IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

The record on appeal is bound in four volumes which are consecutively numbered. All references to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

Ms. Nazario was charged by an information filed in Broward County with one count of trafficking in cocaine by being in possession of an amount in excess of 400 grams (R-444). Trial by jury was held, and a verdict was returned finding Ms. Nazario guilty as charged (R-451). The trial court adjudicated her to be guilty and sentenced her to the minimum mandatory term of 15 years imprisonment with credit for time served. The court imposed the mandatory fine (R-453). Notice of appeal was timely filed from entry of the judgment and sentence (R-457).

Prior to trial Ms. Nazario filed a motion to suppress physical evidence (R-446-448). In the motion Ms. Nazario alleged that she was a passenger on a Greyhound Bus which she had boarded in Miami. During a scheduled stop at the bus station in Ft. Lauderdale she was approached by two Broward Sheriff's detectives (R-446). While seated on the bus she was first approached by an English speaking detective, but since she spoke Spanish he was unable to communicate with her (R-446). A second detective, who spoke Spanish, then approached her and, following what the officer contends was a voluntary consent, her luggage was searched (R-446-447). The officers found cocaine in a package that she was carrying and she was arrested (R-447). The motion to suppress contended that under the totality of the circumstances the consent was mere acquiescence to authority and that a reasonable person would not believe that she was free to leave at the time the officers were seeking permission to search her luggage (R-447-448). Ms. Nazario alleged that her inability to

speak English and her unfamiliarity with legal procedures was another factor that the court should consider (R-448). Ms. Nazario also asserted that in this situation the state was required to meet the burden of proving by clear and convincing evidence that she freely and voluntarily consented to the search (R-448).

A hearing was held on the motion to suppress at which two sheriff's detectives testified and at which Ms. Nazario testified. The trial court ruled that the standard for the state to establish consent under these circumstances was a mere preponderance of the evidence, and the court found that consent was freely, voluntarily and intelligently given under that standard (R-103-104). The trial court made no finding of probable cause (R-103-04).

On direct appeal the district court affirmed and held that the consent extended to the intrusion into the wrapped box inside Ms. Nazario's bag (Appendix - A-1-4). The dissenting judge was of the opinion that the consent was not genuine and that the circumstances showed only acquiescence to the authority the officers displayed and that Ms. Nazario's "opportunity" to leave the bus was not a reasonable option since she was a long way from her home and in a strange city (Appendix - A-4-9).

STATEMENT OF THE FACTS

(a) The Suppression Hearing

Broward Detective Norberto Vichot testified that he was with the unit that worked the buses, planes and trains making "contact with the public and look for drug couriers, smugglers and so forth" (R-53). The purpose of the unit was to speak to the public in general and ask if the officers could "search their luggage and so forth." (R-53). On June 17, 1986, at about 6:20 p.m. he and Detective Damiano, his supervisor, were working at the Ft. Lauderdale Greyhound Bus Station located at 513 Northeast Third Street, Broward County, Florida (R-53-54). They were in plain clothes, wearing jeans and a regular shirt (R-9). Each was wearing a green jacket with "Sheriff" on the back and a star on the front (R-54). Weapons were carried underneath the shirt, but they were not displayed openly (K-9-10). The officers routinely board all northbound buses going from Ft. Lauderdale and make "random contact" with people on the bus in order to obtain permission to search luggage (R-9-10).

Officers boarded the bus and went straight to the back of the bus eventually coming in contact with Ms. Damaris Nazario (R-55). She was seated in the window seat (R-55). The passenger seat next to her was vacant except for a pillow (R-11). Detective Damiano went up to her, identified himself by showing his badge and I.D. card, and asked her if she had a minute to speak with him (R-55-56). She did not seem to understand, so Damiano called Norberto Vichot to speak to her in Spanish (R-56). Vichot had been born in Cuba and spoke fluent Spanish (R-56). Ms.

Nazario testified at the hearing that she was born in Puerto Rico (R-78). She denied being told of her right to refuse to allow the search (R-80-81).

