IN THE SUPREME COURT OF FLORIDA

DAMARIS NAZARIO,	)	
	)	
Petitioner,	)	
	)	
VS.	)	CASE NO. 73,665
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON JURISDICTION

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XUTHOHITIES CITED

PRELIMINARY STATEMENT

The petitioner was the appellant in the District Court of Appeal. She was the defendant in the trial court. She will be referred to as petitioner and by name in this brief.

Attached hereto are conformed copies of the portions of the record deemed necessary to reflect jurisdiction in the Court.

STATEMENT OF THE CASE

This is a petition to review a decision of the District Court of Appeal, Fourth District, issued October 26, 1988 (A-1). A timely motion for rehearing was filed and denied by the district court on January 18, 1989 (A-2). Notice to invoke discretionary jurisdiction was filed, and review is sought based upon express and direct conflict of decisions upon the same question of law.

In Nazario v. State, the decision below, the district court by a divided opinion held that consent given by a passenger on a common carrier to inspect luggage also authorized the law enforcement officer to poke a hole in a package, which was wrapped and its contents could not be seen, that was contained inside the luggage (A-1, page 2). The District Court of Appeal relied upon its earlier decision in State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). A dissenting opinion expressed the view that it was unreasonable to conclude that a reasonable person under such circumstances would have felt free to leave because the person would have had to leave a bus traveling to another state, move

around a police officer standing over her and walk off the bus into a strange community a thousand miles from her home.

Express and direct conflict is asserted on two grounds. First, the reliance upon State v. Wargin, supra, is in direct and express conflict with a decision of this Court.

Second, express and direct conflict exists as to whether the consent to search need be shown by only the greater weight of the evidence instead by clear and convincing evidence. The kind of circumstances in the present case have been held by other courts to require proof by clear and convincing evidence when a person is de facto seized and detained at the time "consent" is obtained. On this ground express and direct conflict of decisions also provides jurisdiction to review the decision below.

STATEMENT OF THE **FACTS**

The facts as set forth in the majority opinion below are as follows (A-1, page 1-3):

> The defendant was convicted of trafficking in cocaine. The trial court denied her motion to suppress evidence obtained in the search of her luggage while she was a passenger on a Greyhound bus. Sheriff's deputies boarded the bus while it was stopped at the terminal. After speaking with several passengers, they conversed with the defendant.[1]
>
> The deputies' testimony was that the defendant responded affirmatively when asked if she would speak with them. The defendant was advised of their identity and purpose. The deputies did not block her exit and she was told that she had a right to refuse consent to search her luggage. When asked if she would consent, she did so, identifying her luggage as one bag above her head and one between her feet. She handed the latter bag to the deputy, who uncovered a package wrapped in plastic tape. The deputy testified that he had seen packages wrapped in this manner on hundreds of occasions, and based on nis experience, he had reason to believe it contained cocaine. He poked a hole in the package and his suspicion was confirmed. At no point did the defendant withdraw or seek to limit her consent.
>
> The defendant denied giving her consent to the search and being told she could refuse the officers' request. However, she did sign a "consent to search" form acknowledging that she nad given consent to the search, and that she had been informed of her right to refuse.
>
> The trial court made the following findings: there was a lawful encounter; there was no stop; nor detention prior to discovery of the contraband; the defendant was one of many people on the bus the officers spoke with; and a reasonable person would not have felt detained. He also found that no weapons were brandished and that the officers had politely asked the defendant if she would speak with them. The court stated that he had weighed credibility and concluded that consent to search had been freely and voluntarily given.

> The trial court applied the correct standard of proof in concluding, after determining that there had been no unlawful detention, that the state had sufficiently proven consent by the preponderance of the evidence.
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> ---
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> The defendant is Spanish speaking, but one of the deputies is fluent in Spanish, which is his native tongue. After the initial contact, all communications were in Spanish. We do not consider this an issue in this case. See State v. Santamaria, 464 So.2d 197 (Fla. 3d DCA 1985); Restrepo v. State, 438 So.2d 76 (Fla. 3d DCA 1983).

Concerning the additional issue resolved by the district court, whether the consent to search the luggage included the right to open and inspect closed containers found therein, the district court resolved this question as follows (A-1, page 4):

> Defendant also contends that any consent to search the luggage did not include a search of its contents. However, we conclude that the trial court did not err in determining that the consent did extend to an examination of the package. See State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982); Rosa v. State, 508 So.2d 546 (Fla. 3d DCA), rev. denied, 515 So.2d 230 (Fla. 1987); Palmer v. State, 467 So.2d 1063 (Fla. 3d DCA 1985). See also United States v. White, 706 F.2d 806 (7th Cir. 1983). We also note that the validity of the search of the container in this case is even further buttressed by the testimony that the package was readily recognized as the type commonly used to transport cocaine. Seea Burke v. State, 465 So.2d 1337 (Fla. 5th DCA 1985).

