O/a 9-4-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,814

JAMES KEHOE and
MICKEY DeVIVO,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONERS ON THE MERITS

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TOPICAL INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

OTHER AUTHORITIES

INTRODUCTION

Petitioners, JAMES KEHOE and MICKEY DeVIVO, were the appellees in the District Court of Appeal of Florida, Fourth District, and the defendants in the Circuit Court. Respondent, the STATE OF FLORIDA, was the appellant in the Fourth District and the prosecution in the Circuit Court. In this brief, the parties will be referred to as the defendants and the State, respectively. The Record on Appeal transmitted to this Court by the Fourth District will be referred to by the symbol "R." All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE

The defendants were charged by information filed in the Circuit Court in and for Broward County, Florida on October 30, 1984 with trafficking in cannabis in that they had in their actual or constructive possession on October 14, 1984, over one hundred but less than two thousand pounds of marijuana. (R.137). The defendants entered pleas of not guilty (R.138-9), and subsequently filed a MOTION TO SUPPRESS PHYSICAL EVIDENCE, arising out of the warrantless stopping, search and seizure of their truck, trailer and vessel. (R.141-144). After a hearing held on November 25, 1985, before the Circuit Court (R.1-136), the trial judge entered an ORDER GRANTING DEFENDANTS' MOTION TO SUPPRESS PHYSICAL EVIDENCE. (R.145-146). The trial court found that the stop and detention of the defendants' vehicle were illegal.

The State thereafter filed a timely notice of appeal (R.152), and on November 26, 1986, the Fourth District issued its decision reversing the trial judge's order of suppression. That

decision is reported at 498 So.2d 560. See Appendix to this Brief. The defendants thereafter filed a timely notice to invoke discretionary jurisdiction, and this Court on April 14, 1987, issued its ORDER ACCEPTING JURISDICTION AND SETTING ORAL ARGUMENT.

STATEMENT OF THE FACTS

The events giving rise to this case commenced at about 3:00 a.m. on October 14, 1984, when Deerfield Beach police patrol officer Lamar Williams observed a green Ford truck with a boat trailer attached parked at an intersection near a motel. (R.7-8). Officer Williams thought it "unusual" to see a boat trailer and truck in that area at that time of night. (R.8).

As part of his routine patrol, Williams drove toward where the truck and trailer were parked and was able to obtain the full license numbers for both the truck and the trailer. (R.9, 16-18). In order to do this, Williams did not need to exit his police vehicle and simply approached the trailer in his car to observe its tag, utilizing his headlights. (R.17). Williams "was able to see the tag" without physically going to the tag itself and noted its number, J61 891. (R.17-18). Although the tag was "slightly bent in a upward direction," since "it was readable" and Williams was able to read all of the numbers, he did not issue any citation. (R.9, 17-18). Williams testified that the tag was "[a]ctually . . .a relatively clean plate." (R.19).

Williams next observed the truck and boat trailer at about 5:45 a.m., this time parked at the Pioneer Park Boat Ramp, a city park which is open 24 hours a day. (R.9-10). The truck was facing southwest, in line with the boat ramp; the truck was "in a

no parking zone at that location," although it was at all times attended by a white male standing near by, who later became known as defendant Mickey DeVivo. (R.10). Officer Williams issued no citation and, although he was "suspicious," felt that the driver of the truck had not committed any violations of State law. (R.22).

Williams continued his surveillance for about one hour and observed defendant DeVivo leaning against the truck. (R.11). The truck and trailer were parked at a boat ramp where there is off and on loading of boats that come out of the water many times; it is a 24 hour park and there is no municipal ordinance that a boat cannot land and go up on a trailer at 6:00 a.m. and be driven away. It is "not a crime" for a truck to be there anticipating the arrival of a boat. (R.20). There was room for another truck or trailer at that particular ramp. (R.31).

As his tour of duty neared its end, Williams notified the Deerfield Beach police dispatcher to notify vice officers at home to advise them of his observations. (R.11). When Officer Williams met with the vice officers, Detective Sergeant Gary Null and Detective Jeff Hurt, he advised them of his observations, including the full tag numbers for both the truck and the trailer, further advising the detectives that his records check for both the truck and trailer revealed that they were not stolen and that there was nothing unusual. (R.46-7, 81, 89). In his relating of events to the detectives, Sergeant Williams gave no indication that the trailer's license tag was obscured in any fashion. (R.89). Prior to leaving his tour of duty, Williams took no police action although he was "suspicious" because of "[t]he hour." (R.20, 24).

Narcotics Detectives Null and Hurt have previously investigated "particular circumstances and procedures utilized by traffickers in gaining entry to the City of Deerfield." (R.27, 71). The officers had knowledge that drugs have previously been brought into Pioneer Park by the boat ramps. (R.30, 71). Detective Hurt has utilized a drug courier profile at train stations looking for "drug profile candidates" and has made stops and arrests based upon this profile. (R.85-6). On some occasions when stops and arrests have been made based upon the "drug profile criteria," "there is usually a violation and the people are stopped for that for a violation." (R.86). Detective Null is aware of "other intelligence from other agencies concerning smuggling through boat ramps." (R.40).

Prior to meeting with Officer Williams, Detective Null had no intelligence information that any boat was going to be laden with marijuana and arriving at the boat ramp; nor did he have any information that the green truck had been used in any prior criminal conduct. (R.59). Both Detectives Null and Hurt met with Officer Williams at the Deerfield Beach Police Department, some two hundred yards from where the truck and trailer were parked. (R.28). Detective Null had been contacted to meet with Williams "concerning a suspicious truck and trailer." (R.28). As stated, Officer Williams relayed his observations to the detectives, including uniformed patrol officer James Dusenbery who had also been told to proceed to Pioneer Park regarding "a suspicious" vehicle that was under surveillance. (R.101-2). All three officers were advised by Officer Williams that a check on the tags

for both the truck and trailer revealed nothing unusual. (R.46-8, 81, 89, 106).

Upon taking up surveillance, Detective Null observed defendant DeVivo sitting on a picnic table by the green truck with the attached boat trailer. (R.30). After some 10 to 25 minutes of surveillance, Detective Null observed DeVivo go to the cab of the truck and back the trailer down into the water on the ramp. (R.32). Null then observed that a thirty foot Scarab boat being piloted by defendant Kehoe was approaching the boat ramp. (R.33). The vessel was proceeding toward the ramp "creating somewhat of a wake" in an area that was a no-wake area. (R.34). In addition, Null observed that the operater, Defendant Kehoe, was "looking from side to side and behind him, looking around as if to be looking for somebody." (R.35). As the boat got closer, Null observed that there were no FL numbers on the left side of the boat; Null was unable to see whether there were numbers on the right side of the boat. (R.35-6, 42).[1]

The officers observed the vessel ride right up onto the trailer and saw the truck pull the boat and trailer out of the water and proceed up the ramp for some 75 to 100 yards before

