IN THE SUPREME COURT OF FLORIDA

WILLIE REYNOLDS,

Petitioner,

v. CASE NO. 75,832

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Jurisdiction in this case is based upon Article V, Section 3(b)(4) of the Florida Constitution, which grants this Court the authority to review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance. The first district court certified the following two questions as being of great public importance:

> WHETHER IT IS PROPER FOR POLICE TO HANDCUFF A PERSON WHOM THEY ARE TEMPORARILY DETAINING?
>
> WHETHER A PERSON'S CONSENT TO SEARCH CAN LEGALLY BE VOLUNTARY IF GIVEN WHILE HANDCUFFED DURING TEMPORARY DETAINMENT?

The opinion of the district court is styled Reynolds v. State, __So.2d__, Case No. 89-234, 15 FLW D678 (Fla. 1st DCA 1990). A copy of the opinion is included in an appendix.

References to the documents and transcript in the consecutively numbered record will be designated "R".

STATEMENT OF THE CASE AND THE FACTS

A. Trial Court

John Parsons, a Tallahassee vice investigator, worked with a confidential informer equipped with a wireless transmitter to discover evidence of drug transactions. Parsons had used the informer frequently and the information supplied was always reliable. (R 55-58).

On October 13, 1988 the informer was in the Ebony Lounge, known for consumption and sale of crack cocaine, and Parson was in a nearby location. The informer transmitted that a vehicle was arriving to distribute cocaine to dealers at the lounge. A female got out of the car, distributed cocaine in a series of transactions, reentered the car, and the car drove away. The female still had cocaine on her person when she left and there was other cocaine in the car. (R 58-61).

Parsons alerted other officers and the car was spotted and followed. Eventually the car stopped at a gas station. As petitioner, who was driving, stepped out of the car the officers who had converged on the stopped car detained him with handcuffs. (R 62-63).

According to Parsons the police identified themselves, told petitioner he was under arrest, and placed handcuffs on him. (R 64). The reason for handcuffing, aside from probable cause to arrest, was:

> It's a standard operating procedure for us, under circumstances involving crack or these types of felonies, because of the reports of automatic weapons and the heavy shootings that we observe and also hear

> about or witness, that we just don't take those risks.
>
> And every time we make a stop, they are handcuffed, really, if for no other reason, for safety for them and us.
>
> And that's the first thing that happens. We want control over the situation. And then when it's stabilized, we go from there. (R 65).

The informant had not mentioned that anyone other than the woman was in the car or that the woman was armed. Parsons did not know who petitioner was when the stop was made. (R 77).

Officer McDaris was assisting in the drug investigation. She was in an unmarked police car when she heard the description of the car described by Officer Parsons. She saw and followed that car until it stopped at a gas and food store. (R 79-82). Officers Parsons, Hendry, and McDaris approached the stopped car and after petitioner got out McDaris told him to put his hands on the car and she then handcuffed him. She did that because:

> Since I've been doing, you know, the Crack Squad and the cocaine stuff, I have seen guns and I've gotten hurt.
>
> In March, I had tried to detain someone that wasn't under arrest yet, and ended up with a dislocated shoulder. He knocked down two police officers and me, and drug me down the street.
>
> With the guns and the knives and the whole aspect of what's been going on with the crack cocaine, it's become procedure with the Crack Squad that when we detain somebody, we handcuff every person that we detain, for our own safety. (R 83).

After petitioner was detained, McDaris turned to the female in the car and Officer Hendry stayed with petitioner. McDaris heard petitioner give Hendry permission to search him. (R 84). Cocaine and marijuana were found during that search. (R 85).

Officer Hendry's report was introduced in evidence without objection. (R 88) (State's Exhibit 1, R 25). In part the report stated:

> This officer assisted Inv. McDaris (683) and Inv. Parsons (511) with the traffic stop of a 1988 Chevy Corsica 4d white FL# YEI-96S at the Shell station.
>
> Both cuffed the driver: Willie Reynolds and turned him to me to be placed in my marked car. I advised him that this was a narcotics investigations (sic) and a more detailed explanation would be provided shortly. I patted him down for weapons with negative results.
>
> I then asked permission to search his pockets telling him that he had the right to refuse. He said twice that I could search him and "go ahead." I then pulled two (2) coin bags of suspect cannabis from his front left upper jacket. Suspect then said "no-I don't want you to search me." I told him that he was under arrest. (State's Exhibit One, R-25).

As a result of the search petitioner was charged in the Circuit Court of Leon County with possession of cocaine with intent to sell and possession of less than 20 grams of cannabis. (R 1). Petitioner moved to suppress the evidence, contending it was seized during a period of illegal detention. (R 19-20).

