IN THE SUPREME COURT OF THE STATE OF FLORIDA

ADRIAN AVERY,

Petitioner,

vs. CASE NO. 73,289

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 820-2150

JEFFREY ANDERSON
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

CONSTITUTIONS CITED

PRELIMINARY STATEMENT

The Petitioner was the Appellee in the court below and the defendant in the trial court. Respondent was the Appellant in the court below and the prosecution in the trial court. In the brief the parties will be referred to as they appear before this Honorable Court. A copy of the district court's opinion is attached to this brief as the Appendix.

The following symbols will be used in this brief:

"R"	Record on Appeal;
"A"	Appendix.

STATEMENT OF THE CASE AND FACTS

On July 26, 1986, at approximately 8:00 p.m., Officer Turner of the West Palm Beach Police Department was at the Trialway Bus Station assisting Officer Fahey in investigating the illegal transportation of narcotics and weapons on board the bus line (R4).

Turner testified that the normal procedure during the investigation is to conduct surveillance of the bus station (R5). Once a bus arrives, the officers would speak to the bus driver and check to see if Broward County Sheriff's office had checked the bus at the Ft. Lauderdale terminal (R5). In this particular instance, Officer Turner did not believe that the Broward Sheriff's office had checked this bus (R5).

The officers observed the bus Petitioner was riding on pull up (R5-6). The Trailway buses usually only stopped for five (5) to ten (10) minutes at the station (R19). Turner spoke to the bus driver and asked permission to board the bus which was granted (R6). Turner and Fahey went to the rear of the bus to speak with passengers (R6). Turner testified that the procedure would be to introduce themselves as police officers, with badges exposed, and to request permission to speak with the passenger (R6). Turner testified that on every occasion so far passengers have agreed to talk (R6).

Turner decided to speak with Petitioner who was sitting three or four rows from the rear of the bus (R7). By this time there were only a couple of minutes remaining before the bus was scheduled to leave (R19). Petitioner had boarded the bus, which

was destined for Dallas, in North Miami (R18). Turner observed Petitioner "scooting" a bag under his seat with his feet (R7). Turner believed that Petitioner was trying to conceal the bag (R7). As soon as Officer Fahey was finished speaking with a passenger directly in front of Petitioner, the officers spoke to Petitioner (R7).

Turner requested permission to speak with Petitioner and received it (R7). Turner explained to Petitioner that they were conducting an ongoing investigation into the transportation of illegal narcotics and weapons (R8). Turner asked Petitioner where he was traveling to and if he had a bus ticket (R8). Turner then looked at the ticket and gave it back to Petitioner (R8). Turner then asked Petitioner if he had any luggage on board and Petitioner acknowledged that he did and pointed to the black bag under his seat (R9).[1] Petitioner then placed the bag in his lap (R9).

Turner requested permission to search the bag and advised Petitioner he had a right to refuse (R9). Turner testified that if there was a refusal he would ask for a reason for the refusal (R10). If there was no reason given for the refusal Turner would then request that his dog be allowed to search the bag (R10-11). Turner testified that if Petitioner had refused the search he would be free to leave (R11). Turner did not testify that this information was ever communicated to Petitioner. Turner

[1] Later during the hearing Turner testified that if he testified it was a black bag his testimony was inaccurate (R14). Turner also testified that all he could remember about Petitioner was the fact that he was a black man (R14).

testified that if someone refused to consent at the West Palm Beach Station the usual procedure is to notify the next bus stop in Ft. Pierce (R15). Petitioner told the officers that they could search his bag (R9). The officers had consent forms available but did not use them because of time constraints (R16). Turner testified that if the forms were used it could take two or three minutes to explain the consent to search (R19). Turner testified that people would then hesitate to sign the written consent forms (R19). Turner testified that once the officers found something then a written consent form would be presented (R19).

Prior to the search Petitioner told the officers that they would find a replica pistol in his bag (R9). They did (R9). The officers also found a piece of foam rubber the size of a softball (R10). Turner squeezed the foam rubber and heard a cracking noise (R9-10). Turner then pulled the foam rubber apart and found cocaine inside (R10).

