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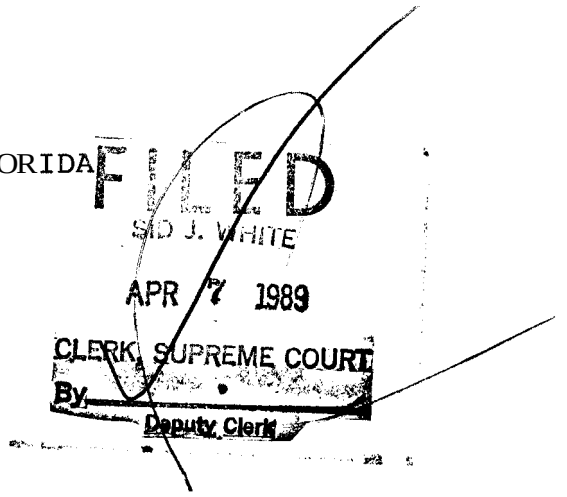
IN THE SUPREME COURT OF FEORIDA



TONY TOPHA JONES, a/k/a **TONY** TYRONE JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,809

PETITIONER'S INITIAL BRIEF ON THE **MERITS**

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida, and the appellee in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellant in the lower courts. In the brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

At 8:40 p.m. on December 30, 1986, Agents Turner and Fahey of the West Palm Beach Police Department boarded a Greyhound bus at the Greyhound bus station in West Palm Beach. Tney set about interrogating passengers seated on the bus with the end of investigating the transportation of illegal narcotics and weapons. R63. Petitioner was seated on the window side of the rear seat. Id. During the course of this operation Agent Turner found 54 grams of suspected cocaine on or about petitioner's person. Id. Petitioner was arrested and taken to the police station, where he confessed to possession of the cocaine. R64-65.

The state charged petitioner in the Fifteenth Judicial Circuit with trafficking in cocaine. R69. He entered a plea of not guilty, and moved to suppress the substance taken from him and his resulting confession on the ground that they were a product of an illegal search. R85.

Agent Turner testified on the motion to suppress that he told petitioner that he and Fahey were investigating the transportation of illegal narcotics and weapons, and that petitioner agreed to speak with him. R8-9. Turner asked whether anyone owned a bag on a rack over petitioner's head. R9. Receiving no response, he seized it and handed it to Fahey, who found a pistol inside. Id. According to Turner, petitioner appeared nervous and uneasy, and "was attempting to push a black nylon jacket underneath the seat in front of him, with his feet." Id. Turner asked whether it was his. Petitioner said it was, and picked it

up and put it in his lap. R9-10. Telling petitioner he had the right to refuse, Turner asked whether he could search the jacket, and petitioner said, "Sure, go ahead." R10. Discovering suspected cocaine inside, Turner arrested petitioner and thereafter obtained his confession. Turner testified on cross-examination that there were no police department standards governing the bus stop searches. R28.

The trial court granted the motion in a written oruer. Relying on Delaware v. Crouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the court wrote that the search was unreasonable under the fourth amendment because there were no standards or rules governing the police activity on the bus. R90.

The state took an interlocutory appeal to the Fourth District Court of Appeal, which reversed on the authority of State v. Avery, 531 So.2d 182 (Fla. 4th DCA 1988). The district court certified this cause to this Court as involving a question of great public importance.

SUMMARY OF ARGUMENT

The actions of the police in boarding the bus during a brief stopover, seizing and searching the bag without consent, and questioning petitioner were unreasonably coercive, so that the resulting search violated the fourth amendment and article I, section 23 of the Florida Constitution.

ARGUMENT

A. Two significant considerations govern this case. First, the passenger on a common carrier is in an especially vulnerable position so that the law affords him special protections. Second, the Fourth Amendment forbids wholesale police operations such as the one at bar absent reasonable police regulations governing them.

