IN THE SUPREME COURT OF FLORIDA



JUNIOR McPHERSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,295:

# PETITIONER'S BRIEF ON THE MERITS

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## AUTHORITIES

## PRELIMINARY STATEMENT

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

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

## STATEMENT OF THE CASE AND FACTS

Petitioner, JUNIOR McPHERSON, was charged with possession of more than 20 grams of marijuana by information filed September 13, 1986 (R-103-104). Petitioner filed a pretrial motion to suppress the physical evidence which was discovered during routine searches of bus passengers on a northbound bus at the West Palm Beach Greyhound terminal. (Supplemental Record).

On April 29, 1987, the suppression hearing was held, the Honorable Carl H. Harper, Circuit Judge presiding (R-2).

On September 4, 1986, around 12:25 a.m. petitioner, Junior McPherson, was a paid passenger seated in a Greyhound Bus at the West Palm Beach Greyhound Bus Station while it made a scheduled stop en route from Miami to New York City. At that time there were two West Palm Beach Police officers at the station, Officers Turner and Fahey. They were assigned to the drug interdiction police unit (R-9). For their entire eight hour shift that night they were assigned to board eight northbound buses to conduct "consent" searches of all passengers without regard to probable cause, founded suspicion or any drug courier profile within time permitted by the bus layover (R-44,46,62-63).

The officers stated that they would attempt to search all passengers, starting at the rear of the bus (R-53) except for any 70 year old nuns, small children or people whom they knew (R-46,70). Although written consent to search forms are available for their use, the officers did not use them because they were too time consuming on such a brief layover (R-66). If they had to use the form they would only get to search one or two persons at each rest

stop (R-46,37). The officers stated that if a passenger refused to consent to a search of his carry-on luggage or he refused to talk the officers would not immediately move on (R-34). First they would ask why he did not want to speak or he would be asked to consent to a dog sniff search of his luggage outside the bus. If the passenger again refused, then the officers would move on, though consent was rarely withheld. Officer Fahey estimated about ten percent of the bus searches would result in locating illegal drugs (R-69).

Fahey and turner said that they stopped requesting consent to search when appellant was arrested (R-46). They said it was necessary to have two officers to conduct this procedure because it was not safe for one officer alone and because they needed a witness to any consent that would be given (R-46,65).

Here, Turner testified that they approached an unknown bus driver and asked if this bus had been searched by the Broward Sheriff's Office. When they found it had not, they sought and received his permission to enter the bus (R-10,51). After speaking with four or five other passengers and searching some of them (R-13,61), Turner and Fahey approached petitioner who was seated at a window seat in the rear area of the bus (R-14,50). Turner stood next to petitioner in the aisle (R-20). Turner identified himself as a police officer, displayed a badge and said that he was investigating the transportation of narcotics and weapons (R-55). Turner then asked petitioner if he was willing to answer some questions and petitioner agreed. Turner asked petitioner where he

was going and petitioner said to New York (R-40). Turner asked for petitioner's bus ticket to verify his answer and gave it back to petitioner.

Petitioner was then asked if he had any luggage and he said that he did not. Turner then asked petitioner whether the tote bag on the floor between his legs was his and petitioner said that it was (R-17-18). Turner then asked petitioner if he would consent to the search of his tote bag. Turner also told petitioner that he had the right to refuse consent (R-18).

Petitioner opened the bag on his lap and started going through the items in it. Turner then again asked if he could search it and petitioner said sure (R-19,57). Petitioner put the bag on the empty seat next to him and Turner searched it himself. Turner's search revealed two small bundles wrapped in trash bags which Officer Turner squeezed and then punctured in order to view the contents without further consent from petitioner (R-19). Turner testified that he always looked in packages and would even unwrap presents with bows if he found them contained within a passenger's luggage (R-40).

Inside the plastic bag Turner saw marijuana and petitioner was arrested.

Petitioner was taken to the West Palm Beach Police Station. Fifteen minutes after the arrest he was given his Miranda rights and he made a statement admitting that he got the marijuana in Miami and was transporting it to New York for a friend (R-27). At this same time appellant signed a written consent to search form concerning the earlier search of his tote bag.

Petitioner is a 28 year old black male who lives in New York City. He did not ask to leave during this procedure (R-57). He testified that he agreed to the search of his tote bag because of the way the police approached him, because he felt he had no other choice; it was late at night and he was in a town where he did not know anyone (R-74,78).