The petitioner argued in the trial court that the drugs should be suppressed because:

> [The police] went beyond the kind of detention contemplated by the stop and frisk statute. They handcuffed Mr. Reynolds. They, in effect arrested him. They went beyond detention. They arrested him.
>
> And what I'm saying is that this consent to search was the product of that ....
>
> * * *
>
> What I'm saying is, you can't arrest somebody when you only have a reasonable suspicion. And they went beyond the kind of detention contemplated by a reasonable suspicion.
>
> * * *
>
> But my whole argument is that they went beyond the kind of detention contemplated by Florida Statutes, and by the supreme court, for that matter, when we talk about stop and frisk. And what they had done was, they had illegally arrested him and this consent to search was the product of that illegal arrest, and therefore, it's invalid. (R 96-98).

The judge denied the motion and stated his reasons as follows:

> I think the problem in this case is the handcuffing prior to asking any questions or anything else.
>
> But I believe the officer testified that in their view, the person is not under arrest.
>
> Now, whether that is or not, I don't know. To me, it's very clear that if Mr. Reynolds was not placed under arrest, just got out of the car, was asked to get out of the car, show his ID, so forth and so on, then they ask him if they can search him, and he says yes, yeah, there's no problem, it's a consentual(sic) search. We don't have a problem.

> The fact that the -- and I'm not aware of any cases. This is apparently new policy by TPD, and I'm not sure if I've seen it in other states, although it would seem that it might be a policy in some of your metropolitan areas. I don't know. I just haven't seen a case on it. I think that it's basically a consentual(sic) search. I don't think the fact that he is handcuffed takes away from the fact that it's a consentual(sic) search.
>
> I would say this: If they don't ask him, and just search him, I think you've probably got a bad search, under the facts of this case. But once he gave consent to search, then I think they were well within their rights to do so.
>
> * * *
>
> So based upon that rationale and based upon a finding that they had the probable cause to stop the car, and once he gave consent that it became a valid search, regardless of whether or not he was handcuffed.
>
> They could have asked him, regardless of whether he was handcuffed or not, whether he agreed to be searched. And if he had said no, then they wouldn't have been able to search him, validly, from my view, in either circumstance. (R 98-100).

The motion to suppress was denied and petitioner pled no contest to the lesser offense of possession of cocaine, reserving the right to appeal the suppression issue. (R 98, 106-106). The state agreed to nol pross the possession of cannabis charge.

Petitioner was adjudged guilty and sentenced to three years in the department of corrections. Over petitioner's objection, the judge also imposed a period of one year probation following the prison term. Pending violation of probation charges in other cases were disposed of by the judge finding

petitioner had violated probation but then terminating the probation. (R 106-117).

B. Appellate court

Appeal was taken to the first distict court to review (1) the denial of the motion to suppress and, (2) the imposition of probation following a prison sentence. The court affirmed both rulings.

The search was upheld with a finding that the police policy of handcuffing suspected drug dealers was not unreasonable, and consequently the consent given while petitioner was handcuffed was valid. The court said that "Because of the high incidence of weapons associated with cocaine trafficking, particularly in light of the irrationality that this drug produces, we ... find that the legality of [petitioner's] temporary detainment was not vitiated by having been handcuffed during it." (Citations omitted) (Appendix at 4). From that holding the court further concluded that since the "handcuffed temporary detainment [was] valid, it follows that the voluntariness of [petitioner's] consent to search was not compromised by the use of handcuffs alone." Ibid.

The probationary split sentence also was affirmed, on the authority of Poore v. State, 531 So.2d 131 (Fla. 1988). Judge Zehmer, concurring specially, agreed with the ruling on the suppression issue, but would have also certified as of great public importance the probationary split sentence question, as another panel of that court had done in Glass v. State, 15 FLW D299 (Fla. 1st DCA 1990), review pending, case no. 75,600

The two questions certified by the majority are:

> WHETHER IT IS PROPER FOR POLICE TO HANDCUFF A PERSON WHOM THEY ARE TEMPORARILY DETAINING.
>
> WHETHER A PERSON'S CONSENT TO SEARCH CAN LEGALLY BE VOLUNTARY IF GIVEN WHILE HANDCUFFED DURING TEMPORARY DETAINMENT.

SUMMARY OF THE ARGUMENTS

ISSUE I. The petitioner was detained on less than probable cause and thus could not have been subjected to a search incident to arrest. By handcuffing petitioner without facts supporting a reasonable basis for doing so, the police exceeded the scope of a lawful seizure incident to a detention under Terry v. Ohio, 392 U.S. 1 (1968).

The trial judge erroneously upheld the search by ruling that the fact of being handcuffed without probable cause did not affect the voluntariness of the consent to be searched. In making that ruling the judge failed to apply the correct legal standard, which requires voluntary consent to be established by clear and convincing evidence when the suspect is illegally detained.

The district court's affirmance was based on a blanket rule that suspected drug traffickers can be handcuffed incident to a Terry stop. That rule is not supported by any case and is inconsistent with the requirements of Terry and its progeny that the scope of the intrusion must be limited to what is reasonably necessary under the circumstances.

This court should disapporve the per se rule adopted by the district court and reafffirm the doctrine that reasonableness of a seizure under Terry v. Ohio must be evaluated by the totality of circumstances.