1. The law has long recognized the unique vulnerability of passengers on common carriers. Hence, a common carrier of passengers is required to exercise the highest degree of care, vigilance, and precaution for its passengers. 14 Am.Jur.2d, Carriers § 916. Among travellers on common carriers, bus passengers are the most susceptible to police coercion.

The typical bus passenger occupies the low end of the socio-economic spectrum in America today. Greyhound Lines, Inc., the carrier involved here has released the following passenger profile of its ridership:

Age	% of passengers
16-24	24.9%
25-34	19.3%
35-44	15.6%
45-51	13.1%
55-64	12.4%
65+	14.7%
Sex	
male	45.0%
female	55.0%

Education

Lack of high school degree	17.1%
High school graduate	24.0%
Trade school graduate	5.8%
Some college	27.9%
College graduate	16.6%
Graduate school degree	8.6%

Marital Status

Married	32.0%
Never married	40.9%
Divorced/separated	15.9%
Widowed	11.2%

Household Income

Less than $15,000/year	44.8%
$15,000 - $24,999/year	21.0%
$25,000 - $34,999/year	14.4%
More than $35,000/year	19.8%

Traveling Companions

Traveling alone	65.9%
With relative(s)	14.4%
With friend(s)	10.2%
With children	9.5%

Reason for Trip

Visiting relatives or friends	51.5%
Vacation	23.6%
Personal business	14.4%
School	4.1%
Commuting	3.6%
Business	2.8%

Race

Black	23.1%
Hispanic	6.0%
Oriental	3.5%
White	62.7%
Other	4.7%

Home community

Rural	20.8%
Urban	45.8%
Suburban	33.5%

Employment

Employed full time	41.8%
Employed part time	11.2%
Full-time student	16.0%
Active-duty military	1.7%
Retired	18.9%
Uneinployed	10.4%

Greyhound Lines, Inc., Fact Sheet, February 1989 (App. 2-8).

From the foregoing, it is obvious that the typical bus passenger is more susceptible to coercive police tactics than travelers on "exclusive" forms of transportation. Most bus passengers travel alone, are single, and lack a college degree. Almost sixty percent do not hold a full time job. Undereducated, underprivileged, with nowhere to go, he is an especially vulnerable target.

While buses may be comfortable for purposes of traveling from city to city, they are not conducive for the unrestricted free movement of its passengers. The aisle of a Greyhound bus is only 14 inches wide, App. 9, which can accommodate only one person walking down an aisle. If an individual were to attempt to pass another person standing in the aisle, both passengers would have to turn to their side and squeeze by each other. Weight and size difference cause greater restrictions on movement. In this small space, an armed police officer blocking the aisleway hovering over a seated passenger with nowhere to go[1] creates highly intimidating environment.

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1 Surely one can disembark from the bus and wait for another bus, but typically tnis involves an unnecessary delay to the passenger of several hours. For instance, a person traveling to Chicago from Miami and arriving in West Palm Beach at 3:35 p.m. would have to wait until 8:20 p.m. in order to catch another bus to Chicago. (App. 10-11).

The "captive" environment of a bus has been alluded to in a slightly different context by the Supreme Court in the case of Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714 (1974). (No violation of First and Fourteenth Amendments where city transit system refused to accept political advertising.) Justice Douglas, in his concurring opinion, aptly describes the harsh realities facing bus passengers:

> While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the riaht of the commuters to be free from forced instrusions on their privacy precludes the city from transporting its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.
>
> * * *
>
> One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, suck as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try not to listen. There is no difference when the message is visual, not auricular. In each the viewer or listener is captive.

[Emphasis supplied]. 94 S.Ct. at 2719.

