THE SUPREME COURT OF FLORIDA

CASE NO: 70,996

TERRANCE BOSTICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL

****

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner, TERRANCE BOSTICK, was the Defendant in the trial court and Appellant in the Fourth District Court of Appeal. Respondent, STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the Fourth District Court of Appeal. In this brief the parties will be referred to as they appear before this Honorable Court i.e. Petitioner and Respondent.

Throughout this brief all references to the Record on Appeal will be made by the letter "R" followed by the appropriate page number e.g. (R-12).

STATEMENT OF THE CASE

Petitioner, TERRANCE BOSTICK, was charged by Information with one Count of Trafficking in Cocaine and one Count of Possession of Cannabis (R-15).

Petitioner filed a Motion to Suppress seeking to exclude evidence obtained in a search by the police (R-16-17). On March 24th, 1986 a hearing was held on the Motion to Suppress (R-21-87). On August 4th, 1986 the trial court, in a written order, denied the Motion to Suppress (R-104).

On September 8th, 1986, Petitioner entered a change of plea to nolo contendere to the charges and reserved his right to appeal the denial of the Motion to Suppress (R-1-9). On October 8th, 1986 Petitioner was sentenced to five years in state prison to be followed by two years of probation (R-10-14, 108-110).

Following a timely filed Notice of Appeal (R-111) Petitioner prosecuted an appeal in the Fourth District Court of Appeal. On April 8th, 1987, the Appellate court issued a Per Curiam Affirmed decision. On July 22nd, 1987, the Appellate court denied Petitioner's Motion For Rehearing but certified a question to this Honorable Court as being of great public importance, Bostick v. State, 510 So. 2d 321 (Fla. 4th DCA 1987). Petitioner now presents his Initial Brief to this Honorable Court.

STATEMENT OF THE FACTS

On August 27th, 1985, Petitioner bought a bus ticket in Miami, Florida. He got on a bus in Miami with a destination of Atlanta, Florida (R-59). The bus which Petitioner boarded made a scheduled stop in Fort Lauderdale, Florida. Petitioner was lying on the back seat of the bus (R-30,44,60).

During the stop in Fort Lauderdale the bus was boarded by two members of the Broward County Sheriff's Office (R-28-29, 44). These were plain-clothes officers but they were wearing "raid jackets" which clearly identified them as police officers (R-28,39,44,76). One of the officers was carrying a small pouch inside which was a gun (R-28,34-35,49). Although Petitioner never saw a gun (R-67) he thought that was what the pouch contained (R-63,76).

The officers boarded the bus to make random citizen contacts (R-34,39-50). They had no permission to board the bus, no ticket for the bus, no search or arrest warrant, and no reasonable suspicion of any criminal activity (R-33, 38,49).

The officers went to the back of the bus where one stood by Petitioner and the other stood a little further toward the front of the bus (R-30,44). One of the officers asked Petitioner his destination to which he replied, "Atlanta" (R-29,37). The officer then asked Petitioner for his ticket and identification (R-29,54,61). Petitioner showed his ticket and identification, with which there was no problem (R-29,37, 54, 61).

Petitioner was resting on a red bag (R-29,36,52). The officer asked and allegedly received consent to search the red bag (R-29,46). The red bag did not belong to Petitioner but was the property of another passenger on the bus (R-30-31,45, 60). The search of the red bag did not turn up any contraband (R-29,42).

While the one officer was searching the red bag the other officer saw a blue bag in an overhead rack (R-29,42,46,57-58). Petitioner was asked if the bag was his and he replied it was (R-29,42,72). The officer asked for and allegedly received permission to search this bag also (R-29,46) although Petitioner denied this (R-63,72,76-77).

The officer's testimony was that Petitioner was told he could refuse (R-42) although Petitioner also denied this (R-63). Although the officer was familiar with consent forms he did not carry them although he testified there was no reason he could not do so (R-41-42).

The blue bag contained cocaine and when this was found Petitioner was placed under arrest (R-29).

SUMMARY OF THE ARGUMENT

There is a distinction between a stop in a bus or train station or airport and a stop of someone actually on a bus, train or plane. The proper analogy is between the above situation and the distinction between a person on the street or the same person driving a car.

Just as the person driving his car has been held to be entitled to certain protections the person on another form of transportation should be entitled to the same protections. Like the person in the car a person on a bus should be free from random searches left to the unfettered discretion of the officer in the field. There should be written guidelines covering the type of stop involved in the instant case.

Based on the totality of the circumstance in this case it is clear that the consent given by Petitioner was not truly voluntary. The consent was given after Petitioner was illegally detained and there was no break in the chain which would purge the taint.

ARGUMENT

This cause brings to this Honorable Court an issue relating to a person's right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the Constitution of the United States and Article I Section 12 of the Constitution of the State of Florida.

