IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,313

THE STATE OF FLORIDA,

Petitioner,

vs.

CARLOS FRANCO SUCO,

Respondent.

FILED
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By
Deputy Clerk

****

ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The evidence which the trial court suppressed was seized pursuant to a warrantless search of a single family home owned by the respondent Carlos Franco Suco. In January 1985, Suco orally leased the home on a six-month basis to codefendants Jorge and Isabel Betancur, who commenced living on the premiss with their three children. Although Suco did not reside at the house, he frequently was there to collect the rent and to ensure that proper maintenance was conducted and necessary repairs made to the house. Moreover, he possessed a key to the front door and had the right to enter the house whenever he chose, as there were no stated restrictions to his right of entry (A.2).[1/]

On June 7, 185, at approximately 9:00 p.m., Suco, accompanied by codefendant Jorge Navarrette, walked up to the front door of the aforesaid house and knocked. Isabel Betancur was in the laundry room of the house and did not hear the knock. When no one answered the door, Suco used his key to open the door and entered the house. He proceeded to walk to the family room where he sat down on a couch and began to watch television with the Betancur children (A.2).

At approximately the same time, officers of the Metro-Dade Police Department who were on patrol in the area in an

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1/ References are to the Appendix to the Brief of Respondent, which contains the original opinion of the District Court of Appeal, the opinion on rehearing, and copies of the decisions in State v. Mallory, 409 So.2d 122 (Fla. 2d DCA 1982), and Daniels v. State, 411 So.2d 1034 (Fla. 1st DCA 1982).

unmarked police car saw Suco and Navarrette standing at the front door of the house. Their suspicions aroused, they circled back to the house and observed that the two men they had seen earlier were no longer there. They then surveilled the premises for about fifteen minutes during which time nothing happened. Determined to investigate the matter further, they called for backup police assistance (A.2-3).

After the arrival of the backup units, Officers Gonzalez and Silvia went around to the back of the house where Gonzalez was able to observe the two Betancur children watching television in the living room area. He then returned to the front door and, accompanied by Officer Morales, knocked on the door. Isabel Betancur, with a small baby in her arms, answered the door and had a conversation with the two officers. During this conversation, Officer Silvia, in back of the house, was able to observe Suco walk out of the kitchen area, sit down and begin watching a Flintstone cartoon on television (A.3).

Meanwhile in the front of the house, Officers Morales and Gonzalez conversed with Isabel Betancur who was unaware that Suco and Navarrette were in the house and who consented to allow the police to enter the house for the purpose of locating two men whom the police suspected might be home invaders (A.3).

Officers Gonzalez, Morales and Cravens entered the house and discovered that no home invasion had taken place. They observed Suco sitting in the living room watching television. Mrs. Betancur immediately had a brief conversation with Suco as

to when he had entered the house and it was obvious to the police that the two were acquainted. The police also observed Navarrette standing by the door of the northwest bedroom, and he too presented no evidence of being a home invader (A.3-4). There followed two distinct searches conducted by the police.

First, Officer Cravens continued his search for possible home invaders by walking down the hall into the northeast bedroom of the house. He observed a table in the middle of the room with paper, rubber bands, and writing implements on it, a large amount of United States currency and two vinyl suitcases with the sides slashed. He also looked in the closet and discovered a bag with money in it. Cravens suspected that he had stumbled on a large amount of illegal drug money, returned to the living room, and so informed the other officers (A.4).

The police then ordered everyone outside the house onto the front porch where the officers obtained identification from Suco, Isabel Betancur and Navarrette. While the suspects remained on the porch in police custody, Officers Cravens and Gonzalez reentered the house and went back to the northeast bedroom to inspect the cash and physical evidence there. Eventually, the police seized the physical evidence from the northeast bedroom. The trial court ruled below that this evidence was reasonably seized by the police pursuant to the plain view doctrine. This aspect of the trial court's ruling was not before the district court (A.4).

Second, the police escorted Suco, Isabel Betancur and Navarrette into the house, and separated MRs. Betancur from the rest of the group. They learned from her that she had a revolver in the master bedroom and they seized same. The police then gathered everyone in the living room and **learned that the defendant Suco was the owner of the house. The police then separated Suco from the rest of the group and attempted to obtain his consent to search the house. Suco refused to give such consent** (A.5).

Officer Fernandez then took Isabel Betancur aside again and had a conversation with her. Mrs. Betancur eventually signed a written form, consenting to a police search of the house and the police then conducted a general search of the house, during which time they discovered and seized 208 kilos of cocaine, cash and three semiautomatic weapons (A.5).

The trial court specifically found the following with reference to Mrs. Betancur's consent for this general search:

> "4. The Court specifically finds that ISABEL BETANCUR did not freely consent to the subsequent search of the house either orally or in writing. This Court specifically finds that the consent form signed by Isabel Betancur was, under the totality of the circumstances, not freely, voluntarily, and knowingly signed. The Court finds, based upon the evidence, that the consent to search form and *Miranda* waiver form which were shown to ISABEL BETANCUR and which she was simply asked to read and sign, were not explained to her and that no adequate effort was made by Officer Fernandez to ensure that the forms were understood by ISABEL BETANCUR and that she was freely and voluntarily waiving her rights. The Court notes that the burden is upon the State to prove through clear and convincing

> evidence that ISABEL BETANCUR freely consented to the search of the home. In this case, not only has the State failed to meet its burden, but this Court is convinced by the clear and convincing evidence that ISABEL BETANCUR did not consent to the search of her home."

(A.5-6).

