IN THE SUPREME COURT OF FLORIDA

CASE NO: 75,057

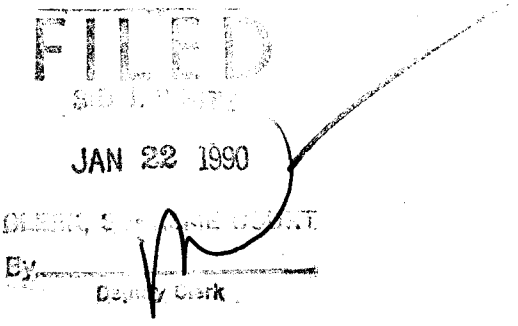
THE STATE OF FLORIDA,

Petitioner,

vs

LUZ PIEDAD JIMENO
AND
ENIO JIMENO

Respondents.



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ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

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BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

PAGES

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... ii

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE AND FACTS..... 2

III. SUMMARY OF THE ARGUMENT..... 6

IV. ARGUMENT 7

(1) **THE TRIAL COURT CORRECTLY GRANTED THE MOTION TO SUPPRESS THE EVIDENCE ON THE GROUND THAT THE SCOPE OF CONSENT TO SEARCH THE AUTOMOBILE DID NOT EXTEND TO A CLOSED BAG FOUND INSIDE THE AUTOMOBILE**..... 7

(2) **WHERE THERE ARE OTHER GROUNDS WHICH SUPPORT THE TRIAL COURT ORDER SUPPRESSING THE EVIDENCE, THEN THE ORDER OF SUPPRESSION SHOULD BE UPHELD ON APPEAL EVENTHOUGH THE TRIAL COURT MAY HAVE ASSIGNED THE WRONG REASONS FOR ITS RULING**..... 13

a). **IN ADDITION TO THE TRIAL COURT'S GROUNDS FOR GRANTING THE ORDER OF SUPPRESSION, SUPPRESSION OF THE EVIDENCE WAS REQUIRED BECAUSE THE APPELLEES WERE ILLEGALLY STOPPED PRIOR TO THE ALLEGED CONSENT TO SEARCH HAVING BEEN GIVEN**..... 14

b). **IN ADDITION TO THE TRIAL COURT'S GROUNDS IN GRANTING THE ORDER OF SUPPRESSION, SUPPRESSION OF THE EVIDENCE WAS REQUIRED BECAUSE ENIO JIMENO DID NOT HAVE THE AUTHORITY TO THE SEARCH OF THE AUTOMOBILE**..... 16

c). **IN ADDITION TO THE TRIAL COURT'S GROUNDS FOR GRANTING THE ORDER OF SUPPRESSION, SUPPRESSION OF THE EVIDENCE WAS REQUIRED BECAUSE THE STATE FAILED TO MEET ITS BURDEN OF PROOF NECESSARY TO SHOW THAT ENIO JIMENO FREELY AND VOLUNTARILY CONSENTED TO THE SEARCH**..... 17

V. CONCLUSION..... 20

VI. CERTIFICATE OF SERVICE..... 20

TABLE OF CITATIONS

CASES	PAGE(S)
Denehy v. State, 400 So.2d 1217(Fla. 1980)	18
Kehoe v. State, 521 So.2d 1094 (Fla. 1988)	15,16
Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980)	9
Palmer v. State, 467 So.2d 1003 (Fla. 3d DCA 1985)	10
Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980)	13
Restrepo v. State, 438 So.2d 76 (Fla. 3d DCA 1983)	18,19
Riddlehoover v. State, 198 So.2d 651 (Fla. 3d DCA 1967)	15
Robinson v. State, 388 So.2d 286 (Fla. 1st DCA 1980)	19
Rodriguez v. State, 189 So.2d 656 (Fla. 3d DCA 1966), cert. den. 389 U.S. 848 (1966)	11
Rosa v. State, 508 So.2d 546 (Fla. 3d DCA 1987)	11
Shelton v. State, 14 FLW 1653, 1654, (Fla. 3d DCA, July 11, 1989)	11,13
Silva v State, 344 So.2d 559 (Fla. 1977)	17
Talavera v. State, 186 So.2d 811 (Fla. 2d DCA 1966)	13,19
State of Florida v. Alvarez, 258 So.2d 24 (Fla. 3d DCA 1972)	13

