IN THE SUPREME COURT OF FLORIDA

TERRENCE BOSTICK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,996

****

ON PETITION FOR DISCRETIONARY REVIEW

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the appellee and the prosecution, respectfully, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court, except that Respondent may also be referred to as "the state."

Reference to the record will be made by the letter "R" followed by the appropriate page number

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as it appears at page two (2) of his brief.

STATEMENT OF THE FACTS

Unable to accept Petitioner's Statement of the Facts as it appears at pages three (3) and four (4) of his initial brief due to its incomplete and inaccurate recitation of the proceedings below, Respondent presents its own statement of the facts as follows:

Officer Joseph Nutt of the Broward County Sheriff's Office, Narcotics Division, testified that on August 27, 1985, he and Officer Rubino boarded a Greyhound bus while at the Fort Lauderdale station as part of their daily duties in checking for narcotics violations (R 28, 34). Officer Nutt testified he proceeded to the back of the bus where he saw Petitioner in the very back of the bus resting on a red bag (R 29). The officer, using a normal conversational tone of voice (R 27, 36), identified himself as a police officer, through his "badge and I.D." (R 31, 36), and asked Petitioner where he was traveling to. Petitioner replied he was going to Atlanta. The officer

then asked to see Petitioner's ticket and identification. The Petitioner complied and produced a driver's license. The officer after looking at the documents, returned them to Petitioner (R 29, 31, 36-37). At that point, the officer asked Petitioner if the "red bag" was his; Petitioner replied, "yes." The officer asked if he would consent to a search of the bag; Petitioner replied, "okay, go ahead" (R 41). The red bag did not contain contraband (R 30), and was returned to the true owner, Mr. Williams (R 30-31).

Officer Nutt testified that his partner, Officer Rubino, noticed a bag in the overhead rack and asked Petitioner if that bag was his. When Petitioner answered in the affirmative, Officer Nutt asked Petitioner if the bag could be searched for drugs (R 29); Petitioner again answered, "okay, go ahead" (R 41, 42). The search of this blue bag produced the cocaine, and Petitioner was then placed under arrest (R 29).

Officer Nutt testified he and his partner were wearing plain clothes on that date, but that they had green windbreakers which bore patches with the Sheriff's insignias to identify them as police officers (R 28, 39). The officer also stated he carried his police firearm in a hand-carried pouch, which remained zipped up throughout the contact with Petitioner (R 35).

Officer Nutt stated Petitioner at no time made any attempt to disembark from the bus (R 40), although the police did not block or in any way impede Petitioner from getting off the bus (R 31). Further, the officer testified that he indeed asked Petitioner if he could search the blue bag separately from

the request to search the red bag, and that two (2) separate consents were obtained from Petitioner (R 42).

Officer Steven N. Rubino also took the witness stand and testified that he and Officer Nutt on August 27, 1985, were wearing green Sheriff's jackets, "green windbreakers with Sheriff Department patches, insignias on them" (R 44). He confirmed that Officer Nutt carried his firearm in a zipped up pouch, which was not unzipped prior to approaching Petitioner (R 41, 51). The officer stated that in a normal tone of voice (R 46), Officer Nutt explained to Petitioner that they were police officers, and what their duties were, and then asked Petitioner for permission to do a consent check of his bags for drugs (R 46). Officer Rubino stated he heard Officer Nutt ask to check each bag, and he heard Petitioner give two (2) verbal consents (R 46). He stated Petitioner was free to go; that there was no intimidation, show or use of force on Petitioner, and his path was not blocked (R 47). Officer Rubino testified Petitioner was in the rearmost seat, Officer Rubino was standing in front of the seat in front of Petitioner facing Petitioner, and Officer Nutt was next to him, half on the seat and half in the isle (R 44, 55).

Officer Rubino testified Appellant was sitting in the last seat of the bus on the driver's side (R 44). He stated another passenger, Mr. Williams, was sitting in the rearmost seat of the passenger side of the bus in front of the bathroom, four or five seats from the rear of the bus (R 48, 55). But it was testified Officer Rubino did not see or remember noticing

Mr. Williams when the officers first went to the back of the bus (R 48).