Vichot testified that he identified himself to her as a deputy sheriff and stood in the isle parallel to her seat with Damiano behind him (R-57-58). Vichot denied that he was physically blocking her exit if she had wanted to rise and leave the bus (R-56). Vichot stated that he spoke with her in a conversational tone and asked her where she was going to which she replied Detroit, Michigan (R-58). Vichot then asked her if she had any luggage and she pointed to a bag on the overhead luggage rack and to another bag between her legs on the floor of the bus (R-58). Vichot explained to her about their duty as narcotics officers (R-58-59). He explained that there was a drug problem in South Florida with illegal narcotics being transported in buses and that the officers seek the help of the public in letting the officers "search her bag with consent," and he advised her that she had a right to refuse (R-59). Vichot then told her that he wanted to search her luggage and that she had a right to refuse to which she said, "Yes, if you want" in Spanish (R-66).

Damiano said Ms. Nazario handed the luggage without verbal comment (R-15-16):

> Q Let's go back just a little. While you were searching the piece of luggage that she had reached down between her legs to retrieve and hands to you, did Miss Nazario ever indicate to you in a physical way she did not want you to search her piece of luggage to hand to you?

A No, Sir,

MR. REYES: Objection, leading.

THE COURT: Overruled.

BY MR. GALLAGHEH:

Q Go ahead.

A When she handed the bag to me, she smiled, or with a - like a friendly-type smile and handed the bag to me and no time make any gesture to me or anything other than that, nor was there anything verbal said to me, sir.

Vichot placed the luggage from the overhead rack on the seat next to Ms. Nazario and began looking through it by putting his hand inside of it (R-13). He found no drugs or weapons (R-13). The bag that had been on the floor between her legs was given to Detective Damiano who was behind Vichot, and Damiano found a box wrapped with plastic tape inside of it (R-14). He punched a hole in the box and found cocaine (R-14). No express consent was given to punch a hole in the box (R-49-50). Damiano had seen cocaine wrapped in plastic on hundreds of occasions (R-14). There was no suspicion of Ms. Nazario prior to the search (R-45-47).

Ms. Nazario was then arrested and given her Miranda rights (R-16-17). She was transported to the Ft. Lauderdale-Hollywood International Airport Sheriff's Office (R-17). While in the office she at that time signed a written post-consent to search form indicating that she had consented to the search on the bus (R-18).

Detective Vichot admitted that he had not told her that she had a right to leave the bus (R-67).

(b) The Trial

Robert Harrison, an expert in forensic chemistry, identified the substance as containing cocaine and having a gross weight of 1,002.1 grams (R-344-346).

Officers Damiano and Vichot testified to the details of the search and arrest of Ms. Nazario (R-247-341). These facts are already set forth above.

The state rested (R-349). Ms. Nazario renewed her pretrial motions and again argued that the trial court should suppress the evidence due to an invalid consent to search (R-349). The motion was denied (R-349). Ms. Nazario moved for judgment of acquittal on the basis that the evidence should have been suppressed and that the evidence would thereupon be insufficient. That motion was denied (R-349-350).

Ms. Nazario testified in her own behalf and stated that she was born in Puerto Rico and had lived in Detroit, Michigan for ten years (R-352-353). She was 24 years old and attended two years of schooling in this country (R-367). She attended as much as the eighth grade and spoke a mixture of English and Spanish in school (R-367). She lived with her mother and two children, aged eight and two (R-353). She was not employed (R-353). She was living on welfare (R-354). A man named Rodolfo Moreno in Detroit offered her some money if she would come to Miami and pick up a package and return it to Michigan (R-355). Mr. Moreno paid for an airline flight to Miami where she was picked up at the airport and taken to a hotel (R-355). She was given $500 and was told that she would receive $1,000 when she returned to Detroit

(R-355-356). She knew that the package that she was to carry to Detroit would contain cocaine (R-356). The box was brought to her at the hotel room (R-357). She then bought a bus ticket to Detroit and boarded the bus in Miami (R-358). She was on the bus when it made a regular stop in Ft. Lauderdale (R-359). The officers came on the bus and the English speaking officer approached her (R-359-360). The officer told her that "they had their rights" (R-360). The English speaking officer showed her a badge and a picture and told her that he was a federal policeman and that he had the right to check her baggage (K-360). He told her to give him her ticket and to tell him where she was going (R-360). She did not understand him fully and he called the Spanish officer to speak with her (R-360). The Spanish officer asked her where she was going and she gave him the ticket (R-360). He then asked her if she had any luggage to which she said it was "on the top" (R-361). She told the officers nothing about the package that was on the floor at her feet, but the officers saw it (R-361). They asked her what was that and she told them that it was a bag and then "they picked it up and looked in it." (R-361). The officer who spoke Spanish to her did not tell her she had the right to refuse the search of her luggage (R-361). He told her that he had the right to search (R-362). She was then arrested, put into a car and driven to the airport where she was questioned (R-362-363).