Petitioner was charged with possession of cocaine (R29). He moved to suppress the contraband at a hearing held on December 22, 1986, before the Honorable Marvin Mounts, Jr., of the Circuit Court. At the hearing, Officer Turner testified as above. The trial court granted the motion to suppress and entered the following order:

> Officer Chris Fahey testified that he and Officer Turner, both of the West Palm Beach Police Department comprised a unit which checked the Trailways Bus Station looking for people who might be acting as couriers for drugs northbound. They along with a dog trained to sniff

for drugs would visit the bus station on a random basis for the purpose of checking northbound buses.

On July 6, 1986 at approximately 8:10 p.m., they boarded a bus stopped in West Palm Beach bound for Dallas. They were not in uniform but their badges were prominently displayed and they wore windbreakers which designated the department.

They proceeded to the rear of the bus and began interviewing passengers in an effort to gain their consent to search their luggage.

Officer Turner's attention was drawn to Mr. AVERY because he appeared nervous and used his feet to push his tote bag under the seat. It is noted that Mr. AVERY is a large man, As a result of Mr. AVERY's actions, he was subjected to the officer's questioning.

Officer Turner testified that he obtained the oral consent of Mr. AVERY to look through his baggage that was underneath his seat. The officers were aware that their Department had a written consent to search form but that they didn't feel it was necessary to use such a form because it would take too much time and they couldn't do it for all passengers on board or something to that effect. Further testimony indicated that a consent form might be executed once a search had been completed and the suspect under arrest.

The prospect of being a seated passenger on a commercial public transportation vehicle and seeing police officers come on board with their badges prominently displayed checking each passenger is an intimidating and coercive situation in and of itself.

I find that if consent was given in this case it was coerced by the situation I have just described. Furthermore, I find that the Defendant's actions did not give rise to a founded suspicion which would justify his detention. Ingram v. State, 364 So.2d 821 (Fla. 5th DCA 1978); Robinson v. State, 388 So.2d 286 (Fla. 1st DCA 1980); Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983); Gorney v. State, 409 So.2d 220 (Fla, 4th DCA 1982).

The state filed a timely notice of appeal (R43). The Fourth District Court of Appeal, ~~En Banc~~, reversed the trial court holding that the trial court erred in finding that the search was improper and certified the following question:

> MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

(A12). Petitioner timely filed a Motion for Rehearing En Banc. On October 12, 1988, the district court denied the motion (A1). On November 2, 1988, Petitioner timely filed a notice to invoke discretionary jurisdiction of this Court. On November 10, 1988 this Court issued an order setting a briefing schedule for this cause.

SUMMARY OF THE ARGUMENT

The police actions, without a founded suspicion of criminal activity, tainted any alleged consent. The police actions of cornering Petitioner, a ticketed passenger on a northbound bus, with their badges prominently displayed, was not a mere consensual encounter. Petitioner was not in a public place when police approached him, rather he was a ticketed passenger aboard a bus who had the right to be left alone in the midst of his journey. By boarding the bus without tickets, the police were exercising a superior right not enjoyed by any other citizen to approach Petitioner and question him regarding his travel plans, destination, and luggage. Assuming that no founded suspicion of criminal activity was required, at a minimum police may only interfere with travellers in transit if such is done with written guidelines to prevent unbridled police discretion and with sufficient warnings so that travellers will not be surprised by the interference.

Assuming arguendo that there was no arbitrary intrusion, the trial court's finding that the consent was invalid must still be affirmed. The totality of the situation supports the trial court's finding. No matter how subtle the implied coercion to consent, the resulting consent is invalid. Here the police cornering Petitioner with an accusatory request, combined the other factors, indicate a coercion that a layman would not feel free to ignore. There were sufficient circumstances to support the trial court's finding that Petitioner's consent was not voluntary.

Assuming, arguendo that Petitioner's alleged consent was not merely acquiescence to apparent police authority, nor tained by the police intrusion into his privacy, because the search went beyond the scope of the alleged consent the trial court did not err in suppressing the evidence. Any alleged consent to search the luggage did not automatically extend to the containers within the luggage. Furthermore, any alleged consent to search the luggage did not extend to destruction of the property within the luggage.

Assuming, arguendo that no violation of the right to be free from unreasonable searches and seizures occurred, the intrusion, without any suspicion of illegal activity, into Petitioner's privacy by boarding the bus and questioning him in the midst of his journey violated Petitioner's right to be left alone under Article I, Section 23, of the Florida Constitution. Without any suspicion of illegal activity occurring on the bus, there was no compelling state interest to board the bus. More importantly, whatever state interest was involved, it was not being attempted through the use of the least intrusive means. Consequently, the resulting intrusion was in violation of Petitioner's right to be let alone under Article I, Section 23, of the Florida Constitution.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION TO SUPPRESS.

