

DA 1-8-88

IN THE SUPREME COURT OF FLORIDA

FILED

1987

RECORDED
m

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 70,526

GLADYS CAROL HUTCHINSON,
Respondent

BRIEF OF THE RESPONDENT ON THE MERITS

MARSHALL G. SLAUGHTER
Attorney at Law
Post Office Box 226
Bartow, Florida 33830

COUNSEL FOR RESPONDENT

TOPICAL INDEX

	PAGE NO.
TABLE OF CITATIONS	ii, iii
POINT ON APPEAL	iv
STATEMENT OF THE FACTS	v, vi, vii
STATEMENT OF THE CASE	viii
ARGUMENT - POINT I	1 - 8
ARGUMENT - POINT II	9 - 11
CONCLUSION	12, 13
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

	<u>PAGE NO.</u>
<u>Bailey v. State</u> , 319 So.2d 22 (Fla. 1975)	2, 3
<u>Correa v. State</u> , 389 So.2d 1204 (Fla. 3d DCA 1980)	4
<u>Dean v. State</u> , 406 So.2d 1162 (Fla. 3rd DCA 1981)	2
<u>Engle v. State</u> , 391 So.2d 245 (Fla. 5th DCA 1980)	5
<u>Florida v. Royer</u> , 460 U.S. 491, 75 L Ed. 2d 229 (1980)	1, 2
<u>Ingram v. State</u> , 364 So.2d 821 (Fla. 4th DCA 1978)	7
<u>Jordan v. State</u> , 384 So.2d 277 (Fla. 4th DCA 1980)	7
<u>Major v. State</u> , 389 So.2d 1203 (Fla. 3rd DCA 1980)	3, 4
<u>Mobley v. State</u> , 335 So.2d 880 (Fla. 4th DCA 1976)	7
<u>Norman v. State</u> , 379 So.2d 643 (Fla. 1980)	4
<u>Pirri v. State</u> , 428 So.2d 285 (4th DCA 1983)	7
<u>Raffield v. State</u> , 362 So.2d 138, 140 (Fla. 1st DCA 1978)	2
<u>Robinson v. State</u> , 388 So.2d 286 (Fla. 1st DCA 1980)	6
<u>Rosell v. State</u> , 433 So.2d 1260 (Fla. 1st DCA 1983)	8
<u>Sagorrias v. State</u> , 39 So.2d 252 (Fla. 1956)	4
<u>Samuels v. State</u> , 318 So.2d 190 (Fla 2nd DCA 1975)	3
<u>Schneider v. State</u> , 416 So.2d 475 (Fla. 2d DCA 1982)	1
<u>Silva v. State</u> , 344 So.2d 559 (Fla. 1977)	6
<u>State v. Stell</u> , 407 So.2d 642 (Fla. 4th DCA 1981)	10
<u>State v. Worgin</u> , 418 So.2d 1261 (Fla. 4th DCA 1982)	4
<u>Taylor v. State</u> , 355 So.2d 160 (Fla. 3rd DCA 1978)	4, 7
<u>Tolovera v. State</u> , 186 So.2d 811 (Fla. 2d DCA 1966)	3, 5

<u>U.S. v. Chemlay</u> , 741 F.2d 1346 (11th Cir. 1984)	2, 7
<u>U.S. v. Lopez-Pages</u> , 767 F.2d 776 (11th Cir. 1985)	2, 5
<u>U.S. v. Marshall</u> , 425 F.2d Supp. 1282, (U.S.D.C. S. D. Fla. 1978)	5
<u>U.S. v. Milian-Rodriguez</u> , 759 F.2d 1558 (11th Cir. 1985)	4
<u>U.S. v. Pulido-Basqueriz</u> , 800 So.2d (9th Cir. 1986)	6
<u>Vinson v. State</u> , 345 So.2d 711 (Fla. 1981)	9
<u>Wilson v. Renfroe</u> , 91 So.2d 857 (Fla. 1957)	9