Petitioner submits that a common carrier owes to its passengers a duty to warn of the impending police action. It seems that the carrier would have tnis additional responsibility. First, the police must receive permission from the carrier before entering the bus. Thus, the carrier has knowledge of this "condition" which exists. Tnis is somewhat analogous to the

carrier's duty to warn of dangers which are reasonably foreseeable and which might cause harm to the passenger as set out in, e.g., Werndli v. Greyhound Corp., 365 So.2d 177 (Fla. 2d DCA 1978). Werndli was a bus passenger who was seriously injured by an unknown assailant after arriving in the middle of the night at her destination terminal only to find it darkened, closed and locked. The terminal was located in a high crime area. Finding the carrier liable even though Merndli left the terminal area, the Court stated:

> Greyhound maintains, however, that any duty on its part terminated absolutely when appellant left its premises after completing her trip. We find it unnecessary to address that point because Greyhound's duty arose and was breached at the time appellant purchased her ticket. A common carrier is under a duty to warn passengers of dangers which are reasonably foreseeable and which might cause harm. This is especially true in situations where the passenger would not, in the exercise of reasonable care, be likely to anticipate and apprehend the danger. Tietz v. Inter. Ry. Co., 186 N.Y. 347, 78 N.E. 1083 (1906). Inasmuch as Greyhound knew or should have known that its Fort Myers terminal was located in a high crime area and would be darkened, closed, and locked at the time appellant was due to arrive there in the middle of the night, we believe that Greyhound should have warned or informed appellant of such a potentially dangerous condition in order that she might take that fact into consideration before purchasing her ticket and leaving St. Petersburg.

Id. 178 (Footnote omitted; emphasis added).

While this is not the forum to entertain a civil action, it certainly appears that the carrier had a duty to warn the defendant of the police[2] actions at the time the defendant purchased

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[2] The duty to warn may also be transferred to the police themselves. In State v. Jones, 483 So.2d 433 (Fla. 1986),

his ticket. A simple warning would have sufficed enabling the passenger to make an informal decision on whether to board the bus or not. Only in this situation, where a warning is issued, could it be argued that the passenger could catch another bus, for it is in that situation that the passenger could make alternative arrangements.

No one, whether rich or poor should be subjected to the fear tactics now being employed. The police actions were unjustified and without cause. Simply because one is on a bus should not render his constitutional rights void.

2. The "reasonableness" standard of the Fourth Amendment protects against arbitrary actions by the police. See Marshall v. Barlow's, Inc., 436 U.S. 307,312, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). The reasonableness standard usually requires, at a minimum, measurement against an objective standard, that "the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." Delaware v. Prouse, 440 **U.S.** 648,654-55, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Cf. Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) (inventory search valid where conducted pursuant to written standardized caretaking procedures).

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the Florida Supreme Court addressed the constitutionality of police drunk driving roadblocks. Finding the roadblocks constitutional the Court recognized that to pass constitutional muster there must be written guidelines and specific procedures created. The Court suggested that prior announcements to the public would be necessary where the police do not give adequate visual warnings of the impending roadblock. Id. 439.

With the above as background, petitioner turns to analysis of the case at bar.

B. There are three reasons for suppressing the evidence in the instant case. Petitioner submits that: (1) the police actions, without a founded suspicion of criminal activity, tainted any alleged consent; (2) the totality of the situation supports the trial court's finding of coercion; and (3) the government intrusion invaded petitioner's right to privacy under article I, section 23 of the Florida Constitution. Petitioner will address each of these issues below.

1. The police actions, without a founded suspicion of criminal activity, tainted any alleged consent.

To reach its decision the district court was required to conclude the action of the officers in boarding the bus, displaying authority, and standing over a bus passenger in a narrow bus aisle wnile questioning him, after illegally searching a handbag without consent (thus evincing an intent to search regardless whether any intent was received) and without a founded suspicion of criminal activity, was a mere voluntary "encounter" rather than an interference with the passenger's cognizable rights so as to vitiate the alleged consent.