If the correct principles had been applied here, the search should have been ruled unconstitutional under the Fourth and Fourteenth Amendments. No facts were presented to justify a

reasonable belief that petitioner was armed, or that handcuffing was otherwise reasonable under the circumstances, thus petitioner was illegally seized.

Since the trial and district courts both found that the custody was legal, neither of them addressed the voluntariness of consent. But the consent, given while petitioner was illegally seized, was the product of the illegal custody. In that situation the state was required to prove by clear and convincing evidence that the taint of the illegal custody was dissipated. Norman v. State, 379 So.2d 643 (Fla. 1980). The evidence was insufficient to meet that standard and the purported consent should have been ruled involuntary.

Issue II. The sentence of incarceration followed by probation violated double jeopardy. The legislature has the exclusive authority to determine punishment for categories of crimes. The courts do not. The Double Jeopardy Clauses of the state and federal constitutions prohibit the courts from imposing more punishment than the legislature authorizes. The legislature did not authorize the probationary split sentence and therefore the imposition of both incarceration and probation as a probationary split sentence violated double jeopardy.

This issue is now before this Court in Glass v. State, case no. 75,600, on a certified question from the first district court of appeal.

ARGUMENT

ISSUE I

THE FOURTH AMENDMENT DOES NOT PERMIT A PER SE RULE THAT ALL PERSONS SUSPECTED OF DRUG TRAFFICKING MAY BE HANDCUFFED WHEN DETAINED FOR INVESTIGATION ON LESS THAN PROBABLE CAUSE AND THEREFOR CONSENT TO SEARCH IS PRESUMPTIVELY TAINTED IF GIVEN DURING A PERIOD OF ILLEGAL DETENTION IN HANDCUFFS.

Introduction

The issue is narrow. Petitioner conceded there was founded suspicion to stop the car and to question him. The police, however, exceeded the limits of a proper stop when they handcuffed him without having probable cause for arrest. The consent obtained while petitioner was handcuffed was tainted by the illegal custody and no intervening event broke the chain of illegality.

In the trial court the judge mistakenly ruled that being handcuffed had no bearing on whether the consent to search was valid, saying that "once he gave consent ... it became a valid search, regardless of whether or not he was handcuffed." (R 100). That ruling overlooked the principle, to be discussed later, that illegal custody taints consent.

On appeal, the district court did not find the custody illegal, and consequently did not rule on whether the illegality of the custody nullified consent.

A. Handcuffing

The trial judge properly stopped short of ruling that there was probable cause to arrest petitioner. There was not. The informer had not mentioned anyone except the woman in the

car; nor was there any evidence that petitioner participated in the drug transactions or had knowledge of the presence of drugs in the car. Inferentially, if not explicitly, the judge ruled that the police could not have made a valid arrest with the information then available when he said "If they don't ask him, and just search him, I think you've probably got a bad search...." (R 99).

The officers themselves did not claim to be making a search incident to arrest. The reason for handcuffing petitioner was a policy adopted by the "Crack Squad" of handcuffing nearly every person they detained for questioning. Petitioner argued in the trial court that the policy exceeds the permissible scope of detention without probable cause.

The district court agreed with the police, applying a broad rule that handcuffing incident to detention without probable cause was justified simply because petitioner was suspected of cocaine trafficking. Neither the cases cited by the district court nor any other authority supports that sweeping pronouncement.

It is tempting to mount a soap box to preach about the loss of individual privacy rights caused by the war on drugs. Those arguments have been made eloquently elsewhere. See, e.g. Bostick v. State, 554 So.2d 1153, 1158-59 (Fla. 1989); State v. Avery, 531 So.2d 182 (Fla. 4th DCA 1988) (en banc); id. at 188 (Letts, J., concurring); id. at 188-194 (Glickstein, J., concurring and dissenting); id. at 194-199 (Anstead, J., dissenting). But on the other hand the state, in soap box

rebuttal, could regale the court with countervailing examples of police officers being killed or wounded by detained suspects. Indeed, Officer McDaris testified about her own injuries while detaining someone.

The United States Supreme Court recognized those competing interests when it decided in Terry v. Ohio, 392 U.S. 1 (1968) that detention on less than probable cause did not violate the Fourth Amendment; but incident to that detention the police were allowed to conduct only "a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault [them]." Id. at 30-31. Terry did not authorize physically seizing the person except for a pat down to disclose the presence of weapons. Accord, Sibron v. New York, 392 U.S. 40 (1968) (disapproving search of detained suspect to look for drugs).

Florida codified the Terry decision in Section 901.151, Florida Statutes. The police are limited to a search for weapons when detaining a suspect for questioning. Even when a valid stop is made, police violate the Fourth Amendment by "conduct ... more intrusive than necessary to effectuate an investigative detention otherwise authorized by the Terry line of cases." Florida v. Royer, 460 U.S. 491, 504 (1983).

Without probable cause to arrest or a reasonable basis to believe weapons were present, the police had no right to place petitioner in handcuffs as if he had been arrested. The physical seizure of the whole person greatly exceeded the scope of an authorized protective pat down for weapons. Even if

handcuffing was a reasonable initial response, it was not permissible after the frisk by Officer Hendry. His pat down for weapons had negative results, yet the petitioner remained in handcuffs when asked for consent to search.