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[1] No citation was ever issued for the FL number violation. (R.52). Detective Null admitted that he was "not very" experienced with the state or federal regulations requiring FL numbers on boats and was unable to recite the state or federal violation in question. In point of fact, sec. 327.11(5), Fla.Stat. (1983) required the vessel registration numbers to appear on the hull of the vessel. The legislature recently created sec. 327.73(1)(b), Fla.Stat. (1986 Supp.), providing that a violation of the above statute relating to display of number is a "noncriminal infraction." Neither of the detectives communicated this decal violation to any other law enforcement officer. (R.82).

stopping. (R.37, 70). Defendant Kehoe then jumped off of the boat and got into the driver's seat of the truck and then the truck proceeded to leave the park area. (R.37). Detective Null thought it "unusual" that the boat did not first stop on the ramp and that the plug of the boat was not pulled to allow water to drain from the vessel. (R.37-8). Detective Hurt thought it was "unusual" that the boat's operator was still inside the boat when the truck pulled it out of the water for the 75 to 100 yards before stopping, and without first securing the boat. (R.70). Detective Null had heard from other officers about boats being pulled out of the water in this fashion without pulling the plug for drainage (R.37-8) and Detective Hurt had heard of another occasion where a boat utilizing the same boat ramp was stopped and found to contain narcotics. (R.71).

Null thought it was "also unusual" for the boat and trailer to be driven away from the ramp "without the helmsman coming out of the boat," although he acknowledged that after driving up the ramp, the "helmsman" did get off the boat and enter the truck. (R.37)

Detective Hurt observed that it is "not normally" the procedure for a boat to pull away from the ramp with the operator still on the vessel and that "usually" people secure the boat on the trailer before pulling away. (R.72). Hurt also observed that there were "a few items of weight" in the bed of the truck, consisting of three containers of water, some large rocks which would be used for decoration of a lawn, and some bags of fertilizer. (R.73). Detective Hurt "suspected" that these items

were for additional weight "to assist the truck in pulling a heavy load on the ramp." (R.74).

As the truck and trailer with the vessel proceeded out of the area, Detective Null notified road patrol officer Dusenbery, who had previously been alerted, to make a stop of the truck and boat. (R.39, 52, 75, 83). The truck was not speeding away with the boat. (R.60-61). Detective Null based his decision to effectuate a stop of the truck and trailer on "other intelligence from other agencies concerning smuggling through boat ramps," and on the observations he had made. (R.40). He had concluded that "the vessel was being used to traffic in cannabis or a controlled substance." (R.40). In radioing dispatch to advise Officer Dusenberry to stop the truck, Detective Null did not advise that he believed there was any violation of State law regarding the FL number on the vessel, or that the truck and trailer had been illegally parked on the boat ramp. (R.53-4, 82). Detective Null merely asked Officer Dusenbery to stop the truck. (R.54, 83).[2] Uniformed officer Dusenbery was not given any specifics as to the observations made by the officers, and in fact had no direct communication from them at all, simply making a "traffic stop" in response to a dispatch instruction. (R.93, 101).

Before making a u-turn and positioning himself to make the "traffic stop," Officer Dusenbery knew that there was "a suspicious incident that they [Null and Hurt] had been surveilling" and that this was the vehicle that they wanted stopped. (R.102).

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[2] Both officers acknowledged that there was no "hot pursuit" of the truck and trailer. (R.63, 84).

Dusenbery acknowledged that had he not been directed to stop the truck and trailer, he would not have made the u-turn and would not have been behind the trailer. (R.102). Officer Dusenberry was going to stop this vehicle "no matter what" because that is what the other officers asked him to do. (R.104, 106). Dusenbery knew "ahead of time that Sergeant Williams had previously been able to visualize the tag and had already run a check on it." (R.106).

It was only after Detectives Null and Hurt had ordered Officer Dusenbery to effectuate the stop, and after Dusenbery positioned himself behind the truck and trailer, that he observed for the first time that the license tag on the trailer was bent and he could not read the whole tag. (R.94). Dusenbery had no information about the tag being bent prior to his following the vehicle to make the stop as directed by Dectives Null and Hurt. (R.108-9). The surveilling detectives, Null and Hurt, had previously been advised by Sergeant Williams that the full number of the license tags of both the truck and trailer were recorded and they had been given no information at all that the tag was obscured. (R.46-8, 81, 89, 106, 108-9).

Pursuant to his instructions, Officer Dusenbery pulled over the truck and trailer with the vessel attached. (R.94). After being stopped, the driver, Kehoe, and the passenger, DeVivo, exited and almost immediately thereafter, Detectives Hurt and Null arrived. (R.95-97).[3] As Detective Null approached the rear of

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[3] All of the officers acknowledged that a stop and detention had been effectuated. (R.61, 83, 91). It was only after the stop was made that Detective Null observed that the tag of the trailer "was somewhat obscured." He testified that it appeared that "the vessel

the boat, he stepped up on the trailer and looked across the front of the vessel, observing a "rectangular shaped object" which he later determined to be a bale of cannabis. (R.41). Detective Hurt also stepped up onto the trailer and made the same observation. (R.77). The defendants were arrested and some seventy-seven bales of marijuana were later discovered in the vessel. (R.78). Other than the "not normal conduct" observed by Detective Hurt, Hurt could not smell any odor of marijuana coming from the boat prior to standing on the trailer; nor could he see any marijuana prior to doing so. (R.85).

At the hearing on defendants' motion to suppress, in response to a question from the trial judge, Officer Dusenbery stated that he "wouldn't consider it necessarily a dereliction of my duty" to ignore a person who is violating a tag requirement. (R.109). Defense counsel argued to the trial judge that Sergeant Williams had been able to observe the full license tag number of the trailer earlier in the morning and that it would be "legal fiction to suggest that that was the true basis of the stop of this vehicle" and that the surveilling officers "knew that the tag was legitimate. . .or nothing unusual about it five hours earlier." (R.117-18). The defense also argued that there was no

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[3] (continued) going up on the trailer had bent the tag to where you could not see the last number of the tag." (R.42). Although he testified that he could not read the number on the tag after the stop was made, he acknowledged that he could read the last digit on the photograph of the tag admitted into evidence by the State. (R.42-3). In any event, it is clear that none of the surveilling or stopping officers where aware that the tag had been bent obscuring the last digit until after the order to stop the vehicles was issued. (R.46-8, 81, 89, 106, 108-9).

"articulable" suspicion to justify the stop, but merely a "bare suspicion." (R.118).

The trial judge inquired of the prosecutor if it was not the testimony of the officers that they observed the plate get bent and that they "know the number ahead of time." (R.121-2).[4] Finally, the trial judge observed:

> I am trying to separate probable cause to stop a boat and trailer full of contraband versus probable cause to stop a boat and trailer because there was a bent tag that my fellow officer observed getting bent a little while ago, because we read the tag number off of it before it got bent. (R.124).

In the course of its decision reversing the trial court's order of suppression (R.145-6), the Fourth District recognized the rule that "mere 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." 498 So.2d at 562. However, the court found more than mere presence at an unusual hour in an area where crimes had been committed and held that the "trial court erred in finding that the officers lacked a sufficient basis to stop appellant's [sic] vehicle." Id. at 564.

