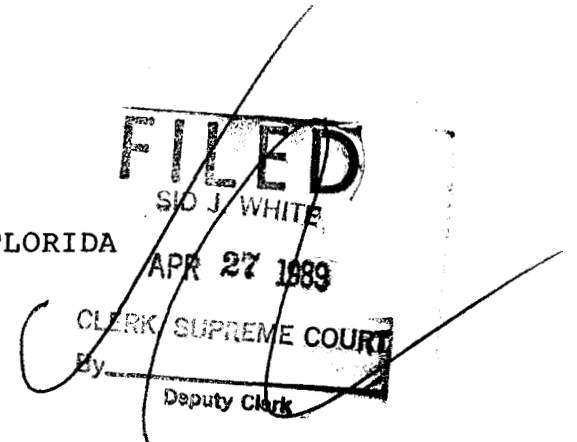
IN THE SUPREME COURT OF FLORIDA



MICHAEL MCBRIDE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,514

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward county, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In this brief, the parties will be referred to as they appear before this court.

The symbol "R" will denote Record on Appeal.

They symbol "A" will denote Appendix

The symbol "RB" will denote Respondent's Brief.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon his Brief on the Merits for his Statement of the Case and Facts with the following additions clarifications and corrections:

When Mr. McBride responded to Detective Palmer's request to search his bag he [McBride] did not understand that the had a right to refuse the search or that he had that choice. Rather, he felt that the detective had given him an ultimatum (R 65-78). Parenthetically, Petitioner notes that Respondent's assertion that Mr. McBride initially "displayed" (RB **33)** his bag to the officer and that he "in fact assisted" (RB **4)** the officer in the search are less than accurate given the fact that Mr. McBride initially pointed to his bag (RB 12-13) and that Mr. McBride helped the detective to go through his bag because he did not want him [Palmer] to mess up his camera (R 66).

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS BECAUSE CORNERING PETITIONER ON A NORTHBOUND BUS WAS NOT A VOLUNTARY ENCOUNTER

The majority of Respondent's brief is devoted to the claim that Petitioner and the dissenteing judges in the district court, have all opined that police approaching a bus pasenger is per se impermissible in and of itself. However, neither Petitioner nor Judge Anstead in his dissenting opinion in State v. Avery, 531 So.2d 1182 (Fla. 4th DCA 1988) have taken such a position.[1] Rather, Petitioner and the trial court recognized that police approaching a ticketed passenger is an important factor, but that such a factor was not dispositive in itself.[2] If such a position was advocated, Petitioner would not have mentioned in his brief such circumstances as police prominently displaying badges while standing in a narrow aisle over Petitioner, the lack of

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1 Admittedly, this position was advocated by Judge Glickstein in his dissent.

2 For example, Petitioner is not positing if adequate warnings and guidelines were provided thus limiting arbitrary police discretion; if the police did not stand over seated passengers with their badges prominently displayed during questioning; if such questioning occurred during a two-hour layover, rather than a layover lasting only several minutes, thus allowing the passengers to leave and reboard the bus to avoid police without fear of forfeiting their journey; if the procedure were more fully explained to them through the use of written consent forms; and if the questioning were not done while the passenger was in the midst of his journey -- that police approaching the passenger on the bus might not be permissible. However, it is police approaching a passenger combined with the other circumstances mentioned above which converts a mere encounter into something more.

warning and guidelines, the lack of use of consent forms, the fact that Petitioner was in the midst of his journeyand had been asleep in his window seat, etc. Instead, Petitioner would have merely argued that because the contact occurred aboard a bus, ipso facto any resulting consent was tainted or coerced. However, an analysis of Petitioner's brief demonstrates that no such position was taken.[3]

If any analysis exudes a per se approach, it is that of Respondent. By merely characterizing Petitioner's brief as a per se analysis, without analyzing all the circumstances in the above mentioned paragraph, Respondent has adopted a position approving arbitrary bus searches as a matter of law.[4] In its brief Respondent has claimed that the four (4) reasons given by Petitioner for suppressing the evidence lack merit. Respondent's claims will be addressed below.