PAGE(S)

State of Florida v. Carney,
423 So.2d 511 (Fla. 3d DCA 1982)..... 9

State of Florida v. Contraras,
512 So.2d 339 (Fla. 3d DCA 1987)..... 15

State of Florida v. Fuksman,
468 So.2d 1067 (Fla. 3d DCA 1985)..... 10,11

State v. Drake
343 So.2d 1336 (Fla. 1st DCA 1977)..... 11

State of Florida v. Kassidy,
495 So.2d 907 (Fla. 3d DCA 1986)..... 17

State of Florida v. Wells,
539 So.2d 464 (Fla. 1989)..... 7,8,9,12,13

United States v. Anderson,
859 F.2d 1171 (3 Cir. 1988)..... 11

United States v. Dichcarnte
445 F.2d 126, 129 N 3(7th Cir. 1970), cert. denied
95 S. Ct. 241 (1974)..... 10

United States v. Kapperman,
764 F.2d 786 (11 Cir. 1985)..... 12

United States v. Ross,
456 US 798, 102 S.Ct. 257, 72 L.Ed. 572 (1987)..... 8,10,12

United States v. White,
706 F.2d 806 (7 Cir. 1983)..... 12

Walter v. United States,
447 US 649, 100 S.Ct. 2395, 65 L.Ed. 2d 410 (1980)..... 9

I. INTRODUCTION:

The State of Florida, the Appellant in the District Court and the prosecution in the Trial Court will be referred to as the Petitioner herein. LUZ PIEDAD JIMENO and ENIO JIMENO were the Appellees in the District Court and the Defendants in the Trial Court, and will be referred to as the Respondents or by their respective names in this Brief. The Record on Appeal will be referred to by use of the symbol "R", and the Transcript of the Suppression hearing by the use of the symbol "T", each followed by the appropriate page number. Reference to the Petitioner's, the State of Florida, brief before this Court will be by use of the symbol "IB", followed by the appropriate page number

II. STATEMENT OF THE CASE

Respondents were charged with knowingly being in actual or constructive possession of cocaine (R-1-1a). Prior to trial, the Respondents moved to Suppress the evidence found inside a closed bag below the passenger seat of the automobile occupied by the Respondents prior to their arrest (R-112-113). The Trial Court granted the Motion to Suppress by finding that the consent given by Enio Jimeno to search the vehicle did not extend to the closed bag (R-117).

The Petitioner appealed the Trial Court's decision and the Third District Court affirmed. This petition for discretionary review then followed.

FACTS

In this Appeal the Petitioner does not contest the Trial Court's findings (A-1), and its only argument is that the Court misapplied the law when granting the Motion to Suppress (A-5, 8-12).

The Respondents throughout the Pretrial proceedings and before the District Court contended that even if the Trial Court's reasons for suppressing the evidence were incorrect, that the Order should still be upheld because it is correct for other reasons. Therefore, the Respondents submit the following Statement of Facts which support their contention that the Trial Court's Order is correct for additional reasons other than those assigned in its ruling.

The State's only witness at the suppression hearing was Officer Frank Trujillo (T-52). Officer Trujillo was the Officer who allegedly obtained consent from Enio Jimeno to search the automobile. Officer Trujillo's testimony was that he first encountered the Respondents when he saw them driving to a restaurant parking lot and use the public telephone there (T-17). He overheard Enio Jimeno say on the telephone "I only have one, and I want you to look at it. I'll meet you at about 1:30" (T-17). Thinking this to be suspicious, Officer Trujillo called in other units to conduct a surveillance of the Respondents movements which continued for about 2 hrs. and 45 minutes (T-18). During all of this time no effort was made to determine who owned the automobile which the Respondents were occupying. However, when first having encountered the Respondents, Luz Jimeno was driving the automobile (T-17, 18), which was later searched, and Enio Jimeno was the front seat passenger.

