IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,665

DAMARIS NAZARIO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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LIST OF CITATIONS

E MI STATEMEN

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

"R" denotes Record on Appeal;

"A" denotes Respondent's Appendix;

"PA" denotes Petitioner's Appendix.

STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case to the extent that they present a non-argumentative recitation of the proceedings below. Respondent would include the following:

The district court affirmed the trial court's ruling not only on the grounds of proper consent but also because the search was justified based on probable cause.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts to the extent that they present a non-argumentative recitation of the proceedings in the trial court, with the following additions and clarifications:

Officer Damiano, an eight-year veteran, has spent the last four years in the drug interdiction unit (R 7). He has made well over two hundred fifty drug related arrests (R 7). He has seen and touched cocaine at least one thousand (1,000) times (R 8). He also stated that he has seen cocaine wrapped, the way Petitioner's was wrapped, at least three hundred (300) times (R 14). Officer Damiano also was aware that Petitioner was traveling to Detroit with a one-way ticket (R 45-46).

After Petitioner handed her bag to Damiano, he immediately searched it (R 13).

POINTS ON APPEAL

POINT I

WHETHER THE CONSENT TO SEARCH PETITIONER'S BAG EXTENDED TO THE PACKAGE FOUND IN THE BAG?

POINT II

WHETHER THE DISTRICT COURT PROPERLY FOUND THE EXISTENCE OF PROBABLE CAUSE TO UPHOLD THE SEARCH OF PETITIONER'S PACKAGE?

POINT III

WHETHER THE DISTRICT COURT APPROPRIATELY CONCLUDED THAT THE ENCOUNTER WAS PROPER AND THAT PETITIONER'S ENSUING CONSENT WAS VOLUNTARY?

POINT IV

WHETHER THE DISTRICT COURT APPLIED THE PROPER STANDARD OF REVIEW AS NO ILLEGAL POLICE CONDUCT PRECEDED PETITIONER'S CONSENT?

SUMMARY OF THE ARGUMENT

The decision below is not contrary to this Court's opinion in State v. Wells, 539 So.2d 464 (Fla. 1989). The consent was well defined as it did encompass the package found in the luggage.

The district court's determination that consent was proper was not the only valid ground to uphold the search. There was sufficient testimony from the officer to find the existence of probable cause, consequently, the search was proper under this alternative ground. Second, the district court properly determined that the citizen-police encounter was a voluntary one.

Since the encounter was a permissible one, the proper standard to determine voluntariness is a preponderance of the evidence.

ARGUMENT

POINT I

THE CONSENT TO SEARCH PETITIONER'S BAG EXTENDED TO THE PACKAGE FOUND IN THE BAG.

When making a determination as to whether the scope of consent was exceeded by police officers, the totality of the circumstances must be considered; State v. Fuksman, 468 So.2d 1067, 1070 (Fla. 3rd DCA 1985):

> It is not merely the consenting party's words and actions, but the words and actions of all involved, as well as the surrounding circumstances which define the scope of a consent search. The totality of circumstances is the proper test for determining the scope of such a search.

State v. Fuksman, 468 So.2d 1067, 1070 (Fla. 3rd DCA 1985).

Respondent submits that based on such a test, the facts of the instant case illustrate that consent extended to the taped package. Once Petitioner agreed to speak with the officers, Vichiot asked permission to search her luggage and explained the purpose of the search:

> I explained we were having a problem in South Florida with illegal narcotics being transported on these buses *so* we seek the public's help and cooperation helping to stem the tide by letting us search her bag with her consent.

R 59). Petitioner claims that she was unable to object to the search because of the language barrier between her and Damiano. She also claims that the bag was not searched in front of her. Respondent asserts that there is no record evidence that Petitioner could not see the search being conducted. To the contrary, Vichiot stated that he thought the luggage was put at her side (R 60). Furthermore, Damiano stated that he was standing next to her chair behind her so as not to block the aisle (R **12**). There is absolutely no evidence that Damiano then moved away or in any way attempted to impede Appellant's vision during the search.

With respect to Petitioner's inability to speak English, she was able to and did converse with Vichiot in Spanish (PA 2 n. **1**). If for some reason she decided not to speak with Vichiot, she could have very easily physically taken back the luggage, which she had previously handed to the officer. Petitioner had every opportunity to terminate the search at any time.

