IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,295

JUNIOR McPHERSON,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

****

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant, and Respondent the appellee, in the appeal before the Fourth District Court of Appeal. Petitioner was the defendant in a criminal prosecution arising out of the Seventeenth Judicial Circuit in and for Broward County, Florida. The parties will be referred to as they appear before this Honorable Court, except that Respondent may be referred to as the State.

The symbol "R" refers to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts only those portions of Petitioner's Statement of the Case and Facts which relate to the posture of the Case.

Respondent's provides the following Statement of the Facts:

Officer John Turner testified he was with Officer Chris Fahey at the West Palm Beach Greyhound Bus Station at about 12:25 a.m. on September 4, 1986. They were on duty, dressed in plain clothes, and displayed no weapons. Their duties were to board the busses and check for people transporting illegal drugs (R 8-9).

Officer Turner asked the driver of a New York bound Greyhound Bus whether the bus had been checked by the Broward County Sheriff's Office when it was in Fort Lauderdale. He said, "No." Then Officer Turner asked for and received permission to board the bus, a procedure conducted with the same bus driver on prior occasions (R 10-11). The bus was at a normal pick up and rest stop and the police officers did not delay the bus (R 12).

There were about 15 to 20 people on the bus. When Officer Turner boarded the bus he went to the rear and talked first to the passenger sitting in the last seat of the bus (R 12). No announcement restricting movement was made. Officer Turner only displayed a badge carried on a chair (R 13). Passengers could come and go freely. They went and got coffee and used the rest rooms (R 13).

After a few minutes, and after contacting four or five other passengers, Officer Turner reached the petitioner, Junior McPherson (R **13-14**). Petitioner was sitting at a window seat on the side opposite the driver, and had a tote bag between his legs. Officer turned contacted him (R **14**).

Officer Turner spoke to the appellant as follows:

> How are you doing tonight?
> My name is Officer Turner.
> I am a police officer for the
> City of West Palm Beach. This
> is Officer Fahey. Do you mind
> if I talk to you?

Petitioner responded, "No, I don't mind" (R 15). Officer Turner then explained they were investigating the transportation of illegal narcotics and weapons on board the bus line. He asked petitioner where he was going and if he had any luggage on board the bus (R **15**). Petitioner said he was travelling to New York City. The officer asked to see his bus ticket and Petitioner gave Officer Turner his ticket (R 16). After verifying that the destination was New York City, Officer Turner returned the ticket to Petitioner (R **17**).

Petitioner then answered he had no luggage on board the bus **(R 17)**. Officer Turner, having sight of the tote bag, asked Petitioner if the tote bag was Petitioner's and Petitioner said, "Yes" (R **17**). Officer Turner then asked Petitioner "if he would consent to a search of his bag for illegal narcotics or weapons and explained to him that he had the right to refuse the search of his bag" (R **18**).

Petitioner pulled the bag up from between his legs and said, "Sure, you can search my bag." Petitioner then unzipped the bag (R 18). He opened it up and shuffled around the contents. Officer Turner then asked if he could search the bag himself (because of the fear of hidden weapons (R 39)). Petitioner set the bag down on the empty aisle seat. Officer Turner then searched the Petitioner's bag and found two bundles wrapped in trash bags which contained marijuana (R 19). Petitioner never withdrew his consent for Officer Turner to search his bag (R 20).

Petitioner never requested to leave his seat or leave the bus while Officer Turner conducted the search. If he had, Officer Turner "would have had to let him leave" (R 20).

After the marijuana was found, Petitioner was advised he was under arrest, was placed in handcuffs and removed from the bus to wait for a police car to transport him to the police station for later questioning (R 20-21).

Prior to questioning, Officer Turner asked Petitioner if he understood English (R 22). He then read him his rights from a rights advisement card which was subsequently signed by Petitioner (R 25). Petitioner never requested a lawyer, spoke freely, and was never coerced. He appeared to fully understand what was happening and did not appear to be under the influence of drugs or alcohol (R 26).