As to the pretextual nature of the stop, the Fourth District, while observing that "there is no question but that the bent tag obscuring one of the digits is a comparatively minor

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[4] The court was, no doubt, recalling the State's direct examination of Detective Null where he testified that the tag of the trailer "was somewhat obscured. It appeared that the vessel going up on the trailer had bent the tag to where you could not see the last number of the tag." (R.42). The prosecutor "absolutely" denied that the officer so testified. (R.122).

infraction which would not necessarily result in a stop," id. at 565, held that it will no longer consider as relevant the severity of the infraction leading to a traffic stop, notwithstanding ulterior police motives to search, so long as "a police officer actually observed a traffic violation (as opposed to fabricating one as an excuse to make a stop). . .". Id. at 565. The court further held that the severity of the traffic infraction "will not by this Court. . .be considered relevant to the question of the officer's authority to make the traffic stop." Id. In so doing, the Fourth District expressly rejected the rationale of the First[5] and Second Districts[6] and agreed instead with the "better rule" of the Third[7] and Fifth Districts[8] holding that so long as any citizen committing a minor traffic infraction could be stopped for the offense, the fact that the police officer would not have stopped a suspect but for further suspicion of criminal activity will not render it an unlawful "pretext" stop. Id. at 565.

This proceeding to invoke this Court's discretionary

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[5] See, e.g., Porchay v. State, 321 So.2d 439 (Fla. 1st DCA 1975), overruled in part on other grounds, 403 So.2d 349 (Fla. 1981).

[6] See, e.g., 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).

[7] Bascoy v. State, 424 So.2d 80 (Fla. 3d DCA 1982); State v. Ogburn, 483 So.2d 500 (Fla. 3d DCA 1986).

[8] Although the decision reviewed herein did not cite any Fifth District case, it is clear that the Fifth District has recently aligned itself with the Third District on the pretext issue. See State v. Irvin, 483 So.2d 461 (Fla. 5th DCA), rev. denied, 491 So.2d 279 (Fla. 1986); Esteen v. State, 503 So.2d 356 (Fla. 5th DCA 1987).

review followed.

SUMMARY OF ARGUMENT

The trial court properly suppressed the evidence seized by the police pursuant to an unlawful investigative stop of the defendants' vehicle where that stop was based upon a bare suspicion or hunch of criminal activity predicated upon the justly condemned "drug courier profile." There was nothing unique or unduly suspicious about the defendants' conduct in driving their boat onto a trailer in a public park open for 24 hours and utilized for precisely that purpose. Viewed in isolation or in their totality, all of the observations made by the surveilling police officers were consistent with entirely innocent conduct. Whether the officers utilized an impermissible "drug courier profile" or not, their investigative detention of the defendants was not predicated on reasonable or founded suspicion of criminal activity.

The Fourth District's alternative basis for rejecting the trial judge's presumptively correct order of suppression is that the police stop of the defendants' vehicle was justified on the basis of a slightly bent license tag of the trailer pulling the boat. The Fourth District's ruling that it will no longer assess the gravity of a minor traffic infraction, notwithstanding objective evidence that police harbored an unfounded suspicion of criminal activity, creates a dangerous and unnecessary rule, especially where, as here, the objective evidence clearly demonstrates that the minor traffic infraction was not known to the police until after their decision to stop the vehicle based on their mere suspicion of criminal activity. This case presents a

classic example of a pretextual stop. In determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation. Because the objective evidence in the case at bar suggests that a reasonable officer would not have stopped the defendants without an invalid purpose to obtain evidence of additional criminal activity, the stop must be deemed pretextual and the trial court correctly granted suppression of the evidence.

QUESTION PRESENTED

> THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION TO SUPPRESS WHERE THE POLICE STOP OF THEIR VEHICLE WAS BASED ON A BARE SUSPICION OR HUNCH OF ILLEGAL ACTIVITY PREDICATED ON A DRUG COURIER PROFILE AND WHERE THE STOP, OBJECTIVELY VIEWED, WAS BASED ON AN AFTER-THE-FACT PRETEXTUAL LICENSE TAG VIOLATION, CONTRARY TO THE DEFENDANTS' RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 12 AND 23 OF THE FLORIDA CONSTITUTION.

The defendants submit that the trial court's order of suppression was imminently correct where a stop of the defendants' truck, trailer and vessel was patently based on a universally condemned "drug courier profile" which constituted no more than a bare suspicion of criminal activity, and where the stop, under any objective standard of reasonableness, was a classic pretextual stop predicated upon a minor license tag violation, learned after-the-fact of the stop itself.

The defendants will first discuss the requirements for

reasonable suspicion to justify an investigative stop of a person or vehicle, followed by a more particularized discussion of the so-called "drug courier profile" as applied to, first, airport-train-bus station detentions, and second, vehicle stops, and finally, the defendants will discuss the law condemning pretext stops.

Initially, it must be observed that this is a case in which the trial judge, after hearing the testimony and weighing the credibility of the police officer-witnesses, concluded that the stop and detention was illegal. See R.122-124, 145. Thus, this case is governed by the settled principles that the ruling of the trial court on a motion to suppress, "is clothed with the presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling." McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). Accord, State v. Nova, 361 So.2d 411 (Fla. 1978). Apparently, the Fourth District forgot the rule that as "a reviewing court we must interpret the evidence and the reasonable inferences derived therefrom in a manner most favorable to the trial court." Smith v. State, 378 So.2d 281, 283 (Fla. 1979). See also, Garcia v. State, 492 So.2d 360, 365 (Fla. 1986) (trial court's ruling on a motion to suppress is presumptively correct and will be accepted if the record contains evidence supporting the ruling).

The Police Lacked a Reasonable Suspicion of Criminal Activity

It is by now well established that although police may conduct a brief investigative stop of a vehicle, see Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979), such stop must be

justified by specific, articulable facts sufficient to give rise to a founded or reasonable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883 (1968); section 901.151, Florida Statutes. Investigative stops of vehicles are invalid if based upon only "unparticularized suspicion or 'hunch.'" Terry at 27, 88 S.Ct. at 1883.

This Court has steadfastly applied the Terry principles in a variety of factual situations. Coladonato v. State, 348 So.2d 326 (Fla. 1977)(no reasonable suspicion where "unusual" van with out-of-state plates observed by police on three different occasions in a closed business district at night); Mullins v. State 366 So.2d 1162 (Fla. 1978)(no reasonable suspicion where defendant found riding bicycle slowly through residential area in the early morning hours); State v. Levin, 452 So.2d 562 (Fla. 1984), affirming 449 So.2d 288 (Fla. 3d DCA 1983)(no reasonable suspicion where defendant found walking at 3:00 a.m. in "high class" neighborhood where there had been numerous residential burglaries); cf., Tamer v. State, 484 So.2d 583 (Fla. 1986)(finding reasonable suspicion where defendant driving station wagon with open tailgate through parking lot of medical building late at night, where there had been arson fires in the area, and where defendant made sharp u-turn with "tires squealing" upon observing police vehicle).

