus Curiae and filed its Initial Brief on March 16, 1987. Respondent requested and was granted until April 14, 1987, 1987 to file its Answer Brief.

STATEMENT OF THE FACTS

In Wells v State, 492 So.2d 1375 (Fla. 5th DCA 1986) the District Court in conlcuding that the warrantless search was unreasonable and unlawful, stated that the facts were not in dispute and found:

> "...On the evening of Monday, February 11, 1985, Trooper Rodney Adams of the Florida Highway Patrol stopped the appellant for speeding. The appellant exited his vehicle and produced his driver's license and explained to the officer that the car belonged to a friend. The officer ran a license and tag check and verified the accuracy of the statement concerning the ownership of the car, and also determined that the appellant's driver's license had expired. During the course of conversation, Trooper Adams noticed the smell of alcohol upon the appellant's person. After appellant acknowledged that he had been drinking, field sobriety tests were administered to him and the apppellant was then arrested for driving under the influence of alcohol. Appellant agreed to take a breathalizer test and Trooper Adams informed him that he would be transported to the machine located at the Florida Highway Patrol Station. The officer testified that the car was parked off the highway, and was not a hazard to traffic.
>
> Before departing to the station, appellant asked Adams if he could retrieve his jacket, which was in the automobile. Adams returned to the car with appellant to be certain that appellant was not going after a weapon. When appellant opened the car door Trooper Adams, using his flashlight, saw what apeared to be a

large sum of money lying on the floorboard on the driver's side.

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 that he had to impound the car he asked for permission to look in its trunk. Appellant first attempted to open the trunk and when unable to do so, gave the key to Trooper Adams who was also unsuccessful. Appellant was told that if the trunk could not be opened with the key, that it may have to be "popped" open. The appellant agreed to this and indicated that he did not know what was in the trunk. Appellant was taken to the Florida Highway Patrol Station to take the breathalyzer test and the vehicle was towed to K & S Automotive at approximately 12:30 or 1:00 A.M. The officer never asked for and was never given permission to search the passenger compartment of the car.

Trooper Adams arrived at K & S Automotive at approximately 1:30 A.M. and proceeded to search the car with the assistance of Grover Bryon, an employee of K & S. A search of the interior of the car resulted in the discovery of two marijuana "roaches" in the ashtray. Bryon opened the locked trunk with the key, explaining to the officer that the button had to be depressed as the key was turned. There was only a locked blue suitcase in the trunk. Adams instructed Bryon and another employee of K & S to pry open the locked suitcase. After about 10 minutes, the suitcase was pryed open and a dark colored plastic garbage bag was found inside the suitcase. Adams opened the garbage bag and found inside a quantity of marijuana.

Although the officer throughout his testimony characterized the search as an "inventory search," it is clear that the warrantless

> search cannot be sustained on that basis. The parked automobile was not a traffic hazard, there was no cause to believe that it contained contraband, and the officer concededly did not advise the defendant of alternatives to impoundment which were available to him. Miller v State, 403 So.2d 1307 (Fla. 1981); State v Marini, 488 So.2d 551 (Fla. 5th DCA 1986); Moore v State, 417 So.2d 1131 (Fla. 5th DCA 1982). The evidence would not support the search on the basis of probable cause because on this point too, the officer conceded that he had none. Nor can the search be supported as one incident to the defendant's arrest, because it was not contemporaneous to the arrest. Preston v United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); State v Marini, supra.

An additional reading of the Record On Appeal reflects that after Trooper Adams saw what appeared to be a large sum of money lying on the floor of the driver's side, Trooper Adams consulted with other law enforcement officials concerning the money and the vehicle (R87, 117, 244, 245). He was told, "go ahead if I thought the guy was DUI, take him in for DUI, have the car impounded...anybody can have three thousand dollars on the floor of their car", (R87). Trooper Adams was also informed by his supervisor that "more or less, the money was irrelevant to the situation at the time", (R242).

Trooper Adams made the decision himself to have the vehicle towed at this juncture (R242).

