

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,057

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO  
and  
ENIO JIMENO,

Respondents.

FILED  
DEC 29 1989  
[Handwritten signature]

\*\*\*\*\*

ON PETITION FOR DISCRETIONARY REVIEW  
CERTIFIED QUESTION

\*\*\*\*\*

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

MICHAEL J. NEIMAND  
Florida Bar No. 0239437  
Assistant Attorney General  
Department of Legal Affairs  
Ruth Bryan Owen Rohde Building  
401 N. W. 2d Avenue (Suite N921)  
Miami, Florida 33128  
(305) 377-5441

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1-4
SUMMARY OF THE ARGUMENT.....	5
QUESTION PRESENTED.....	6
ARGUMENT.....	7-13
CONCLUSION.....	14
CERTIFICATE OF SERVICE.....	14

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
Palmer v. State, 467 So.2d 1003 (Fla. 3d DCA 1985).....	10
Rosa v. State, 508 So.2d at 546 (Fla. 3d DCA 1987), <u>review denied</u> , 515 So.2d 230 (Fla. 1987).....	10,13
State v. Drake, 343 So.2d 1336 (Fla. 1 DCA 1977).....	9
State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985).....	8,10
State v. Wells, 539 So.2d 464 (Fla. 1989).....	3,7,8
United States v. Anderson, 859 F.2d 1171 (3 Cir. 1988).....	12
United States v. Dichcarnte, 445 F.2d 126, 129 N 3 (7th Cir. 1970), <u>cert. denied</u> 95 S.Ct. 241 (1974).....	9
United States v. Kapperman, 764 F.2d 786 (11th Cir. 1985).....	12
United States v. Ross, 456 U.S. 795, 102 S.Ct. 257, 72 L.Ed.2d 572 (1982).....	8-11
United States v. White, 706 F.2d 806 (7th Cir. 1983).....	11
Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).....	11

## INTRODUCTION

Petitioner, the State of Florida, was the Appellant in the District Court and the prosecution in the trial court. The Respondents, Luz Piedad Jimeno and Enio Jimeno were the Appellees in the District Court and the Defendants in the trial court. The parties will be referred to as they stood before the trial court. The symbol "R" will designate the record on appeal; the symbol "T" will designate the transcript of proceedings and the symbol "A" will designate the Appendix to the brief.

## STATEMENT OF THE CASE AND FACTS

The Defendants were charged by information with trafficking in cocaine. (R.1-1a). They pled not guilty and requested trial by jury.

Prior to trial, Defendants filed a motion to suppress evidence, alleging that the cocaine was seized pursuant to consent and the consent to search the vehicle did not extend to the package which contained the cocaine. (R. 112-113). At the hearing thereon, the Defendants did not present any witnesses. The sole testimony came from the arresting officer, Detective Trujillo. (T. 1-76). At the conclusion of the hearing the trial court entered an order granting the motion to suppress. The State adopts the trial court's factual findings as the controlling facts herein:

Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings:

1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.

2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Ceasar Tabares was in the back seat.

3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.

4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.

5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.

6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, in fact, the officer never requested permission to open the bag and examine the contents.

(T. 116-117).

The unrefuted testimony established the additional fact that when Detective Trujillo was advising the Defendants of the nature of the investigation and was requesting consent to search the vehicle, he told the Defendants that if they did consent to search that consent could be withdrawn at any time. (T. 23).

Based on the foregoing, the trial court concluded that the scope of the consent given did not extend to the search and seizure of the bag. Therefore, on the authority of State v. Wells, 539 So.2d 464 (Fla. 1989) the trial court granted the motion to suppress. (R. 117).

The Third District Court of Appeal affirmed the trial court's suppression. The District Court, after finding that the trial court's findings were supported by the record, held that the totality of the circumstances was insufficient to extend the scope of the consent search for narcotics to areas where narcotics could reasonably have been located. (A 1-2)

The District Court then certified the following question:

Whether a consent to a general search  
for narcotics extends to containers  
within the general area agreed to by  
the defendant.

(A 2).

The District Court then stayed its mandate. The State  
then sought the discretionary review of this Court.