To be sure, the fourth amendment does not prohibit voluntary interaction between the police and citizens because "there is nothing in the Constitution wnich prohibits a policeman from addressing questions to anyone on the streets." Terry v. Ohio, 392 U.S. 1, 34, 8%S.Ct. 1868, 1886, 20 L.Ed.2d 889 (1968). Such

a consensual street encounter between police and a citizen is premised on police officers enjoying the liberty (again, possessed by every citizen) to address questions to other persons. Id. at 31, 32-33, 88 S.Ct. at 1885-1886. "Ordinarily the person addressed has an equal right to ignore his interrogator and walk away." Id. An "encounter" becomes a detention as soon as a reasonable person would have believed he was not free to leave. Florida v. Royer, 460 So.2d 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). At bar, there is evidence to support the trial court's finding that there was a detention and not merely a consensual encounter.

In his dissent in Snider v. State, 501 So.2d 609 (Fla. 4th DCA 1986) Judge Glickstein correctly perceived that approaching a ticketed passenger aboard a bus is not like approaching a citizen on the street. Unlike the situations in Royer or Mendenhall, petitioner was not approached in a street or public area where people are free to come and go. Petitioner was seated on a bus, in the midst of a journey, for which he had legally purchased a ticket, Only ticketed passengers and employees of the bus line would board this northbound bus. Accordingly, the action of the officers, in boarding the northbound bus, confronting the seated, ticketed passengers, displaying their badges, and requesting to examine travel documents, clearly entailed a show of authority. These officers were exercising a superior right not enjoyed by any other citizen to grab and search the bag over petitioner's head without permission and to approach petitioner and question him regarding his travel plans, destination, and luggage. Cf.

Alvarez v. State, 515 So.2d 286, 290 (Fla. 4th DCA 1987) (person in sleeping car on train should legitimately expect that "his or her privacy will not be intruded upon, with the possible exception of a brief entry by a ticket collector, or encounters in the passageway with other similarly ticketed passengers or train personnel").

A passenger aboard a bus has a special privacy interest to be let alone which he does not enjoy in public places, This is emphasized by Justice Douglas, a well-known guardian of first amendment rights, in his concurring opinion in Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) where he recognized that even precious First Amendment rights would have to give way to the special interest of a bus passenger to be let alone:

> The First Amendment, however, draws no distinction between press privately owned, and press owned otherwise. And if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
>
> In asking us to force the system to accept his message as a vindication of his constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transporting its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

419 U.S. at 306-307, 94 S.Ct. at 2719 (emphasis added). Justice Douglas further noted that bus passengers are captive and not

free to ignore the activities on a bus by merely exiting like people in other public places. In the present case petitioner would not feel free to leave. He could only leave if he were to forfeit his journey.

Since petitioner was already a traveller in the stream of commerce, the rule of Delaware v. Prouse should apply here. In that case the Court held that invasion into privacy by conducting a license and registration check of persons travelling the highway cannot be arbitrary; there must be at least a reasonable suspicion that the law is being violated. Since petitioner was already a passenger on a common carrier, he must have, and he asserts he did have, the same rights as all other travellers.[3]

Of course, under some limited circumstances police may invade the privacy of travellers. However, the intrusion cannot be random or arbitrary. For example, in Jones v. State, 483 So.2d 433 (Fla. 1986) this Court recognized that there must be written guidelines and specific procedures created to ensure that arbitrary intrusions into the liberties of citizens do not occur:

> Paramount among all other considerations, the fourth amendment requires that all seizures be based on either: (1) specific evidence of an existing violation; (2) a showing that reasonable legislative or administrative standards are met; or (3) a showing that officers carry out the search pursuant to a plan embodying specific neutral criteria which limit the conduct of the individual officers.. .. We agree and find that it is essential that a written set of uniform guidelines be issued before a

[3] There should be no less protection afforded chose who, because of financial considerations, must travel by bus or train, than to those who own cars. Indeed, as already noted, the passenger on a common carrier receives special protection from the law.

> roadblock can be utilized ... so as to minimize the discretion of field officers, thereby restricting the potential intrusion into the public's constitutional liberties. Written guidelines should cover in detail the procedures which field officers are to follow at the roadblock.

