IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,298

TYRONE E. SHAW,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE FOURTH DISTRICT
COURT OF APPEALS

BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The Petitioner, TYRONE E. SHAW, was the Defendant below and shall be so referred to in this Brief when his actual name is not used. The State of Florida, Respondent, will be referred to as "the State". The following symbol "R" will have reference to the pages of the Record on Appeal.

STATEMENT OF THE CASE

The Petitioner, a passenger in transit on a Greyhound bus through Ft. Lauderdale, was arrested on March 8, 1988, following a search of his luggage by Broward County Sheriff's officers that uncovered a quantity of marijuana and cocaine. (R53,54) Subsequently, on March 24, 1988, a formal two-count information was filed in Broward County Circuit Court alleging that he violated Florida Statute 893.135 by being in actual and constructive possession of more than 400 grams of cocaine and, further, that he was in active and constructive possession of greater than 20 grams of marijuana. (R55) On May 12, 1988, a motion to suppress evidence and statements was filed by the Petitioner (R58-63), and on July 7, 1988, a hearing was held on said motion. (R1-42) Following the hearing, the Court orally denied the motion, and on September 12, 1988, the Court entered its written order of denial. (R64-65) Subsequently, the Petitioner entered a no contest plea to Counts I and II of the information, reserving his right to appeal the denial of the motion to suppress. (R43-52) The parties agreed and the Court found that the motion was dispositive of the case. The Petitioner was then sentenced to a 15-year minimum mandatory on Count I with a $250,000 fine, and 18 months concurrent time as to Count 11. (R67-68)

On May 31, 1989, the Fourth District Court of Appeal affirmed the Petitioner's conviction and sentence on the authority of State v. Avery, 531 So.2d 182 (4th DCA 1988), and certified to this Court the same question of great public importance that had been certified in State v. Avery. Subsequently, a Notice to Invoke Discretionary Jurisdiction was timely filed with this Court.

STATEMENT OF THE FACTS

Detectives Robert Trawinsky, Martin Katz, and Mary Guess are members of a special interdiction unit of the Broward County Sheriff's Office. One of their duties is to board northbound buses in transit through Ft. Lauderdale in an effort to detect individuals who might be acting as couriers for drugs. (R5,13,18,28) On March 8, 1988, the three were on duty at the Ft. Lauderdale terminal, and at approximately 11:40 p.m. Trawinsky and Katz boarded a northbound Greyhound bus that had originated in Miami. (R6,19) Detective Guess remained outside the bus. (R7,29)

Katz and Trawinsky were not in uniform but wore windbreakers that clearly designated that they were members of the Broward Sheriff's Office. (R13,25) They proceeded to the rear of the bus and began interviewing passengers and searching their luggage. (R6) Eventually, they reached the Petitioner who was seated in the middle of the bus. (R6,19) The detectives could not remember how many people they had searched by the time they reached the Petitioner, however, Trawinsky testified that it would have been how ever many people that were seated behind the Petitioner. (R14)

At this point the detectives testified that they displayed their identification to the Petitioner, told him that they were having problems with narcotics and weapons in South Florida that were leaving the state, and would like his cooperation and consent for a voluntary search of his luggage, and that he had a right to refuse. (R7;14-15;20) According to them, the Petitioner said o.k., and that he had three bags in the overhead rack. He then pulled down a grey totebag and unzipped it. (R7)

The officers searched the bag and found a brown tape wrapped package. (R7) They asked the Petitioner what was in it and he said marijuana. (R7) He was then placed under arrest, his bags were seized, and he was transported to the airport narcotics office for processing. (R8) There, a complete search of the luggage found four more brown wrapped packages. (R9) Of the five packages, one contained approximately 1.16 pounds of cocaine and the others a total of 3.81 pounds of marijuana. (R53)

Subsequently, the detectives had the Petitioner sign a waiver of rights form and a form acknowledging that he had given verbal consent to search. (R9-12;23-24) The detectives testified that they do not carry the forms with them on the bus. (R15,26) Thereafter, the Petitioner stated that he had purchased the narcotics for $5,000, and was going to Birmingham, Alabama to sell them. (R11)