While being questioned the officers told her about helping them and that they would help her in return **(R-364).** She was told about going to court to see if permission could be obtained to have her take the drugs to detroit **(R-364).**

The defense rested and renewed its motion for judgment of acquittal and for suppression, but the motions were denied **(R-369).** Ms. Nazario requested two special instructions which the trial court denied **(R-372-373).** The requested instructions were filed in writing and are contained in the record on appeal **(R-449-450).** The instructions that **Ms.** Nazario requested would have advised the jury that warrantless searches are impermissible unless conducted under certain exceptions, one of which was consent **(R-449).** The instruction would have advised the jury that it would have to find that the consent to search in this case was freely and voluntarily given **(R-449).** The second requested instruction would have advised the jury that a consent to search form would not automatically establish actual consent and that the jury should consider the form along with the totality of the circumstances in making a determination as to whether the consent to search was freely and voluntarily given **(R-450).** The trial court denied the instructions and ruled that the issue of the voluntariness of the consent was a judicial question and not a jury issue **(R-373-374).**

Ms. Nazario additionally argued that since the credibility of the police officers was in question, the jury did not believe the officers on the issue of whether the consent to search was voluntary, the jury would then have a basis to disregard other

testimony given by those officers **(R-374).** The trial court again adhered to its ruling that the issue of consent to search was not a matter on which the jury should receive legal instructions **(R-374-375).** The trial jury, while deliberating, sent a note to the trial judge which read as follows:

> Do the circumstances of the encounter on the bus and how the police officers handled the search have any bearing on our decision in the case?

(R-425-426).

The judge proposed to answer the jury that the legality of the search was a legal question for the court to determine and not for the jury to consider **(R-426).** Ms. Nazario disagreed with that answer because it would be telling the jury not to look at the credibility of the police officers which was a critical part of the case. Petitioner argued that the issue of the credibility of the officers was enlightened by their testimony concerning their conduct in obtaining the "consent" **(R-426-429).** Ms. Nazario requested that the trial court answer the jury by telling the jury that the credibility of the officers was something that tne jury should look at and that anything that had to do with their credibility should be considered **(R-432).** The trial judge then instructed the jury as follows:

> THE COURT: I have a question from the jury which reads as follows: Do the circumstances of the encounter on the bus and how the police officers handled the search have any bearing on our decision in the case? Is that the question of the jury?
>
> MS. PALMER: Uh-huh. (Positive response).

> THE COURT: And in response, I would say that whether a search is a lawful search or an unlawful search is a question for the Court to determine. It is the function of the jury to determine whether or not the facts of the case establish the offense of trafficking or any lesser included offense as I have defined those offenses to you.

(R-433).

The jury, which at that point had been deliberating from 3:45 p.m. until 4:40 p.m., retired and returned with a verdict of guilty two minutes later (R-421,425,434). The jury found Ms. Nazario guilty as charged (R-435). The trial court adjudicated her to be guilty and sentenced her as stated above.

Timely direct appeal was taken, to no avail, and this Court granted review upon timely petition to review the ruling of the appellate court.

SUMMARY OF ARGUMENT

The decision below was issued prior to, and is directly contrary to, this Court's decision in State v. Wells, 539 So.2d 464 (Fla. 1989). The purported consent given to search luggage was construed below to include authority to open, and here destroy, a plastic-tape wrapped box inside one of petitioner's bags. The Wells decision requires that the decision below be quashed.

This was the primary issue on which the result below was based, The district court adhered to its view that consent to open a bus passenger's luggage gave authority to pry into closed and secured containers without any further request for and receipt of additional or specific consent. There was no suspicion in this case of any wrongdoing when the officers obtained the "consent" to open Ms. Nazario's luggage as part of a random drug interdiction program being conducted on northbound common-carrier buses in Ft. Lauderdale. Petitioner relies upon Wells as that decision directly controls this issue and this case.

