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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL W. GREEN,

Respondent.

_____/

CASE NO. 72,998

PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL
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_____/

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida (Appellee/ Plaintiff below), will be referred to herein as "the State." Respondent, Michael W. Green (Appellant/defendant below), will be referred to herein as "Respondent." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the appendix of this brief will be by the symbol "A" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Officer Ferrick stopped Respondent's automobile at approximately 2:30 a.m. on June 13, 1986, after observing Respondent driving on the wrong side of the road. The road was four lanes wide and traffic was sparse. Ferrick immediately put on his emergency lights to warn Respondent of oncoming traffic and further observed Respondent's vehicle swerve before turning across the median and proceeding in the correct direction. After turning across the median, Respondent stopped his car further down the highway, parking it at an angle on the northwest corner of the intersection with the front tires on the grass area and the right rear of the vehicle at the curb where it would obstruct the flow of traffic in the outside lane.

Ferrick detected an odor of alcohol on Respondent's breath and advised him that he was to perform some field sobriety tests. Ferrick described the alcohol odor as slight but marked it as being moderate when he completed his report. Respondent's completion of the several tests was not altogether successful and it was noted that Respondent experienced difficulty in understanding the basic instructions to one of the tests. Ferrick categorized his ability to understand instructions as fair, but upon completion of Respondent's attempts to perform the test, it was Ferrick's opinion that Respondent was too impaired to operate his automobile. He therefore placed Respondent under arrest and told him that his vehicle was obstructing the normal

flow of traffic. He recalled that he advised Respondent he would not let him back in the vehicle to move it off the road and that it would be towed to the police department impound lot.

Respondent thereafter consented to take a breathalyzer test at the police station, the results of which were .06 and .06+. Ferrick commented to Respondent that the breathalyzer reading was not consistent with the level of impairment he was observing, to which Respondent informed Ferrick that he was taking tranquilizer medication. Ferrick did not conduct any drug screening on Respondent because he did not think it was necessary.

After taking the breathalyzer test, Respondent desired to make a phone call and was permitted to do so. He was unable to contact anyone to come and get him and was thereafter taken to the county jail.

When Ferrick reported to work for his next shift, he observed that Respondent's car was still in the impound lot. He asked the officer he was relieving if anyone had attempted to pick up the vehicle and was told that no one had done so. By the end of his shift, the car still being present, Ferrick felt obligated to perform an inventory search based on the fact that he had observed luggage on the back seat of the car and did not know what other valuable items might be present. He retrieved the car keys and during the search discovered a loaded .38 caliber revolver underneath the seat, and a blue bag in the

console glove compartment holding cocaine straws with suspected cocaine residue, three razor blades, and a plastic baggy with some black capsules in it. The partially opened suitcase revealed a sock stuffed into a shoe in which was found three plastic prescription bottles, one of which had the label scraped off and did not look valid. That bottle contained what appeared to be a large number of valium tablets. At this point, Ferrick returned the cap on the bottle and placed it back in the sock, put the sock in the shoe and zipped up the bag. He took the blue bag and the gun into the station and advised the officer he had found some illegal items. He then retrieved the luggage and the other items. (A 2-4).

Respondent moved to suppress the narcotics and paraphernalia and the circuit court denied the motion on December 12, 1986. Respondent was thereafter found guilty by jury verdict of possession of a controlled substance and paraphernalia (R 487).

On appeal, the First District Court of Appeal reversed with one dissent, holding that the motion to suppress should have been granted (A 1-7). The State's motion for rehearing was denied on August 24, 1988) (A 8).

SUMMARY OF ARGUMENT

The court below erred in reversing Respondent's conviction for possession of controlled substances and drug paraphernalia where the court relied on Miller v. State for the proposition that an alternative to automobile impoundment must be offered to an arrestee. In the 1987 case of Colorado v. Bertine, the requirement that a reasonable alternative to impoundment must be offered was effectively eliminated by the United States Supreme Court. Since Miller was decided in 1981 it is no longer good law in light of Bertine and in light of the 1982 amendment to Article I §12 of the Florida Constitution which mandates that the law of search and seizure be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court.