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3 Also, it should be noted that in Hunter v. State, 518 So.2d 304 (Fla. 4th DCA 1987), Judge Anstead, a dissenting judge in the present case, did not take a per se approach, but instead analyzed the total circumstances and concluded that because the defendant had observed other passengers refusing to consent to the search of their luggage prior to his consenting, the defendant had proof that he could refuse to consent without fear and therefore such consent was not tainted or coerced.

4 In its brief Respondent analyzes several of the circumstances of this case. For example, Respondent posited that, as a matter of law a ticketed passenger aboard a bus enjoys no greater right of privacy than any other person in public (RB 5-6), and as a matter of law that being informed of the right to refuse vitiates the effect of any detention. Neither conclusion is true, much less as a matter of law. Respondent's analysis in essence posits because each individual circumstance is not per se coercive, the sum of all circumstances is per se not coercive. Such an analysis does not consider the totality of the circumstances.

A. THE POLICE ACTIONS, WITHOUT A FOUNDED SUSPICION OF CRIMINAL ACTIVITY TAINTED ANY ALLEGED CONSENT.

Respondent claims that the majority in the district court analyzed the factors and circumstances involved and properly concluded that there was merely an "encounter between the police and Petitioner" (RB at **8-9).** However, the Avery majority did not analyze intimidating factors such as those referred to herein, but merely concluded that there was merely an "encounter" and not a situation where Petitioner would not feel free to leave. The fact is police actions of boarding the bus, without tickets, - standing in a narrow aisle over a seated passenger, in effect cornering him, displaying their badges, and requesting to examine travel documents clearly entailed a show of authority superior to the rights possessed by ordinary citizens.[5] Respondent has even recognized such by labeling this procedure as a law enforcement investigatory "technique" (RB at 7). Like other investigatory techniques which could be used to arbitrarily invade the privacy of citizens, such as roadblocks, there must be some written guidelines to ensure that the police procedures used do not arbitrarily invade the privacy of the bus passenger at the officers' unfettered discretion. See Jones v. State, **483** So.2d **433, 438** (Fla. **1986).**[6] Respondent claims that the regularity of

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5 Contrary to Respondent's assertion, ordinary citizens are not permitted to board busses, without a ticket and to stand over seated passengers displaying badges, or other signs of authority, while asking about travel plans and for consent to search luggage.

6 For example, guidelines could ensure that police do not use the procedure only a matter of minutes before the bus is to

these procedures eliminates the necessity of any guidelines. However, this procedure is relatively new and is not used on local public transportation which has regular daily passengers. Rather, it is used on interstate bus routes which a passenger may use only once a year, or once in a lifetime. There is no warning that the procedure could be used just before the bus is to leave. Moreover, the regularity of the procedure, without guidelines limiting the discretion of police, merely heightens the quantity of arbitrary invasions into a traveller's privacy.

Respondent also claims that there was no actual police misconduct such as force or threats of force, and the only restraints on Petitioner were caused by the circumstances that bus travellers normally endure and not by any actions of the police. However, the police, by their actions of boarding the bus midjourney and prominently displaying their badges while standing in a narrow aisle over a seated sleeping passenger, took advantage of the circumstances[7] that bus travellers normally endure so that a reasonable passenger would not feel free to leave. See Nazario v. State, 13 F.L.W. 2385, 2387 (Fla. 4th DCA October 26, 1988) (Webster, J., dissenting) (to conclude that reasonable person would have felt free to get up and exit bus in a strange community is "absurd"). As explained in Michigan v. Chesternut, ___ U.S. ___, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988), whether a

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leave. This would give the passenger the opportunity to exit the bus and reboard without forfeiting his or her journey.

7 For a more complete, but not exhaustive, listing of the circumstances see Judge Anstead's dissent in State v. Avery, 531 So.2d at 196.

person feels free to leave will not be based solely upon police conduct, but will be a function on the setting in which the conduct occurs:

> Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.

108 S.Ct. at 1979. In the instant case due the police actions combined with the particular circumstances which police waited for, and took advantage of, a reasonable person would not feel free to leave the bus and forfeit his journey.