The surveillance of the Respondents showed them to be driving around an apartment complex twice and the second time going into one of the apartments with a briefcase and a package wrapped in a multicolor fabric (T-18-20).

The Respondents left the apartment with the same briefcase and package wrapped in the multicolor fabric and drove away. Officer Trujillo testified that at that point he intended to approach Respondents eventhough he knew he did not have probable cause to stop them. (T-41 & 44).

Officer Trujillo then testified that he witnessed Enio Jimeno, who was now driving the automobile, commit a traffic

infraction and told Officer Bales, who was traveling behind him, that he was going to stop the Respondents for the traffic infraction (T-21). This testimony of Officer Trujillo was contradicted by Officer Bales at his deposition (T-53-54). At his deposition, as the Trial Court read at the suppression hearing (T-53-54), Officer Bales testified that Officer Trujillo told him on the non-recorded police radio frequency that he was going to stop the Respondents because he suspected that the automobile contained narcotics. (T-53-54).

Officer Trujillo stopped the Respondents, met Enio Jimeno away from the automobile and outside of the hearing distance of the Respondents and Officer Bales, the only other officer on the scene at the time. Officer Trujillo testified to having identified himself to Enio Jimeno, telling him that he suspected that he was carrying narcotics, and asked for permission to search the vehicle by telling him that if he did not get his cooperation that then he would have to get a search warrant (T-22,38).

Before allegedly eliciting consent from Enio Jimeno to search the automobile, Enio Jimeno told Officer Trujillo that the car was registered in his wife Luz Jimeno's name, but that it belonged to both of them (T-24). Officer Trujillo did not ask Luz Jimeno for consent to search the automobile (T-45).

According to Trujillo, after consent was obtained everyone exited the vehicle prior to the search (T-48). A closed grocery bag was found beneath the front passenger seat and the evidence was found therein (T-28).

It is important to note that Officer Trujillo did not believe

that he had probable cause to obtain a search warrant at any time prior to the search (T-45).

Based upon the seizure of the cocaine found inside the closed bag in the automobile, the Respondents were charged with possession of cocaine by Information (R-1-1a).

The Respondents filed a Motion to Suppress the Evidence on the grounds that the alleged consent to search the automobile did not extend to the contents inside the closed bag, that the stop of the Defendants' automobile which led to the subsequent search was an illegal stop which tainted any subsequent alleged consent to search the automobile, that Enio Jimeno did not have the authority to give any consent to search the automobile because he did not own it, that Enio Jimeno did not freely and voluntarily consent to the search, and that Enio Jimeno did not actually consent to the search (R-2-38,112-113).

The Court granted the Respondents' Motion to Suppress because the scope of the consent allegedly given to search the automobile was exceeded when the officers examined the contents of the closed bag found inside the automobile (R-116-117).

The District Court of Appeal found that the Trial Court's findings were supported by the Record because the consent to search the general open area of the automobile did not extend to the closed bag where the evidence was found. (A 1-2).

The District Court then certified the following question:

Whether consent to search an open area for narcotics extends to closed containers found within the open area. (A 2).

III. SUMMARY OF THE ARGUMENT

The Trial Court correctly ordered suppression of the evidence because the scope of the consent to search the automobile did not extend to the contents of the closed bag. The evidence presented by the Petitioner in the Trial Court confirms that the police officers did not obtain consent to search any closed compartments or containers inside the automobile, and that the consent applied only to the general open area of the automobile.

In addition to the grounds assigned in the Trial Court Order suppressing the evidence, there are three additional grounds, argued below, which support the Trial Court's Order.