Petitioner said he picked up the marijuana in Miami and was taking it to New York City for a family friend. Petitioner didn't answer how much he was getting paid but he admitted the bag was his and that he knew the marijuana was in his bag (R 27).

Petitioner never refused to answer any other questions. He then signed a consent to search form (R **27**). (The trial court stated it would not consider the written consent form as it was executed ex post facto).

During cross-examination, Officer Turner testified that if passengers tell him they don't want to talk to him then he has to leave. He cannot talk to them (R **34**). No one has said that to him yet (R **35**). Several people have refused to allow a search of their bags (R **35**). When they refuse, Officer Turner asks if they would consent to a sniffer dog checking their unopened bag. Usually they consent to that procedure (R **35-36**). However, some passengers have refused to allow any search and refused to get off the bus. In those cases, Officer Turner and his fellow officers leave (R **36**). This has only happened two or three times (R **36**). The majority of passengers who are searched have nothing in their bags but clothes and personal belongings (R **36**).

Officer Fahey testified to the same surrounding facts as Officer Turner (R **49-54**). Officer Fahey could see and hear Officer Turner's encounter with the appellant (R **54**). He fully corroborated Officer Turner's testimony (R **55-57**). He testified Officer Turner advised Petitioner that he had a right to refuse such a search (R **57**). Petitioner said, "**Go** ahead." Then Petitioner opened his bag and started going through it. Petitioner never asked to leave and never indicated he didn't want to talk with the police officers (R **57-58**).

Petitioner was never detained until after the bag search. His ticket was returned to him after only a few seconds and appellant had his ticket back before the bag was opened (R 58).

Officer Fahey heard Officer Turner pressing on the bundles of marijuana and saw him pull one up and tear it (R 59).

Officer Fahey testified that Appellant's exit was never blocked until the moment he was arrested (R 59).

If someone refuses to talk to the police, that is their right and the police must walk away, according to Officer Fahey. If consent to open and search a bag is refused, the police officer may ask for consent to search by a sniffer dog. If that is also refused, and the person won't come off the bus, that is their option, and the police must walk away from them according to Officer Fahey's testimony (R 60).

Officer Fahey had searched the bag of one other passenger before appellant's bag was searched by Officer Turner. Fahey didn't find anything (R 61). He testified that they try to search everybody, from back to front, on every bus headed North from Miami (R 62).

The officers had never seen or heard of Petitioner before they boarded the bus (R 69).

Petitioner's only direct testimony about why his consent was involuntary was because, "I am in a town where I don't known nobody'' (R 74). On cross examination Petitioner stated he had no choice but to consent, "Well, because how they approached me and I am in a town where I am not familiar with anyone and it was late at night, you know, so that is it" (R 78).

Petitioner testified that he was not threatened and he never requested to get off the bus before he was arrested (R **79-80).**

The trial judge determined the encounter was not a stop pursuant to Florida Statute **gj901.151,** but rather a "mere contact" and that Petitioner voluntarily consented, knowing of his right to refuse (R **95, 119).** Petitioner did not restrict, withdraw or limit his consent to search his tote bag (R **119).**

SUMMARY OF THE ARGUMENT

A person's consent to search is not per se involuntary whenever law enforcement officers board a bus.

The trial court found the appellant freely and voluntarily consented to a search of his tote bag after being advised of his right to refuse permission to search. The trial court found that the State showed the free and voluntary consent by clear and convincing evidence. The trial court found the consent to search the tote bag was not restricted or withdrawn.

The trial court's findings of fact arrive before this court with a presumption of correctness which has not been overcome by Petitioner. Respondent further asserts that the majority opinion in Bostick v. State, 554 So.2d 1153 (Fla. 1989) is erroneously decided and should be receded from in the opinion to be issued in this case.

ISSUE I

PETITIONER'S CONSENT TO THE SEARCH OF HIS LUGGAGE AFTER A VOLUNTARY ENCOUNTER MANDATES AFFIRMANCE OF THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS.