Probable cause is not an alternative ground to support the trial court's ruling. The courts below did not find probable cause.

The court below, in a dictum, noted that the officers had often found cocaine in plastic-wrapped packaging. Yet, no express probable cause was held to exist. The court below

indicated that this fact of the plastic-taped box somehow "bolstered" the suppression denial. Yet, consent is not bolstered by any such fact. It either does or does not establish probable cause, a completely separate ground.

Since it is clear in the facts that there was no reason to suspect petitioner of criminal activity, there was nothing on which to base probable cause except the fact that plastic-wrapped packages are often found to contain cocaine. This Court has ruled on this issue also and has held that observation of opaque containers must be linked with significant other factual indicators of criminality for probable cause to open the container can exist. Caplan v. State, 531 So.2d 88 (Fla. 1988), directly controls this sub-issue.

Petitioner also raises a third and fourth point concerning the illegal and unreasonable nature of the bus detail operation for two reasons. One, it puts normal passengers in a detention situation where passengers are unable to leave the officers without giving up their seats on the bus. This is impermissible because a voluntary police-citizen encounter must permit the citizen to simply leave the officer's presence or it is a detention.

And two, the circumstances of the stopped bus encounter are coercive. The expectation that one is fully free to refuse permission to search is so diminished that the "consent" in such a situation is pure acquiescence because passengers,, and reasonable persons, would fear having to end their journey if they refuse.

Finally, even if voluntary consent could be given the detention aspect separately is an unlawful police action that requires application of the clear and convincing standard of proof on the part of the state. The fact that the person may say "no" does not mean a reasonable person would feel free to leave. The special circumstance of this kind of encounter mandates use of the clear and convincing standard.

ARGUMENT

POINT I

WHETHER CONSENT TO SEARCH A BAG, GIVEN BY A BUS PASSENGER ON A COMMON-CARRIER, EXTENDS TO DESTRUCTION OF A CLOSED CONTAINER FOUND THEREIN, WHEN THERE ARE NO OTHER GROUNDS TO SUSPECT THE PASSENGER OF TRANSPORTING CONTRABAND?

The trial court denied the motion to suppress on the ground that consent had been given by Ms. Nazario for sheriff's officers to open her bags as she was traveling from Miami to Detroit on a common-carrier, a Greyhound bus, during its scheduled stop in Ft. Lauderdale (R-100-104). The District Court of Appeal applied its decision in State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982), in holding that the consent by Ms. Nazario to a search of her luggage included authority to poke a hole in a closed container found inside the luggage. Nazario v. State, 4th DCA Case No. 86-2296, pages 2,4 of slip opinion (Appendix - A-2,4).

In State v. Wells, 539 So.2d 464 (Fla. 1989), this Court disapproved of the decision in Wargin to the extent that the Wargin decision conflicted with the decision in Wells. In Wells the Court declined to apply the principles of United States v. Ross, 456 U.S. 798 (1982), to the consent-search context. In Ross the Supreme Court had held that a search of an automobile based upon probable cause to search permitted the police to lawfully search any container found inside. There was no issue of consent to search in Ross.

This Court in Wells held that the principles which underlie the rules relating to consent searches are totally incongruous to the freedom of choice inherent in searches pursuant to consent. This Court stated, id. at 467:

> A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. [Citing to State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985), at 1070.] On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatable, and fusing them could lead to absurd results.

In the present case Ms. Nazario was a ticketed passenger traveling by bus from Miami to Detroit. The sheriff's officers, according to the findings made by the trial court, obtained consent from her to search her luggage. Inside the luggage the officers found a box wrapped in plastic tape which the officer punctured with one of his keys (R-14-15):

> Q How was the package wrapped?
>
> A Trying to refer to the exact wrapping. It was in a box shape form, sir. I don't recall right offhand the exact color wrapping or way it was wrapped, but it was wrapped in plastic tape.
>
> Q Had you ever seen cocaine wrapped like that previously?
>
> A Yes, sir.
>
> Q On how many occasions?
>
> A From -- Have to say to be - say in excess of 300 times, sir.
>
> Q And how did you know there was cocaine in there?
>
> A Based upon my experience, sir.

Q Well, did you see any white powder?