Following this Court's guidance, the district courts of appeal have condemned stops based upon "bare suspicion" as opposed to reasonable, articulable suspicion of criminal activity. Thus, in Romanello v. State, 365 So.2d 220, 221 (Fla. 4th DCA 1978), a case not dissimilar to the one at bar, police were attracted to the

defendant's attempt to trailer a boat at a boat ramp in Fort Lauderdale. Defendant Romanello was in a van with an attached trailer and defendant Isley was in a boat trying to negotiate it from the water onto the trailer. Since the vessel "seemed heavily loaded," the surveilling officers' "curiosity" was aroused and they detained both defendants, thereafter detecting the odor of marijuana. Holding that the officers had no "founded or reasonable suspicion" of criminal activity, the appellate court reversed the trial court's denial of suppression, holding that "the officers had only a 'hunch' (although a good one as it turned out), that is, a 'bare' or 'unfounded' suspicion that something was wrong, which is clearly not sufficient to validate a stop and detention." 365 So.2d at 221 (original emphasis). The court particularly observed that "the weighted down appearance of the boat and the difficulties encountered in maneuvering it" could not justify a reasonable basis for suspecting criminal activity.[9]

In State v. Arnold, 475 So.2d 301 (Fla. 2d DCA 1985), the trial court's suppression of evidence as to defendants Gardiner and Whitehurst was upheld as not based on reasonable suspicion. Police there had lawfully come upon an abandoned boat full of marijuana and had arrested others hiding nearby in the surrounding brush; police learned that still others involved in the smuggling venture were hiding in bushes in the area. Police later found defendant Gardiner walking across a bridge and observed that his pants were wet and muddy, his shirt was inside out, and he had scratches on

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[9] The trial judge in the case at bar expressly relied upon Romanello. See R.145.

his face. The officers "thought Gardiner had run through brush" and effected a stop which resulted in his arrest for smuggling and trafficking in marijuana. Still later, police saw defendant Whitehurst at a pay phone nearby and observed he had no shirt although it was a fairly cool morning; they also noticed that his jeans were wet, he had mud on his shoes, and burrs in his chest hairs. Moreover, on being questioned, defendant Whitehurst was nervous and police, while not formally arresting him, asked him to come to the sheriff's office. The trial judge granted suppression of evidence seized pursuant to these stops and the Second District affirmed as to these two defendants finding no reasonable suspicion of criminal activity. The court observed that their appearance was not inconsistent with the not uncommon practice of transients sleeping in the brush and dressing in the manner observed by the police. See 475 So.2d at 307-8.

In Freeman v. State, 433 So.2d 9, 10 (Fla. 2d DCA 1983), police observed three men at about 2:20 a.m., one carrying a lit flashlight in the parking lot of an apartment complex that had experienced numerous automobile burglaries; after driving around the block, the officers returned and observed an automobile exiting the parking lot carrying several individuals. Police stopped this automobile and subsequently seized evidence. Reversing the denial of suppression, the Second District held:

> Although carrying a lit flashlight in the early morning hours through a parking lot which has suffered a rash of vehicle burglaries may give rise to a "bare" suspicion of illegal activity, it does not, without more, give rise to a "founded" suspicion of illegal activity. 433 So.2d at 10.

Accord, Carter v. State, 454 So.2d 739, 742 (Fla. 2d DCA 1984) (observation of occupants of parked car in an area known for illegal narcotics distribution where defendant looked around and bent down toward middle of console held insufficient reasonable suspicion for belief that defendant was ingesting narcotics, since the observed conduct "was at least equally consistent with noncriminal activity"); Teresi v. State, 12 FLW 1096 (Fla. 2d DCA April 22, 1987)(same).

It is submitted that, as in the cited cases above, the officers here had but a "bare suspicion" or "hunch" of drug activity. The testimony of all four officers is rife with "suspicious" or "unusual" or "not normal" observations.[10] The above decisions are ample support for the conclusion that the officers here lacked a reasonable or founded suspicion based upon articulable facts to justify their stop of the defendants' truck and trailer. However, as will be observed, yet another well developed line of authority also supports the conclusion that no reasonable suspicion existed in the case at bar.

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[10] To illustrate, the initial surveilling officer, Lamar Williams, was "suspicious" because of the hour when he made his first observation. (R.15). Detective Null thought it "unusual" that the boat did not first stop and pull the plug for drainage. (R.37-39). He was investigating a "suspicious truck and trailer." (R.28). Detective Hurt found that it was "not normally" the procedure for a boat's operator to stay on the boat and that "usually" the water is drained and the boat is secured. (R.72). Hurt "suspected" that the items in the truck bed were there for additional weight to assist in pulling a heavy load. (R.74). He was "suspicious" and thought it "possible" that the truck and trailer were waiting for a boat loaded with marijuana. (R.79). Finally, uniformed officer Dusenbery was advised that the officers were investigating a "suspicious incident." (R.102).

Police Use of a "Drug Courier Profile" is Insufficient as a Matter of Law to Constitute Reasonable Suspicion

The defendants submit that the decision to stop their vehicle in the case at bar was clearly predicated upon the so-called "drug courier profile" utilized by police agencies to justify otherwise legally unsupportable detentions. The detectives acknowledged their use of the profile at such places as train stations to make stops and arrests of persons believed to be "drug profile candidates." (R.27, 85-6). The officers have collected "intelligence from other agencies concerning smuggling through boat ramps" (R.40), and had heard from other officers that boats arriving at the Pioneer Park boat ramp, which had been pulled out of the water without draining the plug, had been found to be carrying marijuana. (R.30, 37-8, 71).

It is submitted that such use of a "drug profile" has been justly condemned by the United States Supreme Court, this Court, the federal courts, and nearly every appellate court in Florida. Its use constitutes an insidious police practice which, while designed to ensnare those engaged in the deplorable drug trade, also entrenches upon the rights of "a very large category of presumably innocent [persons], who would be subject to virtually random seizures were [this] Court to conclude that as little foundation as there was in this case could justify a seizure." Reid v. Georgia, 448 U.S. 438, 441, 100 S.Ct. 2752, 2754 (1980). While the drug profile initially arose in the context of airports, train and bus stations, its use has pervasively spread to a variety of other scenarios, such as the public highways and roads. The defendants will first address the development of the profile within

the airport context, and then discuss its spread to other common and public endeavors.

In Reid v. Georgia, supra, the United States Supreme Court first addressed the "drug courier profile" and held it to be insufficient to establish the requisite reasonable and articulable suspicion to justify an investigative detention of a citizen. There, the Supreme Court rejected the following factors as constituting founded suspicion: (1) the defendant and his companion arrived from a "drug source city"; (2) the defendant was traveling in the early morning hours when law enforcement activity is diminished; (3) defendant and his companion appeared to be trying to conceal the fact that they were traveling together; (4) they apparently had no luggage other than shoulder bags; (5) they became increasingly nervous during their encounter with police. Characterizing the observed conduct as justifying no more than an "'inchoate and unparticularized suspicion or hunch'", 100 S.Ct. at 2754, quoting from Terry v. Ohio, supra at 27, 88 S.Ct. at 1883, the Supreme Court held that the profile characteristics constituted "too slender a reed to support the seizure in this case." 100 S.Ct. at 2754.

