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IN THE SUPREME COURT OF FLORIDA

VINCENT NELSON,  
Petitioner,  
vs.  
STATE OF FLORIDA,  
Respondent.

CASE NO. 74,421

PETITIONER'S REPLY BRIEF ON THE MERITS

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UNITED STATES CONSTITUTION

Fourth Amendment . . . . .	3, 4, 7, 9, 10
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4 W.LaFave, Search and Seizure (2d Ed. 1987) . . . . . 7,8,9

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 appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

The symbol "R" will denote Record on Appeal.

The symbol "RB" will denote Respondent's Answer Brief.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as found in Petitioner's Initial Brief on the Merits.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER-  
DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE

The sole issue presented to the Fourth District Court of Appeal by way of Petitioner's nolo contendere plea was whether Petitioner-Appellant had standing to raise the fourth amendment issues with respect to the evidence observed following his unlawful stop. The trial court denied Petitioner's motion to suppress ruling Petitioner lacked the requisite standing to bring the motion. R 9-10. On appeal to the Fourth District, Judge Garrett noted that Petitioner "entered a no contest plea reserving the right to appeal the trial judge's finding Appellant lacked standing to object to the stopping of the stolen car." Nelson v. State, 546 So.2d 49 (Fla. 4th DCA 1987).

The Fourth Amendment to the United States Constitution forbids unreasonable searches and seizures. It is clear that the stopping of a motor vehicle and the detaining of its occupants is a seizure. Delaware v. Prouse, 440 U.S.648, 99 S.Ct. 1319 (1979). In Brown v. Texas, 433 U.S. 47, 99 S.Ct. 2637 (1979), the Court held:

"The Fourth Amendment, of course, 'applies to all seizure of the person, including seizures that involve only a brief detention short of traditional arrest. [Citations.] '[W]herein a police officer accosts an individual and restrains his freedom to walk away, he has "'seized'" that person' [citation] and the Fourth Amendment requires that the seizure be 'reasonable.'" (Emphasis added.)

Id. at 50; 99 S.Ct. at 2640.

This Honorable court held in State v. Jones, 483 So.2d 433,

435 (Fla. 1986) that "[u]nquestionably stopping any automobile and detaining its occupant constitutes a seizure within the meaning of the Fourth Amendment to the United States Constitution." The trial court found that Petitioner was unlawfully stopped. Respondent does not dispute this finding.<sup>1</sup> Therefore Petitioner maintains that he clearly has standing to contest his own unlawful stop and illegal arrest by the police officer regardless of his lack of an expectation of privacy in the stolen vehicle he had occupied.

In the usual Fourth Amendment case, the challenged evidence is direct or primary in its relationship to the prior arrest or search so that if it is determined that a Fourth Amendment violation has occurred the consequence must be suppression of that illegally obtained evidence in the trial of a defendant. The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, Weeks v. Unites States, 232 U.S. 383, 34 S.Ct. 341 (1914), and of testimony concerning knowledge acquired during an unlawful search, Silverman v. United States, 365 U.S. 505 (1961). However not infrequently this challenged evidence is secondary, derivative, or "fruit of the poisonous tree." The exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the

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<sup>1</sup> Respondent in its Answer Brief on the Merits acknowledges: "In this case, the petitioner was stopped on a mere hunch and was subsequently charged with grand theft of the vehicle in which he was stopped." RB 4-5.

point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint," Nardone v. United States, 308 U.S. 288, 341, 60 S.Ct. 266 (1939). See Wong sun v. Unites States, 371 U.S. 471, 484-485, 83 S.Ct. 407, 415-16 (1963).

