0/A 9-4-87

IN THE SUPREME COURT OF FLORIDA

JAMES KEHOE and
MICKEY DeVIVO,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

CASE NO 69,814

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioners were the appellees in the Fourth District Court of Appeal and the defendants in the Criminal Division of the Circuit Court, the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellant below and the prosecution in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal. All emphasis has been supplied unless the contrary is indicated.

The following symbols will be used:

"R" Record on Appeal

"AB" Petitioner's Brief on the Merits

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as found on pages one (1) through eleven (11) of the initial brief, with the following additions and/or clarifications:

Sergeant Williams thought that it was unusual to see any boat trailers and large trucks in that area, especially at that time of night. (R 8). Williams took a look at the vehicle, went around the block, and obtained the tag numbers off the trailer and truck. (R 8-9). Williams couldn't actually read the plate as he approached. (R 17). He testified that the trailer tag was slightly bent in an upward fashion, that it "took a litle bit to actually get the tag number", and that he "had to get a little closer to the trailer than you would normally have to", in order to read the tag. (R 9). Williams testified that the tag was "rather hard to see". (R 9). The truck had a New York tag, whereas the trailer had a Florida tag. Williams did not give the operator a citation at that time because the truck was parked and to be in violation, the truck would need to be in operation on the roads. (R 18).

Williams again observed the truck and trailer at 5:45 a.m., parked at the Pioneer Park boat ramp. It was parked in a ready loading position in a no parking zone. (R 10). Williams testified that in order to load a vessel, the operator would only need to back up the truck straight into the boat ramp area. (R 10). Williams observed Mickey DeVivo standing near the truck and observed the truck and trailer for approximately one hour without noting movement (R 11). Williams testified that during the course of his eight year career he seldom saw boats and trucks operating at 5:45 a.m. (R 7, 20-21).

At approximately 7:00 a.m., Williams met with Detective Sergeant Gary Null and Detective Jeff Hurt to advise them of his observations. (R,12-13). Williams relayed to them the information he had as to his "initial contact, usual contact with the vehicle, the fact that it was parked on the beach, the fact that the two plates were different. It was quite a long trailer, which would indicate a sizeable type of vessel that would go on it, like I say, it was unusual for that truck to be in that area of that particular time of night. Then once again seeing it approximately two and a half hours afterwards at the boat ramp with someone waiting around as if they are waiting on a vessel, that is what I explained to them. . ." . Williams also told them that he had problems reading the tag on the trailer (R 49).

Detective Null testified that when he and Hurt arrived at Pioneer Park to conduct surveillance, he observed DeVivo sitting at a picnic table. (R 30, 67). At approximately 7:55 a.m., Null and Hurt observed DeVivo run to the truck and back the trailer down into the water (R 32, 67-68) as a 30 foot Scarab boat approached (R 32, 68).

When Detective Hurt observed the boat approach the boat ramp, he noticed that the boat did not bear a visible hull registration. (R 70, 82). Null also made this same observation.(R 35-36). The truck and loaded boat were driven about 100 yards at which point Kehoe, the operator, jumped down off the boat and got into the driver's side of the truck. (R 37, 72-73). Null testified that in his experience as a police officer, he had seen boats being taken out of the water. (R 37). Null stated that it was unusual that the boat was simply driven onto the trailer and pulled out. (R 37). The boat did not stop on the upgrade of the ramp nor was the plug pulled from the vessel to allow the water to drain. (R 37).

Hurt observed several items of weight in the back of the bed of the truck. (R 73-74). Based on his experience, he felt that those items represented additional weight to assist the truck in pulling a heavy load onto the ramp. (R 72).

As the truck and trailer proceeded out of the park, Null notified dispatch to have a marked unit stop the truck. (R 39). Based upon his observations, Null believed that the vessel was being used to traffic in cannabis or a controlled substance. (R 40). Dusenbery had been assigned to stand by just outside of the park to assist in the investigation. (R 52). Null requested Dusenbery to stop the truck and trailer. (R 52, 83).