This Court has firmly adhered to Reid's holding that "similarities between a suspect and a 'drug courier profile' are insufficient to establish the requisite reasonable and articulable suspicion." Jacobson v. State, 476 So.2d 1282, 1286 (Fla. 1985). In Jacobson, this Court considered the following factors, in their totality, and concluded that they did not establish a reasonable suspicion to justify an investigative detention:

> 1. Travel between two centers of narcotics trafficking;
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> 2. Travel with only minimal luggage;
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> 3. Late arrival at the airport;
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> 4. Nervousness while trying to get a flight out;
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> 5. The suspects were in the age group normally involved in drug trafficking;
>
> 6. Cash purchase of one-way tickets;
>
> 7. Increasing nervousness after the encounter;
>
> 8. A discrepancy between defendant's first statement to one officer as to where he was from and his later answer to another officer's question as to where he was from.

476 So.2d at 1286-7. Added to these factors, this Court opined that even the additional factor of attempted concealment of travel together would not be sufficient to justify a detention. 476 So.2d at 1286. This Court observed that "[w]hile the detectives in this case did not explicitly state that their suspicions were based on a 'profile,' their testimony clearly shows that this is exactly what triggered their investigation." Id.[11] Finding "no indication that any unique factors had been observed" by the police in Jacobson, other than the profile characteristics, this Court held there was no reasonable suspicion to justify the detention. See also United States v. Ballard, 573 F.2d 913 (5th Cir. 1978).

Even long prior to this Court's definitive condemnation

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[11] Of course, as earlier observed, the testimony of Detectives Null and Hurt also clearly demonstrated their reliance upon "procedures utilized by drug traffickers" (R.27), and "drug profile candidates." (R.85-6).

of the profile in Jacobson, the Florida courts have rejected it as justifying an investigative detention. Thus, in State v. Frost, 374 So.2d 593 (Fla. 3d DCA 1979), the court held that "the fact that a person exhibits the general characteristics and conduct relied upon by the officers in this case, and as outlined in a so-called 'drug courier's profile,' are not sufficient to create a reasonable basis for an investigative stop." Id. at 596 n.4. There, police observed the defendant at the airport who appeared to be nervous and found him to be traveling under an alias. Next, in State v. Battleman, 374 So.2d 636 (Fla. 3d DCA 1979), the court again rejected the profile where the defendant appeared nervous, was on a "turn-around" trip from Miami to San Francisco with one of the same bags, and purchased his ticket with cash. See also State v. Santamaria, 464 So.2d 197 (Fla. 3d DCA 1985)(profile characteristics insufficient to justify stop where defendant found carrying two light bags, paid for his ticket in cash, looked at the officers whenever they passed by where he was seated, exited the area upon seeing the officers standing by the conductor, and had a runny nose indicative of cocaine use); Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983)(no reasonable suspicion where the defendant appeared nervous at the airport, purchased a one-way ticket for cash, carried only a shoulder bag and an attache case, appeared to notice the police officers, and left the terminal building and abandoned his plans to depart); Robinson v. State, 388 So.2d 286, 288-90 n.1 (Fla. 1st DCA 1980)(origination of flight from "drug profile target city," prior narcotics arrest, payment for ticket with large amounts of cash, held insufficient reasonable suspicion

to justify detention).

Clearly, the drug profile, applied to airport scenarios, is insufficient to justify an investigative detention. However, the profile does not end at airports and train stations. It extends as in this case and others to boat ramps and highways and involves the unlawful detention of vehicles as well as individuals.

Perhaps the case closest to the one at bar in which the drug courier profile was utilized and held insufficient to justify a detention is Kayes v. State, 409 So.2d 1075 (Fla. 2d DCA 1981), rev. denied, 424 So.2d 762 (Fla. 1982). There, a surveilling police officer "who had a wealth of experience in narcotics investigation, outlined the profile of a typical drug smuggling operation in Florida." 409 So.2d at 1076. Pursuant to this particular profile,

> [d]rug smugglers use medium-sized boats to meet freighters carrying marijuana. These boats are met in turn by swift racing boats which transport the marijuana to shore where it is off-loaded into large capacity vehicles and stored in warehouses. From the warehouses, marijuana is transported by vehicles to various dealers. Id.

Armed with knowledge of the above profile, 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 surveilling detectives ordered a uniformed officer to stop the

vehicle. Police then smelled marijuana and arrested the defendants, leading to the seizure of marijuana. The Kayes court expressly applied the United States Supreme Court's airport profile analysis employed in Reid v. Georgia, supra, to the above scenario and held that as so applied, the "drug smuggling operation, cannot constitute a reasonable suspicion of criminal activity enabling an officer to stop a participant." 409 So.2d at 1077-8 n.2. The court observed that prior to seizing the defendants' vehicle, police had "no actual knowledge that appellants were engaged in any criminal activity. The officer's suspicions were based on the profile of typical drug smuggling activities." 409 So.2d at 1077. The court also observed that police were unjustified in their assumption that it was drugs that were "weighting the vehicle down." Id. at 1078. "In short, while a profile of a smuggling operation may help identify criminal activity, it can also encompass innocent citizens." Id.

It is submitted that the Kayes profile is materially indistinguishable from that employed by Detectives Null and Hurt in the case at bar. Here, the profile consisted of use of the boat ramps at Pioneer Park in the early morning hours where the operator of the boat does not drain the vessel or secure it prior to driving up the ramp, and where "items of weight"[13] are "suspect[ed]" to be used to assist the vehicle in pulling a heavy load up the ramp. (R.37-8, 40, 71, 74).

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[13] These "items of weight" consisted of plastic jugs of water, large rocks of the type used for decoration of a lawn, and bags of fertilizer. (R.73). Of course, all of these items are entirely consistent with the innocent conduct of landscaping and lawn care.

Use of a similar, although unspoken, profile was condemned in Oesterle v. State, 382 So.2d 1293 (Fla. 2d DCA 1980), where police had a tip that a marijuana laden plane had just landed in a pasture; responding to the scene, police saw the plane which was visible from an intersection and which could be reached through a gate in a fence. Surveilling officers observed a truck with a "topper" with blackened windows[14] and an out of county tag approach at about 6:30 a.m. They stopped the truck which led to the arrest of the defendant. The Second District, in an opinion by then Chief Judge Grimes, held:

> [T]he information available to [the police] did not give rise to a well founded suspicion.***[N]either the fact that the truck had an out-of-county tag nor the fact that the topper's windows were blacked out was sufficient to indicate criminal activity. 382 So.2d at 1295.

Thus, even with a tip about a drug plane,[15] and observation of a vehicle driving at 6:30 a.m. within sight of the marijuana plane and in violation of Florida law pertaining to blackened windows, police had no reasonable suspicion to justify a vehicle stop. Here, police, who had no-tip, observed an attended vehicle and trailer in a 24 hour public park, arguably in violation of

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[14] At the time, §316.210, Fla.Stat. (1977) prohibited any such obstruction of windshields or side windows. See 1975 Op. Atty. Gen. Fla. 075-263 (October 13, 1975).