483 So.2d 438 (emphasis added, citations omitted). In addition, in United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) the Court emphasized that the intrusion into privacy that occurred was not unconstitutional during a permanent roadblock because the "subjective intrusion -- the generating of concern or even fright on the part of lawful travellers" is appreciably less than a roving roadblock. 96 S.Ct. at 3083. The Court also noted that "motorists using these highways are **not** taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere." Id. In other words, assuming that there is a statutory authorization for interfering into the privacy rights of a traveller,[4] there must be minimum guidelines and some type of warning to the public of the potential interference. In this case there were no guidelines for the police to follow nor warnings to the passengers that the police were going to board the bus and ask questions. As noted by Judge Anstead's dissent in State v. Avery, 531 So.2d 182 (Fla. 4th DCA 1988), the traveller does not know how many time he will be intruded upon during his trip:

> In so ruling, I have some strong personal reservations about the drug interdiction program described herein, in spite of the fact that

[4] Border Patrol agents had the statutory authorization to interrogate those-believed to be aliens, -Martinez-Fuerte, 96 S.Ct. at 3080 ftnt.8.

> drug smuggling is a major problem in our society today. The procedure is inherently intrusive on a person's right of privacy. It invites abuse and tends to diminish fourth amendment protections. For example, how may times must a person be confronted with this procedure while he is travelling from Miami to New York City? And, where will it all end, i.e., can it be used on board airlines during a layover? Can police officers go through a neighborhood, knocking on doors and asking for consent to search houses in their war against drugs?

531 So.2d at 198 (emphasis added). This arbitrary intrusion which is without warning and is potentially unlimited is like the random intrusions which the Supreme Court does not tolerate:

> We concluded there that random roving patrol stops could not be tolerated because they "would subject the residents ... [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of the Border Patrol officers.... [They] could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road.. .." Ibid. There also was a grave danger that such unreviewable discretion would be abused by some officers in the field. **Ibid.**
>
> Routine checkpoints stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere.

Martinez-Fuerte, 96 S.Ct. at 3083 (emphasis added). Any consent after the arbitrary intrusion into petitioner's privacy was invalid under State v. Frost, 374 So.2d 593 (Fla. 3d DCA 1979) and Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75. L.Ed.2d 229 (1983). There can be no valid consent unless there is clear and convincing evidence of an unequivocal break in the chain of

illegality between the unlawful detention and the purported consent. Norman v. State, 379 So.2d 643, 646-647 (Fla. 1980); Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987). Here, there was no such break.

The tact that petitioner was advised of his right to refuse is not an unequivocal break in the chain of illegality. This statement was given uuring the same time as tne coercive circumstances noted by the trial judge. In Norman v. State, 379 So.2d 643, 647 (Fla. 1983), this Court made clear that consent is voluntary "only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action." Because the coercive circumstances occurred at the same time as the warning, the state cannot prove that there was clear and convincing evidence that the warning disspated those circumstances.

In addition, it should be noted that petitioner was probably never given an effective advisement of his right to refuse to consent. The officers had consent forms available but did not use them. Under these circumstances, the simple advisement of the right to refuse consent was not an effective advisement as required. See Schneckloth v. Bustamonte, 412 U.S. 218, 231, 93 S.Ct. 2041, 2050, 36 L.Ed.2d 854 (1973) (advisement is not dispositive because it normally is impractical to inform of the detailed requirements of an effective warning). The advisement during the time of the intimidating circumstances is not an unequovical break in the chain of illegality. The trial court did not err in suppressing the evidence.

