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THE SUPREME COURT OF FLORIDA

CASE NO. 76,404

STATE OF FLORIDA,

Petitioner,

vs.

ANNIE HESTER,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS 3

FACTS 5

SUMMARY OF ARGUMENT 6

ARGUMENT 6

POINT I 6

THE COURT SHOULD RECEDE FROM THAT PORTION OF STATE v. JIMENO HOLDING THAT FLORIDA'S RIGHT OF PRIVACY PROVISION, ARTICLE I, SECTION 23, OF THE FLORIDA DECLARATION OF RIGHTS DOES NOT MODIFY ARTICLE I SECTION 12 OF THE FLORIDA DECLARATION OF RIGHTS.

POINT II 10

THE STOP OF RESPONDENT'S VEHICLE WAS CLEARLY A PRETEXT TO SET UP THE SEARCH OF IT.

POINT III 12

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS EVIDENCE SINCE IT WAS NOT SHOWN THAT RESPONDENT VIOLATED § 316.238 (2), FLA. STAT. (1987), BY FAILING TO DIM HER HEADLIGHTS, THE SOLE BASIS FOR THE OFFICER'S STOPPING OF THE RESPONDENT'S VEHICLE.

CONCLUSION 13

CERTIFICATE OF SERVICE 14

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715

TABLE OF CITATIONS

CASES	PAGE
Davis v. State, 17 FLW S77 (Fla. 1992)	8
Doctor v. State, 17 FLW S167 (Fla. 1992)	10
Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983)	11
Kehoe v. State, 521 So.2d 1094 (Fla. 1988)	10
Norman v. State, 379 So.2d 643 (Fla. 1980)	11
Reynolds v. State, 17 FLW S6 (Fla. 1992)	11
Shaktman v. State, 553 So.2d 148 (Fla. 1989)	8, 9
State v. Clark, 511 So.2d 726 (1st DCA 1987)	12
State v. Hume, 512 So.2d 185 (Fla. 1987)	7, 9
State v. Jimeno, 564 So. 2d 1083 (Fla. 1990), reversed, Florida v. Jimeno, ___ U.S. ___ 111 S.Ct. 1801 (1991), on remand, State v. Jimeno, 588 So 2d 233 (Fla. 1991)	7, 8, 9, 13
State v. Webb, 398 So.2d 820 (Fla. 1981)	13
State v. Wells, 539 So.2d 464 Fla. 1989), affd. Florida v. Wells, ___ U.S. ___, 110 S.Ct. 1632 (1990)	8, 9
Traylor v. State, 17 FLW S42 (Fla. 1992)	7, 8
Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981)	13
STATUES AND RULES OF COURT	
Florida Declaration of Rights, Article 1 § 12	7, 8, 9
Florida Declaration of Rights, Article 1 § 23	7, 8, 9
F.S. 316.003 (43)	12
F.S. 316.237(1)(a)	12
F.S. 316.238(2)	12

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE. FORT LAUDERDALE. FLORIDA 33304 • BROWARD: (305) 467-8715

TREATISES AND PERIODICALS

LaFave, Search and Seizure 2d § 8.2(d). 11

Leban, Pretext Traffic Stops, 10
The Florida Bar Journal, February, 1991

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FACTS

The State has in its brief quoted the facts set forth in the fourth district's opinion. Hester v. State, 563 So 2d 191, 192 (Fla. 4th DCA. 1990). Respondent would add to that recitation the following testimony from the suppression hearing.

The officer conceded that "standing alone ... [Respondent's] failure to dim headlights [did not give him] enough probable cause to go inside and search that car". (R. 29-30). The officer testified that he did not issue the traffic citation until **after** he had placed Respondent under arrest for the controlled substance. (R. 32). The officer did not recall how many other vehicles he had stopped for failure to dim their headlights. (R. 33). The officer conceded that the car using the high beam headlights that he had passed earlier was "not this [Hester's] car." (R. 43).