According to Trooper Adams, "..if I was going to place him under arrest for DUI, I would have towed the car regardless, and from there, upon towing it, we would have to do an Inventory Search", (R236). Trooper Adams also stated if Appellant had not gotten his jacket, he would have been placed in the patrol car and taken to the station for the breathalyzer test, (R237). Trooper Adams further indicated that his Standard Operating Procedure in a stop such as this would have been the towing of the automobile (R247).

Mr. Wells was taken to the Florida Highway Patrol Station where he blew a .08 (R35). Trooper Adams stated that he would have given Mr. Wells the benefit of the doubt on the Alcohol Influence Report and checked the box showing Respondent as fit to drive. (R43) The vehicle was towed to K & S Automotive at approximately 12:30 or 1:00 A.M. (R140, 147).

Trooper Adams arrived at K & S Automotive at approximately 1:30 A.M. and before the start of the Inventory Search said he wanted to go through the car real good because he felt there were drugs in it, (R146, 148).

Two stub roaches of marijuana were found in the ashtray of the vehicle. According to Grover Clinton Bryan of K & S Automotive, who assisted Trooper Adams in inventorying the

vehicle, (R67, 148), Trooper Adams insisted there was more somewhere, that the money found was from a drug deal, "There ain't nobody runs around with that kind of money unless they've been dealing drugs or something like that", R149).

On August 8, 1986, at the Suppression Hearing, Trooper Adams when questioned about whether he made a statement concerning marijuana being in the car before the start of the Inventory Search stated he could not recall it if he did (R250, 251).

SUMMARY OF ARGUMENT

A consent search is reasonable only if kept within the bounds of actual consent. The District Court of Appeal found that Mr. Wells had given his permission to "look in the trunk" of his vehicle and that permission did not extend to the locked luggage within the trunk nor to the passenger compartment of the car. The decision of the District Court of Appeal should be affirmed.

Colorado v Bertine 40 CrL 3175 (January 14, 1987) is inapplicable to the instant case in that Trooper Adams was not following the Florida Highway Patrol Policy Manual which requires consultation with the driver if it is determined that the vehicle should be impounded. There is a showing that Trooper Adams acted in bad faith or for the sole purpose of an investigation therefore the search in question is required to meet traditional probable cause standards and Bertine is not controlling.

ARGUMENT I

THE DECISION OF THE DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED IN THAT THE WARRANTLESS SEARCH CANNOT BE JUSTIFIED AS A CONSENSUAL SEARCH OF THE RESPONDENT'S LOCKED LUGGAGE AS IN STATE V WARGIN, 418 SO.2d 1261 (FLA 4th DCA 1982)

The basic rule of Constitutional Jurisprudence states that:

> "..The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions..." Katz v United States, 398 U.S. at 357 (1967).

The Petitioner cites to State v Wargin, 418 So.2d 1261 (Fla 4th DCA 1982) for its proposition that Respondent's consent to a recognized exception to the warrant requirement to look into the trunk of his vehicle constituted consent for Trooper Adams to look into the locked luggage subsequently found within the locked trunk of the vehicle.

In Wells v State, 492 So.2d 1375 (Fla. 5th DCA 1986) the District Court of Appeal held that:

> "...the totality of the

> circumstances demonstrate that appellant's permission "to look in the trunk" was that and nothing more, and did not extend to the locked luggage within the trunk, nor to the passenger compartment of the car. Without search consent, the search was unlawful..." See Horovitz v State, 433 So.2d 545 (Fla. 4th DCA 1983, Wells at p. 1378

The Court noted that the appellant had indicated,

> "...that he did not know what was in the trunk..."

and further,

> "...the officer never asked for and was never given permission to search the passenger compartment of the car..." Wells at p. 1376

Wargin, supra, relied upon by petitioner for extending the rule announced in United States v Ross, 456 U.S. 798 (1982) which was grounded upon the existence of probable cause to search an automobile, to searches grounded upon consent where no probable cause exists, also recognizes that a consensual search may be restricted in terms of time or area, Leonard v State , 431 So.2d 614 (Fla. 4th DCA 1983), and must be terminated upon withdrawal of consent, Goldberg v State, 407 So.2d 352 (Fla. 4th DCA 1981).

