IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

PATRICK MORGANTI,

Respondent.

CASE NO.69,798

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the district court of appeal. Petitioner was the prosecution in the trial court and the appellee in the district court of appeal.

In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE

Respondent agrees with the statement in the initial brief except to add the following:

Respondent was placed on probation for two years for the offense of robbery.[1] R 262. After the Department of Corrections filed an affidavit charging that respondent violated his probation, he filed a motion to suppress physical evidence and statements with respect to the charge of possession of PCP. R 269-271. The trial court denied the motion to suppress, R 274-276, revoked respondent's probation, and adjudged him guilty. R 277. Respondent filed a motion to reopen the violation of probation final hearing and the motion to suppress. R 279-280. After a hearing, the trial court filed an amended order again denying the motion to suppress. R 288-289. The trial court found respondent to be an habitual offender, R 294, and sentenced him to 30 years' imprisonment. R 291. The sentencing guidelines called for a sentence of eight years in prison. R 290. Respondent timely filed his notice of appeal, R 296, and his appeal to the district court of appeal followed.

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[1] The robbery occurred on December 26, 1983. R261.

STATEMENT OF THE FACTS

Respondent agrees with the statement in the initial brief except to add the following:

A motion to suppress and the final hearing for violation of probation were heard together. The first witness for the state was Robert Harrison, a forensic chemist, who testified that State's Exhibit A consisted of a dollar bill wrapped around a substance which he identified as phencyclidine, commonly known as PCP. R 10-11.

The next witness was Officer Delarosa of the Hollywood Police Department. On the day in question he and Sergeant Kordzikowski were making a traffic stop in the parking lot of a pizza restaurant called Pizza King. Someone told Delarosa that there was a fight "to occur" at the restaurant. The officers went over to the restaurant and another person said that four white males had just left and were getting into a car. R 17-18. Delarosa, Kordzikowski, and Officer Smith went up to a car which was parked in the parking lot. Respondent was a passenger in the front seat of the car. R 18. The officers asked the persons in the car to produce identification. Only one of the persons had "proper identification." R 19. The officers ran a computer check, and arrested two of the persons on outstanding warrants. R 19. Delarosa was interviewing respondent and told him to stand in front of one of the patrol cars and to stay there while Delarosa went on with his investigation. Respondent kept walking around, and would not stay still. Delarosa informed him several times to stand still. R 20. Over objection, Delarosa testified that Kordzikowski told him that respondent had been involved in some

sort of shooting some years back with a DEA agent. Delarosa then told respondent to turn around so that he could pat him down for weapons. As he turned around and put his hands on the car, respondent reached into his right front pocket and threw down a dollar bill which Sergeant Kordzikowski seized. R 21. Asked to expand upon his testimony that respondent was walking around, Delarosa replied that respondent kept walking behind the officers, turning to the sides of the officers, and was very jittery. R21. On the way to police headquarters, respondent said that the officers "missed the subject that was selling PCP that was in the front door at the Pizza King." R23. Delarosa conducted a Valtox test of the dollar bill which showed positive. R22-23. Delarosa had not known respondent prior to the night of the arrest. R25. Delarosa did not see the fight that supposedly occurred at the pizza restaurant. He did not recall having heard or seen anything concerning weapons having been used in the supposed fight. R26. Delarosa had ordered the people from the car in order to investigate the possibility that a misdemeanor might have occurred. R26. Respondent refused to give identification, saying that he was a confidential informant. R27. Delarosa then ordered respondent to give his name and date of birth, and ordered him to stay by the police vehicle and not to leave. Respondent was detained. R27. Delarosa testified that respondent was not free to leave until after the investigation of the possible misdemeanor of disturbing the peace had been completed. R32. It was Delarosa's opinion that respondent was under the influence of alcohol or narcotics. R33.

