O/a 6-20-88

IN THE SUPREME COURT OF FLORIDA

CLARK A. CAPLAN,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 71,709

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent was the appellee and prosecution and Petitioner the appellant and defendant in the courts below.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbol will be used:

"R" Record on Appeal

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on page one (1) of Brief of Petitioner on the Merits with the following additions and clarifications:

1. Officer Roberts of the Hollywood Police Department testified that on September 26, 1985, at about 12:45 p.m., the Petitioner was involved in an auto accident directly in front of the Hollywood Police Station (R 5-6).

2. After ascertaining that there were no injuries to the occupants of either vehicle, Officer Roberts asked Petitioner for his driver's license and registration to the vehicle, which Petitioner produced (R 8).

3. The Petitioner's vehicle was in such a condition that it could not be driven away (R 8).

4. After a brief conversation between Petitioner and Officer Roberts concerning the disabled vehicle, Petitioner requested Officer Roberts' assistance in obtaining a wrecker service to tow the vehicle (R 8).

5. Officer Roberts proceeded with routine police procedure in contacting "Mac's Towing Service" and filling out a vehicle tow slip (R 9).

6. Officer Roberts testified that pertinent information is required to be placed on the tow slip including the VIN identification number (R 9).

7. In this case, Petitioner was not the registered owner of the vehicle, so it would be automatic that the police check the VIN number (R 10).

8. Officer Roberts was outside the car looking into the front windshield to check the VIN number when he observed what appeared to be marijuana joints on the floor (R 11).

9. Officer Roberts testified that an inventory of the car is routine police procedure when a car is towed under orders of the police department:

> We do an inventory of the car for radios, tape players, any personal objects that they might want to take with them. We check the trunk, see if there is a tire, battery, et cetera so nothing is stolen at the compound where it is taken.
> (R 10, 11).

10. The towing sheet is an actual police document that the tow driver signs a receipt for (R 25).

11. The trial court asked Officer Roberts the following question during his examination:

> THE COURT: Now, when you called the towing company, were you calling the towing company as a favor to this gentleman so that the towing company could take the car on his behalf and if so, why would you then fill out a standard police inventory receipt or on the other hand, were you calling the towing company for another reason?
>
> THE WITNESS: Well, in all accident investigations, if there is -- The

> people do have an option to call their own tow company or the city tow company.
>
> If the city tow company is used, no matter what, the inventory tow slip is used. It is an operating procedure with the police department and since we had the discussion, he said will you -- I told him we had Mac's Towing Service which can tow your car and he asked if I would call them because his car could not be moved. (R 32, 33).

12. When Officer Roberts opened the door he discovered that there was smoke inside the vehicle and it smelled like burning marijuana (R 13).

13. Officer Roberts testified that he had smelled that smell before, "hundreds of times" (R 14).

14. Officer Roberts testified that he has been a police officer for over ten years and approximately six years in undercover narcotics work with special training in drug enforcement and drug identification (R 4).

SUMMARY OF THE ARGUMENT

I. Case law establishes that once probable cause exists the police may conduct warrantless searches of automobiles and containers found therein. Respondent submits that the officer sub judice had probable cause to search the Petitioner's car based on his training, knowledge and experience that the hand-rolled cigarettes contained marijuana. Thus, the Fourth District's opinion below is not in conflict with any appellate decision in this State.

II. The principles and reasoning of the Supreme Court in South Dakota v. Opperman, 428 U.S. 364 (1976) and Colorado v. Bertine, ___U.S. ___, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) dictate that the inventory of Petitioner's car was entirely reasonable where it was a caretaking function of police performed in accordance with standard police procedures.

ARGUMENT

POINT I

PROBABLE CAUSE TO SEARCH EXISTS WHERE BASED ON AN OFFICER'S TRAINING EXPERIENCE, AND KNOWLEDGE, HE REASONABLY BELIEVES THAT HAND-ROLLED CIGARETTES CONTAIN MARIJUANA.

Petitioner complains that the "mere observation of hand-rolled cigarettes in an automobile is insufficient to establish probable cause to search the vehicle" and that the Fourth District was in error when it held otherwise and approved the trial court's denial of Petitioner's motion to suppress. Further, he specifically alleges that the Fourth District's decision below is in direct conflict with this Court's decision in P.L.R. v. State, 455 So.2d 363 (Fla. 1984), and the Second District's decision in Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978). Respondent maintains however that the Fourth District correctly found there was probable cause to justify a search and that its decision is entirely consistent with P.L.R. and Carr.