> "...Lastly, the police need not make additional requests for consent to open containers found during a consent search. A person may of course limit his consent to a police

> search even during the course of the search by some verbal or physical act indicating the withdrawal of consent. Goldberg v State 407 So.2d 352 (Fla. 4th DCA 1981); Major v State, 389 So.2d 1203 (Fla. 3d DCA 1980), pet. for review denied, 408 So.2d 1095 (Fla. 1981); Villari v State, 372 So.2d 522 (Fla. 1st DCA 1979). The appellee could have limited his consent at any time before the police opened the Kleenex box and discovered the cocaine. By neither saying nor doing anything to withdraw his consent, appellee consented to the entire search and everything it revealed...". Wargin at p. 1263.

In the instant case, Respondent's consent was limited to only looking into the trunk of the vehicle. Actual entry into the trunk did not occur until the vehicle had been towed to K & S Automotive and Mr. Wells had been taken to the Florida Highway Patrol Station. Wells, supra.

Additionally, it can be questioned whether Wargin, supra, is in fact a total repudiation of Ross, supra, in that Wargin, in concluding:

> "...that the holding in Ross applied to consent searches and that consent to search luggage includes the authority to search closed containers within the luggage which may conceal the object of the search..." Wargin at p.1263

has set forth a probable cause standard through acknowledgment

that there be an actual object of the search.

Contrary to the Petitioner's assertion that "the only distinction between Wargin and the case sub judice is that in Wargin consent was given to search the suitcase while here consent was given to search a car's trunk," are the facts that :

> "...At the Fort Lauderdale Airport, two plainclothes Broward County deputy sheriffs approached the appellee after his actions in the airport terminal fit a drug courier profile. The police officers identified themselves, explained that they were narcotic agents, working with the cooperation of the public, and asked the appellee to permit them to inspect his carry on luggage. He consented. Appellee went into a closed room with the officers and unlocked his suitcase. One of the officers lifted a strangely heavy Kleenex box out of the suitcase..." Wargin at p. 1262

and a finding by the trial court:

> "...that the excessively heavy Kleenex box gave the police a well-founded suspicion that the box contained something other than Kleenex..." Wargin at p.1262

In Wells, supra, the District Court of Appeal found,

> "...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 that he had to

> impound the car he asked for permission to look in its trunk..." Wells at p.1376

The Petitioner makes repeated reference to Ross, supra, to bolster the holding in Wargin, supra, yet the concluding paragraph of the Ross opinion unequivocally states:

> "...We hold that the scope of the warrantless search authorized by the automobile exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search..."Ross at p. 825

The Petitioner also relies upon United States v Kapperman, 764 F.2d 786 (11th Cir. 1985) for the theory that the ruling in Ross, supra, is relevant to consent searches yet the signed consent form authorized the police in Kapperman to search the car and remove:

> "...whatever documents or items of property whatsoever, which they deem pertinent to the investigation..."

The Court found that language consistent with permitting the police to search the unlocked suitcase.

The Respondent, in the instant case, did not sign a consent to search form and limited his consent to only looking into the

trunk of the vehicle. Actual entry into the trunk did not occur until the vehicle had been towed to K & S Automotive and Mr. Wells had been taken to the Florida Highway Patrol Station. Wells, supra.

United States v White, 706 F2d 806 (7th Cir. 1983) is also inapt in that White gave his consent to search his apartment for heroin and because heroin could reasonably be believed to be in the flight bag, the flight bag was within the scope of the consent to search and was permissible.

In holding that the search of the locked closet adjacent to a desk was valid, the Court in United States v Milian-Rodriguez 759 F.2d 1558 (11th Cir. 1985) cert. denied, 106 S.Ct.135 (1985) found the signed consent form was general;

> "...and there was absolutely no discussion of any limit on the search or on the nature of the items to be inspected. Moreover, the execution of the consent form was part of Milian's on-going effort to cooperate with the police. Because the agents would not make a deal except for material of "great interest," Milian had strong incentive to grant an authorization which was as broad as possible..." Milian-Rodriguez at p. 1563

Moreover, the Court found that although the Defendant was unable to provide the key to the closet he was still present in the

office when the agents attempted to open the closet and advised them that the keys were in his briefcase,