The State appealed the suppression order only with respect to the respondent Suco. The issue presented to the District Court of Appeal was phrased by that court as follows:

> This is an appeal by the State from an order suppressing, in part, certain evidence obtained from the search of a private house. The central issue presented is whether a lessor's Fourth Amendment rights are invaded by an otherwise unreasonable search of his leased premises conducted by police where, as here, the lessor (1) retains and exercises a possessory interest in the said premises, and (2) is present on the premises with the permission of the lessee at the time of the search and does not consent to same.

(A.1). The court concluded that Suco had a reasonable expectation of privacy, which was violated by the police search of his house, based on both of these factors (A.9-10).

The State's rehearing petition primarily addressed the second factor relied upon by the Court, Suco's presence on the premises as an invited guest of Mrs. Betancur. On rehearing, the district court reaffirmed its earlier holding, stating:

> In the instant case, the defendant Suco, as the invited guest **of his tenant,** had every right to complain that his privacy was invaded when the police ushered everyone out of the premises and then back into the living room -- **where they brushed aside Suco's refusal to consent to a further search,** coerced his tenant into allowing same, and then conducted a totally unauthorized second search of the dwelling. Even aside from Suco's possessory

> interest in the premises which alone gives him standing in this case, his presence on the premises with the consent of the tenant was enough in itself for him to complain that his privacy interests were disturbed by the unwarranted police action in this case.

(A.14). The court explicitly distinguished the decisions in State v. Mallory, 409 So.2d 1222 (Fla. 2d DCA 1982), rev. den., 418 So.2d 1280 (Fla. 1982), and Daniels v. State, 411 So.2d 1034 (Fla. 1st DCA 1982), noting:

> **In those cases, unlike the instant case, the defendant was not a lessor-owner of the searched premises with a possessory interest in the same.**

(A.13).

SUMMARY OF THE ARGUMENT

The two district court decisions relied upon by the State do not directly and expressly conflict with the decision of the Third District Court of Appeal in the case at bar. In the case at bar, the defendant Suco owned the house which was searched and was present on the premises, at the time of the search, not only with the consent of **his** tenant, but also pursuant to certain possessory rights in the leased premises which he retained and exercised that evening. In the case at bar, the district court pointed out that both decisions relied upon by the State "are factually distinguishable from the instant case" because in both of those cases, "unlike the instant case, the defendant was not the lessor-owner of the searched premises with a possessory interest in same." (A.13). In fact, in State v.

Mallory, 409 So.2d 1222 (Fla. 2d DCA 1982), the Second District Court of Appeal explicitly noted that the defendant in that case "claimed no financial or ownership interest in the residence." Id. at 1224 (A.17). Thus, the decision of the Third District Court of Appeal in the case at bar does not directly and expressly conflict with either of the decisions cited by the State and this court should find that conflict jurisdiction does not exist.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE CASE AT BAR DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS IN DANIELS v. STATE, 411 So.2d 1034 (Fla. 1st DCA 1982), and MALLORY v. STATE, 409 So.2d 1222 (Fla. 2d DCA 1982), rev. den., 418 So.2d 1280 (Fla. 1982).

A reading of the decisions relied upon by the State shows that neither Daniels v. State, 411 So.2d 1034 (Fla. 1st DCA 1982), nor Mallory v. State, 409 So.2d 1222 (Fla. 2d DCA 1982), rev. den., 418 So.2d 1280 (Fla. 1982), directly and expressly conflicts with the decision in the case at bar.

In Daniels v. State, supra, the facts and holding were as follows:

> The evidence in the instant case established that Mr. Daniels was, in effect, **a guest of a guest**. At the time of the search, he had been in the trailer only a few hours. He testified he had been in no part of the trailer except the front room, that he did not even "know" that the trailer had a back bedroom, although he assumed that it did. When police sought his permission to search the trailer, he deferred to Mr. Hawkins because he was "just visiting." Under the circumstances, we con-

> clude that the search of the **back bedroom** and the seizure of the marijuana therein did not violate Mr. Daniels' Fourth Amendment rights.

411 So.2d at 1037 (A.21).

In State v. Mallory, supra, the court held that the defendant, as a mere overnight guest in the house, had no reasonable expectation of privacy therein. In so doing, the court explicitly noted that its holding might have been different if the defendant had more of a personal interest in the premises:

> Although ownership is not the only criterion in determining the privacy question, it is certainly important to note that Mallory claimed no financial or ownership interest in the residence.

409 So.2d at 1224 (A.17).

In the case at bar, the District Court of Appeal, in its decision on rehearing, noted that in both State v. Mallory, supra and Daniels v. State, supra, "unlike the instant case, the defendant was not a lessor-owner of the searched premises with a possessory interest in the same." (A.13). In this case, Suco was far more than a mere invited guest. He was the owner of the premises in question and was present on the premises, not only as an invited guest of **his** tenant, but also because, as the owner of the premises, Suco retained and exercised certain possessory rights in the leased premises which gave him a right to be there and a reasonable privacy expectation therein (A.9). The trial court found, under the totality of the circumstances, that the admittedly unreasonable search of the house, conducted pursuant to a consent coerced from Suco's tenant, after he had refused

consent to search, violated Suco's reasonable expectation of privacy and suppressed the evidence as to him. The decision of the District Court of Appeal in the case at bar, affirming the trial court's order of suppression, simply does not directly and expressly conflict with either of the decisions relied upon by the State.

CONCLUSION

Based on the foregoing reasons and citations of authority, Respondent respectfully urges this court to deny review.

Respectfully submitted,

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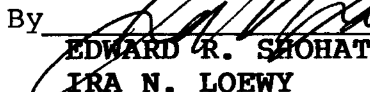
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 20th day of April 1987 to Richard L. Kaplan, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avenue, Suite 820, Miami, Florida 33128.

By 

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