IN THE SUPREME COURT OF FLORIDA

DAMARIS NAZARIO,

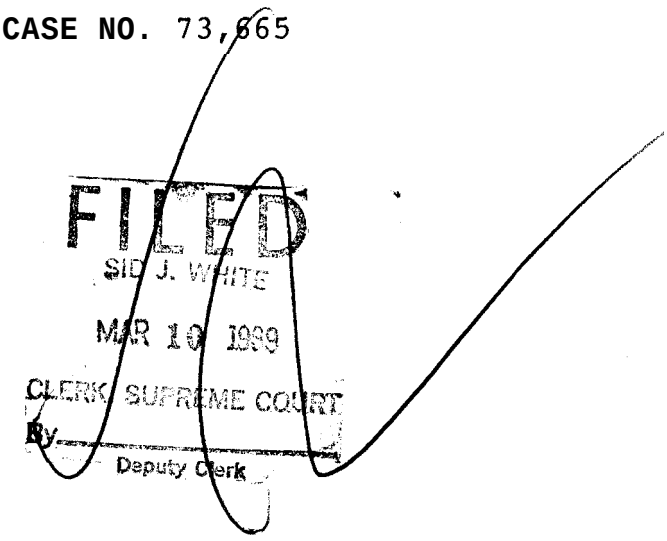
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,665



RESPONDENT'S AMENDED ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the Appellee in the District Court of Appeal and was the prosecution in the trial court. Petitioner was the Appellant in the appeal proceedings and the defendant at trial.

The symbol A-1 denotes the District Court's opinion along with the appropriate page number.

STATEMENT OF THE CASE

In Nazario v. State the district court found that, based on the totality of the circumstances, the consent given by Petitioner included a search of the package. The district court also relied on the alternate theory that once the officers saw the package wrapped in the manner that it was, probable cause existed to open it irrespective of consent. Burke v. State, 465 So.2d 1337 (Fla. 5th DCA 1985).

The dissenting opinion discussed the proper standard to be applied in the context of whether or not the initial stop was a seizure (A-1 pg. 4-9). Basically, the dissent is in disagreement with State v. Avery, 531 So.2d 182 (Fla. 4th DCA 1988). The dissent stated that under the preponderance of the evidence standard, the trial court's finding of consent was proper (A-1 pg. 6).

The district court further found that the Petitioner's difficulty with the English language did not require use of the clear and convincing standard, because one of the police officers, fluent in Spanish, spoke to the defendant in Spanish (A-1 pg. 2).

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts.

POINTS ON APPEAL

POINT I

WHETHER THE DISTRICT COURT'S OPINION WAS BASED SOLELY ON STATE v. WARGIN?

POINT II

WHETHER THE DECISION IS CLEARLY DISTINGUISHABLE FROM ACOSTA v. STATE AS NO ANTECEDENT POLICE MISCONDUCT WAS PRESENT TO WARRANT THE HIGHER STANDARD?

SUMMARY OF THE ARGUMENT

There is no express and direct conflict by the Court's reference to Warqin as the district court made it clear that, under the totality of the circumstances, the consent included the search of the package. This analysis is in compliance with Florida law including Wells.

The preponderance standard is appropriate and in accord with existing case law as no circumstances existed to warrant implementation of the higher standard of clear and convincing.

ARGUMENT

POINT I

THE DISTRICT COURT'S OPINION WAS NOT BASED SOLELY ON STATE v. WARGIN.

Petitioner attempts to establish direct and express conflict between the instant case and State v. Wells, 13 F.L.W. 686 (Fla., December 1, 1988) simply because the opinion cites to State v. Warqin, 418 So.2d 1261 (Fla. 4th DCA 1983). Such perfunctory analysis of Nazario v. State is misleading and incorrect.