In P.L.R. this Court upheld the seizure of a manila envelope containing marijuana at a known drug transaction site predicated upon the testimony of an experienced narcotics officer. This Court's holding in P.L.R. was based

upon a "totality of the circumstances" analysis. P.L.R. at 366. In support of its conclusion, this Court cited State v. Redding, 362 So.2d 170 (Fla. 2d DCA 1978) and Albo v. State, 379 So.2d 648 (Fla. 1980). In Redding a police officer investigating a citizen's complaint observed several small, flat, tinfoil packets inside the defendant's shoes in the back seat of his car. The warrantless seizure of the packets, later found to contain Phencyclidine, was upheld where the police officer testified that, based on his long experience as an undercover officer, he beleived that the packets contained either heroin or cocaine. The officer stated that he knew narcotics were customarily carried in this type of container. Likewise, in Albo, this Court upheld the warrantless seizure of marijuana wrapped in black plastic from a mobile home and held:

> ... given his experience [as a narcotics investigator] plus the defendant's failure to produce the vehicle's registration and the fact that the rear end of the motor home looked weighted down, the circumstances support [the officer's] determination that the bales were marijuana ...

Id. at 650.

In finding that under the totality of the circumstances the officer in P.L.R. had probable cause to search, this Court distinguished Thompson v. State, 405 So.2d 501 (Fla. 2d DCA 1981), Carr v. State, supra, and Harris v. State, 352 So.2d 1269 (Fla. 2d DCA 1977), on the basis that the

totality of the circumstances present in those cases did not give rise to probable cause. This Court specifically distinguished Carr, a case where hand-rolled cigarettes were observed by a police officer, on the basis that it was not within the arresting officer's knowledge that the cigarettes contained marijuana. P.L.R. at 365. It is significant to note that in Carr, testimony or evidence regarding the basis of the officer's knowledge, i.e., training and experience, was conspicuously absent.

In contrast to the scenario presented to the Carr court, upon which the Second District based its decision, the Fourth District expressly found the existence of probable cause and stated:

> . . . taking into consideration the totality of the circumstances, and the training and experience of the officer, there was sufficient cause to support his conclusion that the vehicle contained contraband. See P.L.R. v. State, 455 So. 2d 363 (Fla. 1984), cert. denied, 469 U.S. 1220, 105 S.Ct. 1206, 84 L.Ed.2d 349 (1985); Albo v. State, 379 So.2d 648 (Fla. 1980); State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981); State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978); Tamburro v. State, 343 So.2d 638 (Fla. 4th DCA 1977); Baggett v. State, 494 So.2d 221 (Fla. 1st DCA 1986); State v. Nobles, 477 So.2d 32 (Fla. 1st DCA 1985), case dismissed, 492 So.2d 1334 (Fla. 1986); State v. Spence, 448 So.2d 599 (Fla. 2d DCA 1984); Adams v. State, 375 So.2d 638 (Fla. 1st DCA 1979), cert. denied, 385 So.2d 754 (Fla. 1980); State v. Redding, 362 So.2d 170 (Fla. 2d DCA 1978).

Caplan v. State, 515 So.2d 1362 at 1363 (Fla. 4th DCA 1987). Thus, it is clear that the Fourth District's conclusion that probable cause did in fact exist was not based upon the oficer's "mere observation" of the hand-rolled cigarettes, as Petitioner suggests. Indeed, the Fourth District found Carr not to be controlling. It is therefore clear that the Fourth District's decision below is not in conflict with Carr and is rather distinguishable from Carr for the same reasons noted by this Court in P.L.R.

Respondent would maintain that the Fourth District's conclusion is supported by the record where Officer Roberts, the arresting officer, happened upon Petititoner's car after Petitioner had an automobile accident in front of the Hollywood, Florida, police station (R 7-8). Officer Roberts saw Petitioner get out of the car and asked Petitioner for his driver's license and registration which Petitioner provided (R 8). It was obvious that the car could not be driven away and Officer Roberts and Petitioner had a conversation regarding the towing of the car (R 8). Officer Roberts testified that Petitioner asked him if he could have the car towed for Petitioner (R 8), and told Petitioner of the availability of the city's contract wrecker service (R 8). Officer Roberts testified that Petitioner then asked him to call the wrecker service (R 8). After doing so, Officer Roberts proceeded, in accordance with routine department requirements, to fill out the tow

