IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLARK A. CAPLAN,)

Petitioner,)

Vs.)

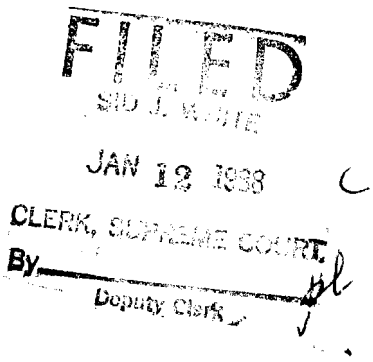
STATE OF FLORIDA,)

Respondent.)

_____)

D.C. CASE NO.: 4-86-0501

CASE NO.: 71,709



PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND THE FACTS

Petitioner, CLARK CAPLAN, seeks to have reviewed a decision of the District Court of Appeal, Fourth District, dated December 2, 1987 (Appendix 1).

The Petitioner was originally the Defendant in the trial Court below. He was the Appellant in the District Court of Appeal. This was an appeal in a criminal case from an order denying a motion to suppress evidence (Appendix 3). The District Court of Appeal affirmed the trial Court's Order.

This case arose when the Defendant was involved in a traffic accident in front of a police station. The Defendant was not injured, but his vehicle required towing. He requested the police officer on the scene to assist him by calling a tow truck to the scene while he went to make a phone call. The police officer called the towing company normally used by the police department and, while waiting, began to fill out a "tow slip" which was normal police procedure when the police were having a vehicle towed. While looking through the windshield for the VIN, the police officer saw several small, hand-rolled cigarette wrappings on the floorboard. He could not see what was inside the cigarette wrappings. He surmised that they contained marijuana and opened the door to the vehicle to investigate. He retrieved the cigarettes and discovered that they did, indeed, contain marijuana. The Defendant was, thereafter, arrested. (Appendix 1).

The Defendant filed a Motion to Suppress the evidence

seized from his automobile (Appendix 4). The grounds for the Motion were that the search of the vehicle was without a warrant and without probable cause. After an evidentiary hearing, the Court entered an Order denying the Motion and justifying the search as being permissable both under the "plain view" doctrine and as an "inventory search". (Appendix 3).

The Defendant, having entered a nolo contendre plea, filed an appeal. The District Court of Appeal rendered an opinion on July 1, 1987 affirming the lower Court's Order (Appendix 2). The District Court, thereafter, granted the Defendant's Motion for Rehearing (Appendix 5), vacated its opinion of July 1, 1987, and rendered a new opinion affirming the lower Court's Order in a split decision (Appendix 1). This Petition for Discretionary Review followed.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal is in direct conflict with decisions of other District Courts as well as the Supreme Court on two distinct issues.

First, the lower Court held that mere observation of hand-rolled cigarettes inside a vehicle was sufficient to establish probable cause to search the vehicle when the police officer, through his experience, believed the cigarettes contained marijuana even though he could not see what was inside the cigarettes. Cases from several Districts as well as the Supreme Court have held to the contrary.

Second, the lower Court held that a vehicle inventory was proper even though no police impoundment of the vehicle occurred and without notifying the driver of the various alternatives available. This, too, was in direct conflict with a decision of the Supreme Court.

ARGUMENT

I

THE PRESENT DECISION IS IN DIRECT CONFLICT WITH THOSE CASES HOLDING THAT MERE OBSERVATION OF A CONTAINER, WITHOUT MORE, AND WITHOUT THE ABILITY TO SEE THE CONTENTS OF THE CONTAINER, IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEIZE OR SEARCH THE CONTAINER FOR CONTRABAND.

The decision of the District Court held, essentially, that upon observation of hand-rolled cigarettes on the floorboard of a car, a police officer, utilizing his experience and training, who believed that they contained contraband, had probable cause to enter the vehicle to seize the cigarettes. The facts were that after a simple traffic accident, the investigating officer noticed several small, hand-rolled cigarette papers on the floor of a car involved in the accident. He could not see what was inside the cigarettes. (See the reproduction of the officers testimony in the dissenting opinion Appendix 1). (See also the finding of fact of the trial Court, Appendix 3). He believed, based upon his experience and training, that they contained marijuana. Based upon that belief he entered the vehicle to search it.

There is a line of cases in direct conflict with this decision. Those cases hold, basically, that mere observation of a container, which police believe is a common container for contraband, is, without other indicia of criminality, insufficient to establish probable cause to search. In Carr

v. State, 353 So.2d 958 (Fla. 2d DCA, 1978), the salient facts are indistinguishable from those in the instant case. There, as here, a police officer observed hand-rolled cigarettes through the window of a car. Assuming that the cigarettes contained marijuana, the officer entered the car to seize the cigarettes. The Court there held that observation of hand-rolled cigarettes, but not their contents, was insufficient to justify a warrantless search. That is in direct conflict to the holding in the instant case. Other cases from various District Courts of Appeal have similarly held that mere observation of an oblique container will not justify a warrantless search even though a police officer believes that the container is normally used to carry contraband. Taylor v. State, 381 So.2d 255 (Fla. DCA, 1980); Chappell v. State, 457 So.2d 1133 (Fla. 1st DCA, 1984); Thompson v. State, 405 So.2d 501 (Fla. 2d DCA, 1977). These cases, for the same reasons discussed, are also in conflict with the present decision.

