IN THE SUPREME COURT OF FLORIDA

WILLIE MAE ROBINSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 72,583
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITION'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

The petitioner was the defendant in the trial court and the appellant in the District Court of Appeal, Fourth District. She will be referred to as petitioner in this brief.

The record on appeal consists of the record volume containing the pleadings, the transcript of proceedings at the motion to suppress hearing, and a supplemental transcript has been filed as part of the record on appeal containing the plea entry hearing. Petitioner entered a plea of nolo contendere reserving the right to appeal the denial of the motion to suppress.

References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses for the volume containing the pleadings and for the suppression hearing. The supplemental transcript will be referred to by the symbol "SR" followed by the appropriate page number therein, when reference is made to the plea entry hearing.

STATEMENT OF THE CASE

The petitioner was charged by an information on July 11, 1986, in Broward County, with trafficking in cocaine, possession of cannabis, and possession of drug paraphernalia (R-46). On October 13, 1986, she entered a plea of nolo contendere specifically reserving the right to appeal the denial of the motion to suppress evidence seized during an inventory search (SR-7). The dispositiveness of the motion to terminate the charges against the petitioner was clearly understood at the plea entry hearing (SR-3-5).

The motion to suppress physical evidence asserted that a vehicle which had been placed in her custody had been stopped for traveling too closely to another automobile (R-48). The motion alleged that after the vehicle was stopped by a state trooper that the driver, who did not have a valid driver's license, was arrested (R-48). The vehicle was impounded although no necessity to remove the vehicle from any roadway was involved, and the trooper did not advise of the need to provide a reasonable alternative to impoundment (R-48). After calling a wrecker, the officer conducted an "inventory" search and found the contraband which was the subject of the motion to dismiss (R-48).

A hearing was held on the motion at which testimony was taken and following the hearing the trial court denied the motion (R-43-44).

The trial court adjudicated petitioner to be guilty and sentenced her to three-and-a-half years imprisonment on Count I, with the three year minimum provisions of the drug trafficking

statute, and to three-and-a-half years imprisonment on Count II, concurrently with credit for time served (R-53-54). On Count III, the misdemeanor, the trial court sentenced to time served (R-55).

Notice of appeal was timely filed from entry of the judgment and sentence (R-56). The Fourth District Court of Appeal affirmed in an opinion which held that the impoundment procedure of Miller v. State, 403 So.2d 1307 (Fla. 1981), to be no longer valid due to a recent U.S. Supreme Court decision. The question was certified and jurisdiction in this Court was timely invoked.

STATEMENT OF THE FACTS

The testimony at the suppression hearing revealed that Florida State Trooper West effectuated a traffic stop of a motor vehicle when the officer observed the vehicle following too closely while traveling north on the Florida Turnpike (R-8-10). He intended to issue a warning (R-22). The driver, one Joseph McClendon, did not have a valid driver's license but presented the officer with rental papers for the vehicle (R-11). The rental contract for the vehicle did not indicate that either Mr. McClendon nor the petitioner were involved in the rental (R-11). The papers also indicated that the vehicle was six days overdue according to the rental contract (R-11). The officer ran the name and date of birth of Mr. McClendon through the computer and confirmed that his driver's license had been suspended (R-12).

The officer retained the rental agreement (R-12). Mr. McClendon advised the officer that the name of the person who had rented the vehicle was Mr. McClendon's common law wife (R-15). The contract for rental of the vehicle did not specify who could be driving the vehicle (R-25). The officer had no knowledge that the petitioner and Mr. McClendon were anything other than the lawful custodians of the vehicle (R-25). The officer checked and found that the car had not been reported stolen or missing by either the lessor or the renter of the car (R-24). The officer had no knowledge as to whether the contract for rental had been extended (R-24). The officer did not make any effort to have his dispatcher contact the lessee of the car, whose address and phone

number was listed on the contract, although it would have been "quite easy" he said for his dispatcher to call and obtain information from the lessee of the vehicle (R-24-25,30-31).