The state's next witness was Sergeant Kordzikowski. He testified that patrons of the pizza restaurant told him that respondent and other subjects "were the ones involved in the disturbance." Asked if he was told anything specific about the disturbance, Kordzikowski replied: "That basically. Just the disturbance at that time." R36. Kordzikowski testified that although respondent initially said he would not give his name because he was an informant, he finally did give his name. Kordzikowski then spoke with a detective on the radio, who said that "the subject Morganti was involved in a shooting of a DEA agent several years prior to this." Kordzikowski gave this information to Delarosa, who then patted respondent down. R38. As Delarosa started to pat respondent down, respondent pulled a dollar bill from his pants pocket and threw it to the ground. R39. Kordzikowski picked up the bill. R39-40. He identified state's exhibit A as the dollar bill. R40. He testified that respondent seemed to be under the influence of alcohol or drugs. R40-41. Respondent was "slightly" under the influence. R41. Several minutes elapsed during the period from respondent's initial refusal to give his name until the time that he finally gave his name. R43-44. From the time of the stop until the time of the pat down, respondent was pacing around, and kept calling Kordzikowski to the side. He was walking in back of Kordzikowski, walking around the car, and kept putting his hands in his pockets and taking them out. He seemed fidgety and quite nervous. He was wearing blue jeans and a shirt tucked into his

pants. R49. Kordzikowski was unable to testify whether he saw any bulge in respondent's clothes which would have indicated that he was carrying a weapon. R49-50.

Officer Smith testified that when the officers arrived at the pizza restaurant one of the employees pointed to a car parked in the lot with several persons standing around it. The employee said that they were the persons involved in the disturbance at the bar. According to Smith, the employee said that the persons were "just refusing to leave and being loud and so on." Asked for further details about what employees said to him, Smith testified: "It was just. They were all intoxicated or under the influence and I don't exactly remember the exact disturbance but they refused to leave and were loud. That I remember him stating. Other than that, they were beginning to leave as we were there." R53. The manager did not say that they were drunk and disorderly, but said that they refused to leave and were loud. R54. The officers then went over to the persons by the car and asked them for identification. Smith noticed that respondent was definitely under the influence of something. R54. Respondent was not comprehending what the police were saying, was very fidgety, was walking around, and would not stay put. He initially refused to give his name, saying he was an informant. Smith testified that the officers received information over the radio from a detective that "possibly this subject, or father, or one of the members of the family was involved in the shooting of a DEA agent." R55. The officers then decided to pat respondent down. R55. As they set about patting him down, respondent reached into his pants pocket, pulled out a dollar bill and threw

it to the ground. R56. On cross-examination, Smith admitted that he did not know whether the person to whom he had spoken at the restaurant was an employee; he may have been a customer. R57-58. For all he knew he was simply a person sitting at a table who did not like the people who were making noise. R58.

The next witness was Donna Stark, respondent's probation officer. She testified that respondent was behind in paying his costs of supervision. R63. She testified that respondent failed to submit to an evaluation for counseling or for placement in a drug, alcohol, psychological, or sociological program. R65. Ms. Stark did not give respondent a deadline, within the two-year probationary period, by which he would have to submit to evaluation. R68. On June 4, 1985, she discussed the matter with respondent; she did not tell him that his probation would be revoked for his failure to submit to evaluation.Respondent also did not pay any of his public defender's fee. R66-67. Ms. Stark testified that she had verified that respondent was working for a furniture company and was working for several different roofing companies. She did not know how much he was making. R67.

Defense counsel said that he would not call respondent to testify as to the motion to suppress, and the trial court then heard argument on the motion.

Respondent did testify on his own behalf as to the charges of violation of probation. He testified that he did not think that there was any specific time limit during which he would have to seek the entrance into the treatment program. R84. He also testified that he did not have the money to pay for a treatment program, and did not have a car in which to drive to the program.

R86-87. He testified that he had worked for a furniture company for approximately a month, and then, after being laid off, went to work for various roofing companies. R87. He admitted that he did not pay the $40.00 cost of supervision, and did not pay anything toward the public defender's fee, testifying that he had an understanding with his attorney on that matter. R91-92.

After the conclusion of respondent's testimony, a somewhat tangled discussion ensued between the trial court, the prosecutor, defense counsel, respondent, and the probation officer. The hearing concluded with the trial court stating that he would let respondent "discuss the legal issue at another time." The trial court said that the matter would be continued until the next week. R104.

The case came up again before the trial court nine days later, at which time the trial court then heard extensive argument on the motion to suppress. During the course of the discussion, the prosecutor argued that the defense had failed to establish standing. The trial court responded by saying: "I would accept the police officers' testimony as state witnesses that they saw him throw this down and he discarded it. I would accept that. I would think that establishes his standing." R119. When defense counsel started to argue the standing issue, the trial court cut him off saying: "I'm all right with the standing. I think their witnesses prove the standing." R130. The hearing concluded with the trial court stating that he would think the matter over. R132.