Respondent also indicates that Petitioner being a ticketed passenger aboard a bus has no more significance than if he had been some other place in public. However, as noted in Petitioner's brief on the merits at 13-14, a passenger aboard a bus is a captive audience and is not free to ignore the activities on a bus by merely exiting like people in other public places. Lehman v. City of Shaker Heights, 418 So.2d 298, 306-307, 94 S.Ct. 2714, 2719, 41 L.Ed.2d 770 (1974) (Douglas, J., concurring). In United States v. Hammock, 2 F.L.W. Fed. C1537 (11th Cir. November 18, 1988) the special circumstances of the setting aboard a bus, as opposed to other places, was noted:

> We recognize that actions by law enforcement officers that would not constitute an arrest in, for example, an airport environment, see e.g. Berry, 670 F.2d at 594-595, might constitute an arrest when used to interdict drug

> couriers travelling by bus, because of the inherent limitations on a bus passenger's freedom of movement.

2 F.L.W. Fed. at C1539.[8]

Respondent and the district court below in Avery both rely heavily on I.N.S. v. Delgado, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984) to justify the conclusion that a mere consensual encounter occurred, as opposed to an intrusion into Petitioner's expectation to be free from intrusion, despite the existence of a psychological environment in which he "might be thought to be afraid that he or she was not free to leave." 531 So.2d 190.[9] Delqado is not really applicable to the instant situation. First, the encounters in Delqado were in a workplace where the workers do not enjoy the same freedoms or privacy interests as bus passengers in interstate commerce. In Delgado the Supreme Court emphasized that it was not the presence of police authority that would make the workers not free to leave, rather

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8 In Hammock the ultimate holding was there was no arrest because the officers "took great pains to ensure that the passenger would feel free to exit" by standing behind them outside the aisle during questioning and because it was the defendant who initiated the conversation. Here, unlike in Hammock, Petitioner asleep did not initiate the conversation and common experience plainly suggest that two men standing in the aisle of a bus would effectively block passage. Compare Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983) (officers positioning themselves to block passengers is a factor in determining Terry stop).

9 In addition, in United States v. Rembert, 694 F.Supp. 163 (W.D. N.Car. 1988) a district court judge relied almost exclusively on Delgado to conclude that a reasonable person would feel free to leave the bus in another situation where police boarded a bus. In Rembert the district judge did not analyze the totality of the circumstances involved in a case such as this. In addition, the reliance on Delgado was misplaced.

it was their voluntary obligation to their employers. 104 S.Ct. at 1763. In the present case it was not a voluntary obligation to someone else that would make Petitioner feel he could not leave. Instead, he could only leave if he forfeited his journey, i.e. an obligation owed to him.

More importantly, unlike here, the workers in Delgado sought injunctive relief. Thus, as the Court explained, only the actual description of actual encounters between the actual respondents and the I.N.S. agents could be considered in deciding Delgado. 104 S.Ct. at 1763, ftnt.4, 1765. Unlike here, because the particular respondents in Delgado were actually permitted to leave the building during the survey, 104 S.Ct. at 1764 ftnt.7, it could not be said that the respondents did not feel free to leave. Finally, in Delqado the respondents were merely asked where they were from. 104 S.Ct. at 1764. The questioning did not involve randomly requesting consent to search one's personal belongings. It must be remembered that a consensual encounter between police and citizens is premised on the police officer's enjoying "the liberty [possessed by every citizen] to address questions to other persons." Terry v. Ohio, 392 U.S. 1, 31-33 (1968). While normal citizens frequently ask one another where they are from, citizens do not ask one another for consent to search luggage for drugs. It is only due to the show of police authority that such a request is granted.[10]

[10] Here, Petitioner stated he felt he did not have the option of refusal, but rather felt the intimidating detective had given him an ultimatum (R 71-77),

Respondent alternatively claims that the advisement of the right to refuse as a matter of law removes the taint of the detention. This claim is specious. This is especially true where Petitioner was informed of the right to refuse during the time of the coercive circumstances.[11] There was no unequivocal break in the coercive circumstances where, in fact, the advisement of the right to refuse occurred only during the presence of those same circumstances. In addition, the simple advisement of the right to refuse is not an effective advisement as required. See Schneckloth v. Bustamonte, 412 So.2d 218, 231, 93 S.Ct. 2041, 2050, 36 L.Ed.2d 854 (1973) (advisement is not dispositive because it normally impractical to inform as "the detailed requirements of an effective warning"). This is precisely why the presentation of written consent forms prior to obtaining consent is important.