The trial court entered the following written order suppressing the evidence:

> Officer Chris Fahey testified that he and Officer Turner, both of the West Palm Beach Police Department comprised a unit which checked the Trailways Bus Station looking for people who might be acting as couriers for drugs northbound. They along with a dog trained to sniff for drugs would visit the bus station on a random basis for the purpose of checking northbound buses.
>
> On July 6, 1986 at approximately 8:10 p.m., they boarded a bus stopped in West Palm Beach bound for Dallas. They were not in uniform but their badges were prominently displayed and they wore windbreakers which designated the department.
>
> They proceeded to the rear of the bus and began interviewing passengers in an effort to gain their consent to search their luggage.
>
> Officer Turner's attention was drawn to Mr. AVERY because he appeared nervous and used his feet to push his tote bag under the seat. It is noted that Mr. AVERY is a large man. As a result of Mr. AVERY's actions, he was subjected to the officer's questioning.
>
> Officer Turner testified that he obtained the oral consent of Mr. AVERY to look through his baggage that was underneath his seat. The officers were aware that their Department had a written consent to search form but that they didn't feel it was necessary to use such a form because it would take too much time and they couldn't do it for all passengers on board or something to that effect. Further testimony indicated that a consent form might be executed once a search had been completed and the suspect under arrest.
>
> The prospect of being a seated passenger on a commercial public transportation vehicle and seeing police officers come on board with their

> badges prominently displayed checking each passenger is an intimidating and coercive situation in and of itself.
>
> I find that if consent was given in this case it was coerced by the situation I have just described. Furthermore, I find that the Defendant's actions did not give rise to a founded suspicion which would justify his detention. Ingram v. State, 364 So.2d 821 (Fla. 5th DCA 1978); Robinson v. State, 388 So.2d 286 (Fla. 1st DCA 1980); Horvitz v. State. 433 So.2d 545 (Fla. 4th DCA 1983); Gorney v. State, 409 So.2d 220 (Fla. 4th DCA 1982).

(R41-42). The district court held that the trial court erred in finding that the search was improper and certified the following question:

> MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

(A7). There are four legitimate reasons for suppressing the evidence in the instant case. Petitioner submits that: (A) the police actions, without a founded suspicion of criminal activity, tainted any alleged consent; (B) the totality of the situation supports the trial court's finding of coercion; (C) the search went beyond the scope of any alleged consent; and (D) the government intrusion invaded Petitioner's right to privacy under Article I, Section 23, of the Florida Constitution. Petitioner will address each of these issues below.

A. The police actions, without a founded suspicion of criminal activity, tainted any alleged consent.

The Fourth Amendment is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976). To reach its decision the district court was required to first conclude the act of the officer's boarding the bus, displaying authority, and standing over a bus passenger in a narrow bus aisle while questioning him, without a founded suspicion of criminal activity, was a mere voluntary "encounter" rather than an interference with a cognizable privacy right so as to vitiate the alleged consent.

Was the activity in the instant case merely a consensual encounter between police and a citizen that does not implicate the Fourth Amendment as discussed in United States v. Mendenhall, 446 So.2d 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)? True, the Fourth Amendment does not prohibit voluntary interaction between the police and citizens because "there is nothing in the Constitution which prohibits a policeman from addressing questions to anyone on the streets." Terry v. Ohio, 392 U.S. 1, 34, 88 S.Ct. 1868, 1886, 20 L.Ed.2d 889 (1968). Such a consensual street encounter between police and a citizen is premised on police officers enjoying "the liberty (again, possessed by every citizen) to address questions to other persons." Id. at 31, 32-33, 88 S.Ct. at 1885-1886. "Ordinarily the person addressed has an equal right to ignore his interrogator and walk away." Id. An

"encounter" becomes a detention as soon as a reasonable person would have believed he was not free to leave. Florida v. Royer, 460 So.2d 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, reh'g, denied, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980); Nease v. State, 484 So.2d 67 (Fla. 4th DCA 1986). Application of this standard makes it clear that there is evidence to support a finding that in this case there was a detention and not merely a consensual encounter.