The Petitioner called as a witness one of his prior high school teachers who testified that the Petitioner has a special learning disability that, in her opinion, would render him unable to read and understand the waiver of rights and consent to search forms that were apparently signed at the airport office. (R31-34)

SUMMARY OF ARGUMENT

The instant case presents the same issue that has been previously certified to this Court in State v, Avery, 531 So.2d 182 (4th DCA 1988), and in Bostick v. State, **510** So.2d 321 (4th DCA 1987). Petitioner submits, as did the defendants in those cases, that his alleged consent to search and waiver of rights were vitiated by the detectives' conduct. At the time that they confronted him on the bus they had no prior knowledge of him. Further, he did nothing to specifically attract their attention once they were on board. Thus, there was not even a reasonable suspicion to justify their intrusion into his privacy. Yet, by their actions, the detectives clearly created a situation whereby a reasonable person would not have believed that he was free to leave the bus. As such, there was an unwarranted seizure within the meaning of the Fourth Amendment, and any and all consents and waivers that were given pursuant to that wrongful seizure should have been suppressed.

ISSUE

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE AND STATEMENTS OBTAINED AS A RESULT OF THE PETITIONER'S ALLEGED CONSENT TO SEARCH AND WAIVER OF RIGHTS GIVEN AFTER POLICE OFFICERS BOARDED A BUS WITHOUT ARTICULABLE SUSPICION AND RANDOMLY SOUGHT CONSENT TO SEARCH FROM EACH OF THE PASSENGERS?

The instant case presents the same issue that has been previously certified to this Court in State v. Avery, 531 So.2d 182 (4th DCA 1988), and in Bostick v. State, 510 So.2d 321 (4th DCA 1987). Petitioner submits, as did the defendants in those cases, that his alleged consent to search and waiver of rights were vitiated by the detectives' conduct. At the time that they confronted him on the bus they had no prior knowledge of him. Further, he did nothing to specifically attract their attention once they were on board. Thus, there was not even a reasonable suspicion to justify their intrusion into his privacy. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). See also Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion); 460 U.S. at 525, 103 S.Ct. at 1336-1337 n.3 (Burger, C.J., Rehnquist & O'Connor, JJ., dissenting); Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). Yet, by their actions, the detectives clearly created a situation whereby a reasonable person would not have believed that he was free to leave the bus. Royer, 460 U.S. at 505, 103 S.Ct. at 1326 (plurality

opinion) (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart & Rehnquist, JJ.)); United States v. Berry, 670 F.2d 583, 590-91 (5th Cir. 1982) (Unit B) (en banc); United States v. Thompson, 712 F.2d 1356 (11th Cir. 1983). As such, there was an unwarranted seizure within the meaning of the Fourth Amendment, and any and all consents and waivers that were given pursuant to that wrongful seizure should have been suppressed.

In the instant case, the Petitioner was enclosed on a bus at the time he was confronted by the detectives. It was almost midnight. The bus driver was not on board. (R13-14) Contrary to the situation in Avery,[1] the Petitioner did nothing to arouse any suspicions from the officers once they had boarded. Nevertheless, he was confronted with their show of authority as they displayed their badges and identification and announced that they were investigating the problem of drugs on northbound buses. Indeed, this occurred after the detectives had searched each and every other person on board the bus who was seated behind the Petitioner. Given those circumstances, Petitioner submits that it would be clearly unreasonable to expect that a passenger already in transit in the middle of the night should have to leave his means of transportation in order to avoid contact with the police.[2] On the contrary, no reasonable person would feel free to do so. Obviously, the officers were trying to create an intimidating situation wherein a passenger would feel that he had no other choice but to do as they asked.

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[1] In Avery, the defendant appeared nervous to the detectives and was seen using his feet to push his tote bag under the seat.

[2] It should be noted that Detective Guess was standing immediately outside the bus.

