0-495
no 8

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellee/Petitioner,

vs.

FSC 69,363

MARTIN LESLIE WELLS,

Appellant/Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

The respondent, Martin Leslie Wells, was arrested on February 11, 1985 for driving under the influence. Based upon the fruits of a search of the vehicle that he was driving the respondent was subsequently charged with possession of cannabis. The respondent filed a motion to suppress, which was denied, and later pleaded nolo contendere to the charge, specifically reserving his right to appeal the suppression issue.

On appeal, the suppression issue was reduced to the question of whether the search of the respondent's car exceeded the scope of the respondent's consent to search. The Fifth District Court of Appeals (district court) decided the case in favor of the respondent and reversed his judgment and sentence. Wells v. State, Case No. 85-1630 (Fla. 5th DCA August 21, 1986). (See Appendix 1). The petitioner, the State of Florida, timely filed its notice to invoke discretionary jurisdiction.

STATEMENT OF THE FACTS

The district court's conclusion that the facts of this case are not in dispute is, for the most part, correct. The respondent's motion to suppress conceded crucial facts and the motion was considered on the basis of deposition testimony stipulated into evidence and made a part of the record of the case. As stated by the district court, the facts are as follows:

> 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 colored plastic garbage bag was found inside the suitcase. Adams opened the garbage bag and found inside a quantity of marijuana.(See Appendix 1).

SUMMARY OF ARGUMENT

This honorable court should exercise its discretionary jurisdiction in this case to resolve the conflict in decisions between this case and State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). The issue presented in this conflict is whether the scope of consent searches has been expanded by federal decisional law.

ARGUMENT

ISSUE

WHETHER THIS HONORABLE COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION TO REVIEW THIS CASE BECAUSE THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

The district court's holding in the case sub judice rests squarely on its conclusion that the search of the respondent's trunk and the container found therein, i.e., a suitcase, was illegal because it exceeded the scope of the respondent's consent to search the trunk of the automobile. (See Appendix 1). As authority to uphold the instant search, the petitioner cited to the district court the case of State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). (See Appendix 2). The Wargin case held that the Ross rule applied to consent searches and that therefore consent to search a container or conveyance was also consent to search all containers found therein. Ross v. United States, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

The district court discussed at length the Wargin and Ross cases and ultimately decided Wargin's holding was wrong. As support for that conclusion, the district court cited the case of State v. Fuksman, 468 So.2d 1067 (Fla. 3rd DCA 1985) and stated

> The Third[District Court of Appeal]has considered the same question and has held contrary to the Wargin decision. . . .
>
> We agree with the analysis of Fuksman. (See Appendix 1).

A conflict in decisions of various district courts thereby arises. The Fourth District Court of Appeals has ruled that the scope of an otherwise unrestricted consent to search permits the search of closed containers found in the place or thing being searched. Wargin, supra. The Third District Court of Appeals specifically rejected the Wargin holding as "conclusory. . . and without analysis." Fuksman, supra at 1069. (See Appendix 3). The conflict of decisions which provides the basis for invoking discretionary jurisdiction in this cause arises when the Fifth District Court of Appeals also rejected Wargin. This conflict is express because the district court specifically discussed Wargin at length. This conflict is direct because the district court's holding rejects Wargin's proposition that Ross applies; the district court instead held that consent to search the trunk of a vehicle "did not extend to the locked luggage within the trunk. . ."

The petitioner submits that it has thoroughly researched the decisional law in Florida and has found that only the Third, Fourth and Fifth districts have ruled on this particular issue. The instant case, Wargin and Fuksman are most of the very few cases which discuss this issue. Since this issue is governed by principles of law relative to the Fourth Amendment to the United States Constitution, this honorable court should exercise its discretionary jurisdiction to insure that decisional law in Florida comports with federal constitutional law. Art. I, §12, Fla. Const.

CONCLUSION

Based upon the arguments and authorities herein, the petitioner respectfully prays that this court find that there is a conflict in decisions among the district courts of appeal and the petitioner further prays that this court exercise its discretionary jurisdiction to resolve this question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's brief on jurisdiction has been furnished by mail to: Sharon Ehrenreich, Esquire, Law Firm of Huntley Johnson, 14 E. University Avenue, Gainesville, FL 32602, on this 18th day of September, 1986.

JOSEPH N. D'ACHILLE, JR.
OF COUNSEL