In Royer, supra, the Court explained the limited nature of the seizure allowed by a Terry stop, saying:

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear; an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. [Citations omitted]. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. (Emphasis added).

460 U.S. at 500.

The state's efforts to justify handcuffing were of a general rather than specific nature. The police had no information about weapons on the person of the petitioner or the female with him in the car. The explanation for the seizure was based on references, some of them vague, to experiences with drug dealers as a whole. No specific facts were given to support a reasonable belief that petitioner was armed or otherwise a threat to the officer's safety.

The courts have not allowed the police to violate privacy rights based on generalized assertions about drug dealers when they have no knowledge that the individual being confronted may be armed. E.g. Roundtree v. State, 544 So.2d 1101 (Fla. 1st DCA 1989) (state failed to present evidence to support "officer peril" exception to the knock and announce requirement); King v. State, 371 So.2d 120, 122 (Fla. 1st DCA 1978) (neither defendant was seen armed, "consequently no reasonable belief existed that the officers' peril would have increased had they first demanded entrance"); Rodriguez v. State, 484 So.2d 1297, 1298 (Fla. 3d DCA 1986) (the testimony that "we knew we had a drug dealer supposed to be carrying a stolen gun to protect his drugs ... [was] entirely too vague" to support an exception to the knock and announce requirements).

A blanket policy of handcuffing every suspected drug dealer detained under the stop and frisk law without any indication that the individual may be armed is simply too broad. Handcuffing on a public street is a greater intrusion than the limited pat down of the outer clothing authorized only when there is a reasonable suspicion based on articulable facts that the person may be armed. See, United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982)("handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical Terry stop."). Handcuffing without reasonable suspicion that the person is armed overrides the Terry requirement of founded suspicion for a pat down.

Even when the police believe the suspect is armed they must confine the scope of the forceable stop to the protective frisk for weapons. Compare, Adams v. Williams, 407 U.S. 143, 148 (1972) ("the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable."), with Sibron v. New York, 392 U.S. 40 (1968) (Terry search can be justified only if the officer has reasonable grounds to believe the suspect is armed and the scope of the search must be confined to the goal of discovering weapons).

The seizure here was excessive because a valid stop does not necessarily mean there can be a valid frisk; an officer "for his own protection ... may conduct a pat down to find weapons that he reasonably believes or suspects are then in possession of the person he has stopped." State v. Webb, 398 So.2d 820, 822 (Fla. 1981). On the other hand, without reasonable suspicion that weapons are present, Terry, Sibron, and Webb do not allow the police to make even the limited pat down.

If the police cannot conduct a pat down without reasonable suspicion that weapons are present, it logically follows that they cannot perform the more intrusive task of handcuffing the suspect for their own protection without some basis for believing he is armed. And in this case there was no evidence suggesting the presence of weapons.

Per se rules are not favored in stop and frisk cases because the question of reasonablness almost invariably depends

on the unique circumstances of each situation. Instead, the courts have examined the totality of circumstances when determining reasonableness under the Fourth Amendment. For example, in Florida v. Royer, supra, 460 U.S. at 506-07 the Court said

> We do not suggest that there is a litmus-paper test for distinguishing a consentual encounter from a seizure for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

See also, Brown v. Texas, 443 U.S. 47 (1979) (to justify detention, state must show requisite reasonable suspicion, based on objective facts, that the suspect was engaged in criminal activity; merely being in a neighborhood frequented by drug dealers was not enough to justify stop of defendant and demand that he produce identification); State v. Royer, 389 So. 2d 1007, 1020-26 (Fla. 3d DCA 1980) (Hubbart, J. concurring) (investigative stops based on drug courier profile must be judged according to a careful case-by-case constitutional analysis).

Furthermore, the authorities relied on by the district court here do not support the announced rule that as a matter of law all drug trafficking suspects can be handcuffed incident to a Terry stop. No case goes that far.

The court based its decision mainly on United States v. Bautista, supra, 684 F.2d 1286, but there the federal court appoved the handcuffing because it was reasonable under the circumstances. The rule applied was merely that "police conducting on-the-scene investigations involving potentially dangerous suspects may take precautionary measures if they are reasonably necessary." 684 F.2d at 1289. Unlike the district court here, the federal court focused on the particular facts making the officer's conduct reasonable: "[D]efendants were suspected of robbery in which three men with guns participated and the third robber might still have been in the vicinity. The handcuffs eliminated the possibility of an assault, or escape attempt during the questioning ...." Id. at 1289-90.

Bautista does not approve handcuffing without particularized suspicion. The court cited United States v. Thompson, 579 F.2d 187 (9th Cir. 1979) as authority for handcuffing. There the court found it reasonable for the officer to handcuff the suspect because he kept reaching for the inside pocket of his long coat, and continued to do so despite being warned that he would be handcuffed if he did not stop.

