11-13

**IN THE SUPREME COURT OF FLORIDA**

CASE NO. 70,313

O/A 12-4-87

THE STATE OF FLORIDA,

Petitioner,

vs.

**CARLOS FRANCO SUCO,**

Respondent.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

# BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

**RICHARD L. KAPLAN**
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

## TABLE OF CONTENTS

## TABLE OF CITATIONS

## TABLE OF CITATIONS
## CONTINUED

**CASES** **PAGE**



## OTHER AUTHORITY

## INTRODUCTION

The appellant, the State of Florida, was the prosecution in the trial court. The appellee was the defendant. The parties will be referred to as they stood before the trial court. References to the record on appeal will be denoted by the symbol "R". References to the transcript of the proceedings will be denoted by the symbol "T".

## STATEMENT OF THE CASE

The defendant was charged with trafficking in cocaine and conspiracy to traffic in cocaine. (R. 7-8A). A motion to suppress was presented and evidence adduced on October 31, 1985 through November 4, 1985. (T. 1-800). The court granted in part the defendant's motion to suppress. (T. 788-797). The State filed a timely notice of appeal. (R. 71). This appeal follows.

The Third District Court of Appeal held the Defendant was an invitee who and had a reasonable expectation of privacy to challenge the search.

## STATEMENT OF THE FACTS

Officers Mark Silvia and Norberto Gonzalez were working with the Crime Suppression Unit of the Metro-Dade Police Department on June 7, 1985. (T. 20, 207). They were in plain clothes and an unmarked police vehicle. (T. 21, 213). They were specifically watching for home invasion robberies. In the area they were patrolling there had been numerous instances of robbers kicking in doors or pretending to be policemen and thereby gaining entry to houses. (T. 23-24, 208-209). At 9:10 p.m. as they were patrolling, Officer Silvia saw two white males on the front porch of a house. They were in front of double door which, Officer Silvia stated, are weak and thereby easier to kick open. (T. 25-26). One of the two men was leaning over and looking into the living room window. (T. 27, 210). It aroused the suspicion of the officers. They turned around to investigate. (T. 31, 212). The two men were gone when the officers went back to the house. (T. 31, 212). The officers parked, watched the house and called for a marked police unit. (T. 31, 213). Uniformed Officers Morales, Cravens and Gross arrived. (T. 32, 37, 214). Officer Silvia went to the rear of the house. He looked into a rear window and saw a child watching television and the defendant sitting down. He then saw the co-defendant, Navarrte, walk into the room. (T. 34-36). Morales and Gonzalez knocked on the front door of the house. (T. 218). Mrs. Betancur answered. (T. 221). When

asked, Mrs. Betancur said no one had come to her door and that only she and her children were home. (T. 222, 227, 463, 43). She was asked about a car that was in her driveway. She did not know about the car being there or who owned it. (T. 39, 224-225, 464). Officer Silvia said there was a man inside the house. (T. 43, 92-93, 227). As Mrs. Betancur had said there was no one but her children in the house, the police suspected a burglary in progress. (T. 381). Officer Gonzalez asked Mrs. Betancur if they could check the house for her safety. She agreed. (T. 228-229, 465). The defendant was sitting in the family room. (T. 230). Mrs. Betancur apparently knew the defendant but asked how and when he had come in. (T. 468, 624). While searching the house for robbery suspects, Officer Cravens walked into a bedroom containing open ledger books, an open box with a large amount of money in it and suitcases. (T. 388-389). The suitcase were slashed open as against opened by normal means. Coffee grounds were inside. (T. 115, 242). At that point, the police suspected narcotics were involved. The officers stayed at the scene approximately one hour waiting for Officer Fernandez to arrive with a consent to search form. (T. 346, 524). Mrs. Betancur signed the form consenting to the search of the house. (T. 535-537). A search of the house revealed three Mac 11 semi-automatic guns (T. 543), 208 kilos of cocaine and large amounts of cash. (T. 404).

The trial court found the consent to search was not intelligently and voluntarily given by Mrs. Betancur. (T. 788-797). It suppressed the cocaine and the money. The State argued that the defendant lacked standing to contest the evidence. The defendant produced a warranty deed to him dated August 31, 1984 and recorded in September, 1984 in official record book 1226 on page 183. (T. 202-203). Mr. and Mrs. Betancur had a six-month oral lease with the defendant running from January, 1985 through July, 1985. Mr. Betancur testified that he and his family were renting and living in the house. Rent was paid on a monthly basis. (T. 203-206). Mrs. Betancur testified that the defendant owned the house and that she rented it. She had lived there with her husband and children since January. (T. 619). The defendant retained a key to the house. (T. 632). He went to the house from occasion to occasion to collect the rent or when the house was damaged. (T. 620, 673). The court held the defendant had standing. (T. 698).

