047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 76,404

ANNIE HESTER,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner adopts the preliminary statement set forth in its brief on the merits.

STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's statement of the case and facts supplementing the facts in Petitioner's brief on the merits, but would note that the trial court implicitly rejected Respondent's testimony that the trooper told her that he had to search her car because "(i)t's a law" (R 67).

SUMMARY OF ARGUMENT

I. As this Court has held that Article I, Section 12 of the Florida Constitution takes precedence over article I, Section 23, Respondent's suggestion that this Court recede from State v. Jimeno has no merit.

II. The State proved by clear and convincing evidence that the consent given in this case was the product of lawful police conduct. The traffic stop in this case was a valid stop based on a violation of Chapter 316, F.S., and was not pretextual, as the trooper had no prior knowledge or suspicion of Respondent.

ARGUMENT

ISSUE I

IF A MOTOR VEHICLE IS LAWFULLY STOPPED BY A LAW ENFORCEMENT OFFICER AND THE DRIVER CONSENTS TO THE OFFICER SEARCHING THE VEHICLE, DOES THE CONSENT GIVEN EXTEND TO THE SEARCH OF A BROWN PAPER BAG FOLDED-OVER, WITHIN THE VEHICLE, WHICH IS NEITHER LOCKED NOR SEALED?

Petitioner would note that this Court has jurisdiction over the instant case by virtue of the above question certified by the Fourth District Court of Appeal as one of great public importance.

Respondent is asking this Court to recede from its opinion in State v. Jimeno, 588 So.2d 233 (Fla. 1991), wherein this Court stated:

> Jimeno now argues that the opening of the paper bag violated his right to privacy pursuant to article I, section 23 of the Florida Constitution. We reject this argument because of article I, section 12 of the Florida Constitution, which requires this Court to construe Fourth Amendment issues in conformity with rulings of the United States Supreme Court. As explained in *State v. Hume*, 512 So.2d 185 (Fla. 1987), 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.

Id. at 233.

This Court recognized that in Fourth Amendment search and seizure matters, article I, section 12 of the Florida

Constitution prevails over the right to privacy provision of the Florida Constitution. The people of Florida unequivocally declared that the right to privacy provision is superceded by the U.S. Supreme Court's opinions on search and seizure issues. By voting to adopt article I, section 12 of the Florida Constitution, the people exercised their sovereign power to amend the State's organic law. Respondent is asking this Court to ignore the will of the voters and to "overrule" the United States Supreme Court. For obvious reasons, this result cannot be effectuated.

Respondent further urges this Court to recede from its Jimeno opinion using the "framework" set forth in Traylor v. State, 17 F.L.W. S42 (Fla. 1992), rehearing denied 17 F.L.W. ____ (Fla. 1992). Respondent overlooks the fact that there is no Florida constitutional provision requiring Fifth Amendment issues to be resolved pursuant to U.S. Supreme Court caselaw, thus permitting the result arrived at in Traylor. Article I, section 12, however precludes such a result in the area of searches and seizures and in a citizen's expectation of privacy relating thereto.

Consequently, Petitioner respectfully urges this Honorable Court to answer the certified question in the affirmative and reverse the ruling of the district court quashing the trial court's order denying Respondent's motion to suppress evidence.

ISSUE II

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER FINDING THE TRAFFIC STOP PROPER AND NOT PRETEXTUAL.

Respondent's Issues II and III are consolidated here as both issues were related to the seizure of the evidence in this case. Petitioner would note that the instant issue was not contemplated by the certified question at issue in this case.

The evidence adduced at the hearing on Respondent's motion to suppress two kilograms of cocaine found in her car shows that Trooper Vaughen was driving in the northbound lane of the Florida Turnpike at 1:15 a.m. heading toward a reported accident which he was subsequently cancelled out of, as another trooper had already arrived at the scene. The trooper passed Respondent's car, which had its high beam headlights on, and was also travelling in the northbound lane. Trooper Vaughen pulled off the roadway.

Trooper Vaughen testified that he stopped Respondent because she was approaching from his rear, as he was waiting to come back onto the roadway, and her headlights were blinding him (R 8). This was a clear violation of Section 316.238(2), Florida Statutes. Respondent contends that it has not been shown that she violated that statute. Section 316.238, Florida Statutes, states:

> **316.238 Use of multiple-beam road lighting equipment.** -- Whenever a motor vehicle is being operated on a roadway or shoulder adjacent thereto during the times specified in §316.217, the driver shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirements and limitations:
>
> (1) Whenever the driver of a vehicle approaches an oncoming vehicle within 500 feet, such driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver. The lowermost distribution of light, or composite beam specified in §316.237(1)(b) and 316.430(2)(b) shall be deemed to avoid glare at all times, regardless of road contour and loading.
>
> (2) Whenever the driver of a vehicle approaches another vehicle from the rear within 300 feet, such driver shall use a distribution of light permissible under this chapter other than the uppermost distribution of light specified in §316.237(1)(a) and 316.430(2)(a).

