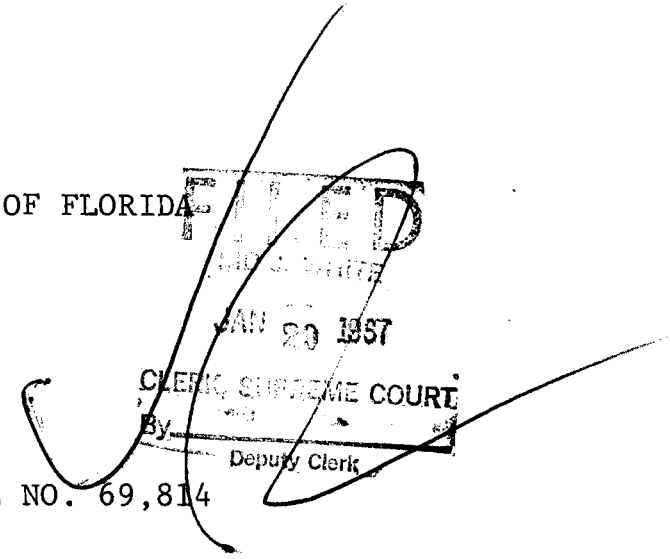
IN THE SUPREME COURT OF FLORIDA



JAMES KEHOE and
MICKEY DeVIVO,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,814

AMENDED BRIEF OF RESPONDENT ON JURISDICTION

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LIST OF CITATIONS

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellee in the District Court of Appeal, Fourth District. Respondent was the prosecution in the trial court and the Appellant in the Fourth District.

In the brief the parties will be referred to as they appear before this Honorable Court, except that the Petitioners may also be referred to as the defendant.

The following symbols will be used:

"A" Appendix.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on pages one (1) through four (4) of Petitioner's Jurisdictional Brief, to their limited extent, with the following additions:

The trailer was parked in a "no parking" zone as though ready to load an incoming boat. (A2). The officer was suspicious because boats seldom pull into the park so early in the morning. (A2).

At 6:45 a.m. Officer Williams reported his observations to Vice Officers Null and Hurt who continued surveillance.

At 7:55 a.m., Kehoe created a wake in a no wake zone

while entering. In addition to noticing the water containers, rocks, and bags of fertilizer in the back of the truck used to pull the boat out, Officer Null also observed that the tag on the trailer was bent. (A3).

As the truck and boat left the park, Null contacted Officer Dusenbery to stop the truck. As Dusenbery came up behind the trailer he could not read all of the numbers of the bent license tag. Dusenbery later testified that, although he stopped the vehicle primarily because of Null's instructions, he would have stopped it for the tag violation alone. (A3).

SUMMARY OF THE ARGUMENT

Petitioner has not, and cannot, demonstrate that the decision of the Fourth District Court of Appeal in the instant case "expressly and directly" conflicts with other state appellate decisions pursuant to Florida Constitution Art. V, Section 3(b)(3). Therefore, this Honorable Court should decline to accept jurisdiction of the case.

POINT INVOLVED

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL PRESENTS DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION; AND THEREFORE, WHETHER THE SUPREME COURT'S JURISDICTION CAN BE PROPERLY EXERCISED?

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT PRESENT DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION; THEREFORE, THE SUPREME COURT'S JURISDICTION CANNOT BE PROPERLY INVOKED.

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result, than other state appellate courts faced with substantially the same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Article V, §3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). Petitioner has not and cannot demonstrate that the decision of the Fourth District Court of Appeal in the instant case expressly and directly conflicts with another state appellate decision. Therefore, Respondent respectfully requests this Honorable Court to decline to take jurisdiction in this case, since Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Contrary to Petitioner's assertions, the Fourth District's finding of founded suspicion to justify the stop of defendants' truck and trailer, does not directly and expressly

conflict with 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) where the facts in the case at bar are not only distinguishable from those cases, but strongly support the officers' founded suspicion. In Kayes, supra, the surveilling officers applied a drug courier profile in stopping the defendant's vehicle after observing a van parked inside a warehouse and observing a Ford vehicle entering the warehouse. The officers became suspicious when they observed the defendants leave the warehouse driving the Ford which appeared to be weighted down. Kayes, at 1077. During the course of the surveillance, the officers noticed that the defendants appeared nervous while eating at a restaurant. The appellate court held that no founded suspicion existed to justify the stop. It is clear from reading the Fourth District's opinion in the case at bar that the court was merely surveying divergent sets of facts from different district court opinions to illustrate between stops which are valid or invalid based upon founded suspicion. The instant case presents far more egregious facts than those present in Kayes. In the case at bar, no testimony was adduced at the suppression hearing that the officers stopped the defendants based upon a "drug courier profile". These facts simply do not exist in the present case. Simply because the truck was weighted down as if to assist in pulling a heavy load does not compel the conclusion that the stop

was based on a profile. Rather, there were a number of factors witnessed by the officers which created founded suspicion, namely, the boat operator's actions in looking around as he approached the boat ramp and the haste with which the defendants loaded the boat onto the boat trailer and left the park. The scarab boat created a wake in a no wake zone and after the boat was loaded, the defendants failed to secure it or to pull the plug to drain the water. Contrary to Petitioner's assertions that the Fourth District rejected the rule that a drug smuggling profile in and of itself does not create a founded suspicion of criminal activity, the court merely declined to follow it as it was not a concern in the instant case where the stop was not based upon a drug courier profile. The Fourth District correctly found that all of the circumstances witnessed by the officer in light of their knowledge and experience created a founded suspicion.

