O/A 1-8-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 70,526

GLADYS CAROL HUTCHINSON,

Respondent.

BRIEF OF THE PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

OF COUNSEL FOR PETITIONER

/tms

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

FLORIDA CONSTITUTION:

PRELIMINARY STATEMENT

GLADYS CAROL HUTCHINSON will be referred to as the "Respondent" in this brief. The STATE OF FLORIDA will be referred to as the "Petitioner". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

Respondent plead nolo contendere to the possession of methamphetamine and possession of drug paraphernalia. (R 94) In doing so, the respondent reserved the suppression issue for appellate purposes. (R 94)

On appeal to the Second District Court of Appeal, the respondent obtained a reversal of the judgment and sentence. The grounds for reversal were the denial of the motion to suppress by the trial court.

Petitioner sought discretionary review by filing a notice to invoke the discretionary jurisdiction of this Court. Jurisdictional briefs were filed and the court entered an order accepting jurisdiction on September 25, 1987. It is from this posture that the instant case comes before this Court.

STATEMENT OF THE FACTS

The petitioner accepts the facts in the opinion of the District Court for the purposes of this petition. The facts of the case as stated in the opinion reported at 505 So.2d 579 at 580 are as follows:

> The chain of events culminating in the search began when the assistant manager of a supermarket, Jerry Geisler, observed the defendant shopping in the store using a shopping cart. Geisler testified that his suspicions were aroused by the fact that the defendant had an unusually large purse lying in the cart. He described it as like a small airline bag, two feet across and six or eight inches wide. Continuing to observe the defendant while she shopped, Geisler became convinced that the defendant was engaged in shoplifting and called the police. When Officer Jerbie Bryan arrived in response to Geisler's call, the defendant had not yet left the store. Bryan advised Geisler to go back inside the store and when the defendant exited, to follow her. Meanwhile, Bryan remained in the parking lot and waited. The defendant exited the store pushing a grocery cart containing her purchases, followed by Geisler. Geisler pursued the defendant to her car while Officer Bryan pulled his patrol car up to the defendant's car. Geisler indicated to Officer Bryan that the defendant was removing articles from her purse and hiding them underneath the seat of her car.
>
> Bryan testified that he walked up to the defendant's car and advised her that she was suspected of shoplifting, which she vehemently denied. Officer Bryan said that "we" requested to look in her handbag and that she "just started taking stuff out." He further testified that there were little zip-up bags, cloth bags, in the large bag and that the defendant would open some of these small bags and others she would not, laying these aside. During this process, Sergeant Robert Walker drove up and started observing what was going on. When the defendant completed the process of

emptying her handbag and opening some, but not all, of the small bags, Officer Bryan said "now, let's go back and open all of them." He said the defendant picked up one particular small bag and unzipped it and zipped it back up real quick. Sergeant Walker's interest focused on that bag and he asked the defendant what was in it. She would unzip it and zip it back up. Sergeant Walker asked her a couple more times "what's in the container in the bag?" The defendant said nothing; she just handed the bag to Sergeant Walker. When Walker opened up the bag, he found that it contained a white substance. Officer Bryan was then reminded of seeing a jar in another bag and he went back and looked in that bag again. Upon further examination, Officer Bryan found a white substance in that bag also.

SUMMARY OF THE ARGUMENT

A criminal defendant's consent to search must be voluntary. A consent is not voluntary if it is the product of duress or coercion. When consent is given in the absence of circumstances which would make a reasonable person to believe that he did not have the ability or entitlement to refuse law enforcement's request to search, the consent is the product of the defendant's free will; and as such, volitional.

The above standard requires a factual determination. On review, such a factual determination is viewed in a light most favorable to the appellee and with all inferences that can be reasonably made from such facts which would accrue to the appellee's benefit. Having done so, the reviewing court must determine whether such a view provides legally sufficient evidence that consent given was voluntary and not the product of coercion or duress. The respondent's actions, which were the product of her own thoughts and the absence of any overreaching by law enforcement provide this factual basis.

ARGUMENT

ISSUE I

RESPONDENT CONSENTED TO THE SEARCH.

Article I, §12, of the **Florida Constitution** provides that search and seizure law in this state is to be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the United States Supreme Court held that whether there is lawful consent is to be determined by the totality of the circumstances. Totality of circumstances was further discussed in a confidential informant setting in Illinois v. Gates, 462 U.S. 213 (1983). In Gates, the court stated that a reviewing court should not perform a de novo review; but rather, should give deference to the court who made the initial finding of probable cause. This Court has for all practical purposes recognized the deference to be given to the trial court's factual determination by reviewing the trial court's holding in a light most favorable to the record evidence which supports the trial court's ruling. See McNamara v. State, 357 So.2d 410 (Fla. 1978).