In his dissent in Snider v. State, 501 So.2d 609 (Fla. 4th DCA 1986) Judge Glickstein correctly perceived that approaching a ticketed passenger aboard a bus is not like approaching a citizen on the street. Unlike the situations in Royer or Mendenhall, Petitioner was not approached in a street or public area where people are free to come and go. Petitioner was seated on a bus, in the midst of a journey, for which he had legally purchased a ticket. Only ticketed passengers and employees of Trailways bus lines would board this northbound bus. These police officers were previously authorized by the Trailways bus lines to board the buses and question the passengers (R6). Accordingly, the officers boarding the northbound bus, to confront the seated, ticketed passengers, display their badges and request to examine their travel documents clearly entailed a show of authority similar to a conductor on a train or a bus employee who would board its common carrier to make sure the passengers' papers were in order. These officers were exercising a superior right not enjoyed by any other citizen to approach Petitioner and question

him regarding his travel plans, destination, and luggage. Cf., Alvarez v. State, 515 So.2d 286, 290 (Fla. 4th DCA 1987) (person in sleeping car on trail should legitimately expect that "his or her privacy will not be intruded upon, with the possible exception of a brief entry by a ticket collector, or encounters in the passageway with other similarly ticketed passengers or train personnel").

A passenger aboard a bus has a special privacy interest to be let alone which he does not enjoy in public places. This is emphasized by Justice Douglas, a well-known guardian of First Amendment rights, in his concurring opinion in Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) where he recognized that even precious First Amendment rights would have to give way to the special interest of a bus passenger to be let alone:

> The First Amendment, however, draws no distinction between press privately owned, and press owned otherwise. And if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
>
> In asking us to force the system to accept his message as a vindication of his constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transporting its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

419 U.S. at 306-307, 94 S.Ct. at 2719 (emphasis added). Justice Douglas further noted that bus passengers are captive and not free to ignore the activities on a bus by merely exiting like people on other public places. In the present case Petitioner would not feel free to leave. He could only leave if he were to forfeit his journey.[2]

Since Appellee was already a traveller in the stream of commerce, the rule of Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), should apply here. In that case the Court held that invasion into privacy by conducting a license and registration check of persons travelling the highway cannot be arbitrary; there must be at least a reasonable suspicion that the law is being violated. Since Appellee was already a passenger on a common carrier, he must have, and he asserts he did have, the same rights as all other travellers.[3]

Of course, under some limited circumstances police may invade the privacy of travellers. However, the intrusion cannot be random or arbitrary. For example, in Jones v. State, 483 So.2d 433 (Fla. 1986) this Court recognized that there must be written guidelines and specific procedures created to ensure that arbitrary intrusions into the liberties of citizens do not occur:

> Paramount among all other considerations, the fourth amendment requires that all seizures be based on either: (1) specific evidence of an existing violation; (2) a showing that reason-

---

2 This may explain why no one had ever refused Officer Turner's request to search their luggage (R6).

3 There should be no less protection afforded those who, because of financial considerations, must travel by bus or train, than to those who own cars.

> able legislative or administrative standards are met; or (3) a showing that officers carry out the search pursuant to a plan embodying specific neutral criteria which limit the conduct of the individual officers. ... We agree and find that it is essential that a written set of uniform guidelines be issued before a roadblock can be utilized ... so as to minimize the discretion of field officers, thereby restricting the potential intrusion into the public's constitutional liberties. Written guidelines should cover in detail the procedures which field officers are to follow at the roadblock.

483 So.2d 438 (emphasis added) (citations omitted). In addition, in United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) the Court emphasized that the intrusion into privacy that occurred was not unconstitutional during a permanent roadblock because the "subjective intrusion -- the generating of concern or even fright on the part of lawful travellers" is appreciably less than a roving roadblock. 96 S.Ct. at 3083. The Court also noted that "motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere." Id. In otherwords, assuming that there is a statutory authorization for interfering into the privacy rights of a traveller,[4] there must be minimum guidelines and some type of warning to the public of the potential interference. In this case there were no guidelines for the police to follow nor warnings to the passengers that the police were going to board

[4] Border Patrol agents had the statutory authorization to interrogate those believed to be aliens. Martinez-Fuerte, 96 S.Ct. at 3080 ftnt.8.

the bus and ask questions. As noted by Judge Anstead's dissent in the instant case, citing a trial judge, the traveller does not know how many time he will be intruded upon during his trip:

> In so ruling, I have some strong personal reservations about the drug interdiction program described herein, in spite of the fact that drug smuggling is a major problem in our society today. The procedure is inherently intrusive on a person's right of privacy. It invites abuse and tends to diminish fourth amendment protections. For example, how may times must a person be confronted with this procedure while he is travelling from Miami to New York City? And, where will it all end. i.e., can it be used on board airlines during a layover? Can police officers go through a neighborhood, knocking on doors and asking for consent to search houses in their war against drugs?