[15] Of course, the officers in the case at bar had no prior information at all about either an expected load of drugs in general or the boat involved in this case in particular. (R.59-60).

parking laws[16], and a vessel committing a minor boating infraction[17] certainly less indicative of drug smuggling than blackened windows.

Yet another use of the profile was condemned in Simon v. State, 424 So.2d 975 (Fla. 4th DCA 1983), where police observed the defendant driving a Ford, 4-wheel drive, pick-up truck with two spotlights on the front of a camper shell and with heavy duty suspension; although the truck appeared to be unloaded, "the officer was suspicious because '[i]t fit a profile of several vehicles that. . .[he had] seen in the past utilized in smuggling operations.'" 424 So.2d at 976. With ground and air surveillance over a three hour period, police observed the truck driving north, returning south, and then north again; it approached an airport, waited for a brief interval and then continued north yet again. After the defendant-driver stopped for a phone call, he drove back to the airport road where he met another person driving a Bronco. Both vehicles went north and stopped at a gas station where the

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[16] No parking violation was cited by any of the officers here possibly because no violation occurred at all. Sec. 316.1945(1)(c)(2), Fla.Stat. (Supp. 1984), prohibits parking a vehicle "whether occupied or not, except temporarily for the purpose of, and while actually engaged in, loading. . .passengers . . .[at] any place where signs prohibit parking." Arguably, the truck and trailer here, attended at all times by defendant DeVivo, were thus lawfully parked temporarily at the public ramp provided for the very purpose of loading an incoming boat. (R.20). Officer Williams conceded that it was "not a crime" for a truck and trailer to be where they were anticipating the arrival of a boat. (R.20). In fact, Williams felt he had no reason to arrest the truck's driver for committing any violations of any state law. (R.22). The defendants were never subsequently cited for unlawful parking.

[17] The decal violation of §327.11(5), Fla.Stat., is a mere infraction pursuant to §327.73(1)(a), Fla.Stat.

drivers spoke with yet a third person. Then the defendant drove the Ford pick-up to a private ranch to a "hammock" near what appeared to be an "airstrip." When police next saw the defendant's truck, "it appeared to be heavily loaded." 424 So.2d at 976. After the defendant drove to a plaza and exited, police stopped him and observed boxes in the rear of the truck which they later found to be filled with methaqualone.

While the Simon court saw the case as one involving the need for "probable cause" and not "founded suspicion"[18] id. at 976, it viewed its task as determining whether the police had "a reasonable belief that the defendant was violating the law." Id. at 977. In reversing the trial court's denial of suppression, the Fourth District held:

> Although varying degrees of significance can be attached to individual facts, seen in their totality they do not support a reasonable belief that the defendant was violating the law.***The fact that the defendant talked with other individuals or drove the route outlined above does not indicate criminal activity. Id.

It is submitted that whether couched in terms of "probable cause" or "reasonable suspicion," the Simon court's finding of "no reasonable belief" and that the observed conduct did "not indicate criminal activity" is equally applicable to the case at bar. The

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[18] This was so "[b]ecause the officer began to search the truck almost immediately. . .". 424 So.2d at 976. Here too, as soon as Detective Null approached the defendants' truck and trailer, he stood on the fender and looked into the boat observing the bales of marijuana. (R.41, 77). Such activity clearly constitutes a "search." D'Agostino v. State, 310 So.2d 12 (Fla. 1975); State v. Oliver, 368 So.2d 1331, 1335 (Fla. 3d DCA 1979).

"profile of vehicles. . .utilized in smuggling operations" in the past, which was condemned in Simon, id. at 976, is equally unavailing here where both officers admitted relying upon a "drug profile" whereby "drug traffickers" utilized the same boat ramp at Pioneer Park and failed to drain their boats. (R.27, 30, 37-8, 40, 71, 85-6).

The Fourth District, while ignoring its own precedent in deciding the case at bar, previously held in State v. Anderson, 479 So.2d 816 (Fla. 4th DCA 1985), that there was no reasonable suspicion to justify an investigative detention where the defendant was initially properly stopped for speeding, but detained thereafter based upon the following observed factors: an air valve used for inflating air shocks; air shocks without a trailer or hitch; display of nervousness by the defendant; and luggage carried in the rear seat which, in the experience of the police officers, indicated that the trunk was used for carrying contraband. The trial judge, in an order fully approved by the Fourth District, held:

> The fact that luggage is contained in the rear seat is as consistent with the possibility that the occupants wish to have ready access to it as it is with the fact that they did not want to open their trunk at a motel because it might contain unlawful material. 479 So.2d at 818.

Similarly, in Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980), the fact that police had observed "'thousands' of drug situations 'with an m.o. where people lean into a car' in a high crime area," was held insufficient to create a reasonable suspicion of criminal activity. Certainly the "m.o." utilized by the police

in Kearse is analogous to the "drug courier profile" utilized by the police in the case at bar. See R.27, 40, 85-6.

Finally, and most recently, the Fifth District had occasion to condemn use of a vehicle profile in In re Forfeiture of $6,003, 12 FLW 1069 (Fla. 5th DCA April 16, 1987), where the profile utilized and held insufficient consisted of:

> 1) a late model vehicle;
> 2) Florida rental tags;
> 3) Two occupants observed initially in the vehicle;
> 4) The driver appeared to be male;
> 5) The driver appeared to be approximately 35 years of age;
> 6) The vehicle was traveling northbound on I-95, a route frequently used by drug couriers;
> 7) The vehicle was traveling in the evening in an extremely cautious manner;
> 8) The driver did not look at the trooper as the [defendants] passed the patrol car.

The Fifth District held that "[t]he drug courier profile used in this case is too general and unparticularized to support a Terry stop. . .". See also, United States v. Smith, 799 F.2d 704 (11th Cir. 1986).

The defendants submit that regardless of the context in which the drug courier profile is utilized, be it at the airport, train station, or, as here, at a boat ramp, it is insufficient as a matter of law to constitute a reasonable suspicion to justify an investigative detention. Here, the Fourth District relied upon the following "observations" to justify its finding of a founded suspicion of criminal activity:

> [T]he park's prior history of drug trafficking involving use of the boat ramp; the unusually early hour for a truck and trailer to be at the park to

> pick up an incoming boat; the long wait for the boat; the driver of the boat looking all around the area as he pulled in; lack of registration numbers on the boat; the heavy items in the back of the truck, which could have been placed there to assist the truck in pulling a heavy load up the ramp; the highly unusual manner in which the boat was loaded onto the trailer and driven away, without draining the water or securing the boat. 498 So.2d at 563.