No similar analysis was made here either by the trial judge or the district court. Both erroneously accepted as law and fact that every drug trafficking suspect is dangerous regardless of the circumstances and seizure by handcuffing is automatically allowed.

The state court decisions relied on by the district court are distinguishable. Harper v. State, 532 So.2d 1091 (Fla. 3d

DCA 1988), rev. den. 541 So.2d 1172 (Fla. 1988) held that police were justified in handcuffing a person standing near cocaine and a butane torch in open view when executing a search warrant on a house during a murder investigation. The court ruled that sufficient grounds existed for a temporary Terry detention and that handcuffing under those circumstances was permissible. Similarly, in Wilson v. State, 547 So.2d 215 (Fla. 4th DCA 1989) the court approved handcuffing incident to detention of a person outside a house where police were executing a search warrant for drugs.

Both Harper and Wilson involved search warrants. Here there was no search warrant, so the added protection of a magistrate's determination of probable cause for the intrusion was absent. See, Michigan v. Summers, 452 U.S. 692, 701-02 (1981) (approving detention of resident while police executed search warrant on his residence, noting the "prime importance" of the fact that a "neutral and detached magistrate had found probable cause"; also noting that "because the detention ... was in respondent's own residence, it could add only minimally to the public stigma associated with the search itself...." Even so, the Supreme Court in Summers did not expressly or otherwise approve handcuffing incident to the detention, as there is no indication the police there used any physical restraint.

To the extent that Harper and Wilson can be read to allow police routinely to handcuff all persons on premises to be searched, they should be disapproved for the reasons

painstakingly explained by Judge Glickstein, dissenting, in Wilson v. State, supra, 547 So.2d at 217-221 (Glickstein, J., dissenting).

Wilson follows Harper which in turned relied on two earlier third district cases, State v. Lewis, 518 So.2d 406 (Fla. 3d DCA 1988) and State v. Ruiz, 526 So.2d 170 (Fla. 3d DCA 1988) as support for the proposition that handcuffing incident to detention is permissible. Neither case involved handcuffs. Both, however, contain rather sweeping pronouncements of police authority to detain persons suspected of drug dealing and so are vulnerable to the same criticism as the first district's opinion here; they overlook the principle that the specific facts of each case are the test for reasonablness.

The first district court pronounced an unsupported and arbitrary rule of law in place of the required totality of circumstances test. That rule should be repudiated by this court.

Since the evidence failed to establish a reasonable basis for using handcuffs to detain petitioner, that form of custody constituted an illegal seizure under the fourth amendment.

B. Consent

When the trial judge ruled that the handcuffs were irrelevant to consent he overlooked the principle that illegal custody presumptively taints consent. Bailey v. State, 319 So.2d 22 (Fla. 1975). The court in Bailey ruled that after illegal custody is established, the state must prove subsequent consent by clear and convincing evidence.

In Norman v. State, 379 So.2d 643, 646-47 (Fla. 1980) the court reiterated the test for consent and said:

> The voluntariness vel non of the defendant's consent to search is to be determined from the totality of circumstances. But when consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. [Citations omitted]. The consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action.

Under Bailey and Norman the illegality of the custody invokes a higher standard of proof that the consent to search was voluntary. Applying the wrong standard of proof in evaluating consent is reversible error. Bostick v. State, supra, 554 So.2d at 1158 (presumption of correctness which normally accopmanies judge's findings of fact does not apply when judge uses wrong standard to determine voluntariness of consent to search); Edwards v. State, 532 So.2d 1311, 1315-16 (Fla. 1st DCA 1988); State v. Martin, 532 So.2d 95 (Fla. 4th DCA 1988).

The judge here ruled that the handcuffs were irrelevant to consent. By his own admission, therefore, he had no reason to invoke the higher standard of proof which the situation required. He could not have properly applied the tests summarized in Alvarez v. State, 515 So.2d 286, 288-289 (Fla. 4th DCA 1987) which are that consent following illegal detention "must be particularly scrutinized.... [and] the closer the connection between a consent and any improper conduct by the police, the

less likely a consent will be found to be freely and voluntarily given...."

The only evidence of a break in the chain of illegality was the testimony that petitioner was heard to consent by Officer McDaris while in the custody of Officer Hendry, and Hendry's report stating that he told petitioner he did not have to consent. Without more, the simple warning given by Hendry was not sufficient to remove the taint of the illegal custody, especially when the handcuffs remained after the frisk proved negative.

While some cases suggest that warning of the right to refuse consent overcomes the taint of illegal detention, e.g., Edwards v. State, supra, 532 So.2d 1311; Pirri v. State, 428 So.2d 285 (Fla. 3d DCA 1983), that does not relieve the trial judge of the obligation to determine, if, considering the totality of circumstances, the consent was voluntary or merely submission to apparent police authority. See, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (test is totality of circumstances); Edwards, supra, 532 So.2d at 1315 (petitioner's compliance was merely acquiescence to authority and not a free and voluntary consent to search); Robinson v. State, 388 So.2d 286 (Fla. 1st DCA 1980) (same). Even when the police claim to have advised the suspect of the right to refuse consent, the court may still find the consent was "merely a reflexive submission to apparent authority, which was from its inception, impermissible. State v. Castillo, 545 So.2d 965, 967 (Fla. 3d

DCA 1989), citing State v. Butler, 520 So.2d 325 (Fla. 3d DCA 1988).