## SUMMARY OF ARGUMENT

The State submits two issues for this Court's determination pursuant to its authority to plenary review cases involving conflict jurisdiction.

I

The Defendant was the landlord of the property searched. He retained the right to enter the premises solely to collect rent and make repairs. Although the Third District Court of Appeal found the Defendant was an invitee the State submits that decision holding the Defendant had standing was erroneous. At the time of the search the Defendant entered the house and sat down to watch television without the lessees consent. He did not enter the areas where the cocaine and firearms were found. He could not have a reasonable expectation of privacy in the areas he did not enter.

II

By leasing the house the Defendant gave up his possessory interest. He owned the house but no longer had free access to it nor the authority to limit who entered or left the house. He therefore could not have a reasonable

expectation of privacy in the house. The tenants, the Betancurs, had an expectation of privacy in the house. They had free access to the house and had authority to keep others out. The Defendant did not retain any of these rights. Therefore, the Defendant did not have an expectation of privacy in the house. He lacked standing to contest the evidence discovered therein.

## POINTS ON APPEAL

Pursuant to this Court's decision in Bould, infra the State submits the following issues for review:

I

WHETHER AN "INVITEE" WHO ENTERS A RESIDENCE WITHOUT THE OCCUPIER'S KNOWLEDGE HAS NO REASONABLE EXPECTATION OF PRIVACY IN AREAS HE DOES NOT ACCESS.

II

WHETHER A LANDLORD HAS STANDING TO OBJECT TO A FOURTH AMENDMENT SEARCH WHEN HE RETAINS THE RIGHT TO ENTER ONLY TO COLLECT RENT AND AFFECT REPAIRS.

## ARGUMENT

### I

AN "INVITEE" WHO ENTERS A RESIDENCE WITHOUT THE OCCUPIER'S KNOWLEDGE HAS NO REASONABLE EXPECTATION OF PRIVACY IN AREAS HE DOES NOT ACCESS.

The Defendant did not have a reasonable expectation of privacy in the attic and northwest bedroom as he was found in the living room. This Court should reverse and remand.

The State contends an invitee lacks standing to object to the validity of a residential search. Of course the initial inquiry involves whether or not the Defendant had a reasonable expectation of privacy.

In Daniels v. State, 411 So.2d 1034 (Fla. 1st DCA 1982) the Court set forth the following test:

> Initially, we would observe that the questions of standing and the legality of the search have merged. The proper inquiry is whether it may be said that the Fourth Amendment rights of the individual challenging the search have been violated. To answer this question a court must look to the "totality of the circumstances" in order to determine (1) if the defendant had a subjective expectation of privacy in the area searched, and (2) if that expectation is one which society is prepared to recognize as reasonable.
>
> [Footnotes omitted]. Id. at 1036.

This analysis must focus on the facts of this case.

It is clear the Defendant was found watching television in the living room. (T. 34-36). Equally, as clear is the fact the guns were found in the northwest bedroom (T. 543) and the 208 kilo grams of cocaine in the attic. (T. 404). The record does not suggest the Defendant accessed the areas where the contraband was found at the time of the seizure.

These facts in light of Daniels, supra, analysis establish the Defendant had no reasonable expectation of privacy in the area searched. The defendant in Daniels testified he had only been in the residence (a trailer) a few hours and had not gone into the back bedroom. Id. at 1037. In the Defendant's case there was no testimony that he, during the time prior to the raid, accessed either the attic or northwest bedroom. Therefore, he had no reasonable expectation of privacy in the areas searched. He had no standing to object to the search.

Additionally, the State also relies on State v. Mallory, 409 So.2d 1222 (Fla . 2d DCA 1982) in which the Court held a guest had no standing to object to a search. In Mallory, supra, that defendant kept personal effects in the house and access to a hidden key by which he could enter and leave at will. Id. at 1233. Furthermore, Mr. Mallory, like the Defendant, had a permanent home elsewhere, he was merely a visitor.