Finally, the officer testified that he called for a wrecker and impounded the vehicle without obtaining any consent to search the vehicle, nor to impound the vehicle, and that the officer gave neither Mr. McClendon nor the petitioner any alternative to towing and impounding the vehicle (R-23).

The petitioner established, without any contradiction, during her testimony at the hearing that the vehicle had been expressly placed in the joint custody and possession of the petitioner and Mr. McClendon by the lessee (R-34-35).

The officer testified that the vehicle when stopped was not a hazard to traffic (R-23). It was stopped between the Hollywood and State Road 84 exits on the Florida Turnpike, less than two miles from a service plaza at 2:30 - 2:45 in the afternoon (R-25-26). It was not a rush hour period (R-26). According to the officer, the petitioner "may have" told him her son was in a hospital in Jacksonville and he did not recall if she had asked for him to allow her to call someone to drive her to Jacksonville so she could see her son in the hospital (R-28-29). The officer did not offer petitioner any alternative to towing and impounding the car (R-23). Mr. McClendon, the driver, did object to the officer searching the personal belongings in the vehicle (R-29). The officer performed an inventory and seized the contraband upon which petitioner's convictions were based (R-28).

After announcing that the car had to be impounded, the officer asked petitioner if "anything in the car" belonged to her, and she said nothing in the car belonged to her (R-17-18). Upon searching the trunk and the petitioner told the officer that "the things in the back belonged to her" (R-28).

Petitioner gave uncontradicted testimony that her sister called from Jacksonville to tell her that petitioner's son had been in an accident (R-34). The lessee of the rental vehicle, a Ms. Betty Reilly, offered the vehicle to petitioner to go home to Jacksonville (R-34). Mr. McClendon would drive the vehicle and bring it back to Miami (R-34). Both had permission to use the car (R-35). Petitioner had driven her own 1978 Granada from Jacksonville to Miami when she took a friend home after he had interviewed in Jacksonville for a job (R-33-34). Her car then needed repair in Miami, and when she got the call from her sister regarding her son, petitioner accepted possession of Ms. Reilly's rental car along with Mr. McClendon's help in getting back to Jacksonville (R-34).

Once the officer stopped the vehicle because he observed Mr. McClendon driving too close to another vehicle, petitioner told the officer she was trying to get to Jacksonville (R-35). She asked the officer if he would let her call Betty Reilly and let her come pick up the car and take petitioner home (R-36). He told her the car would be impounded (R-36). The officer did not remember but also did not dispute her requesting an alternative to impoundment (R-28-29).

The trial court denied the motion giving reasons as follows (R-43-44):

> THE COURT: Well, the Court finds that at the beginning, the defendant did have standing. You know, the Beja case, she has that right, I suppose, to object like the Beja case says. But let's look at this from the evidence. It is a lawful stop, because he thought that the defendant's car was tailgating, so the stop was lawful, so that takes it out from a lot of the Beja case, really, because that was an unlawful stop. Here, we have a lawful stop.
>
> And after the stop, the officers, I feel, had probable cause to believe that a felony was being committed. And I think that was pretty good police work, as a matter of fact, at that point, he said, "Hey, is any of this stuff yours?"
>
> And the purpose of impoundment is to secure the personal property of the evidence. They said no, so then what was the officer supposed to do, insist that that was theirs? So I think that he did the right thing.
>
> And if he felt that there was probable cause for a felony, he certainly has a right to impound the car, and if anybody says the stuff isn't theirs, he certainly then has a greater right.
>
> You know, whatever right they had, they threw it out in their, I suppose, imperfect way of trying to disavow the contraband.
>
> Now, I think that the officers acted fairly. I think that the search was, under our law, fair. Accordingly, the motion to suppress is denied.