> "...By describing the location of the keys which would provide entry into the closet, Milian provided additional evidence of his consent to the search..." Milian-Rodriguez at p. 150

A consent search is reasonable only if kept within the bounds of the actual consent:

> "...A suspect's consent can impose limits on the scope of a search in the same way as do the specifications of a warrant, see Mason v Pulliam, 557 F.2d 426 (5th Cir. 1977). Moreover, the government may not use consent to a search which was initially described as narrow as license to conduct a general search....Milian-Rodriguez at p.1563

ARGUMENT II

THE DECISION OF THE DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED IN THAT THE WARRANTLESS SEARCH OF RESPONDENT'S LOCKED LUGGAGE FOUND WITHIN THE LOCKED TRUNK OF THE VEHICLE EXCEEDED THE SCOPE OF THE RESPONDENT'S CONSENT.

Consent to search and what is included within the scope of a consent to search is ordinarily to be determined by the totality of circumstances, Martin v State, 411 So.2d 169 (Fla. 1982).

In Leonard v State, 431 So.2d 614 (Fla 4th DCA 1983) the Court held that an officer's second search of a vehicle exceeded the scope of the consent given. The Court stated:

> "...One who consents to a search may limit the scope of that search. A consent search is reasonable only when kept within the bounds of the consent, and the scope fo the search must be strictly tied to and justified by the circumstances..." Leonard at p. 615.

The Respondent limited his consent to only looking into the trunk of the vehicle Wells, supra, therefore, the opening of the locked suitcase found within the locked trunk went far beyond the parameters of any consent. Horovitz v State, 433 So.2d 545 (Fla

4th DCA 1983)

In United States v Covello, 657 F.2d 151 (7th Cir. 1981) the Court reversed and remanded the case for a re-examination of the scope of the consent to search after the District Court had suppressed evidence based upon the requirement of a separate explicit consent for the luggage. At issue was the interpretation of the signed consent form which authorized agents,

> "...to conduct a complete search..and to take from the premises any letters, papers, materials, or other property which they may desire..." Covello at p.154

The issue of unbridled consent was again evident in Martin v State, 411 So.2d 169 (Fla. 1982). The Defendant contended that he did not give the agricultural inspector permission to look under the platform inside the van. The Court found that the search was conducted with the Defendant's consent in that,

> "...The record reflects that after he had seen part of the van, been unable to look under the platform, and ordered the van back to the inspection station, Mr. Shope asked defendant to open the door once more so that he could see how much more fruit the van contained. As appellee notes, at the time of said

> request, the only spot that had not been searched was the area under the platform, so defendant must have known that the inspector, in looking for more fruit, would search that area..." Martin at p.171, 172

In Slater v State, 90 So.2d 453 (Fla 1956) the Court found the Defendant posed no objection whatsoever to a search of his automobile and took the keys from the ignition and unlocked the trunk wherein was found lottery materials. The opinion does not indicate the location of the lottery materials in the trunk of the vehicle.

United States v Torres 663 F.2d 1019 10th Cir 1981) also involves unbridled consent in that the apparent owner of the vehicle in question signed a consent permitting the police to make,

> "...a complete search and authorizing the taking of letters, papers, narcotic drugs, other drugs, material or other property..." Torres at p.1021

The Defendant, in an attempt to retract his consent to the search of the vehicle claimed he did not expect the officers to tear the car apart. The Court found,

> "...unquestionably Torres gave his voluntary consent when he signed the form which was provided him. This explained that a complete search was to be made, and thus, of course, it logically follows permission to

search contemplates a thorough search..." Torres at p. 1027

Whether or not the search that was conducted was one to which consent was given was a question the Court examined in United States v Sierra Hernandez 581 F.2d 760 (9th Cir 1978) cert. denied 99 S.Ct. 333 (1978) where it was found that the opening of the hood of Defendant's truck did not go beyond the scope of consent:

> "...Before the hood was opened the appellant gave permission for an agent to look in the back of the truck and even went so far as to aid in the search. He expressed no concern when the agent proceeded to the hood, and apparently made no attempt to retract or narrow his consent. See United States v Miller, 491 F.2d 638, 651 (5th Cir.), cert. denied, 419 U.S.970, 95 S.Ct. 236, 42 L.Ed.2d 186 (1974). Failure to object to the continuation of the search in these circumstances is properly considered as an indication that the search was within the scope of the initial consent. Sierra Hernandez at p. 768

Actual entry into the trunk did not occur until the vehicle had been towed to K & S Automotive and Mr. Wells had been taken to the Florida Highway Patrol Station. Wells, supra

Chestnut v State, 404 So.2d 1064, (Fla 1981) has also been cited to by Petitioner for the premise that "permission to board

boat constituted consent to search cabin thereof". In holding that there was consent to board and search the boat, the Court found:

> "...According to the deputies' testimony, they then approached petitioners' craft and, upon requesting permission were told to "be my guest". As one of the officers approached the boat's cabin, the windows of which were taped over and the door of which was wired shut, he was told "You don't have to look, it's loaded." The officer then opened the cabin, which was filled with marijuana..." Chestnut at p. 1064, 1065

Holding that the search of personal papers of the Defendant, pursuant to consent to search his home for narcotics, was unreasonable because it went beyond the scope of the Defendant's consent, the Court in United States v Dichiarinte,445 F.2d 126 (7th Cir. 1971) stated,

> "...Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search..." Dichiarinte at p. 129

In United States v Patacchia, 602 F.2d 218 (9th Cir. 1979) the Court found that the facts did not evidence consent to search

the trunk,

> "...It is true that Patacchia indicated a willingness to open the trunk when asked to do so; but his response was qualified. He could not open it, he said, because of the inoperative release switch, the damage to the rear of the car, and the absence of a trunk key. The response, "I would but I can't " is not the equivalent of "Yes, you may open it if you can..." Patacchia at p.219

In State v Carney, 423 So.2d 511 (Fla 3 DCA 1982) the Court held that permission to go aboard the Defendant's boat was not the equivalent of consent to search hidden compartments and containers.

The Respondent limited the scope of his consent to only looking into the trunk of the vehicle.

Actual entry into the trunk did not occur until the vehicle had been towed to K & S Automotive and Mr. Wells had been taken to the Florida Highway Patrol Station. WElls, supra.

ARGUMENT III

COLORADO V BERTINE, 40 CrL 3175 (JANUARY 14, 1987) IS INAPPLICABLE TO THE INSTANT CASE IN THAT THE IMPOUNDMENT OF RESPONDENT'S VEHICLE DID NOT CONFORM TO THE FLORIDA HIGHWAY PATROL POLICY MANUAL WHICH REQUIRES CONSULTATION WITH THE DRIVER IF IT IS DETERMINED THAT THE VEHICLE SHOULD BE IMPOUNDED, THEREFORE, MILLER V STATE, 403 So.2d 1307 (Fla. 1981) NEED NOT BE RECONSIDERED. SHOULD BERTINE BE APPLICABLE EVIDENCE OF A PRETEXTUAL SEARCH RENDERS THE SEARCH UNREASONABLE UNLESS PROBABLE CAUSE STANDARDS ARE MET.

The Supreme Court in South Dakota v . Opperman, 428 U S 364 (1976) expressly identified the automobile inventory procedure as a caretaking, non-criminal function developed in response to three distinct needs: (1) The protection of the owner's property while it remains in police custody; (2) The protection of the police against claims or disputes over lost or stolen property; (3) and, the protection of the police from potential danger.

A lawful impoundment is the touchstone of a valid Inventory Search and the impoundment in Opperman was held to be necessary since the unoccupied vehicle had been illegally parked in a restricted zone for approximately seven hours 3 A.M. to 10 A.M.,

and had received two tickets. The Court characterized the inventory procedure in this manner:

> "...The police were indisputably engaged in a caretaking search of a lawfully impounded automobile..the inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. As in Cady there is no suggestion that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive..." Opperman at p. 3100.

The Court with emphasis on the unoccupied nature of the vehicle and the unavailability of the owner, to make other arrangements for the safekeeping of his belongings, concluded that the conduct of the police was not unreasonable under the Fourth Amendment.