POINT ON APPEAL

POINT I

IF A YOUNG LADY IS ACCOSTED IN A DARK PARKING LOT BY TWO UNIFORMED POLICEMEN, AND A CIVILIAN WHO IS SHOUTING THAT SHE IS A THEIF, IS NOT TOLD WHAT SHE IS SUSPECTED OF STEALING, IS NOT INFORMED OF ANY OF HER RIGHTS, AND SHE SUBSEQUENTLY OPENS SOME ZIPPERED BAGS FROM HER PURSE, BUT NOT OTHERS, HAS SHE CONSENTED TO A GENERAL SEARCH?

POINT II

IF A PROSECUTING ATTORNEY ENTERS A NOLLE PROSEQUI ON A CASE AFTER JEOPARDY HAS ATTACHED, AND WHILE A MATTER IS PENDING IN THE APPELLATE COURTS, IS THE NOLLE PROSEQUI EFFECTIVE?

Respondent elects to use the Statement of Facts contained in her "Initial Brief of Appellant". The adoption of the facts contained in the opinion of the Second District Court of Appeals by Plaintiff provides too condensed a recitation to fully explore the issues.

This case is concerned with a young lady who was accused of shoplifting in a Winn-Dixie store in Sebring, Florida. A subsequent search of zippered cosmetic bags in her purse resulted in the seizure of amphetamines.

The manager of the store testified that he observed Respondent, Ms. Hutchinson, shopping in the store, with a large purse lying in her buggy. He said that the purse was unzipped and he observed items lying on top of the purse. The manager called the police and told the responding officer, BRYAN, that he saw Ms. Hutchinson put an article in her purse (R. 25). The manager testified that he was not sure whether he told BRYAN he saw her put the incense in her purse (R. 15), but then said he did (R. 16).

The officer waited outside the store. When Ms. Hutchinson exited the store, the manager followed her. He signaled the officer and they approached Ms. Hutchinson, who was then at her car. The first officer, BRYAN, pulled alongside her car; the manager was there yelling about thieves and shoplifters (R. 20), 38). Another officer, WALKER, also drove up (R. 21). Ms. Hutchinson became very

upset when Officer BRYAN told her she was suspected of being a shoplifter (R. 9, 21). She was never told what she was supposed to have stolen (R. 26). In fact, nothing had been stolen (R. 36), but the manager still insisted she had (R. 17).

The testimony is somewhat in conflict at this point. The manager testified that one of the officers, BRYAN, asked to see in her purse. He said she then opened the purse and pulled out zippered bags and stuff, and then put them back in the purse. The manager said that Officer WALKER then asked what was in the little bags (R. 10). The bags were opaque (R. 40).

Officer BRYAN testified that Ms. Hutchinson spontaneously began pulling items from her purse, some of which she opened, others she did not. BRYAN said he told her then to go through individually and open each bag (R. 24). BRYAN said that Officer WALKER then told her several times to open the bag the amphetamines were found in, and she finally handed it to him, and he opened it (R. 24).

Officer WALKER testified that BRYAN asked to look in her purse and she started taking the items out. WALKER said she opened and closed them, but was hesitant to open one. After she closed it, he asked what was in it because it was dark and he couldn't see (R. 29). WALKER asked her twice what was in the bag, and she finally handed it to him. He opened the bag and found a black film container. Inside the film container he found a plastic bag with a white powder in

it (R. 30).

The incense was ultimately found in the bag with the groceries (R. 26). That was the only item the manager told BRYAN she had stolen (R. 25).

BRYAN testified that there was no probable cause to arrest Ms. Hutchinson for anything prior to WALKER's discovery of the contents of the film canister (R. 26); and the amphetamines were not in plain view (R. 27). BRYAN also testified that Ms. Hutchinson was not going to be allowed to go anywhere until she had opened every bag in her purse (R. 27).