2. The totality of the situation supports the trial court's finding.

Assuming arguendo that there was no arbitrary intrusion involved in this case, the trial court's finding that the consent was invalid must still be affirmed. Judge Anstead noted in his dissent in Avery: "... the majority fails to honor tne fundamental rule of appellate review that reviewing courts must interpret the evidence and reasonable inferences therefrom in a manner to sustain the trial court's ruling. McNamara v. State, 357 So.2d 410 (Fla. 1978)." 531 So.2d at 194. Judge Anstead then listed some factors in this case which could support a factual finding in support of the suppression. The following factors listed by Judge Anstead as being present would also be relevant to whether petitioner was coerced into acquiescing to apparent police authority:

> 1) the contrast between access to an obviously public bus terminal and the interior of an interstate bus in transit where access to the latter is restricted to passengers with tickets and otners having a good reason to be on board with the authorization of the bus company;
>
> 2) the novelty of a police search of a bus in this country and the unfamiliarity of many passengers with their right to refuse consent for a search by the police without having to fear arrest or other repercussions as a consequence of that refusal;
>
> 3) the tremendous authority placed in the hands of police officers to compel obedience to their requests and the peaceful deference of that authority urged upon our citizens. When uttered by a person in authority, a "may" often becomes a "must";
>
> 4) the implicit accusatory nature of a request by the police to search a particular passenger's luggage for illegal drugs;

> 5) the small area to which a seated passenger is confined and the resulting conspicuousness attendant to a passenger's attempt to publicly decline to give consent, to refuse further conversation with police or to leave a bus already filled with passengers;
>
> 6) tne narrow aisles whicn are automatically "blocked" merely by the presence of a police officer even though the officer may not "intend" that his presence in the aisle should serve to "detain" the passengers whose bags he seeks to search;
>
> 7) the brief duration for which the bus is stopped for departure;[5]
>
> 8) the police officers' presence on board right up until the time that the bus is ready to depart, thereby making the passenger less likely to depart, thereby making the passenger less likely to view exit and reentry onto the bus to be a reasonable alternative.

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[5] The police officers testified that they only had ten minutes to check the bus during the boarding operation.

532 So.2d at 196.

As explained in Schneckloth v. Bustamonte, 412 U.S. 227, 228-229, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973), no matter how subtle the implied coercion, the resulting consent is invalid:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed.2d 746:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form: but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In the present case petitioner as a ticketed passenger aboard a bus, knowing that police were not aboard as ticketed passengers, would reasonably believe that the police were aboard the bus only due to their special status. Petitioner had no warning that the police regularly boarded buses. When questioning petitioner the police stood over him in the narrow aisle of the bus. By telling petitioner that there was an investigation into smuggling and then requesting to search his luggage, the police request was implicitly accusatory. By searching the bag without consent, they communicated that they would search regardless whether consent was received. Certainly, no reasonable person, with the exception of trained judges and lawyers, would feel free to ignore the intrusion into his privacy by police.[5]

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[5] Indeed, these are the very comments by Judge Letts in his dissent in Bostick v. State, 510 So.2d 321, 323 (Fla. 4th DCA 1987):

> Moreover, my version of common sense tells me that a paid and ticket passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary

It is well-settled that for consent to be valid it cannot be mere acquiescence to apparent police authority. Lockwood v. State, 470 So.2d 822 (Fla. 2d DCA 1985); Mosley v. State, 335 So.2d 880 (Fla. 4th DCA 1976); Bailey v. State, 319 So.2d 22, 27 (Fla. 4th DCA 1975). The circumstances in this case support a finding that petitioner merely acquiesced to apparent police authority. The following portion of State v. Kerwick, 512 So.2d 347 (Fla. 4th DCA 1987) further illustrates how coercive these bus intrusions are:

> Even if the Rulings of Law made herein were not amply supported by the evidence, the Court would find extremely troublesome the admitted policies of these Broward deputies regarding 'encounters' with the public. Despite the apparent protections of Article One, Section 23 of the Florida Constitution, commonly referred to as a 'right of privacy', the evidence in this cause has evoked images of the days, under other flags, when no man travelled his nations's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badae-weildina uolice for identification, travel papers -- in short a raison d'etre -- is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, or Stalin's Moscow, or it is the white supremacist South Africa. Yet, in broward County, Florida, these police officers approach every person on board buses and trains (that time permits') and check identification, tickets, ask to search luggage -- all in the name of 'voluntarv cooperation'
>
> stopover while the policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