First, suppression of the evidence was required because the Respondents were illegally stopped before the alleged consent to search the automobile was obtained. The record below establishes that Officer Trujillo had planned to stop the Respondents before the alleged traffic infraction was committed, eventhough he knew that he had no lawful grounds to justify the stop. Officer Bales at his deposition contradicted Officer Trujillo's testimony that the reason for stopping the Respondents was a traffic stop by testifying that Officer Trujillo told him on the non-recorded radio police frequency that he was going to stop the Respondents due to his suspicions of narcotics being in the automobile. Thus, the State's failure to address the plan in Officer Trujillo's mind to stop the Respondents without any legal justification and the testimony of Officer Bales, left the State unable to prove with clear and convincing evidence that any consent to search the automobile was not tainted by the prior illegal stop of the

Respondents.

Second, the alleged consent obtained from Enio Jimeno to search the automobile was not sufficient to permit the search. Although, prior to the search, Enio Jimeno told Officer Trujillo, that the registered owner of the automobile was Luz Jimeno, consent was never obtained from Luz Jimeno. Since the marital relationship between the Respondents is not by itself enough to allow the presumption that Luz Jimeno assigned her personal right to grant or deny consent to Enio Jimeno, the officers acted without proper authorization when the search was conducted without Luz Jimeno's permission.

Third, the State failed to present clear and convincing evidence that valid consent was given by Enio Jimeno to search the automobile. Officer Trujillo's threat to obtain a search warrant if Enio Jimeno did not consent to the search together with the surrounding of the Respondents by the officers, created a ripe situation to induce consent coercively and involuntarily.

IV. ARGUMENT

(1) THE TRIAL COURT CORRECTLY SUPPRESSED THE EVIDENCE ON THE GROUND THAT THE SCOPE OF CONSENT TO SEARCH THE AUTOMOBILE DID NOT EXTEND TO THE CLOSED BAG FOUND INSIDE THE AUTOMOBILE.

In State v. Wells, 539 So.2d 464 (Fla. 1989), this Court differentiated between the scope of a consensual search without probable cause versus that of a search done with probable cause:

> "A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. On the other hand, a probable

> cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon State-sponsored coersion thus are incompatible, and fusing them could lead to absurd results." State v. Wells, 539 So.2d 464, 467 (Fla. 1989).

Again, Officer Trujillo at no time obtained consent from the Respondents to search any closed compartments or containers inside the vehicle. Thus, the Trial Court correctly applied the law in State v. Wells, 539 So.2d 464, 467 (Fla. 1989) and its progeny in ordering that the evidence be suppressed.

The Petitioner contends that the principals of United States v. Ross, 456 US 795, 102 S.Ct. 257, 72 L.Ed.2d 572 (1982) should apply equally to consent searches. (I-B 5, 8-12).

This Court in State v. Wells, 539 So.2d 464, 467 (Fla. 1989) expressly disapproved applying U.S. v. Ross, 456 US 798, 102 S.Ct. 257, 72 L.Ed. 572 (1987) to cases where there is no probable cause to search, and the State is relying upon consent to justify the search. In this Court's own words:

> "There was no issue of a consent search in Ross. Indeed, the principles that applied at probable cause searches are totally incongruous to the freedom of choice inherent in consent." State v. Wells, 539 So.2d 464, 467 (Fla. 1989).

In the instant case as in the Wells case, the Officer testified that he did not obtain consent to search any closed containers inside the vehicle when obtaining the alleged consent to search the vehicle, and that he at no time had any probable cause to search the vehicle or its contents (T-22,38,41,44,45) (R-73,75,78,116,117).

A. The scope of a consensual search made without probable cause is not extended to closed objects, where no consent to search those objects has been obtained, just because the subject

of the search are narcotics.

The Petitioner argues that the holding of State v. Wells, 539 So.2d 464, 467 (Fla. 1989) and its progeny should not apply to cases where narcotics are the subject of the search (IB-5, 8-12). However, the Florida courts have consistently found suppression of evidence of narcotics to be required where the only justification of the search was consent, and consent was not obtained to search the closed objects where the evidence was found. Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980), State v. Carney, 423 So.2d 511 (Fla. 3d DCA 1982).