Officer Rubino also stated that when he and Officer Nutt approached Petitioner, the officers identified themselves by showing their badges and I.D. cards (R 53). That Officer Nutt asked Petitioner where he was traveling to; Petitioner said he was going to Atlanta (R 54). That Officer Nutt asked to see Petitioner's bus ticket and I.D., and Petitioner complied (R 54). That Officer Nutt then explained their duties to Petitioner and asked for permission to search; that Petitioner replied, "yes, or go ahead" (R 57). That while Officer Nutt was searching the red bag, Officer Rubino noticed the blue bag (R 45, 57), and asked Petitioner if the blue bag was also his, to which he replied affirmativley (R 45). At that point Officer Nutt asked Petitioner if they could check the blue bag as well, and Petitioner said yes, so Officer Rubino took it down from the rack (R 52-53). When Officer Nutt finished checking the red bag, he zipped it up and went on to search the blue bag (R 58).

Petitioner, Terrance Bostick, then took the stand. He testified he boarded the Greyhound bus in Miami to go to Atlanta (R 59). That when the bus arrived in Fort Lauderdale, he was laying in the back seat, trying to get some sleep, so he had borrowed a bag from another passenger to use as a pillow as he had "no bag" (R 60). Petitioner stated the officers did not identify themselves as police officers until they looked at his "identification and everything." However, Petitioner conceded

he knew the two gentlemen were police officers immediately upon seeing them (R 76).

Petitioner testified the officer asked to see his ticket and I.D., and he complied (R 61). That the officer asked him if the red bag was his, and that he answered, "yes." That the officer then asked for permission to search it, and he said, "yes, sure" (R 61). Petitioner testified at no time did he tell the officers the red bag was Mr. Williams' bag (R 72), nor did he verbally ask Williams if the bag could be searched (R 70).

Petitioner further testified he was asked whether the blue bag was his, and that he acknowledged it was (R 72). However, he stated when they asked him for permission to search the blue bag, Petitioner "didn't quote (sic) anything" (R 62). He conceded, on cross-examination by the prosecutor, that at no time, did he tell the officers "stop, don't search my bag" or objected in any other way (R 73).

Petitioner, during cross-examination, first testified, he was not aware of cocaine being in his bag, because he did not pack the bag (R 64, 74). Then on further questioning, conceded this was his bag, that he had packed it, and knew the cocaine was inside the bag (R 75).

Petitioner testified the officers used a normal tone of voice when talking to him, not loud, and that no treats were used on him (R 71). He testified he "never saw a gun" (R 67), but that the officer was carrying a pouch which he knew contained a firearm (R 63, 76). Petitioner testified that while Officer Nutt was searching the bag, he put the pouch "under his shoulder."

QUESTION PRESENTED

MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM FOR, AND RECEIVE, CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH?

SUMMARY OF THE ARGUMENT

The initial contact between Petitioner and the two police officers did not amount to a stop or detention. The search of the blue bag which produced the cocaine was a valid warrantless search conducted pursuant to Petitioner's voluntary consent. The factual determination on a motion to suppress on whether there was a valid consent to search is the exclusive province of the trial court. The record on appeal supports the trial court's finding of a valid consent. As such, Petitioner having failed to show abuse of discretion by the trial court, the Fourth District Court of Appeal properly affirmed the judgment of the trial court. The lower court's findings, in turn, should be approved by this Court, by answering the certified question in the affirmative.

ARGUMENT

MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM, FOR, AND RECEIVE CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH?

This question certified by the Fourth District Court of Appeal as one of great public importance must be answered in the affirmative. The fact that the officers boarded the bus without a founded suspicion that one of the passengers therein was involved in criminal activity is not being contested. The state's entire case revolves around the contention that when a police officer approaches a passenger either on the bus, or at the terminal, the approach amounts to no more than a mere "contact" between a police officer and a citizen, involving no coercion or detention, and therefore, no warrant is needed as this encounter involved no Fourth Amendment violations. State v. Jones, 454 So.2d 774, 776 (Fla. 3d DCA 1984).

Through several rulings the United States Supreme Court has declared that there are three types of police/citizen encounters: full scale arrests that must be supported by reasonable suspicion, and mere contact between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment and of Article I, §12 of the

Florida Constitution.[1] Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

With reference to the mere contacts between police and citizens the Supreme Court stated:

> (L)aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some question, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See Dunaway v. New York, 442 U.S. 200, 210 n.12, 99 S.Ct. 2248, 2255 n. 12, 60 L.Ed.2d 824 (1979); Terry v. Ohio, 392 U.S. 1, 31, 32-33, 88 S.Ct. 1868, 1885-1886, 20 L.Ed.2d 889 (1960) (Harlan, J., concurring); Id., at 34, 88 S.Ct., at 1886 (White, J. concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v. Mendenhall, 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (Opinion of Stewart, J.). The person approached,