The trial court expressly found that petitioner had standing to contest the stop (R-43). The petitioner had argued in the trial court that the failure of the officer to advise petitioner as one of the persons in lawful possession and custody of the vehicle, of any alternative to impoundment required suppression of the fruits of the subsequent inventory search (R-40-41).

SUMMARY OF ARGUMENT

Petitioner relies upon the Miller v. State, infra, rationale for impoundment of vehicles to demonstrate that the procedure for determining when it is necessary to impound is not a direct Fourth Amendment concern. Since the Florida procedure does nothing more than establish a basis for determining when it is necessary to impound, the Colorado v. Bertine, infra, decision does not overrule our law regarding how the impoundment decision is made.

Petitioner urges the Court to decide this issue by following the distinction between determination of when to impound the later inventory is not directly at issue, and thus this is not primarily a search issue. Our procedure should thus be upheld.

ARGUMENT

ISSUE PRESENTED

WHETHER THE CERTIFIED QUESTION, VIZ.:

> DOES THE 1983 AMENDMENT TO ARTICLE I SECTION 12 OF THE FLORIDA CONSTITUTION, COUPLED WITH THE COLORADO v. BERTINE DECISION, OVERRULE MILLER v. STATE, PROVIDING THE POLICE ARE NOT ACTING IN BAD FAITH?

SHOULD BE ANSWERED IN THE NEGATIVE?

The certification poses the question whether the procedures for determining when protective impoundment of property is necessary have been overruled. Citing to Colorado v. Bertine, ___U.S.___, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), the district court held that the procedure announced by this Court for impoundment of property "no longer exists." Miller v. State, 403 So.2d 1307 (Fla. 1981), held that the "automobile inventory search is different" from normal exceptions to the warrant requirement. Id. at 1311. Under the Fourth Amendment to the U.S. Constitution, and under Article I, Section 12, of the Florida Constitution, the automobile inventory "is not an investigative search but is allowed because it is a necessary part of the caretaking function of the police when an impoundment occurs." Id.

This Court in Miller stated that the purpose of an impoundment "is basically for the protection of the owner," and that the subsequent inventory is "a caretaking, noncriminal one" serving three purposes. Id. These purposes were listed in Miller as (1)

the protection of the owner's property while it remains in police custody, (2) the protection of the police against claims or disputes over lost or stolen property, and (3) the protection of the police from potential danger from the contents of property in their custody. Id. The primary purpose, to protect the owner's property, was stated thusly in Miller, id. at 1311:

> The first and primary purpose is for the benefit of the vehicle owner, and the other two purposes are incidental to and supportive of the first. These latter two justifications do not arise at all unless there is sufficient reason for the police to impound and take responsibility for the vehicle in the first instance.

The Miller decision set forth the procedure for determining necessity for impoundment. Impoundment must be necessary before any inventory occurs, id. at 1313:

> Clearly, just an arrest of an individual who happens to be in a motor vehicle without anything more does not justify impoundment.

The burden to show that the impoundment was lawful and reasonable and necessary under the circumstances rests upon the state. Id.

The question resolved in Miller was whether the police must advise a "present owner or possessor that his vehicle is being impounded." Id. The Court required that the following simple procedure be utilized for determining the necessity for impoundment, id. at 1314:

> What we hold is that an officer, when arresting a present owner or possessor of a motor vehicle, must advise him or her that the vehicle will be impounded unless the owner or possessor can provide a reasonable alternative to impoundment.

The present case asks this Court to resolve the concerns about whether the procedures for determining the necessity for impoundment are still valid in light of the 1982 amendment to Article I, Section 12, of the Florida Constitution. This Court in Bernie v. State, 524 So.2d 988 (Fla. 1988), at 992, construed the amendment as "bring[ing] this state's search and seizure laws into conformity with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment...." Justice Ehrlich, concurring, stated the effect of the amendment succinctly as follows, id. at 993:

> It is apparent that by adopting this amendment the electorate intended to tie Florida courts' interpretation of article I, section 12 to the coattails of the United States Supreme Court. Under this amendment the federal Supreme Court is in effect the "ultimate arbitor" of what protections are provided under article I, section 12. (Footnote omitted).

