OIA 10-3-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,637



DOROTHY CROSS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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ON APPLICATION FOR DISCRETIONARY REVIEW

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# PETITIONER'S BRIEF ON THE MERITS

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## INTRODUCTION

Petitioner, Dorothy Cross, was the defendant in the trial court and the appellee in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellant in the District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbols "R", "Tr." and "ST" will be used to refer to portions of the record on appeal, transcripts of the lower court proceedings and supplemental transcript, respectfully. All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

The state appealed from a pre-trial order granting the defendant's pretrial motion to suppress cocaine found in her valise. The salient facts heard on the motion to suppress are as follows:

Detectives observed the defendant at Miami Amtrak Station. She was carrying a small coach bag. They approached her and identified themselves as police officers. She agreed to speak with them. She showed her ticket and identification. The items were returned and one of the detectives told her they were having a problem with narcotics being transported through the train station. He then asked for permission to search her bag, advising her that she need not consent if she did not want to. She said it was okay to search. In the course of searching the detective discovered a hard, baseball shaped object wrapped in brown tape. The detectives testified that, in their more than twenty years combined experience as narcotics detectives, they had seen cocaine packaged that way on "hundreds of occasions." One of them, without asking permission of the defendant, cut into the baseball-shaped object and found cocaine.

Based on the foregoing facts, the trial court suppressed the cocaine and ruled that (1) the detective did not have probable cause to believe that the baseball-shaped object wrapped in tape contained contraband and (2) cutting into the object exceeded the scope of the consent. At first, the Third District Court agreed with the trial court and affirmed. State v. Cross, 535 So.2d 282 (Fla. 3d DCA 1988). However, en banc, the District Court

reversed the suppression order and made the following findings:

> "Once the detectives found the taped, baseball-shaped object, in light of their many years experience in narcotics work, they had probable cause to believe that Cross was carrying contraband . . . . The revelation of cocaine through the further examination of the object was nothing more than a search incident to a valid arrest."

535 So.2d at 286.

In this appeal, the defendant asks this Court to quash the decision of the District Court on the ground that it conflicts with prior decisions of this Court. An Order Accepting Jurisdiction was entered by this Court on May 15, 1989.

## QUESTION PRESENTED

**WHETHER THE OBSERVANCE OF THE OPAQUE OBJECT SHAPED LIKE A BASEBALL AND OFTEN USED TO TRANSPORT COCAINE GAVE RISE TO PROBABLE CAUSE TO CUT INTO THE OBJECT?**

## SUMMARY OF ARGUMENT

The District Court's holding that the mere observance of a baseball-shaped object often used for packaging cocaine was sufficient to afford probable cause to search the object directly conflicts with Caplan v. State, 531 So.2d 88 (Fla. 1988) wherein this Court held that "the mere observance of an opaque container commonly used to transport contraband does not, without more, give rise to probable cause to search."

## ARGUMENT

THE OBSERVANCE OF THE OPAQUE OBJECT SHAPED LIKE A BASEBALL AND OFTEN USED TO TRANSPORT COCAINE DID NOT GIVE RISE TO PROBABLE CAUSE TO CUT INTO THE OBJECT.

A trial court's decision on a motion to suppress the fruits of an unreasonable search and seizure comes to the appellate court with a presumption of correctness, and in determining the validity of the trial court's conclusions. The Court should interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in a light most favorable to sustain those conclusions. Taylor v. State, 355 So.2d 180 (Fla. 3d DCA 1978).

Based on the facts in this case, the trial court found as follows:

> "An object which is hard, the size of a baseball and wrapped in tape is not an inherently suspect item. It is not anymore suspect when it is found in a tote bag at a train station. Unless, of course, every object wrapped in tape is suspect. Without more it does not prove probable cause to arrest a person. There was nothing more in this case." (R. 25).

In reversing, the District Court has apparently overlooked the fact that the arrest in this case took place on August 29, which is the height of the baseball season. To suggest that carrying a wrapped baseball at that time of year is highly incriminating seems ludicrous at best.

It is also significant that in most of the cases cited by the District Court, the odd-shaped, wrapped object was soft and malleable to the touch, State v. Rodriguez, 477 So.2d 1025 (Fla.

3d DCA 1985) on rehearing; State v. Jurisa, 475 So.2d 873 (Fla. 4th DCA 1985); Palmer v. State, 467 So.2d 1063 (Fla. 3d DCA 1985). In the case at bar, the object of the search was not only not odd-shaped, but it was hard to the touch (ST. 28-29), thus negating the probability that it contained cocaine.

Clearly, if Detective Rodriguez had probable cause merely by observing the object in question, then it should not have been necessary to cut the object open before arresting the defendant. (ST. 32). As the trial court so aptly observed:

> ". . . while the Detective testified that this was a common way of packaging cocaine, the Court finds it significant that this package was hard, not malleable, and in a common base-ball shape, rather than an unusual shape, as has so often been testified to in prior instances in this courtroom." (R. 24).

The clear cut conflict between this Court's decision in Caplan v. State, 531 So.2d 88 (Fla. 1988) and opinion sought to be reviewed was clearly and succinctly analyzed in the following from Judge Ferguson's dissenting opinion below:

> A rule governing probable cause to search opaque containers which could hold either innocent or illegal contents was set forth recently by the Florida supreme court. In Caplan v. State, 531 So.2d 88 (Fla. 1988), the court held that "the mere observation of an opaque container, without more, cannot constitute probable cause. There must be at least an additional objective and reasonably specific element justifying the state agent's inference of wrongdoing." Caplan, 531 So.2d at 92.
>
> The opaque container in Caplan was a hand-rolled cigarette, which in common experience, is more likely to contain contraband than is a ball-shaped and taped package. Holding that the hand-rolled cigarette must be suppressed, the court wrote that even if the officer possessed the expertise to recognize

> contraband does not, without more, give rise to probable cause to search." Caplan, 531 So.2d at 92. Here, when the officers stopped Mrs. Cross, opened her luggage, and rummaged through her undergarments in public view, there was no evidence of the "something more" justifying an inference of wrongdoing required for probable cause to search a container other than the outer one for which consent was given.

It is submitted that the opinion under review also conflicts with this Court's decision in State v. Wells, 539 So.2d 464 (Fla. 1989) where the Court held that an accused's consent to search the trunk of his automobile did not permit the officer to pry open locked luggage in the truck. The following reasoning of this Court should be controlling in the case at bar:

> ". . . we decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.
>
> When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis.

539 So.2d at 467.

## CONCLUSION

Based on the foregoing argument and authorities cited, the decision of the District Court should be quashed and the trial court's suppression order should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, JULIE S. THORNTON, Assistant, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 6th day of February, 1989.

N. Joseph Durant, Jr.

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