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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 69,363

MARTIN LESLIE WELLS,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

On February 11, 1985, the respondent, Martin Leslie Wells, was stopped for speeding and subsequently arrested for driving under the influence (R 216-217, 224). Upon a search of the respondent's car, the respondent was found to be in possession of more than twenty grams of cannabis. The respondent was subsequently charged with that felony crime. The respondent filed a motion to suppress evidence, claiming that the search was without a warrant and was otherwise illegal (R 1-7). The trial court, the Circuit Court of the Seventh Judicial Circuit in and for Putnam County, Florida, heard the motion (R 210-266). The motion was denied (R 18).

The respondent then pleaded nolo contendere to the felony charge of possession of a controlled substance, reserving his right to appeal the denial of his motion to suppress (R 280-296). The respondent was sentenced (R 267-274, 275-276). The respondent appealed to the district court, the District Court of Appeal of the State of Florida, Fifth District (R 19).

On August 21, 1986, the district court reversed the respondent's conviction. Wells v. State, 492 So.2d 1375 (Fla. 5th DCA 1986). [See Appendix 1]. The petitioner timely filed its notice to invoke the discretionary jurisdiction of this Court. The issue of jurisdiction was briefed and on January 22, 1987, this Court accepted jurisdiction. This brief follows.

STATEMENT OF THE FACTS

The decision of the district court recites most of the facts which are relevant to the issues presented in this appeal. Those facts are adopted by the petitioner as a partial statement of the facts:

> The facts are not in dispute. 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 appellant 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 appeared 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 clored plastic garbage bag was found inside the suitcase. Adams opened the garbage bag and found inside a quantity of marijuana.

Wells v. State, 492 So.2d 1375, 1376 (Fla. 5th DCA 1985).

The district court also noted that Trooper Adams believed his search of the car was in inventory search subsequent to the impoundment of the car. Supra, at 1376. Since the petitioner

argued to both the trial court and district court that the facts regarding the respondent's consent to search were dispositive, the petitioner has not heretofore summarized the facts relevant to the impoundment/inventory of the respondent's car; the petitioner will review them now.

As noted by the district court,

> The [respondent's] parked automobile was not a traffic hazard, ... and the officer concededly did not advise the [respondent] of alternatives to impoundment which were available to him.

supra at 1376. However, the record plainly shows that Trooper Adams believed that he was required to impound and inventory the respondent's car.

> Well, based upon regulations we go by, if I was going to place [the respondent] 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 (R 236).

Trooper Adams consulted with another trooper about the situation and, ultimately, Trooper Adams called his supervisor regarding the impoundment of the car (R 239-245). Since Trooper Adams had decided to arrest the respondent for driving under the influence, he also decided to impound and inventory the respondent's car (R 242-243). Trooper Adams believed his actions comported with standard operating procedure (R 246-247).

It is also important to note that on appeal the respondent stated as fact that Trooper Adams followed his standard operating procedure in impounding the car and performing an inventory search. [See, Initial Brief of Appellant/Respondent, page 5].

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision in this case expressly and directly conflicts with the decision of another district court, namely State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). Inasmuch as State v. Wargin correctly relates the Ross rule to consent search law, the decision by the Fifth District Court of Appeal is incorrect and should be quashed. The judgment and sentence of the trial court should be affirmed as the consent search herein was valid under State v. Wargin.

The decision of the district court is also incorrect and should be quashed on the grounds that the instant search was valid under general principles of consent search law. The respondent gave law enforcement unrestricted permission to search the trunk of the car he was driving. Under prevailing decisional law, that consent extends to containers, i.e., the suitcase, found in the trunk. Therefore, the judgment and sentence of the trial court should also be affirmed irrespective of Wargin, supra, as the instant search was within the scope of the respondent's unrestricted consent.

Finally, there is a third basis for reversing the decision of the district court and affirming the respondent's conviction. Since the instant decision by the Fifth District Court was rendered, a change in the law has occurred. The decision under review specifically states that under Miller v. State, 403 So.2d 1307 (Fla. 1981), the search in this case was not a valid vehicle inventory search. The recent case of Colorado v. Bertine, 40 CrL 3175 (January 14, 1987), has

specifically rejected elements of Miller which were relied upon by the Fifth District Court in this case. Under Article I, Section 12 of the Florida Constitution this Court should recede from Miller, conform Florida law to federal law, and rule that the search herein was an objectively reasonable, ergo constitutionally permissible, vehicle inventory search under Colorado v. Bertine, supra.

ARGUMENT

POINT ONE

THE DECISION OF THE DISTRICT COURT SHOULD BE QUASHED AND THE RULING OF THE TRIAL COURT AFFIRMED AS THE SEARCH IN THIS CASE IS VALID UNDER STATE v. WARGIN, 418 So.2d 1261 (Fla. 4th DCA 1982).