The defendants submit that each of these factors, and all of them viewed in their totality, cannot constitute a reasonable, articulable basis for concluding that the defendants were involved in criminal activity. Instead, these observations, even in their totality, created but a "bare suspicion." As will be observed, none of the above factors can justify a reasonable suspicion. Thus, the "history" of the area for drug trafficking is insufficient. Carter v. State, 454 So.2d 739 (Fla. 2d DCA 1984) (recognized areas for illegal narcotics distribution anduse); see also Levin v. State, 449 So.2d 288 (Fla. 3d DCA 1983)(prior residential burglaries committed in the area), aff'd, 452 So.2d 562 (Fla. 1984). Nor is the "unusually early hour" sufficient. Mullins v. State, 366 So.2d 1162 (Fla. 1978)("very early morning hours"); Levin v. State, supra, (3:00 a.m.); Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983)(2:00 a.m.). Nor is the fact that the defendants were "looking all around" sufficient. Carter v. State, supra. Nor is the lack of registration numbers on the vessel indicative of criminal activity, any more so than a violation of the window tinting laws. See Oesterle v. State, 382 So.2d 1293 (Fla. 2d DCA 1980). Nor are the "heavy items" which "could have been" used to assist the truck in pulling a heavy load indicative

of criminal activity. Romanello v. State, 365 So.2d 220 (Fla. 4th DCA 1978)("Surely, the weighted down appearance of the boat . . .cannot, in this day and age, and particularly in this location, be deemed to provide a proper 'foundation' or 'reasonable' basis for suspecting the existence of crime."); Kayes v. State, 409 So.2d 1075 (Fla. 2d DCA 1981), (observation that car was "weighted down with its chassis close to the ground" held insufficient); rev. denied, 424 So.2d 762 (Fla. 1982)Simon v. State, 424 So.2d 975 (Fla. 4th DCA 1983)(fact that vehicle was "heavily loaded" and "riding lower than before" held insufficient). Finally, the "highly unusual manner" in which the boat in this case was loaded without draining or securing it, cannot constitute reasonable suspicion. See Simon v. State, supra, (unusual circuitous route of vehicle insufficient).

Whether this case is viewed as a profile case or not, the factors observed by the police, even viewed in their totality, are simply insufficient to justify the unlawful stopping of the defendants' vehicle. Jacobson v. State, supra; Kayes v. State, supra.

However, the Fourth District, no doubt aware of the shaky foundation upon which it built its decision, resorted to an "alternative" basis for its reversal of the trial court's order of suppression. The defendants will now address the pretext issue.

The Classic Pretext: The Bent License Tag

Significantly, the Fourth District did not include in its amalgamof "observations" that purportedly constituted a reasonable suspicion for the stop the fact that the license tag on the trailer

was bent obscuring the final digit on the tag.[20] Instead, the court expressly held that the bent tag violation alone authorized the police officer to make the stop and that the court would not engage in an assessment of whether the tag violation was a mere pretext for a search even if the "'officer would not have stopped [the] defendant but for the suspicion that the defendant was involved in criminal activity.'" 498 So.2d at 565, quoting State v. Ogburn, 483 So.2d 500, 501 (Fla. 3d DCA 1986). The court also held that where "it appears that if a police officer has actually observed a traffic violation (as opposed to fabricating one as an excuse to make a stop), he has the authority under the law to stop the driver committing the violation." 498 So.2d at 565.

In so ruling, the Fourth District expressly declined to follow the rule of the First and Second Districts that where the gravity of the traffic offense is such that a citizen would not be routinely stopped for it, but for an officer's suspicion of more serious criminal activity, it will be held pretextual. See Porchay v. State, 321 So.2d 439 (Fla. 1st DCA 1975)(traffic stop for bent, partially illegible license tag held invalid because the officer's primary motivation for the stop was that he felt the occupants of

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[20] The Fourth District did observe 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." 498 So.2d at 565. The court was apparently aware of Officer Dusenbery's concession in response to the trial judge's question that he "wouldn't consider it necessarily a dereliction of my duty" to ignore the tag violation. (R.109).

the vehicle were "suspicious"), overruled in part on other grounds, 403 So.2d 349 (Fla. 1981); State v. Gray, 366 So.2d 137 (Fla. 2d DCA 1979)(missing taillight, tag light and lack of clearance lights held insufficiently serious traffic violations to justify stop); Diggs v. State, 345 So.2d 815 (Fla. 2d DCA)(stop by officer who believed defendant had invalid driver's license held "pretext" stop where officer "suspected the appellant of unlawful drug activity or use."), cert. denied, 353 So.2d 679 (Fla. 1977).

The Fourth District concluded that the "better rule" arose from the Third District's decisions in Bascoy v. State, 424 So.2d 80 (Fla. 3d DCA 1982), and State v. Ogburn, supra. While not cited in the Fourth District's decision, the Fifth District's decision in State v. Irvin, 483 So.2d 461 (Fla. 5th DCA), rev. denied, 491 So.2d 279 (Fla. 1986), adopted the Bascoy rule and held that the fact that police may have wished to detain a suspect for another reason does not invalidate a stop "which follows the commission of a traffic or other offense which would subject any member of the public to a similar detention." 483 So.2d at 462. Signifcantly, the Fifth District in Irvin expressly left open the question of whether this rule "would also control if. . .one would not ordinarily be stopped but there is an appropriate basis upon which he lawfully could be." 483 So.2d at 462 n.2 [original emphasis]. This was so in Irvin because the "gravity" of the violation there was sufficiently serious that it could easily be said that any citizen "would be" routinely stopped for

committing it.[21]

The defendants submit that the Irvin question, left open there, appears to be precisely the question closed by the Fourth District in the case at bar, which acknowledged that the bent tag violation is one which would not ordinarily result in a traffic stop but for an ulterior motive by the police. 498 So.2d at 565. The defendants submit that in so ruling, the Fourth District unnecessarily created bad law for two very important reasons. First, it has long been the rule of this very Court that such a transparently pretextual reason for stopping a citizen is anathema to a free society. Collins v. State, 65 So.2d 61, 63 (Fla. 1953). Second, the record in this very case, which the Fourth District apparently chose to ignore, plainly reveals that the bent tag violation was not in point of fact the basis for stopping the defendants' vehicle.

Taking the second reason first, the record here clearly demonstrates that Detectives Null and Hurt made the decision to stop the defendants' truck, trailer and boat, at a point in time when, from all the information they had, the license tag on both the truck and the trailer were fully readable, had previously been recorded and checked by Officer Williams and found to be in complete order. In fact, Officer Williams had given no information at all to any of the surveilling or stopping officers that the tag

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[21] The Irvin traffic offense was speeding 70 mph in a 50 mph zone. In the case at bar, as the Fourth District expressly held, "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." 498 So.2d at 565.

was obscured in any fashion. (R.46-8, 81, 89, 106, 108-9). It was only after Detectives Null and Hurt had ordered Officer Dusenbery to effectuate the stop, and after Dusenbery position himself behind the truck and trailer, that the bent tag came into view. (R.94). Dusenbery acknowleged that had he not been directed to stop the vehicle, he would never have positioned himself behind it and would never have seen the bent tag; moreover, he was going to stop the vehicles "no matter what" because he had been directed to do so by the surveilling officers. (R.102, 104, 106). In these circumstances, use of the "bent tag" as an after-the-fact justification for the stop constitutes a classic pretext. Viewing the conduct of the officers objectively, without resort to their true subjective suspicion of drug activity, the stop was illegal.

