IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellee/Petitioner

vs.

CASE NO: 69,363
DCA-85-1630

MARTIN LESLIE WELLS,

Appellant/Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

On February 11, 1985, Martin Leslie Wells, was arrested for Driving Under the Influence of Alcohol. During a warrantless search of the vehicle, marijuana was discovered in a locked suitcase in the locked trunk of the vehicle.

The Respondent, Martin Leslie Wells, was charged with Possession of Cannabis with Intent to Deliver.

A Motion to Suppress evidence seized pursuant to the search was filed with the Trial Court and was subsequently denied by the Trial Court.

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 denial of his Motion to Suppress evidence.

On Review, the Fifth District Court of Appeal held that the search of Martin Leslie Wells' vehicle had exceeded the scope of his consent and reversed the Judgment and Sentence, Wells v. State, 11 F.L.W. 1835 (Fla 5th DCA, Aug. 29, 1986).

On September 18, 1986, Petitioner, the State of Florida, filed a Notice to Invoke Discretionary Jurisdiction.

STATEMENT OF THE FACTS

The Fifth District Court of Appeal stated that the facts of the case were not in dispute and recited the facts 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 offier 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.

SUMMARY OF ARGUMENT

In order to justify invocation of Supreme Court Jurisdiction, Article V, Section 3(b)(3) of the Florida Constitution (1980) requires any decision of a District Court of Appeal to expressly and directly conflict with a decision of another District Court of Appeal, on the same question of law.

Jurisdiction can only be supported by Section 3(b)(3) when a conflict of decisions, not a conflict of opinions, or reasons arise.

The Petitioner, the State of Florida, has cited to the decision of State v. Wargin, (Fla. 4th DCA 1982) as creating a conflict with the decision in the instant case.

In Wargin, supra, the Court, dealing with an unrestricted consent to search carry on luggage, expanded the permissible scope of a consent search by holding:

> "...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.

In the instant case, the Fifth District Court of Appeal, dealing with a restricted consent to search a vehicle 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 such consent, the search was unlawful". Wells at p.1837.

The required express and direct conflict mandated by the Florida Constitution is not present due to the fact that State v. Wargin, supra, while expanding the permissible scope of a consent search, recognizes the defendant's ability to limit the permissible scope of the consent search. In the instant case, the Fifth District Court of Appeal, also recognizing the defendant's ability to limit the permissible scope of the consent search, held that the defendant had limited his consent to search thereby limiting the permissible scope of the search to the trunk of the vehicle.

Additionally, no express and direct conflict is present due to the fact that, conflict if found arises between prior written opinions cited to in the case sub judice.

ARGUMENT

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL WITH RESPECT TO THE ISSUE OF THE SCOPE OF A RESTRICTED CONSENT SEARCH, SO AS TO VEST JURISDICTION WITH THE SUPREME COURT.

The Supreme Court must look at the decisions of the Courts, rather than at the conflict in the opinions of the Courts, to determine the presence or absence of conflict necessary for jurisdictional review. Niemann v. Niemann, 312 So.2d 733 (Fla.1975), Jenkins v. State, 385 So.2d 1356 (Fla.1980).

As the Court stated in Gibson v. Maloney, 231 So.2d 823 (Fla.1970):

> "...It is conflict of decisions not conflict of opinions or reasons that supplies jurisdiction for review by certiorari Gibson at p.823.

In the case sub judice, the District Court in analyzing whether appellant's consent to look in the trunk of the car included consent to open and search the locked suitcase found in the trunk cited to Wargin, supra, as relied upon by the State for the proposition that a consent to search encompasses all containers found during the search, extending United States v. Ross 102 S.Ct. 2157(1982) to consensual searches. The Court also cited to State v. Fuksman, 468 So.2d 1067 (Fla.3d 1985) for its holding that Ross, supra, did not

apply to consensual searches. In discussing the scope of a consent search the Court made a further comparison of the two cited cases, Wargin and Fuksman, supra stating that:

> "...We agree with the analysis of Fuksman". Wells at p.1837.

If there is a conflict as contended by Petitioner, the conflict arises between Wargin and Fuksman, supra. The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the District Court that is before the Supreme Court for review, not whether there is conflict in a prior written opinion now cited for authority Dodi Publishing Company v. Editorial America, 385 So.2d. 1369 (Fla.1980). Neither Wargin nor Fuksman are before the Court for review.

Additionally, the required express and direct conflict mandated Florida Constitution is not present due to the fact that State v. Wargin, supra, while expanding the permissible scope of a consent search, recognizes the defendant's ability to limit the permissible scope of the consent search. In the instant case, the Fifth District Court of Appeal, also recognizing the defendant's ability to limit the permissible scope of the consent search, held that the defendant had limited his consent to search thereby limiting the permissible scope of the search to the trunk of the vehicle.

CONCLUSION

This Court may only review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal on the same question of law. In the absence of the requisite conflict mandated by the Florida Constitution, the Court has no jurisdiction for review. The conflict necessary to confer jurisdiction is not present in the instant case therefore this Court should decline review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on jurisdiction has been furnished via U. S. Mail to JOSEPH N. D'ACHILLE, JR., Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 10 day of October, 1986.

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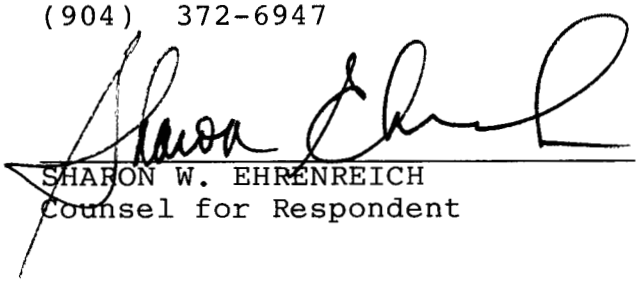

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