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[11] If Respondent were correct on its claim, consent would be voluntary where the accused was informed of his right to refuse while a gun was pointed at his head. As noted in United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973) knowledge of the right to refuse does not necessarily dissipate the taint of a coercive situation:

> Bustamonte held that "knowledge of a right to refuse is a factor to be taken into account, [but] the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent." Schneckloth v. Bustamonte, supra, 412 U.S. at 249, 93 S.Ct. at 2059. Bustamonte cuts two ways. The knowledge of the right to refuse consent is no longer a necessary condition for valid consent, but neither is it necessarily a sufficient condition. It is only an element to be considered as part of the "totality of circumstances." What is required is a "careful sifting of the unique facts and circumstances of each case."

492 F.2d at 1264.

Where the advisement of the right to refuse was only given during the time of the coercive circumstances, and was not a detailed effective warning, it did not unequivocally break the chain of coercive circumstances.

B. THE TOTALITY OF THE SITUATION SUPPORTS THE TRIAL COURT'S FINDING.

Respondent claims there was no outward indicia of control and the police did not physically touch Petitioner and therefore the trial court was incorrect in finding that the resulting consent was tainted.[12] Respondent ignores the fact that consent is may be tainted even where the coercive circumstances are only subtle or implicit. See Schneckloth v. Bustamonte, 412 U.S. 227, 228-229, 93 S.ct. 2041, 2048, 36 L.Ed.2d 854 (1973). Respondent also claims that Petitioner's actions and statements are not inconsistent with giving the police permission to search his bag (RB at 21). Such an observation totally misses the point. Petitioner concedes that he did consent. However, he does not have to protest or resist to make that consent a mere acquiescence to police authority. In fact, it seems logical that, when in the midst of his journey he is roused from sleep and confronted by police on the bus and he acquiesces for fear of what the police might do if he resists their authority, a bus passenger will totally acquiesce rather offer any resistance. Respondent's

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12 Respondent also claims that the police did not block Petitioner's path. However, although the officers may not have intended to block Petitioner's path, their presence in the narrow aisles of a bus in effect cornered him. Cf.: State v. Avery, 531 So.2d at 196 (Anstead, J., dissenting) and footnote 8, supra.

claim has not adequately addressed the intimidating circumstances mentioned in pages 3-4, 19-21 of Petitioner's brief on the merits. The trial court erred in failing to conclude Petitioner's consent had been coerced.

C. THE SEARCH WENT BEYOND THE SCOPE OF ANY ALLEGED CONSENT.

Respondent claims that when Petitioner consented to police searching inside his bag he unequivocally gave unlimited consent for the police to open items within the bag. Such a claim is specious. As noted by this Court in State v. Wells, 14 F.L.W. 87 (Fla. March 2, 1988) a consent to conduct a warrantless search gives the police no more authority than reasonably conferred by such consent. The consent to search inside the bag could not reasonably constitute consent to open the bottle within the luggage. See Wells, supra at 88 (and cases cited therein) ("If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so...").

Moreover, Mr. McBride did not understand that he had the right to refuse the search and that the detective had issued an ultimatum [to allow the search] (R 65-78). It logically follows that Mr. mcBride's consent was coerced - a mere acquiescence to authority. Respondent's claim that Mr. McBride "assisted" in the search (RB 4) is belied by Mr. McBride's testimony that he helped Detective Palmer go through his bag because he was worried that he detective would damage his camera (R 66).

Respondent's alternative assertion that the search could be justified on some sort of probable cause basis is not substantiated by the record. There is not one shred of testimony by the detectives nor of argument by Respondent below that the scale gave rise to probable cause to search further. Rather, Detective Palmer merely commented that he saw the gram scale, then he saw the white bottle, then opened the white bottle (R 13, 40). Indeed, he specifically testified that he believed he could continue searching because Petitioner had consented to the search.

Respondent theorizes that the scale could have given rise to probable cause (RB 22-23). It is just as plausible, if not more so, that the detective saw the scale, opened the bottle to find the cocaine, then, in an afterthought, connected the bottle to the drugs.