The Fourth District Court of Appeal certified, as a question of great public importance, the following question:

> 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?

The question certified contains within it two sub-issues which need to be discussed. The first of these sub-issues deals with the manner in which the police boarded the bus. The police boarded this bus with no suspicion of criminal activity, no warrant and no permission.

There is no question that a police officer, just like any other citizen, is free to approach someone and engage him in conversation, Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L. Ed. 2d 229 (1983), Jacobsen v. State, 476 So. 2d 1982 (Fla. 1985). The problem in cases such as those presented here comes with the realization of where Petitioner was when he was so approached. In this case Petitioner was not on the street or in a bus or train terminal or in an airport. In this case,

Petitioner was seated on a bus for which he had properly and legally purchased a ticket. This was also a bus which was neither at its starting or ending destination but was in transit.

As was noted by Judge Glickstein in his dissent in Snider v. State, 501 So 2d 609 (Fla. 4th DCA 1986);

> "I perceive a great distinction between a police-citizen encounter on a public street or in the waiting room of a transportation terminal, and its counterpart in a bus, train or airplane after the citizen has boarded it."

Apparently, Judge Glickstein continues to be convinced of the distinction and troubled by the lack of court opinions on the matter. In the recent case of State v. Carroll, 12 FLW 1885 (Fla. 4th DCA Aug. 7th, 1987) The Judge had this to say;

> "A number of Appellate judges apparently see no legal difference in approaching random passengers on board buses, trains and airplanes which are prepared to depart from the station or airport and random passengers still in the station or airport who have not boarded. I disagree with them, but can point to no reported opinion which discusses and recognizes the difference - a fact that others could assert to be the best proof of there being none."

Petitioner is also unable to point to any judicial opinion, other than those of Judge Glickstein, which recognizes a difference between persons in a terminal or airport and person on board a bus, train or plane. This, however, does not mean the distinction does not exist. Petitioner asserts

that it does exist and can be demonstrated by a simple analogy.

As previously noted, and as stated by the United States Supreme Court in Royer, 460 U.S. at 497, 103 S. Ct at 1324, 75 L. Ed 2d at 229 (1983);

> ". . .law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place . . ." (emphasis added).

The bus or train station or airport is that other public place where an approach by the police does not violate the search and seizure clauses.

The United States Supreme Court has recognized that the person who can be approached on the street is entitled to extra protection when he gets into a car, see United States vs. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct 3074, 49 L. Ed 2d 1116 (1976), Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed 2d 660 (1979). This Honorable Court has also seen fit to provide that extra protection from random stops to a person in his car, see State v. Jones, 483 So. 2d 433 (Fla. 1986).

While cars have become somewhat pervasive in our society there should certainly be no less protection afforded to those persons who are not fortunate enough to be able to afford a car and must take alternate transportation such as a train or bus or to those persons, who for whatever reason, choose a means of transportation other than their car.

This is not to say that under no circumstances can police officers get on a bus , train or plane. It is just to say that as was recognized in Delaware v. Prouse, supra and State v.

Jones, supra the boarding cannot be a totally random matter left to the unfettered discretion of the officer in the field.

Any type of roadblock or stopping of a person in transit should be conducted;

> ". . .so as to minimize the discretion of field officers, thereby restricting the potential intrusion into the public's constitutional liberties. Written guidelines should cover in detail the procedures which field officers are to follow at the roadblock. Ideally, these guidelines should set out with reasonable specificity procedures regarding the selection of vehicles, detention techniques, duty assignments. . .," State v. Jones, supra at 438.

In the instant case, there was no showing of any neutral criteria being used. The testimony of the officers appears to show that the decisions are solely in their discretion. This type of a stop should be held to be an unconstitutional invasion of the right to be free from unreasonable searches and seizures.

The second sub-issue which needs to be discussed in conjunction with the certified question is as to Petitioner's consent. It is by now axiomatic that a warrantless search is per se unreasonable, subject to a few established exceptions among which is the consensual search. Katz v. United States, 389 U.S. 347, 88 S. Ct 507, 19 L. Ed. 2d 576 (1967), Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), Norman v. State, 379 So. 2d 643 (Fla. 1980).

The question to be considered is whether the consent was truly voluntary or whether it was coerced or the product of duress. This is a question which is to be determined by the totality of

the circumstances. United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) citing Schneckloth v. Bustamante, supra, Norman v. State, supra.

As was noted by this Court in Norman v. State, supra at 646,

> ". . . when consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. (Citations omitted). The consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action. (Citations omitted)."

As previously demonstrated, the boarding of the bus by the police in this case was an illegal police activity which taints any subsequent consent. However, even should this Court find that the boarding of the bus was legal it must look at the other circumstances.