slip on department forms (R 9). Because Petitioner was not the registered owner of the car, Officer Roberts checked the VIN number as part of the department's standard operating procedure (R 10). It was also the police department's policy that when a vehicle is towed after an accident by a city contract wrecker service, that an inventory of the contents of the car be made as part of the documentation (R 10, 25, 30, 33). While checking the VIN number which could be seen through the car's windshield, Officer Roberts noticed through the window what appeared to be marijuana "joints," (hand-rolled marijuana cigarettes), on the floorboard (R 10-11). At this point it should be noted that the "joints" were in open view. Ensor v. State, 403 So.2d 349 (Fla. 1981). The Petitioner was not present at this time since he had gone inside the police station to call someone to pick him up (R 8). Believing that the hand-rolled cigarettes contained marijuana (R 10-11), Officer Roberts opened the car door and smelled marijuana smoke (R 13). A search of the car uncovered cocaine as-well-as marijuana (R 14).

It is crucial to note that Officer Roberts was a ten (10) year veteran of the police department and had had extensive training by the Drug Enforcement Agency and the police department in drug identification (R 4). Officer Roberts had worked six (6) years undercover in a narcotics unit and had made "hundreds" of drug arrests (R 4-5). Further, Officer Roberts testified that he had personally seen controlled substances "over hundreds of times" (R 5), and had seen hand-rolled

marijuana cigarettes identical to those in Petitioner's car, "hundreds" of times (R 11). It was Officer Roberts' experience that when these items were seized in the past and were submitted to the lab, the cigarettes have tested positive for marijuana (R 13). Officer Roberts believed, that based on his training and experience the hand-rolled cigarettes in Petitioner's car contained marijuana (R 13). Although Officer Roberts acknowledged that hand-rolled cigarettes can also contain tobacco, he beleived the cigarettes in Petitioner's car contained marijuana based on his experience and training and because they appeared to be half-smoked (R 28, 11).

Clearly, Officer Roberts' training, knowledge and experience led him to believe that the half-smoked, hand-rolled cigarettes contained marijuana. As noted in Dixon v. State, 343 So.2d 1345 (Fla. 2d DCA 1975):

> The test to determine probable cause is whether the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed.

Unlike, the Carr scenario, it was within Officer Roberts' knowledge that the cigarettes contained marijuana and the basis of that knowledge was adduced at the hearing on the motion to suppress. Further, probable cause to justify a warrantless search, exists when an officer, based upon his knowledge and experience, has a belief that a vehicle contains

evidence of a crime. See State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981); and State v. Noble, 477 So.2d 32 (Fla. 1st DCA 1985). Thus, based upon the totality of the circumstances, including the officer's training, experience and knowledge, probable cause to search can exist upon the observation of what appear to be hand-rolled marijuana cigarettes. Sanchez v. State, 507 So.2d 673 (Fla. 3d DCA 1987); State v. Spence, 448 So.2d 599 (Fla. 2d DCA 1984); Melendez, supra; Adams v. State, 375 So.2d 638 (Fla. 1st DCA 1979); Tamburro v. State, 343 So.2d 638 (Fla. 4th DCA 1977). Indeed, this Court has recognized such in P.L.R.

Although the seizure in the instant case was not at a known drug transaction cite, Officer Roberts did observe a container commonly used to hold narcotics, i.e., a hand-rolled cigarette. See Adams; Lachs v. State, 366 So.2d 1223 (Fla. 4th DCA 1979); Tamburro; Redding; Albo; P.L.R; Carr; he also testified as to the basis of his knowledge as to why he thought the cigarette contained marijuana. It should be noted that such testimony was conspicuously absent in Carr. The officer's knowledge as to the contents of the cigarette cannot be ignored. Carr is distinguishable in its facts. As noted by the same district court of appeal that decided Car, the Second District held in Spence:

> We hold that in the light of all the circumstances and the experience, perception, and careful observation of the officers, probable cause existed. The facts available to the officers would 'warrant a man of reasonable caution in the belief'

> that the cigarettes contained marijuana. Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 1543 75 L.Ed.2d 502 ((1983), quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925). The facts in the instant case are easily distinguishable from the facts in Carr. In Carr, an officer whose experience in the narcotiss field was not recounted had approached an individual standing outside his vehicle to determine his identity and reason for being in a residential neighborhood at 10:30 p.m. Although identity and explanation were furnished, the officer, for unstated reasons, chose to examine the interior of the vehicle, using his flashlight. In the process, he observed two hand rolled cigarettes. Cf. State v. Redding, 362 So.2d 170 (Fla. 2d DCA 1978) (distinguishing Carr due to the presence of other circumstances).
>
> The error of the county and circuit courts resulted in a serious miscarriage of justice. The erroneous application of the Carr holding could significantly hamper the efforts of law enforcement personnel to curtail the use of narcotics at public events such as rock concerts.