The issue that petitioner urges as dispositive in this case is the distinction drawn in Miller v. State, supra at 1314, between the impoundment and the subsequent "inventory search" which follows after a valid impoundment has occurred. Under Bernie the inventory search procedures are affected by United States Supreme Court decisions because a protective inventory search involves application of standards of reasonableness mandated by the Fourth Amendment. This Court in Miller, id. at 1314 stated:

> Nothing in this opinion affects those situations in which there is probable cause that a vehicle contains or constitutes evidence of a crime which justifies a reasonable search. In

> the instant case the state readily concedes that there was no probable cause to justify the search.

The standards for impoundment determine when it is necessary for the state to exercise a caretaking function. This is totally separate, and serves a distinctly different purpose, from the seizure of property for the purpose of searching it for evidence of a crime. This distinction was the basis upon which the Miller decision was rendered. When the inventory occurs despite violation of the procedures for determining the need for impoundment, no valid or lawful impoundment has occurred. The procedures for impoundment are separate from, and necessarily precede, an inventory search.

For this reason, the Court should decide that the Miller procedures for impoundment have not been eliminated by Colorado v. Bertine, supra. This state has not been deprived by the amendment to Article I, Section 12, of the power to determine when and how a protective impoundment of property may occur. The procedures for an impoundment of property are essentially a civil function.

This Court noted in Elson v. State, 337 So.2d 959 (Fla. 1976), at 962, that an inventory search is valid only when the police have some valid reason or right for taking the defendant's property into its custody. Miller v. State, supra, clarified the caretaking nature and purpose of the impoundment. The subsequent "inventory," has consistently been held to constitute a search under the Fourth Amendment. State v. Jenkins, 319 So.2d 91 (Fla. 4th DCA 1975).

Since an "automobile" is not a talisman in whose presence the Fourth Amendment protections evaporate, South Dakota v. Opperman, 428 U.S. 364 (1976), an improper search of an automobile constitutes a substantial invasion into the privacy of another. United States v. Ortiz, 422 U.S. 891,896 (1975). The "impoundment" of a vehicle allegedly "for safe keeping" when no cause exists, such as when a car is legally parked on a street in front of a house, is an invalid impoundment. However, it is the subsequent search and seizure of the vehicle and the items contained therein that involves the Fourth Amendment. See In re: 1972 Porsche Two Door 74 Fla. Lic. Tag ID 91780, 307 So.2d 451 (Fla. 3d DCA 1975).

As can be seen, the question of proper impoundment is frequently linked with the legal issue of the reasonableness of the subsequent seizure and search of personal property. However, the distinction between them is clear. Miller defined standards for determining a safe-keeping impoundment which are distinct from the search and seizure that may arise after impoundment to inventory the impounded property.

For the above stated reasons, this state's established procedures for determining the propriety and necessity for impoundment of property have not been effected or invalidated by the decision in Colorado v. Bertine, supra. In Bertine the United States Supreme Court approved reasonable state regulations relating to impoundment procedures and to the subsequent inventory of the impounded property. It was held that reasonable regulations administered in good faith for inventorying impounded

property satisfy the Fourth Amendment, even though the Court recognized that equally reasonable rules might require a different procedure. In that case departmental regulations gave the police discretion to choose between impounding a vehicle whose owner had been arrested for driving under the influence of alcohol or parking and locking it in a public parking place. This discretion to determine the feasibility and appropriateness of impoundment did invalidate the subsequent inventory search.

This Court has held almost precisely the same in Miller v. State, supra. In Miller the Court approved the exercise of discretion in good faith by an officer in determining the necessity for an impoundment. But Miller required the officers to advise the owner or possessor that the vehicle will be impounded unless the owner or possessor can provide a reasonable alternative.