In this case, Petitioner was lying on the back seat of the bus. Two persons, easily identifiable as police officers, got on the bus. One of those persons had in his hand a small pouch which Petitioner thought and which it turned out did contain a gun. One of the persons came and stood over him while the other was a short distance behind him.

Petitioner was questioned as to his destination and then asked to produce his ticket and identification. When these items checked out they were returned to him. The officer then allegedly explained their purpose, told Petitioner he was free to refuse to allow a search and was asked to consent to a search of his bag.

Petitioner can set forth no more sound reasoning then did Judge Letts in his dissent in the Fourth District Court of Appeal and Petitioner would therefore adopt that reasoning as his own, Bostick v. State, 510 So. 2d 321 (Fla. 4th DCA 1987), dissenting opinion of Judge Letts.

Petitioner would only add some brief argument to Judge Letts' opinion. In Florida v. Royer, supra, the United States Supreme Court made special note of three of the factual findings of the Third District Court of Appeal of Florida. One was the retrieval and possession of Luggagae and possession of the ticket of Mr. Royer. This does not exist in the instant case. Another was Mr. Royer's finding himself in a small enclosed area being confronted by two police officers. Petitioner would assert that there was little difference between Mr. Royer's position and Petitioner's being on the last seat of a bus with two police officers between himself and any means of exit. The third factor was Mr. Royer's being informed that he was suspected of transporting narcotics. Petitioner asserts that there is little difference between that and Petitioner's being confronted by two officers, one of whom is holding a gun and explaining that there purpose was to look for narcotics.

Petitioner has demonstrated that there were two illegal police activities in this case. The first was the boarding of the bus and the second was the seizure of Petitioner by his not being able, under all the circumstances, to reasonably believe he was free to leave or refuse consent. In order to

render the taint harmless Respondent would have to show an unequivocal break in the chain.

The only fact to which Respondent could point would be the informing of Petitioner that he could refuse consent. It should be noted that this occurred during the stop while the officers were over Petitioner. This is merely one factor on Respondent's side and cannot outweigh all the other factors already enumerated.

The giving of warnings or advising of right to refuse is only one factor out of many and even so important an act as the giving of Miranda warnings cannot in and of itself always cure a taint caused by illegal police action, see Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

The advisement given to Petitioner was a short, oral statement. While it would not necessarily cure a taint a written consent form would probably be much stronger evidence of a break in this chain of illegality. The officer in this case was aware of such forms but chose not to use them. Their use would not be too great a burden to place on police officers.

CONCLUSION

Based on the foregoing facts and legal authorities, the certified question should be answered in the negative and this case should be reversed and Petitioner should be discharged.

Respectfully submitted,

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BY:
KENNETH P. SPEILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to Georgina Jimenez-Orosa, Assistant Attorney General, 111 Gerogia Avenue, Suite 204, West Palm beach, Florida 33401, this 18th day of September, 1987.

BY:
KENNETH P. SPEILLER

THE SUPREME COURT OF FLORIDA

CASE NO: 70,996

TERRANCE BOSTICK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE
OCT 13 1987
CLERK, SUPREME COURT
By________
Deputy Clerk

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ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL

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APPENDIX TO INITIAL BRIEF OF PETITIONER

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DECISION OF FOURTH DISTRICT COURT
OF APPEAL ON PETITION FOR REHEARING ----------------------1-7

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to Georgina Jimenez-Orosa, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 13th day of October, 1987.

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BY: ________
KENNETH P. SPEILLER

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1987

TERRANCE BOSTICK,

Appellant,

v. CASE NO. 4-86-2409.

STATE OF FLORIDA,

Appellee.

Opinion filed July 22, 1987

Appeal from the Circuit Court for Broward County; Russell E. Seay, Jr., Judge.

Kenneth P. Speiller and Max P. Engel of Law Offices of Max P. Engel, Miami, for appellant.

Robert A. Butterworth, Jr., Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

ON PETITION FOR REHEARING

PER CURIAM.

The Petition for Rehearing is denied on the authority of Rodriguez v. State, 494 So.2d 496 (Fla. 4th DCA 1986) and Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987). Notwithstanding this affirmance, we deem the cause now before us to be of great public importance and we certify the following question to the Supreme Court:

> 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?

WALDEN and STONE, JJ., concur.
LETTS, J., concurs in part and dissents in part.

LETTS, J., dissenting in part:

I concur in the decision to certify the question. I otherwise dissent.

This appeal evolves from police activity on a bus in the form of a random request for consent to search a passenger's luggage without articulable suspicion. The trial judge, though he orally expressed reservations, denied, without comment, the motion to suppress the evidence of contraband discovered in the luggage. Inherently, the trial judge's order was tantamount to a holding that a consensual police encounter took place rather than an illegal intrusion equivalent to a seizure. I dissent.