The ramifications of sanctioning this type of police encounter are immense. Judge Glickstein in his dissenting opinion in Avery has spelled out many of the concerns with respect to these "random encounters" and perhaps stated it best when he observed:

> The so-called war on drugs may unwittingly have become a war upon a prized element of our democracy--the right to be let alone.

Id. at 189. Petitioner urges this Court to adopt the reasoning of that dissent and not to further condone an erosion of the principles of the Fourth Amendment.

* * * * * *

Even though the trial court found that under the "totality of the circumstances" the Petitioner's consent and waiver were voluntary, the question remains whether, assuming that the initial encounter was illegal, the connection between the illegality and the consent to search and answer questions was sufficiently attenuated to permit the use of the evidence obtained at trial. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 99 L.Ed.2d 441 (1963).

The Fifth Circuit in United States v. Robinson, 625 F.2d 1211 (5th Cir. 1980), has specifically clarified much of the confusion that has arisen in this area. They stated:

> The Supreme Court has made it absolutely clear that, in order for a confession given after an illegal seizure to be admissible in evidence, the government must prove two things: that the confession is voluntary for purposes of the fifth amendment, and that the confession was not the product of the illegal seizure. Dunawag v. New York, 442 U.S. 200, 216-220. 99 S.Ct. 2248, 2258-60, 60 L.Ed.2d 824 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). ...

Id. at 1219.

The Court then went on to cite the particulars as enumerated by the Supreme Court in such a situation:

> In Brown v. Illinois, the Supreme Court delineated three factors to be considered in determining whether the voluntary consent was obtained by exploitation of the illegal seizure: "[t]he temporal proximity of the [seizure] and [the consent], the presence of intervening circumstances,...and, particularly, the purpose and flagrancy of the official misconduct...." 422 U.S. at 603-04, 95 S.Ct. at 2261. Last year, in Dunaway v. New York, 442 U.S. 200, 217-220, 99 S.Ct. 2248, 2259-60, 60 L.Ed.2d 824 (1979), the Supreme Court noted the continuing vitality of the Brown analysis. In addition, Dunaway reaffirmed Brown's holding that Miranda warnings do not, without more, dissipate the taint of an illegal seizure. Id. 99 S.Ct. at 2258-60.

Id. at 1220.

They concluded by saying:

> ...Contrary to the magistrate's apparent view of the law, a voluntary consent to search does not remove the taint of an illegal seizure. Rather, voluntariness is merely a threshold requirement. The "causal connection" between the illegal seizure and the consent to search must be independently examined, utilizing the factors set out in Brown in light of the policies to be served by the fourth amendment exclusionary rule. ...

Id. at 1220. See also United States v. Bailey, 691 F.2d 1009, 1013-1014 (11th Cir. 1982).[3]

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[3] In Bailey, the 11th Circuit also stated:

> This circuit and the former Fifth Circuit have held that a defendant's voluntary consent to be searched, obtained after the defendant had been illegally arrested but also after the defendant had been advised of his right to refuse to be searched, will not in itself dissipate the taint of the unlawful arrest.

In the present case, the search occurred immediately after the officers confronted the Petitioner. There were no intervening circumstances whatsoever. Then, following his formal arrest, there was no break in the chain of events and within a half hour he was given waiver and consent to search forms to sign. Even more so, the illegality here had a "quality of purposefulness" to it. Brown v. Illinois, supra at 605. Indeed, these detectives were members of a special unit of the Broward County Sheriff's Office whose sole duties are to randomly confront citizens on buses and trains in an attempt to search their bags. Thus, under these standards, there is no other finding warranted but that the searches and questionings were the product of the illegal encounter with the Petitioner and accordingly all evidence and statements should have been suppressed.

CONCLUSION

For the aforementioned reasons, the Petitioner prays that his conviction be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed this 6th day of July, 1989, to Assistant Attorney General Joan Fowler, Palm Beach County Regional Service Center, 111 Georgia Avenue, West Palm Beach, Florida 33401.

THOMAS F. ALMON