IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLARK A. CAPLAN,)

Appellant,) **CASE NO.:** 71,709

Vs.)

STATE OF FLORIDA,)

Appellee.)

_____)

REPLY BRIEF OF APPELLANT

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ARGUMENT I

MERE OBSERVATION OF HAND-ROLLED CIGARETTES IN AN AUTOMOBILE IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH THE VEHICLE.

The State has argued in its brief, essentially, that the searching officer's experience in the field of narcotics justified the warrantless search when he saw some hand-rolled cigarette wrappings. The State argued that Carr v. State, 353 So.2d 958 (Fla. 2d DCA, 1978) is distinguishable because the record in Carr failed to establish the officer's experience. While the State has correctly stated that "totality of circumstances" is the proper test, it has failed to properly apply the analysis that this Court established in P.L.R. v. State, 455 So.2d 363 (Fla., 1984).

P.L.R. held that mere observation of an oblique container (such as cigarette wrappings) could not, in and of itself, establish probable cause to search the container. This is true even when the container is one recognized by the police as frequently used to hold contraband. Now, the only way a police officer would know that a container is frequently used to hold contraband is based upon his experience in the field. Thus, experience is a built-in factor. P.L.R., however, ruled that more was needed to rise to the level of probable cause. The primary additional factor cited by P.L.R. was location of the suspect container at a known narcotics transaction site. Thus, the likelihood that the container has contraband inside would be higher.

Here, there were no additional factors to increase the likelihood that the cigarette wrappings contained contraband. This case is similar to Carr, supra., Taylor v. State, 381 So.2d 255 (Fla. 5th DCA, 1980), Chappell v. State, 457 So.2d 1133 (Fla. 1st DCA, 1980), Harris v. State, 352 So.2d 1269 (Fla. 2d DCA, 1977), and Thompson v. State, 405 So.2d 501 (Fla. 2d DCA, 1981) despite the decision under review herein claiming that Carr, supra. is not controlling. The lower appellate opinion fails to give any reasons why it is not controlling and the analysis of P.L.R., supra. is applicable here as argued in the initial brief.

II

THE LOWER COURTS ERRED IN HOLDING THAT AN INVENTORY SEARCH OF AN AUTOMOBILE WHICH WAS INVOLVED IN A TRAFFIC ACCIDENT AND WHICH WAS NEITHER IMPOUNDED NOR IN POLICE CUSTODY WAS LEGALLY PERMISSABLE.

The State has repeatedly referred to the towing company used as a "city contract wrecker service" (Br. at 9, 15, 16, 17). However, that characterization is misleading. The police officer testified as follows:

> "I said we have a rotation wrecker service with the Hollywood Police Department. We can use that service if he wished." (R.8).
>
> "Q. Let me get this straight. Mac's Towing doesn't work for the police department, they are an independent contractor?
>
> A. That is true." (R.23).

Thus, the wrecker service used by Mr. Caplan was also used, on occassion, by the Hollywood Police Department but was not a part of the police department. It could hardly be stated that anytime anyone called Mac's Towing to tow a car that the police could or should rush over to conduct an inventory search.

The other argument raised by the State which merits reply is the State's contention that Colorado v. Bertine, _____U.S._____, 107 S.Ct. 738, 93 L.Ed. 2d 739 (1987) overrules the requirement in Miller v. State, 403 So.2d 1307 (Fla. 1981) that alternatives to impoundment must be explained to the owner or possesor of a vehicle before an inventory search may be

conducted. While this is a valid argument, it lacks certain analysis.

First, this case arose before the Bertine decision. Second, the reasoning of the U.S. Supreme Court in Bertine is important. A careful reading of the case reveals that the Court does not believe the 4th Amendment requires the police to be subject to a "less intrusive means" analysis of a reviewing Court because the police must make on-the-spot decisions. It emphasized that standard department procedures must be strictly adhered to. Here, the "less intrusive means" analysis in hindsight has not occurred because the Miller requirement was known years before this search was made. It was, or should have been, part of every police department's standard procedure to the extent that alternatives to impoundment should be discussed. Thus, in Florida, at least, the concern of the U.S. Supreme Court was not applicable.

Actually, the discussion of alternatives to impoundment is really only a factor to be considered in determining the necessity of impoundment. If, as Bertine states, notifying the owner of alternatives to impoundment is not required by the 4th Amendment, at least it should still be considered by the courts as a factor in the determination of whether an impoundment was necessary. Impoundment was not necessary in this case because Mr. Caplan was on the scene and capable of making decisions.

Furthermore, this Court does not need to even reach this issue because of the arguments raised in the initial brief. In short, there was no impundment and, therefore, no necessity to conduct an inventory search.

CONCLUSION

The police officer did not have probable cause to conduct a search of the subject vehicle. Observation of hand rolled cigarette wrappings alone, without more, is insufficient to establish probable cause.

Additionally, the police officer did not need to conduct an inventory search of the vehicle. It was never in police custody and, therefore, the rationale permitting an inventory search was never met.

The decision of the lower appellate Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct coy of the foregoing was mailed this the 13th day of June, 1988, to: THE OFFICE OF THE ATTORNEY GENERAL, 111 Georgia Avenue, Room #204, West Palm Beach, Florida, 33401.

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