Officer Dusenbery effected the stop of the truck. Dusenbery testified that he stopped the truck based upon an improperly displayed tag and his directive to stop the vehicle. (R 94, 95). Dusenbery testified that he had to make a U-turn to make the stop. As he got behind the trailer, he observed that the trailer tag was bent such that he couldn't read the whole tag. (R 94). Dusenbery testified that had he not been directed to make the stop, but simply had seen the tag, he would have made the stop anyway. (R 94, 106, 107, 109). Although Dusenbery made the U-turn in order to stop the truck and thus was able to view the tag (R 102, 105), Dusenbery testified that he always makes a U-turn at that location as it is the end of his city limits. (R 105). Dusenbery testified that at the time he stopped the truck, he assumed that Williams had already ran the tag but he didn't know this for sure. (R 107-108). He didn't have any information about the tag itself. (R 108-109). Dusenbery didn't have any registration information on the vehicle. (R 107-108).

When Dusenbery stopped the truck and trailer, DeVivo and Kehoe exited the vehicle and approached Dusenbery. (R 95). The driver of the

vehicle, Kehoe, was unable to produce a license and registration. (R 95). Kehoe told Dusenbery that his name was Dean Miller. (R 96). Null testified that he looked at the tag after Dusenbery had stopped the vehicle and that he could not see the last letter. (R 42, 49).

During the argument on the motion to suppress, the trial judge inquired if it was not the testimony of the officers that they observed the plate get bent. (R 121-122).[1] In response to this line of inquiry by the Court, the prosecutor pointed out that the court was "circumventing the right for the State to make a stop, because you are saying the violation wasn't of a magnitude enough". (R 123). The State further argued that the "fact that a violation is committed in an officer's presence and he makes the stop" didn't render the stop illegal. (R 124). The State also submitted that there was probable cause to stop the vehicle based upon the observations of the narcotics officers. (R 126). After hearing the evidence presented and entertaining argument therein, the trial court granted the motion to suppress finding the stop to be illegal. (R 145).

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[1]The only officer to testify as to this was Detective Null who testified that, "It appeared that the vessel going up on the trailer had bent the tag. . ." (R 42). However, as previous testimony reveals, Williams gave no indication to them that the tag was obscured and already bent. (R 89). Thus, Null was clearly speculating as to the cause of the bent tag.

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS WHERE THE TOTALITY OF THE CIRCUMSTANCES PROVIDED A FOUNDED SUSPICION OF CRIMINAL ACTIVY AND WHERE THE OFFICER STOPPING THE VEHICLE WITNESSED A TRAFFIC VIOLATION?

SUMMARY OF THE ARGUMENT

The trial court erred in granting the motion to suppress where the police had a reasonable suspicion of criminal activity which had a factual foundation in the circumstances observed by the officers when interpreted in light of the officers' knowledge. Although each factor taken alone might not have given rise to a founded suspicion of criminal activity, taken together as viewed by experienced police officers they provided clear justification for the stop.

The trial court also erred in granting the motion to suppress where the officer made a proper stop for a traffic violation. Petitioner would have this Court scrutinize the gravity of the offense for which a vehicle was stopped in assessing the legality of the stop. This type of analysis would involve highly subjective determinations of which traffic violations are sufficiently severe such that an average person would routinely be stopped for them. One police officer would routinely stop for an offense that another might not. A police officer's authority should not be circumscribed by such judicial hair-splitting. As long as there is an objective basis for the stop, this Court should not concern itself with the officer's motivations in making the stop. The stop in the present case would have been made for the license tag violation alone, aside from the suspicions of the detaining officer. Not only would a reasonable officer have made the stop in question, but the proper inquiry is whether an officer could have made the stop in question. Because the record reveals that the officer would have stopped Petitioners for the tag violation, regardless of the directive he received, the stop was proper and the trial court erred in granting the motion to suppress.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS WHERE THE TOTALITY OF THE CIRCUMSTANCES PROVIDED A FOUNDED SUSPICION OF CRIMINAL ACTIVITY AND WHERE THE OFFICER STOPPING THE VEHICLE WITNESSED A TRAFFIC VIOLATION.