The defendants here have no quarrel with the objective standard utilized by the Third and Fifth Districts. In fact, the Supreme Court of the United States has indicated that that is the standard by which purported pretext stops must be assessed. In Scott v. United States, 436 U.S. 128, 98 S.Ct. 1717 (1978), the Supreme Court acknowledged that while "[i]n view of the deterrent purposes of the exclusionary rule, consideration of official motives may play some part in determing whether application of the exclusionary rule is appropriate. . ., the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." 436 U.S. at 135-7, 98 S.Ct. at 722-3. By using this "objective assessment" test, it is clear that the bent tag was a fact and circumstance unknown to any of the officers involved in this case until after the stop

was ordered.

In this regard, the case at bar is indistinguishable from the recent decision of the United States Court of Appeals for the Eleventh Circuit in United States v. Smith, 799 F.2d 704 (11th Cir. 1986). There, the court found a classic pretextual stop where a Florida highway patrol officer, the infamous Trooper Vogel, utilizing his "drug courier profile," began following a vehicle on Interstate 95 intending to stop it because of his suspicions of drug activity, when he observed the vehicle cross over the white center line and return back into its proper lane. Vogel "did not stop the car because it 'weaved.' Rather, he had determined to make an 'investigative stop' of the vehicle from the moment he began pursuit in reliance on the drug courier profile." 799 F.2d at 706.[22] The district court ruled that the purported "weaving," a violation of section 316.089(1), Florida Statutes, "was only a pretextual reason for the stop." 799 F.2d at 706.[23] The government argued that since the trooper "could have stopped the vehicle to issue a traffic citation or to investigate whether the driver was intoxicated," id. at 708, the stop was not a pretext.

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[22] Again this is the precise factual scenario in the case at bar where Detectives Null and Hurt had already ordered the stop of the defendants' truck and trailer based upon their suspicion of drug activity and ordered uniformed officer Dusenbery to stop them, prior to any knowledge about a bent license tag. (R.48, 81, 89, 106).

[23] While the district court in Smith found the stop pretextual, it nevertheless denied suppression alternatively finding that there was a reasonable suspicion to otherwise justify the stop. The Eleventh Circuit reversed that finding in an analysis which the defendants in the case at bar commend to this Court with regard to the argument, supra, concerning the lack of reasonable suspicion to justify the stop.

This was so, the government claimed, because Trooper Vogel had probable cause to stop the vehicle for weaving, and the stop was therefore "reasonable regardless of any possible invalid purpose." Id. at 709.

The Eleventh Circuit agreed that "an objectively reasonable stop or other seizure is not invalid solely because the officer acted out of improper motivation." Id. at 708-9. However, viewing the "objective evidence" in the case before it, the court found that "Vogel had no interest in investigating possible drunk driving charges: He began pursuit before he observed any 'weaving' and, even after he stopped the car, he made no investigation of the possibility of intoxication." Id. at 710.[24]

In arriving at its holding that the stop was pretextual, the Eleventh Circuit expressly held:

> [W]e reject the government's contention that the stop. . .was valid because Trooper Vogel could have stopped the car to investigate the possibility of drunk driving. We conclude that in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation. Because the evidence suggests that a reasonable officer would not have stopped the appellants without an invalid purpose to obtain evidence of additional criminal activity, we reverse. 799 F.2d at 708 [original emphasis].

See also, United States v. Cruz, 581 F.2d 535 (5th Cir. 1978)(en

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[24] Again, these objective facts are identical to the case at bar where Detectives Null and Hurt ordered the stop, and Officer Dusenbery "began pursuit" before any of the officers observed any bent tag. (R.46-8, 81, 89, 106).

banc)(utilizing the "would versus could" rationale).

Of course, it is precisely this standard which the Fifth District in Irvin left open, see 483 So.2d at 462 n.2, but which the Fourth District unwisely and categorically rejects. See 498 So.2d at 565-6.

That it is unwise is clear and brings us to the other rationale for quashing the Fourth District's decision. A refusal to objectively assess the reasonableness of a police officer's stop of a vehicle based ostensibly on a minor traffic infraction of trivial gravity, even in the face of overwhelming evidence of an ulterior motive to search for evidence of greater crime, runs counter to the very purpose behind the protections afforded by the Fourth Amendment, to guard against unreasonable searches. To illustrate, one need only look to this Court's early decision in Collins v. State, 65 So.2d 61 (Fla. 1953), where, armed with information about suspected bolita violations, police followed the defendant's vehicle and observed him drive "a foot over the center line of the highway on three occasions." They stopped the defendant's vehicle and subsequently found lottery paraphernalia. After reviewing the objective facts before it, this Court held:

> A holding that such a feeble reason would justify a halting and searching would mean that all travelers on the highway would hazard such treatment, for who among them would not be guilty of crossing the center line so much as a foot from time to time. All could, therefore, be subjected to inconvenience, ignominy and embarrassment on the excuse that an occasional incident might yield some contraband or other. 65 So.2d at 63.

Similarly, the Eleventh Circuit in Smith considered the

purposes behind the Fourth Amendment and the policy considerations of permitting minor traffic offenses to justify stops of vehicles where police harbour suspicion of more serious crime:

> If officers were permitted to conduct Terry-stops based on what conceivably could give rise to reasonable suspicion of minor violations, the necessary connection between a seizure's justification and its scope would inevitably unravel.
>
> * * *
>
> [P]olice officers could easily make the random, arbitrary stops denounced in Terry. With little more than an inarticulate "hunch" of illegal activity
>
> an officer could begin following a vehicle and then stop it for the slightest deviation from a completely steady course. 799 F.2d at 711 [original emphasis].

Alluding to this Court's 1953 decision in Collins, the Eleventh Circuit continued:

> Like the Supreme Court of Florida, we believe that such a result would run counter to our Constitution's promise against unreasonable searches and seizures by law enforcement officials. Id.

Certainly these considerations are equally applicable to the case at bar where the Fourth District expressly found that "there is no question" that the bent tag violation was so minor an infraction that it "would not necessarily result in a stop." 498 So.2d at 565. The finding of a pretext in the case at bar is fully justified in view of the fact that, as in Smith, the infraction was not known until the decision to stop had already been made.

The defendants therefore ask this Court to adhere to the

rationale of its decision in Collins, and to reject the Fourth District's abdication of its duty to review the objective reasonableness of the conduct of police officers "engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 372 (1948). In the era of "good faith," United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), to turn a blind eye to patently pretextual conduct of police officers simply because they "could" act, notwithstanding all objective evidence that they "would" not act absent unfounded suspicion of more serious crime, is at once ill-advised and contrary to the rights safeguarded in our State and federal constitutions. The trial court correctly granted the defendants' motion to suppress.

CONCLUSION

Based upon the above and foregoing argument and citation of authority, the defendants respectfully request this Court to quash the decision of the Fourth District with directions that the decision of the trial judge suppressing evidence be affirmed.

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 11th day of May, 1987.

/s/ Mark King Leban