SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 1 1989
CLERK, SUPREME COURT
By Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 72,998

MICHAEL W. GREEN,

Respondent.

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ON REVIEW
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

* * * * * * * * * * * * * * *

RESPONDENT'S RESPONSE BRIEF

* * * * * * * * * * * * * * *

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A. WHERE SPECIFICALLY REQUESTED, A REASONABLE ALTERNATIVE TO IMPOUNDMENT SHOULD BE GRANTED TO AN ARRESTEE.

B. THE SEARCH IN THE CASE AT BAR EXCEEDED THAT OF A PROPER INVENTORY SEARCH.

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PRELIMINARY STATEMENT

Respondent was the Appellant/Defendant in the lower court and will be referred to in this brief as Respondent. Petitioner was the Appellee and prosecution in the lower court and will be referred to in this brief as Petitioner. References to the following and indicated by the appropriate symbol followed by the appropriate page number(s):

TR1 - Volume I of the trial transcript

TR3 - Transcript of the hearing on Respondent's Motion to Suppress

R - Record on Appeal

ISSUE ON APPEAL

THE SEARCH OF RESPONDENT'S AUTOMOBILE AND CONTAINERS LOCATED THEREIN WAS UNLAWFUL AND THE OPINION OF THE DISTRICT COURT OF APPEAL REVERSING RESPONDENT'S CONVICTIONS FOR POSSESSION OF CONTROLLED SUBSTANCES AND DRUG PARAPHERNALIA SHOULD BE AFFIRMED.

A. WHERE SPECIFICALLY REQUESTED, A REASONABLE ALTERNATIVE TO IMPOUNDMENT SHOULD BE GRANTED TO AN ARRESTEE.

B. THE SEARCH IN THE CASE AT BAR EXCEEDED THAT OF A PROPER INVENTORY SEARCH.

STATEMENT OF CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts and offers the following additional facts for clarification.

Respondent was charged by Information with four (4) counts, to-wit:

1. Driving under the influence;
2. Possession of a controlled substance, to-wit: Valium;
3. Possession of a controlled substance, to-wit: Cocaine; and
4. Possession of drug paraphernalia.

Respondent filed a motion seeking to suppress the legality of the search of his automobile. (R:460-461). Respondent's Motion to Suppress was denied and he proceeded to trial on all counts. Respondent's objection to introduction of the evidence seized from his automobile was renewed throughout the trial. (TR1:7-8). Respondent was found not guilty as to Count One of the Information, driving under the influence; and was convicted on all other charges.

During the roadside detention by Officer Ferrick, Respondent requested that his automobile be moved to the side of the road and left there at the scene of his arrest. (TR3:6-7). The officer advised Respondent that his automobile would be towed and impounded, indicating to Respondent that he had no alternative to the impoundment. (TR3:7). The officer never advised Respondent that any alternative to impoundment existed even when Respondent requested to move his automobile to the roadside. (TR3:7).

Following roadside tests, the officer took Respondent to the Bay County Sheriff's Department and conducted a breathalyzer test. Thereafter, Respondent

was incarcerated and the officer returned to the Cedar Grove Police Department at which time he noticed Respondent's automobile in the impoundment yard. (TR1:106-107). No inventory search was conducted at that time and the arresting officer advised the officer coming on duty that the automobile should be released in the event Respondent came to retrieve the automobile. (TR1:107). The arresting officer then went off duty at 6:00 a.m. on June 13. At 6:00 p.m. on June 13, the arresting officer returned to duty and noticed the automobile still in the impoundment yard. (TR1:108). He then worked his usual shift and got off at 6:00 a.m. the following day, June 14. (TR1:109). The officer stated that he then felt obligated to perform an inventory search. (TR1:109). The record is devoid of any evidence as to the policy of the department as to when an inventory search is appropriate. The officer testified only that it was his procedure to make a list of valuable items when he decided to conduct such an inventory search. (TR1:109).

During the search of Respondent's automobile, the officer opened the console glove box, located an opaque blue bag of the type that covers a Crown Royal liquor bottle, opened it and found cocaine paraphernalia and cocaine residue. (TR1:110). These items are the subject of Counts Three and Four of the Information.

Thereafter, the officer proceeded to search the back seat of Respondent's automobile, observed a suitcase and opened it. (TR1:111; TR3:29-39). After opening the suitcase, the officer proceeded to pull socks out of a shoe which was in the suitcase and found three (3) prescriptions plastic bottles containing Valium tablets. The Valium tablets located inside the prescription bottle, that was inside the sock, that was inside the shoe, that was inside the suitcase in Respondent's automobile seized by Officer

Ferrick during his attempt to locate items of value to be inventoried were the subject of Count Two of the Information.

SUMMARY OF ARGUMENT

Although an officer may no longer be required to advise an arrestee that the arrestee has a right to a reasonable alternative to impoundment, a different situation is presented where the arrestee specifically suggests a reasonable alternative. Where a reasonable alternative is suggested by an arrestee regarding his automobile, it should be respected, notwithstanding the Bertine decision that an officer is not required to advise an arrestee of alternatives to impoundment. Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 378, 93 L.Ed.2d 739 (1987).