On September 20, 1985, the trial court entered an order denying the motion to suppress. R274-276. The case came up again before the trial court on October 21, 1985. The trial court judge remarked that he had already denied the motion to suppress and asked if there was anything more to be done in the case. R135. The prosecutor said that he had put in all of his evidence except to formally introduce the contraband into evidence. R136. The trial court accepted it into evidence. R136. Asked if he had anything to present, defense counsel said that respondent had already testified. Respondent then said that he had a few things to say. R137. Respondent was placed under oath and gave a rambling discourse concerning a lie detector test he had given while working as an informant for federal authorities. R137-138. He said that he had not used the PCP. R138. Respondent described his discussion with the police officer as follows:

> The State Attorney has me as a witness for several different cases. He says I don't care what you did for them. You're a scum bag as far as I am concerned and that dollar is yours. I said no, it isn't. He said yes, it is and he arrested me.

R139-140.

Asked if he was telling the court that he did not throw the bill down,he replied: "I swear to God I'd take a lie detector test now to prove that." R140. The trial court then found that respondent violated his probation by possession of PCP, and adjudicated him guilty. R140-141.

On November 25, 1985, defense counsel filed a motion to reopen the violation of probation proceedings and the motion to suppress. R279-280. The basis of the motion was that defense counsel had newly discovered evidence to present which would contradict the testimony of the police officers.

The case came up before the trial court on December 20, 1985. At that time the trial court judge heard the additional evidence presented by respondent.

The first defense witness was Michael Russo, respondent's brother, who was with him on the night of his arrest. He testified that he, respondent, and several others went out for drinks at Pat's Bar. They did not go to the Pizza King Restaurant. R151.[2] Respondent's party was parked in a parking lot when a police car pulled up behind them, blocking their way out of the parking lot. R152. Three officers came up to the car, and the people got out of the car. R153. The officers patted them down. R153. Russo was sure that respondent was patted down with the others. R154. Russo saw an officer searching respondent or attempting to search him, and saw the police officer bend over and pick up a dollar bill. R155-156. Russo heard someone say something along the lines of: "look what Morganti dropped." R160. An officer standing next to Russo, who was in no position to be able to see the dollar bill, also said that he had seen respondent drop it. R160-161. Russo heard respondent say that the dollar bill was not his. R163.

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2 The Pizza King Restaurant and Pat's Bar stood next to each other, and respondent's party parked in a parking lot 20 or 25 feet from the Pizza King. R155.

The next defense witness was Mitchell Rosenhain, the driver of the vehicle in question. He testified that a police vehicle came up and police officers ordered everyone out of the car. The officers started checking everybody and asking questions. R171. He testified that he was searched a total of three times that night by the police. R174. He testified that the group was not in the pizza restaurant that night. R176-177.

The next witness was Randy Redford, respondent's half brother, who was also with the group on the night in question. He testified that they were about to pull out of the parking lot of Pat's Bar when they were stopped by the police. R179. He testified that, when the police said that respondent had dropped the dollar bill, respondent said that he had not dropped anything out of his pocket, and Russo asked the policeman how he could see it. R181-182. The police officer talking to Redford at that time was also not in a position to be able to see the dollar being dropped and picked up. R182. They had been in Pat's Bar that night because respondent was supposed to be working for a federal agent, finding out something about someone at the bar. R184-185. The police officers searched Redford as soon as he got out of the car, and searched him again later. R187.

The defense called Officer Delarosa. He testified that a patron from Pizza King directed the officers to the restaurant, where a barmaid told them that "a group of subjects were causing a disturbance with another one of the patrons." R191-192. The barmaid went outside with Delarosa and pointed down the sidewalk to some persons. Asked if the barmaid identified those persons as the ones who were "doing this," Delarosa replied: "I don't

recall exactly what she said." R192. There were six people in the car. R193. Delarosa did not ask any of them whether they had been in the pizza restaurant and never went back to the restaurant to find out any additional information about the supposed disturbance. R195-196. None of the six people in the car gave any indication that they had been in Pizza King. R196. Asked by the trial judge whether anyone indicated that they were not in the Pizza King, Delarosa replied: "No, judge. The only reason I knew they were is from the barmaid who pointed at them and said that's them. While I was walking up to the Pizza King with the patron this group of subjects were walking towards the car from the Pizza King and in that direction. They were walking southbound toward their car." R196. Delarosa repeated his previous testimony that respondent reached inside his pocket and threw down a dollar bill as Delarosa was about to search him. R198-199. Delarosa testified that Rosenhain's car was parked halfway between Pizza King and Pat's Bar. R202. Delarosa testified that he could not remember whether it was the barmaid or a patron who had pointed down the sidewalk and said, "that's them." R203. Asked what he told the occupants of the car when he went up to it, Delarosa replied: "I told them we had a complaint of a disturbance and they were involved with the disturbance." The two women with respondent were extremely intoxicated. The person who originally flagged down the officers never did point to respondent's group and say that they were the persons involved in the disturbance. R206.

