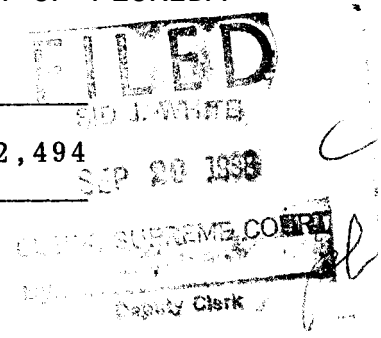
IN THE SUPREME COURT OF FLORIDA



CASE NO.: 72,494

TRAVIS HARRISON CRESSWELL,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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CERTIFIED QUESTION

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

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

ARGUMENT

> BECAUSE THE DEFENDANT WAS ILLEGALLY AND ARBITRARILY SEIZED AND DETAINED WITHOUT FOUNDED SUSPICION OR PROBABLE CAUSE IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE TRIAL COURT ERRED IN DENYING HIS MOTION TO SUPPRESS.

A. A Profile Detention Without a Well Founded Suspicion of Criminal Activity.

The Respondent in its brief has adopted a most unusual method of responding to the legal issue presented by the facts of this case. Initially, the State attempts to prevent review of the real issue underlying this appeal by asserting that the facts are not reflective of the certified question. That position, simply put, is wrong.

The question certified to this Honorable Court recognized that this case presents a simple "profile detention". Additionally, the record unequivocally reflects that the Petitioner was detained by Trooper Vogel predicated solely upon profile factors and absolutely nothing else. Frankly, the record leaves no doubt that profile factors (his "cumulative similarities") were the only reason the Petitioner was detained by Trooper Vogel after his issuance of the traffic warning.[1]

The entire thrust of the State's brief, as enunciated in their Summary of Argument, is that "following the valid traffic stop . . . the trooper observed certain factors which would have alerted the suspicions of any officer in his position" (State's Brief, p. 5). A careful analysis of the record and the State's brief (see State's Brief, pp. 9-10) shows that these "certain factors" consist of only one thing outside the standard profile matters -- the presence of a steering wheel lock. All other factors are either "profile type", or information gleaned after the infraction warning was issued and the illegal detention began.

[1] In fact, even the stop appears to have been predicated upon these profile characteristics and not the alleged traffic infraction. See pp. 8-9, infra.

It is important to keep in mind that the State's brief intermingles facts ascertained by Trooper Vogel subsequent to the issuance of the traffic warning, with the profile factors he used to justify the detention in question. For example, all information derived from the Petitioner regarding when and under what circumstances he obtained the vehicle he was driving, as well as his response regarding the trunk key, was information obtained after the detention decision had been made and implemented by Vogel. Needless to say, that information cannot, as a matter of fact and law, be retroactively used as the State attempts to in their brief to justify the detention (see State's Brief, pp. 10, 16, 21, 22).

The State's assertion that Trooper Vogel "noted that the case did not fit the cumulative similarities in at least two respects" (State's Brief, p. 9) is an admirable, but erroneous, attempt to defuse the Petitioner's argument regarding the inappropriateness of the use of profile characteristics to justify a detention (see Petitioner's Brief, pp. 19, 20). At no time did Vogel "note" that he considered the factors outside of his profile in any way. While attempting to justify his actions throughout the record based on "cumulative similarities" (a fact repeatedly acknowledged by the State in their brief at pages 3,

5 and 9), Vogel at no time indicates that he considered the factors that did not fit into his profile in determining whether or not he had a founded suspicion that Cresswell personally was committing a crime. Although on cross-examination Vogel was forced to acknowledge the time distinction and the fact that Cresswell was not driving overly cautiously (R.32, 34, 35), he never bothered to say how these factors which were contrary to his profile impacted on his decision to detain which he was basing on "cumulative similarities".[2] Contrary to the State's argument, the existence of these "non-matching factors" does not transform this case into a non-profile detention. Vogel's failure to consider these dissimilar factors merely confirms that a drug courier profile in and of itself is so amorphous and subject to the whims of an individual officer that it should not be sanctioned as the predicate for a detention decision.