Wells, supra, reiterated that voluntary consent vel non of a search must be determined by the totality of the circumstances. Wells, 13 F.L.W. at 687. The Court's cite to Wargin is followed by reference to Rosa v. State, 508 So.2d 546 (Fla. 3rd DCA, rev. denied, 515 So.2d 230 (Fla. 1987) and Palmer v. State, 467 So.2d 1063 (Fla. 3rd DCA 1985) (A-1 pg. 4). Both Palmer and Rosa rely on the totality of the circumstances in determining that consent extended to an additional container found in a person's luggage. Palmer, supra, 467 So.2d at 1064; Rosa, supra, 508 So.2d at 548. Furthermore, Palmer makes it very clear that the Third District does not endorse Wargin's proposition that United States v. Ross, 456 U.S. 798 applies to consensual searches. Palmer, supra, 467 So.2d at 1064 f.n. 1; State v. Fuksman, 468 So.2d 1067 (Fla. 3rd DCA 1985).

Respondent submits that the instant case is not in direct and express conflict with Wells. The Court's opinion is based on the trial court's analysis of all the facts presented (A-1 pg. 2-4). This emphasis on the totality of the circumstances is in express agreement with Wells. The Court stated that:

> She handed the latter bag to the deputy, who uncovered a package wrapped in plastic tape.
> At no point did the defendant withdraw or seek to limit her consent.

(A-1 pg. 2). Respondent submits that this analysis is consistent with Wells; Palmer; and Rosa.

Petitioner further claims that the Court made no express finding of probable cause. Respondent submits that a probable cause determination was made by the Court as evidenced by the following:

> The deputy testified that he had seen packages wrapped in this manner on hundreds of occasions, and based on his experience, he had reason to believe it contained cocaine.

(A-1 pg. 3). The Court later stated:

> 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. See, Burke v. State, 465 So.2d 1337 (Fla. 5th DCA 1985).

The pertinent holding of Burke is:

> The search of the tinfoil packets found inside the purse was a lawful search based upon probable cause. It doesn't take a policeman to know those small square tinfoil packets contained with heroin, cocaine, hashish or amphetamines.

Burke, supra, 465 So.2d at 1338. Respondent maintains that the Court did in fact find as an alternate ground that probable cause existed (A-1 pg. 2, 4).

Respondent submits that this Court should not accept jurisdiction to review the decision below as this opinion is not in direct and express conflict with State v. Wells, supra.

POINT II

THE DECISION IS CLEARLY DISTINGUISHABLE FROM ACOSTA v. STATE AS NO ANTECEDENT POLICE MISCONDUCT WAS PRESENT TO WARRANT THE HIGHER STANDARD.

Petitioner alleges that the district court applied the wrong standard in reviewing the trial court's determination of consent. Petitioner claims that the court's use of the preponderance of the evidence standard is in direct and express conflict of Acosta v. State, 519 So.2d 658 (Fla. 1st DCA 1988).

Respondent submits that special circumstances which warranted the stricter standard of clear and convincing in Acosta are not present here. The court in Acosta articulated the reasons which prompted the application of the more stringent standard:

> ...the latter standard, however, as earlier indicated is inapplicable to the facts at bar, due to Trooper Stallworth's antecedent police misconduct, his repeated requests for consent, and his failure to advise the defendant of his right to refuse consent, once it became reasonably apparent to him that the defendant may not have understood the requests, caused by the defendant's difficulty in speaking the English language.

Acosta, supra, 519 So.2d at 661 (f.n. 2). Those questionable activities are not present in the instant case as noted by the district court. (A-1 pg. 2).

Respondent further submits that neither Acosta nor any other case in Florida state that a police officer, fluent in

Spanish [as the officer was in the instant case (A-1 pg. 3)] is not a competent interpreter as suggested by Petitioner.

Respondent submits that this Court should not accept jurisdiction as there is no conflict with Acosta v. State, supra. The opinions are in fact in accord.

CONCLUSION

WHEREFORE, Respondent submits that this Court does not have jurisdiction as Petitioner has failed to establish any express and direct conflict between the decision below and current Florida law on either issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Amended Answer Brief on Jurisdiction has been forwarded, by courier, to LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, FL 33401, this 8th day of March, 1989.

Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix has been forwarded, by courier, to **LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, FL 33401, this 8th day of March, 1989.**

Of Counsel