The cases cited by the Petitioner to support its argument that the scope of consent in a narcotics search should be broader due to the nature of the items sought, do not support the Petitioner's arguments. As shown below, each of the cases cited by the Petitioner are either clearly distinguishable from the instant case or they support the Respondent's position.

First, the Petitioner's use of Walters v. United States, 447 US 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) is incorrect because in that case the Court reversed the Trial Court's denial of the Motion to Suppress where the government had not received a warrant or any authorization to search the contents of boxes which appeared to contain pornographic materials. This case did not involve consent or any other basis to support the warrantless search. In the instant case, the State has relied upon consent from the outset to justify the search. Also, in the Walters case there is no discussion as to the lawfulness of the search into closed containers, because this issue could not be addressed

without the government having any lawful basis upon which to conduct the search.

Likewise, the Petitioner's discussion of United States v. Dichcarnte, 445 F.2d 126, (7th Cir. 1970) cert. denied 95 S.Ct. 241 (1974) is equally misplaced herein because that case does not involve the search of closed containers. In Dichcarnte, the issue involved the seizure of papers which were out in open view. However, the Court's opinion did disapprove of officers seizing items which were not in plain view where the consent to search only extended to the general open area. United States v. Dichcarnte, at 130-131.

The Petitioner's use of State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985) does not support its position because in that case the defendant expressly approved the search of the inner contents of his briefcase. In fact, the Court in Fuksman disapproved the application of the standard enunciated in United Sates v. Ross, 456 US 795, 102 S.Ct. 257, 72 L.Ed.2d 572 (1982) to consensual searches for the same reasons stated by this Court in Wells. State v. Fuksman, at 1069-1070.

The Petitioner suggests that Palmer v. State, 467 So.2d 763 is inconsistent with the District Court's decision in the instant case. However, the facts in Palmer were that the package found on the defendant's person was distinctively wrapped and shaped in such a manner so as to give the officers a resonable belief, based upon their education and experience, that the package contained narcotics. It was upon this fact that the District Court in Fuksman affirmed the Trial Court's decision denying the Motion to

Suppress the Evidence.

In the instant case the Record is devoid of any facts which would have given the officers any probable cause to believe that the bag contained narcotics. In fact, the Petitioner's use of State v. Fuksman in cases where the facts are as in the instant case, has been disapproved of on various occasions. Shelton v. State, 14 FLW 1653, (Fla. 3d DCA July 11, 1989) appeal dismissed, 1-5-90, State v. Rodriguez, 477 So.2d 1025, 1026 (Fla. 3d DCA 1985).

The Petitioner's Brief incorrectly includes State v. Drake, 343 So.2d 1336 (Fla. 1st DCA 1977). Although this 1977 decision when considered in a vacuum may support the Petitioner's position, a review of the Wells decision and cases preceding it clearly show that any force which the decision in Drake may have to the instant case has been eliminated by subsequent case law. Shelton v. State, 14 FLW 1653, 1654 (Fla. 3d DCA July 11, 1989) App. dismissed 1/5/90.

The Petitioner's use of Rosa v. State, 508 So.2d 546 (Fla. 3d DCA 1987) is misplaced because the issues addressed there were not the same issues upon which the Trial Court in the instant case rested its decision.

The Petitioner's citation of United States v. Anderson, 859 F.2d, 1171 (3 Cir. 1983) is incorrect because in that case the officers had obtained written consent to remove any letters, documents, papers or other property which was part of the investigation. In the instant case consent was only orally given and did not extend to any closed objects inside the vehicle. Likewise,

United States v. Kapperman, 764 F.2d 786 (11 Cir. 1985) does not apply to the facts here because the officers in that case obtained written consent which expressly extended to the object subsequently searched.

Last, the State's use of United States v. White, 706 F.2d 806 (7 Cir. 1983) is only repetitive of prior State/Appellate arguments to this Court and the Florida Supreme Court that the scope of a consensual search without probable cause should be equal to that of the scope of the search where probable cause exists. However, this Court as well as the Florida Supreme Court have already disapproved of this argument and the State's attempt to apply the standard enunciated in United States v. White, 706 F.2d 806 (7 Cir. 1983) to consensual searches without probable cause. State v. Wells, 539 So.2d 464, 467 (Fla. 1989).

