0 a 2-3-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,637

DOROTHY CROSS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JULIE S. THORNTON
Florida Bar No. 0336475
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohdes Building
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

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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 Third District Court of Appeal. All parties will be referred to as they stood in the lower court. The symbol "R" will be used to refer to the record on appeal. The symbol "T" will be used to refer to the transcript of the lower court proceedings.

STATEMENT OF THE CASE

On July 24, 1986, the defendant was charged by Information with trafficking in cocaine in violation of section 893.135, Florida Statutes (1985), and possession of a controlled substance in violation of section 893.13, Florida Statutes (1985). (R.1-2).

On August 29, 1986, the defendant filed a motion to suppress the evidence on the basis that she was subjected to an unlawful stop and, therefore, the consent to search was tainted thereby. (R.4-5). The defendant also maintained that the search exceeded the scope of the consent. (R.4-5). A second motion to suppress the evidence was filed on September 5, 1986. (R.6-11). This motion elaborated on the issues raised in the first motion.

On September 5, 1986, a hearing was held on the defendant's motion to suppress. (S.R.l-39). At the conclusion of the hearing, the trial court granted the defendant's motion to suppress. (S.R.36). On October 8, 1986, the trial judge rendered a written order finding that 1) the defendant was unlawfully seized without founded suspicion of unlawful activity';[1] 2) the detectives did not have probable cause to believe that the baseball-shaped object which was wrapped in tape contained

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[1] The defendant conceded in the District Court that the initial encounter was a mere police-citizen encounter and not a seizure within the meaning of the Fourth Amendment. State v. Cross, 535 So.2d 282 (Fla. 3d DCA 1988), on rehearing en banc.

contraband; and 3) the search that was conducted exceeded the scope of the consent. (R.20-25).

The State appealed to the Third District Court of Appeal the order of the trial court granting the defendant's motion to suppress and the court affirmed. State v. Cross, 535 So.2d 282 (Fla. 3d DCA 1988). The State then filed a motion for rehearing en banc, which was granted, and the suppression order reversed. State v. Cross, 535 So.2d 282 (Fla. 3d DCA 1988)(en banc).

STATEMENT OF THE FACTS

The facts relevant to the defendant's arrest were supplied by Detectives Robert Fernandez and John Facchiano, the only witnesses that testified at the hearing.

On July 3, 1986, Detectives Fernandez and Facchiano were employed with the Narcotics Squad of the Organized Crime Bureau. (T.12). At approximately 8:00 a.m. the detectives entered the Miami Amtrak Station. (T.12). Detective Fernandez observed that the defendant "perked up" and "took notice" of the detectives arrival. (T.14-15). The defendant appeared somewhat nervous and visually monitored the movement of the detectives. (T.14-15). The defendant was carrying a small coach bag. (T.15).

At approximately 8:35 a.m. there was a boarding call for Gate B and the defendant proceeded to the line for boarding. (T.15). The detectives, who were standing beside the conductor at the podium, discovered that the defendant was travelling to South Carolina when the conductor announced the point of destination to fellow Amtrak employees. (T.16). Detective Fernandez testified that the bag that the defendant carried, which measured approximately one by two feet, seemed to be a small amount of luggage for a woman travelling from Miami to South Carolina. (T.16-17).

After the defendant proceeded past the conductor, Detectives Fernandez and Facchiano approached her and identified themselves as police officers while displaying a police badge. (T.17). Detective Fernandez asked if he could speak with the defendant and she agreed. (T.17). The detective asked if he could see her ticket and some type of identification. (T.17, 32). The defendant produced the Amtrak ticket which was issued in the name of Dorothy Edmond and a Florida driver's license with the name Dorothy Cross. (T.17). The defendant stated that Edmond was her maiden name. (T.17).

Detective Fernandez returned both items to the defendant and proceeded to explain the problem with narcotics being transported to other parts of the country through the train system. (T.18). He then asked the defendant for permission to

search her bag, advising her that she need not consent if she did not want to. (T.18, 32). The defendant stated, "No, its okay." (T.18).

