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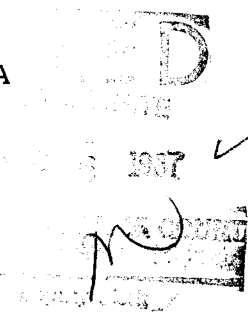

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 69,363

MARTIN LESLIE WELLS,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The petitioner asserts that the respondent has not successfully distinguished the petitioner's federal decisional authority which would uphold this search on the basis of consent. The petitioner's federal authority plainly uses the Ross rule to expand and define the scope of a search that is authorized by consent. Moreover, the consent which was given by the respondent can not be viewed as restricted or limited consent; in light of the respondent's disclaimer of knowledge of the contents of the vehicle's trunk, it is not logical to conclude that the respondent sought to exclude any item in the trunk from the trooper's scrutiny. The respondent certainly did not communicate any specific limitation on the scope of his consent by his mere assent to the troopers request to search. Therefore, this court should uphold the search sub judice as a valid consent search.

The petitioner also asserts that the respondent has failed to show that a reconsideration of Florida case law is not required to conform Florida law to recent United States Supreme Court rulings on impoundment/inventory searches. This Court had held that the Fourth Amendment to the United States Constitution and South Dakota v. Opperman, infra, required that a driver be consulted prior to impounding his vehicle and searching it. However, the recent case of Colorado v. Bertine, infra, which interprets and applies Opperman, rules that such consultation is not a necessary predicate to impoundment. Therefore, a reconsideration of this Court's prior decisions is required under

Art I, §12 of the Florida Constitution. In applying Bertine, this Court should uphold the search sub judice as a valid inventory search.

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).

In answer to the petitioner's argument that the search sub judice should have been affirmed on the authority of State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982), the respondent posits an unusual argument. The respondent contends that reliance on Wargin to extend the Ross rule to consent searches is misplaced as Wargin repudiates United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). This position, however, is wholly untenable. As stated by the Wargin court,

> 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 ....

Therefore, it is clear that Wargin does not repudiate Ross; rather, Wargin logically extends the Ross rule.

The language in Ross, supra, which has been applied to consent searches is oft-quoted.

> 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.

Ross, supra at 102 S.Ct. 2170-2171. This portion of the Ross opinion was discussed in the numerous federal cases cited by the petitioner; those cases were cited, of course, because they involved consent searches. While the respondent attempts to distinguish the federal decisional law cited by the petitioner on factual grounds, the respondent does not, and can not, refute that federal law has applied the Ross rule to consent searches. Federal decisional law authority supports the decision in Wargin, supra. See, Art. I, §12, Fla. Const. Therefore, in reviewing the conflict between the instant case and Wargin, supra, this Court should rule that Wargin is correct.

As previously mentioned, the respondent attempts to distinguish the federal authority cited by the petitioner on factual grounds. These distinctions, however, are extremely weak. In light of the foregoing language quoted from Ross, supra, the respondent can not successfully argue that written consent to search is somehow dispositive. What is crucial is whether there is "a legitimate search under way". Here, there is no doubt that the respondent generally consented to the search of the trunk. Wells v. State, 492 So.2d 1375, 1376 (Fla. 5th DCA 1986). Therefore, the search of the trunk which was undertaken was "legitimate" and the suitcase found inside that trunk was a "nice distinction" which "must give way".

This Court should quash the decision of the district court, uphold the search sub judice and affirm the lower court's judgment and sentence on the basis of State v. Wargin, supra.

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.

In answer to the petitioner's argument that the search _sub judice_ was valid under general consent search principles, the respondent adopts the district court's conclusions on this point. On the basis of the respondent's affirmative reply to the trooper's request to "look in the trunk", the respondent concludes that his consent did not allow the trooper to look any further. This conclusion, however, is incorrect. The respondent's consent can not be viewed as restricted in light of the respondent's disclaimer of knowledge of the contents of the trunk. _See_, _Wells_, _supra_ at 1376. If a person does not know of the contents of a vehicle's trunk _ipso facto_ that person's consent to search can not be understood to exclude any articles therein.

