IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,) CASE NO,: 71,631
vs.)
PAUL CLIVE JOHNSON,
Respondent.)
)

RESPONDENT'S BRIEF ON THE MERITS

CARL H. LIDA, ESQUIRE
LAW OFFICES OF CARL H. LIDA, P.A.
Attorney for Respondent
2000 South Dixie Highway
Suite 217
Miami, Florida 33133
Tele. No.: (305) 285-9799

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STATEMENT OF THE CASE

The Respondent adopts the Petitioners Statement of the Case in its entirety.

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STATEMENT OF THE FACTS

The Statement of the Facts that the Respondent is relying on are found in the Findings of Facts from Judge McFerrin Smith's Order (R.169-171) andtestimonytaken at the Motion to Suppress.

On June 4, 1985 at approximately 4:15 a.m. Paul Johnson was driving a 1985 Lincoln Continental with Maryland tags northbound on Interstate 95 at the 1-4 overpass. Trooper Robert Vogel was on a drug interdiction patrol that night looking for people to stop that matched his drug courrier profile.

Trooper Vogeldecided to pull over the Defendant's vehicle for the sole reason that the Trooper felt that it matched "his profile". The factors that the Trooper relied upon to make the stop of the Defendant in this case are:

A) The time was 4:15 a.m.

B) The Defendant was alone.

C) The Defendant was about thirty years old.

D) The car had out-of-State tags.

E) The car was a large model.

F) The Defendant was a male.

G) The Defendant was wearing casual clothes.

H) The Defendant was driving in an "overly cautious" fashion.

I) The Defendant was driving northbound on Interstate 95, a known route for the transportation of illegal drugs from South Florida.

See Judge McFerrin Smith's Order (R.169-171). Based on these

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factors and these factors only Mr. Johnson was stopped and detained by Trooper Vogel.

At a Motion to Suppress hearing Trooper Vogel testified that he had basic training as a recruit conducted in Tallahassee in 1972 and subsequent to that he attended one forty (40) hour course of narcotics detention apprehension put on by Volusia County in February, 1984 (R.3).

Based on a group of approximately thirty (30) arrests for narcotics Trooper Vogel compiled a list of similarities that he felt was common to the thirty (30) cases that he has investigated.

Trooper Vogel testified that he does not keep records of all the vehicles that he stops and releases without searching, or those vehicles he stops and searches and does not find any contraband (R.33). No statistics were kept by Trooper Vogel of the characteristics of vehicles that he stops and had negative results with.

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The Fifth District Court of Appeal has certified the following question to this Court:

> "MAY A PROFILE OF SIMILARITIES OF DRUG COURRIERS WHICH IS DEVELOPED BY A LAW ENFORCEMENT OFFICER AND WHICH, IN LIGHT OF HIS EXPERIENCE, SUGGESTS A LIKELIHOOD OF DRUG TRAFFICKING, BE RELIED UPON HIM TO FORM AN ARTICULABLE OR FOUNDED SUSPICION WHICH WILL JUSTIFY A BRIEF INVESTIGATORY TRAFFIC STOP ON THE HIGHWAYS KNOWN TO THE OFFICER TO BE FREQUENTLY USED FOR THE TRANSPORT OF DRUGS."

ISSUE

ALTHOUGH THE FIFTH DISTRICT COURT OF APPEALS HAS CERTIFIED THE ABOVE REFERENCED ISSUE TO BE DECIDED BY THIS COURT COUNSEL FOR THE RESPONDENT RESPECTFULLY SUGGESTS THAT THE ISSUE SHOULD BE FRAMED IN THE FOLLOWING MANNER.

MAY THIS PROFILE OF SIMILARITIES OF DRUG COURRIERS DEVELOPED BY TROOPER ROBERT VOGEL BE USED BY HIM TO JUSTIFY A BRIEF INVESTIGATORY STOP ON THE HIGHWAYS OF THE STATE OF FLORIDA.

ARGUMENT

Until Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), no stop or detention could be made by law enforcement authorities on less than probable cause. After the Terry v. Ohio, supra. decision the Supreme Court of the United States allowed stops on less than probable cause if the arresting or detaining officer had

> "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, supra. at 1880. (Also see footnote 18.)

The Supreme Court, in Terry, went on to say

> "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch', but to specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry v. Ohio, supra. at 1883.