The petitioner's primary argument before the district court was that the search of the respondent's car was valid under State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). In reversing the respondent's conviction, however, the district court specifically declined to follow Wargin; instead, the district court followed State v. Fuksman, 468 So.2d 1067 (Fla. 3rd DCA 1985), a case which also specifically declined to follow Wargin. The decision in this case thereby creates a conflict in decisions of the district courts, such conflict providing the basis for this Court's jurisdiction. Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

Below, the petitioner argued that the respondent consented to the search of his car and the trunk thereof. The distict court did find that the respondent consented to the search of the car's trunk, that court going so far as to note the respondent attempted to open the trunk for the trooper and agreed to the trunk being "popped" open if necessary. Wells, supra at 1376. Based upon these facts, the petitioner asserts that the trooper's subsequent search of the trunk and the suitcase found therein is valid as it was within the scope of the respondent's consent and within the holding in Wargin.

In State v. Wargin, supra, the Fourth District Court of

Appeal held that consent given to search an item of luggage necessarily confers upon law enforcement the authority to search all closed containers found therein. Wargin was in part based upon the holding in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). The Wargin court noted the Ross rule, quoting therefrom

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search... When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand. [Footnotes omitted].

Wargin, supra at 1262-1263. The Wargin court went on to state

> We find no reason to limit the application of Ross to automobiles or to searches conducted only with probable cause. We conclude that the holding in Ross applies 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.

supra at 1263. The only distinction between Wargin and the case sub judice is that in Wargin consent was given to search a suitcase while here consent was given to search a car's trunk.

The district court below disapproved of Wargin. It stated

that the Ross rule, which related to warrantless searches of automobiles based on probable cause, was inapposite because "[c]onsent searches operate on different rules than probable cause searches." Wells, supra at 1378. While the petitioner can not disagree with the district court's generalization, the petitioner does disagree with that court's conclusion that Ross is entirely irrelevant. It is apparent from the record that Trooper Adams was concerned that more money might be in the trunk and his conclusion that a second large sum of money could be found therein is indisputably correct. Since it is only logical to believe that more money might indeed be found in the trunk or suitcase, any "nice distinctions" between the trunk of the car and the suitcase found therein "must give way." Ross, supra at 102 S.Ct. 2171. Therefore, since Ross laid down this rule with specific reference to any "legitimate search", the petitioner posits that the district court below wrongly rejected Wargin.

Other courts have found the Ross rule "relevant" to consent search analysis. United States v. Kapperman, 764 F.2d 786 (11th Cir. 1985); United States v. White, 706 F.2d 806 (7th Cir. 1983); see also, United States v. Milian-Rodriguez, 759 F.2d 1558 (11th Cir. 1983), cert. denied, _____ U.S. _____, 106 S.Ct. 135,— L.Ed.2d ___ (1985) and United States v. Eschwieler, 745 F.2d 435 (7th Cir. 1984), cert. denied, 469 U.S. 1214, 105 S.Ct. 1188, _____ L.Ed.2d ___ (1985). Each of these cases involved a search wherein broad consent to search was given; in each case, the court noted as significant the fact that the objects of the searches could have been found in the places searched. The

petitioner asserts that United States v. Kapperman is virtually indistinguishible from this case. In Kapperman, a co-defendant signed a consent-to-search from authorizing a search of his car; pursuant to that consent, law enforcement searched the trunk and searched an unlocked suitcase found therein, finding contraband in the suitcase. Citing Ross, the Kapperman court upheld the search. In the instant case, the respondent unquestionably consented to a search of his car's trunk; he even attempted to help the trooper to effectuate said search. Moreover, the respondent knew that force would be employed if necessary in the search of the trunk; even though the respondent denied knowledge of the contents of the trunk, he must have contemplated the use of similar force on any containers found inside the trunk. Wells, supra at 1376. The petitioner asserts that the Ross rule is relevant to this case and the district court should have followed Wargin, supra. The petitioner further asserts that Wargin is a correct interpretation of federal law and it should be applied in this case. Kapperman, supra and White, supra; Art. I, §12, Fla. Const. This Court should adopt Wargin, reverse the decision of the district court and affirm the trial court's judgment and sentence against the respondent.

POINT TWO

THE DECISION OF THE DISTRICT COURT SHOULD BE QUASHED AND THE RULING OF THE TRIAL COURT AFFIRMED AS THE SEARCH IN THIS CASE IS VALID UNDER GENERAL PRINCIPLES OF LAW REGARDING CONSENT SEARCHES.