The facts of this case are undisputed for the vast majority of events. After being called by the retailer, law enforcement approached the respondent and requested to look into her handbag. Thereafter, respondent started removing items. After opening various bags within her purse, respondent was asked about a particular bag. The respondent then handed that bag to law

enforcement. When viewed in the totality with deference to the finding of consent below, there are sufficient facts upon which the trial court could conclude that the act of handing the bag to law enforcement was a manifestation of a consent. As such, the trial court's denial of the motion to suppress should be affirmed on appeal. To the extent that the Second District's opinion states that the state failed to meet its burden of showing that consent was freely and voluntarily given; it has in substance re-weighed the evidence and has not restricted its scope to mere sufficiency of evidence which would support the trial court's ruling contrary to Gates, supra, and McNamara, supra.

Petitioner would analogize the above position to that of a claim of insufficiency of evidence to support a criminal conviction when raised on appeal. Whereas due process requires that the state meet the "beyond a reasonable doubt standard" at trial, the scope of review on appeal is solely legal sufficiency without a reweighing of evidence by the appellate court. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). In Jackson v. Virginia, 443 U.S. 307 (1979), The United States Supreme Court recognized the deference to be given the finder of fact when it stated:

> " . . . a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."

To any extent that there is evidence which suggest acquiescence, this evidence must be discounted to the extent the objective acts

of the respondent suggest voluntary consent. On appeal, it must be presumed that these acts of voluntary consent were found to be credible by the trier of fact and that the evidence of acquiescence was not. Since there are facts which are sufficient to support a finding of voluntary consent, an appellate court should defer to these findings.

Petitioner would suggest that respondent's act of handing the bag to law enforcement is analogous to the facts in United States v. Pulido-Basqueriz, 800 F.2d (9th Cir. 1986). In Puido-Basqueriz, the defendant placed his briefcase onto an airport x-ray machine conveyor belt. Having done so, the Ninth Circuit stated that this was implied consent absent an election not to fly before there was a further search. Sub judice, the facts show an initial consent to a search of the items in the handbag. If appellant wished to restrict or withdraw her consent, she must be held to a duty to make an affirmative act which is consistent with this position. Compare Nelson v. Pulliam, 557 F.2d 426 (5th Cir. 1977). Further, respondent's act of handing the bag to law enforcement is an additional fact in support of consent. Puido-Basqueriz, supra, and Palmer v. State, 467 So.2d 1063 (Fla. 3rd DCA 1985).

To the extent the Second District's opinion find a acquiescence in the absence of coercion or duress to be insufficient for a finding of a waiver, it has adopted the higher standard required of a waiver applied by the Ninth Circuit Court of Appeal in Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971). This

was specifically rejected in Schneckloth v. Bustamonte, supra, where the diametrically opposite was found to be applicable. That being: the absence of duress or coercion is evidentiary support of consent. Admittedly, acquiescence to implied authority to search, absent consent, is not a voluntary consent to the search. Bumper v. North Carolina, 391 U.S. 543 (1968). However, the record clearly shows that law enforcement ask for permission without any showing of force or a suggestion that a denial would not be respected. To require more, such as informing the respondent that she had a right to refuse, is contrary to Schneckloth v. Bustamonte, supra, where the Court stated:

> One alternative that would go far toward providing that the subject of a search did not know he had a right to refuse consent would be to advise him of that right before eliciting his consent. That, however, is a suggestion that has been almost universally repudiated by both federal and state courts, and, we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies.

The respondent spontaneously started taking items out of her purse upon law enforcement's request. Law enforcement was lawfully present. Petitioner submits in such a setting consentual inquiry cases such as I.N.S. v. Delgado, 466 U.S. 210 (1984), provide the following direction:

> While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free to respond, hardly eliminates the consensual

> nature of the response. Cf. Schneckloth v. Bustamonte, 412 U.S. 218, 231 - 234 (1973). Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.
>
> I.N.S. v. Delgado, at 216

Applying the above, petitioner submits, the scope sub judice is whether the circumstances, when viewed in a light most favorable to the petitioner were so intimidating that a reasonable person would not have believed he could refuse law enforcement's request to search the purse. Applying that standard, the facts sub judice do not project a setting whereby apparent authority to search would vitiate the consent that was manifested by respondent's acts. The instant case is factually different to that of Florida v. Royer, 460 U.S. 491 (1983). In Royer, the United States Supreme Court determined that law enforcement's approach of a criminal and the request for his airplane ticket did not violate the Fourth Amendment. However, the majority opinion expressed the belief that the extent of the intrusion had amounted to the equivalent of an arrest since law enforcement did not return his airline ticket and asked him to accompany them to another room. Thereafter, the Court concluded that the subsequent consent was tainted by the unlawful arrest. Royer at 501. However, the Court agreed with the state's argument that had consent been obtained within the limits of the investigative detention, the consent would have been valid. Royer at 502. Sub judice, the consent was with a no greater showing of authority by

law enforcement than that in Royer and was within the time and place boundaries of an investigative stop. As such, the consent was fully given without limitation or recantation and the respondent's search was lawful. Royer, supra.

CONCLUSION

Based on the above stated facts, arguments and authorities, Petitioner would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Marshall G. Slaughter, Esq., 245 South Central Avenue, P. O. Box 226, Bartow, Florida 33830, this 7th day of October, 1987.

OF COUNSEL FOR PETITIONER.