The officer testified that it was his policy to ask "most everyone" he stopped if he could search their vehicle. (R. 55, 56). The request to search was something he did "normally". (R. 29). The officer stated that "no one" ever refused to consent to the search. (R. 56). The officer indicated that he "searched every car." (R. 59).

Respondent testified that the officer told her:

> " 'Well, you know, I done stop your car for your bright lights and I have to. It's a law. I have to search your car for drugs.'" I told him, " 'Okay'". (R. 67).

The passenger, Antoinette Johnson, also testified that Respondent was told: "It was a law that they had to search every

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car they stopped." (R. 75).

Respondent argued to the trial court that the stop was a pretext. (R. 85, 86). The trial court found that the officer "conceded" that he "did not have probable cause or reasonable suspicion" (R. 94). The trial court ruled: "You don't need probable cause or reasonable suspicion to ask someone for consent to search." (R. 93).

SUMMARY OF ARGUMENT

The court should recede from that portion of State v. Jimeno holding that Florida's right to privacy provision, Article I, Section 23, of the Declaration of Rights does not modify Article I Section 12 of the Declaration of Rights.

The stop of Respondent's vehicle was clearly a pretext to set up the search of it.

Respondent did not violate § 316.238 (2), Fla. Stat.

ARGUMENT

POINT I

THE COURT SHOULD RECEDE FROM THAT PORTION OF STATE v. JIMENO HOLDING THAT FLORIDA'S RIGHT OF PRIVACY PROVISION, ARTICLE I, SECTION 23, OF THE FLORIDA DECLARATION OF RIGHTS DOES NOT MODIFY ARTICLE I SECTION 12 OF THE FLORIDA DECLARATION OF RIGHTS.

After a thorough review of the record and the case law it appears to Respondent's counsel that the only way the scope of her general consent to the search of her vehicle can be limited to exclude the consent to search the paper bag containing the controlled substance is to ask this court to recede from that part

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of State v. Jimeno, 586 So. 2d 233 (Fla. 1991) which held, relying on State v. Hume, 512 so. 2d 185 (Fla. 1987), that:

> ...our right of privacy provision, article I, section 23, does not modify the applicability of article I, section 12, particularly since section 23 was adopted prior to the present section 12. State v. Jimeno, supra., 586 So. 2d at 233.

The framework for receding from Jimeno may be found in the court's recent decision of Traylor v. State, 17 FLW S42, 43 (Fla. 1992):

> In any given state, the federal Constitution ...represents the floor for basic freedoms; the state constitution the ceiling.
>
> Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their own bills of rights, state courts should focus on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.
>
> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and **to give independent legal import to every phrase and clause contained therein.** We are similarly bound under our Declaration of Rights to construe each provision freely in order to

> achieve the primary goal of individual freedom and autonomy. (Emphasis added)

In State v. Wells, 539 So.2d 464, (468 Fla. 1989), affd. Florida v. Wells, ___ U.S. ___, 110 S.Ct. 1632 (1990) this court appeared to read the privacy amendment as impacting to a degree on the "zone of privacy" aspects of Article 1 § 12:

> The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world. It creates a legally recognized zone of privacy inside that container that is protected under the United States Constitution **and Florida's privacy amendment** from the kind of governmental intrusion without probable cause that occurred in this case. (Emphasis added).

Very recently, in Davis v. State, 17 FLW S77, S78 (Fla. 1992) this court, citing to **Wells** but not to **Jimeno**, again affirmed that the scope of consent to a search "must be considered in light of the consenting person's expectation of privacy." And, in Shaktman v. State, 553 So.2d 148, 150 (Fla. 1989) the court applied Article 1 § 23 to an ongoing criminal investigation stating that in it "...the people of Florida [have] unequivocally declared for themselves a strong, clear, **freestanding**, and express right of privacy as a constitutional fundamental right." (Emphasis added).