ISSUE ON APPEAL

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE RESPONDENT'S CONVICTION FOR POSSESSION OF CONTROLLED SUBSTANCES AND DRUG PARAPHERNALIA WHERE THE COURT RELIED ON MILLER V. STATE FOR THE PROPOSITION THAT A REASONABLE ALTERNATIVE TO AUTOMOBILE IMPOUNDMENT MUST BE OFFERED TO AN ARRESTEE.

This Court accepted jurisdiction of this cause based on a conflict between the First District Court of Appeal's decision below and the Second District's decision in State v. Williams, 516 So.2d 1081) (Fla. 2d DCA 1987) and the Fourth District's decision in Robinson v. State, __ So.2d __, 13 F.L.W. 1244 (Fla. 4th DCA May 25, 1988).

The First District Court of Appeal held below that where a driver is arrested, he or she must be advised that the vehicle will be impounded unless a reasonable alternative to impoundment can be provided by the owner. In so ruling the court relied on Miller v. State, 403 So.2d 1307 (Fla. 1981).

In contrast, the Second District Court of Appeal held correctly in State v. Williams, supra, that

> We conclude that the requirement of the Florida Supreme Court's opinion in **Miller** that an arrested driver be offered an alternative to the impoundment of his car no longer exists. **Colorado v. Bertine**, __ U.S. __, 107 S.Ct. 378, 93 L.Ed.2d 739 (1987). In **Bertine** the arrestee, like the defendant in this case, was not offered an alternative to the impoundment of his car. Quoting from

> **Illinois v. Lafayette**, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), the United States Supreme Court said in **Bertine** that that did not matter:
>
> > [t]he real question is not what "could have been achieved," but whether the Fourth Amendment **requires** such steps ... The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.
>
> __ U.S. __, 107 S.Ct. at 742, 93 L.Ed.2d at 747.

Williams, supra at 1084.

Regarding Miller v. State, supra, the Second District went on to state:

> The ruling of **Bertine** that offering reasonable alternatives to impoundment is not necessarily required is fully applicable in Florida due to the 1983 amendment to the provisions of Article I, section 12 of the Florida Constitution, that amendment having come into effect after **Miller's** reliance upon those provisions. The amendment added to Article I, section 12 the requirements that the right under the Florida Constitution to be secure against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court" and that "articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."
>
> Accordingly, police searches of arrested motorists' cars in Florida are now appreciably less restrained by the exclusionary rule under which unconstitutionally seized evidence is excluded from the evidence at

> trial. The case before us exemplifies the foregoing amendment to the Florida Constitution as having, in the words of the Florida Supreme Court, the effect of "removing the 'independent protective force of state law.'" **State v. Lavazzoli**, 434 So.2d 321, 323-324 (Fla. 1983). Prior to the amendment to Article I, section 12 Floridians had, as recognized by **Miller**, the "substantive right [under specific wording of Article I, section 12] to have articles or information obtained as the result of an illegal search or seizure excluded from evidence in the courts of this state ..." **State v. Bernie**, 472 So.2d 1243, 1246 (Fla. 2d DCA 1985). Following the amendment Florida's exclusionary rule has been characterized by the Florida Supreme Court as "nothing more than a creature of judicial decisional policy" of the United States Supreme Court because the specific wording of the Fourth Amendment does not contain an exclusionary rule and "the federal exclusionary rule [is] preeminently a rule of court and only procedural." **Lavazzoli**, 434 So.2d at 323. As a result, rather than ensuring to Floridians rights under the federal constitution as the amendment to the Florida Constitution might seem to do, the amendment has the effect in this case of taking away a right not provided by the federal constitution.

Williams, supra at 1084, 1085 (A 12, 13).