The detectives placed the tote bag on the ground, opened it, and observed two items of clothing and an object concealed inside a pair of pants and a black slip. (T.18). The clothing was removed from the object and the detective observed a baseball-shaped item wrapped in brown tape. (T.18, 32).

Detective Fernandez, a detective with 10 1/2 years experience, 6 1/2 of which were in narcotics, testified that he had observed cocaine packaged in that manner on numerous times in the past. (T.12, 19). Detective Facchiano, who had 14 years experience as a narcotics detective, 9 1/2 of which were in this particular operation, testified that he had observed such packaging on "hundreds of occasions." (T.30, 32).

Detective Fernandez stated that the defendant was placed under arrest at that time. (T.19). Detective Facchiano, however, testified that Detective Fernandez cut into the object and observed that it contained white powder before the defendant was placed under arrest. (T.32). During the encounter, which lasted approximately three to five minutes, the defendant was nervous. (T.20-21, 33). Prior to the discovery of the tape wrapped object, the defendant was free to leave. (T.21, 33).

QUESTION I

WHETHER THE OFFICERS HAD PROBABLE CAUSE TO BELIEVE THAT THE TAPE WRAPPED PACKAGE CONTAINED COCAINE?

SUMMARY OF THE ARGUMENT

The detectives had probable cause to arrest when they observed the baseball-shaped package wrapped in brown tape in the defendant's bag. The officers, who had extensive experience in narcotics, testified that they had observed cocaine packaged in this manner on numerous or hundreds of occasions in the past. This knowledge, in addition to the suspicions raised by the defendant's prior conduct, provided probable cause to believe that the package contained narcotics. Accordingly, the search was proper as a search incident to arrest.

ARGUMENT

THE OFFICERS HAD PROBABLE CAUSE TO BELIEVE THAT THE TAPE WRAPPED PACKAGE CONTAINED COCAINE.

The central issue for resolution in this appeal is whether the discovery of the baseball-shaped object wrapped in tape provided probable cause for arrest under the facts in this case. It is the State's contention that the totality of the circumstances surrounding the observation of the package, from the perspective of the experienced narcotics detectives, constituted probable cause.

In determining whether an officer has probable cause to believe that an object constitutes evidence of a crime, an examination must be conducted of the totality of the circumstances in light of the police officer's training, education, and experience. State v. Ellison, 455 So.2d 424 (Fla. 1984); P.L.R. v. State, 455 So.2d 363 (Fla. 1984), cert. denied, 469 U.S. 1220, 105 S.Ct. 1206, 84 L.Ed.2d 349 (1985). See United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). In making such a determination, the standard of probable cause is important. As one court noted concerning probable cause:

> Probable cause does not emanate from an antiseptic courtroom, sterile library or a sacrosanct adytum, nor is it a pristine 'philosophical concept existing in a vacuum', *Bell v. United States,* 102 U.S. App. D.C. 383, 386, 254 F.2d 82, 85 (1958), but rather it requires a pragmatic analysis of 'everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949).

United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972).

Probable cause means only "a fair probability that contraband or evidence of a crime will be found." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (emphasis added). It is not necessary that the belief that an object constitutes contraband be correct or even that it be more likely true than false. Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). See United States v. Cruz, 834 F.2d 47 (2d Cir. 1987); United States v. Peacock, 761 F.2d 1313 (9th Cir. 1985); United States v. Adcock, 756 F.2d 346 (5th Cir. 1985). Applying these standards in the instant case demonstrates that the Third District Court of Appeal correctly determined that the officers had probable cause to arrest the defendant.