The Florida Supreme Court in Miller v State, 403 So.2d 1307 (Fla. 1981) approved the doctrine of an inventory search as authorized by the United States Supreme Court in Opperman, and in accordance with that decision held:

> "(1) the purpose of an inventory search is a caretaking function exclusively for (1) protection of the owner's property, (b) protection of the police from claims and disputes over lost or stolen property which has been impounded, and (c) protection of the police from danger: (2) an inventory search is not conducted in order to discover evidence of a crime, and any suggestion that standard police procedure for an inventory search is actually a pretext for an investigative search will require the search to meet traditional probable cause standards or be invalidated; (3) there must be a threshold inquiry by the trial court to determine that impoundment was for a lawful purpose and was reasonable and necessary under circumstances; and (4) when owner or possessor of the vehicle is present, arresting officer must advise him that motor vehicle will be impounded unless owner or possessor is not required in circumstances where vehicle is unattended, owner is not readily available, or owner or possessor, is mentally incapacitated..." Miller at p.1309

Noting that the police must not use the Inventory Search as a subterfuge to conduct a warrantless search for incriminating evidence, the requirement of good faith must be coupled with the actual need to impound the vehicle:

> "...In determining the reasonableness and necessity for impoundment, consideration must be

> given to available alternatives when a competent owner or possessor is present or reasonably available..." Miller at p. 1313

In Sanders v State, 403 So.2d 973 (Fla 1981), the Florida Supreme Court refined the Miller decision by holding that an arrestee need not be advised of all available options to impoundment, but he must be consulted as to the impoundment.

> "...Our holding does not mandate that an arrestee must be advised of all available options to impoundment; such a per se rule would be unworkable because of changing conditions and circumstances. However, the extent of the consultation with an arrestee is a factor for the trial judge to consider in determining whether the impoundment was reasonable and necessary..." Sanders at p. 974

The Florida electorate, in the November 1982 elections, approved certain amendments to Article I, Section 12 of the Florida Constitution, effective January, 1983, which preclude Florida courts from interpreting the state constitutional guarantee on search and seizure so as to give an individual greater rights than that enjoyed under the Fourth Amendment as interpreted by the United States Supreme Court.

> "...(1) Miller constitutes, in part, an authoritative interpretation of the Fourth Amendment which

> interpretaiton the subject amendments in no way limit and (2) Miller constitutes, as well, an authoritative interpretation of Article I, Section 12 of the Florida constitution, which interpretation accords a person no greater rights than that enjoyed under the Fourth Amendment - a result which the subject amendments permit..." Small at p. 784

In Bertine v Colorado, 40 CrL 3175 (January 14, 1987), the Court concluded that:

> "...reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure..."

and upheld the inventory search of Defendant's van and backpack directly behind the front seat which in turn led to the opening of closed containers. In footnote Six (6) of the opinion the Court stated:

> "...We emphasize that in this case the trial court found that the police departments procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria." Bertine at p. 3177

The Florida Highway Patrol Policy Manual Legal Bulletin 83-03 advises the Florida Highway Patrol to consult with the driver of the vehicle if the State Trooper determines that the vehicle should be impounded. The focus in the instant case is not on the inventory itself but on the standardized written procedures of the Florida Highway Patrol. Trooper Adams, if following the standard procedures of the Florida Highway Patrol, rather than his own set of standard procedures would have been required to consult with the driver of the vehicle after a decision to impound the vehicle has been made.

In Opperman, supra and Illinois v Lafayette, 462 U.S. 640 (1983) the Supreme Court upheld car inventories pursuant to standard police procedures. Standard Police Procedures in the instant case require consultation. Without consultation prior to the impoundment and subsequent inventory search, the search is not conducted according to standardized procedures and therefore is unreasonable under the Fourth Amendment.

Bertine, supra, did not address the issue of department policy promulgated to include consultation with the driver of a vehicle prior to impoundment.

The impoundment and Inventory Search of an automobile must be for a good faith caretaking purpose and cannot be used as a

subterfuge to conduct a warrantless search. Opperman, Bertine, supra.