To sum up, the Petitioner's argument that the Trial Court misapplied the law is based upon a misinterpretation of the law defining the scope of consensual searches made without probable cause. The Trial Court's application of State v. Wells, 539 So.2d 464, 467 (Fla. 1989) in granting the Order of Suppression was correct because the doctrine of U.S. v. Ross, 456 US 798, 102 S.Ct. 257, 72 L.Ed. 572 (1989) does not apply to consensual searches made without probable cause.

Petitioner's position proposes that we ignore the extent of the permission given to search in consensual settings and assume that the subject of the search is enough to waive any wish on the part of the consenting party to limit the scope fo the search. This argument asks us to ignore logic because it is not within

human experience to believe that someone would consent to the search of a container which is known by the consenting party to contain contraband. Talavera v. State, 186 So.2d 811 (Fla. 2d DCA 1966).

Petitioner also argues that since the consenting party can withdraw consent at any time that the scope of the search is conditioned upon the consent remaining or being withdrawn. This argument ignores reality and the mechanics of a search. In most cases, as in this case, the consenting party is taken away from the area being searched while the search is ongoing, and in any event would not have the opportunity to withdraw the consent until after the containers have been opened. Thus, the Courts in this State when addresing the issue presented herein have consistenly ruled that it is an impermissible pressumption that the mere identification of the purpose of a search when eliciting consent gives the officer authority to search closed containers. State v. Wells, 539 So.2d 464 (Fla. 1989), Shelton v. State, 14 FLW 1653, 1654, (Fla. 3d DCA, July 11, 1989) App. dismissed 1/5/90.

2. WHERE THERE ARE OTHER GROUNDS WHICH SUPPORT THE TRIAL COURT ORDER SUPPRESSING THE EVIDENCE, THEN THE ORDER OF SUPPRESSION SHOULD BE UPHELD ON APPEAL EVEN THOUGH THE TRIAL COURT MAY HAVE ASSIGNED THE WRONG REASONS FOR ITS RULING.

Where the Trial Court assigned the wrong reasons for entering an Order Suppressing the Evidence, then the Appellate Court will uphold the Trial Court's Order where the Order is sustainable upon other grounds. State of Florida v. Alvarez, 258 So.2d 24 (Fla. 3d DCA 1972), Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1988).

In addition to the grounds assigned by the Trial Court in its

Order suppressing the evidence, the Respondents argued below that the following four grounds required that the evidence be suppressed:

A. That the Petitioner could not prove with clear and convincing evidence that proper and valid consent to search the vehicle was obtained.

B. That since the officer illegally stopped the Respondents any consent to search the automobile obtained after the stop was tainted by the illegal stop.

C. That Enio Jimeno did not have the authority to consent to the search of the automobile owned by his wife Luz Jimeno.

D. That Enio Jimeno did not freely and voluntarily consent to the search.

A. IN ADDITION TO THE TRIAL COURT'S GROUNDS FOR GRANTING THE ORDER OF SUPPRESSION, SUPPRESSION OF THE EVIDENCE WAS REQUIRED BECAUSE THE RESPONDENTS WERE ILLEGALLY STOPPED PRIOR TO THE ALLEGED CONSENT TO SEARCH BEING OBTAINED.

The Respondents were surveilled for approximately 2 hours and 45 minutes prior to the stop and subsequent search (T-18). During all of that time no effort was made to obtain a search warrant because the officers did not have probable cause to obtain one (T-41 and 44). Nevertheless, Officer Trujillo intended to stop the Respondents even though he knew that he did not have any probable cause within which to stop them (T-41, 44).

Conveniently, after Officer Trujillo began to plan to stop the Respondents he allegedly saw Enio Jimeno commit a traffic infraction. The commission of the traffic infraction was denied by the Respondents and Officer Bales at his deposition. Also, Officer Bales testified at his deposition that Officer Trujillo

told him on the non-recorded police radio frequency that he was going to stop the Respondents based on his own suspicions of narcotics being in the automobile (T-45,53-54).