ARGUMENT

Respondent is well aware of this court's holding in Bostick v. State, **554** So.2d **1153** (Fla. **1989),** but respectfully asserts that Bostick is wrongly decided, and urges that this court overrule or recede from that opinion. Respondent would also point out that it is seeking certiorari review of Bostick in the Supreme Court of the United States, and anticipates that that court will quash the opinion issued by this court in Bostick. Respondent would request that this court not issue its opinion in this case until the United States Supreme Court resolves Bostick.

In this case, Judge Carl H. Harper heard the testimony of both of the police officers and Petitioner. Officer Turner testified that he had asked Petitioner for his consent to search his tote bag, and then further explained that Petitioner had the right to refuse to consent to the search. Officer Fahey corroborated Turner's testimony (R **18, 57).** The evidence showed that Petitioner, himself, unzipped the tote bag and began "shuffling" around the contents (R **19, 57).** When Turner asked if he could search the bag himself, Petitioner placed the bag on the empty aisle seat and never withdrew his consent (R **19-20, 57-58).** Petitioner's testimony was that he was coerced into consenting because

> Well, because how they approached me and I am in a town where I am not familiar with anyone and it was late at night, you know, so that is it (R **78).**

Petitioner went on to testify the officers did not threaten him, and that Petitioner never asked to get off the bus (R 79-80). There was no evidence that Petitioner attempted to leave the bus at any time, even though the officers both testified that Petitioner was not the first passenger on the bus they talked to, and one other passenger had had their baggage searched before Officer Turner approached Petitioner (R 61).

Respondent submits there was no evidence that Petitioner was coerced into remaining in his seat before he was approached by Officer Turner. The officers testified there was no announcement restricting the movement of the passengers and that passengers could come and go freely, and that some went for coffee and others used the rest rooms (R **13,** 53-54). Under these circumstances the trial judge could certainly find there was no coercion or threat apparent or implied from the manner in which the officers approached Petitioner, despite Petitioner's self-serving testimony.

The trial court, based upon clear and convincing evidence (which was so clear and so convincing that it overcame the judge's predisposition to suppress the fruits of the search (R 93)), determined that Petitioner had not been seized prior to the discovery of the marijuana and that Petitioner freely and voluntarily consented to a search of his tote bag (according to

the undisputed testimony of the police officers). The trial judge also determined that Petitioner never restricted, withdrew or limited his consent to search, once given (R 119).

The United States Supreme Court, in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), announced a five-point test for use by trial courts in determining the voluntariness of a consent to search. The first factor is whether there was any coercion, either express or implied. Petitioner testified he was not threatened by the officers on the bus (R 79). He was not restrained before the encounter (R 79). Any coercion, even imagined, came from Petitioner himself who arranged his own travel itinerary to be at West Palm Beach at 12:25 a.m. The second factor is whether Petitioner's capacity was limited in any way. Petitioner made no such assertion at trial and has not made it on appeal. Petitioner was 28 years old and testified before the trial court on the motion to suppress. The third factor is whether Petitioner was advised of his right to refuse to consent to the search. As described above, and as found by the trial court, Officer Turner did so advise Petitioner. The fourth factor is whether the police threatened to obtain a search warrant. Both officers testified that if consent to search was withheld and a passenger refused to exit the bus, they would have to "leave" or "walk away" (R 36, 60). The fifth and final factor is whether Petitioner's conduct and/or statements were consistent with a valid consent to the search. Petitioner admitted knowledge of

the contents of the tote bag after a full legal rights advisement subsequent to his arrest (R 22-25, 27). Officer Turner testified Petitioner appeared to fully understand what was happening. Petitioner understood English and was not under the influence of drugs or alcohol (R **26).** For whatever reason, Petitioner gave his consent. Consent made absent coercion, threats or physical force will not be invalidated merely because one "bows" to the surrounding circumstances.