This Defendant was a landlord who maintained a key for the purpose of collecting rent and repairs. However, on the day of the search he entered the premises for a purpose other than rent or repairs, he was found watching television in the living room. (T. 34-36). This is the exact situation faced in Mallory, i.e. even though the Defendant had access he had no sufficient expectation of privacy. He could not have standing.

Furthermore, in State v. Loomis, 418 So.2d 482 (Fla. 4th DCA 1982) an invitee, who was present in the curtilage (yard) at the time a warrantless search of the yard and garage of the residence yielded both growing and other marijuana, was held to lack standing to challenge the seizure.

The Federal Circuit Court for Eleventh Circuit has likewise held a guest has no standing to challenge. In United States v. Rackley, 742 F.2d 1266 (11th Cir. 1984) two defendants were present at the off loading of cocaine from a boat docked behind a Fort Lauderdale residence. Id. at 1268-9. Federal agents searched the residence and a vehicle and found 260 pounds of cocaine. Id. at 1269. In that case the Eleventh Circuit held:

> The evidence shows that neither Crosby nor Rackley had a legitimate expectation of privacy to afford them standing to contest the search of the house. In United States v. Meyer,

656 F.2d 979 (5th Cir. 1981), the Fifth Circuit stated that:

> [w]hile an ownership or possessory interest is not necessarily required, the mere legitimate presence on the searched premises by invitation or otherwise, is insufficient in itself to create a protectible expectation. A defendant must also establish a legitimate expectation of privacy in the particular area searched in order for a fourth amendment challenge to be allowed.

Meyer, 656 F.2d at 981. (emphasis added)(citations omitted). The evidence elicited at the suppression hearing clearly establishes that Rackley and Crosby were mere guests on the premises leased by Sanders. While one's status as a guest does not necessarily exclude one from an expectation of privacy in the searched premises, the ability to object to a search is ordinarily limited to only those persons whose privacy is invaded by the search. United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973). Neither Rackley's nor Crosby's privacy was invaded by the search conducted at the house. Neither man had any valid expectation of privacy in either the garage, the plastic garbage bags obtained from the garage, the house itself, or the Lincoln Continental automobile parked in front of the house.

At the suppression hearing, Sanders asserted that Rackley had a key to the house and that he stayed there several times during the month of June. Sanders admitted, however, that Rackley did not stay in the house immediately preceding the search and seizure, and never kept a full wardrobe in the house when he was there. This testimony suggests that Rackley's expectation of privacy, if it existed at all, was limited to the guest bedroom where he

> stayed, whenever he stayed there. Since no evidence was seized from the guest bedroom, Rackley's expectation of privacy in that guest bedroom is of no legal consequence. Appellant Crosby, who never stayed overnight, does not possess even a possibility of a valid privacy expectation in the house. [Emphasis added]
>
> Id. at 1270

The State submits the Defendant as a guest had no legitimate reasonable expectation of privacy in the entire house. He maintained his key for the purpose of rent collection and property maintenance. A factual circumstance which gave him far less access than the defendant's in Rackley, supra.

The cases cited above demonstrate a defendant must have a legitimate expectation of privacy in the area searched. The Defendant was watching television in the living room. The suppressed evidence 208 kilos of cocaine and 3 MAC-11 firearms were found in the attic (T. 404) and the northwest bedroom (T. 543) respectively. There is no evidence which establishes that at the time the Defendant entered the residence and sat in the living room he had any expectation of privacy, yet alone a reasonable one. It is precisely this point which the trial court and the Third District Court of Appeal overlook. The Defendant had no reasonable expectation of privacy in the areas searched the northwest bedroom and attic!

Finally, the "privacy interest" of the Defendant as an "invitee" is not the kind society should recognize as reasonable. Society should not recognize a "invitee's" speculative privacy interest in areas of another's residence in which the Defendant did not access.

Therefore, this Court should reverse and remand with instructions to vacate the suppression order and set for trial.

## II

A LANDLORD HAS NO STANDING TO OBJECT TO A FOURTH AMENDMENT SEARCH WHEN HE RETAINS THE RIGHT TO ENTER ONLY TO COLLECT RENT AND AFFECT REPAIRS.

Originally, in the Third District Court of Appeal this cause was brought forth questioning the right of the Defendant as a landlord to assert standing in the premises when they are leased to another. Pursuant to Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977), on remand, Hartford Accident and Indemnity Co v. United States Concrete Pipe, 369 Sos.2d 451 (Fla. 4th DCA 1979), appeal after remand, 437 So.2d 1061 (Fla. 1983). The State requests this Court examine the complete merits of the cause.