In People v. Flowers, 111 Ill.App.3d 348, 444 N.E.2d 242 (1982), the defendant was convicted of burglary and possession of burglary tools. The defendant filed a pretrial motion to suppress evidence seized pursuant to a warrantless search by police of a vehicle defendant was driving and in which the owner was a passenger. The State argued that the defendant has failed to establish "standing" to assert a Fourth Amendment violation premised upon the search of the owner's car. The trial court agreed and denied the motion to suppress physical evidence. The Flowers Court held that because the defendant failed to demonstrate that he had a reasonable expectation of privacy in the vehicle or the items seized he did not have standing to object to the reasonableness of the search of the car and seizure of evidence therein. However the defendant's alternative argument for standing based on the illegality of the stop was accepted by the appellate court as follows:

Defendant has also argued that the stopping of the car and detention of its occupants for a routine traffic offense was an unreasonable seizure of his person under the Fourth Amendment of the United States Constitution requiring suppression of evidence seized as a result thereof. (Delaware v. Prouse (1979), 440 U.S. 648, 99 S.Ct. 1391, 50 L.Ed.2d 660; People v. Kunath (1981), 99 Ill.App.3d 201, 54 Ill.Dec. 621, 425 N.E.2d 486.) Although we have found defendant did not have a legitimate expectation of privacy in the car and thus could not raise a challenge to its search, he clearly may test the reasonableness of the stop of the vehicle and

his detention as it affected his personal liberty. See, People v. Deppert (1980), 83 Ill.App.3d 375, 38 Ill.Dec. 675, 403 N.E.2d 1279.

444 N.E.2d at 246-247 [Emphasis added].

The Flowers court found that the police officers there has a reasonable basis for stopping and detaining the defendant-driver.

In People v. Reynolds, 101 Ill.App.3d 576, 428 N.E.2d 694 (1981), judgment aff'd, 94 Ill.2d 160, 445 N.E.2d 766 (1983), the defendants were driving a car with a trailer. A police officer stopped the vehicle. As the officer approached it from behind, he noted several cartons in the trailer. The trial court granted the defendants subsequent motion to suppress the contents of this trailer which was seized by the officer. The trial court found that the officer's actions constituted an arrest of the defendants without probable cause. The trailer and its contents were determined by the court to be the fruit of this illegal arrest and seizure and the motion to suppress was granted. On appeal, the State citing Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978) argued that because the defendants did not own the trailer in which the seized goods were found, the defendants lack standing to assert any Fourth Amendment rights. The Reynolds court rejected this argument holding:

The State's reliance upon Rakas is misplaced. In Rakas, the defendants attempted to assert that their right of privacy under the Fourth Amendment had been violated when the police searched the vehicle in which they had been riding. The vehicle was not owned by either of the defendants. In Rakas there was no claim that the police did not have cause to stop the vehicle in which the defendants had been riding or that, prior to the search, they had been illegally arrested. Under such circumstances, the United States Supreme Court held that

they did not have standing to assert that their personal right of privacy has been violated by the search of a third person's property.

In the instant case, the defendants are not claiming a privacy right in another person's property, rather they are asserting a violation of their basic Fourth Amendment right to be free from unreasonable seizures of their persons. This basic right has long been recognized and the evidence obtained as a direct result thereof must be suppressed as the fruit of the poisonous tree. Wong Sun v. United States (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; People v. Myles (1978), 62 Ill.App.3d 931, 934, 20 Ill. Dec. 64, 379 N.E. 897.

428 N.E.2d at 696-697 [Emphasis added].

In State v. Conger, 183 Conn. 386, 439 A.2d 381 (1981), the Supreme Court of Connecticut held that even a driver of a stolen vehicle may challenge the vehicle search on the ground of the illegality of the stop or arrest because such search follows the violation of a personal right to free movement. The Court distinguished Rakas as not involving any challenge to the constitutionality to the initial stop and search.

Professor LaFave in his treatise on the Fourth Amendment "Search and Seizure" (2d Ed. 1987) in Section 11.3(e) explains this limitation upon the Rakas holding:

For one thing, it is important to note, as the concurring opinion in Rakas takes great pains to emphasize, that the "petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle," so that the question before the Court was a "narrow one: did the search of their friend's automobile after they had left it violate any Fourth Amendment right of the petitioners?" This would indicate, as two-thirds of the Court (the two concurring justices and the four dissenters) recognize, that a passenger does have standing to object to police conduct which intrudes upon his Fourth Amendment protection against unreasonable seizure of his person. If either the stopping of the car or the passenger's removal from

it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit.

