IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,809

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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NARY STATEME

Petitioner, Tony Jones, the criminal defendant and appellee in the appended State v. Jones, 537 So.2d 153 (Fla. 4th DCA 1989), review granted, Case No. 73,809 (Fla. 1989), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellant below, will be referred to as "the State."

References to the one-volume record on appeal will be designated "(R:)."

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State rejects appellant's "statement of the case and facts" as incomplete, and further rejects those factual assertions contained in the argument portion of his brief as inappropriately based on nonrecord materials, see e.g. Preston v. State, 528 So.2d 896, 898 (Fla. 1988) and Hill v. State, 471 So.2d 561 (Fla. 1st DCA 1985). Accordingly, the State substitutes its own statement of the case and facts necessary to resolve the narrow legal issues presented upon certiorari, as follows:

On February 3, 1987, the State filed an information in the Palm Beach County Circuit Court charging petitioner with having trafficked in between 28 and 200 grams of cocaine the previous December 30 (R 69-70). Petitioner filed a pretrial motion to suppress the cocaine in question and a confession, alleging that these items had come into the possession of the police as the result of an improper search and seizure (R 85-87). A hearing upon petitioner's motion was held before the Hon. James Carlisle on May 14 (R 1-61).

At this hearing, the State established that West Palm Beach Police Officer John Turner and Agent Chris Fahey went to the local Greyhound Bus Terminal at 8:40 p.m. on the evening in question (R 4-5). Acting pursuant to a generalized unwritten departmental policy to check northbound busses beginning from the rear for illegal drugs and weapons, the men boarded a bus headed for Los Angeles and saw petitioner in one of the far back seats (R 5-6; 22-28; 31-32; 58). Turner introduced himself and Fahey to petitioner, explained what they were looking for, and asked

petitioner if he had any luggage (R 6-9). Petitioner replied that he did not, so Fahey opened a nearby unclaimed maroon bag and discovered a .357 revolver inside (R 7-9). Petitioner reacted by nervously attempting to kick a black nylon jacket under the seat in front of him (R 9-10). Advising petitioner that he could refuse to give such consent, the now-suspicious Turner uncoercively asked petitioner if he could search the jacket for drugs and weapons (R 10; 25). Petitioner replied "sure, go ahead" (R 10-11). The officer located 54 grams of cocaine in the jacket's pocket (R 12). Petitioner was arrested, taken to the police station, read his Miranda v. Arizona, 384 U.S. 436 (1966) rights to his comprehension, signed a consent to search form, and admitted that the cocaine was his (R 12-15).

The modestly-educated petitioner personally took the stand for the defense and promptly disavowed that the jacket in which the cocaine had been discovered was his (R 35-38; 42). Prosecuting counsel immediately asserted that petitioner thus had no standing to contest the search of the jacket and the seizure of the cocaine found in its pocket, and moved that his motion to suppress be denied (R 38-39). However, the hearing proceeded, with Judge Carlisle ultimately ruling for the defense (R 58). The judge reasoned that he "need not consider whether [petitioner's] consent was freely and voluntarily given," essentially because consents to search given on busses were inherently coerced, citing Delaware v. Prouse, 440 U.S. 648 (1979) (R 89-91).

The State timely appealed this order of dismissal to the Fourth District (R 92), which reversed and remanded for further

proceedings under State v. Avery, **531** So.2d 182 (Fla. 4th DCA 1988), review granted, Case No. 73,289 (Fla. 1988). However, the Fourth District certified the following question to this Court as being of great public importance:

> MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

State v. Jones, **537** So.2d **153, 154.** On February 28, 1989, petitioner timely filed his notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

The Fourth District properly reversed the trial judge's order of dismissal based upon its decision of State v. Avery. Even if this Court ultimately decides that Avery was incorrectly decided, however, it must still direct that this cause be remanded for trial both because petitioner forfeited his standing to maintain his motion to suppress, and because his actions gave Officer Turner a founded suspicion that criminal activity was afoot sufficient to justify the officer's search of the jacket and confiscation of the cocaine found inside.