Two police officers, complete with badges, insignia[1] and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers, admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification. The ticket, from Miami to Atlanta, matched the defendant's identification and both were immediately returned to him as unremarkable. However, the two police officers persisted and explained their presence as narcotic agents on the lookout for illegal drugs. In pursuit of that aim, they then requested the defendant's consent to search his luggage. Needless to say, there is conflict in the evidence about whether the defendant

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[1] Their dress was "casual" over which they donned clearly marked "raid" jackets before entering the bus.

consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.

I am uncomfortable with a scenario such as this and I have extensively studied two United States Supreme Court opinions, cited hereafter, in search of counsel and guidance. With the utmost of respect, I have some trouble reconciling these two decisions and I do not find them entirely consistent with one another. Certainly, their results are opposite. However, while I am fully conscious of, and will quote from, United States v. Mendenhall, 446 U.S. 544, 64 L.Ed 2d 497, 100 S.Ct. 1870 (1980), I am primarily persuaded by Florida v. Royer, 460 U.S. 491, 75 L.Ed 2d 229, 103 S.Ct. 1319 (1983), which is the most recent of the two and which I believe supports my conclusion.

Royer teaches that there is no litmus test for distinguishing between a consensual encounter and a seizure in violation of the Fourth Amendment. Accordingly, the endless variations in facts and circumstances of each case make it "unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers . . . ." Id. at 1329. However, the circumstances of Royer do provide a basis for comparison with the controversy now before us.

The facts of Royer were:

1. The initial approach was by plainclothes policemen in an airport concourse, not on an actual plane.

2. The police displayed no weapons.

3. The defendant's ticket and I.D. did not match.

4. The defendant became noticeably nervous during the conversation.

5. The defendant was told he was suspected of transporting narcotics.

6. The defendant's ticket and I.D. were not returned to him making it clear, as the <u>Royer</u> court held, that he was not free to leave.

7. The defendant was requested to and did accompany the two policemen to a small enclosed room (described by law enforcement as "a large storage closet") equipped with a desk and two chairs.

8. His checked luggage was retrieved without his consent and brought to the small room.

9. He did not give his consent to the search when first approached ("on the spot," as defined by the <u>Royer</u> court), but only after being taken to the room and interrogated.

By contrast, the facts of the instant case reveal that:

1. The initial approach in Fort Lauderdale was by uniformed police on the actual bus in which the defendant was in transit from Miami to Atlanta.

2. There <u>was</u> display of a weapon.

3. The defendant's ticket and I.D. <u>did</u> match.

4. There is nothing in the record denoting nervousness on the defendant's part.

5. The defendant was not told that he was suspected of transporting narcotics.

6. The defendant's ticket and I.D. were immediately returned to him.

7. The defendant was not requested to leave the bus or to accompany the police officers anywhere.

8. No checked luggage was retrieved.

9. The defendant gave his consent to search "on the spot."

Obviously, some of the above enumerated facts in Royer favor a consensual encounter while others reflect a seizure. In the same vein, factors pro and con exist in the case at bar. Yet, it is clear that in Royer the overriding consideration was whether the defendant could reasonably believe he was free to leave. In deciding he was not free to do so, the Royer court, quoting our Third District Court of Appeal, made much of the confinement in the small room as "an almost classic definition of imprisonment" Id. at 1323. The Royer court further cited as evidence that he was not free to leave, the failure by the police to return the defendant's ticket and their retrieval and possession of his luggage. True, in the case at bar, there was no retention of a ticket nor was any of the luggage impounded prior to the request for consent to search it. Further, there was obviously no interrogation room to which the defendant was transported. Nevertheless, as the court held in Mendenhall, the test for the presence of a seizure is whether "in view of all of the circumstances surrounding the incident a reasonable person would have believed he was not free to leave." Id. at 1877. In helping to define circumstances which would indicate the passenger was not free to leave, Mendenhall cites examples, among others, such as the presence of more than one officer, the

display of a weapon, and in a subsequent paragraph, the wearing of uniforms. Id. at 1877. All three of these examples, illustrative of seizure, are present in the instant case. Moreover, my version of common sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover, while two policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

My having decided that the defendant was not free to leave, it follows that the police questioning under the facts of this case constituted an illegal detention and a seizure. In the words of the Royer court, since the defendant "was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search." Id. at 1329.

Nor do I find that the State has sustained its burden of establishing that any such taint was rendered harmless by a subsequent unequivocal break in the chain connecting the original seizure with the ensuing consent to search. On the contrary, the consent to the search was given immediately upon the heels of the illegal detention and no measurable break in the chain took place. See Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA

1987), and Brown v. Illinois, 422 U.S. 590, 45 L.Ed. 416, 95 S.Ct. 2254 (1975).

In conclusion, as I have already said, quoting from the United States Supreme Court on the subject, there is no available litmus test and my dissenting opinion is therefore confined to the totality of the facts and circumstances now before this court.

I WOULD REVERSE.