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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,057

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO and,  
ENIO JIMENO,

Respondents,

-----  
ON REMAND FROM UNITED STATES SUPREME COURT  
-----

REPLY BRIEF OF PETITIONER ON REMAND

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ARGUMENT

BASED ON THE UNITED STATES SUPREME COURT'S DECISION IN THE INSTANT CASE, THIS COURT MUST QUASH THE ORDER OF THE TRIAL COURT SUPPRESSING THE EVIDENCE OF THE COCAINE AND REMAND FOR TRIAL.

The Defendant now claims the police's consensual opening of the paper bag violated his right to privacy, pursuant to Article I, Section 23 of the Florida Constitution. In his motion to suppress, in the trial court and in all other courts, the Defendant advanced no argument on the privacy issue, but rather claimed only that his consent to search the automobile did not extend to the paper bag. Therefore the search of the paper bag violated his rights guaranteed by the Fourth Amendment of the United States Constitution and the Florida Constitutions' parallel provision, Article I, Section 12. Since Defendant failed to present the trial court, or any other court, with the specific legal argument either by motion or objection, he did not preserve the privacy issue for appellate review. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Forrester v. State, 565 So.2d 391 (Fla. 1st DCA 1990).

A comparison of the burden of proof at the trial level that results from the different claims demonstrates why it is improper for this Court to consider the privacy argument when the trial court did not. In the search and seizure context, once a defendant has established that he had a reasonable expectation of privacy under the circumstances, and that a warrantless search

and seizure occurred, the burden shifts to the State to demonstrate that the search was reasonable and that the State was not required to obtain a warrant under the circumstances. Norman v. State, 379 So.2d 643 (Fla. 1980). That is exactly what occurred at the suppression hearing before the trial court.

In comparison, when a defendant raises a privacy challenge, he must first show that the government has intruded into an area encompassed within the "zone of privacy" protected by Article I, Section 23. Only then does the burden shift to the State to demonstrate that the challenged intrusion "serves a compelling State interest and accomplishes its goal through the use of the least intrusive means." Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544, 547 (Fla. 1985). The State's burden in the search and seizure context is far less stringent than that under Article I, Section 23. Shaktman v. State, 529 So.2d 711, 717 N. 8 (Fla. 3d DCA 1988) approved, 553 So.2d 148 (Fla. 1989).

In the instant case, the trial court only ruled under the Fourth Amendment of the United States Constitution and Article I, Section 12 of the Florida Constitution. There was no mention whatsoever of Section 23 at the suppression hearing. The trial court was never called upon to consider whether the Defendant had a legitimate expectation of privacy in the Section 23 context, nor whether the police action served a compelling State interest via the least intrusive means. Having thus failed to properly preserve the issue, by failing to raise it in the trial court,

the Third District Court of Appeal, this Court on review of the Third District's decision, the United States Supreme Court, the Defendant may not raise the argument for the first time on remand from the United States Supreme Court.

Assuming arguendo, that the issue was properly preserved for review, Defendant is correct when he assumed that the State will undoubtedly argue that Article I, Section 12 bars this Court from applying Article I, Section 23 to this case. The right of privacy provision, Article I, Section 23, of the Florida Constitution does not modify the applicability of Article I, Section 12, particularly since the people adopted Section 23 prior to the present Section 12. State v. Hume, 512 So.2d 185 (Fla. 1987). Therefore the only time Article I, Section 23 can be used to suppress evidence is when the Fourth Amendment to the United States Constitution, and thereby Article I, Section 12, is not implicated. Shaktman v. State, supra (use of a pen register does not constitute a search or require a warrant under the Fourth Amendment and Article I, Section 12, therefore Article I, Section 23 protections were considered). Winfield v. Division of Pari-Mutual Wagering, supra (Bank records, subpoenaed by the government without notice to a depositor under investigation were not private papers within the ambit of the Fourth Amendment and Article I, Section 9, therefore Article I, Section 23 protections were considered). Since the Fourth Amendment applies to searches and seizures, Department of Law Enforcement v. Real Property, 16 F.L.W. S497, 499 (Fla. August 15, 1991), Article I, Section 12 is

the exclusive State Constitutional provision under which the validity of search and seizures can be challenged. Therefore Article I, Section 23 is preempted from the field.

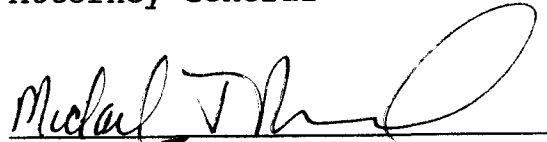
In the instant case, the search of Defendant's vehicle required either a warrant or an exception to the warrant requirement. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925); Katz v. United States, 389 U.S. 747, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A well recognized exception to the warrant requirement is a consent search. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). As such the search and seizure in the instant case clearly fell with the Fourth Amendment. Defendant's reliance on Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) for a heightened privacy interest for the contents of a locked container is misplaced, since it was overruled in California v. Acevedo, 500 U.S. \_\_\_, 111 S.Ct. \_\_\_, 114 L.Ed.2d 619 (1991). Further, the mentioning of Article I, Section 23 by this Court in Wells v. State, 539 So.2d 464, 468 (Fla. 1989) affirmed on other grounds, 109 L.Ed.2d 1 (1990) is pure dicta and is in direct conflict with previous holdings of this Court and should be disregarded. State v. Hume, supra.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully requests that this Court quash the order suppressing the evidence and remand the case for trial.

Respectfully submitted,

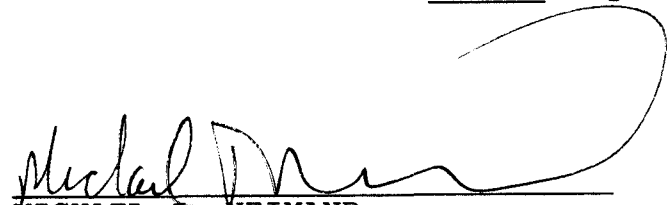
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITION ON REMAND was furnished by mail to BENJAMIN S. WAXMAN, Attorney for Respondents, 2250 S.W. 3rd Avenue, Suite 100, Miami, Florida 33129 on this 5 day of September, 1991.



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/bfr