O.A. 3-8-91 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,184

ANTONIO PEREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

In this reply brief, as in the initial brief, all emphasis is supplied unless the contrary is indicated.

SUMMARY OF ARGUMENT

Contrary to the claim made by the state, petitioner does not claim that all property discarded at any time following an illegal stop must be considered tainted by the illegal stop simply because the evidence would not have been discovered but for the stop. Rather, petitioner contends that in determining whether discarded property must be suppressed as the product of a prior illegal stop, courts must apply the test established by the United States Supreme Court in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Pursuant to that decision, there can be neither a per se rule of admissibility nor a per se rule of inadmissibility. The facts of each case must be examined to determine if the test established in Wong Sun requires suppression.

Contrary to the representations by the state, decisions of the United States Supreme Court do not support the state's attempt to draw a distinction between an illegal order to stop and the actual detention resulting from the illegal order to stop. In fact, the decision of the Court in Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988), expressly rejects the government's attempt to draw such a distinction. Furthermore, the issues pending before the Court in California v. Hodari D., cert. granted, 111 S.Ct. 38, 112 L.Ed.2d 15 (1990), do not involve a distinction between an illegal order to stop and the actual detention resulting from the illegal order to stop. There was no order to stop in that case.

The numerous decisions from many different courts cited in the initial brief, and the persuasive reasoning utilized by those courts, demonstrate that the seizure of "abandoned" property in this case was tainted by the prior illegal stop. The state's attempt to justify a contrary result, supported by citation to a single decision based on faulty reasoning, and without any attempt to distinguish even one of the cases cited by petitioner, is singularly unpersuasive.

ARGUMENT

THE SEIZURE OF EVIDENCE CANNOT BE UPHELD ON GROUNDS OF ABANDONMENT WHERE THAT ABANDONMENT IS THE DIRECT RESULT OF AN ILLEGAL STOP BECAUSE THE ABANDONMENT OF THE EVIDENCE DOES NOT REMOVE THE TAINT OF THE PRIOR POLICE ILLEGALITY.

NO "BUT FOR" RULE PROPOSED

Contrary to the claim made by the state (see Brief of Respondent at p. 6), petitioner is not proposing the adoption by this Court of a "but for" rule. Petitioner in no way claims that all property discarded at any time following an illegal stop must be considered tainted by the illegal stop simply because the evidence would not have been discovered but for the stop. Rather, petitioner contends that in determining whether discarded property must be suppressed as the product of a prior illegal stop, courts must apply the test established by the United States Supreme Court in Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963): "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."

For example, suppose Antonio Perez had managed to elude the police officers who had illegally ordered him to stop. Suppose further that Mr. Perez returned to his house, and the next morning he decided to throw away the firearm in the trash. If the police later tracked down Mr. Perez at his home and decided to search his trash, thereby discovering the firearm, the firearm would not be subject to suppression because it had not been

discovered by exploitation of the illegal stop, but rather had been uncovered by means sufficiently distinguishable from the illegal stop to be purged of the taint of that illegality. Thus, even though it could be said that the police would not have discovered the firearm "but for" the illegal stop, the firearm nevertheless would not be subject to suppression because its discovery was not the product of that illegal stop.

Where, however, as in this case, the police discover the firearm because it is discarded within minutes of the illegal stop, and during the chase which immediately followed the illegal police order to stop, it is clear that the firearm must be suppressed. This is not so because the firearm would not have been discovered but for the illegal stop. Suppression is required because the discovery of the firearm was the direct product of the police illegality.

Thus, it is clear that petitioner is not proposing a per se rule of suppression of evidence which would not have been discovered "but for" a prior police illegality. The only per se rule at issue in this case is the per se rule of admissibility established by the Third District Court of Appeal in State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980), and endorsed by respondent in this case. Under that rule, a person's otherwise voluntary abandonment of property can never be tainted or made involuntary by a prior illegal police stop. As demonstrated in petitioner's initial brief, that per se rule cannot be squared with the decision of the United States Supreme Court in Wong Sun.