Ms. Hutchinson testified in her own behalf and said that the officers told her they wanted to see what was in her purse, to take everything out (R. 38). She said that she emptied her purse, but was never told what she was supposed to have taken (R. 39). She said that if they had asked permission, she would have said no, but it was made plain to her that she was not going to be allowed to leave until she emptied her purse (R. 39, 41, 42).

Ms. Hutchinson said she took everything out, even turning her purse upside down, put everything back, and then was ordered to go back through her purse and open every item (R. 40-42).

STATEMENT OF THE CASE

Respondent, GLADYS CAROL HUTCHINSON, accepts the Statement of the Case outlined by Plaintiff in Plaintiff's Brief on the merit, with the addition that a Notice of Nolle Prosequi was filed in the Tenth Judicial Circuit on May 13, 1987.

ARGUMENT

POINT I

IF A YOUNG LADY IS ACCOSTED IN A DARK PARKING LOT BY TWO UNIFORMED POLICEMEN, AND A CIVILIAN WHO IS SHOUTING THAT SHE IS A THIEF, IS NOT TOLD WHAT SHE IS SUSPECTED OF STEALING, IS NOT INFORMED OF ANY OF HER RIGHTS, AND SHE SUBSEQUENTLY OPENS SOME ZIPPERED BAGS FROM HER PURSE, BUT NOT OTHERS, HAS SHE CONSENTED TO A GENERAL SEARCH?

Plaintiff's initial argument is, in essence, that an appellate court has no power to reverse a trial court's decision no matter how incorrect, capricious, or unjust it may be, if there is anything at all in the record that could in any way support it. Fortunately, that is not the law, else why have appellate courts? Trial judges are human and they do make mistakes. Schneider v. State, 416 So.2d 475 (Fla. 2d DCA, 1982). Their decisions must be supported by substantial competent evidence. There is no evidence to support a conclusion that Ms. Hutchinson consented to a search of her bags.

Florida v. Royer 460 So.2d 491, 75 L Ed. 2d 229 (1983) is a valid example of the state of the law on this point, as well as being analogous to the instant case. Ms. Hutchinson was, in effect, under arrest from the initial contact with the police, because Officer Bryan testified that she was not going to be allowed to go anywhere until she had opened every bag in her purse (R. 27). This was made doubly offensive by Bryan's testimony that there was no probable cause to arrest Ms. Hutchinson prior to Officer Walker's

opening of the film canister (R. 26).

Florida v. Royer, supra, further holds that where consent is offered as justification for a warrantless search, the burden is on the State to prove that consent was freely and voluntarily given. That burden is not met by showing mere submission to a claim of lawful authority, and that is all that was shown by the testimony in the case at hand. Accord, U.S. v. Lopez-Pages, 767 F. 2d 776 (11th Cir. 1985); U.S. v. Chemaly, 741 F. 2d 2346 (11th Cir. 1984); Raffield v. State, 362 So. 2d 138, 140 (Fla. 1st DCA, 1978).

Plaintiff argues that the Second District Court of Appeals impermissibly reweighed the evidence in reaching its decision. It is submitted that a reviewing court must examine the evidence in a case to determine whether or not the trial court has met the essential requirements of the law, and to determine whether the trial court's rulings are supported by the evidence Dean v. State 406 So. 2d 1162 (Fla. 3rd DCA 1981), cert. denied, 413 So.2d 1877 (Fla. 1982). That does not mean that the evidence is reweighed. In the case at hand, there is no evidence to sustain a finding of consent to the search, unless the self-serving statements of the officers that they thought she consented to the search are considered evidence, but their testimony does not present the "strong circumstances" necessary to "qualify as an acceptable alternative to the preservation of the constitutional rights of citizens" Bailey v. State, 319

So.2d 22 (Fla. 1975). Bailey, like the case at hand, involved the search of a cosmetics bag (with the testimony as to consent in conflict) held that the mere conclusions of a searching officer were insufficient to establish consent. Bailey goes on to hold that even though the District Court of Appeal had affirmed on the ground that it could not substitute its judgment for that of the trial court, the Florida Supreme Court could not agree, and reversed.