Where police officers are acting on a "hunch" raised by acts of the defendants which are equally consistent with drug traffickers' profile and innocent persons, then the Trial Court is correct in suppressing evidence found pursuant to the officers acting upon this hunch. In State v. Contraras, 512 So.2d 339 (Fla. 3DCA 1987) this District Court of Appeal stated:

> "Using a pay telephone, bowling at a bowling alley, driving to a beauty salon, stopping at a nearby house, and leaving that residence with a bag are not specific and articulable facts which would justify stopping of defendant Contraras" State v. Contraras 512 So.2d 339 340 (Fla. 3DCA 1987).

Likewise, where it is evident that the pretext of a minor traffic violation was used by the officer to stop a vehicle and search it without a warrant, then the search is not valid. Riddlehoover v. State, 198 So.2d 651 (Fla. 3DCA 1967).

Detective Bales contradicting fellow officer Trujillo's allegation regarding the traffic stop, and Trujillo disclosing his plan to stop the Respondents without any probable cause, before the alleged traffic infraction, establishes that the stop was only the result of Officer Trujillo's hunch that criminal activity was afoot.

This Court held a search invalid because a traffic stop of an automobile for a bent tag was a mere pretext of the officer's motivations to detain the defendant and test the officer's suspicions. In Kehoe v. State, 521 So.2d 1094 (Fla. 1988) the Court did not accept the State's argument that once an infraction

is committed the stop can no longer found to be pretextual and unacceptable. The Court reasoned that the cases cited in the State's Brief in support of this argument were no longer acceptable because in the Court's own words:

> "Allowing the police to make unlimited stops based upon the faintest suspicion would open the door to serious constitutional violations. It is difficult to operate a vehicle without committing some trivial violation-specifically when discovered after detention. In the case under review, it appears the police decided to stop Kehoe before noticing the bent tag. Moreover, it is unlikely that a reasonable officer would stop Kehoe solely for this violation."
>
> ..."The State must show that under the facts and circumstances that a reasonable officer would stop the vehicle absent an additional and valid purpose". Kehoe v.State, 521 So.2d 1094, 1097 (Fla. 1988).

In the instant case Officer Trujillo admitted that he decided to stop the Respondents without any probable cause before he witnessed the alleged traffic infraction. Therefore, lacking a founded suspicion Officer Trujillo concocted a means by which to justify the stop on the basis of a traffic violation. The Respondents submit that the concerns presented by the facts in Kehoe to this Court also exist here.

> "When the police realize that they lack a founded suspicion, they sometimes attempt to justify a stop on some obscure traffic stop". Kehoe v. State, 521 So.2d 1094, 1096 (Fla. 1988).

B. IN ADDITION TO THE TRIAL COURT'S GROUNDS IN GRANTING THE ORDER OF SUPPRESSION, SUPPRESSION OF THE EVIDENCE WAS REQUIRED BECAUSE ENIO JIMENO DID NOT HAVE AUTHORITY TO CONSENT TO THE SEARCH.

The automobile which Enio Jimeno allegedly consented to a search of was owned by his wife Luz Jimeno who was present at the time of the search (T-24,45). Although the officers had followed and surveilled the Respondents for a period of approximately 2

hours and 45 minutes, they did not investigate who the owner of the vehicle was by simply calling in the license plate number of the automobile (T-30). In spite of Enio Jimeno having told Trujillo that the vehicle was registered in Luz Jimeno's name, Trujillo did not obtain consent from her to search the automobile (T-24,45).

In Silva v. State, 344 So.2d 559 (Fla. 1977) this Court held that a husband's consent to search premises which he had joint dominion and control over with his wife was not sufficient to justify the search, because the wife was present at the time of the search and did not consent to the search. Likewise, in the instant case Luz Jimeno, the owner of the automobile, was never asked for permission to search the automobile. The fact that she was married to Enio Jimeno who allegedly consented to the search is not sufficient because her right to refuse or give consent was personal to her, and could not be assigned to her husband without her expressly giving him that right. Silva v. State, 344 So.2d 559 562 (Fla. 1977).

