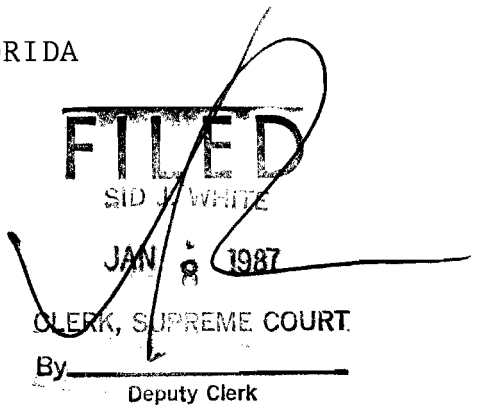
IN THE SUPREME COURT OF FLORIDA



CASE NO. 69,814

JAMES KEHOE and
MICKEY De VIVO,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition to Invoke Discretionary Jurisdiction to
Review Decision of the District Court of
Appeal of Florida, Fourth District

BRIEF OF PETITIONER IN SUPPORT OF JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Fourth District's opinion fully sets forth the facts upon which it reversed the trial court's order suppressing evidence seized after the defendants' vehicle was stopped by the Deerfield Beach police. Those facts, briefly stated,[1] are summarized as follows: at 3:00 a.m. on the date in question, a police officer observed a pickup truck with a boat trailer attached to it parked at an intersection. The officer "thought" this to be "unusual." Slip opinion (hereinafter S.O.) at 1. The officer also observed that the license tag on the trailer (not the truck) was bent, "making the number difficult to read." S.O. at 2.

At 5:45 a.m., the same officer observed the same truck and trailer at a city park boat ramp that is open 24 hours a day; the trailer was ready to load an incoming boat, and the officer observed defendant De Vivo standing by the truck. The officer was "suspicious" because of the early hour. S.O. at 2.

At 7:55 a.m., another officer observed a boat, driven by defendant Kehoe, approach the boat ramp. Defendant De Vivo backed the trailer into the water and Kehoe, looking around as he approached the loading ramp, drove the boat onto the trailer. The boat did not have registration numbers on its side. The police were aware that illegal drugs had previously come into the park by boat. S.O. at 2.

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[1] Petitioners will be referred to as defendants and the respondent will be referred to as the State. All emphasis herein is added unless otherwise indicated. The Fourth District's decision (see appendix) at page 8 contains a summary of the facts leading to the stop of the defendants' vehicle and trailer.

After defendant Kehoe drove the boat onto the trailer, he remained on board while defendant De Vivo pulled it about 75-100 yards from the dock; Defendant Kehoe then climbed into the driver's seat and the truck drove out of the park. The police "thought" this to be "unusual" since Kehoe did not drain water from the boat and failed to secure it before driving away. S.O. at 2-3. In addition, the officers observed in the back of the truck three water containers, some rocks, and fertilizer bags which, in the officers' "opinion" were used for additional weight to assist the truck in pulling a heavy load up the ramp. S.O. at 3. The officers concluded from these observations that the boat "was being used for drug trafficking." S.O. at 3. Accordingly, they instructed a uniformed police officer to stop the truck and trailer, which stop resulted in the discovery of marijuana in the boat. S.O. at 3.

The Fourth District, in reversing the order of suppression, expressly found that "there is no question but that the bent tag obscuring one of the digits is a comparatively minor infraction which would not necessarily result in a stop." S.O. at 13. In addition, the Fourth District expressly recognized the rule that "presence of an individual at an unusual hour in an area where previous crimes had been committed is not enough to support a founded suspicion of criminal activity." S.O. at 5.

As to the initial basis for its holding, that there was a reasonable suspicion to justify the stop of the vehicle, the Fourth District expressly rejected the applicability of the Second District's decisions in Carter v. State, 454 So.2d 739 (Fla. 2d DCA

1984), and Kayes v. State, 409 So.2d 1075 (Fla. 2d DCA 1981), rev. denied, 424 So.2d 762 (Fla. 1982). Instead, the Fourth District applied the decisions of the Third and Fifth Districts in State v. Lawson, 446 So.2d 202 (Fla. 3d DCA), rev. denied, 453 So.2d 44 (Fla. 1984), and State v. King, 485 So.2d 1312 (Fla. 5th DCA 1986).