ISSUE

MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SERACH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

ARGUMENT

For the reasons capably expressed by the Fourth District's majority opinion in State v. Avery, and by the State in its brief in this Court in Avery, both of which are appended to this brief, the State submits that this Court should answer the certified question in the negative. The State would add here that its position has been further fortified by the recent decision of the United States Supreme Court in United States v. Sokolow, 3 FLW Fed. S242, 245 (April 3, 1989), confirming that the need to stem drug trafficking in our nation's airports authorizes the police to approach and speak with travelers who may even mildly arouse their suspicions. The State would further add that petitioner's reliance upon Greyhound's demographics for the proposition that "the typical bus passenger occupies the low end of the socio-economic spectrum" ("Petitioner's Initial Brief on the Merits," p. 5-7) is not only inappropriate given that these demographics were not introduced below, see Preston v. State and Hill v. State, but is unavailing in any event. Although it was established below, as noted, that petitioner is modestly educated (R 42), the trial judge did not find that this lack of formal schooling impacted upon petitioner's ability to tender a valid

consent to search. Certainly this Court would be ill-advised to accept petitioner's invitation to set up a condescending rule that those members of our society who are lacking either advanced education or high-paying jobs are per se incapable of tendering a valid consent to a search of their belongings on a bus. Cf. Chestnut v. State, 14 FLW 9 (Fla. January 5, 1989), holding that a diminished mental capacity is not a defense to committing criminal acts.

Even assuming arguendo that this Court answers the certified question in the affirmative, it should still approve the result reached by the Fourth District in this case as right for the wrong reason. See Stone v. State, 481 So.2d 478, 479 (Fla. 1985). As noted, when petitioner testified at the suppression hearing, he flatly disavowed that the jacket in which Officer Turner had found the cocaine he was charged with possessing belonged to him (R 35-38). As the prosecutor contemporaneously asserted (R 38-39), one who disavows a possessory interest in property lacks standing to contest its search and seizure, see e.g. United States v. Salvucci, 448 U.S. 83 (1980); State v. Swank, 399 So.2d 510, 513 (Fla. 4th DCA 1981), review denied, 408 So.2d 1096 (Fla. 1981); State v. Wright, 402 So.2d 579, 582 (Fla. 4th DCA 1981), review denied, 411 So.2d 385 (Fla. 1981). Petitioner's anticipated retort to the contrary notwithstanding, it makes no difference that his disavowal of ownership occurred at the suppression hearing rather than on the scene. See e.g. United States v. Perry, 746 So.2d 713, 714-715 (11th Cir. 1984), cert. denied, 470 U.S. 1954

(1985); United States v. Renton, 700 F.2d 154, 160-161 (5th Cir. 1983). Since petitioner forfeited his standing to maintain his motion to suppress, the trial judge should have denied same and ordered petitioner to stand trial without further ado. This Court should direct that the judge do so, without regards to its ultimate disposition of Avery.

The State would further submit that there exists an alternate basis to reach this same result. As noted, when Officer Turner boarded the bus and encountered petitioner- which the officer had every lawful right to do, see e.g. State v. Rawlings, 391 So.2d 269, 270 (Fla. 4th DCA 1980), review denied, 399 So.2d 1145 (Fla. 1981)- he discovered a gun in an unclaimed bag, to which petitioner reacted by nervously attempting to kick the jacket where the cocaine was ultimately discovered under a nearby seat, thus arousing the suspicions of the officer that the jacket might contain a weapon or narcotics (R 6-12; 25). The foregoing events clearly authorized Turner to confiscate and search the jacket. Compare Brezial v. State, 416 So.2d 818, 819-820 (Fla. 4th DCA 1982).

In sum, the State contends that this Court should approve the decision of the Fourth District and remand this cause for trial.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court should APPROVE the decision of the Fourth District and REMAND this cause for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to: GARY CALDWELL, ESQUIRE, ASSISTANT PUBLIC DEFENDER, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 25 day of May, 1989.

John Tiedemann

Of Counsel