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[1] Amicus Curiae devotes five pages of his brief (see brief pages 15-19) asserting that Art. I §12 of the Florida Constitution exceeds the reach and prohibition of the Fourth Amendment to the United States Constitution. And that this question should be resolved by this Court. Respondent points out that the matter has indeed been resolved by this Honorable Court in State v. Hume, 12 F.L.W. 464 (Fla., September 10, 1987), deciding that Article I §12 of the Florida Constitution is to be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

In any event, Amici does not have standing to inject issues not raised by the parties. Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982), approved, 400 So.2d 1282 (Fla. 1983). Thus, this argument should not be considered in this case.

> however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. Terry v. Ohio, supra, 392 U.S., at 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring); Id., at 34, 88 S.Ct. at 1886 (White, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. United States v. Mendenhall, supra, 446 U.S., at 556, 100 S.Ct. at 1878 (Opinion of Steward, J.). If there is no detention-no seizure within the meaning of the Fourth Amendment-then no constitutional rights have been infringed.
>
> Florida v. Royer, supra, 103 S.Ct. at 1324.

The record in the instant case reveals that the initial contact between Officers Nutt and Rubino and Petitioner did not amount to a Terry stop, therefore there was no instrusion into Petitioner's constitutionally protected interest. Since the officer at the moment he approached Petitioner did not have any founded suspicion upon which to approach and question him, Petitioner could have simply ignored Officer Nutt and continued trying to sleep. The record herein is very clear, including Petitioner's testimony, that Petitioner was cooperative with the police. Petitioner said he was willing to, and did answer the questions posed to him. He showed his ticket and driver's license to Officer Nutt. Upon inspecting the ticket and driver's license, Officer Nutt found nothing to lead him to suspect Petitioner, and promptly gave the ticket and I.D. back to Petitioner. According to Petitioner's own account, when Officer Nutt asked him if the red bag he was resting his head on was his, Petitioner said yes.

When asked if the bag could be searched, Petitioner said, "okay, sure." When Officer Rubino noticed the blue bag in the overhead rack and asked Petitioner if the bag was also his, Petitioner responded yes. Officer Nutt then asked if this bag could also be searched. This is where the Petitioner's version differs from that of the officers. Petitioner testified that when he was asked whether the blue bag could be searched, he "quoted nothing" (R 62). The officers, however, testified Petitioner, as to the blue bag, also said "okay, go ahead" (R 42, 46). Thus, the search of Petitioner's blue bag which produced the cocaine was a lawful warrantless search pursuant to Petitioner's consent.

In the case at bar, since the officers truthfully admitted they had no basis for suspecting Petitioner of any illegal activity, Petitioner could have ignored the officers' request for identification. Florida v. Royer, supra. The fact that Petitioner voluntarily responded and provided his ticket and driver's license for inspection did not amount to a detention. Particulary where the officers properly returned the ticket and driver's license to Petitioner. U.S. v. Mendenhall, 446 U.S. 544, 110 S.Ct. 1870, 64 L.Ed.2d 497 (1980); Nease v. State, 484 So.2d 67, 68 (Fla. 4th DCA 1986). Once the officers obtained Petitioner's consent, without threats or force of any kind, to search the blue bag, the cocaine found therein gave the officers the necessary probable cause to arrest Petitioner and charge him with trafficking in cocaine. Once arrested the Petitioner was properly searched which led to the charge for possession of cannabis.

Petitioner and Amici argue that the mere entering of the bus by the police officers was invalid equating this case to a checkpoint stop without any guidelines, regularity, or consistency in the choice of either bus or passenger to search, without the prior permission and consent of the Greyhound officials. The state submits this argument is without merit. That the consentual encounter occurred in the Greyhound bus rather than in an airport terminal or the bus terminal in this case, does not show any violation of Petitioner's privacy right. The encounter that occurs in this type of case occurs while the bus is at a regular scheduled rest stop. The police officers board the bus as any regular citizen may and converse with any remaining passengers. The officers do not close the doors to prevent anyone from leaving the bus, nor do they await for the bus to be ready to depart before beginning any search. The officers simply explain to the passenger, willing to listen, that buses are becoming a means for drug traffickers to transport the contraband within the United States; that they are requesting the cooperation of citizens in the war against drugs, and that they would like to search the bags if the person consents, but the person does not have to consent. If the passenger does not wish to speak or even listen to the officers, the passenger is free to ignore the officers and remain at his seat, or disembark the bus and wait until the bus is ready to continue on its way before getting on the bus again. The officers, without suspicion, have no authority to force anyone to talk to them, or agree to a search

of the bags.