As for its alternative holding, concerning the pretextual stop argument, the Fourth District expressly rejected the Second District's rule set forth in such cases as State v. Holmes, 256 So.2d 32 (Fla. 2d DCA 1971), aff'd, 273 So.2d 753 (Fla. 1972); State v. Gray, 366 So.2d 137 (Fla. 2d DCA 1979); Diggs v. State, 345 So.2d 815 (Fla. 2d DCA), cert. denied, 353 So.2d 679 (Fla. 1977); and the First District's decision in Porchay v. State, 321 So.2d 439 (Fla. 1st DCA 1975), overruled in part on other grounds, Ensor v. State, 403 So.2d 349, 355 (Fla. 1981), and adopted instead as the "better rule" the Third District's reasoning in such cases as Bascoy v. State, 424 So.2d 80 (Fla. 3d DCA 1982), and State v. Ogburn, 483 So.2d 500 (Fla. 3d DCA 1986).[2] In so doing, the Fourth District expressly recognized that the decisions which have followed Holmes have "continued to strictly follow [its] rule and thus to distinguish between more serious and less serious traffic offenses in determining whether a stop is a valid traffic stop in situations where the officer's primary motivation for the stop was

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[2] In addition, although not cited by the Fourth District in the case sought to be reviewed herein, see the Fifth District's decision in State v. Irvin, 483 So.2d 461 (Fla. 5th DCA 1986). Irvin is expressly cited by the Third District in Ogburn.

suspicion of serious criminal activity." S.O. at 10. After recognizing and rejecting the Holmes, Diggs, Gray, and Porchay[3] decisions, the Fourth District expressly noted "the likelihood of conflict between the districts as to what is or is not a sufficiently serious traffic offense to avoid the stop being characterized as a pretext stop." S.O. at 11.

Accordingly, on the prextextual stop issue, the Fourth District holds that it will no longer assess the seriousness of the traffic offense involved and so long as the police officer "could" make a traffic stop, the fact that he "would not necessarily" do so absent suspicion of other more serious criminal activity will no longer "be considered relevant to the question of the officer's authority to make the traffic stop." S.O. at 13.

SUMMARY OF THE ARGUMENT

The Fourth District has directly and expressly conflicted with abundant Florida decisional law that a drug trafficking profile will not, without more, constitute a reasonable suspicion to justify an investigative detention. Instead of relying upon controlling decisions from other district courts, the Fourth District has relied upon distinguishable decisions and thus misapplied the rule of law of those cases.

In addition, the Fourth District has expressly conflicted with the established law in Florida for assessing whether a minor traffic infraction for which a citizen would not ordinarily be

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[3] The Fourth District expressly characterized the Porchay decision as "a case which is substantially similar to the present case. . .". S.O. at 11.

stopped is a pretext for an ulterior motive of the police to search based on a bare suspicion of criminal activity.

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH, OR MISAPPLIES, THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE ISSUES OF WHAT CONSTITUTES REASONABLE SUSPICION TO JUSTIFY A VEHICLE STOP, AND THE TEST TO APPLY IN DETERMINING WHETHER A STOP IS PRETEXTUAL.

Based upon the facts observed by the surveilling officers, summarized at page 8 of the District Court's decision, the Fourth District holds that a reasonable suspicion justified the stop of the defendants' truck and trailer. In so doing, the court expressly and directly conflicts with the Second District's decisions in Carter v. State, and Kayes v. State. In Kayes, it is clear that surveilling police officers, based upon their experience in narcotics investigations, applied a "profile of a typical drug smuggling operation" in stopping the defendant's vehicle. See 409 So.2d at 1076. Armed with knowledge of this "profile", the officers observed a van parked inside a warehouse; later, a Ford vehicle was driven into the warehouse and the officers "became suspicious" when they observed the defendants leave the warehouse in the Ford which was then "weighted down with its chassis close to the ground." Id. at 1077. Later, as the defendants ate at a restaurant, they "appeared nervous" and when they drove off in the Ford, the surveillance had a uniformed officer stop the vehicle. The police then smelled marijuana and arrested the defendants, leading to the seizure of marijuana. Id. It is submitted that the Kayes facts are materially indistinguishable from those in the case

at bar where, based upon the observations of the events at the public park and boat ramp, the officers were "suspicious", S.O. at 2, and "concluded that the boat was being used for drug trafficking." S.O. at 3. The police here, no less than those in Kayes, clearly applied an unwritten "profile" of suspected drug traffickers to effectuate the stop of defendants' boat and trailer. However, here as in Kayes, "police had no actual knowledge that [defendants] were engaged in any criminal activity." Id. at 1077. The Kayes holding is equally applicable here:

> [M]eeting the criteria of such a [drug] profile does not, in and of itself, create a well-founded suspicion of criminal activity. As appellants left the warehouse, the police assumed drugs were weighting the vehicle down. Id. at 1078.

Kayes expressly held that "a drug smuggling profile, a loose set of characteristics believed to be typical of a drug smuggling operation, cannot constitute a reasonable suspicion of criminal activity enabling an officer to stop a participant." Id. at 1078 n.2. The Fourth District rejects this settled rule of Florida law.