A Yes, sir, I am sorry. We punched a nold in it, but I don't recall with what was used at this time.

Q You don't know what type of implement you used?

A Could have been my key, my handcuff key, could have been Detective Vichot's light, but I honestly don't recall, sir.

The decision below is in direct and express conflict with the Court's decision in State v. Wells, and should be quashed. The reasoning of the District Court is diametrically at odds with the resolution of the issue as announced by this Court's decision in Wells. The consent given by Ms. Nazario did not include, and she was not later asked to consent to, the opening or destruction of the wrapped box inside of her suitcase (R-49-50):

Q You didn't ask her if you could puncture a hold in the package after you found them?

A No, sir.

Under these circumstances, the consent that the trial judge found could not extend to opening the wrapped container, Nor could it extend to the destruction of the container by punching a hole in it. This was not reasonably included within the consent given for officers to look into the passenger's bags who is in transit.

While the testimony showed that Ms. Nazario did not expressly exclude the opening of the wrapped box it should be noted that the wrapped box was in the suitcase that was being searched by Detective Damiano, who did not speak Spanish (R-60). The only

officer that she could converse with verbally was Detective Vichot, who was searching the bag that had been in the overhead luggage rack. While Detective Damiano was searching the bag that had been on the floor between her legs **(R-59-60).** Damiano "was behind" Detective Vichot at the time Damiano searched ***Ms.*** Nazario's bag **(R-60).** Thus, it would have been difficult for her to express any lack of consent to punching a hole in the box to Detective Damiano since Detective Vichot was next to her on the bus **(R-60).** Detective Damiano described the bag as being "handed back to me," thus indicating that he was indeed behind Detective Vichot where it would be difficult for Ms. Nazario to express any disapproval, either verbally in Spanish which Damiano did not understand or by gestures, because Damiano was not searching that bag in front of her.

Therefore, the petitioner submits that under Wells this search must be declared unreasonable because it exceeded any reasonable scope of the consent given. As noted in Wells, closed containers are sometimes, and presumably, closed in order to keep their contents private. Moreover, a consent to a voluntary search of a passenger's suitcase cannot be reasonably construed to include the destruction of some of the items it contains. The District Court's determination that this kind of consent includes empowering the officers to take it upon themselves, without a single additional word of warning, and without any notice and opportunity to object, to punch holes in boxes with their keys should be disapproved. This manner and extent of the

search violate ordinary expectations of privacy and reasonableness on the part of the public. It is inconsistent with the constitutional protection against unreasonable searches and seizures for an alleged voluntary search of this kind to be conducted in such an unreasonable manner.

Wherefore, it is prayed that this Court will reverse and remand with instructions that the motion to suppress be granted.

POINT II

WHETHER THE SEARCH OF THE CLOSED CONTAINER COULD BE UPHELD AS BEING SUPPORTED BY PROBABLE CAUSE WHEN THE OFFICERS FOUND NO GROUND TO SUSPECT CONTRABAND EXCEPT THAT THERE WAS A BOX WRAPPED IN TAPE INSIDE MS. NAZARIO'S SUITCASE?

The District Court of Appeal, while expressly basing its decision upon the consent, nevertheless indicated that the validity of the search of the container was "even further buttressed by the testimony that the package was readily recognized as the type commonly used to transport cocaine." (Nazario v. State, Fourth DCA Case No. 86-2296, page 4 of slip opinion) (Appendix A - 4).

This Court cannot approve the search based upon probable cause because the trial judge did not find that probable cause existed. The District Court also did not find that probable cause existed because probable cause was not an issue. Thus probable cause is not an alternative ground for the decision.

Further, the question of whether or not probable cause might or might not exist is totally irrelevant to whether the consent extended to the opening of the inside closed container, or to the manner in which that container was punctured. Consent is separate from probable cause, and consent is not buttressed by any facts tending to indicate cause to suspect the contents.

As far as the existence, vel non, of probable cause, this case shows that there was absolutely no reason for the officers to suspect that Ms. Nazario was transporting cocaine. The

officers expressly stated that this was a mere voluntary encounter (R-48). Detective Damiano, who was the supervisor, said that there was no concern raised because Ms. Nazario was heading toward a northern city, namely Detroit (R-45). He stated that "any city" would be north of Ft. Lauderdale, therefore anybody who was on that bus "is going north of the city." (R-45). He stated that the fact that she was going to Detroit, as opposed to a city such as Palatka played no part at all in raising concern in his mind that she might be a drug trafficker (R-45).