After the hearing, the court announced it intended to suppress the evidence, that such police conduct was reprehensible and appeared to be an illegal stop. Specifically the court commented that it was offensive and reprehensible that the officers spent their entire shift searching passengers on northbound buses. The court said: "They don't get on there just to have a little friendly conversation or citizen contact but they are there for the avowed purpose of searching everybody on that bus." (R-92). The court requested a memorandum of law and said it would study it even though the court's initial impression was that it was a stop without a founded suspicion (R-94).

After reading written memorandum from both state and the defendant, the court reluctantly denied the motion to suppress finding that the court was compelled to deny the motion on the authority of Rodriquez v. State, 494 So.2d 496 (Fla. 4th DCA 1986). (R-117-121). In the final paragraph of the court's order denying the motion to suppress the court stated:

> 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 many times must a person be confronted with this procedure while he is traveling from Miami to New York City? And, where will it all end, i.e. can it be used onboard airlines during a layover? Can police officers go through a neighborhood, knocking on doors and asking for consent to search houses and contents in their war against drugs? Nevertheless, as noted above, this court felt compelled to deny the motion on the basis of the controlling appellate court cases cited herein.

(R-120).

Petitioner then entered a negotiated plea of nolo contendere reserving the right to appeal the order denying the motion to suppress. Trial counsel specifically agreed the issue presented by the motion to suppress was dispositive of the case (R-122).

Petitioner was adjudged guilty and sentenced to a term of six months imprisonment in the county jail, which was stayed pending appeal (R-124). On August 31, 1988, the district court affirmed petitioner's conviction in a per curiam opinion citation to State v. Avery, 531 So.2d 182 (Fla. 4th DCA 1988). (Appendix - 1). Petitioner timely filed his notice of invocation of discretionary jurisdiction. On February 7, 1990, this Court accepted jurisdiction and ordered briefs on the merits. This brief follows.

## SUMMARY OF ARGUMENT

The police department's policy of working the buses is an investigative practice which implicates the protections of the Fourth Amendment and Article I, Section 12 of the Florida Constitution. Under these circumstances, the officers restrained petitioner's freedom of movement under a show of authority in an intimidating and coercive situation which constituted a detention. A reasonable traveler would not have felt free to leave or free to disregard the questions and walk away since there was no place to which he might leave. The officers cornered petitioner, standing over him in the aisle while he, a ticketed passenger on a northbound bus, made a short rest stop in West Palm Beach. This Court's recent decision in Bostick v. State, 14 F.L.W. 586 (Fla. November 30, 1989), requires reversal.

## ARGUMENT

### POINT ON APPEAL

**BOSTICK v. STATE REQUIRES REVERSAL BECAUSE THE OFFICERS' CONDUCT OF CORNERING PETITIONER IN HIS SEAT ON A NORTHBOUND BUS WAS NOT A VOLUNTARY ENCOUNTER BUT A FORCED ONE.**

This case is controlled by this Court's recent decision in Bostick v. State, 14 F.L.W. 586 (Fla. November 30, 1989), rehearing denied January 29, 1990. The recently developed investigative technique of law enforcement officers "to work the buses" is a practice which implicates the protections against unreasonable seizures of the person guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 12, Florida Constitution. The trial judge at the motion to suppress hearing strongly denounced the police conduct as reprehensible and found it to be an illegal stop. But for the district court's previously decided case of Rodriquez v. State, 494 So.2d 496 (Fla. 4th DCA 1986), the trial court would have granted the motion to suppress in the first instant. Judge Harper specifically said that this "procedure is inherently intrusive on a person's right of privacy." (R-120).

This is exactly what this Court held recently in Bostick v. State, that under circumstances nearly identical to those described here, a reasonable traveler would not have felt that he was free to leave or that he was free to disregard questions of the officers and walk away. United States v. Mendenhall, 446 U.S. 544 (1980). In fact, there was no place for petitioner to walk away to.

Petitioner's case was decided in the district court on the authority of State v. Averv, 531 So.2d 182 (Fla. 4th DCA 1988), which was reversed by this Court in Avery v. State, 14 F.L.W. 591 (Fla. Nov. 30, 1989), on the authority of Bostick. Bostick requires reversal. The police conduct here constituted a detention, not a voluntary encounter. Bostick v. State, supra. The officer's testimony in this case is particularly revealing for they specifically said that if someone indicated any unwillingness to speak to them would not terminate their efforts to search the passenger (R-34-35).

The marijuana in petitioner's luggage was discovered by means of an illegal search and seizure in contravention of petitioner's constitutional protections under the state and federal constitution so reversal is now required. Bostick v. State, supra.

## CONCLUSION

**WHEREFORE**, based on the authority in Bostick v. State, reversal is now required in the instant case.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 5 day of March, 1990.

Margaret Good

MARGARET 'GOOD
Assistant Public Defender