Respondent maintains that the stop made by Dusenbery at the direction of Hurt and Null was proper where the officer giving the direction has observed sufficient activity to form the basis for a founded suspicion. See McClendon v. State, 440 So.2d 52 (Fla. 1 DCA 1983); Crawford v. State, 334 So.2d 141 (Fla. 3 DCA 1976). The relevant founded suspicion here is that of the officers who actually observed the activities of Petitioners; namely, Null, Hurt and Williams. Respondent maintains that it is the aggregate of these circumstances, interpreted in light of these officers' knowledge, which provided a reasonable suspicion of criminal activity such as to justify the stop. Although none of these facts taken alone might have given rise to a founded suspicion of criminal activity, taken together as viewed by experienced officers they provided clear justification for the stop of Petitioner.

In Tamer v. State, 484 So.2d 583 (Fla. 1986), this Court recognized that an aggregate of factors, when viewed by an experienced police officer, could provide the founded suspicion necessary to justify a detention. This Court relied on United States v.Cortez, 449 U.S. 411 (1981) which sought to define the "elusive concept of what cause is sufficient to authorize police to stop a person":

> But the essence of all that has been written is that the totality of the circumstances -- the whole picture -- must be taken into account. Based upon that whole

> picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.
>
> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns or operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person.
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> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; juries as factfinders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particular suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

United States v. Cortez, supra, at 417-418, Florida Courts continue to recognize that founded suspicion is that reasonable suspicion which has some factual foundation in the circumstances observed by the officer when interpreted in light of the officer's knowledge. See, e.g., Watts v. State, 468 So.2d 256 (Fla. 2 DCA 1986); Clements v. State, 396 So.2d 214 (Fla. 4th DCA 1980), review denied 408 So.2d 1092; State v. Stevens, 354 So.2d 1244 (Fla. 4 DCA 1978).

Petitioners posit that the officer had but a "bare suspicion" or "hunch" of drug activity. Respondent submits that Petitioner's analysis is incorrect where it seeks to view each factor in isolation of each other. This approach ignores that the circumstances witnessed by the officer must be viewed in there totality. United States v. Cortez, supra.

Respondent submits that Petitioners' reliance on State v. Levin, 452 So.2d 1562 (Fla. 1984); Mullens v. State, 366 So.2d 1162 (Fla. 1978); Coladonato v. State, 348 So.2d 326 (Fla. 1977); and Freeman v. State, 433 So.2d 9 (Fla. 2 DCA 1983) is misplaced. The case sub judice involves much more than mere presence of Petitioners at an unusual, early morning hour in a location where illegal drug trafficking had previously occurred as the Fourth District recognized. 498 So.2d at 562.

Moreover, the instant case is distinguishable from Carter v. State, 454 So.2d 739 (Fla. 2 DCA 1984), wherein two police officers observed the defendant and others sitting in a parked vehicle outside a lounge at 9:00 p.m. The interior light was on and the oficers observed the defendants looking around prior to bending down in the front seat. The appellate court reversed the denial of the motion to suppress, finding that the stop was based on nothing more than a mere "hunch". Certainly, in the case at bar there were more factors present than just the suspicious activities of Kehoe, the boat operator, looking from side to side and behind him. (R 35).