The fact that she had purchased a one-way ticket caused no suspicions because, as he put it "most people do have a one-way ticket." (R-46).

Ms. Nazario was seated in a window seat alone, and there was a vacant aisle seat next to her (R-10-11). When Detective Damiano approached her it was "just randomly" because there was "nothing suspicious," and there was "no reason why we approached her other than to solicit her cooperation and assistance." (R-10).

After producing his badge and ID card, Detective Damiano called Detective Vichot, because Vichot spoke Spanish and Ms. Nazario could not understand the English spoken by Detective Damiano (R-11-12). Under this Court's decision in Caplan v. State, 531 So.2d 88 (Fla. 1988), the observation in her bag of a box wrapped in plastic tape does not constitute probable cause. The officers could not see inside the box, and the mere observation of an opaque container does not create probable cause "in the absence of other facts." Caplan v. State, supra. This Court

has held that the observation of hand-rolled cigarette papers, in the absence of other facts to indicate probable cause, does not alone give rise to probable cause to search. This Court cited with approval in Caplan cases from other jurisdictions involving a plastic bag, a soft pouch, a prescription bottle, and an ornamental smoking pipe in all of which courts had held that those containers could have held either innocent or illegal contents. Nothing indicated the latter and thus probable cause did not exist to search.

In the present case persons use boxes, and may wrap those boxes, in order to protect the contents in transit. Numerous innocent items, a prized, or breakable, icon or object is best transported in a box that is wrapped to protect the contents from loss or breakage. Shoe boxes, for example, are a commonly known convenient container for any number of items that have nothing to do with the transport of illegal drugs.

The fact that the officers in this case had on numerous prior occasions found contraband in containers wrapped with plastic tape is not enough to give probable cause to search all such containers they encounter. In this case there are no other facts to support a determination by the officers, or by the courts that have ruled in this case, that this wrapped box gave probable cause to seize or search it. Ms. Nazario, as shown by the facts above, was not under suspicion as a drug courier. She was as far as the officers were concerned a cooperating citizen who, presumably innocent, was traveling from Miami to Detroit.

In the absence of other facts such as existed in P.L.R. v. State, 455 So.2d 363 (Fla. 1984), there were no other facts to support a determination that probable cause existed. In P.L.R., by contrast, the defendant had been seen in the drug trafficking area previously by the arresting officer. The defendant had a small manila envelope in his pocket which the officer had seen used previously to contain marijuana for sale. The evidence also showed that 90% of the kind of envelopes that P.L.R. possessed had been seen in the particular high drug area where P.L.R. was observed.

Thus, in P.L.R. there were attendant facts which supported a finding that the opaque container did contain contraband. In P.L.R. those were specific and articulable facts, when taken together all indicated a high probability that P.L.R. was in possession of illegal drugs.

The holding of this Court in P.L.R. carefully stated that additional facts are required. This Court reaffirmed that principle in Caplan v. State, supra.

In light of the above, this Court must find that there is no basis upon which the search in this case could be upheld under the doctrine of probable cause to search without a warrant. First, there was no finding of probable cause, secondly there were insufficient facts which could give rise to probable cause. Therefore the decision below should be quashed and there is no alternative basis upon which to approve the holding of the District Court of Appeal.

POINT III

WHETHER THE POLICE PRACTICE IN SEEKING CONSENT TO SEAKCH LUGGAGE OF PASSENGERS ABOARD COMMON-CARRIERS IS INHERENTLY COERCIVE OR WHETHER IT IS A VOLUNTARY POLICE-CITIZEN ENCOUNTER?

Ms. Nazario contends that the police action, as shown by the evidence in this case, constitutes a pattern of activity that has significant aspects of coercion which taints any alleged consent. The police action, conducted without any founded suspicion of criminal activity, of seeking consent to search the luggage of passengers already en route on an interstate bus is not a typical voluntary police-citizen encounter.