The defendant, who was leaving Miami by train, "perked up" when she observed the officers enter the station and visually monitored their whereabouts, becoming "a little nervous" upon seeing them. (T.12, 15-16). In addition, the defendant was travelling to North Carolina with a ticket that did not bear her name and carried a small amount of luggage for such a destination. (T.16-17, 25). During a consensual search, the defendant appeared a bit nervous and the officers discovered a hard baseball-shaped object wrapped in brown tape. (T.18, 20, 32). The object was concealed in two pieces of clothing. (T.18-19, 32). Officer Fernandez, who had 10 1/2 years experience as a detective, 6 1/2 years in narcotics, testified that he believed the package contained cocaine. (T.12, 19). In addition, he stated that he had seen cocaine packaged in this manner numerous times in the past. (T.19). Officer Facchiano, who had 14 years experience as a narcotics detective, 9 years in this particular unit, stated that the taped package was similar to those he had observed on "hundereds of occasions." (T.32). Accordingly, the experienced narcotics officers, who knew that the defendant was travelling under an assumed name and had exhibited suspicious conduct prior to the search, had probable cause to believe that the distinctively wrapped package contained narcotics. Such a conclusion is supported by the following cases.

In State v. Redding, 362 So.2d 170 (Fla. 2d DCA 1978), it was held that a police officer had probable cause to seize several small, flat, inch-by-one-quarter-inch tinfoil packets which were observed inside the defendant's shoes in his vehicle. In that case, the officer testified that in his long experience as an undercover officer, he believed the packets contained either heroin or cocaine because narcotics were customarily wrapped in this fashion. In addition, he was aware of the defendant's bizarre conduct prior to the seizure and he observed the peculiar location of the packets. Based upon all of the above, the court held that "at the very least" the officer had probable cause to believe that the packets contained contraband. As such, the seizure of the packets was justified.

In Albo v. State, 379 So.2d 648 (Fla. 1980) this Court held that the officer's warrantless seizure of marijuana from a motor home was justified where the officer had probable cause to believe that thirty-five to forty square bales wrapped in black plastic and burlap contained marijuana. The court held that "[g]iven [the officer's] experience plus the defendant's failure to produce the vehicle's registration and the fact that the rear end of the motor home looked weighed down, the circumstances support [the officer's] determination that the bales were marijuana." Albo v. State, supra at 650.

Likewise, in P.L.R. v. State, supra, this Court held that officers had probable cause to arrest where they were at a narcotics location site, making a narcotics arrest, when they observed a small manila envelope in the defendant's pocket. An officer testified that the envelope was "of the type commonly used in that area. . .[for] what they call a nickel bag of marijuana. . . This is, in fact, the only use I've ever seen these envelopes put to." P.L.R. v. State, supra at 364. Based upon the above factors, it was held that the officer had probable cause to arrest.

In Palmer v. State, narcotics officers approached the defendant at the Miami Amtrak Station and received permission to "look into" his tote bag. The officers discovered therein "several packages wrapped in brown paper, each six inches long and two inches wide." Upon squeezing one package, it was discovered that it contained a "malleable" substance. Palmer v. State, supra at 1063. The Third District Court of Appeal held that the distinctively wrapped, shaped, and sized packages provided probable cause to believe that the packages contained narcotics. Finally, in State v. Jurisa, 475 So.2d 973 (Fla. 4th DCA 1985), the Fourth District Court held:

> Predicated in part on the police officer's testimony that he had seen narcotics wrapped in similar silver duct tape packages on 'hundreds of occasions; we believe there was probable cause to search those

> packages, exposed during a consent search of the defendant's carry-on luggage at the bus station.

State v. Jurisa, supra at **973.**

A recent case from the Second Circuit Court of Appeals, with facts similar to those in the instant case, reached a result consistent with the Third District Court of Appeal. In United States v. Barrios-Moriera, **872** F.2d **12** (2d Cir. **1989),** experienced drug agents observed the defendant drive slowly past a vehicle that they had been surveilling with reference to a drug related homicide. One agent followed the defendant and observed him park his vehicle in front of his apartment and remove a shopping bag from the trunk. The agent followed the defendant as he mounted the stairs to his apartment. He called for the defendant to stop but the defendant continued walking up the stairs. The officer approached and looked into the bag observing a rectangular package wrapped in tape.