Similarly, the Court in Samuels v. State, 318 So.2d 190 (2nd DCA 1975), held that while ordinarily the appellate court should not substitute its judgment, it is essential for the hearing court to determine that the evidence is clear and convincing. In the instant case, the trial court did not give any reasons for its decision, it only said, "The court will deny the motion" (R. 47).

The testimony of the officers clearly illustrate that there was no free and voluntary consent, because they had to tell her three times that they wanted to look into the bag, and she then reluctantly handed it over (R. 30).

A distinction is recognized in the law between submission to the apparent authority of a law enforcement officer and unqualified consent. Mere acquiescence in a search is not necessarily a waiver of a valid search warrant. Rather, for a person to waive his search and seizure rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search. Bailey v. State, 319 So.2d 22 (Fla. 1975); Tolovera v. State, 186 So.2d 811 (Fla. 2d DCA 1966) . . . we therefore hold that the Defendant did not validly consent to the warrantless search.

Major v. State, 389 So.2d 1203 (3rd DCA

1980).

It must clearly appear that a person voluntarily permitted or expressly invited and agreed to the search Correa v. State, 389 So.2d 1204 (3rd DCA, 1980). This showing must be by clear and convincing evidence Norman v. State, 379 So.2d 643, 647 (Fla. 1980).

Major, supra, also shows that even if, arguendo, some consent is given, the scope of the search may be limited. Thus, as in the instant case, where Ms. Hutchinson opened some zippered bags and not others, she clearly evidenced that she was not freely and voluntarily consenting to a search, much less to a general search, Taylor v. State, 355 So.2d 160 (3rd DCA 1978).

In U.S. v. Milian-Rodriguez, 759 F.2d 1558 (11th Cir. 1985), the court specifically held that:

A suspect's consent can impose limits on the scope of a search in the same way as do the specifications of a warrant. The government may not use consent to a search which was initially described as narrow as license to conduct a general search.

- at 1563.

And in State v. Worgin, 418 So.2d 1261 (4th DCA 1982):

"A person may, of course, limit his consent during the course of the search by some verbal or physical act indicating the withdrawal of the conduct" at 1263.

This concept of limited consent is not new in Florida law, as evidenced by Sagorrias v. State, 39 So.2d 252 (Fla.

1956), wherein the court held that even though the Defendant there had consented to a search of his car's trunk, he had not extended his consent to the interior of the car and packages inside.

Americans have a Constitutional right to be secure from unreasonable searches and seizures; it is a fundamental and cherished liberty, Tolovera v. State, 186 So.2d 811 (2d DCA 1966). One of the main impetuses of the emigration of people from other lands to America was the abuse of tyranny that can result when police have an unfettered right to search without a warrant. And that is why American courts have established the rule that searches conducted without the prior approval of a judge or magistrate are per se unreasonable, subject to certain exceptions, U.S. v. Marshall, 452 F. 2d Supp. 1282, (U.S.D.C. S.D. Fla. 1978).

The burden of proving consent is a heavy one, "even verbal agreements to accompany an officer who requests a search should be scrutinized exceptionally closely to ensure a complete absence of coercive influence", U.S. v. Lopez-Pages 767 F.2d 776 (11th Cir. 1985) at 780. Marshall supra, defined consent as "assent without coercion", and also noted that a person may limit the scope of the consent to search which he gives, and iterated that the purpose of these rules was to prevent police from using a subterfuge to reconnoiter a protected area. Accord, Engle v. State, 391 So.2d 245 (5th DCA 1980).

Plaintiff argues that the case at hand is analogous to that of U.S. vs. Pulido-Basqueriz, 800 So.2d _____ (9th Cir. 1986). Respondent would submit that voluntarily placing a briefcase on an airport X-Ray-machine conveyor belt is in no way similar to handing over a cosmetic bag to a policeman who is demanding to look inside it.

