O/A 3-8-91

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FILED
SID J. WHITE
JAN 28 1991
CLERK, SUPREME COURT
By
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,184

ANTONIO PEREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED CONFLICT

* *

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

	PAGES
TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
QUESTION PRESENTED	4
ARGUMENT	5
THE SEIZURE OF EVIDENCE CAN BE UPHELD ON THE GROUNDS OF ABANDONMNENT WHERE THE ABANDONMNET OCCURRED AFTER AN ILLEGAL STOP, BUT BEFORE AN ACTUAL DETENTION OCCURRED.	
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

CASES — PAGE

Brown v. Illinois
422 U.S. 590, 95 S.Ct. 2254,
45 L.Ed.2d 416 (1975)................................... 11

California v. Hodari D.
112 L.Ed.2d 15 (1990), 48 Cr. L. Rptr. 3001............ 9

Michigan v. Chesternut
486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988)... 9

Michigan v. Tucher
417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)..... 6

People v. Hodari D.
265 Cal. Rptr. 79 (1989)............................... 10

State v. Oliver
368 So.2d 1334 (Fla. 3d DCA 1979)
cert. dismissed, 383 So. 2d 1200 (Fla. 1980)........... 5

Wong Sun v. United States
371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)....... 6,11

OTHER AUTHORITY

Stop and Frisk Law, Fla. Stat. 901.151..................... 9

INTRODUCTION

The Petitioner, Antonio Perez, was the Appellee below. The Respondent, the State of Florida, was the Appellant below. The parties will be referred to as they stood before this Court. The symbol "R" will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below.

SUMMARY OF THE ARGUMENT

The Petitioner contends that a stop, without a detention, implicates the exclusionary rule and therefore any abandoned property must be suppressed as fruit of the poisonous tree. Petitioner is seeking a per se rule that any abandoned property which follows an illegal stop requires suppression because, but for the stop, the abandonment would not have occurred.

The State submits that a stop without a detention, does not implicate the exclusionary rule. The reason behind the exclusionary rule is to deter improper police conduct. Most stops are made in good faith for investigatory reasons. The application of the exclusionary rule to property abandoned after an illegal stop, but without a detention, would serve no useful purpose; it would only deter lawful police investigatory tools.

Assuming arguendo, that the stop subjects abandoned property to the exclusionary rule, the State then submits that illegal stop alone does not automatically make the evidence fruit of the poisonous tree. Rather, the focus must be based on the objective reason for the stop. Evidence should be suppressed only when the purpose of the stop is to seek the type of property abandoned. This standard would ensure that, property abandoned pursuant to a good faith investigatory stop would not be suppressed, and would be in accordance with the policies behind

the exclusionary rule. On the other hand, property abandoned during a stop, which was used as a ruse to uncover evidence of a specific crime, would be suppressed and thus would serve the deterrent purpose of the exclusionary rule.

QUESTION PRESENTED

WHETHER THE SEIZURE OF EVIDENCE CAN BE UPHELD ON THE GROUNDS OF ABANDONMENT WHERE THE ABANDONMENT OCCURRED AFTER AN ILLEGAL STOP, BUT BEFORE AN ACTUAL DETENTION OCCURRED.

ARGUMENT

THE SEIZURE OF EVIDENCE CAN BE UPHELD ON THE GROUNDS OF ABANDONMENT WHERE THE ABANDONMENT OCCURRED AFTER AN ILLEGAL STOP, BUT BEFORE AN ACTUAL DETENTION OCCURRED.

In State v. Oliver, 368 So.2d 1334 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980) the defendant, after being advised to stop, continued on his way and prior to detention, discarded contraband. The court finding the abandonment to be voluntary, held:

> . . . [A] person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person . . . Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search, . . . and even that result may vary depending on the facts of the case.

Id. at 1336. The holding was based on the reasoning that not every street encounter escalates into a search. Therefore, the abandonment of property before an actual detention occurs cannot be considered the product of the stop. Thus the abandonment of property in the hope of avoiding a police search is an independent act unrelated to the illegal stop. Id. at 1336.

The Petitioner contends that Oliver must be overruled and replaced with a but for rule; to wit: But for the illegal stop, the property would not have been discarded. Based on this rule of law, Petitioner would have all subsequently discarded property tainted by the initial illegal stop regardless of the objective facts encompassing the stop. The petitioner's position has been explicitly rejected by the United States Supreme Court. See Wong Sun v. United States, 371 U.S. 471, 487-488, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963)("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police")(emphasis added).