In Sanders v. State, 403 So.2d 973 (Fla. 1981), the Court refined the procedure when it clarified that the officer need not advise of all standard alternative choices. The officer, in making the good faith determination of the need for impoundment, simply notifies the owner or possessor and requires him or her to provide a reasonable alternative.

Thus the requirement to advise the owner is inexorably linked to the determination itself of whether there is a need to impound. The determination to impound cannot be made by an officer on the scene unless the officer determines somehow that it is necessary and appropriate in order to protect the property. In Sanders, this Court held that it was an inappropriate burden

to put on the police to make them discover whether reasonable alternatives to impoundment exist in a given circumstance. This Court in Sanders left that to the owner or possessor but required the simple method of the officer advising that impoundment would occur unless a reasonable alternative was provided.

Therefore, in order for the officer to make a reasonable and good faith determination of the need for impoundment, he must let the owner or possessor know to provide a reasonable alternative. Otherwise the officer himself would have to make that determination by considering all of the possible alternatives himself. This would place the responsibility for the property initially in the hands of the police and unnecessarily burden the officer with determining what alternatives to impoundment to pursue. If the procedure established in Miller were to be abandoned, the police officers would be required to consider alternatives relating to someone's property rather than leaving this obligation on the owner or possessor.

Colorado v. Bertine, supra, for example, discusses the complicated procedures the Boulder Police Department are required to use. According to those regulations, before securing a vehicle, the risk of damage or vandalism had to be considered and the police themselves are responsible for being concerned about the care and security of the vehicles.

It is plain that some procedure must be followed on the scene when officers make the determination of whether to impound. By definition this occurs in situations where there is no probable cause to search for criminal evidence. The Florida

procedure does not run afoul of Colorado v. Bertine, supra, because it provides for the owner or possessor to carry a burden that otherwise would be placed on the police. All the police need do is advise the arrestee that impoundment will occur in the absence of an alternative. By requiring the possessor or owner of the vehicle to provide the alternative the least burden is placed on the officer concerning the protection of the property. The entire subject of impoundment, and alternatives to impoundment, is as this Court noted in Miller primarily to protect the property and the owner from loss.

The Florida law has been clear that impoundment is for the preservation of property and its contents, and not for evidence searches, as shown by numerous decisions. Thus it is not a Fourth Amendment issue. See Altaman v. State, 335 So.2d 636 (Fla. 2d DCA 1976) (true basis to uphold inventory is when impoundment occurs for preservation of property and contents); Weld v. Wainwright, 325 So.2d 44 (Fla. 4th DCA 1976) (unattended vehicle not sufficient to justify impoundment or resulting inventory); Gunn v. State, 336 So.2d 687 (Fla. 4th DCA 1976) (no showing of traffic hazard or nuisance of parked car invalid basis for impoundment and subsequent search); State v. Hinton, 305 So.2d 804 (Fla. 4th DCA 1975) (vehicle parked off road not constituting hazard or nuisance not shown to have been validly impounded). Only when impoundment is unnecessary is a subsequent Fourth Amendment issue directly involved regarding the search and inventory.

Accordingly, the petitioner requests this Court to quash the decision of the Fourth District, which held that the procedures for determining impoundment announced in Miller are no longer valid. The fact in this case that the officer failed to advise the occupants, both of whom were possessors of the vehicle under consent from the lessee, that an impoundment would occur and of the need to provide any reasonable alternative mandates that the impoundment he declared invalid. This Court should direct that the cause be remanded with instructions that the motion to suppress be granted.

CONCLUSION

Wherefore, based on the foregoing it is respectfully requested that the Court direct this cause to be remanded with instructions that the motion to suppress be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOY B. SHEARER, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 14th day of July, 1988.

LOUIS G. CARRES
Assistant Public Defender