The petitioner also argued to the district court that the instant search was valid under general consent search law. The petitioner expanded on this argument by discussing how State v. Wargin, supra, correctly expanded accepted principles of consent search law. The district court did not accept the petitioner's arguments, ruling instead that the totality of the circumstances indicated that the scope of the respondent's consent did not extend to the suitcase in the trunk. Wells, supra at 1378. The petitioner asserts that the district court misinterpreted the facts and misapplied the law in its decision.

Generally, the totality of circumstances must be evaluated to determine if a persons's consent was freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Chesnut v. State, 404 So.2d 1064 (Fla. 1981); Martin v. State, 411 So.2d 169 (Fla. 1982). A person may limit the scope of the search in terms of the objects sought or the places to be searched. Milian-Rodriguez, supra; Leonard v. State, 431 So.2d 614 (Fla. 4th DCA 1983); Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983). Moreover, a person may withdraw his consent to search. United States v. Torres, 663 F.2d 1019 (10th Cir. 1981), cert. denied, 456 U.S. 973, 102 S.Ct. 2237, 72 L.Ed.2d 847 (1982); United States v. Sierra-Hernandez, 581 F.2d 760 (9th Cir. 1978), cert. denied, 439 U.S. 936, 99 S.Ct. 333, 58

L.Ed.2d 333 (1978); Goldberg v. State, 407 So.2d 352 (Fla. 4th DCA 1981). Whether valid consent was given or whether said consent was limited or withdrawn are questions of fact to be decided by the trial court, whose rulings should be affirmed unless they are clearly erroneous. Chestnut, supra; Leonard, supra; see also, Torres, supra and Sierra-Hernandez, supra.

The factual issues in this case, however, are largely not in dispute. It is undisputed that the respondent's consent to search the trunk of his car was freely and voluntarily given; his co-operation with Trooper Adams in attempting to open the trunk proves this fact. Likewise, the respondent did not limit his consent or withdraw it. The only question which remains is whether the search conducted in this case fell within the respondent's consent to search the trunk of his car. The petitioner asserts that the search did not exceed the scope of the respondent's consent.

The scope of an otherwise unrestricted consent search may be inferred from the facts. In other cases, consent to search compartments or containers found within a motor vehicle has been inferred from a general consent to search the vehicle itself. Martin, supra [consent to search compartment in truck cargo area inferred from giving of consent to second search]; Kapperman, supra [consent to search suitcase found in trunk inferred from general consent and from fact that objects of search can not be expected to be "lying loose in an automobile"]; United States v. Covello, 657 F.2d 151 (7th Cir. 1981) [consent to search suitcase found in trunk inferred from general consent and from defendant's

cooperative attitude]; see also Milian-Rodriguez, supra [consent to search nearby closet inferred from general consent to search desk and from defendant's cooperation].

Based on the facts of this case, it is apparent that the district court drew the incorrect conclusion when it ruled that the respondent's consent did not extend to the suitcase found in the trunk. First, it is undisputed that the appellant disclaimed any knowledge of the contents of the trunk. Ipso facto, he could not have limited his consent to search any articles found therein. See, Slater v. State, 90 So.2d 453 (Fla. 1956) [defendant consented to search of trunk, then "sought to disassociate himself" from items found therein]. Moreover, the respondent cooperated thoroughly with the officer's investigation, explaining that the car was not his and how he came into possession of the car. It is clear that the respondent could have attributed ownership of the suitcase to the owner of the car. Based upon the stated knowledge of the respondent, his cooperation with law enforcement and his unrestricted consent to search the trunk of the car, the petitioner asserts that the search in this case was valid as it was within the scope of the respondent's consent. Slater, supra [defendant voluntarily opens trunk of car]; Chestnut, supra [permission to board boat constituted consent to search cabin thereof]; Martin, supra; Kapperman, supra; Covello, supra; Sierra-Hernandez, supra [affirmative reply to officer's question, "May I look inside the truck? " constituted valid consent to search cab, cargo area and under hood, finding concealed marijuana under hood]. The trial

court's implicit finding that the search did not exceed the scope of consent should be affirmed based on the facts and reasonable inferences from the record. Chestnut, supra.

The decision of the district court should be reversed and the trial court's judgment and sentence imposed against the respondent should be affirmed.

POINT THREE

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.

Since this Court's decision in Miller v. State, 403 So.2d 1307 (Fla. 1981), Florida law has recognized vehicle inventory searches as a valid exception to the search warrant rule. In Miller, this Court adopted South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), as the prevailing rule of law under Article I, Section 12 of the Florida Constitution. However, noting "a tenuous five-four decision" in Opperman and expressing a concern for maintaining reasonableness in inventory searches, this Court's decision in Miller established as a predicate to a lawful inventory search that the owner or driver of the vehicle, if he is available, must be consulted regarding alternatives to impoundment of the car.

> An inventory search of a motor vehicle without such advice or consultation to a present owner or possessor upon arrest results in an unreasonable search under the United States and Florida constitutions and must be excluded under the Florida constitutional exclusionary rule. [emphasis supplied].