The State submits that Petitioner's approach is overly simplistic. First, what must be determined is whether the exclusionary rule is applicable when property is discarded after an illegal stop, but before an actual detention occurs. If it does not, as the State submits, then the inquiry ends and property is not suppressible. If the exclusionary rule is applicable in such a situation, then the proper standard of review to determine if the discarded property is tainted by the illegal stop is whether, under the objective facts, the purpose of the stop was to uncover the evidence so discarded. In Michigan v. Tucher, 417 U.S. 433, 446-447, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) the United States Supreme Court explained the purpose of the exclusionary rule as follows:

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

We have recently said, in a search and seizure context, that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." United States v. Calandra, 414 US 338, 347, 38 L Ed 2d 561, 94 S Ct 613 (1974). We then continued:

> "'The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.' Elkins v. United States, 364 US 206, 217 [4 L Ed 2d 1669, 80 S Ct 1437] (1960)."
>
> Ibid.

In a proper case this rationale would seem applicable to the Fifth Amendment context as well:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. (footnotes omitted)

An application of the foregoing principles to the instant case, clearly establishes that the exclusionary rule is inapplicable where abandonment occurs after an illegal stop but before detention occurs. A major investigatory tool of law enforcement is to stop an individual to ascertain whether further investigation is necessary. See Stop and Frisk Law, Fla. Stat. 901.151. Most of these investigations are completed after the initial encounter and the individual is permitted to go about his business. Id. These investigatory stops are done in good faith, and not in an attempt to either willfully or negligently deprive an accused of some right, no useful purpose would be served to apply the exclusionary rule to situations where property is abandoned after an illegal stop but before an actual detention occurs. The only thing that the exclusionary rule will deter in this situation is future lawful police investigatory techniques. If all evidence is excluded in situations like the instant one, the police officer on the street would no longer have the capabilities to conduct instant investigations of suspicious circumstances. In the interim, the suspect would gain an advantage over the police and the ramifications therefrom could be fatal. To apply the exclusionary rule to these situations would place the police in the unenviable position of reacting to crimes as opposed to acting against crime. Therefore, the State submits that when there is an illegal stop and property is abandoned before an actual detention occurs, the exclusionary rule is inapplicable

since it would have no deterrent effect on future wilful or negligent police conduct.

Although the United States Supreme court has not yet explicitly addressed the subject, the indications are clear that the state's position will find favor with the Court. In Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988), the Court held that an individual is not seized when he is followed by a police car as long as the conduct does not communicate to a reasonable person that he was not at liberty to ignore the police. However, Justice Kennedy with whom Justice Scalia joined, opined in a concurring opinion, "that whether or not the officer's conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." Id. at 486 U.S. 877.

Furthermore, the exact questions posed herein are presently pending in the United States Supreme Court in California v. Hodari, D., 112 L.Ed.2d 15 (1990), 48 Cr. L. Rptr. 3001. In the California State Court, it was held that even when an accused is not actually physically restrained, he was still detained when he saw a police officer running toward him in a manner indicating the officer's intent to block his path and confront him. The Court held that since there was no reasonable suspicion to support the detention, the accused's discarding of

the illegal drugs prior to contact was the direct result of the illegal detention and therefore the evidence was suppressed. People v. Hodari D., 265 Cal. Rptr. 79 (1989). The questions upon which certiorari was granted are:

> 1. Is physical restraint required for seizure of person under Fourth Amendment?
>
> 2. May citizen who is pursued by police officer on public street immunize himself from prosecution by discarding incriminating evidence and asserting that he did so out of fear of unlawful search?

48 Cal. 3001. This case was argued on January 14, 1991 and as soon as an opinion is rendered, the same will be provided forthwith.

In the interim, the State urges this court to move to the vanguard in the war against drugs and reaffirm the validity of Oliver. In so doing, this court will once again be aligned with the United States Supreme Court and the inferior courts who believe that we must provide law enforcement with all the tools the Constitution permits to fight the war on drugs. Overruling Oliver, would greatly hamper law enforcement and provide a free ride to criminals. Against this background, the State urges this court, at the most to find that the exclusionary rule is inapplicable here or at the least not to rule until the United States Supreme Court decides Hodari.

If the Fourth Amendment protections are applicable herein, then the State submits that discarded property is still not suppressible as fruit of the poisonous tree. The reason is that under the applicable principles, the objective facts established that the discarded property was not tainted by the illegal stop.

The United States Supreme Court in Wong Sun v. United States, 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) enunciated the following test.

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality,' the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

In Brown v. Illinois, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) the Court listed the factors to utilize to determine if evidence is fruit of the poisonous tree as: whether the evidence obtained is a product of the defendant's free will; the temporal proximity of the illegality to the discovery of the evidence; the presence of intervening

circumstances; and the purpose and flagrancy of the official misconduct.