In Carter, also rejected by the Fourth District here, officers patrolling parking lots where illegal narcotics distribution was prevalent, observed defendants in a vehicle parked at a parking lot of a lounge; an interior dome light was on and one of the defendants was observed looking around prior to bending down in the front seat. One of the surveilling officers "believed" that the defendant was ingesting cocaine and approached the vehicle. After securing the occupants, the officers observed a white powder and arrested them. The Second District found no reasonable

suspicion, notwithstanding the prevalence of drug activities in the parking lot, noting that the observed conduct "was at least equally consistent with noncriminal activity." 454 So.2d at 742.

Instead of following Kayes and Carter, the Fourth District applied State v. Lawson and State v. King. In so doing, the defendants submit that the Fourth District misapplied the correct rule of law emerging from Lawson and King to the facts of the case at bar.[4] In Lawson, police observed defendant driving at about 4:30 a.m. very slowly and around the same block four or five times. The only store open was an all-night gas station which had been the scene of previous burglaries in the recent past. The Third District held that the time and location, as well as the prior burglaries, plus the circling of the block four or five times at about 10 miles per hour gave rise to a reasonable suspicion to justify the stop. Certainly, these facts are totally distinguishable from the innocent conduct observed by the police in the case at bar.

In State v. King, supra, in addition to observing the defendants drive by slowly and park at a bar known for drug dealing and prostitution, police observed the car back up to the rear door of the building with its engine running in a manner so as to "provide a quick exit" thus giving rise to a reasonable suspicion of criminal activity. Again, no such conduct appears in the case at bar.

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[4] Clearly, such a "misapplication of the law" vests this Court with discretionary review jurisdiction. See Guerrero v. State, 289 So.2d 396, 398 (Fla. 1974).

Finally, the Fourth District, in finding a reasonable suspicion in the case at bar, expressly cited, but rejected, Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983), and Levin v. State, 449 So.2d 288 (Fla. 3d DCA 1983), aff'd, 452 So.2d 562 (Fla. 1984). In Freeman, police observed the defendant at 2:20 a.m. in the parking lot of a building where there had been numerous automobile break-ins while carrying a lit flashlight. Police later observed the defendant's car drive out of the parking lot and stopped it, subsequently seizing evidence. The Second District held that the observed conduct, even coupled with the "rash of vehicle burglaries" in the area, while giving rise to a "suspicion," did not give rise to a "founded" suspicion of illegal activity. 433 So.2d at 10. In Levin, defendant was observed walking in a "high class" residential area which had experienced burglaries at about 3:30 a.m. The Third District and this Court held that this conduct did not provide a reasonable suspicion to stop the defendant. Although the Fourth District gives "lip service" to Freeman and Levin, S.O. at 5, that court refused to apply them to the case at bar.

It is submitted that in finding a reasonable suspicion, the Fourth District has created a dangerous precedent which at once directly and expressly conflicts with Kayes, Carter, Freeman and Levin, and missapplies Lawson and King.

On the pretextual stop issue, a mere reading of the Fourth District's decision reveals its direct and express conflict with the Second District's decisions in Holmes, Gray, and Diggs, and the First District's decision in Porchay. Holmes held that a

stop is not pretextual if the gravity of the infraction is such that "any citizen would routinely be stopped for it. . .". 256 So.2d at 34. The gravity of the infraction test was applied to find a pretext in Gray (missing tag and taillight); Diggs (suspicion of invalid license), and in the indistinguishable (see note 3, supra) Porchay (license tag bent and not fully readable).

The Fourth District's opinion expressly recognizes the "likelihood of conflict between the districts" in application of the Holmes gravity of the offense rule. The Fourth District cites the Third District's decisions in Bascoy v. State and State v. Ogburn as support for its "better rule" that regardless of whether the police would have stopped the defendant, so long as they merely could have stopped him, the stop will be lawful.[5] While Bascoy does not reveal the gravity of the infraction, Ogburn does reveal dangerous obstruction of traffic and lane changing on an expressway. In contrast, the Fourth District expressly recognized in the case at bar that the bent license tag was a "comparatively minor infraction which would not necessarily result in a stop." S.O. at 13.

The Fourth District's "better rule" ignores the abuse of the citizenry that such a per se rule imposes and divests both trial and appellate courts of their traditional role in protecting against abusive police stops. Since the conflict of decisions is

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[5] The "would" versus "could" issue was expressly left open in the Fifth District's recent State v. Irvin, 483 So.2d 461, 462 n.2 (Fla. 5th DCA 1986). There, clearly the gravity of the offense was such that any citizen would have been stopped.

manifest, this Court should exercise its discretionary review jurisdiction.[6]

CONCLUSION

The defendants respectfully request this Court to grant discretionary review of the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Amy Lynn Diem, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 5th day of January, 1987.

Mark King Leban

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[6] The United States Supreme Court has granted certiorari in Missouri v. Blair, 40 Crim.L.R. 4008, to review a Missouri Supreme Court decision that a traffic arrest was a mere pretext. See Missouri v. Blair, 691 S.W.2d 259 (Mo. 1985).