The United States Supreme Court has held that properly conducted consensual searches are constitutionally permissible, that the question of whether a consent is voluntary is a question of fact to be determined from the totality of circumstances on a case-by-case basis, that there is no requirement to advise the person of the right to refuse consent, and that the fourth and fourteenth amendments do not discourage citizens from cooperating with and aiding police to the utmost of their abilities in apprehending criminals. Schneckloth v. Bustamonte. The right of the police to approach citizen passengers and request consent to conduct searches of their persons and luggage has been specifically recognized in the context of public transportation facilities. United States v. Mendenhall, **446** U.S. **544, 100** S.Ct. **1870, 64** L.Ed.2d **497 (1980);** rehearing denied, **448** U.S. **908, 100** S.Ct. **3051, 65** L.Ed.2d **1138 (1980);** Florida v. Royer, **460** U.S. **491, 103** S.Ct. **1319, 75** L.Ed.2d **229 (1983);** Florida v. Rodriguez, **469** U.S. 1, **105** S.Ct. **308, 83** L.Ed.2d **165 (1984).** The critical importance of obtaining citizen cooperation in drug interdiction

was clearly delineated in United States v. Berry, 670 F.2d 583, 594 (5th Cir. 1982):

> The interest of the government in terminating drug smuggling is, on the one hand, very substantial. The toll on our society in lives made wretched, in costs to citizens, and in profits of gross size funneled to the most odious criminals, is staggering. See Mendenhall, supra, 446 U.S. at 561-62, 100 S.Ct. at 1881 (Powell, J., concurring in part and concurring in the judgment); United States v. Oates, 560 F.2d 45, 59 (2d Cir. 1977). Compounding this burden is the difficulty in interdicting a drug trade carried on by highly organized and sophisticated syndicates that are exceptionally well funded and are dealing in an easily transportable, easily hidden commodity. Informing our police that they cannot approach citizens to enlist their voluntary support in ending this trade may be tantamount to preventing its interdiction at all.

The dissent in Bostick by Justice Grimes recognized and stated the controlling federal case law. Moreover, the United States Eleventh Circuit Court of Appeal has recently held differently than this court did in Bostick. United States v. Blake, 888 F.2d 795 (11th Cir. 1989). Blake was also a case arising out of Broward County, Florida, where state police officers approached two travelers, obtained consent for a search, and seized contraband. Although the contraband was later suppressed because the scope of the consent was exceeded, the analytical approach and the propositions of law relied on directly conflict with the Bostick bright line rule. See legal analysis at 798:

> It has long been recognized that police officers, possessing neither reasonable suspicions nor probable cause, may nonetheless search an individual without a warrant so long as they first obtain the voluntary consent of the individual in question. Schneckloth v. Bustamonte, 412 U.S. 218, 92 S.Ct. 2041, 36 L.Ed.2d 854 (1973).
>
> * * *
>
> Whether a suspect voluntarily gave consent to a search is a question of fact to be determined by the totality of the circumstances.
>
> * * *
>
> The determination as to whether a suspect's consent is voluntary is not susceptible to neat talismanic definitions; rather, the inquiry must be conducted on a case-by-case analysis.
>
> Id.

Moreover, a trial court's ruling on a motion to suppress comes to this court clothed with a presumption of correctness. This Court must interpret the evidence and the reasonable inferences derived from it in the light most favorable to the trial court's determination. Smith v. State, 378 So.2d 281 (Fla. 1979). The factual determination on a motion to suppress as to whether there was consent to search was within the exclusive province of the trial judge. See e.g. Snider v. State, 501 So.2d 609 (Fla. 4th DCA 1986) (J. Letts concurring specially).

Based on the foregoing, Respondent would request that this court approve the affirmance of the denial of Petitioner's motion to suppress by the Fourth District Court of Appeal, or in the

alternative, stay the issuance of an opinion in this case until Bostick is decided by the United States Supreme Court.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Respondent respectfully requests that this court approve the opinion of the Fourth District Court of Appeal which affirmed the denial of Petitioner's motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by courier to MARGARET GOOD, ESQUIRE, ASSISTANT PUBLIC DEFENDER, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 23 day of March, 1990.

Of Counsel

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