C. IN ADDITION TO THE TRIAL COURT'S GROUNDS FOR GRANTING THE ORDER OF SUPPRESSION, SUPPRESSION OF THE EVIDENCE WAS REQUIRED BECAUSE THE PETITIONER FAILED TO MEET ITS BURDEN OF PROOF NECESSARY TO SHOW THAT ENIO JIMENO FREELY AND VOLUNTARILY CONSENTED TO THE SEARCH.

Officer Trujillo testified below that he told Enio Jimeno that he suspected he was carrying narcotics, asked for permission to search the vehicle, and that if he did not get his cooperation that he would apply for a search warrant (T-22, 38).[1] Thus,

[1]Since Trujillo's request for consent and threat to obtain a warrant was made in the same breath, Enio Jimeno's response could just as well have been a request that the officer obtain a warrant. State v. Kassidy, 495 So.2d 907 (Fla. 3DCA 1986).

Officer Trujillo told Enio Jimeno that he would try to obtain a warrant if consent was not forthcoming, eventhough he knew that he did not have probable cause to obtain a warrant (T-38,41, 44).

In Denehy v. State, 400 So.2d 1217 (Fla. 1980) this Court held that where an officer told the Defendant that he would attempt to obtain a search warrant if consent was not forthcoming, that the threat to obtain the warrant was a means of coercively inducing the Defendant's consent. Likewise, officer Trujillo's threat to obtain a search warrant made it appear to Enio Jimeno that he had no actual choice in whether the car was searched, and that he was not fee to go on his way.

The voluntariness of the consent must be determined by examining the totality of the circumstances which include such factors as the age, education, intelligence, and knowledge of the Defendant. Restrepo v. State, 438 So.2d 76, 77 (Fla. 3DCA 1983). Enio Jimeno is a Colombian national who has lived in the United States for a very short period of time and was not educated here. Therefore, his lack of sophistication of our constitutional guaranties, his background from a culture where authority is unquestioned and equally feared, made it more imperative that the officer apprise him clearly and unequivocally of his right to refuse permission to the search. This was not done in this case.

Furthermore, at the time that Enio Jimeno allegedly consented to the search, he was surrounded on both ends of the road by Detective Trujillo's unit and Detective Bales'. In Robinson v. State, 388 So.2d 286, (Fla. 1st DCA 1980) the Court held that where police officers do not have a sufficient basis to conduct a lawful investigatory stop, then the State must prove with clear and convincing evidence that the Defendant freely and voluntarily consented to the search subsequent to the illegal stop in order to show a clear unequivocal break in the chain of illegality to dissipate the taint of the prior illegal stop.

In the instant case, the totality of the circumstances are that the officer used coercive language when requesting consent by threatening to obtain a warrant, he knew he could not get, while Enio Jimeno was surrounded on both ends of the road by police officers without being advised of his right to leave the scene. Thus, any consent to search was a mere submission to the apparent authority of the officers to detain Enio Jimeno, and not consent freely and voluntarily given. Restrepo v. State, 438 So.2d 76, 78 (Fla. 3d DCA 1983).

Last, the fact that the automobile contained contraband supports Respondents' contention that consent was not freely and voluntarily given because it is not in accordance with human experience for someone to consent to a search which would reveal incriminating evidence. Talavera v. State, 186 So.2d 811 (Fla. 2d DCA 1966).

V. CONCLUSION

Based on the foregoing reasons, arguments, and citation of authority this Court must affirm the Order of the Trial Court suppressing the evidence.

Respectfully submitted,

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IV. I HEREBY CERTIFY that the foregoing was hand delivered to MICHAEL J. NEIMAND, Assistant Attorney General, Department of Legal Affairs, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, on this 19th day of January, 1990.

By: _____
SIDNEY EFRONSON, ESQ.