Applying these principles to the instant case establishes that the illegal stop did not taint the property which was discarded prior to the actual detention. As the Third District noted in Oliver, the discarding of the property is the product of Petitioner's own free will based on his desire to avoid being searched. The time and space between the illegal stop and the abandonment also shows that the stop itself did not cause the abandonment but rather the Petitioner's fear of search caused the abandonment. Petitioner's flight from the illegality was caused not by the police but by Petitioner's fear of a search. The purpose of the stop was a legitimate investigatory stop which was not made in flagrant disregard for Petitioner's rights and was not the cause of the abandonment. Rather, the abandonment was caused by Petitioner's own subjective fear of a search.

Since the reasonable man would not equate all stops with searches, then Petitioner's subjective expectation that the illegal stop would escalate to a search is unreasonable. To hold that but for the illegal stop, the property would not have been discarded misses the mark. Rather, it is what the reasonable man would have thought under the circumstances, which determines if the taint is sufficiently attenuated. In the

instant case, the reasonable man, after being stopped by the police, would not have thought a search was forthcoming. Therefore, the abandonment was not the product of the illegal stop.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully requests this Court to affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits was furnished by mail to HOWARD K. BLUMBERG, Attorney for Petitioner, 1351 N.W. 12th Street, Miami, FL 33125 on this 23 day of January, 1991.

MICHAEL J. NEIMAND
Assistant Attorney General

bfs.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,184

ANTONIO PEREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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APPENDIX TO BRIEF OF
RESPONDENT ON THE MERITS

Opinion, 3d DCA, May, 15, 1990.

NO" FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 89-2024
ANTONIO PEREZ,	**	
Appellee.	**	

Opinion filed May 15, 1990.

An Appeal from a non-final order from the Circuit Court for Dade County, Gisela Cardonne, Judge.

Robert A. Butterworth, Attorney General, and Joan L. Greenberg, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellee.

Before HUBBART, COPE and LEVY, JJ.

COPE, Judge.

The State appeals an order suppressing a handgun seized by the police. We reverse.

Two uniformed City of Miami police officers were on patrol in an area known to be high in narcotics activity. They observed

Perez and another male, who appeared to be passing an object between them. Believing that the two might be engaging in a narcotics transaction, one officer exited the police car and started to walk toward Perez. He either told Perez to freeze, or to stop. Perez fled on foot and the officer chased him. Perez ran into an alley while pulling something from his waistband. The officer heard a loud, metallic noise of something dropping in the alley. The officer caught Perez who, after being given Miranda warnings,[1] volunteered that he became nervous and ran "because he knew the gun that he had was stolen." A revolver was recovered in the alley. Perez was charged with carrying a concealed firearm and carrying a concealed firearm by a convicted felon. See §§ 790.01, 790.23, Fla. Stat. (1987).

Perez moved to suppress the firearm and the statement he made to the officers. The trial court concluded, and the State concedes, that the police officers did not have a founded suspicion which would support an investigative stop of the defendant under section 901.151, Florida Statutes (1987). The court granted the motion to suppress on the authority of Monahan v. State, 390 So.2d 756 (Fla. 3d DCA 1980), review denied, 399 So.2d 1146 (Fla. 1981), and Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988), reasoning that the abandonment of the firearm in the alleyway was a product of the officers' effort to make an illegal stop.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The present case is controlled by State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980). There, the court stated:

> Admittedly, the cases here are in some conflict, but the weight of authority is that a person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person. . . . Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search . . . and even that result may vary depending on the facts of the case."

Id. at 1335-36 (citations omitted). Since the present case involved an illegal stop, not an illegal search, the police were entitled to seize the revolver as abandoned property and the motion to suppress it should have been denied.

The trial court's reliance on Monahan v. State is misplaced. In Monahan the police officers were involved in an illegal search, having already examined one of Monahan's two pieces of luggage. Upon being informed that the officers intended to search a second piece of luggage, Monahan disclaimed that he owned it. Our court held that in those circumstances the suitcase could not be deemed abandoned property. 390 So.2d at 757. Monahan did not cite or discuss Oliver, but one of the two cases cited in Monahan, Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974), is treated in Oliver as one of the group of cases holding that an abandonment of property is involuntary where it is tainted by a prior illegal search.

Perez argues that Monahan is irreconcilably in conflict with Oliver. There is dictum in Monahan which can be so read, for the opinion states, in part, "Evidence seized as a result of such illegal arrest should have been suppressed." Id. at 757. On its

facts, however, Monahan involved an illegal search and is consistent with the analysis set forth in Oliver. We harmonize the two cases by treating Monahan as a decision involving an abandonment tainted by a prior illegal search, see State v. Oliver, 368 So.2d at 1336, and by treating the quoted passage from Monahan as dictum.

The other authority relied on by the trial court was the fourth district's opinion in Spann v. State. That decision is factually similar to the present case. We certify that our decision is in conflict therewith.

We reverse that part of the trial court's order which suppressed the firearm and remand for further proceedings consistent herewith.[2]

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[2] The State has not appealed that part of the trial court's order which suppressed the defendant's post-Miranda statement.