Similarly, Romanello v. State, 365 So.2d 220 (Fla. 4 DCA 1978) does not support Petitioners' position. Romanello is distinguishable from the case at bar where the present case presents far more egregious circumstances than that of Romanello. In Romanello, one defendant was attempting to trailer a boat and was encountering difficulties in this regard. The officers thought the boat seemed heavily loaded. The appellate court reversed the denial of

the motion to suppress, finding that all the officers had to base a suspicion on was the weighted down appearance of the boat and the difficulties encountered in maneuvering it. Respondent submits Romanello presents markedly weaker facts. In the instant case, the boat operator was looking around as he approached the boat ramp. (R 35). This is coupled with the haste with which Petitioners loaded the boat onto the trailer and left the park. The boat created a wake in a no wake zone (R 34) and after the boat was loaded, Kehoe failed to get down from the boat and secure it or pull the plug to allow the water to drain. (R 37-38, 70). Instead, he remained on the boat as DeVivo pulled it out of the water and proceeded through the park. (R 37, 70). Finally, the truck which pulled the boat out of the water was weighted down as if to assist in pulling a heavy load. (R 74).

State v. Arnold, 475 So.2d 301 (Fla. 2 DCA 1985), is similarly distinguishable. In Arnold, the trial court's suppression of evidence as to defendants Gardiner and Whitehurst was upheld as not based on reasonable suspicion. The ruling was clearly correct, where these two defendants were not even seen on or in the boat and indeed, were not located in the surrounding area until the next morning. In Arnold, the deputies' suspicions were only aroused due to the defendant's personal appearance, nervousness, and nothing more.

Clearly, the present case is more akin to the line of cases which acknowledge that, although each factor taken separately would not support a founded suspicion, where all of the factors are taken together a founded suspicion of criminal activity arises. A recent example of this type of case is this Court's decision in Tamer v. State, supra. In Tamer, an officer observed the defendant driving a vehicle with an open tailgate through the

parking lot of a plaza that had experienced a rash of recent fires. The plaza was closed at this time. Upon observing a patrol car, the defendant made a sharp U-turn with his tires squealing and drove to a nearby restaurant where he parked his car. This Court found that the circumstances observed by the officer, a seven and one-half year veteran police officer, were sufficient for him to reasonably suspect the defendant of criminal activity. Although none of the facts standing alone might have given rise to a founded suspicion, taken together as viewed by an experienced police officer they provided clear justification for the stop.

Similarly, in Maull v. State, 492 So.2d 821 (Fla. 2 DCA 1986), the Second District relied on this Court's decision in Tamer, supra, to find that the circumstances were sufficient to give rise to a reasonable suspicion justifying the stop of a vehicle in which the defendant was a passenger: The defendant had been dropped off in a parking lot late at night and stood in the shadows. The defendant crouched behind parked cars when any car drove by and appeared nervous and agitated, and was subsequently picked up by the same vehicle.

Similarly, in State v. Lawson, 446 So.2d 202 (Fla. 3rd DCA), reviewed denied, 453 So.2d 44 (Fla. 1984), the trial court's granting of a motion to suppress was reversed where the officer's stop of the defendant's vehicle was based upon his observation of the defendant driving slowly around the block four or five times at an early morning hour, and on the officer's knowledge that buildings in that block had been burglarized in recent months.

Finally, in State v. King, 485 So.2d 1312 (Fla. 5 DCA 1986) error was found on the part of the trial court in granting a motion to suppress where the officer stopped the defendant's vehicle on a combination of factors. In King, 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 it's engine running in a manner so as to provide a quick exit, thus giving rise to a founded suspicion of criminal activity. King is a case not dissimilar to the one at bar where in the instant case, the officers had knowledge that drugs had previously been brought into Pioneer Park by the boat ramps. (R 30, 71). The Petitioners' actions sub judice, as previously stated, indicate that they were in a big hurry to get the boat out of the water and leave the park. Lawson, supra, and King, supra, are illustrative of the cummulative effort of all of the unusual circumstances. See also, State v. Austin, 490 So.2d 104 (Fla. 2nd DCA 1986) (aggregate circumstances supported a reasonable suspicion of criminal activity). Thus, as found by the Fourth District, the trial court erred in finding that the officers lacked a sufficient basis to stop Petitioners' vehicle.