The record totally belies the State's argument that this case was not a profile detention in view of the clear testimony of both Trooper Vogel and the State's own argument. As previously mentioned, the State's attempt to

[2]Cresswell also did not meet other factors in the Highway Patrol profile (see R.36-37) which the trooper also failed to take into account.

justify Cresswell's detention after the issuance of the warning is in large part predicated on the fact that there was a steering wheel lock noted by the trooper in Cresswell's car. Somehow this supposedly becomes a matter that helps create a reasonable suspicion for detention, although neither the trooper nor the State ever explain why or how the existence of a steering wheel lock should in any way be factored into a determination that founded suspicion of criminality exists sufficient to detain a citizen. Candidly, a steering lock is just that -- a lock to keep your car from being stolen -- nothing more and nothing less. The fact that Trooper Vogel hadn't seen one before is of little moment. That certainly creates no suspicion[3] and nothing pointed out by the State in their brief serves to reflect that the existence of a steering wheel lock should somehow manifest itself into a founded suspicion to detain someone.

It is respectfully submitted that the State can find absolutely no support for their argument in United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981), a Border Stop case. To the contrary, the second element of the two-prong ~~Cortez~~ standard requires that all of the circum-

[3]Vogel acknowledged that he had no idea how common such items were in the Boston area (R.41).

stances (including those that don't match the profile) "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing'?. ~~Cortez~~, 449 U.S. at 418, 105 S.Ct. at 695. Nothing in the instant case particularizes any suspicion. At best, the State's argument goes to the first prong of the Cortez test, and only relates to Vogel's traffic stop and the collection of the profile characteristics and other information prior to the infraction warning being issued. When he completed that traffic stop, issued his warning, and collected nothing that rose to the level of founded suspicion, it was incumbent upon him to release Cresswell. His failure to do so should not be tolerated.

The State has totally failed to validly distinguish the holding in State v. Anderson, 479 So.2d 816 (Fla. 4th DCA 1985). That decision is factually virtually identical to the case instanter, and the Petitioner submits that it is reflective of a proper disposition of the matter.

In the consolidated cases of State v. Williams, et al., 12 Fla.Supp.2d 134, 140-142 (Cir. Ct. 15th Jud. Cir. 1985), Circuit Court Judge Carl H. Harper considered a factual scenario legally indistinguishable from the instant case. Judge Harper's opinion is thus submitted as persuasive authority and for its cogent reasoning. In

that case, the defendants were arrested by a highway patrolman at approximately 3:30 a.m. while traveling North on 1-95 in Palm Beach County in a 1979 Chevrolet. They were stopped for the traffic infraction of speeding (64 MPH in a 55 MPH zone). When he approached the car, the trooper smelled a "strong odor of perfume or air freshener" and noticed that, although the car had air shocks, the trunk was "riding high" and there was no trailer hitch on the automobile. All of these factors made him suspect that the car contained marijuana. The defendant Foster produced a driver's license and a registration in the name of someone else. Upon questioning, the stories of the two defendants as to where they were going differed. Since it was raining, the trooper asked the defendants to follow him to the Florida Highway Patrol headquarters, where he called the canine unit. The dogs arrived and alerted on the trunk of the defendants' car. Approximately 40 minutes had elapsed from the time of the stop until the time the dogs alerted on the car. Based on these facts, Judge Harper ruled:

> Trooper Martin was justified in stopping the automobile because it was traveling 64 MPH in a 55 MPH zone. Nevertheless, the totality of the circumstances surrounding the stop for such a minor infraction smacks strongly of a pretext stop for the purpose of a search based on a broad, indistinct drug courier profile. Martin's suspicion that the automobile contained

> marijuana was based on the fact that the automobile with Florida plates had air shocks without a trailer hitch; but was riding high in the rear; that the automobile smelled of perfume or air freshener (an anomaly, to say the least); and the defendants gave conflicting statements to him. Under the totality of the circumstances, Martin did not have probable cause or a well founded suspicion to continue his custodial detention of the defendants or to justify his request to have them travel to FHP headquarters. (Emphasis in original). 12 Fla.Supp.2d at 156.