SUMMARY OF ARGUMENT

Direct and express conflict is shown by the district court's reliance upon Wargin which this Court disapproved in Wells. Jurisdiction exists on this issue.

A second issue also based on conflict concerns the burden of proof of voluntary consent to search. The preponderance standard has been rejected in analogous cases thus reflecting express and direct conflict on this second issue presented.

ARGUMENT

POINT I

WHETHER HELIANCE UPON STATE v. WARGIN FOR THE EXTENT OF A CONSENT SEARCH EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE v. WELLS, WHEREIN THIS COURT DISAPPROVED OF SAID RATIONALE IN WARGIN?

The decision in this case approved the destruction of a wrapped container inside of a suitcase, based upon consent to search the suitcase. The decision of the district court cited to State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). The court expressly held that the trial court did not err in determining that the consent to search the luggage extended to an examination of a wrapped package contained in the suitcase.

This Court in State v. Wells, 13 F.L.W. 686 (Fla. December 1, 1988), held that a consent search does not automatically extend to opening sealed containers contained within the area to be searched. This Court distinguished consent searches from

probable cause searches and disapproved the opinion in State v. Wargin, supra, to the extent that it conflicted with the decision in Wells.

In Wells this Court expressly noted with approval several cases. Among them was Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980), where consent by a defendant for an officer to look in a tote bag at the airport did not extend to the officer inspecting the contents of a closed container, therein a nasal inhaler, inside the tote bag. In Luxenburg v. State, 384 So.2d 742 (Fla. 1st DCA 1980), the opening of a vehicle to an agricultural inspector did not authorize the officer to slit open a bag with a knife to inspect the contents of the bag. These, and other cases, were referred to in Wells as an example of the principle adopted by the court in Wells.

This Court has jurisdiction. The court's reliance upon the consent search under the Wargin rationale is in direct and express conflict with this Court's decision in Wells.

The court in its final sentence in the decision below made a note of its observation that the validity of the search "is even further buttressed by the testimony that the package was readily recognized as the type commonly used to transport cocaine." (A-1, page 4). However, the decision of the court below reviewed a ruling on the extent of the consent by Ms. Nazario. The question probable cause was not the issue. The district court made no express finding of probable cause. This is not adequate as an alternate ground for the decision. Earlier in the decision the district court made clear that after the officer poked a hole in

the package "his suspicion was confirmed," thus showing clearly that his reason to suspect the contents of the package fell short of probable cause necessary to conduct a non-consensual warrantless search of the package.

On this ground petitioner requests the court to accept jurisdiction to review the decision below which rests upon the consent issue and is in direct and express conflict with this Court's decision in State v. Wells, supra.

POINT II

WHETHER THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN ACOSTA v. STATE CONCERNING WHETHER SPECIAL CIRCUMSTANCES REQUIRE THE VOLUNTAKINESS OF CONSENT TO BE MEASURED BY THE CLEAR AND CONVINCING STANDARD?

The district court below applied the greater weight of the evidence standard, the preponderance test, in reviewing the trial court's determination of whether consent to search petitioner's luggage had been voluntarily given. The trial court utilized the preponderance standard, and the district court approved said standard as the correct standard of proof based upon the district court approval of the finding that there had been no unlawful detention.

The court also noted that petitioner is Spanish-speaking but that one of the deputies, who was fluent in Spanish, conducted communications with petitioner in Spanish after the initial encounter. The court thus did not consider this to be an issue in the case in its review of the consent issue.

The decision directly and expressly conflicts with Acosta v. State, 519 So.2d 658 (Fla. 1st DCA 1988), where the court held that the clear and convincing standard of proof for voluntariness must be met by the state when special circumstances exist, although no police misconduct precedes the consent. Special circumstances found in Acosta included the fact that the accused in that case had been in the United States for only three years and had difficulty communicating in English. No interpreter was

utilized in Acosta, and it was found that the accused may not have understood the rights being waived.

In the present case the petitioner did not speak English, and no neutral interpreter was used because one of the officers seeking her consent also performed the role of interpreter. Moreover, she was a passenger already in transit on a Greyhound bus while it made a stop at a terminal on route to her destination. Two officers stood by while she was asked to identify her luggage and consent to a search of the luggage (A-1, page 2).

Circumstances, such as are present in this case, tend to evoke acquiescence and were held in Acosta to require application of the clear and convincing standard. Direct and express conflict jurisdiction exists on this issue also.

CONCLUSION

Wherefore, petitioner submits that this Court has jurisdiction on each of the grounds set forth above and that the Court should exercise jurisdiction to review the decision below and to order to clarify and resolve both issues of law presented herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to CELIA TERENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 14th day of February, 1989.

LOUIS G. CARRES
Assistant Public Defender