(A17), 531 So.2d at 198, (emphasis added). This arbitrary intrusion which is without warning and is potentially unlimited is like the random intrusions which the Supreme Court does not tolerate:

> We concluded there that random roving patrol stops could not be tolerated because they "would subject the residents ... [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of the Border Patrol officers.... [They] could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road.. .." Ibid. There also was a grave danger that such unreviewable discretion would be abused by some officers in the field. Ibid.
>
> Routine checkpoints stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere.

Martinez-Fuerte, 96 S.ct. at 3083 (emphasis added). In this case if Petitioner hadn't consented, the usualy procedure would be fore the West Palm Beach Police to notify the police at the next stop in Ft. Pierce (R15). Any consent after the arbitrary intrusion into Petitioner's privacy was invalid, State v. Frost, 374 So.2d 593 (Fla. 3d DCA 1979), or tainted the voluntariness of any consent. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75. L.Ed.2d 229 (1983). There can be no valid consent unless there is clear and convincing evidence of an unequivocal break in the chain of illegality between the unlawful detention and the purported consent. Norman v. State, 379 So.2d 643, 646-647 (Fla. 1980); Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987). Here, there was no such break.

The fact that Petitioner was advised of his right to refuse is not an unequivocal break in the chain of illegality. This statement was given during the same time as the coercive circumstances noted by the trial judge. In Norman v. State, 379 So.2d 643, 647 (Fla. 1983), this Court made it clear that consent is voluntary "only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action." Because the coercive circumstances occurred at the same time as the warning, the state cannot prove that there was clear and convincing evidence that the warning disspated those circumstances.

In addition, it should be noted that Petitioner was probably never given an effective advisement of his right to refuse to consent. The officers had consent forms available but did not

use them because of time contraints (R16). Officer Turner testified that if the forms were used it would take two or three minutes to explain consent (R19). Turner testified that people would then hesitate to sign the written consent form (R19). Turner testified that once the officers found something then a written consent form would be presented (R19). Under these circumstances, the simple advisement of the right to refuse consent was not an effective advisement as required. See, Schneckloth v. Bustamonte, 412 U.S. 218, 231, 93 S.Ct. 2041, 2050, 36 L.Ed.2d 854 (1973) (advisement is not dispositive because it normally is impracticle to inform of the detailed requirements of an effective warning). The advisement during the time of the intimidating circumstances, is not an unequovical break in the chain of illegality. The trial court did not err in suppressing the evidence.

B. The totality of the situation supports the trial court's finding.

Assuming arguendo that there was no arbitrary intrusion involved in this case, the trial court's finding that the consent was invalid must still be affirmed. As Judge Anstead notes in his dissent -- "... the majority fails to honor the fundamental rule of appellate review that reviewing courts must interpret the evidence and reasonable inferences therefrom in a manner to sustain the trial court's ruling. McNamara v. State, 357 So.2d 410 (Fla. 1978)." (A13), 531 So.2d at 194. Judge Anstead then listed some factors in this case which could support a factual finding in support of the suppression. The following factors

listed by Judge Anstead as being present would also be relevant to whether Petitioner was coerced into acquiescing to apparent police authority:

> 1) the contrast between access to an obviously public bus terminal and the interior of an interstate bus in transit where access to the latter is restricted to passengers with tickets and others having a good reason to be on board with the authorization of the bus company;
>
> 2) the novelty of a police search of a bus in this country and the unfamiliarity of many passengers with their right to refuse consent for a search by the police without having to fear arrest or other repercussions as a consequence of that refusal;
>
> 3) the tremendous authority placed in the hands of police officers to compel obedience to their requests and the peaceful deference of that authority urged upon our citizens. When uttered by a person in authority, a "may" often becomes a "must";
>
> 4) the implicit accusatory nature of a request by the police to search a particular passenger's luggage for illegal drugs;
>
> 5) the small area to which a seated passenger is confined and the resulting conspicuousness attendant to a passenger's attempt to publicly decline to give consent, to refuse further conversation with police or to leave a bus already filled with passengers;
>
> 6) the narrow aisles which are automatically "blocked" merely by the presence of a police officer even though the officer may not "intend" that his presence in the aisle should serve to "detain" the passengers whose bags he seeks to search;

> 7) the brief duration for which the bus is stopped for departure;[5]
>
> 8) the police officers' presence on board right up until the time that the bus is ready to depart, thereby making the passenger less likely to depart, thereby making the passenger less likely to view exit and reentry onto the bus to be a reasonable alternative.