Spence at 600. Probable cause did exist in this case. To find otherwise is to defy common sense and reality as-well-as the knowledge and experience of a trained observer. See Council v. State, 442 So.2d 1072 (Fla. 3d DCA 1983); State v. Profera, 239 So.2d 867 (Fla. 4th DCA 1970); Melendez. Thus, like P.L.R. this case is more like Redding and Albo than Carr, and is distinguishable on that basis. Thus, to Officer Roberts' trained eye, he had sufficient facts to warrant a man of reasonable caution in the belief that the item he saw was evidence of a crime and therefore his subsequent search of the vehicle

was lawful. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Texas v. Brown, 460 U.S. 730 (1983).[1] Respondent thus maintains that no conflict exists and the Fourth District's decision is correct.

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[1] As noted by the Fourth District, the right to search in this case is even further reinforced by the fact that the vehicle was about to be removed by the tow truck. See Carroll v. United States, 267 U.S. 132 (1925).

POINT II

INTRUSION INTO PETITIONER'S CAR FOR THE PURPOSE OF TAKING AN INVENTORY WAS PERMISSIBLE.

Initially it must be noted that the Fourth District justified the search of Petitioner's car and the subsequent seizure of drugs on two grounds. Caplan at 1363. Besides finding that the officer had probable cause to search the car, the Fourth District also found that the officer was justified in making an intrusion into the car for purposes of taking an inventory. Id. Thus, contrary to Petitioner's assertions otherwise, Officer Roberts did not search the car only "because of his belief that he had probable cause to do so" (See Petitioner's Brief, page 10). Indeed, it is clear that Officer Roberts, as part of routine police procedure, had to fill out a tow slip and inventory the car once Petitioner asked him to call the city contract wrecker service, Mac's Towing (R 33, 30, 25). The decision to tow the car arose long before Officer Roberts viewed the hand-rolled cigarettes (R 8-11). Thus, the reason for conducting an inventory of the car did not contemplate a criminal investigation and was entirely proper. See United States v. Prescott, 599 F.2d 103 (5th Cir. 1979).

In any event, Respondent would point out the Petitioner requested Officer Roberts to call a truck to tow his car from the scene of the accident since the front end of

the car was completely totalled (R 8, 33). This is a fact which was conceded by Petitioner on his cross-examination (R 36). Further, Officer Roberts had explained to Petitioner that the towing service would be one which was used by the city on a contract basis (R 8). Thereafter, the towing was conducted in accordance with standard police procedures (R 9-10, 33), and according to those procedures, Officer Roberts commenced filling out a tow slip inventory form which the tow driver would have to sign a receipt for (R 9, 33). Officer Roberts testified that the purpose of taking an inventory of a car when a "city tow" is used is to be sure nothing will be stolen from the car when it is taken to the compound (R 10). Respondent maintains the resonableness of the intrusion into Petitioner's car for the purpose of taking an inventory. In South Dakota v. Opperman, 428 U.S. 364 (1976), the United States Supreme Court recognized an "inventory" wearch of an automobile as an exception to the warrant requirement of the Fourth Amendment. See also Illinois v. Lafayette, 462 U.S. 640 (1983). As recently noted by the Surpeme Court in Colorado v. Bertine, ___U.S. ___, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen or vandalized property, and to guard the police from danger. This caretaking function of the police in conducting inventory procedures has been recognized by the Court in Miller v. State, 403 So.2d 1307 (Fla. 1981).

The reasons for conducting an inventory are the same no matter if the vehicle is taken into custody by police or taken to a private lot. Indeed, the Supreme Court noted in Colorado v. Bertine that "the police may still wish to protect themselves or the owners of the lot against false claims of theft or dangerous instrumentalities." Respondent submits that although Petitioner's car was not impounded, it was within the caretaking function of the Hollywood police to inventory the car in accordance with established police procedure. It was Petitioner who asked that his car be towed from the scene of the accident. He knew that the towing would be done by a city contract towing service. Further, the towing was conducted in total conformance with standard police procedures. Respondent would point out that one of the strongest indications that an inventory check was indeed conducted for legitimate purposes is evidence that such a search is a standard practice for the particular law enforcement. Scott at 106. Respondent maintains that such a search was legitimate even though the Petitioner's car was not impounded. The so-called inventory search in the case sub judice was not an independent legal concept but rather an incidental administrative step preceding the towing of the disabled vehicle. United States v. Edwards, 577 F.2d 883 (5th Cir. 1978). Indeed, one has a lesser expectation of privacy in an automobile. Cardwell v. Lewis, 417 U.S. 583 (1974); Opperman; Colorado v. Bertine.