Given **Jimeno**, the ability of the courts of this state to apply the laudable "federalist principles" of **Traylor** to achieve the "primary goal of individual freedom and autonomy", cannot be accomplished. Under **Jimeno** this court must in a very important and sensitive area of constitutional adjudication take whatever the federal court gives, even when the federal view of the parameters

of the reasonable expectation of privacy afforded to Florida's citizens is markedly narrower than the view held by a majority of this court. Jimeno is its own best example of this. In Jimeno this court initially held, relying on State v. Wells, supra., that a consent to search a vehicle does not extend to a search of a closed container found inside the vehicle. State v. Jimeno, 564 So. 2d 1083 (Fla. 1990). The Supreme Court of the United States reversed and imposed on this court its cramped view of where the objectively reasonable limits on consents to search lie.

Jimeno limits all of the progressive, salutary ideals embodied in the privacy amendment only because section 23 was adopted prior to the present section 12.[1] If Jimeno were overturned, the dimensions of the reasonable expectation of privacy of any Florida citizen in all situations would be ultimately determined by this court as a matter state law under the privacy amendment. The mechanics of how privacy is invaded, the need for a warrant, questions of hot pursuit and a host of other search and seizure issues could still be resolved under section 12 by the application of federal standards. Respondent's reading of Traylor with its

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[1] State v. Hume, supra., was decided before Wells and Shaktman and contains no discussion of why the "freestanding" fundamental constitutional right articulated in Shaktman should be nullified. It would appear to Respondent that either the right of privacy is "freestanding" or it is not. If it is "freestanding", then it must be taken into account in determining whether one has a reasonable expectation of privacy in any particular situation. In measuring the reasonableness of a warrantless search and seizure, the courts would merely take into account Florida's right to privacy as one circumstance in determining whether the police action was reasonable under totality of the circumstances.

emphasis on state courts as "prime arbiters of personal rights," 17 FLW S43, is consistent with this end.

POINT II

THE STOP OF RESPONDENT'S VEHICLE WAS CLEARLY A PRETEXT TO SET UP THE SEARCH OF IT.

On this record it is clear that the this officer used this stop as an excuse to obtain the consent to search. Even if the traffic infraction were a real violation of law, it was under the circumstances so insignificant that the officer's motivation for stopping Respondent easily appears contrived. If the court will picture an unlit high-speed highway with a car on its shoulder preparing to enter the highway, who would not approach that car from behind with brights on, if not to see, then to insure that one is seen. The stop accomplished, the officer made his request to search as he did in every case; consent to the search was expected and was given as it was in every case; and, the vehicle was searched as others were in every case. Undoubtedly, the articulated end of the stop was not a traffic citation but a search of the vehicle. The stop was no more than an event that had to occur so consent to search could be requested and granted. The traffic stop was used by the officer merely as a pretext to set up his search of Respondent's vehicle. A reasonable officer would not have stopped Respondent's vehicle under these circumstances except for the purpose of making a request to search the vehicle, Doctor v. State, 17 FLW S167 (Fla. 1992); Kehoe v. State, 521 So.2d 1094 (Fla. 1988); Leban, Pretext Traffic Stops, The Florida Bar Journal,

February, 1991 at p. 51-54, and any consent to the search is tainted by the unlawful stop. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983); Reynolds v. State, 17 FLW S6 (Fla. 1992); Norman v. State, 379 So. 2d 643 (Fla. 1980); LaFave, Search and Seizure 2d § 8.2(d).

> ...the fruit of the poisonous tree doctrine also extends to invalidate consents which are voluntary. This might occur when the pressure upon the person from the prior illegality is not so great that 'his will has been overborne' under the Schneckloth voluntariness rule, but yet it cannot be said under Wong Sun that his consent was 'sufficiently an act of free will to purge the primary taint.' Illustrative is Florida v. Royer, where suspected drug courier Royer was taken into a mall room at an airport, where he consented to a search of his luggage. The Supreme Court held that the detention of Royer there was an illegal seizure and then concluded, without discussion, 'that the consent was tainted by the illegality,' as doubtless it was (considering, e.g., **that the express purpose of the detention was to obtain the consent).** But the Court reached that conclusion without questioning at all the trial court's ruling that, notwithstanding Royer's brief detention in the room, his consent was 'freely and voluntarily given.'" LaFave, Search and Seizure 2d supra., § 8.2(d) at p. 191. (First emphasis in original, footnotes and citations omitted).