It must be remembered that here the petitioner was still fully subject to the coercive effects of a de facto arrest with all the trappings, including handcuffs. Officer Parsons said petitioner actually was told he was under arrest. Under those circumstances, the bare bones warning in Hendry's report does not suffice to overcome by clear and convincing evidence the presumption that the ensuing consent was involuntary acquiescence to the continuing effects of the illegal custody. From this record it cannot, in any event, be said that the trial judge fulfilled his required role of assessing the voluntariness of the consent by the required standard of clear and convincing evidence. His ruling is entitled to no special deference on appeal.

The district court likewise did not apply the correct standard because it found that the handcuffing was legal custody. Under the totality of circumstances, the state failed to overcome the taint of illegal custody. The trial judge erred in denying the motion to suppress and the distict court's affirmance should be quashed.

C. Summary

The certified questions should be answered in the negative. A per se rule permitting handcuffing of all persons suspected of drug dealing violates the Fourth Amendment.

Likewise consent while handcuffed without founded suspicion presumptively taints any consent given while the person is thus illegally detained.

ARGUMENT

ISSUE II

WHETHER A PROBATIONARY SPLIT SENTENCE VIOLATES DOUBLE JEOPARDY BY ALLOWING COURTS TO IMPOSE A DISPOSITIONAL ALTERNATIVE NOT AUTHORIZED BY THE LEGISLATURE.[1]

The Fifth Amendment to the United States Constitution states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Article I, Section 9 of the Florida Constitution says that no person shall be "twice put in jeopardy for the same offense."

One of the protections afforded by the Double Jeopardy Clauses of both constitutions is against "multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969;) Jones v. Thomas, __U.S.__, 105 L.Ed.2d 322 (1989); Carawan v. State, 515 So.2d 161, 163-164 (Fla. 1987). This court recently reiterated that, with respect to cumulative sentences from a single trial, the Double Jeopardy Clause prevents "the sentencing court from prescribing greater punishment than the legislature intended." State v. Smith, 547 So.2d 613,

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[1]This issue was not certified by the majority of the district court panel, although the identical issue was certified by another panel of the court in Glass v. State, 15 FLW D299 (Fla. 1st DCA 1990). This Court has jurisdiction to decide the issue in its discretion. Trushin v. State, 425 So.2d 1126 (Fla. 1983). Since the district court ruled in Glass that the question was of great public importance, and Glass is pending review in this Court, the issue should be decided in this case as well.

615 (Fla. 1989), quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983).

The power to establish penalties for crimes rests exclusively with the legislature. Smith v. State, 537 So.2d 982 (Fla. 1989); Beynard v. Wainwright, 322 So.2d 473 (Fla. 1975); State v. Garcia, 229 So.2d 236, 238 (Fla. 1969); Wilson v. State, 225 So.2d 321 (Fla. 1969); Brown v. State, 13 So.2d 458 (Fla. 1943). Conversely, the courts have no power to determine the extent of punishment for a category of offense; the task of courts is to apply the sentencing statutes prescribed by the legislature. Smith v. State, supra, 537 So.2d at 986 (holding invalid the original version of the sentencing guidelines rules because they limited the length of sentences and were, therefore, substantive in nature and thus beyond the authority of the supreme court to enact).

Those principles apply to the probation imposed here. Authority for a probationary split sentence must be contained in a legislative enactment. In Section 921.187, Florida Statutes (1987) the legislature authorized courts to impose combinations of punitive sanctions in these ways:

> (1) The following alternatives for the disposition of criminal cases shall be used in a manner which will best serve the needs of society, which will punish criminal offenders, and which will provide the opportunity for rehabilitation. A court may:
> (a) Place an offender on probation with or without an adjudication of guilt pursuant to s. 948.01.
> (b) Impose a fine and probation pursuant to s. 948.011...
> (c) Place a felony offender into community control...pursuant to chapter 948.

> (d) Impose, as a condition of probation or community control, a period of treatment which shall be restricted to either a county facility, a Department of Corrections probation and restitution center, or a community residential or nonresidential facility ... Placement in such a facility may not exceed 364 days.
> (e) Sentence an offender pursuant to s. 922.051 to imprisonment in a county jail ... [for] not more than 364 days.
> (f) Sentence an offender who is to be punished by imprisonment in a county jail to a jail in another county if there is no jail within the county suitable ... pursuant to s. 950.01.
> (g) Impose a split sentence whereby the offender is to be placed on probation upon completion of any specified period of such sentence, which period may include a term of years or less. (Emphasis Added.)
>
> * * *
>
> (k) Sentence an offender to imprisonment in a state correctional institution.