Similarly, in Robinson v. State, __ So.2d __, 13 F.L.W. 1244 (Fla. 4th DCA, May 25, 1988), the Fourth District agreed that the requirement that a reasonable alternative to impoundment must be offered no longer exists in Florida, and certified the question to this Court as a matter of great public importance.

In so holding, that court stated:

> Needless to say, the Second District did not arbitrarily overrule the Florida Supreme Court, and reached its conclusion because of a United States Supreme Court decision on the same subject. **See Colorado v. Bertine**, __ U.S. __, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987 [1 F.L.W. Fed. S53].
>
> We have read **Colorado v. Bertine** and agree with the Second District. Notwithstanding, we are unable to ignore our own supreme court's pronouncements and we therefore certify the following question, it assuredly being one 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?

Robinson, supra at 1244, 1245.

The State submits that resolution of the above certified question would control the outcome of the instant case.

In Miller, supra, this Court stated;

> In our opinion, if the primary purpose of impoundment and inventory search is for security and protection of the vehicle's contents, it necessarily follows that the owner or possessor who is reasonably available must be consulted concerning the impoundment.
>
> We base our conclusion on Section 12 of Article I of the Florida Constitution and the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court in **Opperman**. Our reading of **Opperman** leads us to a firm conclusion that a majority of the United States Supreme Court would not have approved

> that inventory search on federal grounds if the driver or owner of the vehicle had been present or reasonably available.

Miller, supra at 1313.

In Miller, this Court relied in part on South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) and its language stating that the owner of the car was not present to make other arrangements for the safekeeping of his belongings. Id. at 428 U.S. 375. This language leads to the conclusion that in Opperman, the United States Supreme Court did fashion the reasonable alternative requirement relied upon by this Court in Miller.

However, in Colorado v. Bertine, __ U.S. __, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987 [1 F.L.W. Fed. S53], the United States Supreme Court effectively overruled this requirement, stating

> "[t]he real question is not what could have been achieved, 'but whether the Fourth Amendment requires such steps ... The reasonableness of any (emphasis added) particular governmental activity does not necessarily or invariable turn on the existence of alternative 'less intrusive' means." **Lafayette,** 462 U.S. at 647, 77 L.Ed.2d 65, 103 S.Ct. 2605.
>
> We conclude that here, as in **Lafayette,** reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.

Id. at 747.

Hence, as of 1987, the United States Supreme Court no longer required a reasonable alternative requirement to impoundment. Since Miller was decided in 1981 and relied on Opperman, it is no longer good law in light of Colorado v. Bertine since Bertine is fully applicable to Florida courts.

Furthermore, Miller expressly relied on Article I, Section 12, Florida Constitution, as it existed in 1981. In November 1982, this section was amended to add the requirements that the right under the Florida Constitution to be secure against unreasonable searches and seizures shall be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court. State v. Bernie, 472 So.2d 1243, 1246 (Fla. 2d DCA 1985), State v. Williams, supra.

Since Miller dealt with impoundments coupled with inventory searches (Id. at 1313) and relied on constitutional and caselaw authorities that have since been modified, it logically follows that Miller must be modified to come in harmony with these provisions.

Colorado v. Bertine dealt with an impoundment where the owner was not offered an opportunity to make alternative arrangements. The United States Supreme Court stated that such alternatives are not necessary. This opinion, explicitly

dealing with a Fourth Amendment issue (Id. at 93 L.Ed.2d 739), is fully applicable to Florida via the 1982 amendment to Article I, Section 12 dealing with Fourth Amendment issues.

Thus it is evident that the requirement in Miller that an alternative to impoundment must be offered no longer exists, and the First District Court of Appeal's reliance thereon is misplaced. The decision of that court should be reversed with instructions to affirm the judgment of the trial court.

CONCLUSION

Based on the above cited legal authorities, Petitioner prays this Honorable Court reverse the decision below and thereby restore uniformity to Florida decisions on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Ms. Rhonda S. Martinec, Daniel, KIomarek & Martinec, Post Office Box 2522, Panama City, Florida, 32402, this 6th day of January, 1989.

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