SUMMARY OF THE ARGUMENT

The District Court erred in affirming the granting of the motion to suppress on the ground that the scope of the consent given did not extend to the bag searched. This ruling is a misapplication of the law to the facts. Since the Defendants were advised that the investigation concerned narcotics and the search of the vehicle was for narcotics, the scope of the consent given extended to any items which might reasonably contain narcotics. Further, since the Defendants were told that they could withdraw consent at any time, their failure to so withdraw consent when the officer went for the bag, clearly established that the scope of consent extended to the bag. Had it not, the Defendants could have so stated and limited the scope of the consent given.



QUESTION PRESENTED

WHETHER A CONSENT TO A GENERAL SEARCH  
FOR NARCOTICS EXTENDS TO CONTAINERS  
WITHIN THE GENERAL AREA AGREED TO BY  
THE DEFENDANT.

## ARGUMENT

A CONSENT TO A GENERAL SEARCH FOR  
NARCOTICS EXTENDS TO CONTAINERS  
WITHIN THE GENERAL AREA AGREED TO BY  
THE DEFENDANT.

In the instant case the trial court found that the Defendants were lawfully stopped; they were advised that the officer was conducting a narcotics investigation; that the officer wished to search the Defendants' vehicle for narcotics; and that the Defendants consented to a vehicle search for narcotics. However, the trial court suppressed the narcotics discovered during the valid consent search on the ground that the scope of the consent to search did not encompass the brown shopping bag located within the passenger compartment. The trial court relied on State v. Wells, 539 So.2d 464 (Fla. 1989) for its ruling. The State submits that the District Court and the trial court gave an overly narrow interpretation to Wells and thereby misapplied the law to the facts and erroneously suppressed the narcotics.

In Wells, this Court held that a general consent to open and look into the trunk of a car was insufficient to authorize the opening of any locked or closed containers found therein. This Court reasoned that a consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. The totality of circumstances is defined in

State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985) and approved by this Court in Wells as:

...not merely the consenting party's words and actions, but the words and actions of all involved, as well as the surrounding circumstances, which define the scope of a consent search.

Id. at 1070.

This Court in Wells refused to extend the principle of United States v. Ross, 456 U.S. 795, 102 S.Ct. 257, 72 L.Ed.2d 572 (1982) to consent searches. Ross held: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Id. at 825, 102 S.Ct. at 2173. This rejection, the State submits, was based on the erroneous view that the Fourth Amendment principles that apply to probable cause searches are totally inconsistent to consent searches.

When an official search is properly authorized--whether by consent or by the issuance of a valid warrant--the scope of the search is limited by the terms of its authorization Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980). The reason that the same principles apply to consent searches as to probable cause searches is that consent is a waiver of the right to demand that government agents obtain the authorization of a warrant to justify their search and the need for a warrant is waived

only to the extent granted by the consent. Thus if government agents obtain consent or a warrant to search for a stolen television set, they must limit their activity to that which is necessary to search for such an item and they may not rummage through private documents and personal papers. United States v. Dichcarnte , 445 F.2d 126, 129, N 3 (7th Cir. 1970), cert. denied 95 S.Ct. 241 (1974). In Dichcarnte, the court applied the foregoing principles to a consent search for narcotics and held that seizure of personal papers was not within the scope of the consent because reading and rummaging through the papers was not reasonable to determine if narcotics were in the house and therefore exceeded the scope of the consent. The court also held that the search, even if done under a warrant, would have been unreasonable since a warrant authorizing the seizure of narcotics would not give the government the right to search personal papers of the defendant.

This principle, that the scope of a consent search is delineated by the subject matter for which the consent is given and that the scope extends to all areas where the subject matter could reasonably be found, has been accepted in Florida before the decision in Ross. In State v. Drake, 343 So.2d 1336 (Fla. 1 DCA 1977), the defendant gave consent to search his truck for agricultural products. The court held that this general consent to search for agricultural products extended the opening of a backback even though

consent to open the backpack was not sought because it was reasonable to believe agricultural products could have been located in the backpack.

Even after Ross, by without explicitly adopting its rationale, the courts of Florida have held that the scope of a consent search extends to those items which might reasonably contain the items for which consent was given. See Rosa v. State, 508 So.2d at 546 (Fla. 3d DCA 1987), review denied, 515 So.2d 230 (Fla. 1987). Palmer v. State, 467 So.2d 1003 (Fla. 3d DCA 1985). In fact, the court in Fuksman intimated that the scope of consent waived would have extended to the locked briefcase within the car if the officers had informed the defendant of the nature of their investigation and if the defendant did not question the opening of the suitcase. State v. Fuksman, supra, 468 So.2d at 1070 N 3.