Respondent thus submits that under the circumstances

present sub judice, the Fourth District was correct in finding that intrusion into the car was reasonable. Caplan at 1363. Colorado v. Bertine; Opperman; United States v. Scott, 665 F.2d 874 (9th Cir. 1981); Prescott; Edwards; In re One 1965 Econoline, I.D. No. E16JH 702043, Arizona License No. EC-7887, 109 Ariz. 433, 511 P.2d 168 (Ariz. 1973); Miller.

Further, because the towing was for impoundment purposes, it was thus not subject to the "available alternative" requirement of Miller. Respondent would point out that even if Petitioner's car had been impounded, the requirement for an alternative to impoundment be offered no longer exists. State v. Williams, 516 So.2d 1081 (Fla. 2d DCA 1987); Robinson v. State, (Slip op. Florida 4th DCA May 25, 1988). This is so because of the Supreme Court's latest pronouncement in Colorado v. Bertine. In Bertine, the arrestee, like Petitioner, was not offered an alternative to impoundment of his car. Quoting from Illinois v. Lafayette, the Supreme Court said in Bertine that it did not matter:

> [t]he real question is not what 'could have been achieved,' but whether the Fourth Amendment requires such steps .... The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means.
>
> ___U.S. at ___, 107 S.Ct. at 742, 93 L.Ed.2d at 747.

The Supreme Court's holding in Bertine, coupled with the 1983 Amendment to Article I, Section 12 of the Florida Constitution,

overrule Miller. As the Second District reasoned in Williams:

. . . . .

> The ruling of Bertine that offering reasonable alternatives to impoundment is not necessarily required is fully applicable in Florida due to the 1983 amendment to the provisions of Article I, section 12 of the Florida Constitution, that amendment having come into effect after Miller's reliance upon those provisions. The amentment added to Article I, section 12 the requirements that the right under the Florida Constitution to be secure against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court" and that "articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."
>
> Accordingly, police searches of arrested motorists' cars in Florida are now appreciably less restrained by the exclusionary rule under which unconstitutionally seized evidence is excluded from the evidence at trial. The case before us exemplifies the foregoing amendment to the Florida Constitution as having, in the words of the Florida Supreme Court, the effect of "removing the 'independent protective force of state law.'" State v. Lavazzoli, 434 So.2d 321, 323-24 (Fla. 1983). Prior to the amendment to Article I, section 12 Floridians had, as recognized by Miller, the "substantive right [under specific wording of Article I, section 12] to have articles or information obtained as a result of an illegal search

> or seizure excluded from evidence in the courts of this state . . . ." State v. Bernie, 472 So.2d 1243, 1246 (Fla. 2d DCA 1985). Following the amendment Florida's exclusionary rule and "the federal exclusionary rule [is] preeminently a rule of court and only procedural." Lavazzoli, 434 So.2d at 323. As a result, rather than ensuring to Floridians rights under the federal constitution as the amendment to the Florida Constitution might seem to do, the amendment has the effect in this case of taking away a right not provided by the federal constitution.
>
> Thus, Florida courts to a substantial extent are not a part of the trend which has been called "the new federalism" under which there has been a "growing role of the states in protecting civil rights . . . . ," Abrahamson & Gutmann, "The New Federalism: State Constitutions and State Courts," 71 Judicature 88 (Aug.-Sept. 1987), and under which it has been said that "state judges ... have resumed their historic role as the primary defenders of civil liberties and equal rights." Wright, "In Praise of State Courts: Confessions of a Federal Judge," 11 Hastings Const. L.Q. 165, 188 (1984).

Id. at 1084-1085. Respondent thus submits, that because the "reasonable alternative" requirement no longer exists, Petitioner's argument as to this specific area is not persuasive. Respondent therefore maintains that the Fourth District correctly affirmed the denial of Petitioner's motion to suppress.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Respondent respectfully requests that this Court uphold the decision of the Fourth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent has been furnished, by United States Mail, to CARL H. LIDA, ESQUIRE, 2000 South Dixie Highway, Suite 217, Miami, FL 33133, this 27th day of May, 1988.

Of Counsel