The facts are clear that the defendant owned the house but rented it to the Betancur family to live in. Although the defendant had a key, as do many landlords, he did not retain any possessory interest such as a right to a particular room or a right to enter whenever he chose. Mrs. Betancur testified the defendant went to the house only to collect the rent or to check on damage. Therefore, the defendant owned the house but he no longer had a possessory interest. The distinction is not just a technicality of property law but a significant point demonstrating that the defendant had no reasonable expectation of privacy in the house. The case law highlights the significance of the landlord-tenant relationship.

The case closest on point is State v. Smith, 656 S.W. 2d 882 (Tenn.Ct.App. 1983) where in this issue of the landlord's privacy expectation was raised. The court stated:

> "The general rule is that a tentant, not the landlord, has the expectation of privacy in leased premises, unless the lessor has specifically reserved any rights of possession for himself, W. LaFave, Search & Seizure §11.3 (a) (1978); Chapman v. United States, 365 U.S. 610, 616-17, 81 S.Ct. 776, 779-80, 5 L.Ed.2d 828 (1961). Thus, during the rental period the lessee is assumed to have the privacy interests in the premises, unless he abandons the property. People v. Morrison, 196 Colo. 319, 583 P.2d 924, 926 (1978); State v. Chiles, 226 Kans. 140, 595 P.2d 1130, 1136 (1979). The test for abandonment is whether the lessee had a reasonable expectation of privacy in the property as of the date of the search. Id., see also United States v. Wilson, 472 F.2d 901, 902-3 (9th Cir. 1972), cert. denied, 414 U.S. 868, 94 S.Ct. 176, 38 L.Ed.2d 116 (1973)."
>
> State v. Smith, Id. at 887.

In Florida there are no cases not arising from Suco, dealing specifically with a landlord's expectation of privacy in leased premises. There are cases which define the limited rights of a landlord in analogous situations and which demonstrate that a landlord does not have an expectation of privacy in leased premises. In Sheff v. State, 329 So.2d 270 (Fla. 1976), the owner of a motel gave the police consent for them to enter a guest's room. The Supreme Court held the

motel owner had no authority to give that consent. Also, see Sheff v. State, 301 So.2d 13 (Fla. 1st DCA 1974). In Blanco v. State, 438 So.2d 404 (Fla. 4th DCA 1983), a landlord gave the police permission to enter a leased apartment. The court stated therein:

> "The State argues that under the terms of the agreement the landlord had the right to enter. We agree, but that right was for reasonable access for inspection purposes and in order to spray for infestations. Inviting the police to enter and search the apartment is another matter altogether."
>
> Blanco v. State, Id. at 405.

The case law is therefore clear that the landlord-tenant relationship is significant and has an impact on constitutional rights even in the criminal area. The case law shows a landlord has no authority to allow others to enter a tenant's property. When a landlord leases a house he loses his right to have free access to that house and his right to invite in anyone he chooses. Conversely, he also loses his right to exclude anyone he chooses from that house.

Florida statutory law is in accord. §83.53, Florida Statutes, holds that the tenant shall not unreasonably withhold consent from the landlord to enter the dwelling unit from time to time to inspect the premises or make necessary repairs. Implicit in the statute is the right of the tenant

to withhold consent from the landlord to enter. Subsection (2) specifies under what specific conditions the landlord may enter the premises at any time. The times during which a landlord has free access to leased premises is strictly circumscribed by the statute. The point is that both the case law and the statutory law take away from a landlord the right of free access to leased premises. That right is with the tenant, not the landlord. See Chapman v. United States, supra; United States v. Haynie, 637 F.2d 227 (4th Cir. 1980); McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969); also see United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed. 619 (1980).

The distinction between one who owns and one who possesses has been applied to more than just real property. In State v. Cribbs, 406 So.2d 1295 (Fla. 2d DCA 1981), Cribbs gave up possession of the car he owned to one named Baisden. A shotgun was found in the car by the police. The trial court suppressed the shotgun. In reversing, the appellate court stated:

> "Once appellee allowed Baisden to possess his car exclusively, he lost his expectation of privacy, and therefore his standing to challenge the search of the automobile on the basis of lack of probable cause to arrest or search Baisden."
>
> State v. Cribbs, Id. at 1296.