The circumstances in this type of encounter clearly show that this is not a situation where the police stop the buses in the middle of the highway and subject the passenger to a search. Under these circumstances, it cannot be said that talking to a person while on the bus at a scheduled stop is any different from approaching the individual while walking to the bus terminal, or waiting for the bus at the terminal, and asking him for identification and consent to search. The individual whether out in the street, in the terminal, or sitting in the bus has the same power to ignore the police officer's question, and deny consent to search. If the police officer insists, then we have a totally different case, and any contraband obtained therefrom is suppressible. However, if the person decides to speak to the officer and consents to a search of his bags whether on the street, terminal, or bus, he has not been subjected to a detention and his consent makes a warrant unnecessary in that case.

Under the facts sub judice, Petitioner could have ignored the police officers, and the conversation would have ended. He did not have to leave the bus; he simply could have said nothing to the officers and continue trying to sleep. Petitioner herein, however, talked to the officers and clearly gave his consent for the search. The state reasserts that since the officers had no suspicion Petitioner was involved in any criminal activity, Petitioner could have denied consent to search his blue bag, even after the red bag had been searched. Petitioner instead

consented. The record is clear, Petitioner consented and did not make any attempt to withdraw his consent by preventing the officer to search any further.

Amicus Curiae argues that this type of search "may be permissible under the Fourth Amendment" if conducted as part of a general regulatory scheme in furtherance of an administrative purpose." (Amicus brief at page 31). The White House Administration and the Florida Governor's Office have declared a "war on drugs." Due to the allowed searches at airports, drug couriers are now using the common carrier buses as an alternative method of transporting illegal drugs. The procedure under attack herein has been used by the Sheriff's Department, with the approval of Greyhound Lines, in its part on the war against drugs. Therefore, this program is indeed "part of a general regulatory scheme in furtherance of the administrative purpose" of combating drug trafficking.

Petitioner having consented to talk with the officers, as-well-as consenting to search of his bags, cannot now claim invation of privacy because he was in a Greyhound bus. This consentual encounter is no different from the encounters found to be in a public place in Royer, supra, Mendenhall, supra, or Florida v. Rodriguez, ___U.S.___, 33 L.Ed.2d 165 (1984). See also, Nease v. State, supra. From the record herein, it is clear Greyhound is cooperating with authorities on the war against drugs. See, Huffman v. State, 500 So.2d 349 (Fla. 4th DCA 1987). The testimony of the officers was that they perform this type of investigation on Greyhound buses everyday. And that the bus

driver saw them and acknowledged their entrance into the bus (R 32-33). Thus, Petitioner has no standing to assert Greyhound's right to prevent the police officers from entering Greyhound buses and converse with any passenger willing to talk.

Respondent submits, therefore, that because Petitioner was not told he was a suspect, was not physically restrained, not intimidated by a show of weapons, and none of his travel documents were held by the police, the encounter sub judice did not amount to a coercive investigatory stop. Rather, the search was done pursuant to a free and voluntary consent by Petitioner, not a result of an illegal stop.

Unable to show anything more than a mere "citizen's encounter," Petitioner attempts to negate the validity of the consent to search his blue bag. Whether the consent was voluntarily given must be determined by the totality of the circumstances. United States v. Mendenhall, supra.

In Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854 (1973), the United States Supreme Court announced a five-point test for use by trial courts in determining the voluntariness of a consent to search. The five factors to be considered are:

1. Was there any coercion, either express or implied?
2. Was the capacity of the consenting individual limited in any way?
3. Was the individual advised of the right to refuse to consent to the search?
4. Did the police threaten to obtain a search warrant?
5. Was the individual's conduct and/or statements consistent with a valid consent to the search?