This procedure typifies an arbitrary and oppressive interference by police officials with a citizen's right to normal and unencumbered travel. See United States v. Martinez-Fuerte, 428 U.S. 543 (1976), in which the Court remarked that the Fourth Amendment to the Constitution is designed to prevent random and arbitrary interference with the right to privacy and to "personal security of individuals." 96 S.Ct. at 3081. Martinez-Fuerte concerned stops and questioning of motorists at a permanent check point without individualized suspicion. Any searches were limited to what can be seen except when conducted by consent or probable cause.

Petitioner concedes that the police have the right to address questions to anyone on the streets. See Terry v. Ohio, 392 U.S. 1, at 34 (1968). There is no inherent coercion in a typical consensual street encounter, or other typical voluntary encounter, between a policeman and a citizen. The police

officers of course have the liberty to address questions to ordinary citizens. The citizen in such situation has an equal right to walk away. Id. Such an "encounter" becomes a detention, which requires "reasonable suspicion" as soon as the situation changes to one where a reasonable person would have believed he was not fully free to leave. Florida v. Royer, 460 So.2d 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

In Snider v. State, 501 So.2d 609 (Fla. 4th DCA 1986), dissenting, Judge Glickstein of the Fourth District Court of Appeal perceived that approaching a ticketed passenger who is en route on a bus traveling to another city and seeking to search that person's luggage is not equivalent to approaching a citizen on the street or in an open area such as the waiting lobby of a bus station. A person seated on a bus in the midst of a journey, for which he has lawfully purchased a ticket to travel, is in a situation where he has limited range to exercise his individual right to go on his way and decline the encounter.

In the present case the testimony shows that the aisles of the bus, in this case a typical Greyhound bus, allows two persons to walk abreast, thus permitting the person to exit if he wishes, only depending upon the size of the individuals (R-39-40). There was testimony in the present case given by a state witness that a person "might have to turn sideways" depending upon the size of the person in order to exit the bus when one of the police officers is standing in the aisle between the passenger's seat and the door (R-40). This restricted range of movement is

significant when coupled with the fact that most passengers are in a city away from their homes. The officers board the bus so as to not "keep the bus drivers waiting too long" (R-74). If the driver is late, and tells the officers that he is behind schedule, the officers do not board that bus (R-38). Any person deciding to leave the bus to avoid the encounter with the officers would be faced with a real prospect of missing the bus.

Petitioner was a traveler in the stream of commerce and under the rule of Delaware v. Prouse, 440 U.S. 648 (1979). She should have the right to travel without the impediment of this kind of search procedure.

The petitioner requests the Court to note that this issue is pending in Avery v. State, Case No. 73,289, wherein the issue is fully developed that this procedure interferes with the right to citizens to be left alone and the right to be secure in their persons and possessions from illegal searches and seizures.

Petitioner submits that the Court should declare that this procedure is unduly intrusive and occurs in a situation that precludes a free and voluntary consent. It is especially intrusive where there is no basis for the officers to suspect the approached individual of criminal activity. Petitioner distinguishes a situation in which the officers have grounds to approach and detain an individual, which is a situation not involved in this case.

Wherefore, the decision below should be quashed on this ground also.

POINT IV

WHETHER THE DISTRICT COURT ERRONEOUSLY UTILIZED, AND APPROVED USE BY THE TRIAL COURTS OF, THE PREPONDERANCE BURDEN OF PROOF INSTEAD OF THE CLEAR AND CONVINCING STANDARD DUE TO THE SPECIAL CIRCUMSTANCES THAT EXISTED?

The petitioner argued in the trial court that the clear and convincing standard of proof would apply because the petitioner was a non-English speaking person when confronted by the officers on the bus (R-87). The trial court applied expressly the preponderance of the evidence standard for the state to prove consent to search (R-103).

The District Court of Appeal, likewise, ruled that the trial court correctly applied the preponderance standard of proof after determining that there had been no unlawful detention (Appendix - A-3). The district court cited to Denehy v. State, 400 So.2d 1216 (Fla. 1980), and to its decision in Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987).