Respondent testified on his own behalf. He testified that he was searched twice on the night in question. He testified that when he tried to explain to one of the officers that he was a confidential informant, the officer said: "Morganti, I don't care what you have been doing for them. As far as I am concerned you are still a scum bag." R208. Respondent was searched as soon as he got out of the car. R208. Delarosa emptied respondent's pockets, removing a couple of folded dollar bills. Delarosa did not pick up a dollar bill at that time. About five minutes later, Delarosa picked up a dollar bill from the ground and searched respondent again. R209. The rolled up dollar bill was not respondent's and he had never seen it before in his life. R201. The PCP was not his. R201.

After respondent's testimony, defense counsel stated that he had subpoenaed Officer Barber, and that Barber had failed to appear. The trial court judge said that he would recess the proceedings until December 30th so that respondent could bring in his witnesses. R224.

When the case came up again on December 30, 1985, there was further discussion of defense counsel's attempts to subpoena witnesses. Defense counsel said that he was unable to get a subpoena served on Barber to appear on the 30th because he needed ten working days in order to have the subpoena served. R227. After further discussion, the prosecutor and the defense attorney left the court room to speak with Officer Barber on the phone, and, upon their return, stipulated to what Barber would testify to at a hearing. R229-230. According to the stipulation, Barber would have testified that Kordzikowski called the station to find

out if any one knew about any one named Morganti. Barber told Kordzikowski that "he knew of Morgantis." Barber did not remember any conversation concerning the shooting of a DEA agent or any mention of a specific member of the Morganti family. He did tell Kordzikowski that he knew of some Morgantis that dealt in machine guns. Barber had no information to indicate that respondent was, in fact, a member of this Morganti family that dealt in machine guns. According to the prosecutor, Barber had also said on the telephone that he knew that the Morganti family worked together, but defense counsel said that he did not specifically remember that part of the conversation. R230-231.

After further discussion, the trial court recessed the proceedings. On January 22, 1986, the trial court entered an amended order denying the motion to suppress. R288-289.

The case came up again on January 26, 1986. At that time defense counsel said that he had prepared a motion to recuse the trial judge, but was unable to file it because he had been unable to get two persons to sign affidavits setting forth the facts relied upon as grounds for disqualification as required by Rule 3.230, Florida Rules of Criminal Procedure. R240-241. The basis of the motion to recuse was that the trial court judge had made unfavorable remarks about respondent at the sentencing hearing for Mr. Rosenhain. Defense counsel stated that he had spoken with "in excess of 10 people" about the motion, but they all refused to sign the necessary affidavits. R242-243. The trial court then proceeded to find that respondent violated his probation by possession of phencyclidine. R243-244. The trial court judge said that he was not going to find respondent in

violation of his probation as to the charges of failing to pay his costs of supervision and of not paying his public defender's fee. Although the trial court found that respondent had failed to attend a drug, alcohol, psychological, or sociological rehabilitation program as of July 15, 1985, the trial court did not specifically say whether he was finding respondent in violation of his probation as to this allegation. R244.

The state moved that respondent be declared an habitual offender. The trial court found that he had three prior felony convictions. R256. The trial court declared:

> The Court does find that under the section 775.084, it is necessary for the protection of the public from further criminal activity by the defendant that he be declared an habitual felony offender and that in this particular case he should be sentenced to be incarcerated with the Division of Corrections for a period of 30 years.

R258.

The prosecutor asked whether the court would make additional findings as to why it was necessary that respondent be found to be a habitual offender, and the trial court replied: "I will. It's obviously based upon his record." R258.

SUMMARY OF ARGUMENT

1. Assessment of costs against respondent under section 27.3455, Florida Statutes (1985) violated the Ex Post Facto Clause since the crime occurred before the effective date of the statute.

2. The trial court erred by denying the motion to suppress. The officer who ordered respondent to submit to a pat down for weapons did not have such information available to him as to justify a well-founded suspicion that respondent was armed and dangerous. Hence the order that respondent turn around and submit to a pat-down search was illegal. Respondent did not lose standing to attack the search by throwing down the drug-laden dollar bill.