Subsequent to the Terry v. Ohio decision, the Supreme Court of the United States was asked to relax the Terry standard in regard to roving border patrols near the Mexican border and to allow police the right to make a stop of a vehicle near the border based on less than reasonable suspicion. The Supreme Court of the United States declined to do so in United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607

(1975) and ruled as follows:

> "We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving patrol stops. In context of Border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the Border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego with a Metropolitan population of 1.4 million is located on the border. ... we are confident that substantially all of the traffic in these cities is lawful and that relatively few of the residents have any connection with illegal entry and transportation of aliens. To approve roving patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying an illegal immigrant would subject the residents of these and other areas to potentially unlimited interference with their use of the highways solely at the discretion of the border patrol." United States v. Brignoni-Ponce, at **2581.**

In Brignoni-Ponce, supra. the Supreme Court was unwilling to relax the Terry v. Ohio, supra. standard in spite of the fact that the Government had made a convincing demonstration that the public need to do **so** was great. The Court held firm in its holding that a stop on less than reasonable suspicion was unconstitutional.

In the case at bar, the State seems to be arguing that, 1) The public need to stop drug trafficking is great and, 2) Since the State feels Trooper Vogel's stop is a minimal intrusion, these two factors should combine to createareasonable suspicion

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standard that is lower than that announced in Terry v. Ohio and its prodigy. This Court cannot allow that to happen.

A seizure is a seizure is a seizure whether the intrusion is minimal or not. In order to make a seizure the police need reasonable suspicion of ongoing criminal activity. Such suspicion did not exist in the case at bar. Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2552 and 65 L.Ed. 2d 890 (1980); In Re: Forfeiture of $6,003.00 in U.S. Currency, 505 So.2d 668 (Fla. App. 5th Dist., 1987); State v. Anderson, 479 So.2d 816 (Fla. App. 4th Dist., 1985); U.S. v. Smith, 799 F.2d 704 (11th Cir, 1986)[1].

The United States Supreme Court was next asked to relax the Terry standard in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979). The Court refused to relax the Terry standard for stops of automobiles although it was urged to do so, The Supreme Court of the United States reaffirmed its longstanding commitment to the Terry v. Ohio standard and ruled that any stop of a motorist was per se unconstitutional if it were based on anything other than

> "articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law."
> Delaware v. Prouse, supra. at 1391.[2]

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1. The Smith case involved Trooper Vogel also.

2. The Court did approve in Delaware v. Prouse non random stops

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The State of Florida in this case is asking the Court to rule that Trooper Vogel had reasonable suspicion of ongoing criminal activity as it applied to the Defendant in this case based on Trooper Vogel's profile factors which are outlined below:

A) The Defendant committed no traffic violations.

B) The time of the evening was 4:15 a.m.

C) The Defendant was alone.

D) The Defendant was approximately thirty years of age.

E) The car had out-of-state license tags.

F) The car was a large model.

G) The Defendant was a male.

H) The Defendant was wearing casual clothes.[3]

I) The Defendant was driving in an "overly cautious fashion".

J) The Defendant was travelling northbound on a route believed by the Trooper to be used for the transportation of

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(cont.)

such as checkpoints.

3. Casual clothes being described as anything other than a tuxedo or a suit (R.56). "By casual clothes, I mean other than a tuxedo, a suit and a tie."

illegal drugs.

The State argues that these factors plus Trooper Vogel's extensive training and experience should allow this Court to rule that reasonable suspicion existed in this case.[4]

These same factors have already been ruled as too general and unparticularized to give Trooper Vogel a reasonable suspicion that the driver had committed or was about to commit a crime and failed to justify an investigative Terry stop. In Re: Forfeiture of $6,003.00 in U.S. Currency, supra. and U.S. v. Smith, supra.

The Supreme Court of the United States had occasion in Reid v. Georgia, supra. to rule on whether or not a "drug courrier profile" gave rise to an articulate and reasonable suspicion of criminal wrongdoing in order to justify a Terry type detention. In Reid the Court ruled that the profile factors did not, as a matter of law, give rise to a sufficient articulable and well founded suspicion in order to justify a seizure.

> "The other circumstances describe a very large category of presumably innocent travellers who would be subject to

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4. Trooper Vogel's extensive experience consisted of his basic police training and one forty hour course taken by him in 1984. The rest of his experience came from on the street contact with motorists.

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> virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[5] Reid v. Georgia, at 2754.

In looking at Trooper Vogel's reasons for stopping the Defendant the Court must necessarily conclude as a matter of common sense that none of the factors either taken alone or collectively could constitute any suspicion of criminal wrongdoing on Mr. Johnson's part, let alone reasonable suspicion, of any criminal activity.