Plaintiff states that if Ms. Hutchinson wished to restrict her consent to the search, she should have done an affirmative act consistent with that position. It is submitted that unzipping some bags and not others, and only handing over the bag in response to repeated requests, is an affirmative act.

Where there is a doubt about whether a Defendant consented to search, it must be resolved in the Defendant's favor, Robinson v. State, 388 So.2d 286 (1st DCA 1980).

Clearly, once Ms. Hutchinson went through her purse once, and nothing incriminating was found, the order of Officer Walker that she go back through again, and open up everything, was police misconduct, and the search was illegal (R. 29, 30). There was no consent, and the officers should have sought a search warrant if they wished to search her bags, Silva v. State, 344 So.3d 559 (Fla. 1977).

The fact that Ms. Hutchinson was not aware of her right to refuse a search:

Another factor indicating consent was not voluntarily given is the failure of (the officer) to inform (the Defendant) of his right to leave and not to consent to the search. Such knowledge

or lack thereof is a factor to consider in determining voluntariness - U.S. v. Chemaly, 741 F.2d 1346 (11th Cir. 1984), at 1353.

Accord, Jordan v. State, 384 So.2d 277 (4th DCA 1980), Mobley, supra, Taylor v. State, 355 So.2d 160 (3rd DCA 1978).

The mere fact that Ms. Hutchinson silently complied with the officer's request to look into her bag should not be construed to be consent, Ingram v. State, 364 So.2d 821 (4th DCA 1978).

Because the State relies upon consent, an exception to the requirement of a warrant to search, "implicit therein requires a showing that the procurement of a search warrant was not feasible because the exigencies of the situation made that course imperative", Taylor v. State, 355 So.2d 160 (3rd DCA 1978), 183.

The case at hand is analogous to Pirri v. State, 428 So.2d 285 (4th DCA 1983), where the court held that the:

officer could only conduct a carefully limited, self-protective search of the outer clothing . . . to discover the presence of weapons . . . the evidence shows that he was at least de facto in custody. Because of the coercive setting and the officer's failure to notify the Defendant of his right to refuse the search, the Defendant's compliance with the officer's request might possibly be deemed acquiescence to authority, but it certainly does not rise to the level of free and voluntary consent to search. The order under review must, accordingly, be reversed - at 286.

The denial of the motion to suppress should be

reversed. the case at hand is like that of Rosell v. State,
433 So.2d 1260 (1st DCA 1983), where the court held that
"where . . . the State is unable to prove voluntary consent
as opposed to mere submission to apparent authority, the
search will not be upheld", at 1262.

POINT II

IF A PROSECUTING ATTORNEY ENTERS A NOLLE PROSEQUI ON A CASE AFTER JEOPARDY HAS ATTACHED, AND WHILE A MATTER IS PENDING IN THE APPELLATE COURTS, IS THE NOLLE PROSEQUI EFFECTIVE?

Yes. This appears to be a novel situation, and no case directly on point has been found. A case in which the question of a nolle prosequi was addressed was Wilson v. Renfro, 91 So.2d 857 (Fla. 1957). In that case, the prosecutor filed a Motion to Dismiss Information in a DUI/reckless driving case. The trial judge refused to dismiss the case on the DUI, and directed that two additional counts be filed. Appellant appealed to the Circuit Court, which also ruled against him. The matter was then appealed to the Florida Supreme Court on the grounds that the prosecutor's Motion to Dismiss was tantamount to a nolle prosequi, and the County Judge had no authority to deny the Motion to Dismiss. The Florida Supreme Court noted that nolle prosequi translates to "to be unwilling to prosecute", at 859, and that the prosecutor alone has authority to decide whether prosecution should be discontinued prior to the inception of jeopardy. The court held that the Motion to Dismiss was not a nolle prosequi, but did not reach or decide the effect of a nolle prosequi after jeopardy attaches.