> with law enforcement -- to the shocking extent that one officer, Damiano, admitted that during the previous nine months, he, himself, had searched in excess of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck. It certainly shock's the Court's conscience that tne American public would be 'asked,' at badge-point, without the slightest suspicion, to interrupt their schedules, travels and individual liberties to permit such intrusions. This Court would ill-expect any citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. It is much like the feeling that an ordinary citizen has on seeing a patrol car behind him, or observing blue lights flashing, or being confronted by a police officer asking questions.

512 So.2d at 348-349 (emphasis added). The show of authority and intrusion into petitioner's privacy in this case supports the trial court's ruling which should be affirmed.

3. Invasion into the right to privacy guaranteed under Article I, Section 23 of the Florida Constitution.

Assuming that no violation of the right to be free from unreasonable searches and seizures guaranteed by the United States Constitution occurred, the intrusion, without any suspicion of illegal activity, into petitioner's privacy by boarding the bus and questioning him in the midst of his journey violated petitioner's right to be let alone under article I, section 23 of the Florida Constitution.

Article I, section 23, reads as follows:

> **Right to privacy. --** Every natural person has the right to be let alone from government intrusion into his private life except as otherwise provided herein. This section shall

> not be construed to limit the public's right to access to public records and meetings as provided by law.

Section 23 "expressly and succintly provides for a strong right of privacy not found in the United States Constitution." Winfield v. Division of Pari-Mutuel Wagering, Department of Regulation, 477 So.2d 544, 548 (Fla. 1985). As explained by this Court's opinion in Winfield the right to be Pet alone from governmental intrusion was made as strong as possible by excluding words such as "unreasonable" or "unwarranted":

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succintly provides for a strong right or privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

477 So.2d at 548 (emphasis added). This Court also noted that it is the state's, and not the federal government's, responsibility to protect the personal privacy of its citizens to be let alone by other people:

> However as previously noted, the United States Supreme Court has also made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: "the protection of of a person's right to privacy --his right to be let alone by other people -- is, like the protection of his

> property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 350-51, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Id. Thus, section 23 must be relied upon to determine if petitioner's right to be let alone during his journey was violated.

It must be recognized that section 23 is not an absolute guarantee against all governmental intrusion. However, the right to privacy is a fundamental right and it is the burden of the state to justify the intrusion into that right. Winfield, supra at 546. The state's burden was defined by this Court in Winfield, supra, as follows:

> The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

477 So.2d at 547.

In the present case there was no compelling state interest to board a bus and question its occupants without any suspicion that an illegal activity was occurring on the bus. Assuming arguendo that there was a compelling state interest, the state interest was not being attempted through the use of least intrusive means. The police operation of obtaining truly voluntary cooperation from the public would only be advanced, and not compromised, if it occurred in tne less coercive atmosphere of tne station or terminal. Aside from the psychological coercion of questioning the passengers on board the bus minutes before it is to leave, there is no necessity in boarding the bus and cornering passengers to conduct police business where there is no

founded suspicion of criminal activity. The police could as easily conduct its business inside of the station without the resulting intrusion into an individual's rights to be let alone during his travels.[6]

Petitioner's right to be let alone under Article I, Section 23, if such words mean anything, was violated in the instant case.

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6 What is generally not revealed in the bus cases is how many times the right to be let alone is violated. However, one officer using this technique over a nine month period searched over 3,000 bags. State v. Kerwick, 512 So.2d 347, 348 (Fla. 4th DCA 1987).

CONCLUSION

The trial court correctly granted the motion to suppress. The district court's decision should be reversed, and this cause should be remanded to the district court with instructions to affirm the order of suppression.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 25 day of April, 1989.

Of Counsel