> "...Nothing in Opperman or Lafayette prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity..." Bertine at p. 3177

Trooper Adams, upon returning to Martin Leslie Wells' vehicle observed what appeared to be an amount of money on the floor of the driver's side, nothing more. The decision to tow and impound the vehicle was made after consultation with other law enforcement officials, who had referred to the money as irrelevant to the situation.

Prior to the start of the Inventory Search, Trooper Adams said that he wanted to go through the car real good because he felt there were drugs in it.

The search of the vehicle when police officers are deliberately seeking evidence of a crime cannot be sustained as an Inventory Search. State v Chivers, 400 So.2d 1247 (5th DCA 1981).

As authority in analyzing the validity of an Inventory Search, Gordon v State, 368 So.2d 59 (3rd DCA 1979) cites Godbee v State, 204 So.2d 441 (2nd DCA 1969) which stated:

> "...The reasonableness of any search without a warrant is measured from the standpoint of the conduct of the searchers. If their conduct is in some way reprehensible or if they precipitate a search and are motivated therein solely by a desire to "hunt" for incriminating evidence, or if they do so without any plausible explanation or justification, the invasion is an unreasonable one..." Godbee, at p.443

Prior to the Inventory Search, Trooper Adams told Grover Clinton Bryan of K & S Automotive, that he wanted to go through the vehicle real "good" because he felt there were drugs in it. This statement carries with it the suggestion that the Inventory Search was a pretextual search proscribed by the Fourth Amendment, Hicks v State 398. So.2d 1008 (1st DCA 1981), thereby requiring the search to meet traditional probable cause standards if it is to be upheld as valid. Miller, supra

The money, found on the floor of the Appellant's vehicle, does not establish sufficient probable cause to conduct a search without a warrant or to apply to a neutral magistrate for issuance of a search warrant. Miller v State, 137 So.2d 21 (2nd DCA 1962).

Probable cause for issuance of a search warrant cannot be based on mere suspicion but must be based on facts known to exist

Churney v State, 348 So.2d 395 (3rd DCA 1977). Trooper Adams, when questioning other law enforcement officials about the money he saw was told "anybody can have three thousand dollars on the floor of their car".

Evidence of a pretextual search renders the search unreasonable unless probable cause standards are met and Bertine is not controlling.

CONCLUSION

The decision of the District Court of Appeal in Wells v State, 492 So.2d 1375 (Fla 5th DCA 1985) should be affirmed based upon the reasoning set forth by the District court of Appeal.

Bertine, 40 CrL 3175 (January 14, 1987) is inapplicable to the instant case. Should Bertine be found applicable, evidence of a pretextual search renders the search unreasonable unless probable cause standards are met.

Respectfully submitted,

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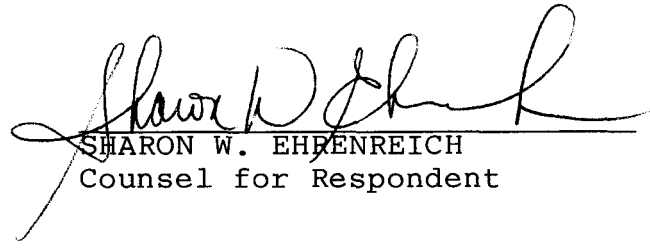

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U. S. Mail to JOSEPH N. D'ACHILLE, JR., Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Fl 32014, R. W. EVANS, Assistant General Counsel, Department of Highway Safety & Motor Vehicles, Tallahassee, Fl 32399-0504 on this 10 day of April, 1987.

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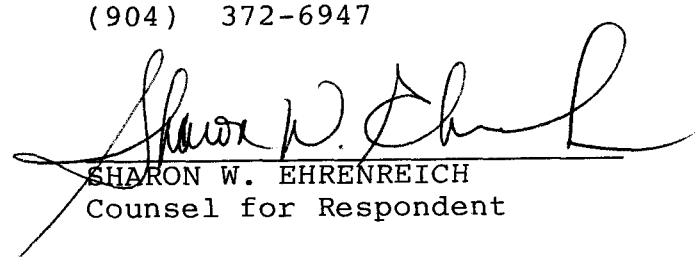

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