The facts of the instant case reflect the probability that Trooper Vogel has learned from his prior cases. See In re Forfeiture of $6,003.00 in U.S. Currency, 505 So.2d 668 (Fla. 5th DCA 1987); State v. Johnson, 516 So.2d 1015 (Fla. 5th DCA 1987); United States v. Smith, 799 F.2d 704 (11th Cir. 1986). The Petitioner respectfully submits that Vogel used the alleged traffic infraction committed by him as a pretextual stop to investigate a situation based solely on his "cumulative similarities". If Cresswell had not met Vogel's "cumulative similarities" (R.120-121), the trooper would not have ordinarily made this traffic stop. By Vogel's own admission, he was engaged in developing his "cumulative similarities" for narcotic enforcement (of wh ch this case became a part) at the time he stopped the Pet tioner (R.129-131).

In view of this Court s recent holding in Kehoe v. State, 521 So.2d 1094 (Fla. 1988), it would be appropriate

to conduct a de novo analysis as to whether or not this case in fact involved a pretextual stop for the purpose of conducting a search. Even if this Court arrives at the conclusion that the stop was a valid traffic stop, Vogel's application of his cumulative similarities should not serve to justify the detention after the issuance of the warning. He had no information at the time he completed the issuance of his traffic infraction warning that rose to the level of founded suspicion, and it was incumbent upon him to release the Petitioner. His failure to do so should have resulted in the defendant's Motion to Suppress being granted.

B. Not a "Brief Detention".

Insofar as the State has chosen to argue the issue regarding the length of the detention herein, the Petitioner would note that Florida Statute § 901.151 authorizes only that a suspect can be "temporarily detained" for a period of time no "longer as is reasonably necessary to effect the purposes of [the statute]." The State has taken the position that since the detention was "only" 47 minutes (State's Brief, p. 19), this Court should rule that the detention was not unreasonably long. Frankly, it is unnecessary to quibble with the State as to whether or not the detention was 47 minutes or 57 minutes

in duration [although the Petitioner vigorously asserts that the detention was in fact 57 minutes long as conceded by Trooper Vogel (R.53)]. Nothing the State has presented in their brief supports their espoused position that a detention of even 47 minutes can be sustained as a reasonable Terry stop (Terry v. Ohio, 392 U.S. 1 (1968), under the circumstances existing in the case at bar.

Herein, the defendant was admittedly detained on the shoulder of the road for virtually an hour (R.7, 26) because no narcotics dog was readily available. Such a protracted and extended detention is clearly improper. As stated in State v. Lundy, 334 So.2d 671, 673 (Fla. 4th DCA 1976):

> But detention authorized by $901.151 is limited and not the same as an arrest . . . If during the temporary detention, probable cause for arrest of the person shall appear, the person may be arrested; however, if after inquiry into the circumstances which prompted the temporary detention no probable cause for the arrest of the person shall appear, he must be released. Fla. Stat. 901.151(4) (1975) (emphasis ours).

Trooper Vogel should have immediately let Travis Cresswell depart the scene when Cresswell refused to sign the consent to search form. When the Trooper learned that a narcotics dog was not immediately available, he had numerous alternatives that he could have used to minimize the

intrusion on Cresswell's Fourth Amendment rights.[4] See Tennyson v. State, 469 So.2d 133 (Fla. 5th DCA 1985).

The inappropriately lengthy detention of the defendant by Trooper Vogel can find no support in United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). The detention sanctioned in Sharpe was only 20 minutes; numerous factors existed creating real suspicion (i.e., the pickup truck appeared to be heavily loaded and the windows of the other camper were covered with quilted bedsheet material rather than curtains); both of the vehicles in question in the Sharpe case took evasive actions and started speeding as soon as the officer began to follow them in his marked car and; as noted by the Court, "The delay [in Sharpe] was attributable almost entirely to the evasive actions of Savage, who sought to elude the police as Sharpe moved his Pontiac to the side of the road. Except for Savage's maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place." 105 S.Ct. at 1576.

Herein, the detention of the defendant was at least two and one-half times as long as that authorized in Sharpe (using the State's time frame) and three times as long using the actual time the defendant was detained. As

[4] Vogel could have smelled around the car and the trunk area for the presence of marijuana or pressed on the fenders of the car to see if there were special shocks or if it was weighted, things he does not remember doing (R.54).

noted by Judge Harper when he rejected Sharpe as inapplicable in his consolidated order in State v. Williams, et al., 12 Fla.Supp.2d 134 (Cir. Ct. 15th Jud. Cir. 1985),

> The conduct of the defendants in Sharpe, and the circumstances surrounding the stops of their vehicles, are much more probative than those of the present cases in creating a well-founded suspicion of criminal activity. None of the defendants now before the court attempted to elude the troopers and their automobiles were not disguised in any way. Therefore, Sharpe is readily distinguishable. See, 12 Fla.Supp.2d at 153-154.