"Ordinarily jeopardy attaches upon the entry of a plea of guilty or nolo contendere, and its acceptance by the Court . . .", Vinson v. State, 345 So.2d 711, 716 (Fla. 1977).

In State v. Stell, 407 So.2d 642 (Fla 4th DCA 1981), the court held that "the bar against double jeopardy would prevent the state from nol-prossing and refileing an Information after the jury has been sworn", at 643. But, the court did not say the state could not file a nolle prosequi after the jury was sworn if it did not file another information. The court did say that "the state may nolle prosequi information within its discretion at any time subject to the limitations discussed below", at 643. The only one of those limitations that is relevant to the case at hand is the one addressed above. The other relates to speedy trial problems.

The Florida Attorney General issued two opinions in 1958 which are relevant to this issue. The first is the matter of entering a nolle prosequi rests entirely within the discretion of the prosecuting officer, without leave of court, in all stages of a criminal prosecution before the jury is empaneled" Fla. Attorney General Rep. 058-64 (Feb. 21, 1958).

The other is close to being on point:

Nolle prosequi is formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further Upon entry on the record, it amounts to a dismissal or nullification of the particular indictment or information and renders nugatory any proceedings carried on subsequently under the same indictment or information.

While this matter has never been judicially resolved in Florida, it would seem to be the better practice to obtain leave of court prior to entering a nolle prosequi after trial has commenced. I find no statute on the subject in

Florida . . . I find no authority that would preclude the prosecuting attorney from attempting to enter a nolle prosequi after the commencement of the case

- Fla. Attorney General Rep. 058-169, May 23, 1958.

It is submitted that the weight of authority, albeit persuasive, is that a prosecuting attorney in Florida has the authority to enter a nolle prosequi, at his discretion, at any stage of the proceedings. It is further submitted that if the nolle prosequi is entered after jeopardy has attached, further prosecution of the matter is barred.

CONCLUSION

The Second District Court of Appeals did not reweigh the evidence in the case at bar, it merely looked to see if there was substantial competent evidence to support the denial of the Motion to Suppress, and found there was none.

Ms. Hutchinson did not freely and voluntarily consent to the search. Her will was overborne and intimidated by the accostment in the dark parking lot by two policemen and a hysterical store manager.

The police engaged in misconduct by:

(a) never informing Ms. Hutchinson of what she was suspected of shoplifting;

(b) not informing Ms. Hutchinson that she had a right to refuse a search;

(c) ordering Ms. Hutchinson to show what was in her purse;

(d) ordering Ms. Hutchinson to go through her purse a second time and open the zippered bags; and

(e) opening Ms. Hutchinson's bag and searching it, as well as opening a closed, opaque container inside - the film canister.

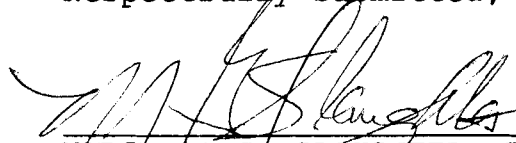
Ms. Hutchinson testified if she had been given a choice, she would have refused the search, as would any person confronted with police and knowing their bag contained a substance for which they could be arrested. But she was not given a choice. The police conducted an illegal,

general, exploratory search without a warrant, without any applicable exception to the requirement of a warrant. This is exactly the type of conduct that the Fourth Amendment was added to the Bill of Rights to prevent, and which caused the courts to formulate the exclusionary rule. People must feel free from pretextual searches, or democracy is a hollow word.

The nolle prosequi by the State renders this matter moot.

The case should be reversed and remanded with directions to the trial court to suppress all evidence seized incident to the improper search.


Respectfully submitted,



MARSHALL G. SLAUGHTER, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-2100
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Honorable Gary Welch, Assistant Attorney General, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, by U.S. Mail this 24th day of October, 1987.


MARSHALL G. SLAUGHTER, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-2100
Attorney for Appellant