Based on the principles of Wells, supra, Petitioner's consent extended to a search of the wrapped package. At no time during the encounter or subsequent search did Petitioner attempt to limit or discontinue the search (R **15-16, 60**). This distinguishes the instant case from Wells. In Wells the car had been impounded, furthermore the defendant in Wells was never told of the purpose of the search. Finally, Petitioner was told that

she could refuse the search but instead she voluntarily picked up her luggage and handed it to Damiano (R 13, 59-60). Given these factual distinctions, this case falls within the parameters of Wells insofar as the issue of consent to search was involved in that case.

Although Respondent asserts that the facts sub judice are in line with Wells, this Court should reexamine its holding in Wells with respect to the relevancy of United States v. Ross, 456 U.S. 798, 102 S.Ct 257, 72 L.Ed.2d 572 (1987) in consent searches.

This Court refused to apply Ross a probable cause search, to a consent search, characterizing the former as "totally incongruous to the freedom of choice inherent in consent. Wells, 539 So.2d at 466. However, in Colorado v. Bertine, 479 U.S. 367, 107 S.Ct 738, 93 L.Ed.2d 739 (1987), the United States Supreme Court relied on Ross in upholding a search based on a strictly administrative procedure, i.e., inventory search. Consequently, this Court's concern with the fact that Ross involved a probable cause search is invalid.

The practical effect of Wells as it stands now is that a general consent to search will now be required to specify which containers, compartments or packages is covered under the search. Such a rigid formula was never envisioned under the "totality of the circumstances evaluation''relied upon by Florida courts or the United States Supreme Court. Fuksman, supra; Schneckloth v.

Bustamonte, 412 U.S. 218, 93 S.Ct 2041, 36 L.Ed.2d 854 (1973). As the Court stated in Bertine:

> "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." United States v. Ross, supra, 456 U.S. at 821, 102 S.Ct at 2170.
>
> We reaffirm these principles here: "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.'" See [Illinois v.] Lafayette, supra, 462 U.S. [640], at 648, 103 S.Ct. 126051, at 2610 [77 L.Ed.2d 65 (1983)] (quoting New York v. Belton, 453 U.S. 454, 458, 101 S.Ct 2860, 2863, 69 L.Ed.2d 768 (1981).
>
> Bertine, 479 U.S. at 375, 107 S.Ct at 743, 93 L.Ed.2d at 747-748.

It is respectfully submitted that this Court's decision in Wells merits further scrutiny insofar as the opinion appears to overlook the decisions in Ross, supra and Bertine, supra. See, Wells, 539 So.2d at 469 dissents by Shaw, J., Overton and McDonald. The obligation of this Court pursuant to Article I,

Section 12, of the Florida Constitution (1980) assures conformity between decisions of this Court and the United States Supreme Court regarding Fourth Amendment issues.[1] This case presents an opportunity to further refine the law and harmonize Wells with Bertine and Ross.

[1] The State of Florida has successfully petitioned the United States Supreme Court to review the decision. in Wells, Case No. 88-1835 on the issue of inventory. The State's brief on the merits was filed on August 12, 1989.

POINT II

THE DISTRICT COURT PROPERLY FOUND THE EXISTENCE OF PROBABLE CAUSE TO UPHOLD THE SEARCH OF PETITIONER'S PACKAGE.

Petitioner claims that there was insufficient evidence to uphold the search based on probable cause. Petitioner relies solely on this Court's opinion in Caplan v. State, **531** So.2d **88** (Fla. **1988).** Respondent submits that the facts in the instant case do establish probable cause based on Caplan, supra and P.L.R. v. State, **455** So.2d **363** (Fla. **1984).**

Petitioner incorrectly states that the district court attempts to buttress the existence of consent by finding probable cause. The district court simply found an alternative ground to uphold the search, i.e., probable cause. In no way can this probable cause determination be construed as an argument for consent. They are two separate grounds which happen to both be supported by the facts. Burke v. State, **465** So.2d **1337** (Fla. 5th DCA **1985);** Curry v. State, **540** So.2d **165** (Fla. 4th DCA **1989).** See also Point I.