Similarly, the facts of Carter, supra, also rejected by the Fourth District, are also distinguishable and do not create express and direct conflict. In Carter, supra, officers patrolling parking lots noted for illegal narcotics distribution, observed the defendants in a vehicle parked at a lounge. The interior light was on and the officers observed the defendants looking around prior to bending down in the front seat. The appellate court found no reasonable suspicion to justify the stop. Certainly, in the case at bar, there was more present than

just the suspicious actions of the defendant in looking around. Petitioner's brief, rather than showing express and direct conflict with Kayes and Carter, relies upon cases which involve markedly weaker facts.

In concluding that the stop was reasonable, the Fourth District reviewed the divergent facts of many appellate decisions regarding what is sufficient to support a finding of founded or reasonable suspicion. There is no one case with precisely the facts of the instant case. Petitioners also maintain that conflict exists with regard to 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). However, the Fourth District correctly found that the instant case was more akin to Lawson and King. In King, supra, the police observed the defendants drive by slowly and park at a bar known for drug dealing and observed a car back up to the rear door of a building with its engine running in a manner so as to provide a quick exit, thus giving rise to a founded suspicion of criminal activity. Petitioner's argument that no such conduct occurred sub judice is specious. Indeed, all of the facts sub judice indicate that the defendants were in a big hurry to get the boat out of the water and leave the park. As in Lawson, supra, all of the factors taken together support a founded suspicion of criminal activity. Lawson and King, supra, are illustrative of the cumulative effect of all of the unusual circumstances.

Petitioner additionally argues that the decision of the Fourth District conflicts with Freeman v. State, 433 So.2d 9 (Fla. 2 DCA 1983) and Levin v. State 449 So.2d 288 (Fla. 3d DCA 1983), aff'd 452 So.2d 562 (Fla. 1984). Respondent maintains that the Fourth District correctly rejected Freeman and Levin, supra, where the Fourth District acknowledged that the case at bar involves much more than the mere presence of the defendants at an unusual early morning hour. (A.5-6).

Turning to the pretextual stop issue, that as to the problem of whether a traffic infraction is sufficiently serious to justify a stop of a vehicle where the officer's primary motivation for the stop was suspicion of serious criminal activity, the Fourth District Court aligned itself with the cases holding that where an officer observes a traffic infraction and makes a stop, the stop is not invalidated by the fact that an officer would not have stopped a defendant but for the suspicion that the defendant was involved in criminal activity. The Fourth District Court's decision in the instant case does not conflict with the Second District's decisions in 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), or Diggs v. State, 345 So.2d 815 (Fla. 2d DCA), cert. denied, 353 So.2d 679 (Fla. 1977). The Fourth District Court's decision is not in conflict with these decisions where the court merely refuses to scrutinize the stop based upon the severity of the traffic infraction.

is no conflict among these cases as all cases do not prohibit the stopping of vehicles for traffic infractions where the officer has an additional motivation for the stop; namely, suspicion of criminal activity. The inquiry conducted by each appellate court is done on a case by case basis.

The Fourth District Court merely gave this rule a more liberal gloss which better serves to prevent the highly subjective determinations as to which infraction is sufficiently serious as to justify a stop. Moreover, if a police officer has actually observed a traffic violation, he has the legal authority to stop the vehicle. The Fourth District's review of an allegation of pretextual stop is no different than that given by other Florida Appellate Courts, only more liberal than the restrictive views of the Second District.

It is thus evident that Petitioners seek to invoke this Honorable Court's jurisdiction in a thinly veiled attempt to pursue a second appeal. Such use of the court's jurisdiction is not permitted. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982). The Court has repeatedly condemned such misguided efforts to invoke its discretionary jurisdiction and has repeatedly emphasized the need for finality in district court of appeal decisions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Petitioner has failed to show express and direct conflict between the decision sub judice and any other state appellate decision and Respondent therefore maintains that this Honorable Court lacks jurisdiction to grant

Petitioner's application for discretionary review.

CONCLUSION

Based upon the foregoing argument and authorities cited therein, the Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent on Jurisdiction has been furnished by U.S. Mail to Mark King Leban, 606 Concord Building, 66 West Flagler Street, Miami, FL 33130, this 15th day of January, 1987.

Amy L. Diem
Of Counsel