Petitioners next contend that the officers stopped the vehicle based upon the so-called "drug courier profile". Respondent submits that Petitioners' argument is without merit where none of the officers testified that Petitioner was stopped on the basis of a drug courier profile. These facts simply do not exist in the present case. Just because Hurt testified on cross-examination that he had used a profile at such places as train stations to make stops (R 85-86) , and the officers had previously been given information from other agencies concerning smuggling through boat ramps (R 40), and the officers were aware that drugs had bee brought into their county through boat ramps at Pioneer Park (R 30), does not compel the conclusion that the Petitioners were stopped on the basis of a drug courier profile. Petitioners seek to creat their own profile from selected excerpts of the record. None of the officers testified that boats which arrive at

Pioneer Park and which do not have their plug pulled comprise a characteristic of a drug courier profile. (R 30, 37-38, 71). The fact that the officers collected intelligence from other agencies concerning smuggling through boat ramps does not necessarily imply that a drug courier profile was compiled with regard to smuggling by boat and that one was used in the present case. No testimony was elicited that the officers used a drug courier profile to make a stop of Petitioner or that the Petitioners even fit within the profile (R 86). Thus, Respondent maintains that Petitioners' argument that the use of a drug courier profile is insufficient as a matter of law to constitute reasonable suspicion lacks support in the record and is, consequently, without merit.

However, to respond to Petitioners' argument, Respondent would point out that drug courier and other criminal profiles are not per se invalid and some have been upheld. United States v. Sharpe, 470 U.S. 675 (1985); Florida v. Royer, 460 U.S. 471 (1983); United States v. Cortez, supra. In Florida v. Royer, supra, at 502 the Court concluded that the fact that the defendant was traveling under an assumed name, in addition to his behavior and appearance, which fit the drug courier's profile, was sufficient to suspect him of carrying drugs and to detain him for the purpose of investigating that suspicion.

Similarly, in Florida v. Rodriguez, 469 U.S. 1 (1984), although the defendants were travelers stopped at the airport, the suspects had already exhibited sufficient suspicious behavior when stopped. Before the defendants were even stopped, they had sighted the plainclothes police officers and spoken furtively to one another. On was overheard urging the other to "get out of here". One defendant's strange movements in an attempt to evade the officer

aroused further justifiable suspicion, as did the contradictory statements by the two defendants regarding their identities.

Respondent maintains that the Petitioners' unique conduct at bar extended well beyond any alleged profile behavior and that the instant case is thus distinguishable from Reid v. Georgia, 448 U.S. 438 (1980); Jacobson v. State, 476 So.2d 1282 (Fla. 1985); Kayes v. State, 409 So.2d 1075 (Fla. 2nd DCA 1981), review denied 424 So.2d 762 (Fla. 1982) and Oesterle v. State, 382 So.2d 1293 (Fla. 2 DCA 1980). The instant case presents facts stronger and more in line with Royer, supra, and Rodriguez, supra, than the weaker facts of the cases relied upon by the Petitioners which present little suspicious behavior beyond the "profile" characteristics. At bar, Petitioners contend that the profile used consisted of the "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' are suspected to be used to assist the vehicle in pulling a heavy load up the ramp"[2] (AB 24). The instant case, apart from any alleged profile similarities presents additional unique factors which serve to create a justifiable suspicion of criminal activity in the minds of the officers. First, Kehoe was observed furtively looking around as he approached the boat ramp. The boat contained no registration numbers on the only side of the boat Null could observe (R 35-36, 42).[3] Further, all of the Petitioners' actions

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[2]It should be noted that the type and size of the boat, a 30 foot Scarab (R 33), were not factors seized upon by the trial counsel as being a further "profile" characteristic.