Pursuant to that decision, there can be neither a per se rule of admissibility nor a per se rule of inadmissibility. The facts of each case must be examined to determine if the test established in Wong Sun requires suppression.

NO DISTINCTION BETWEEN ILLEGAL STOP AND ILLEGAL DETENTION

Aside from its mischaracterization of petitioner's argument, the state makes two basic arguments in its brief in this case. First, the state contends that the exclusionary rule is inapplicable "when property is discarded after an illegal stop, but before an actual detention occurs." (Brief of Respondent at p. 6). The state represents to this Court that the United States Supreme Court "has not explicitly addressed the subject", and also represents that "the exact questions posed herein are presently pending in the United States Supreme Court" in California v. Hodari D., cert. granted, 111 S.Ct. 38, 112 L.Ed.2d 15 (1990).

Contrary to these representations by the state, the United States Supreme Court has explicitly addressed the claims made by the state, and the issues presently pending before the Court in California v. Hodari D., are not the same as the issues pending before this Court in the present case. In Michigan v. Chesternut, 486 U.S. 567, ____, 108 S.Ct. 1975, 1978-1979, 100 L.Ed.2d 565 (1988), the state attempted to make the same distinction drawn by the state in this case, between an illegal order to stop and the actual detention resulting from the illegal order to stop, and such a distinction was expressly rejected by

the Court:

> Petitioner [State of Michigan] argues that the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual. Respondent contends, in sharp contrast, that any and all police "chases" are Fourth Amendment seizures. Respondent would have us rule that the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity.
>
> Both petitioner and respondent, it seems to us, in their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account "'all the circumstances surrounding the incident'" in each individual case. INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984), quoting "United States v. Mendenhall, 466 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)(opinion of Stewart, J.). Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.

(emphasis in original).[1]

The issues pending before the Court in California v. Hodari

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[1] The state in its brief does accurately represent the position of the two concurring justices in Michigan v. Chesternut that a distinction should be drawn between the communication by police officer's of an intent to apprehend and the actual attaining of a restraining effect. However, as Professor LaFave points out, this position was rejected outright by the majority opinion in Chesternut, in the portions of the opinion quoted in the body of this brief. See 3 W. LaFave, Search and Seizure 2d Ed. §9.2 -- 1990 Pocket Part at pp. 38-39.

D. do not involve a distinction between an illegal order to stop and the actual detention resulting from the illegal order to stop. There was no order to stop in that case. See People v. Hodari D., 265 Cal. Rptr. 79, 216 Cal.App.3d 745 (1989). The issue in Hodari D. is whether a police officer's act of running toward the defendant in a manner indicating an intent to block his path and confront him constitutes a Fourth Amendment seizure. Thus, resolution of the issue before this Court in the present case need not be delayed pending issuance of the decision in Hodari D..

SEIZURE TAINTED BY ILLEGAL STOP

The state's second argument in its brief is that if the exclusionary rule applies to an illegal stop prior to an actual detention, then application of the tests established by the United States Supreme Court in Wong Sun, supra, and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) establishes that the discarded property was not tainted by the illegal stop. The only decision cited by the state in support of this conclusion is State v. Oliver, supra, a case which did not utilize the Wong Sun and Brown v. Illinois tests in reaching its decision.

Moreover, the state makes no attempt to distinguish the numerous cases from many different jurisdictions cited in petitioner's initial brief which apply the Wong Sun and Brown v. Illinois tests to very similar factual circumstances and reach the exact opposite conclusion than that reached by the state.

Based on those numerous decisions, and the persuasive reasoning utilized by the many different courts in reaching the conclusion that the seizure of "abandoned" property was tainted by a prior illegal stop, petitioner submits that this Court should disapprove the decision in State v. Oliver, and find that the firearm seized by the police in this case must be suppressed as the product of the prior illegal police stop.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the district court of appeal, and remand the case to the district court with directions that the trial judge's suppression order be affirmed.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 20th day of February, 1991.

HOWARD K. BLUMBERG
Assistant Public Defender