The fact that the Defendant chose to travel in the early morning hours has already been ruled not to be suspicious by the 11th Circuit Court of Appeals in U.S. v. Smith, supra. Common sense dictates that a driver will either be driving alone or with others in the car and Trooper Vogel's own chart indicates that it is more suspicious for two people to be travelling than one (R.21). The fact that the Defendant is thirty years old should not create suspicion of criminal activity. The fact that the car the Defendant was driving was a large model with out of state tags should arouse no suspicion in a State such as Florida which promotes tourism as its number one industry. The fact that the Defendant was a male encompasses approximately half of the population of the United States. The fact that the Defendant was wearing casual clothes is such a "laughable factor"

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5. The State has not contended that the Defendant was not seizedwithinthemeaning of the Fourth Amendment and, therefore, counsel for the Respondent has chosen not to address this issue.

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that it needs no discussion. (See Footnote 3). Lastly, the fact that the Defendant was driving in an "overly cautious" fashion gives rise to the argument, as Trooper Vogel so candidly admits, "You're damned if you do and damned if you don't.", to-wit: You can be stopped if you don't obey the law and you can, likewise, be stopped if you do obey the law.

On the basis of these factors the State of Florida is urging the Court to allow this Trooper to make virtually random traffic stops of the motoring public in our State. Perhaps the State should be reminded of the following:

> "As well as protecting alleged criminals who are wrongfully stopped or searched, the Fourth Amendment of the Constitution protects these innocent citizens as well." U.S. v. Miller, 821 Fed.2d 546 (11th Cir., Court of Appeals 1987) (At Slip Opinion 3543, 44).

The Smith case characterized the Trooper's action in a case remarkably similar to this one as follows:

> "Vogel's suspicion, therefore, was not the result of 'reasonable inferences' from unusual conduct but instead was a classic example of those inarticulate hunches that are insufficient to justify a seizure under the Fourth Amendment." U.S. v. Smith, supra. at 707. (See Footnote 5).

What the State is really asking this Court to do is to disregard the Constitutional precedents that have been established throughout the history of our Republic and merely to conclude that since Trooper Vogel has had some limited success

LAW OFFICES CARL H. LIDA, P.A., 2000 SOUTH DIXIE HIGHWAY, SUITE 217, MIAMI, FLORIDA 33133 • (305) 285-9799

in stopping drug traffickers "the ends justify the means". The State would like this Court to conclude that the non-descript profile factors used by Trooper Vogel which encompass a large majority of the motoring public in this State, coupled with the State's view that a minimum intrusion to the motorist that is stopped, somehow, creates a reasonable suspicion of criminal wrongdoing by that driver, passenger and/or automobile. If this view were adopted by the Court, virtually the entire motoring public of the State of Florida would be subject tp random stops by the police.

> "Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, work place, and leisure activities. Many people spend more hours each day travelling in cars than walking the streets...were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed." Delaware v. Prouse, supra. at 1401.

In conclusion, the State has not demonstrated that a reasonable suspicion of ongoing criminal activity existed in order to justify Trooper Vogel detaining the Defendant in this case and the decision of the District Court should be approved. The certified question should be answered that the profile factors in this case did not create a reasonable suspicion of ongoing criminal activity and cannot be used in the future to justify an investigative type stop.

CONCLUSION

The State has not demonstrated thata reasonable suspicion of ongoing criminal activity existed in order to justify Trooper Vogel detaining the Defendant in this case and the decision of the District Court should be approved.

The entire argument of the State is based on an emotional hysteria that's been created in this Country to stop drug trafficking. When legal analysis gives way to emotional hysteria the result is very bad law.

For the reasons statedherein, the Respondent, PAUL JOHNSON, respectfully requests this Court affirm the decision of the Florida Court of Appeals.

Respectfully submitted,

LAW OFFICES OF CARL **H. LIDA, P.A.**
Attorney for Respondent
2000 South Dixie Highway
Suite **217**
Miami, **Florida** 33133
Tele. No.: (305) 285-9799

CARL H. LIDA

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this the 5TH day of April, 1988, to: ELLEN D. PHILLIPS, ASSIST. ATTORNEY GENERAL, at 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014, and to all counsel of record.

Respectfully submitted,

LAW OFFICES OF CARL H. LIDA, P.A.
Attorney for Respondent
2000 South Dixie Highway
Suite 217
Miami, Florida 33133
Tele. No.: (305) 285-9799

CARL H. LIDA