This decision is also in conflict with this Court's decision in P.L.R. v. State, 455 So.2d 363 (Fla. 1984). There, this Court approved the Carr, supra. line of cases but distinguished them from cases which found probable cause in certain circumstances to search oblique containers. The Court established a totality of circumstances rule but stated that the key factor in cases of this type was whether the observation of the container was at a known narcotics-transaction site. In other words, if a police officer observed what his experience told him was a container which was normally used to convey

narcotics, and if this observation was accompanied by other circumstances indicating a likelihood that the container had narcotics inside, such as the location where the activity occurred, then those circumstances might rise to the level of probable cause. Here, however, there was no indicia of illegal activity surrounding the observation of the hand-rolled cigarettes. The Defendant had been involved in a traffic accident. The area was not a known narcotics-transaction site. It happened directly in front of the police station. The facts of this case, according to the P.L.R., supra. doctrine, do not establish probable cause to search.

This decision is in direct conflict with the decisions cited above from the District Courts of Appeal of the First, Second, and Fifth Districts as well as a decision of the Supreme Court.

II

THE DECISION OF THE DISTRICT COURT THAT WHEN A PERSON INVOLVED IN A TRAFFIC ACCIDENT ASKS A POLICEMAN TO CALL A TOWING SERVICE FOR HIM, THE VEHICLE MAY BE SEARCHED PURSUANT TO AN INVENTORY WITHOUT NOTIFYING THE DRIVER IS IN CONFLICT WITH A DECISION OF THE SUPREME COURT OF FLORIDA.

The Petitioner was involved in a traffic accident. His car needed to be towed from the scene. He had a brief conversation with the investigating police officer about the availablity of towing services. He asked the officer to assist him by calling a towing service. The car was not to be impounded by the police department and it was not to be towed to a police impoundment lot (Appendix 6). It was merely being towed by the same towing service that the City used.

The District Court explicitly held that the police officer had a right to conduct a complete inventory of the automobile under these circumstances. It held, by implication, that the policeman was under no obligation to inform the driver that such a search was to be conducted or of alternatives thereto. These holdings are in direct conflict with Miller v. State, 403 So.2d 1307 (Fla. 1981).

An inventory search is an exception to the warrant requirement of the U.S. Constitution, Amend. IV. Such a search was approved in Florida by Miller v. State, supra. However, this Court made it clear that such a search was only permissable upon the impoundment of a vehicle by the government. (In fact,

the District Court requested supplemental Briefs in this issue, and, virtually, every case in this Country so holds). Nevertheless, the District Court held that the mere assistance of a police officer in obtaining a wrecker service was sufficient cause to permit an inventory search.

Additionally, Miller v. State, supra. held that when an inventory search is conducted pursuant to impoundment of a vehicle, the possessor, if available, must be consulted and the alternatives to impoundment must be explained to him. Here, the opinion of the lower Court implies (see dissent) that no such explanation is necessary. The lower Court opinion seems to be that since the car wasn't impounded, no such explanation is necessary. Thus, a driver arrested would have more rights in the disposition of his vehicle then someone merely involved in a traffic accident. That is in conflict with the holding of Miller v. State, supra.

CONCLUSION

The District Court opinion is in conflict with opinions from various District Courts holding that mere observation of an oblique container is insufficient to establish probable cause to search that container even when police officers believe, based on their experience, that it holds contraband. This Court's decision in P.L.R. v. State, supra., which reviewed all the cases in this area, and which set forth appropriate guidelines for determining probable cause, is also in conflict with the District Court's decision. This Court should take jurisdiction of this case in order to avoid further confusion on this issue which the District Court decision in this matter is likely to foster.

Additionally, the lower Court decision is in conflict with this Court's decision in Miller v. State, supra. The District Court decision permitted the inventory search of a vehicle absent an impoundment of that vehicle and absent notification to the driver that an inventory search would be conducted and alternatives to that procedure. This Court should take jurisdiction of this case because of the far reaching implications of the District Court's opinion. The opinion of the District Court would permit the warrantless search of an automobile absent the one common factor that nearly all Courts have required as a prerequisite to the exception of the warrant requirement: a lawful impoundment of the vehicle. The District Court's opinion opens the door to police intrusion into a motor

vehicle whenever an accident occurs and a tow truck is called. This is so despite the fact that the police are not taking custody of the vehicle but are merely present at the scene and assist in having a tow truck called. This is a dangerous and far reaching precedent which this Court should address.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the Petition for Discretionary Review and Petitioner's Appendix were mailed this the 11th day of January, 1988, to: OFFICE OF THE ATTORNEY GENERAL, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401.

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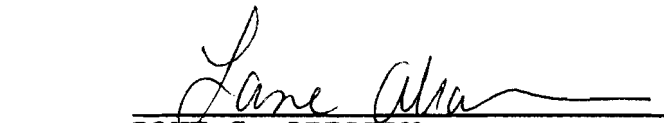

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