---

[5] The police officers testified that they only had ten minutes to check the bus during the boarding operation.

(A15), 532 So.2d at 196.

As explained in Schneckloth v. Bustamonte, 412 U.S. 227, 228-229, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973), no matter how subtle the implied coercion, the resulting consent is invalid:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed.2d 746:
>
> > "It may be that it is the obnoxious thing in its mildest and least repulsive form: but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to

> be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In the present case Petitioner as a ticketed passenger aboard a bus, knowing that police were not aboard as ticketed passengers, would reasonably believe that the police were aboard the bus only due to their special status. Petitioner had no warning that the police regularly boarded buses. When questioning Petitioner the police stood over him in the narrow aisle of the bus. By telling Petitioner that there was an investigation into smuggling and then requesting to search his luggage, the police request was implicitly accusatory. Certainly, no reasonable person, with the exception of trained judges and lawyers, would feel free to ignore the intrusion into his privacy by police.[5] This is exemplified by the fact that no one had ever refused Officer Turner's request to search their luggage (R6).

---

[5] Indeed, these are the very comments by Judge Letts in his dissent in Bostick v. State, 510 So.2d 321, 323 (Fla. 4th DCA 1987):

> Moreover, my version of common sense tells me that a paid and ticket passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover while the policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

It is well-settled that for consent to be valid it cannot be mere acquiescence to apparent police authority. Lockwood v. State, 470 So.2d 822 (Fla. 2d DCA 1985); Mosley v. State, 335 So.2d 880 (Fla. 4th DCA 1976); Bailey v. State, 319 So.2d 22, 27 (Fla. 4th DCA 1975). The circumstances in this case support a finding that Petitioner merely acquiesced to apparent police authority. The following portion of State v. Kerwick, 512 So.2d 347 (Fla. 4th DCA 1987) further illustrates how coercive these bus intrusions are:

> "Even if the Rulings of Law made herein were not amply supported by the evidence, the Court would find extremely troublesome the admitted policies of these Broward deputies regarding 'encounters' with the public. Despite the apparent protections of Article One, Section 23 of the Florida Constitution, commonly referred to as a 'right of privacy', the evidence in this cause has evoked images of the days, under other flags, when no man travelled his nations's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-weilding police for identification, travel papers -- in short a raison d'etre -- is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, or Stalin's Moscow, or it is the white supremacist South Africa. Yet, in Broward County, Florida, these police officers approach every person on board buses and trains (that time permits') and check identification, tickets, ask to search luggage -- all in the name of 'voluntary cooperation' with law enforcement -- to the shocking extent that one officer, Damiano, admitted that during the previous nine months, he, himself, had searched in excess of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck. It certainly shock's the Court's conscience that the American public would be 'asked,' at badge-point, without the slightest suspicion, to interrupt their schedules, travels and individual liberties to permit such intrusions. This Court

> would ill-expect any citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. It is much like the feeling that an ordinary citizen has on seeing a patrol car behind him, or observing blue lights flashing, or being confronted by a police officer asking questions,

512 So.2d at 348-349 (emphasis added). The show of authority and intrusion into Petitioner's privacy in this case supports the trial court's ruling which should be affirmed.

C. The search went beyond the scope of any alleged consent.

Assuming arguendo that Petitioner's alleged consent was not merely acquiescence to apparent police authority, nor tainted by the police intrusion into his privacy, because the search went beyond the scope of the alleged consent the trial court did not err in suppressing the evidence. See, Stuart v. State, 360 So.2d 406 (Fla. 1978) (trial court's ruling should be upheld under the "right for any reason" doctrine).[6]

---

6 See footnote 7 of Judge Anstead's dissent (A16), 531 So.2d at 197:

> Another issue ignored by the majority is the extent of the consent, if any, given to search Avery's luggage. It appears factually that any consent sought and obtained was to "look through" the luggage, not to forcibly tear open a sealed and wrapped container. See, McPherson v. State, No, 87-2226 (Fla. 4th DCA) (Anstead, J., dissenting); Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983); State v. Cross, 13 F.L.W. 270 (Fla. 3d DCA January 26, 1988).