[3]The decal violation of §327.11(5), Fla. Stat. was a second degree misdemeanor pursuant to §327.72(2) at the time of the crimes.

indicated they wanted to make haste -- the boat created a wake in a no wake zone, the boat did not first stop on the ramp but instead was pulled out of the water for 75 to 100 yards before stopping (R 70). The water was not drained nor was the boat secured. (R 37-38, 70). Respondent submits that Petitioners' reliance on Kayes v. State, 409 So.2d 1075 (Fla. 2nd DCA 1981), review denied, 424 So.2d 762 (Fla. 1982) is misplaced. In Kayes, 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 enter the warehouse. The officers became suspicious when they observed the defendants leave the warehouse driving the Ford which appeared to be weighted. Kayes, supra, at 1077. During the course of surveillance, the officers noticed that the defendants appeared nervous while eating at a restaurant. Thus, the conduct observed did not go beyond the profile characteristics themselvs. The appellate court held that no founded suspicion existed to justify the stop. In the instant case, neither officer testified that Petitioners were stopped on the basis of a drug courier profile, nor were the officers asked to identify what drug courier profile characteristics the Petitioners matched. Furthermore, the case at bar contains facts that when taken together, are certainly more indicative of drug smuggling than those present in Kayes. See e.g. Iapichino v. State, 435 So.2d 871 (Fla. 4 DCA 1983) (officers who noted that defendant exhibited a variety of profile characteristics, that he was involved in the transfer of a leather coat with a person who acted as though he were a stranger to the defendant but who clearly was not, had founded suspicion to detain defendant). The Fourth District correctly found that all of the circumstances witnessed by the officers in light of their knowledge and experience created a founded suspicion.

Respondent submits, alternatively, that should this Court find that the officers lacked a founded suspicion as to drug trafficking, the stop was nevertheless valid based upon the officers observation of a bent tag, a traffic violation. Petitioners submit that the real reason they were stopped was because of the officers' suspicions of drug trafficking, rather than for the bent tag, and that the traffic stop is invalid as a "pretext" stop because an average citizen would not routinely be stopped for such an offense. The Fourth District concluded that the traffic violation alone authorized the 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 the 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. 3rd DCA 1986). Thus, the Fourth District has clearly aligned itself with the decisions of the Third and Fifth Districts which reject the use of a pretextual analysis which seeks to scrutinize the severity of the offense and the officer's motivation behind the stop in determing whether a stop is valid.

Respondent submits that this Court should reject the pretextual analysis employed by the First and Second Districts for a number of reasons. In State v. Holmes, 256 So.2d 32 (Fla. 2nd DCA 1971), aff'd, 273 So.2d 753 (Fla. 1972), the Second District promulgated the rule that a traffic stop is not invalidated by the presence of other motivations on the part of the officer so long as "the gravity of the traffic offense is such that any citizen would be routinely stopped for it if seen committing the offenses by a traffic officer on routine patrol." Holmes at 34. The Second District has continued to follow this rule and to distinguish between more serious and less serious traffic offenses in determining whether a stop is valid in

situations where the officers' primary motivation for the stop was suspicion of serious criminal activity. See, e.g., State v. Gray, 366 So.2d 137 (Fla. 2nd DCA 1979) (missing taillight, tag light, or lack of clearance lights not sufficiently serious traffic violations to justify stop); Diggs v. State, 345 So.2d 815 (Fla. 2 DCA), cert. den. 353 So.2d 679 (Fla. 1977) (stop by officer to check driver's license invalid a "pretext" stop, though officer had reason to believe defendant did not have a license);Urguhart v. State, 261 So.2d 535 (Fla. 2 DCA 1971), cert. den. 266 So.2d 349 (Fla. 1972) (exceeding speed limit by 15 m.p.h. is sufficiently serious violation). In an earlier decision, State v. Turner, 345 So.2d 767 (Fla. DCA 1977), the Fourth District followed the Holmes rule in upholding a stop for defective tail lights and to check his driver's license, notwithstanding that the officers' subjective reason for stopping the defendant was that they had previously arrested him and knew him to be a convicted felon.