4 W.LaFave, Search and Seizure at 324-325 (2d Ed. 1987). [Footnotes omitted].

Professor LaFave further indicates in Section 11.3(e) that:

Nothing in Jones suggests that a person who is not lawfully present when confronted by the police has absolutely no Fourth Amendment rights; unquestionably he has standing to bring into issue the lawfulness of his arrest if, for example, incriminating evidence was thereafter found on his person in a search incident to that arrest. This being so, a thief arrested in a stolen car would seem to have a much better chance of establishing standing regarding a search of the car if he presents his claim on the theory that the car search was a "fruit of the poisonous tree" of the prior illegal seizure of his person, than if he is only able to question the legality of the car search standing alone. In this regard, it is noteworthy that the appellate decisions holding a thief has no standing to object to a search of the car he was driving are with rare exception situations in which it does not appear that there was any basis for claiming that the car search was the fruit of an illegal arrest of the defendant. The distinction suggested here is viable even after the Rakas decision, for the Court there, as noted above, was not dealing with a situation in which any objection was being made about the stopping of the vehicle as compared to the subsequent search of it.

4 W.LaFave, Search and Seizure at 329-330 (2d Ed. 1987) [Footnotes omitted - emphasis added].

In Footnote 219, found in Section 11.3(e), Professor LaFave succinctly summaries Respondent's basis for standing in the instant case as follow:

219. So the argument goes, if the primary illegality is an illegal arrest of the defendant, an action as to which the defendant most certainly has standing, then evidence obtained from the car as a consequence is suppressible even if no Fourth Amendment interest in the car can be shown by the defendant, just as the defendant in Wong

Sun, discussed in the text at note 12 supra, was able to suppress narcotics seized at premises where he had no Fourth Amendment interest because their discovery was a fruit of his prior illegal arrest.

4 W.LaFave, Search and Seizure Section 11.3(e), at 330 n.219 (2d Ed.1987).

Thus there is, in fact, "automatic" standing in the area of Fourth Amendment litigation where one contests the validity of one's own arrest or stop.

Respondent also argues as articulated by Judge Garrett in the instant case that by "placing" himself in a stolen car the Petitioner-driver is somehow not afforded Fourth Amendment protection because he "placed" himself in a stolen vehicle. Respondent's contention that anyone who places himself in an automobile that is stolen has waived their Fourth Amendment rights overlooks the Supreme Court's decision in Mincey v. Arizona, 437 U.S. 385, 99 S.Ct. 2408, 2414 (1978). In Mincey, the Court rejected a similar contention that Mincey had forfeited any reasonable expectation of privacy in his apartment by committing a homicide inside. The High Court further stated that "this reasoning would impermissibly convict the suspect even before the evidence against him was gathered." Id. at 391, 98 S.Ct. at 2413. See also Michigan v. Tyler, 436 U.S. 499, 505-506, 98 S.Ct. 1942, 1948 (1978).

It should be further noted that no has legal title to contraband. It is illegal to possess cocaine. Following the logic of Respondent's argument to its natural conclusion, a person in possession of cocaine or some other illegal drug could not raise

a Fourth Amendment objection to its seizure because he was not legally in possession of it. Hence Respondent's waiver or forfeiture argument should be rejected by this Court.

Respondent's back-up argument is that "regardless of whether the petitioner has standing to contest the stop, the Fourth District was correct in not suppressing evidence of a stolen car." RB 5. Respondent argues that the license tag was in plain view and "the car would inevitably have been discovered as stolen pursuant to the license tag being in open view." RB 6. The limited record in the instant case does not support Respondent's alternative position that the vehicle license tag was in plain view from the roadway.

The record indicates that as Petitioner started to drive out of the driveway the officer decided to block the entrance by pulling his police vehicle directly in front of the Petitioner's path causing Petitioner to bring his vehicle to an immediate stop. R 9, 32. Judge Stone in his dissenting opinion wrote: "Our record reflects no apparent cause for the officer blocking the driveway, which prevented the defendant from driving out. A subsequent check of the license tag number, which had not been visible from the road, revealed that the car was stolen." Nelson, 546 So.2d at 50. [Emphasis supplied Foot omitted.]

The Trial Court correctly found that there was no founded suspicion for the stop or probable cause for the arrest of Petitioner. R 6, 9-10. It follows that he has standing to contest his stop or arrest, the trial court erred in denying his motion to