Finally, the petitioner distinguishes two cases cited by the respondent, _United States v. Dichiarinte_, 445 F.2d 126 (7th Cir. 1971) and _United States v. Patacchia_, 602 F.2d 218 (9th Cir. 1979). In _Dichiarinte_, the defendant's consent to search was specifically limited for a particular item, i.e., narcotics. Also, _Dichiarinte_'s ruling is limited to the issue of the scope of consent. _Dichiarinte_ is distinguishible because there the defendant specifically limited the object, not the area, of the search. Moreover, _Dichiarinte_ does not address, as the respondent seems to imply, the issue of exploiting a limited

consent in bad faith to conduct a general exploratory search. The petitioner would maintain, however, that the trooper did not act in bad faith; at the time he obtained the respondent's consent, the trooper was concerned with the possible impoundment of the car and not with searching for evidence of other crimes. Also, Patacchia is distinguishable for the very fact that Patacchia's statement was ruled not to have granted consent to search. In the case at bar, there is no dispute that consent to search was given.

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.

In answer to the petitioner's argument that the search sub judice should be upheld as a valid inventory search in light of Colorado v. Bertine, 40 CrL 3175 (January 14, 1987), the respondent posits two distinct arguments. First, the respondent argues that since the trooper did not follow standard procedures in impounding the car, i.e., consulting with the respondent, the impoundment and inventory search is per se unreasonable. Second, the respondent argues that the inventory search was unreasonable because it was a pretext to avoid a lack of probable cause to search. Neither argument is persuasive.

The respondent's first argument begs the very question which is raised by Bertine, supra. Under Miller v. State, 403 So.2d 1307 (Fla. 1981) and Sanders v. State, 403 So.2d 973 (Fla. 1981), consultation with a vehicle's driver prior to impoundment was usually required. It is clear that standard procedure for the Department of Highway Safety and Motor Vehicles [the Department] was in accord with the dictates of Miller and Sanders. See §11.04.02 of Florida Highway Patrol Policy Manual [Brief of Amicus Curiae, Appendix, p.2]. This, however, was the state of the law prior to Bertine, supra. Bertine, supra, has cast dark shadows of doubt on the continued validity of Miller and Sanders. Therefore, to simply state that the search sub judice

was unreasonable because there was no compliance with standard procedure, i.e., consultation, is fallacy and completely ignores that part of Bertine, supra at 3177, which rules that such "less intrusive means" are not required under the Fourth Amendment to the United States Constitution and South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

The petitioner asserts that under Bertine, supra, consultation is not required. Therefore, the reasonableness of the search sub judice must be considered without regard to that criterion. For the reasons stated in the petitioner's initial brief, the petitioner maintains that this impoundment and inventory search was reasonable.

Digressing slightly, the petitioner asserts that the respondent's first argument does not even correctly state its premises. The respondent, at page 28 of his answer brief, suggests that in this case consultation was required, both under the law and the Department's standard procedures. Since this case involved a suspected drunk driver, the law, as well as the policies of the Department, provided an exception applicable to this case. See, Sanders, supra; see also, the Department's Legal Bulletin 83-03 [Brief of Amicus Curiae, Appendix, pp.13-15]. The fact that the respondent was a border-line drunk driver, however, gave the district court a chance to second-guess the trooper about the respondent's sobriety. Although the petitioner does not quarrel with the district court about how it discerned the respondent's sobriety from a cold record, the petitioner does maintain that the chance for such second-guessing was promoted by

anomalies in Florida law prior to the recent Bertine decision. The petitioner asserts that a thoughtful re-evaluation of Miller, supra, and Sanders, supra is mandated by Bertine, supra. This Court's re-evaluation of this area of the law should result in bright line rules which will eliminate judicial second-guessing and promote reasonable regulations regarding impoundment to guide law enforcement officers in their duties.

In reply to the respondent's suggestion of bad faith, the petitioner asserts that the record belies such a claim. The record clearly shows that the trooper in this case was concerned with the propriety of the impoundment of the respondent's car in and of itself. There was much discussion of this amongst the officers (R 239-245). The petitioner asserts that the nature of this discussion truly indicates an effort to exercise a caretaker function, not to offer a pretext to search for evidence of other crimes. Therefore, the trooper's decision to impound was not tainted by bad faith. Naturally, the trooper's suspicions were justly aroused when the respondent began to change his story about the car and the money found therein. After the car had already been towed, the respondent even tried to offer the trooper some of the money that was in the car; this made the trooper very suspicious (R 54-66, 77-79, 243). These after-acquired suspicions, however, do not negate the reasonableness of the inventory search; once the respondent's car had been towed, it had to be thoroughly searched whatever the trooper's intentions.