The Fourth District correctly observed the problem generated by the Gray, Diggs, and Turner line of cases:

> Gray, Diggs, and Turner illustrate a significant problem created by the Holmes rule: 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. In Turner this court found that defective lights and a driver's license check were sufficient but in Gray and Diggs these same violations were found not to be sufficient.

498 So.2d at 565. Indeed, this rule has also created intra-district conflict as to whether the motivations of an officer making a stop should be determinative in judging the validity of a stop. In Porchay v. State, 321 So.2d 439 (Fla. 1 DCA 1975), overruled in part on other grounds, 403 So.2d 349 (Fla.

1981), the First District refused to find a valid traffic stop for a bent, partially illegible license tag because the officer's primary motivation for the stop was that he felt the occupants were "suspicious". Earlier, however, the First District held that where the Florida Highway Patrol officers were authorized by statute to require drivers to stop and display their driver's licenses, "[t]he officers' motive for acting under the statute is immaterial, hence the fact that he is suspicious that the driver of a particular automobile may be committing a crime neither adds to nor detracts from his authority to stop the automobile and check the driver's license," Cameron v. State, 112 So.2d 864, 869 (Fla. 1 DCA 1959).

Thus, the Fourth District concluded that the "better rule" arose from Bascoy v. State, 424 So.2d 80 (Fla. 3rd DCA 1982), which broadened the Holmes rule in holding that "[w]here the defendants were stopped by an officer for minor traffc infractions of such a nature that any citizen committing them could have been routinely stopped, that the officer 'possibly' would not have stopped defendants but for further suspicion that they were also engaged in criminal activity did not render it an unlawful 'pretext' stop." In State v. Ogburn, 483 So.2d 500, 501 (Fla. 3rd DCA 1986), the Third District recently extended the rule in holding that where an officer observes a traffic violation 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." Recently, the Fifth District adopted the Bascoy rule in State v. Irvin, 483 So.2d 461 (Fla. 5th DCA), rev. denied 491 So.2d 279 (Fla. 1986), 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. Irvin, supra, at 462. Specifically, the Irvin court relied on Scott v. United States, 436 U.S. 128 (1978) for the proposition that:

> It is an established principle that only the objective basis which may support particular police conduct, rather than the officers' subjective intent or belief, is pertinent to determining the propriety of the action in question.

Irvin, supra, at 462. Similarly, in Esteen v. State, ___ So.2d __, 12 F.L.W. 443 (Fla. 5 DCA Feb. 5, 1987), the court once again rejected the 'pretextual' analysis on the grounds that "such an inquiry is not only essentially irrelevant to the proper ones, which are existence and validity of any asserted objective grounds for detention. . ." . In Esteen, the officer stopped the vehicle for weaving and proceeding at a slow rate of speed.

Respondent submits that this Court need not reach the issue of whether a traffic stop is valid where a citizen would not ordinarily be stopped for it but where the citizens could be as Dusenbery testified at bar that he would have stopped the Petitioners for the bent tag violation alone. At bar, Dusenbery testified that had he not been directed to stop the truck, trailer, and boat but simply had seen the tag, he would have effectuated a stop. (R 94, 107). He couldn't read the tag. (R 94). Dusenbery stopped the vehicle based upon his directive and also based upon the infraction he witnessed. (R 95). As Dusenbery testified on cross-examination, "Well, what my testimony says, sir, is whether they wanted me to stop it or not, once I saw the obscured tag, I would have stopped them." (R 105-106).