In the present case, Petitioner according to the testimony of the state's witness, but not the finding of the trial court,[7] gave consent to the officers to look inside his luggage. However, there was no consent to open any containers within the luggage. When the police tore apart the foam rubber to search inside of it the search went far beyond the scope of any consent which was given. See, State v. Cross, 13 F.L.W. 270 (Fla. 4th DCA January 26, 1988) (consent to search luggage did not constitute permission to search inside tape-wrapped ball located within luggage).

Recently there has been some controversy as to whether a consent to search within luggage automatically constitutes a consent to search within closed containers within the luggage, For example, in State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982) a panel of the Fourth District Court of Appeal held that once a suspect consented to the search of his suitcase, such consent extends to any container within the suitcase, This holding was based on the Court's extension to consensual searches of the United States Supreme Court decision in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 2d 572 (1982), which held that where probable cause exists to search a vehicle, the contents of that vehicle, including any closed containers, may also be searched.

---

[7] The trial court found that if there was any consent it was coerced (R42).

In State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985), the Third District Court of appeal expressly refused to adopt the Wargin holding. The Fuksman court pointed out that **Ross** emphasized the existence of probable cause as a predicate to its decision. Thus, the considerations on which **Ross** was grounded are not applicable in a consent to search context where there is not probable cause:

> If a person consents to the search of a vehicle containing luggage and a search of the vehicle alone reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no dilemma because he had no choice: he must let the consenting party be on his way. It is because the citizen has not given police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

State v. Fuksman, supra at 1069-1070 (emphasis in original).

Other decisions by the district courts of Florida have also refused to extend the consent to search luggage to packages contained within the luggage. See, Hutchinson v. State, 505 So.2d 579 (Fla. 2d DCA 1987) (consent to search purse does not constitute consent to search small unopened bag in purse); State v. Cross, 13 F.L.W. 270 (Fla. 3d DCA, January 26, 1988) (consent to search luggage did not constitute permission to search inside tape-wrapped ball located within luggage).

The conclusion in these cases that consent to search luggage does not mean that all containers in the luggage may be rifled receives support from the United States Supreme Court's decision in United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed. 2d 110 (1983) decided subsequent to United States v. Ross, supra, in which Justice O'Connor, writing for the majority, re-affirmed the continuing validity of United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), requiring police to obtain a warrant before searching closed containers:

> The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Although in the context of personal property, and particularly containers, the Fourth Amendment challenge is typically to the subsequent search of the container rather than to its initial seizure by the authorities, our cases reveal some general principles regarding seizures. In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. See, e.g., Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927). Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the court has interpreted the amendment to permit seizure, of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is Present. See, e.g., Arkansas v. Sanders, 442-U.S. 753, 761, 99 S.Ct. 2586, 61 L.Ed.2d 253 (1979); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); Coolidge v. New Hampshire, 403 U.S. 433, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

103 S.Ct. 2637 (emphasis added) (footnotes omitted). Thus, the United States Supreme Court cases are very far from suggesting that the scope of a "consent" search is automatically extended, in the absence of probable cause, to include search of every closed container discovered.

In the present case assuming arguendo that the police obtained consent to search Appellant's luggage, this consent did not extend to the packaging inside the luggage.8 Furthermore, the alleged consent to look inside of the luggage would not extend to the destruction of items within the luggage -- i.e., the tearing apart of the foam ball. As noted in State v. Kerwick, 512 So.2d 347 (Fla. 4th DCA 1987) (adopting the trial court's ruling), there is no doubt that a citizen's consent to search within their luggage does not extend to destroying objects within the luggage:

---

8 In Sanders, the Court explained:

> "The police acted properly -- indeed commendably -- in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marijuana .... Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle ... and seizing the suitcase they suspected contained contraband." 442 U.S., at 761, 99 S.Ct. at 2591.
>
> The Court went on to hold that the police violated the Fourth Amendment in immediately searching the luggage rather than first obtaining a warrant authorizing the search. Id., at 766, 99 S.Ct. at 2594. "That holding was not affected by our recent decision in United States v. Ross, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982)."