The petitioner reasserts that notwithstanding the anomalies

in Florida law the primary question in determining whether the search sub judice is valid is whether said search was preceded by an impoundment which was reasonable under the circumstances. Here, the trooper had arrested the respondent for drunk driving. The respondent's sobriety and judgment were cast in doubt. The respondent's car was parked on the side of the road, albeit legally, miles from the nearest town (R 218). The trooper found thousands of dollars in cash in the car. The petitioner asserts it was entirely reasonable and extremely prudent for the trooper to have the respondent's car towed.

In Bertine, supra, the United States Supreme Court approved inventory searches based on regulations which allowed vehicle impoundments upon the arrest of the driver. If such was permitted in Bertine, the actions of the trooper in this case should not be condemned. It is undisputed that the trooper believed he was conducting an inventory search; in light of Bertine, supra, the trooper's impoundment and inventory search should be deemed reasonable and upheld on that basis.

A thoughtful reconsideration of this area of the law in light of Bertine, supra, must address those policy considerations articulated by the Department. Those policies, which mititate in favor of the petitioner, are logically presented by amicus curiae. Through the brief of amicus curiae, this Court can see how the Department has tried to articulate the law for the benefit of its officers. Through the brief of amicus curiae, this Court can also see how difficult it is for the ordinary highway patrolman to understand and apply Florida law, such as it

was prior to the Bertine decision. The Department's policy was for the driver of a vehicle to be consulted if he was "coherent". The fact that a trooper out on the road, a trial judge and a district court can all disagree on a conclusion about a driver's coherence plainly implicates that this Court should recede from Miller, supra, and allow the Department to promulgate reasonable regulations regarding impoundment of vehicles - regulations which are in plain terms and can be easily applied. Had there been regulations such as those in Bertine allowed in the State of Florida, the petitioner suggests that the troopers would not have had to spend so much time evaluating whether impoundment was proper; they could have just done it and gotten back out on the road.

Of all of the policy considerations discussed by amicus curiae, the policy which is of greatest interest to the public, and therefore worthy of emphasis here, is the policy of keeping the impaired, drunk driver off the road. A primary function of the Department and the Florida Highway Patrol is to maintain safety on the public highways; part of that function is to arrest the drunk driver. The citizens of the State of Florida have a keen interest in highway safety, and hence, in keeping the drunk driver off the road. This goal, however, can be frustrated if a drunk driver, once he has posted bond following his arrest, can get right back in his car and drive away. The roads in Florida become endangered once again and all of the effort in making the first arrest is for naught. Policy and logic both indicate that impounding a drunk driver's vehicle promotes safety on the

roadway. Even impoundments for this limited purpose are reasonable. Of course, the Bertine decision has approved of much wider impoundment regulations than this. This policy, however, should be considered and accepted by this Court.

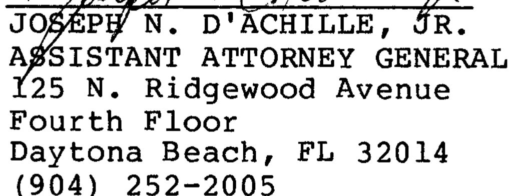
In conclusion, the petitioner asserts that this Court must reconsider Miller, supra, and Sanders, supra, in light of controlling federal authority. Matters of policy should be addressed and this Court should promulgate minimal basic criteria for vehicle impoundments. In doing so, this Court will undoubtedly conclude that the impoundment and inventory search herein was reasonable and should be upheld.

CONCLUSION

The petitioner hereby renews its prayer for relief as originally stated in its initial brief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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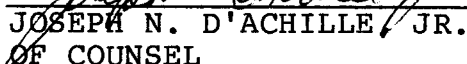
CONCLUSION

I HEREBY CERTIFY that a true and correct copy of the foregoing reply 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, and R.W. Evans, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Neil Kirkman Building, A-432, Tallahassee, FL 32399-0504, on this 4th day of May, 1987.



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