

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
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By: [Signature]
Deputy Clerk

ANTHONY FONTANA,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 76,826

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court. He was the appellee in the district court of appeal. He will be referred to as petitioner, and by name, in this brief.

Attached to this brief is an appendix containing conformed copies of pertinent portions of the record to show the Court's jurisdiction to review the decision below.

References to the appendix will be by the symbol "A," for Appendix, followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

The appellee filed a motion to suppress in the trial court that was granted after hearing (A-1). The state appealed to the Fourth District Court of Appeal (A-1). The facts relied upon in reaching the decision to reverse the order of suppression were set forth in the decision, and are set out in the statement of the facts portion of this brief.

The district court held that the petitioner, who was occupying a passenger seat in an automobile, had no standing to challenge his detention by being ordered out of the vehicle because, the court held, a person sitting as a passenger in a private vehicle has no reasonable expectation of privacy (A-2-3).

The opinion of the lower tribunal is directly and expressly in conflict with the decisions of other district courts of appeal on the same exact question of whether a passenger can routinely be ordered out of a vehicle during an investigative detention.

STATEMENT OF THE FACTS

The district court of appeal set forth the facts upon which its decision was based as follows (A-1-2):

The evidence adduced at the suppression hearing reflected that police officers, patrolling in the early hours of the morning, observed a large number of individuals in the parking lot of a lounge. The area was known for illegal drinking by minors, gang fights, and drugs. Appellee was observed by the officers going and coming from the lounge with different groups of people. Ultimately, he exited the lounge and entered the passenger side of a parked automobile with several other individuals. Prior to entering the car, all of the individuals nervously looked around the parking lot as if to determine if anyone was watching them. Based upon their experience and training, the officers believed a drug transaction was taking place. They therefore drove their unmarked police car to a position behind the car appellee had entered as a passenger, approached said car and shined a flashlight into the interior thereof. Appellee was observed to be furtively trying to conceal something beneath the passenger's seat. The officers ordered him out of the car and, as he stepped out, an officer saw a clear baggie containing a white powdery substance lying on the floor on the passenger's side. The baggie was field-tested for contraband and proved positive. Thereupon, appellee and his companion were arrested and a sizeable sum of money was found on appellee's person. At all times pertinent herein the car in which appellee was a passenger was parked with the engine off.

The district court expressly held that petitioner Fontana as a passenger in the vehicle had no right to contest the detention and ensuing search. The lower tribunal quoted from its holding in State v. Sears, 493 So.2d 99, 100 (Fla. 4th DCA 1986):

* * * A passenger normally has no legitimate expectation of privacy in the interior of the car in which he is riding. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387).

The appellee below filed a notice to invoke the discretionary jurisdiction of this Court due to express and direct conflict between the district courts of appeal on the question whether a passenger in a vehicle may routinely be ordered out of the vehicle. The issue concerns an investigation where there has been no illegality on the part of someone associated with the vehicle, where probable cause is absent and where there is no specific reason to fear for the safety of the officer.

SUMMARY OF ARGUMENT

The lower tribunal reversed an order of a trial court that suppressed the fruits of a seizure of petitioner's person when an officer ordered petitioner to exit a vehicle lawfully parked in which petitioner was a passenger. The decision below that an officer may routinely order occupants out of a vehicle, because they as passengers have no rights to any privacy inside the vehicle, directly and expressly conflicts with the decisions of other district courts of appeal on this exact issue.

Other district courts of appeal have held that a passenger may not be routinely ordered out of a vehicle during an investigative detention. The decision below is directly opposite. One of the district courts of appeal has held that the question is one reserved by the U.S. Supreme Court. The divergent opinions of the district courts on whether the passenger may be ordered out of a vehicle warrants resolution by the Court. The inconsistency of decisions in the various district courts of appeal should be harmonized by resolution of the question in this case where the issue is squarely raised.

ARGUMENT

WHETHER A PASSENGER OF A MOTOR VEHICLE MAY
ROUTINELY BE ORDERED OUT OF THE VEHICLE DURING
A TEMPORARY DETENTION WHEN THERE ARE NO FACTS
JUSTIFYING THE OFFICER TO FEAR FOR HIS SAFETY?

The district courts of appeal are in disagreement about whether Pennsylvania v. Mimms, 434 U.S. 106 (1977), approves of a routine command that a passenger step out of a vehicle during an investigative detention absent any specific reason for the officer to fear for his safety. There is direct and express conflict among the district courts of appeal on this exact question, and jurisdiction in this Court to review the decision below is based upon this conflict.

The First District in Dees v. State, 564 So.2d 1166 (Fla. 1st DCA 1990), held that a passenger in a vehicle could not be ordered out of a vehicle absent reasonable grounds to suspect the occupants of criminal activity even though, as the officer approached, the passenger placed something under the seat. Griggs v. State, 15 FLW 1882 (Fla. 1st DCA July 19, 1990), held expressly that a passenger in a car parked at a laundromat with the engine running had standing to challenge being ordered out of a vehicle and to contest the search of the area where the passenger had been sitting. The court said:

"Appellant was ordered out of the vehicle and thus seized for the purpose of fourth amendment analysis, whereupon the officer then searched the area which had been within appellant's control, likewise seizing the matchbox and ascertaining its contents. In these circumstances appellant's privacy interest is sufficient to establish standing to challenge the lawfulness of the search and seizure."

On the opposite pole is the Fourth District's holding in Fontana v. State, 15 FLW 2350 (Fla. 4th DCA September 19, 1990), the decision sought to be reviewed here, that a person has no standing to contest being ordered out of a vehicle that was parked with the engine off nor to object to the seizure of contraband discovered as a direct result of the order to step out of the vehicle. In words exactly opposite to that of the First District in Griggs the court quoted from its earlier decision in State v. Sears, 493 So.2d 99, 100 (Fla. 4th DCA 1986), viz.: "A passenger normally has no legitimate expectation of privacy in the interior of the car in which he is riding."

The Fifth District has expressed uncertainty on this issue in Jenkins v. State, 15 FLW 2416 (Fla. 5th DCA September 27, 1990), footnote 2, when the court stated: "The question of whether a police order to a citizen to exit a vehicle is permissible absent any violation of law by the citizen was expressly reserved in Pennsylvania v. Mims, 434 U.S. 106,111 n.6,... (1977). The Fifth District distinguished Mims from a temporary detention because in Mims a vehicle had been stopped for a violation of law and the resulting intrusion into the motorist's liberty was de minimus during the time that a citation was being issued.

The Second District in Martin v. State, 521 So.2d 260 (Fla. 2nd DCA 1988), appeared to recognize the right of a passenger in the back seat to contest an illegal detention, search and seizure. But the Third District in State v. Barcenas, 559 So.2d 70 (Fla. 3rd DCA 1990), on the other hand, cited Mims for the proposition that occupants of a vehicle may be ordered out while an officer conducts

a lawful investigation.

In view of these recent divergent rulings, the question whether an occupant has a right to remain in a vehicle during a temporary detention will continue to be answered differently in various areas of the state until ultimately resolved by this Court. The Court should exercise its discretion to review this issue by review of the decision below to resolve the conflict among the district courts of appeal on this issue.

CONCLUSION

WHEREFORE, the direct and express conflict among the district courts of appeal vests jurisdiction, and the divergent decisions on the question warrant exercise of the Court's jurisdiction to determine whether a law enforcement officer may routinely command occupants of a vehicle to get out of the vehicle while the officer conducts an investigation where nor probable cause exists to arrest or search.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 31st day of October, 1990.



LOUIS G. CARRES
Assistant Public Defender