Implicit in Respondent's claim is the assumption that a scale is inherently drug paraphernalia. However, the statutory definition of "drug paraphernalia" requires proof the "[s]cales and balances be used for, intended for use, or designed for use in weighing or measuring controlled substances." Section 893.-145(5), Fla. Stat. (1987). Otherwise put, there must be some evidence

> showing use or intended use and "... by reason of some peculiar characteristic of design the scale could be recognized as being intended only for such use." Otherwise, any type of household or business scale useful for a wholly innocent purpose but also suitable for weighing drugs could be held to constitute drug paraphernalia irrespective of proof that such illicit use was intended.

Williams v. State, 529 So.2d 345, 348-349 (Fla. 1st DCA 1988). Here, there was not even testimony that scales are, as Respondent claims, "necessary equipment [sic.] among drug traffickers" (RB 23). Cf. Williams v. State, supra [holding that testimony a triple-beam scale was commonly used to weigh controlled substances was, standing alone, insufficient to prove that the scale was designed for use in weighing or measuring a controlled substance]. Therefore the opening of the bottle was improper because it exceeded the scope of any consent given and was not based upon probable cause.

D. INVASION INTO THE RIGHT TO PRIVACY GUARNATEED UNDER ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION.

Respondent claims that, assuming arguendo Petitioner's preceding three positions are all invalid, the right to be let alone under Article I, Section 23 of the Florida Constitution has not been violated because this Court must follow United States Supreme Court dictates. Respondent overlooks that in the present point Petitioner is asserting that the police contacting and questioning Petitioner, who was a seated sleeping passenger aboard a bus, without any justification, was a violation of his right to be let alone under Article I, Section 23. Article I, Section 12, and the Fourth Amendment, involve the question of when the government may seize a person, but does not involve the question of when a person is free to be let alone from contact by the government.[13] Thus, Article I, Section 23, is much broader

[13] In State v. Hume, 512 So.2d 185, 188 (Fla. 1987) this Court indicated that Article I, Section 23, would not be utilized to decide an issue involving the interception of communica-

in scope than any right to privacy in Article I, Section 12 or in the Federal Constitution. Winfield v. Division of Pari-Mutuel Wagering, Department of Regulation, 477 So.2d 544, 548 (Fla. 1985). The limitations of where, when, and how the government may contact its citizens, i.e. the person's right to be let alone, has been left to the states. Id.

In its brief Respondent has alleged that if police cannot use the procedure to intrude upon ticketed, seated bus passengers they will also be prohibited from intruding upon ticketed, seated patrons while they are enjoying events such as a symphony or ballgame (RB at 17).[14] Frankly, if the police do not suspect such patrons of any criminal activity, Article I, Section 23, should protect their right to be let alone at such times. Respondent's implicit claim that application of Article I, Section 23, would immunize suspected drug traffickers from investigation is without merit. If police have a reason to believe someone is

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tions by the government which would be analyzed under Article I, Section 12. Unlike Hume, the issue in this subsection involves when the government may invade a person's right to be let alone by contacting him aboard a bus where he is a ticketed, seated passenger. Clearly, Article I, Section 12, does not limit mere government contact with individuals. Whereas, Article I, section 23, clearly provides some protection from certain types of government contact. Thus, unlike Hume, the issue regarding police contact properly involves an analysis of Article I, Section 23, and not Article I, Section 12.

[14] There may be other situations where police contacts may violate a citizen's right to be let alone such as the police daily, without any suspicion of criminal activity, knocking on doors of residences and requesting consent to search for drugs due to the problem in Florida.

trafficking drugs they can investigate. However, Article I, Section 23, prevents arbitrary invasions of a person's right to be let alone.

Finally, as noted in Petitioner's brief on the merits at page 27, the government did not use the least intrusive means available in attempting to obtain voluntary cooperation from its citizens. Such could have been done at the station or terminal, where a person truly would be free to walk away, rather than aboard the bus where Petitioner was mid-journey and asleep.

If the words right to be left alone have any meaning under Article I, Section 23, they were violated in this case. Petitioner relies on his brief on the merits for further argument.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Patricia G. Lampert, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 25th day of April, 1989.

Ellen Morris
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