Moreover, the decision of the United States Supreme Court in Bertine, supra, relied upon by the State in the instant case delineates the requirements for opening and searching closed containers during a proper inventory search. The Court held that it is permissible for officers to open closed containers in an inventory search only if they are following standard police procedures. In the case at bar, the record of devoid of any police procedures mandating or even permitting the opening of containers in a search as was conducted during the search of Respondent's automobile.

Accordingly, the opinion of the court below should be affirmed holding that the evidence that was seized during the search of Respondent's automobile should be suppressed and Respondent's convictions reversed.

ARGUMENT

THE SEARCH OF RESPONDENT'S AUTOMOBILE AND CONTAINERS LOCATED THEREIN WAS UNLAWFUL AND THE OPINION OF THE DISTRICT COURT OF APPEAL REVERSING RESPONDENT'S CONVICTIONS FOR POSSESSION OF CONTROLLED SUBSTANCES AND DRUG PARAPHERNALIA SHOULD BE AFFIRMED.

A. WHERE SPECIFICALLY REQUESTED, A REASONABLE ALTERNATIVE TO IMPOUNDMENT SHOULD BE GRANTED TO AN ARRESTEE.

This Court has accepted jurisdiction of the case at bar based on a conflict between the decision of the First District Court of Appeal below and the decisions in State v. Williams, 516 So.2d 1081 (Fla. 2d DCA 1987) and Robinson v. State, 526 So.2d 164 (Fla. 4th DCA 1988), although Respondent objected to jurisdiction and suggested that no direct conflict was present. At the time of the opinion of the First District Court of Appeal below, this Court had not addressed the effect of the decision of the United States Supreme Court in Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 378, 93 L.Ed.2d 739 (1987), on the decision of Miller v. State, 403 So.2d 1307 (Fla. 1981). The decision of the Second District Court of Appeal in Robinson, supra, was in accord with the decision of the court below in the case at bar.

This Court accepted jurisdiction in Robinson, supra, pursuant to the Fourth District Court of Appeal certifying the following question of great public importance:

> 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?

This Court accepted jurisdiction and answered the question in the affirmative on January 5, 1989. Robinson v. State, ___ So.2d ____, ____ F.L.W. ____, Case Number 72,583 (Fla. January 5, 1989).

Prior to the decision of this Court in Robinson, supra, this Court had analyzed the impact of Bertine upon Miller. State v. Wells, ____ So.2d ____, 13 F.L.W. 686 (Fla., December 1, 1988). It should be noted, however, that both the decisions of this Court in Robinson and Wells, respectively, were delivered subsequent to the decision of the District Court in the case at bar. In Wells, the Court observed that the decision of the United States Supreme Court in Bertine, superseded the requirement of Miller, supra, that an agency is not compelled to provide an alternative to impoundment.

The case at bar is distinguishable from the factual circumstances of Bertine, supra, and Robinson, supra, inasmuch as Respondent specifically requested to move his automobile and leave it roadside. Although an arresting officer may not be required to advise an arrestee that he has a right to a reasonable alternative to impoundment as required under Miller, supra, the independent request of an arrestee regarding his automobile should be respected where reasonable. Inasmuch as there was no reason to disrespect Respondent's specific request regarding his automobile, the impoundment was conducted in bad faith and the subsequent search was improper. Therefore, Respondent's convictions should be reversed and the opinion of the court below affirmed.

B. THE SEARCH IN THE CASE AT BAR EXCEEDED THAT OF A PROPER INVENTORY SEARCH.

In Colorado v. Bertine, 107 S.Ct. 738 (1987), the Court stated:

> We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of

> closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria. (Emphasis supplied.)

This Court recognized the delineations made by the United States Supreme Court when addressing a similar issue in the case of State v. Wells, ___ So.2d ___, 13 F.L.W. 686 (Fla. December 1, 1988).

As in the case of Wells, the record in the case at bar is devoid of any suggestion that the search of the glove compartment and blue bag found therein was conducted pursuant to established or standard police procedures. Moreover, the record certainly is devoid of any police department stardard procedures that mandate a search such as the one conducted by the officer in opening the suitcase, finding shoes, retrieving socks from the shoes, then searching the sock to find a pill bottle, then opening the pill bottle to find a tablet. Such a search is hardly consistent with any attempt to inventory for the protection of an owner's valuables following an impoundment.

Finally, the record in the case at bar is even devoid of any standard police procedures to determine when an inventory search should be conducted following an impoundment. In the instant case, the Respondent's automobile was towed to the city police department's impoundment yard following his arrest. After delivering Respondent to the county jail, the arresting officer returned to the police department and observed Respondent's automobile. The arresting officer advised the officer coming on duty to release the automobile to Respondent. Thereafter, the arresting officer went off duty, came back on duty and the following day, when getting off duty again, decided to search Respondent's automobile. The degree of discretion exercised by the officer in

this case in deciding when to conduct his search and the extent of the search is not consistent with the type of permissible inventory search contemplated in Bertine, supra. Accordingly, the decision of the First District Court of Appeal should be upheld inasmuch as the convictions of Respondent were reversed.

CONCLUSION

Based on the foregoing argument and citations of authority, Respondent respectfully requests the Court to affirm the decision of the District Court.

Respectfully submitted,

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