Petitioner attempts to disavow the' existence of probable cause with reliance on statements made by Damiano with reference to a drug courier profile (R **45-46).** Information known to Damiano at the time he saw the wrapped package was that Petitioner was traveling to Detroit with a one-way ticket (R **45-46).**

The fact that Damiano dismissed the importance of this information for purposes of a drug courier profile in no way detracts from its relevancy to the question of probable cause. Damiano, an eight-year veteran, the last four years spent investigating narcotics-related crimes, knew the package contained cocaine (R 14). He testified to making at least five hundred (500) similar searches and over two hundred and fifty arrests (R 7). He has seen and touched cocaine over one thousand (1,000) times (R 7-8). He testified that he has seen cocaine similarly wrapped in excess of three hundred (300) times (R 14). He has had extensive law enforcement training in this area (R 8). Based on all this knowledge and experience, Damiano knew the package contained cocaine (R 14). In P.L.R., 455 So.2d at 366 this Court held that probable cause existed based on the facts that the container seized was the type commonly used to transport drugs and the search occurred at a known narcotic-transaction cite. Clearly, the facts known to Damiano meet the P.L.R. test.

Respondent would also point out that the district court's opinion is in line with Caplan, supra. Justice Barkett articulated what additional factors along with opaque containers would constitute probable cause:

> 1) Container is of a type commonly used to hold narcotics;
>
> 2) is at a known narcotics transaction cite, and

> 3) is determined to be narcotics-related based on the observation of police officers with sufficient experience and expertise in such matters.

Caplan, 531 So.2d at 91 (1988), f.n. 2.

In the instant case, the determination based on experience has already been stated (R 7-8, 14). The box-shaped plastic wrapping is a commonly used container for drugs (R 14). Lastly, whether or not the area is a known drug cite, Respondent asserts that drugs are known to be transported on buses going north (R 59). If this were not so, there would be no purpose in the drug interdiction unit's encounters on buses.

As Justice Barkett stated, these factors are relevant but are not the only criteria. Respondent asserts that based on all the facts known by Damiano along with his extensive training and experience, probable cause existed. Caplan; P.L.R.

Lastly, Respondent would point out that the district court was correct in making a probable cause determination irrespective of the trial court's failure to do *so.* If there is a strong theory upon which the trial court might properly have denied Petitioner's motion to discharge, then the district court is correct in affirming even if the trial court's stated reason is erroneous. Stuart v. State, 360 So.2d 406, 408 (Fla. 1978).

POINT III

THE FOURTH DISTRICT APPROPRIATELY CONCLUDED THAT THE ENCOUNTER WAS PROPER AND THAT PETITIONER'S ENSUING CONSENT WAS VOLUNTARY.

Petitioner contends that the actions of the police in the instant case did not amount to a voluntary police-citizen encounter. This issue is now pending before this Court in Avery v. State, Case No. **73,289** and Bostick v. State, Case No. **70,996.** To avoid redundancy Respondent would rely on the arguments advanced in those cases. Pertinent portions of those briefs are attached as an appendix to this brief.

Following a Motion to Suppress hearing, the trial court made the following findings of fact:

> 1) Petitioner was one of many people on the bus the officers spoke with (R **9, 54);** 2) weapons were not brandished **(12, 54,** 60); 3) and the officers politely asked Petitioner if she would speak to them (R **55-56, 102); 4)** the officers were simply walking down the bus and were making requests of passengers to search luggage (R 102); **5)** Petitioner acknowledged through signing a consent form that she was advised of her right to refuse the search (R **59,** 103).

The trial court correctly characterized the determination as one involving a question of credibility. Bailey v. State, **295** So.2d **133, 137** quashed **319** So.2d **22** (Fla. **1975).** After weighing the

testimony of the police officers along with the physical evidence, the Court was more persuaded that consent was voluntary (R 103).

Additional facts not addressed in the trial court's order but critical in this determination are the following: Officer Damiano identified himself as such displaying badges and an identification card (R 11). When asked if he could talk with her, Petitioner's accent became obvious to the officer when she responded yes (R 11). During this conversation the aisle was clear and unobstructed (R 12). Both officers were standing behind Petitioner's seat (R 12). At that point Damiano elicited the service of Officer Vichiot who spoke fluent Spanish (R 11). Vichiot identified himself and asked Petitioner if she would speak to them (R 58). After responding yes, Vichiot asked her if she had any luggage (R 58). Petitioner pointed to two bags (R 57). Vichiot then explained his duties with the narcotics interdiction unit (R 59). He further explained that South Florida was experiencing a lot of problems with illegal narcotics being transported through the area on buses (R 59). For this reason the police were seeking the cooperation of the public to help "stem the tide by letting us search her bag with her consent" (R 59). After being told of her right to refuse, she agreed to the search and handed one of her bags to Damiano (R 59-60). At no time did Petitioner attempt to limit her consent (R 60, 61). Once Damiano saw the box-shaped package wrapped in plastic tape, he immediately

suspected it was cocaine (R 14-15). Based on his reasonable belief that cocaine was present, he cut open the bag and found the cocaine (R 15).