The state submits that the police officer's version of the investigatory stop in the instant case does not suggest express or implied coercion. Officer Nutt asked Petitioner if he wanted to converse with the officer, and Petitioner reportedly replied "okay, sure." When asked for consent to the search of his baggage, Petitioner responded "sure, go ahead." Officer Nutt testified that the encounter was initiated when the officer introduced himself and his partner, produced police identification, asked if Petitioner would speak to the officers, and explained south Florida's narcotics problem. The officer testified that he did not block Petitioner's exit from the bus, and would have ended the encounter if Petitioner had refused to speak to the policemen. Petitioner testified he gave consent to the search of the red bag, and that when asked if the officer could search the blue bag, he did not say anything. However, Petitioner testified he did not tell the officers not to search or manifest his objection in any way (R 73). Petitioner denied that he was informed of his right to refuse the search, however, what is most significant, Petitioner stated that he <u>never</u> told the officers that he did not wish to speak with them, <u>never</u> told the officers he wanted to leave, and did not physically attempt to do so, and <u>did not</u> tell Officer Nutt to discontinue the search of his bag. Thus, on the basis of Petitioner's own testimony, combined with that of Officer Nutt, it is not unfair to assume that Petitioner was not coerced into conversing with the officers, and allowing the search of his bag. This was the finding of the trial court, and affirmed by the Fourth District.

Under the second element of the Schneckloth test, Petitioner's capacity to understand the situation he was in must be considered. Petitioner has not asserted that his capacity was limited in any way. In Mendenhall, supra, a 22 year old woman with an eleventh grade education was held capable of voluntary consent to a search. There is no evidence that Petitioner's capacity to consent was inferior to the subject in Mendenhall.

The third element of the Schneckloth analysis inquires into Petitioner's advisement regarding his right to refuse the search at issue. Officer Nutt testified that Petitioner was so informed (R 42).

Fourth in the list of elements in the Schneckloth test, is the inquiry as to the presence of the threat to obtain a search warrant. Petitioner testified that the officers were not loud nor threatened him in any way (R 71), but that Officer Nutt was carrying a pouch which he knew contained a gun (R 77), although he never saw a gun (R 67). Both officers testified there had been no threats or coercion exercised on Petitioner to make him talk or consent to the search. The officers testified that had Petitioner so requested, they would have left him alone and no search would have taken place. The state submits the self-serving testimony of Petitioner was assessed in terms of its credibility in the trial court, and that determination should not be second-guessed on appeal. This, in fact, was the holding by the Fourth District. Appellee submits that it is fair to assume that a trained narcotics investigator would not employ such threats in order to complete an investigation.

The final portion of the Schneckloth test involves a review of Petitioner's conduct and statements during the encounter to determine if they were consistent with voluntary consent. If Officer Nutt's testimony is believed, it is clear that Petitioner willfully consented to both inquiry and the search at issue. Petitioner's own testimony shows that he never attempted to end the inquiry, or limit the search of his baggage.

Petitioner admitted he had knowledge of the cocaine that was contained in his bag (R 75). Because of this knowledge, Petitioner was no doubt under a great deal of stress during the encounter at issue. Indeed, it would seem clear in the instant case, that when Petitioner "bowed" to the events with which he found himself confronted, he may have been understandably unhappy with his situation, being in possession of a quantity of cocaine. Nevertheless, this is not sufficient to invalidate his freely given consent, made absent coercion, threats or physical force, see Cockerham v. State, 237 So.2d 32, 34 (Fla. 1st DCA 1970).

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness; the reviewing court must interpret the evidence and the reasonable inferences derived from it in the light most favorable to the trial court. Smith v. State, 378 So.2d 281 (Fla. 1979); State v. Rizo, 463 So.2d 1165 (Fla. 3d DCA 1984). The factual determination on a motion to suppress as to whether there was consent to search was the exclusive province of the trial judge. See, e.g., Snider v. State, 501 So.2d 609 (Fla. 4th DCA 1984) (J. Letts concurring specially); State v. Carroll, 12 F.L.W.

1885 (Fla. 4th DCA August 5, 1987) (H. Stone concurring) and cases cited therein; Dooley v. State, 501 So.2d 18 (Fla. 5th DCA 1986) and cases cited therein; State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981).

There being competent substantial evidence in the record to support the trial court's findings as to the issue of consent to search and as to the nature of the encounter between Petitioner and the officers, the denial of the motion to suppress was properly affirmed by the Fourth District. See, State v. Carroll, supra, (J. Stone concurring); Racz v. State, 486 So.2d 3 (Fla. 4th DCA 1986); Jordan v. State, 384 So.2d 277 (Fla. 4th DCA 1986).

Lastly, the state will briefly respond to some points raised by the Amicus Curiae brief filed by the Law Office of Joseph S. Paglino. A more thorough response will be made by Amici Curiae, Nick Navarro, Sheriff, Broward County, and Greyhound Lines, Inc.