3. The trial court erred by revoking respondent's probation. The charge of possession of P.C.P. should have been dismissed because the P.C.P. should have been suppressed as argued above.

POINT I

IMPOSITION OF COSTS UNDER SECTION 27.3455, FLORIDA STATUTES (1985) VIOLATED THE EX POST FACTO CLAUSE

The crime of which respondent was found guilty occurred in 1983, R261, well before the July 1, 1985 effective date of section 27.3455, Florida Statutes (1985). Nevertheless, the trial court assessed $200 in costs against respondent pursuant to section 27.3455. R277. A law which is retroactive and more onerous than the law in effect on the date of the offense violates the Ex Post Facto Clause. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Manifestly, it is more onerous to have to pay $200 than not to have to pay $200. Hence, the retroactive application of section 27.3455 to respondent violates the Ex Post Facto Clause.

POINT II

THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS

Officer Delarosa testified that he saw respondent throw down a dollar bill after Delarosa told him to turn around to be patted down for weapons. R21. At the time of the pat down, Delarosa knew the following. Someone had told Delarosa "that there was a fight to occur at Pizza King." R18. Delarosa and other officers went to Pizza King, and Delarosa learned the following: "At that point one of the patrons told us that four white males just left. That they were getting into a car and were about to leave." R18.[3] The officers stopped the car, and had its occupants get out. Respondent, one of the car's passengers, kept walking around. Delarosa testified that Sgt. Kordzikowski told him "that Mr. Morganti was involved in some type of shooting a few years back with a DEA agent." R21. It was then that Delarosa ordered respondent to turn around so that he could be patted down for weapons. R21.

From the the foregoing, all that Delarosa knew when he ordered respondent to turn around to be searched was that he had left a restaurant where a fight was to occur or had occurred, and that he had been "involved in some type of shooting a few years back with a DEA agent."

The exclusionary rule applies to violation of probation cases. State v. Cross, 487 So.2d 1056 (Fla. 1986). A police officer may legally pat down the passenger of a stopped vehicle only upon a founded suspicion that the passenger is "armed and

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[3] At record pages 191-192 Delarosa testified that it was a barmaid who fingered respondent's party.

dangerous." Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1969), Michigan v. Long, 463 U.S. 1032, 1049, n.14, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (applying Terry to investigative stops of automobiles).

A person who "ditches" or abandons contraband in the face of an illegal search or arrest does not lose his right to contest the illegal search. Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974), State v. Lundy, 334 So.2d 671 (Fla. 4th DCA 1976), R.J.M. v. State, 456 So.2d 584 (Fla. 3rd DCA 1984).

In view of the foregoing cases, respondent argues that Officer Delarosa did not have sufficient information upon which to base a conclusion that respondent was armed and dangerous. Hence, the pat down was illegal. Further, throwing down the dollar bill when faced with the illegal search did not constitute abandonment of the bill. Finally, it is clear that the trial court erred by finding both that respondent did not possess the P.C.P.-laden dollar bill (so that he did not have standing to challenge its seizure) and that he did possess the dollar bill (so that he violated his probation), the two findings being contradictory to one another.

In view of the foregoing, the trial court erred by denying the motion to suppress.

POINT III

THE TRIAL COURT ERRED BY REVOKING RESPONDENT'S PROBATION

The affidavit of violation alleged four charges of violation of probation: possession of PCP, a controlled substance; failure to pay costs of supervision; failure to submit to evaluation for counselling or treatment; and failure to pay the Public Defender's fee. R266. The District Court of Appeal has already ruled that the only basis for the revocation of probation was the possession of P.C.P.

Respondent submits that the trial court erred by revoking his probation on the ground that he possessed P.C.P. In this regard, he relies on the argument in Point II above that the trial court erred in not suppressing the P.C.P. He also submits that the trial court erred by finding both that respondent did not possess the P.C.P. so that he lacked standing to attack its seizure and that respondent did possess the P.C.P. so that he was guilty of violating his probation: the two factual findings simply contradict each other.

CONCLUSION

The district court correctly ruled that the $200 in costs should be stricken, and that ruling should be affirmed. The portions of the district court opinion affirming the denial of respondent's motion to suppress, and affirming the revocation of his probation should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Lee Rosenthal, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 12 day of March, 1987.

Of Counsel