

IN THE SUPREME COURT OF FLORIDA

FILED
JUN 29 1987

JUN 29 1987

CLERK SUPREME COURT

By: *[Signature]*
Deputy Clerk

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 SYLESTER EARL SMITH,)
)
 Respondent.)
 _____)

CASE NO. 70,261

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The State adopts the statement in its initial
brief.

STATEMENT OF THE CASE

The State adopts the statement in its initial
brief.

STATEMENT OF THE FACTS

The State adopts the statement in its initial brief, with the following additions:

The Assistant State Attorney who viewed the lineup, John Jolly, was not the prosecutor at trial (R 25, 1). Detective Carroll selected the other persons who appeared in the lineup (R 34).

Harry told Detective Carroll that in the photographic lineup, he had not been able to view the whole bodies of the individuals. Once he viewed the live lineup, he recognized the wide scar on the Defendant's arm and identified him (R 35).

POINT INVOLVED

WHETHER, PRIOR TO THE INITIATION
OF FORMAL ADVERSARY JUDICIAL
PROCEEDINGS IN THE FORM OF AN
INDICTMENT OR INFORMATION, AN
ACCUSED HAS A CONSTITUTIONAL RIGHT
TO COUNSEL AT A COMPELLED LINEUP?

SUMMARY OF THE ARGUMENT

The Defendant had neither a Sixth Amendment nor a Florida constitutional right to counsel at the lineup held prior to the filing of the Information. The only basis upon which he is eligible to challenge the lineup would be if he could establish a violation of due process. In this case, there is clearly no due process violation because the lineup was preserved by photographs and could be challenged by the defense at the trial.

ARGUMENT

PRIOR TO THE INITIATION OF FORMAL
ADVERSARY JUDICIAL PROCEEDINGS
BY INDICTMENT OR INFORMATION,
AN ACCUSED IS NOT CONSTITUTIONALLY
ENTITLED TO COUNSEL AT A COMPELLED
LINEUP.

The State continues to maintain that at the time of the lineup, adversary proceedings had not yet commenced and therefore the Defendant was not entitled to the presence of counsel. Kirby v. Illinois, 406 U.S. 682 (1972). As the First District noted in Traylor v. State, 498 So.2d 1297, 1299-1300 (Fla. 1st DCA 1986), one looks to state law to determine when adversary proceedings have commenced. Since Rule 3.140(a), Fla. R. Crim. P. provides that prosecution shall be solely by indictment or information, the Traylor court concluded that the filing of an information or indictment commences adversary proceedings in Florida.

The distinction between the pre- and post-indictment situation, and why a formal charge signals the initiation of adversary judicial proceedings with the concomitant attachment of the Sixth Amendment right to counsel, was pointed out by the United States Supreme Court's recent decision in Michigan v. Jackson, 475 U.S. _____, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). After a formal accusation has been made, a person who had previously been a "suspect" becomes an "accused" within the meaning of the

Sixth Amendment. Jackson, at 89 L.Ed.2d 639-640. When the lineup was held in the instant case, the Defendant, though under arrest and in custody, still had the status of a "suspect"; the information by which he became an "accused" was filed four days thereafter. It follows then, that there was no Sixth Amendment right to counsel at the time of the lineup.

While it is true, as the Defendant asserts, that a state may grant a greater constitutional right than that provided by the Federal Constitution, historically Florida has not done so with respect to counsel at pre-information lineups. Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), discr. rev. denied, 469 So.2d 750 (Fla. 1985), is an anomaly. In Perkins v. State, 228 So.2d 382 (Fla. 1969), this Court held a suspect is not entitled to counsel at a pre-indictment lineup, and the District Courts of Appeal have followed suit. See, e.g., State v. Ciongoli, 313 So.2d 41 (Fla. 4th DCA 1975).¹

Article I, Section 16, of the Florida Constitution states that in all criminal prosecutions an accused shall have, inter alia, the right to counsel. As the State has shown, in this case at the time of the lineup the prosecution had not yet commenced and the Defendant was not yet an

¹See also the cases cited on page 13 of the Petitioner's initial brief.

accused, because no formal charges had been filed. Therefore, the Defendant cannot rely on the Florida Constitution to give him a greater right, for this section is inapplicable to pre-information lineups.

Likewise, the Defendant's citation to Fla. R. Crim. P. 3.111, Providing Counsel to Indigents, does not support his position. In Jordan v. State, 334 So.2d 589 (Fla. 1976), this Court had occasion to construe the rule. The defendant in Jordan alleged that nodding his head after being given Miranda warnings did not suffice as a waiver of counsel, since §3.111(d)(4) states that such a waiver should be written and signed by two witnesses. Accordingly, he sought suppression of a statement he had made, claiming Florida had a stricter waiver requirement than Miranda. This Court found the argument flawed in two respects. First, the rule concerns providing counsel to indigents, and was taken out of context in the defendant's argument. Second, the court found nothing in the rule which calls for the suppression of evidence. As in Jordan, in this case, the fact that Florida ensures indigents are provided with counsel does not entitle the Defendant to suppression of a lineup identification conducted prior to the filing of formal charges and counsel's appointment. See also, Doerr v. State, 383 So.2d 905 (Fla. 1980) [the failure to notify a juvenile's

parents that he had been taken into custody did not require suppression of his confession].

Finally, the fact that the Defendant had had a first appearance pursuant to Fla. R. Crim. P. 3.130, did not initiate adversary proceedings for the purpose of right to counsel at a lineup. A first appearance is held simply to satisfy the Fourth Amendment's requirement that a probable cause determination be made as a predicate to any significant restraint of pre-trial liberty. Gerstein v. Pugh, 420 U.S. 103 (1974). It is not a critical stage that requires the appointment of counsel. Id. In the present case, counsel was not appointed at first appearance because the Defendant indicated he would retain an attorney (R 477).

Therefore, the State has conclusively shown that there was no violation of either federal or Florida law by the holding of a lineup without counsel for the Defendant, or allowing him to act as his own counsel. The only issue here is whether there was any due process violation arising from the circumstances of the lineup. Stovall v. Denno, 388 U.S. 293, 302 (1967). Clearly, there was not: the live lineup and the prior photographic lineup were both preserved and introduced into evidence (R 228, 317). Consequently, the two stated concerns that caused the court in United States v. Wade, 388 U.S. 218 (1967)

to hold counsel is required at post-indictment lineups--
the possibility the lineup is suggestive and the inability
to reconstruct and show its suggestiveness at trial--
were not present in this case.

Therefore, the State maintains the trial court
correctly denied the Defendant's Motion to Suppress.
The court below erred in reversing the trial court's ruling.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the State respectfully requests that the decision of the Fourth District Court of Appeal be reversed and remanded with directions that the judgment and sentence entered by the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed to Bruce D. Lincoln, Esquire, Sunrise Bay Building, Suite 212, 2701 East Sunrise Boulevard, Fort Lauderdale, FL 33304, this 26th day of June, 1987.

J B Shearer

Of Counsel