Petitioner and Amicus Curiae's argument necessarily center around the contention that the consent was tainted by the "illegal boarding of the bus." The police boarding of the bus was not violative of any citizen's rights. The conversation between the officers and Petitioner being a mere "contact," without any further coercive measures did not amount to a detention of Petitioner. Therefore, the consent being freely and voluntarily given cannot be invalidated by any alleged illegal activity of the police, since none existed.

Amicus heavily relies in the Eleventh Circuit Court of Appeals' decision in United States v. Miller, 821 F.2d 546

(11th Cir. 1987) alleging, the situations are identical. However, the Miller case can be easily distinguished from the facts sub judice. Miller involved the stop and search of an automobile without "reasonable suspicion of illegal activity." The facts in that case were that Miller was driving a car, he borrowed from a friend, north on Interstate 95. Highway Patrol Trooper Vogel observed Miller driving just below the posted limit of 55 miles per hour, and the trooper decided to stop Miller because he was driving "overly cautious," and when he passed two slower vehicles, the right wheels of the car Miller was driving crossed over the white painted lane marker about four inches, in violation of Florida traffic laws. The Eleventh Circuit following the authority of United States v. Smith, 821 F.2d 546 (11th Cir. 1987) found the traffic violation was a pretext for the stop. Therefore, finding the initial stop not to be legitimate, the stop could not validate the search.

Again, the state submits the facts herein are distinguishable. No illegal stop or detention having taken place sub judice, the consensual search was not tainted by any illegal stop. The Petitioner was not stopped or prevented from continuing on his way. The police did not "commandeer the bus" into the Greyhound terminal, rather the encounter occurred during a scheduled stop. The police officers used no pretext to talk to Petitioner, but simply requested the pasengers assistance in the war against drugs, and informed Petitioner he could deny consent for the search. No illegality has been shown herein.

The other cases cited by Amicus Curiae, such as New York v. Quarles, 467 U.S. 649 (1984), Brown v. Texas, 443 U.S. 47 (1979), Orozco v. Texas, 394 U.S. 324 (1969) and United States v. Bowen, 500 F.2d 960 (9th cir. 1974), can be distinguished in the same manner. Those cases turn on the fact that there was an illegal stop without articulable suspicion to believe the defendant was engaged in criminal conduct, or the statements were obtained in violation of Miranda.

In the case sub judice, the police officers did not use a pretext to talk to Petitioner. There was no detention or intrusion into Petitioner's privacy. The cirsumstances herein are likewise distinguishable from the decision in Nease v. State, supra. In Nease, the Fourth District Court of Appeal found the police officers had articulable suspicion to detain the defendant for further questioning. However, since Nease withdrew his consent for the search, the police could not search the luggage without probable cause; the luggage contained contraband. Sub judice, Petitioner gave his consent and did not withdraw same. The search being conducted incident to a free and voluntary consent was valid; thus, this case is not controlled by Nease.

Additionally, the police officers did not board the bus looking for Petitioner. This was not premeditated police conduct against Bostick. If Petitioner had ignored the officers or denied consent to search the blue bag, then Petitioner would be in the same position as Nease, supra, and no search could have been conducted absent probable cause that the blue bag contained contraband.

CONCLUSION

The circumstances in this case clearly show that the conversation between the officers and Petitioner was a mere encounter, and did not amount to an illegal stop, detention, or arrest. As such the search incident to the voluntary consent was not tainted by any prior illegality.

WHEREFORE, based upon the foregoing arguments and authorities cited, Respondent respectfully requests this Honorable Court APPROVE the Fourth District Court's affirmance of the denial of the motion to suppress and affirm the conviction and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent On The Merits has been furnished, by United States Mail, to KENNETH P. SPEILLER, ESQUIRE, Counsel for Petitioner, Law Offices of Max P. Engel, 1461 N.W. 17th Avenue, Miami, FL 33125; JOSEPH S. PAGLINO, ESQUIRE, Counsel for Amicus Curiae in Support of Petitioner, 88 N.E. 79th Street, Miami, Florida 33138; EDWARD A. HANNA, JR., ESQUIRE, Counsel for Amicus Curiae in Support of Respondent, Broward County Sheriff's Office, Organized Crime Division, 2600 S.W. 4 Avenue, Fort Lauderdale, FL 33135; and to G. WILLIAM BISSETT, ESQUIRE, Counsel for Amicus Curiae, Greyhound, in Support of Respondent, Preddy, Kutner, Hardy, Rubinoff, Brown & Thompson, 601 N.E. First Avenue, Miami, Florida 33132 this 9th day of October, 1987.

Georgina Jiménez-Arosa
Of Counsel