Paragraph (g) defines a true split sentence. The mechanism for imposing that sentence is described in Section 948.01(8), Florida Statutes (1987):

> Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, impose a split sentence whereby the defendant is to be placed on probation ... upon completion of any specified period of such sentence which may include a term of years or less. In such case, the court shall stay and withhold the imposition of the remainder of sentence ... (Emphasis Added)

No statute authorizes what was imposed here, a sentence of incarceration followed by probation with none of the incarceration withheld.

A comparison of the statute and the sentence/ probation ordered in this case reveals that petitioner was given two separate punishments when the legislature authorized only one. That is, the legislature allowed the courts to impose prison, or probation, or jail as a condition of probation, or a combination of prison and probation when a specific portion of the incarcerative term is withheld. It did not, however, authorize both straight incarceration and probation in the same case.

Nevertheless, in Poore v. State, 531 So.2d 161 (Fla. 1988), this court set out five sentencing alternatives:

> 1) a period of confinement;
>
> 2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion;
>
> 3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation;
>
> 4) a Villery sentence, consisting of period of probation preceded by period of confinement imposed as a special condition;
>
> 5) straight probation.

Id. at 164.

Admittedly, the kind of sentence petitioner received is authorized in Poore under alternative (3), the "probationary split sentence." One searches the statutes in vain, however, for legislative authorization to impose the separate sanctions of straight prison followed by straight probation. There being no legislative grant of authority to dispose of a single case

with both of those sanctions, the imposition of prison and probation in this case violated double jeopardy under the United States Constitution and the Florida Constitution.

The double jeopardy problems of the probationary split sentence are substantial. Imposing both a sentence and probation when only one disposition is approved is no different than imposing both imprisonment and a fine when the legislature made them mutually exclusive punishments. Dual punishments in those circumstances violate double jeopardy under the United States Constitution. Ex Parte Lange, 18 Wall. 163 (1874); In re Bradley, 318 U.S. 50 (1943).

Closer to home, this court ruled in Ex Parte Bosso, 41 So.2d 322 (Fla. 1949) that when the legislature specified the punishment to be either a fine or imprisonment, the trial court lacked the authority to impose a fine and probation because "it is unlawful for a court to inflict two punishments for the same offense...." Id. at 323.

The double jeopardy decisions are inconsistent with the portion of Poore approving the probationary split sentence alternative. This court apparently was not presented with the double jeopardy arguments raised now when deciding Poore and should reconsider its ruling.

In Poore, this court cited only the judgment and sentence form, Rule 3.986, Florida Rules of Criminal Procedure, as authority for the probationary split sentence. Disagreeing with Judge Cowart that only one kind of split sentence existed in Florida, the court approved Franklin v. State, 526 So.2d

159, 162-163 (Fla. 5th DCA 1988)(en banc), approved, 545 So.2d 851, (Fla. 1989) which said:

> Rule 3.986, rather than being an error, was in fact a clarification of the two separate split sentence alternatives available to the courts. While a judge may clearly withhold a portion of a term of imprisonment and place a defendant on probation for the withheld portion with the understanding that upon revocation of probation, the withheld portion of the sentence will reactivate, this is not the only possible sentencing alternative. In such circumstances, a judge is limited to merely recommitting the defendant to the balance of the preset term of incarceration upon a violation of probation. However, in sentencing a defendant to incarceration followed by probation, the court is limited only by the guidelines and the statutory maximum in punishing a defendant after a violation of probation.

Poore, supra, 531 So.2d at 164.

Rule 3.986 does not cure the constitutional defect. This court, not the legislature, created the judgment and sentence form relied on in Poore when it enacted Rule 3.986 in 1981. In re Florida Rules of Criminal Procedure, 408 So.2d 207 (Fla. 1981). If the court's rule, without legislative authorization, is the basis for the probationary split sentence, any disposition springing from the rule should fail as the consequence of an invalid attempt by the court to enact substantive rather than procedural changes.

In Smith v. State, supra, 537 So.2d 982, the court held that the ranges of the sentencing guidelines were substantive law requiring legislative enactment; the court's procedural rules were ineffective until enacted into law by the legislature. The same reasoning applies to the probationary split sentence. It is substantive law not enacted by the

legislature. The court could not bootstrap the probationary split sentence into existence in Poore by citing a procedural rule when promulgation of the rule was itself beyond the court's authority.

In separate concurring opinions in Carter v. State, 552 So.2d 203 (Fla. 1st DCA 1989), approved, 553 So.2d 169 (Fla. 1989), Judges Barfield and Zehmer accurately identify some problems with the "probationary split sentence" alternative approved by Poore. The concurrences also accurately identify the genesis of these problems, which is that the probationary split sentence is not an approved sentencing alternative under any applicable statute. See sec. 921.187, Fla.Stat.

Noting that Poore is binding on the district court, Judge Zehmer pointed out that "we are not free to find any double jeopardy problems with the imposition of sentence in this case." Carter, supra, 552 So.2d at 205. Nevertheless, he said:

> As Judge Barfield has pointed out in his concurring opinion, section 921.187, Florida Statutes, sets forth the statutory authority for the disposition and sentencing alternatives available in criminal cases, yet the supreme court's opinion in Poore makes no mention of this statute in characterizing the five sentencing alternatives available to the courts.