Based on the pre Ross standards concerning the scope of consent searches it is not surprising that the federal courts have applied the Ross legal principle to consent searches for narcotics and have found that the scope of the consent encompassed all areas where narcotics could be hidden. These courts have all relied upon the Ross principle that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of

entry or opening may be required to complete the search." United States v. Ross, supra, 456 U.S. at 820, 102 S.Ct. at 2170.

In United States v. White, 706 F.2d 806 (7th Cir. 1983), the defendant gave police consent to search his apartment for heroin. The officers proceeded to the apartment and told defendant's wife that defendant had been arrested on narcotics charges and had consented to a search of the apartment. Prior to commencing the search, the defendant's wife, pursuant to a request, directed the police to a flight bag which contained money. The police opened the bag and found marked money used in previous drug purchases. The district court held that although defendant consented to the search of the apartment, the search of the flight bag exceeded the scope of the consent and therefore the seizure of the currency was unlawful. On appeal the Seventh Circuit reversed, holding that the consensual search to look for narcotics encompassed all areas where it would be reasonable to think that heroin would have been hidden, including the flight bag. The court reasoned that the search of the flight bag constituted no greater privacy intrusion that was authorized by the consent to search for narcotics. The court further reasoned that since the officer could reasonably consider that heroin was in the flight bag, the search of the bag was within the scope of the consent.

In United States v. Kapperman, 764 F.2d 786 (11th Cir. 1985), Kapperman and Cervantes were travelling together in an automobile when they were lawfully stopped. Kapperman was arrested for drug smuggling and Cervantes was so informed. Thereafter, the police sought and received Cervantes' consent to search the vehicle. Said search uncovered cocaine in an unlocked suitcase in the car's trunk. The Eleventh Circuit found that the consent form which authorized the police to remove "whatever documents or other items of property whatsoever, which they deem pertinent to the investigation" gave the police authority to open the closed suitcase found inside the trunk. Id. at 794. The reason therefore is that Cervantes' authorization to search for narcotics permitted a search of unlocked luggage contained inside the vehicle, because the officers could reasonably assume that narcotics would be there. Finally, since there was no indication that Cervantes objected to the opening of the suitcase, he did not intend to limit the scope of consent. See also, United States v. Anderson, 859 F.2d 1171 (3 Cir. 1988) (Consent to search for narcotics encompassed all areas and compartments where narcotics could reasonably be found.)

An application of the foregoing principles clearly establishes that the District Court and the trial court misapplied the law to the facts since the scope of consent, based on the totality of the circumstances, encompassed the brown bag. The Defendants were lawfully stopped and were

advised that the police were conducting a narcotics investigation. Defendants consented to search the vehicle and the police searched the brown bag, which bag it was reasonable to conclude could contain narcotics. Therefore, the scope of the search, based on the totality of the circumstances, without a doubt encompassed the brown bag. This is further supported by the fact that when the officer reached for the bag, the Defendant never attempted to withdraw his consent. See, Rosa v. State, supra. (Consent to search outer bag extended to inner bag which contained contraband, where defendant had not by action or words, withdraw his consent prior to the search of the inner bag). Therefore, the search of the brown bag, a place where narcotics could reasonably be found, was within the scope of consent to search the vehicle for narcotics.

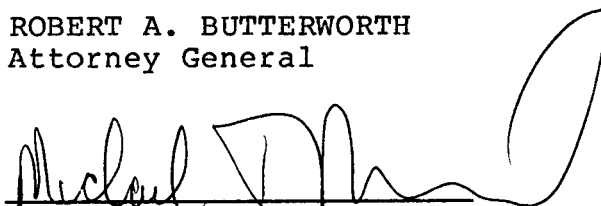


CONCLUSION

Based on the foregoing points and authorities, the State respectfully requests that this Court answer the question in the affirmative and remand the cause to the trial court for trial.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
Attorney General



MICHAEL J. NEIMAND  
Florida Bar No. 0239437  
Assistant Attorney General  
Department of Legal Affairs  
401 N.W. 2nd Avenue, Suite N921  
Miami, Florida 33128  
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to SIDNEY EFRONSON, Attorney for Respondents, 2250 S.W. 3rd Avenue, Suite 100, Miami, Florida 33129, on this 26 day of December, 1989.



MICHAEL J. NEIMAND  
Assistant Attorney General