United States v. Place, supra, ftnt.3, 103 S.Ct. at 2641.

> "Upon hand checking the large suitcase, the officer found a smaller bag therein, which was locked. No request was made by the officer to unlock or open the smaller bag. Defendant testified that if they had requested the right to cut into the luggage, she would have refused. The officer then cut the bag open and pulled from the package a small amount of substance later tested to be cocaine,... The Court rules that any 'consent' amounted to a permission to 'check' the baggage and was clearly limited to that. It did not extend to the type of physical violation and destruction of personal property of a 'cooperative' individual that was demonstrated by testimony. The Court has no doubt, that *any* citizen would object to the type of action taken by the officers in this case, and finds such activity a search and seizure which is, at best, 'unreasonable', and at worst, a flagrant denial of this Defendant's First and Fourth Amendment rights,

512 So.2d at **348** (emphasis added). The consent was logically limited to the opening of the luggage, Thus, the suppression of the evidence must be affirmed because the police exceeded the scope of any alleged consent by the destruction of the foam ball. The trial court did not err in the present case by suppressing the evidence.

D, Invasion into the right to privacy guaranteed under Article I, Section 23 of the Florida Constitution.

Assuming, arguendo that no violation of the right to be free from unreasonable searches and seizures guaranteed by the United States Constitution occurred, the intrusion, without any suspicion of illegal activity, into Petitioner's privacy by

boarding the bus and questioning him in the midst of his journey violated Petitioner's right to be let alone under Article I, section 23 of the Florida Constitution.

Article I, section 23, reads as follows:

> Section 23. Right to privacy.--Every natural person has the right to be let alone from government intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records and meetings as provided by law.

Fla.Const., Art. I, §23. Section 23 "expressly and succintly provides for a strong right of privacy not found in the United States Constitution." Winfield v. Division of Pari-Mutuel Wagering, Department of Regulation, 477 So.2d 544, 548 (Fla. 1985). As explained by this Court's opinion in Winfield the right to be let alone from governmental intrusion was made as strong as possible by excluding words such as "unreasonable" or "unwarranted":

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succintly provides for a strong right or privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

477 So.2d at 548 (emphasis added). This Court also noted that it is the state's, and not the federal government's, responsibility to protect the personal privacy of its citizens to be let alone by other people:

> However as previously noted, the United States Supreme Court has also made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: "the protection of of a person's right to privacy:-his right to be let-alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 350-51, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Id. Thus, Section 23 must be relied upon to determine if Petitioner's right to be let alone during his journey was violated.

It must be recognized that Section 23 is not an absolute guarantee against all governmental intrusion. However, the right to privacy is a fundamental right and it is the burden of the state to justify the intrusion into that right. Winfield, supra at 546. The state's burden was defined by this Court in Winfield, supra, as follows:

> The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. See, Estate of Greenberg, 390 So.2d 40 (Fla. 1980).

477 So.2d at 547,

In the present case there was no compelling state interest to board a bus and question its occupants without any suspicion that an illegal activity was occurring on the bus. Assuming

arguendo that there was a compelling state interest, the state interest was not being attempted through the use of least intrusive means. The police operation of obtaining truly voluntary cooperation from the public would only be advanced, and not compromised, if it occurred in the less coercive atmosphere of the station or terminal. Aside from the psychological coercion of questioning the passengers on board the bus minutes before it is to leave[9], there is no necessity in boarding the bus and cornering passengers to conduct police business where there is no founded suspicion of criminal activity. The police could as easily conduct its business inside of the station without the resulting intrusion into an individual's rights to be let alone during his travels.[10]

Petitioner's right to be let alone under Article I, Section 23, if such words mean anything, was violated in the instant case.

---

9 Officer Turner testified that at the time Petitioner was confronted there would only be a couple of minutes remaining before the bus would leave (R19).

10 What is generally not revealed in the bus cases is how many times the right to be let alone is violated. However, one officer using this technique over a nine month period searched over- 3,000 bags. State v. Kerwick, 512 So.2d 347, 348 (Fla. 4th DCA 1987).

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner requests this Honorable Court to reverse the decision of the district court and affirm the ruling of the trial court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) ~~820-2150~~ 355 2150

Jeffrey Anderson
JEFFREY ANDERSON
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to RICHARD BARTMON, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 5th day of DECEMBER, 1988.

Jeffrey Anderson
Of Counsel.