As in Royer it is clear that the stop and detention in this case was a mere artifice to obtain consent to the search that was the officer's primary goal from the inception of the encounter. The State has not met its burden of showing by clear and convincing evidence that the consent was not a product of the unlawful police conduct. Reynolds v. State, supra., Norman v. State, supra.

POINT III

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS EVIDENCE SINCE IT WAS NOT SHOWN THAT RESPONDENT VIOLATED § 316.238 (2), FLA. STAT. (1987), BY FAILING TO DIM HER HEADLIGHTS, THE SOLE BASIS FOR THE OFFICER'S STOPPING OF THE RESPONDENT'S VEHICLE.

The fourth district ruled in this case that F.S. 316.238(2) does not require that the offending vehicle and the other vehicle be on the same roadway at the same time for an infraction to occur.[2]

In State v. Clark, 511 So.2d 726 (1st DCA 1987) the first district held that in order for there to be a violation of §316.238 there must be two cars travelling on the same roadway. A "roadway" is defined in F.S. 316.003 (43) to exclude the shoulder:

> (43) ROADWAY. - That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term "roadway" as used herein refers to any such roadway separately, but not to all such roadways collectively.

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[2]F.S. 316.238(2) provides:

> Whenever the driver of a vehicle approaches another vehicle from the rear, within three hundred feet, such driver shall use a distribution of light permissible under this chapter other than the uppermost distribution of light specified in ss. 316.237 (1)(a) and 316.430(2)(a).

F.S. 316.237(1)(a) provides:

> There shall be an uppermost distribution of light, or composite beam, so aimed and of such intensity as to reveal persons and vehicles at a distance of at least four hundred fifty feet ahead for all conditions of loading.

Since this case did not involve the situation where two drivers were travelling on the same roadway, Respondent was not required to dim her headlights when approaching the police vehicle parked on the shoulder of the road.

Respondent submits that the fourth district's construction of the statue is neither reasonable nor sensible and is not in conformity with the general rule of statutory construction favoring reasonable and sensible constructions of statutes. See, State v. Webb, 398 So.2d 820, 824 (Fla. 1981); Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981). Although the vision of a driver whose vehicle is parked on the shoulder of a roadway may be obstructed by high-beam headlights approaching from the rear, the use of high-beams would alert the driver of the parked vehicle of the oncoming car and would enable the approaching driver to better view the parked vehicle to determine, among other things, whether any occupants are outside the parked vehicle (in order to prevent accidentally hitting a pedestrian) and whether any occupant of the parked vehicle is in need of any emergency medical treatment or other assistance.

Since Respondent did not violate the headlight law by failing to dim her headlights, the sole basis for the trooper's stopping of her vehicle, the stop of her vehicle was unlawful and the trial court should have granted the motion to suppress.

CONCLUSION

The court should recede from that portion of State v. Jimeno

holding that Florida's right of privacy provision, Article I, Section 23, of the Florida Declaration of Rights does not modify Article I Section 12 of the Florida Declaration of Rights.

The stop of Respondent's vehicle was clearly a pretext to set up the search of it.

The trial court erred in denying Respondent's motion to suppress evidence since it was not shown that Respondent violated § 316.238 (2), Fla. Stat. (1987), by failing to dim her headlights, the sole basis for the officer's stopping of the Respondent's vehicle.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Bradley R. Bischoff, Assistant Attorney General, The Capital, Tallahassee, Florida 32399-1050, this 13th day of May, 1992.

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