Ibid. Judge Zehmer continued:

> Nothing in section 921.187 authorizes the court to sentence an offender to imprisonment for a specified term and, after completing service of the full term of imprisonment, to serve an additional period of probation. The only statutorily authorized basis for imposing a so-called "split

> sentence" is set forth in subsection 921.187(1)(g), which specifies a "true split sentence" as defined in category 2 of the Poore decision ("consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion").

Ibid.. Finally, the judge concluded:

> Therefore, like Judge Barfield, I question the validity of appellant's original sentence under the statute in view of the failure of the opinion in Poore even to mention this important section of the statute. Perhaps the supreme court can more fully explicate the statutory authority for the category 3 "probationary split sentence" alternative described in Poore when properly afforded the opportunity for doing so in an appropriate case.

Ibid.

In light of the decision in Lambert v. State, 545 So.2d 838 (Fla. 1989), limiting the extent of departure to one cell above the guideline range upon a violation of probation, this court may legitimately wonder what difference there is between a probationary split sentence and a true split sentence. That is, assuming a probation violation can never result in a sentence greater than a one cell increase, is this not simply an academic discourse with no real practical effect?

Regardless of the practical effect, petitioner has been given an illegal sentence. Lambert, moreover, might be revised later, either by this Court or the legislature. That has already happened to some extent.

With the advent of habitual offender sentences under the revised habitual offender statute, Section 775.084, Florida

Statutes (1989), the limitations of the guidelines no longer apply to habitual offenders. The strictures of Lambert do not, therefore, apply to habitual offenders given probationary split sentences. Thus, a person given a probationary split sentence under the new habitual offender statute potentially could now be sentenced on a probation violation to any sentence that could have been imposed originally, subject only to credit for time previously served. That result contrasts with the limitations imposed by Poore on the period of incarceration following violation of the probationary portion of a true split sentence. Poore held that the trial judge is limited to imposing the withheld portion of the split sentence.

In Poore, supra, 531 So.2d at 164-65 the court explained the concept that limits the trial judge when the probationary portion of a true split sentence is violated:

> The possibility of the violation already has been considered, albeit prospectively, when the judge determined the total period of incarceration and suspended a portion of that sentence, during which the defendant would be on probation. In effect, the judge has sentenced in advance for the contingency of a probation violation, and will not later be permitted to change his or her mind on that question. (Emphasis in original.)

Those limits were intended by the legislature to apply to all split sentences. The legislature did not expressly authorize any other disposition for a violation of probation following a sentence. The unrestricted prison sentence following violation of probation which this Court approved in Poore is a punishment neither enacted nor intended by the legislature.

Without the limitation of the withheld portion, judges will have only the statutory maximum as the limitation on the sentence which could be imposed for violating probation. That, in effect, allows the judge to sentence a probation violator as if violation of probation were a new crime, rather than reincarceration after a failed attempted at rehabilitation for an old crime. Allowing that would run counter to the principle, recognized in Lambert, that "violation of probation is not itself an independent offense punishable at law in Florida." 543 So.2d at 841.

Failure to recognize the limitations following violation of probation as envisioned in a true split sentence has led the courts to a never ending treadmill of prison followed by probation, followed by a violation, followed by prison again, followed by a new term of probation, followed again by probation, ad infinitum. That is another vice of the probationary split sentence, the possibility of endless rounds of probation violations, not found in a true split sentence.

The legislature did not authorize the courts to dole out sentences in fragments. That is why the statutes provide for only one kind of split sentence; the kind in which the court decides at the outset what the maximum term of incarceration for the crime should be, and then allows the court to give the defendant a chance to mitigate that punishment while being rehabilitated on probation. If the defendant does not avail himself of that opportunity, he is then to be remanded to serve the remainder of what was originally thought to be the proper

punishment for the crime. Absent that limitation trial judges would be permitted to treat each probation violation as a new crime instead of a failure at rehabilitation.

Of course, if a defendant has been convicted of more that one offense, the court may sentence for some offenses and impose probation for others. If probation is violated the court may then impose an appropriate sentence for the probated offenses, because the defendant had originally been placed on straight probation. But without legislative authorization the courts cannot add straight probation to a term of incarceration for a single crime.

The court should, therefore, recede from Poore to the extent that it approves a probationary split sentence. That disposition has not been approved by the legislature and the sentence plus probation in this case violated double jeopardy by imposing more punishment than the legislature authorized.

CONCLUSION

The Court should reverse the conviction for possession of cocaine because of an illegal search.

Petitioner's sentence of incarceration followed by probation violates double jeopardy. The Court should recede from that portion of Poore which approves the probationary split sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by ~~hand delivery~~ US Mail to Virlindia Sample, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Willie Reynolds, #559772, Tallahassee Community Correctional Center, 2616A Springhill Road, Tallahassee, Florida, 32304, this 7th day of May, 1990.

MICHAEL J. MINERVA