Respondent was in clear violation of §316.238(2), Florida Statutes. Respondent's vehicle approached and passed Trooper Vaughen's patrol car with her high beams on, blinding the trooper. In other words, the driver of the vehicle approached the patrol car form the rear within 300 feet using the uppermost distribution of light.

Respondent contends that since the patrol car was parked off the roadway, the statute does not apply. A review of the statute in question reveals that the reference

to "... a motor vehicle ... being operated on a roadway or shoulder adjacent thereto ..." refers to the vehicle using the lights, not the vehicle blinded by the light. There is no mention or requirement that both cars be on the roadway, just that one be in front of the other.

Respondent relies on State v. Clark, 511 So.2d 726 (Fla. 1st DCA 1987), but the facts of Clark are distinguishable as Clark dealt with an arrest for failure to dim headlights which blinded oncoming traffic. Also, the court in Clark construed §316.238(1), Florida Statutes, while the statutory provision relevant in the instant case is §316.238(2), Florida Statutes. Consequently, State v. Clark, supra, offers no guidance.

The language and meaning of §316.238(2), Florida Statutes, is plain and unambiguous, and clearly applies to the factual situation in this case. When a vehicle approaches any other vehicle from the rear within 300 feet, subsection 2 mandates that the approaching driver must dim his or her headlights. Here, Respondent approached the trooper's vehicle from the rear as he was attempting to reenter onto the roadway. Her highbeam headlights blinded the trooper, which is precisely the evil which the statute was designed to remedy. Consequently, the stop of Respondent's vehicle was proper and not pretextual, as Respondent was in clear violation of §316.238(2), Florida Statutes.

This Court has recognized that

> While legislative intent controls construction of statutes in Florida, Griffis v. State, 356 So.2d 297 (Fla. 1978), that intent is determined primarily from the language of the statute. S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978). The plain meaning of the statutory language is the first consideration.

St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). See also State v. Barnes, 17 F.L.W. S 119 (Fla. Feb. 20, 1992).

Respondent incorrectly assumes that "(t)he 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." (Respondent's brief, p. 10). This assumption is not supported by the evidence adduced at the suppression hearing or otherwise.

Respondent relies on Florida v. Royer, 460 U.S. 491 (1983), which is distinguishable from the factual scenario in the instant case. First, Royer was not detained for commission of an infraction, he was approached in an airport because he fit a "drug courier profile" (there was never any suggestion that Respondent fit or was stopped due to any "profile"). The detectives took Royer's airline ticket and driver's license and directed him to a small room without

returning his license or ticket. Respondent was not removed from the area of the stop. Royer's luggage was retrieved from the airline's custody without his consent. Nothing belonging to Respondent was touched without her consent. Royer's detention was found to be illegal, but Respondent's detention was clearly valid as based on a violation of Chapter 316, F.S., as found by both the trial court and the district court.

Reynolds v. State, 17 F.L.W. S6 (Fla. Jan. 2, 1992), cited by Respondent, is also distinguishable, as the defendant in Reynolds was immediately handcuffed as soon as his car was stopped, and he was frisked. While still handcuffed, the police obtained Reynolds' consent to search. Again, this was an impermissibly coercive situation, unlike that at bar.

Norman v. State, 379 So. 2d 643 (Fla. 1980), cited by Respondent, involved a tip by a confidential informant which led to the search of a barn containing marijuana. The defendant was confronted by a police officer who stated that he knew that marijuana was in the barn because the sheriff had looked in the window and had seen it. Under these circumstances, this Court held that this was an unduly coercive situation and the consent to search then given was not free and voluntary. In the instant case, the consent was given pursuant to a routine traffic stop and the trooper had no prior knowledge of the presence of contraband.

The consent given in the instant case was the product of lawful police conduct.

At the hearing on Respondent's motion to suppress, Trooper Vaughen testified that when he stopped Respondent's vehicle he first asked Respondent for her driver's license and registration. She was unable to produce the registration (R 10). Trooper Vaughen then testified;

> I asked Ms. Hester for consent to search her vehicle and if she was the owner of the vehicle. She said yes on both counts. (R 12).

Respondent was advised that she had the right to refuse (R 31).

Respondent on her own then removed the car keys from the ignition and walked to the back of the car and opened the hatchback (R 13). After the trooper searched the trunk, he walked around to the passenger side of the vehicle and asked the passenger to step out while he searched the vehicle. Trooper Vaughen saw a large handbag and asked whose it was (R 15). Respondent stated that it was her handbag. A search of the handbag revealed nothing (R 16).

The trooper then looked on the right front floorboard where the passenger's feet had been and saw a brown paper bag. Upon opening the bag, the trooper saw several kilo-sized packages of cocaine (R 16). A further search revealed several pieces of "crack" cocaine inside a handbag (R 18).

Respondent never objected to the search nor did she at any time seek to limit its scope. Respondent was not coerced in any way and voluntarily consented to the search.

CONCLUSION

Petitioner urges this Honorable Court to answer the certified question in the affirmative and affirm the trial court's order denying Respondent's motion to suppress evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Gene Reibman, Esquire, Special Appointed Public Defender, 600 Northeast Third Avenue, Fort Lauderdale, Florida 33304, this 3rd day of June, 1992.

Bradley R Bischoff

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