In considering the totality of the circumstances, Respondent submits that a voluntary consent has been established. United States v. Mendenhall, 446 U.S. 544, 106 S.Ct 1870, 64 L.Ed.2d 497 (1980); Florida v. Royer, 460 U.S. 491, 103 S.Ct 1319, 75 L.Ed.2d 239 (1973); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct 2041, 36 L.Ed.2d 854 (1973); Denehy v. State, 400 So.2d 1216 (1980). Any other ruling would deny law enforcement officers the ability to briefly encounter citizens at public transportation areas, despite the holding of the United States Supreme Court in Royer, supra:

> ... law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen ...

Id. 75 L.Ed.2d at 236. Given that illegal drug transactions are prevalent in South Florida, further limitations on law enforcement would be inconsistent with public policy and the reasonable limits set forth by the United States Supreme Court.

POINT IV

THE DISTRICT COURT APPLIED THE PROPER STANDARD OF REVIEW AS NO ILLEGAL POLICE CONDUCT PRECEDED PETITIONER'S CONSENT.

Petitioner asserts that the incorrect standard of review was utilized by the trial court. The claim is that the Court should have used the clear and convincing standard rather than a preponderance of the evidence. Petitioner relies on the fact that she spoke Spanish and that the encounter with police amounted to an illegal detention. Respondent will rely on the argument advanced in Point III for a response to Petitioner's second reason, i.e., illegal detention. Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983). The standard of review by which consent is determined does not change absent antecedent police misconduct. Denehy v. State, 400 So.2d 1216 (Fla. 1980); Elsleqer v. State, 503 So.2d 1367 (Fla. 4th DCA), dismissed, 511 So.2d 298 (Fla. 1987); Balthazar v. State, 533 So.2d 955 (Fla. 4th DCA 1988), review granted, Case No. 73,465.

The reason a higher standard is required when police misconduct is present is the fear that such action taints a subsequent consent. Consequently, the relevant factor is the presence ~~vel~~ ~~non~~ of an unlawful detention. The inability to speak English in no way effects the standard to be employed. Elsleqer, 503 So.2d at 1369, citinq Norman v. State, 379 So.2d 643 (Fla. 1980). Petitioner fails to explain how a language problem between

Vichiot and herself can be construed as creating a coercive setting thereby tainting any consent. It is simply a relevant factor to take into consideration. If a language problem exists, the State would be required to prove that a defendant in fact understood his or her rights by pointing to other relevant factors.

Respondent acknowledges that the State's burden in proving consent is heavier in case where a defendant is non-English speaking. In Rosell, supra, the district court acknowledged that the State's heavier burden is overcome when an officer, who speaks the same language as the defendant, adequately informs the defendant of his or her rights. Rosell, 433 So.2d at 1262, n. 1. The district court in the instant case applied that identical logic (PA 2 n. **1**). See also, Garcia v. State, **186** So.2d 556 (Fla. 3rd **DCA** 1966).

Petitioner attempts to create a language barrier between Officer Vichiot and herself where non exists. At no point during cross-examination of the officers was it established or ever discussed that Vichiot could not converse with Petitioner in her native tongue (R **64-81**). More importantly, Petitioner never stated during her testimony that she ever had any difficulty in conversing with Vichiot (R **81-85**). At one point Nazario acknowledged that Vichiot did tell her that there is a large problem in this area with people transporting drugs on buses (R **82**).

In conclusion, the district court correctly determined that language was not a factor in the instant case. Furthermore, the appropriate standard of review was applied based on the absence of any illegal police activity. Denehy, supra.

CONCLUSION

WHEREFORE, based on the foregoing authorities and facts, Respondent respectfully requests that this Court AFFIRM the district court's decision and reject Petitioner's notion that the instant case conflicts with Palmer; Rosa; Wells.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits 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 24th day of August, 1989.

Of Counsel