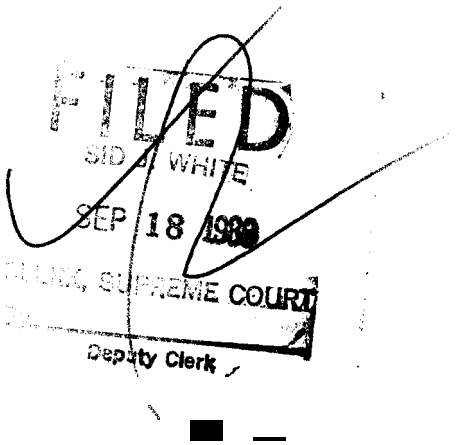
IN THE SUPREME COURT OF FLORIDA



DAMARIS NAZARIO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,665

REPLY BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

Respondent has included in its additions to the statement of the facts the testimony of Officer Damiano that he was aware that petitioner was travelling to Detroit on a one-way ticket (R-45-46). Officer Damiano testified that the fact that she was travelling to Detroit was of no concern, because any city north of Ft. Lauderdale is north of the city (R-45). A destination of the City of Detroit did not cause any concern, nor was the fact that she had a one-way ticket in any way suspicious (R-46). Damiano said that "most people" have a one-way ticket (R-46). Also the fact that she was a Latin female did not raise any suspicion in his mind (R-46).

The container that was searched by way of punching a hole in it was a box wrapped in plastic tape (R-14). The officer could not recall the color of the wrapping or the way it was wrapped, but he remembered during his testimony that the box was wrapped in plastic tape (R-14).

ARGUMENT

POINT ON 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?

Respondent cites to State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985), for the argument that the extent of the consent to search may be determined by the totality of the circumstances rather than strict adherence to the words used. State v. Fuksman requires that the burden of establishing the extent of the consent not be placed on the consenting party. It was also held in Fuksman that a "general and ill-defined consent to search" does not include permission to search "every package and container" within the premises to be searched. In Fuksman the search was of a motor vehicle. The court declined to extend the probable cause extent of authority to search to consent cases because to do so would misapply the considerations upon which a probable cause search is based. In United States v. Ross, 456 U.S. 798 (1982), the Court was concerned with the extent of the authority to search where probable cause had been established. In Fuksman, as this Court also held in State v. Wells, 539 So.2d 464 (Fla. 1989), it was decided that the considerations in determining the extent of a probable cause search are different, and materially dissimilar, to the considerations involved in determining the extent of a consent search. These searches each have a different underlying basis that characterizes the nature of the search as well as the expected extent of the search. State v. Wells, supra.

In State v. Fuksman, supra, the Third District Court of Appeal required the extent of a consent search be defined so that a party would not be unaware of whether his consent had such an extensive scope as to include closed packages and containers.

In Colorado v. Bertine, 479 U.S. 367 (1987), quoted by respondent on page 9 of its brief, the Court referring to United States v. Ross, supra stated that when a legitimate search is underway "[A]nd when its purpose and its limits have been precisely defined" the distinctions between closets and drawers and containers, or between glove compartments, upholstered seats, and wrapped packages give way to the interest of a prompt and efficient completion of the task.

The precise purpose and limits of the search are of critical importance to a consent search. When closed containers and wrapped packages are searched pursuant to a general consent, but the manner of search involves destroying the container by punching holes in it, the search exceeds any reasonable and normal expectation of a person regarding the manner and extent of the search. This Court should so rule and quash the decision of the Fourth District Court of Appeal on this ground.

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 respondent argues that probable cause can be based upon the fact that petitioner was travelling to Detroit on a one-way ticket. However, as set forth in the clarification of the statement of the facts in this brief, the detective stated that the fact that she was a Latin female, was travelling to Detroit or any other northern city, and that she had a one-way ticket was not a cause of suspicion (R-46-47). Detective Damiano stated that most people have one-way tickets, that most cities are north of Ft. Lauderdale and that the fact that she was Latin was also not a ground for a suspicion because a drug trafficker could be Chinese, American or any other nationality (R-47).

Thus respondent's effort to use these facts to create probable cause in this case is an argument that is exactly contradicted by the testimony of the detective. The record does not support a finding of probable cause, and the trial judge did not make such a finding. The Fourth District Court of Appeal indicated that its decision concerning the extent of the search was "bolstered" by the fact that the officer had seen packages wrapped in tape on many occasions containing drugs. However, it is for the trial judge to make the determination of probable cause, and on these facts the officer disclaimed any other basis for suspicion of this passenger. Thus probable cause is not apparent from the face of the record and was not found by the trier of fact.

Thus respondent's attempt to create a probable cause issue is contrary to the record and should be rejected.

POINT III

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

The petitioner, as does respondent, relies upon the arguments in the initial brief and upon the arguments presented and pending in the cases of Avery v. State, Case No. **73,289** and Bostick v. State, Case No. **70,996**, pending in this Court.

Petitioner submits that it has been shown that the expectations of an ordinary travelling citizen, who is en route on a common-carrier to a destination in another city, is unduly impeded by the intrusion of law enforcement officers, wearing insignia to identify themselves as such, seeking consent to search luggage which has been closed and placed on the transportation vehicle for transit. This intrusion is not typical or normal of those encountered by American citizens who have a plainly defined right of free and unimpeded travel under the Constitution of the United States. This kind of encounter is not a typical voluntary police-citizen encounter as experienced between a citizen and a police officer in an open area, such as a street or lobby of a bus station. The close confines of the bus, coupled with the unusual nature of the encounter serve to distinguish this situation in a way that materially affects the free range of responses from the citizen in refusing to permit the intrusion.

Petitioner submits that law enforcement officers have no legitimate power to impede upon the travel of citizens in this manner once the citizens are seated on a public-carrier transport

vehicle, with luggage in place ready to embark on a continuation of the journey after having purchased and presented a ticket authorizing such travel. The "right" to refuse a search in that circumstance is too easily misunderstood as perhaps involving a necessity of the passenger to leave the vehicle and to discontinue the journey in order to avoid the encounter.

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?

Petitioner bases this argument upon the claim that this encounter is not a normal one. The nature of this encounter involves a high risk of intimidation and misunderstanding by the public that the police on a common-carrier asking for consent have the right to obtain that consent. A refusal, even if the right to refuse is understood, may involve the necessity to leave the common-carrier and be forced to delay or discontinue the journey even though the ticket that has been bought and presented.

If a passenger after having presented the ticket disembarks from the bus in order to effectuate a refusal to consent to a search, it is unclear whether the passenger in that circumstance would be forced to purchase another ticket in order to continue the journey later.

Therefore, petitioner submits that the clear and convincing standard is appropriate in this circumstance as it has been applied in other circumstances where police over-reaching is involved. The higher standard is required, as respondent concedes, in cases where police over-reaching may taint the validity of a consent to search. In the present circumstances application of the higher standard is appropriate if, arguendo, the procedure involved here is not invalid under the points set forth above.

CONCLUSION

Wherefore, based upon the foregoing authorities and facts in this case the petitioner respectfully requests the Court to quash the decision of the District Court of Appeal and remand with instructions that the motion to suppress be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to CELIA TERENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 14th day of September, 1989.

LOUIS G. CARRES
Assistant Public Defender