

IN THE SUPREME COURT OF FLORIDA

FILED
SUP. COURT

JAN 20 1983

CLERK OF COURT

By _____
Deputy Clerk

CASE NO. 71,709

CLARK V. CAPLAN,)
)
 Petitioner)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"A" Appendix

"AB" Petitioner's Brief

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as found on pages one (1) and two (2) of Petitioner's Jurisdictional Brief.

POINT INVOLVED

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL PRESENTS DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION: AND THEREFORE WHETHER THE SUPREME COURT'S JURISDICTION CAN BE PROPERLY EXERCISED?

SUMMARY OF THE ARGUMENT

Petitioner has not, and cannot, demonstrate that the decision of the Fourth District Court of Appeal in the instant case "expressly and directly" conflicts with other state appellate decisions pursuant to Florida Constitution Art. V, Section 3(b)(3). Therefore, this Honorable Court should decline to accept jurisdiction of the case.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT PRESENT DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION: THEREFORE, THE SUPREME COURT'S JURISDICTION CANNOT BE PROPERLY EXERCISED.

Petitioner seeks review of the district court's decision below through conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R.App.P. 9.030(a)(2)(A)(iv). Respondent respectfully requests this Honorable Court to decline to take jurisdiction in this case, since Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

It is well-settled that in order to establish conflict jurisdiction, the decision sought to be reviewed directly creates conflict. Mancini v. State, 312 So.2d 232 (Fla. 1973). Petitioner has not and cannot demonstrate that the decision of the Fourth District Court of Appeal in the instant case expressly and directly conflicts with another state appellate decision.

In the instant case Petitioner was arrested for possession of cocaine and cannabis and pled nolo contendere to same upon the following factual scenario as recited by the district court in its opinion below:

The defendant was involved in an automobile accident in front of a police station. The investigating officer first ascertained that there were no injuries, and examined defendant's license and registration. The registration was not in the

defendant's name. The vehicle was blocking an intersection and could not be driven. There was evidence that the defendant asked the officer if the officer could have the vehicle towed, and was told of the availability of the city's contract wrecker service. The defendant told the officer to call that service. After doing so, the officer proceeded, in accordance with routine department requirements, to fill out a tow slip on department forms. The officer checked the automobile VIN number, which could be seen through the windshield. As appellant was not the registered owner, this was standard procedure. The department's procedure, when a vehicle was being towed after an accident by a city contract wrecker service, also required that an inventory of the contents of the car be made as part of the documentation.

While checking the VIN number, the officer noticed, through the window, what appeared to be marijuana 'joints,' (hand-rolled marijuana cigarettes), on the floorboard. The defendant was not present, having left the scene to use a telephone. The officer had had extensive training and experience in drug identification. The officer opened the car door and smelled marijuana smoke. A search of the vehicle uncovered cocaine as well as marijuana. The officer testified that after seeing the cigarette butts he considered that he was conducting a criminal investigation as well as continuing the accident investigation. It is apparent from the record, and the court's decision, that the trial judge accepted the evidence to be that the butts had the appearance of hand-rolled, partially smoked marijuana cigarettes. Counsel for the defendant did not argue below that the butts did not have the appearance of marijuana, but maintained that they also had the appearance of hand-rolled legal cigarettes. The officer acknowledged that the cigarettes' appearance was consistent with either portrayal.

(Appendix)

The district court justified the search and seizure on two grounds, the first being that 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. The second ground relied on by the district court was that where the Petitioner asked the officer to call a truck to tow his car, and the towing was conducted in accordance with standard police procedures, allowing access to the car for the purpose of taking an inventory of its contents was reasonable.

Petitioner alleges that the first ground relied on by the district court in upholding the search is in direct conflict with the second district's decision in Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978) and this Court's decision in P.L.R. v. State, 455 So.2d 363 (Fla. 1984). Respondent maintains however that no conflict exists.

In Carr, the second district reversed a search and seizure as being invalid under the plain view exception and held that the mere observation of hand-rolled cigarettes standing alone did not give rise to probable cause. Id. at 959. In P.L.R. this Court affirmed the principle announced in Carr and distinguished that case from others where observation of a container believed by the officer to contain drugs, coupled with other circumstances, such as a defendant's presence at a known drug transaction site, will give rise to probable cause.