In finding that the agent had probable cause to believe that the package contained cocaine, the court noted the suspicious conduct prior to the observation and held that the taped package "spoke volumes as to its contents", especially to the experienced drug agent who testified that kilos of cocaine are typically wrapped in some type of tape. United States v. Barrios-Moriera, supra at 17, (quoting Texas v. Brown, supra).

In Caplan v. State, 531 So.2d 88 (Fla. 1988) this Court held that the mere observation of opaque containers will not create probable cause in the absence of other facts. In that case it was held that an officer who had observed several small rolled burnt cigarette wrappings on the floorboard of a vehicle involved in a traffic accident did not have probable cause to believe the cigarette contained marijuana. In that case, the officer testified that he did not know what was in the cigarettes and that it could have been tobacco. There were absolutely no other facts to justify the officer's conclusion of wrongdoing. This holding is not inconsistent with the conclusion that the officer's had probable cause in the instant case, however. As the cases set forth infra illustrate, the "other facts" necessary in conjunction with the observation of an opaque container need not constitute a reasonable suspicion of criminal activity. The other facts need only be an objective and reasonably specific element justifying the agent's inference of wrongdoing. Caplan v. State, supra. The analysis must be applied on a case by case basis considering all of the facts surrounding the observation of the opaque container.

In the instant case, the detectives had vast experience in arresting drug offenders who attempt to smuggle drugs through the airport and train systems of this State. Prior to observing the package, the officers observed the defendant's focus upon

them and her nervousness. They also noted that she carried light luggage for a rather long trip. (T.14-17). While these factors would not constitute a reasonable suspicion of criminal activity, they were suspicious enough to these trained officers to warrant investigation during a consensual encounter. During this encounter, the defendant remained nervous and the officers further discovered that the defendant was travelling under an assumed name.[2] (T.17, 27, 33). Knowing these facts, the officers then discovered the package concealed in two items of clothing. The officers stated that they believed the package contained cocaine due to the fact that they had seen cocaine wrapped in a similar manner on, as one officer testified, "hundreds of occasions." (T.19, 32). Unlike Caplan v. State, supra, this case did not involve the mere viewing of an opaque container. Rather like P.L.R. v. State, supra, it involved other facts which combined to create probable cause. The officers, with specialized training, observed suspicious conduct and discovered suspicious facts prior to observing the distinctively wrapped package which "spoke volumes as to its contents". Texas v. Brown, supra. Accordingly, the officers

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2 While the officers testified that the defendant stated that the ticket was issued in her maiden name, it is not unusual for drug smugglers to offer innocent explanations for a discovered inconsistency between their names and the names on their tickets. See United States v. Sokolow, ___ U.S. ___, 45 Cr.L.Rptr. 3001, No. 87-1295 (April 3, 1989) (defendant stated travelling under mother's maiden name); Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)(defendant stated friend had made reservation in other name.

were warranted in opening the package where there certainly was a "fair probability" that it contained cocaine. Illinois v. Gate, supra. As noted in Illinois v. Gates, 462 U.S. at 243-244, n.13, 103 S.Ct. at ___, n.13, 76 L.Ed.2d at 552, n.13, "innocent behavior will frequently provided the basis for probable cause,'' and in determining whether probable cause exists "the inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of noncriminal acts." The suspicions of the vastly experienced officers in the instant case were sufficiently raised to justify a search.

The defendant also maintains that the opinion under review conflicts with State v. Wells, 539 So.2d 464 (Fla. 1989). While the State advanced to the District Court the argument that the search of the package was proper based upon the defendant's consent to search, the District Court apparently did not agree. The decision under review concerns only the issue of whether the officers had probable cause to open the package.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the decision of the District Court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JULIE S. THORNTON
Florida Bar No. 0336475
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **N. JOSEPH DURANT, JR.,** Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125 on this 26 day of June, 1989.

JULIE S. THORNTON
Assistant Attorney General

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