The cases of State v. Leavitt, 427 So.2d 211 (Fla. 3d DCA 1983); State v. Barrowclough, 416 So.2d 47 (Fla. 3d DCA 1982) and Coster v. State, 392 So.2d 16 (Fla. 3d DCA 1980) have no application to the case sub judice. Coster states that ownership of a house by itself does not necessarily establish an expectation of privacy therein. Barrowclough and Leavitt both disagree but for a significant reason. Both of the latter cases state that an expectation of privacy is proven where someone owns and occupies the premises. In these cases there were indications that the defendants not only owned the premises but occupied them as well. In the case sub judice, unlike Coster, Barrowclough or Leavitt, there was evidence not just that the landlord did not occupy the premises but that he had affirmatively given the right of occupancy to the Betancur family by renting them the house. The defendant therefore gave up his possessory interests and any expectation of privacy.

Lastly, it is significant to note that leasing the house did not necessarily mean the defendant had to give up an expectation of privacy. If the defendant had retained some possessory rights in the house by the terms of his agreement with the Betancurs then perhaps he could prove an expectation of privacy. The facts negate this possibility. Mrs. Betancur testified that the defendant came to the house only to collect the rent and to inspect for damages. Although the State intends to link the defendant to the contents of the

bedroom, that was not done at the motion to suppress and the defendant made no allegations or proffer of evidence that he had any interest or knowledge in the contents of the room. To the contrary, the evidence was that at the time he was arrested, the defendant stated he had no knowledge of the contents of the room. (T. 476). Having disclaimed knowledge of the room's contents, the defendant cannot now claim the room's contents are his and thereby prove an expectation of privacy in the room or the house. The Court stated in State v. Jones, 454 So.2d 774, 776 (Fla. 3d DCA 1984):

> "Jones disavowed any knowledge of the boxes and, at best, stated that he was merely keeping an eye on them for someone else. Courts have uniformly recognized that the disclaiming of ownership or knowledge of an item ends any legitimate expectation of privacy in that item. State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979). See, also United States v. Hawkins, 681 F.2d 1343 (11th Cir. 1982); United States v. Pirolli, 673 F.2d 1200 (11th Cir. 1982); United States v. Bush, 623 F.2d 388 (5th Cir. 1980); United States v. Canady, 615 F.2d 694 (5th Cir.) cert. denied, 449 U.S. 862, 101 S.Ct. 165, 66 L.Ed.2d 78 (1980); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) (en banc). The disclaimers by Jones regarding the property refutes any suggestion that an expectation of privacy existed."

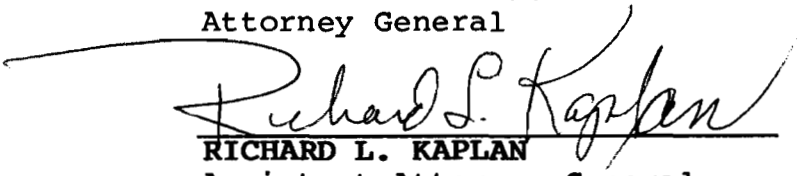
In summary, by leasing the premises, the defendant gave us his possessory interest in the house. He could not have an expectation of privacy in the house which society is willing to recognize as reasonable.

## CONCLUSION

The court should reverse the Third District Court of Appeal and remand with directions to vacated the opinion and mandate so the State may proceed with prosecution.

Respectfully submitted,

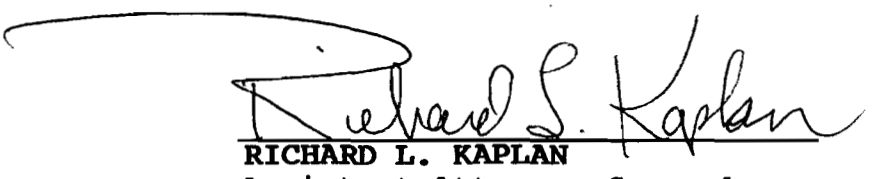
ROBERT A. BUTTERWORTH
Attorney General



**RICHARD L. KAPLAN**
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to IRA N. LOEWY, ESQ., BIERMAN, SONNETT, SHOHAT & SALE, P.A., Suite 500, 200 S.E. First Street, Miami, Florida 33131, on this 19th day of October, 1987.



**RICHARD L. KAPLAN**
Assistant Attorney General

ss/