Respondent maintains that the district court's decision below is consistnet with both Carr and P.L.R. First, it must

be noted that the officer did not search the car based on his mere observation of the two hand-rolled cigarettes alone, as the district court so noted. (Appendix). Rather, the officer searched the car after he saw what he believed to be two hand-rolled marijuana cigarettes, smelled marijuana smoke, and because he was inventorying the car's contents after Petitioner asked him to call a tow truck. Respondent thus submits that where the search of the car was not solely grounded on the officer's observation of the hand-rolled cigarettes, the district court's decision is not in conflict with Carr but rather is distinguishable on the grounds as noted by this Court in P.L.R. Respondent would also submit that the decision below is entirely consistent with P.L.R. since other factors, i.e., the smell of marijuana smoke and the inventory of the car's contents, coupled with the observation of hand-rolled cigarettes which the officer believed to be marijuana, gave the officer cause to search the car. See P.L.R. It was for these reasons that the district court found Carr not to be controlling. (Appendix).

Clearly the district court's decision below is consistent with other appellate decisions in this state and does not conflict with either Carr or P.L.R.

Petitioner also argues that the district court's opinion is in conflict with this Court's decision in Miller v. State, 403 So.2d 1307 (Fla. 1981), because "it held by implication, that the policeman was under no obligation to inform the driver that such a search was to be conducted or

the alternatives thereto." (AB 7-8). Respondent maintains however, that "implication" does not constitute "express and direct" conflict within the meaning of Article V, Section 3(b)(3), Fla. Const.(1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv) such as to vest this Court with jurisdiction. Respondent would also point out that the district court's opinion could not create conflict, expressly or by "implication" where its only pronouncement on this issue was as follows:

Second, even had there not been sufficient cause to conduct the search after viewing the marijuana joints, the intrusion for the purpose of taking an inventory was permissible in any event. The defendant requested the police to call a truck to tow his car from the scene of the accident, and the towing was conducted in accordance with standard police procedures. Under these circumstances, allowing access to the car for the purpose of the taking of an inventory to identify radios, tape players, and other valuables, is reasonable. See Colorado v. Bertine, ___ U.S. ___, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); United States v. Scott, 665 F.2d 874 (9th Cir. 1981); United States v. Prescott, 599 F.2d 103 (5th Cir. 1979); United States v. Edwards, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978); In Re One 1965 Econoline, I.D. No. E16JH702043, Arizona License No. EC-7887, 109 Ariz. 433, 511 P.2d 168 (Ariz. 1973); Miller v. State, 403 So.2d 1307 (Fla. 1981).

(Appendix). Clearly, under these circumstances, where Petitioner's car was not impounded, but rather towed pursuant to Petitioner's request, the district court's opinion is not in conflict with

this Court's decision in Miller.

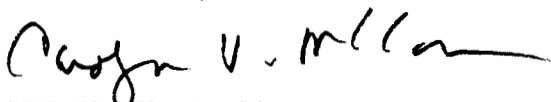
It is thus evident that Petitioner seeks to invoke this Honorable Court's jurisdiction in a thinly-veiled attempt to pursue a second appeal. Such a use of the Court's jurisdiction is not permitted. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982). The Court has repeatedly condemned such misguided efforts to invoke its discretionary jurisdiction and has repeatedly emphasized the need for finality in district court of appeal decisions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Petitioner has failed to show express and direct conflict between the decision sub judice and any other state appellate decision and Respondent therefore maintains that this Honorable Court lacks jurisdiction to grant Petitioner's application for discretionary review.

CONCLUSION

Based upon the foregoing argument and authorities cited therein, the Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the cause.

Respectfully submitted,

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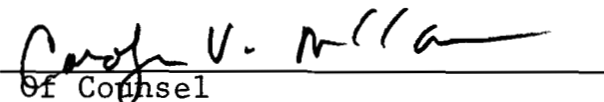


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction has been furnished, by United States Mail, to LANE S. ABRAHAM, P.A., Attorney for Petitioner, 2000 South Dixie Highway, Suite 217, Miami, Florida 33133 this 26th day of January, 1988.



Of Counsel