Miller, supra at 1314. In establishing this predicate, this Court recognized that Opperman involved an illegally parked car while the facts of Miller involved the arrest of the driver of the car ultimately impounded and inventoried. Concerned with the intrusiveness of an inventory search in a Miller situation, the

"alternatives to impoundment" predicate was fashioned. Under Miller, however, Florida and federal law regarding inventory searches was held to be co-extensive.

Miller, supra, however, was decided prior to the recent state constitutional amendment which mandates a concurrence between state and federal law regarding searches, seizures and the exclusion of illegally obtained evidence. Art. I, §12, Fla. Const. Although it has been ruled that the amendment to Article I, Section 12 did not modify Miller, the state of the law has changed once again. State v. Small, 483 So.2d 783 (Fla. 3rd DCA 1985). In light of the recent United States Supreme Court decision in Colorado v. Bertine, 40 CrL 3175 (January 14, 1987), [See Appendix 2], this Court should reconsider Miller. The petitioner asserts that the Miller "alternatives to impoundment" rule no longer coincides with federal law. The petitioner further asserts that this Court should recede from that portion of Miller. Consequently, the search in the case sub judice should be upheld as a valid inventory search.

The case of Colorado v. Bertine, supra, is almost factually indistinguishible from the case at bar. There, a defendant was arrested for driving under the influence. Pursuant to city ordinance, the defendant's van was impounded and inventoried. As part of the inventory search, police found a closed backpack behind the front seat. The backpack was opened, revealing metal cannisters. The cannisters were also opened, revealing drugs and drug paraphernalia.

In Bertine, supra, the United States Supreme Court

specifically addressed the state supreme court's opinion that the inventory search was unreasonable because the defendant was not allowed to make arrangements alternative to this impoundment of his van. The United States Supreme Court rejected this rationale, quoting from its earlier decision in Illinois v. Lafayette, 462 U.S. 640, 647, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983),

> "[t]he real question is not what could have been achieved, but whether the Fourth Amendment requires such steps... The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."

The United States Supreme Court held that inventory searches conducted in good faith and based on reasonable and standardized police regulations are valid under the Fourth Amendment to the United States Constitution. That court further held that inventory searches may extend to closed containers found inside the vehicle.

Bertine's express rejection of the "alternatives to impoundment" rule found in Miller clearly implies that Miller should be reconsidered. The United States Supreme Court has expressly held that neither the Fourth Amendment nor Opperman require that a subject be given the opportunity to provide for alternatives to the impoundment of his vehicle. That portion of Miller is no longer good law; this Court should recede therefrom. Art. I, §12, Fla. Const.

From that position, the petitioner asserts that the instant

search could and should be upheld as a valid inventory search. While this position was not argued by the petitioner below, the district court did address the impoundment/inventory search issue; it held that the instant search was not a valid inventory search as Miller was not followed. That portion of the district court's decision can properly be re-evaluated in light of subsequent decisional law.

The search in this case is a valid inventory serch under Bertine, supra. From the record, it is evident that Trooper Adams was following his department's regulations by impounding the vehicle of a DUI arrestee. While the Florida Highway Patrol's regulations were not made a part of the record below, even the respondent concedes that impoundment was standard operating procedure. Even though the respondent's van was legally parked, there is logic behind impounding a drunk driver's vehicle; should the arrestee post bond, law enforcement would be assured that the drunk driver would not get right back into his car.

The search sub judice also complies with Bertine, supra, in that it is obvious that the impoundment and inventory was in the good faith exercise of law enforcement's "caretaker" function. After discovering $3,000 laying on the floor of respondent's car, Trooper Adams was justifiably concerned for the safety of the respondent's vehicle and property (R 77). Under the circumstances Trooper Adam's actions constituted a good faith impoundment of the vehicle. Trooper Adams's suspicions of respondent's illicit drug activity were only aroused after the

inventory search was begun.

Therefore, the search of the respondent's car should also be upheld as a valid inventory search pursuant to a good faith and objectively reasonable impoundment of respondent's car. This Court should recede from its prior decision in Miller v. State, supra, and affirm the judgment and sentence of the lower court.

CONCLUSION

Based upon the arguments and authorities herein, the petitioner respectfully requests this court to reconsider its prior decision in Miller v. State, 403 So.2d 1307 (Fla. 1981) and recede therefrom. The decision of the district court should be quashed and the judgment and sentence of the trial court should be affirmed on numerous grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief of petitioner has been furnished by mail to: Sharon W. Ehrenreich, Esquire, Law Firm of Huntley Johnson, Esquire, 14 East University Avenue, Gainesville, FL 32602, on this 2nd day of March, 1987.

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