In any event, however, Respondent maintains that this Court should approve the decision of the Fourth District sub judice where there was a lawful basis for which the Petitioners could have been stopped. Respondent submits that the decision in Bascoy, supra, and its progeny is the better rule where it eliminates the problem of courts being required to make highly subjective determinations as to which traffic offenses are sufficiently serious that a stop would routinely be made for them, and which are not. Indeed, Petitioners concede that the "defendants here have no quarrel with the objective standard utilized by the Third and Fifth Districts". (AB 35). Petitioners then contend that even under an objective basis test, the stop herein is invalid because "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 trailer were fully readable, have previously been recorded and checked by Officer Williams and found to be in complete order." (AB 34). Respondent, however, maintains that the stop was valid under an objective basis test. Petitioners' argument misses the point because it focuses on the observations and suspicions of Williams, Hurt and Null which were not communicated to the detaining officer, Dusenbery. A reviewing court is to undertake an objective assessment of an officer's actions in light of the facts and circumstances then known to him. Scott v. United States, 436 U.S. at 137. Thus, the relevant inquiry is what facts were known to Dusenbery at the time he stopped Petitioners, and not what facts were known to Williams, Hurt and Null. At bar, the record reveals that Null merely asked Dusenbery to stop the truck. (R 53, 83). None of the officers' suspicions or observations were conveyed to Dusenbery. Null never told Dusenbery to stop the truck because he believed it contain marijuana or because he believed the boat had a decal violation or because the truck had

been illegally parked. (R 53-54). Hurt never communicated any alleged violations to Dusenbery either. (R 82-83). Dusenbery himself testified that he was not given any specifics as to the observations that were made by the other officers. (R 93). Dusenbery was instructed by dispatch to respond to Pioneer Park to stop a vehicle. (R 93). Dusenbery testified that, "As I turned, I got in behind the trailer, and I could see that the trailer tag was bent where I couldn't read the whole tag, and along with being directed to stop anyways, I went ahead and made the traffic stop on it." (R 94). Dusenbery testified he didn't recall getting information prior to his stop of the vehicle that the tag had already been run and that there was no problem with it. (R 107). Dusenberry didn't have any prior information about this tag. (R 108-109). Thus, when Dusenbery stopped the vehicle, he knew that the other officers wanted it stopped and that he himself had witnessed a tag violation. Thus, the record clearly demonstrates Dusenbery had an objective and lawful basis for the stop. The fact that the other officers might have had suspicions concerning the vehicle is irrelevant. The objective evidence indicates that Dusenbery would have stopped the vehicle for the tag violation alone. Thus, Petitioners' reliance on United States v. Smith, 799 F.2d 704 (11th Cir. 1986) is misplaced where there was no objective evidence in Smith that the trooper would have stopped the defendants for just the weaving. Indeed, the evidence indicated that the trooper would not have stopped the defendant for the weaving but instead, stopped the defendants on the basis of a drug courier profile. The Eleventh Circuit held that the stop was pretextual in nature, concluding that no officer would have stopped the vehicle under those same circumstances, absent the officer's "hunch" that the driver was engaged in illegal activity. It is

undisputed on this record that Dusenbery witnessed a traffic violation and that he did not merely fabricate an excuse to make a stop.

In conclusion, Respondent urges the Court to approve the decision of the Fourth District. If a police officer has a lawful basis upon which to make a traffic stop, he should be allowed to do so even if he has other suspicions concerning the driver. If this Court takes the position of upholding only those stops in which a person would routinely be stopped, as opposed to those stops in which a person could be lawfully stopped, it will inject the subjectivity into the analysis which the Fourth District sought to avoid. What traffic offense one police officer would routinely stop for another police officer might not. The Fourth District has not refused to "objectively assess the reasonableness of a police officer's stop of a vehicle based on a minor traffic infraction", but merely has concluded that there is no reason to abrogate the authority of a police officer to stop a vehicle for a traffic infraction simply because the officer has other suspicions concerning the vehicle or the driver. 498 So.2d at 565. Thus, the trial court erred in granting the motion to suppress where there existed founded suspicion for the stop, and where the vehicle committed a traffic infraction.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests this Court to affirm the District Court's opinion reversing the order of the trial court granting the motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits has been served upon MARK KING LEBAN, ESQUIRE, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130 this 29th day of May, 1987.

Amy L. Diem

Of Counsel