Petitioner submits that for two separate reasons the preponderance of the evidence standard is not the correct standard in this case. The language barrier is one, and the other is that the confrontation on the bus constituted a detention more than a voluntary encounter between the citizen and a police officer. The actions of the officers in approaching the passengers traveling on the bus to seek consent to search their luggage, under all of the circumstances including the narrowness of the aisles on a passenger bus, the fact that passengers are

normally away from their homes, make this encounter the equivalent of a temporary detention. The facts in this case show, without any contradiction, that the officers realized they had no grounds to suspect Ms. Nazario of any wrong doing or criminal activity of any kind. Thus, there was no basis for a detention of her.

In such circumstances, the illegal action of the officers in utilizing a confrontation that amounted to a detention, without grounds to detain, is an unlawful police act that requires use of the clear and convincing standard in order for a consent to search in such circumstance to be valid.

In Denehy v. State, supra, at 1217, this Court stated:

> Under ordinary circumstances the voluntariness of the consent to search must be established by preponderance of the evidence.

When there is police illegality, such as an unlawful detention, the clear and convincing standard must be used because the action of the police "presumptively taints and renders involuntary any consent subsequently obtained." Alvarez v. State, 515 So.2d 286 (Fla. 4th DCA 1987), at 288. This distinction between cases where no police overreaching has occurred, and cases where unlawful police activity occurs, requires a different standard of proof for the state to meet its burden of proving voluntariness under the circumstances. The court explained in Alvarez this distinction, as follows, id. at 288:

> Absent any improper police conduct prior to securing an alleged consent, the consent issue should be determined by the greater weight of the evidence presented to the trial court. However, consent purportedly obtained after prior illegal action by the police, such as an

> invalid detention or arrest or illegal search, must be particularly scrutinized, because such police action presumptively taints and renders involuntary any consent subsequently obtained. Norman v. State, 379 So.2d 643,646-47 (Fla. 1980); Bailey v. State, 319 So.2d 22,28 (Fla. 1975). Logically, the closer the connection between a consent and any improper conduct by the police, the less likely a consent will be found to be freely and voluntarily given, as opposed to being the natural consequence of the police misconduct, This court has described the state's burden in the case of antecedent police misconduct, as a requirement to prove consent by clear and convincing evidence. Cf Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987).

As for the language barrier, the petitioner was a Spanish speaking person who was approached by an officer speaking English. Next a second officer who spoke Spanish conversed with her. Her inability to speak English required a second officer to confront her thus increasing the potential for coercion. Her inability to understand English also prevented her from any spontaneous objection to Officer Damiano puncturing the plastic-wrapped shoebox container because she was unable to converse in his language. In Restrepo v. State, 438 So.2d 76 (Fla. 3d DCA 1983), at 77, the district court held that voluntariness of the consent to search must include consideration of such factors as the education and intelligence and knowledge of the individual. An important element is whether the person is a foreigner who does not readily speak or understand English. In such event, the court in Restrepo held that the burden on the government to show a voluntary consent in such circumstances is heavier. To like effect is Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983),

where in footnote 1, the district court noted that the burden to show a voluntary waiver of rights is heavier where the person is a foreigner not readily conversant in the English language.

The Spanish-speaking detective was raised in Cuba whereas Ms. Nazario came from Puerto Rico (R-51,78). There is a difference between translation and interpretation (R-51). The words petitioner used were "Yes, if you want" or "Yes, if you like," there being alternate translations for her words (R-66,68). It was not shown by the state that the dialect, meaning and inference of his words, and of her words, were the same in both countries. Nor was it shown that the Spanish-speaking officer could establish that their respective backgrounds would give the same meaning to each other's choice of words and phrasing. Thus, no adequate translation was shown to have occurred and the stricter standard of proof should have used for the state to prove voluntary, knowing and intelligent waiver.

Special circumstances exist in this case to require the application of the clear and convincing evidence standard. Special circumstances distinguish a case from the application of the usual and ordinary rule announced in McDole v. State, 283 So.2d 553 (Fla. 1973), adopting the preponderance standard.

Wherefore, on this point the Court should quash the decision below and remand with instructions that a new trial be granted and that a clear and convincing standard of proof be required for the state to establish a voluntary consent to search in this instance.

CONCLUSION

In light of the points set forth above, it is submitted that on each and every point the Court should quash the decision of the District Court of Appeal and remand with instructions that the cause be reversed and remanded in accordance with the ultimate decision of this Court on each of the points set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOAN FOWLER, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 10th day of July, 1989.

LOUIS G. CARRES
Assistant Public Defender