After so noting, Judge Harper ruled that ". . . even if Martin had a well founded suspicion the automobile contained marijuana, the additional detention was invalid both as to duration and location." State v. Williams, et al., 12 Fla.Supp.2d at 156. As in the case before Judge Harper, there was no attempt by Travis Cresswell to flee or elude Trooper Vogel and there was no attempt to disguise his vehicle (R.39).

The State can also find no comfort in the United States Supreme Court's decision in United States v. Place,

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Also, he could have let Cresswell leave and maintained surveillance until a narcotics dog was available and able to catch-up. See Moya v. United States, 745 F.2d 1044, 1050 (7th Cir. 1984); United States v. Giluiani, 581 F. Supp. 212, 217 (N.D. Ill. 1984), and United States v. Chamberlin, 644 F.2d 1262, 1267 (9th Cir. 1980) (20 minute detention of the defendant unjustified without probable cause). See also Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). As noted therein:

> The length of the detention of respondent's luggage alone precludes a conclusion that the seizure was reasonable in the absence of probable cause. Although we have recognized the reasonableness of seizures longer than the momentary ones involved in Terry, Adams, and Brignoni-Ponce, . . ., the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. 462 U.S. at 709, 103 S.Ct. at 2645.

Not only was there no reasonable suspicion existing herein, but the detention of the defendant was so long that, under the circumstances herein present, it must be deemed a ~~de~~ facto arrest.

The opinion in State v. Nugent, 504 So.2d 47 (Fla. 4th DCA 1987) is totally distinguishable from the case at bar insofar as the delay in obtaining the narcotics dog was sanctioned because the officer in that case smelled marijuana in the trunk area of the car and the defendant's license was under suspension. Herein, Vogel smelled nothing (R.54) and Cresswell's license was valid. The Fourth District Court of Appeal itself distinguishes Nugent from State v. Anderson, supra, on these precise grounds. Anderson continues to be viable and logical law.

In the case at bar, the detention of the Petitioner was an unconscionable 57 minutes (R. 52-53) on the shoulder of 1-95. Mr. Cresswell was ordered to remain outside of his vehicle in the blazing hot sun (R.56). There is no way that this detention, in view of its length and the manner in which it was conducted, can be equivalent to a "Terry type" detention and investigation. Rather, the facts fairly shout that when Mr. Cresswell was not allowed to leave the scene after being issued his traffic citation warning, he was in fact placed under arrest. Insofar as this arrest occurred without probable cause, the fruits derived therefrom should have been suppressed.

CONCLUSION

WHEREFORE, based upon the foregoing citations and authorities, as well as those contained in the Petitioner's original brief, coupled with a careful examination of the facts presented by the Record on Appeal, the Petitioner, TRAVIS HARRISON CRESSWLL, contends that the question certified by the Fifth District Court of Appeal should be answered in the negative, the case reversed, and

the lower court directed to grant the defendant's Motion to Suppress.

Respectfully submitted,

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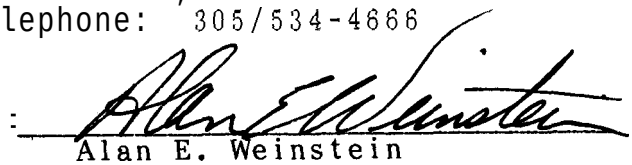
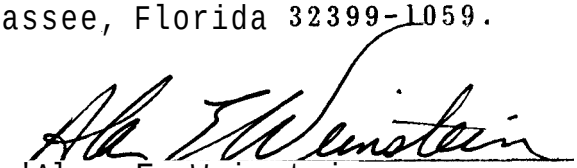
By: 
Alan E. Weinstein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was furnished by U.S. Mail, this 19th day of September, 1988, to: WALTER M. MEGINNISS, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1059.

By: 
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