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IN THE SUPREME COURT OF FLORIDA

ANTHONY FONTANA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,826

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

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

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. The decision below will be referred to as the decision being reviewed. References to the decision being reviewed will be by the designation "Opinion" followed by the appropriate page number of the opinion in parenthesis.

STATEMENT OF THE CASE

The petitioner, ANTHONY FONTANA, was charged with possession of cocaine (R-66). He moved to suppress the physical evidence on the ground of an illegal stop and detention (R-67-69). The final paragraph of the motion summarized petitioner's contention regarding the stop, detention and search (R-69): "Defendant (petitioner) argues that there were insufficient reasons for the police to stop the car Defendant was in. There are no facts alleged by the police that rise even to bare suspicion of illegal activity. The Defendant requests suppression of the evidence against him."

A hearing was held at which the state (respondent) called an officer to testify to the basis for the detention and search. This established that the petitioner was an occupant of a vehicle parked in a parking lot of a lounge frequented by young persons and that the officer had a hunch based upon his experience that there was possible a drug transaction taking place although he did not see any transaction or exchange between any of the persons who had entered the vehicle together (R-8-9,20-24,27).

The trial court entered an order of suppression (R-73). Although the written order did not state reasons, the trial court at the conclusion of the hearing expressed its basis for the order. The trial court initially indicated that the detention was based upon a hunch that fell short of any articulable and reasonable basis for a detention (R-36): "I think there maybe [sic] suspicious behavior, there maybe a hunch. But it's difficult for me looking at the record at this point to articulate particular

reasons for a stop in this case."

The trial court posed a question as to whether the officer's actions in pulling behind the parked vehicle constituted a detention, but stated that it felt the case turned upon whether a furtive movement inside the vehicle is a founded basis for a detention (R-37-38): "Which then brings us down [to] the observations of the officers standing outside the vehicle are a furtive movement under the vehicle is that ... a founded suspicion to justify further activity. Because at that point clearly there is no question there is a detention. If there is not a detention before there's certainly a detention at that point. The Defendant is told to get out of the car, he is definitely stopped, he is definitely detained and definitely not free to leave."

Having thus framed the issue the trial court heard arguments on the issues of whether pulling behind the vehicle constituted a detention and, if not, whether the furtive movement constituted a basis for a detention that occurred when petitioner was ordered out of the vehicle. The court had indicated that if the police vehicle blocking the vehicle petitioner was a detention, then "without question the motion to suppress has to be granted." (R-38). The secondary issue, if the court did not consider that to be a detention, was whether detention that occurred when petitioner was ordered out of the vehicle movement. (R-38). The court termed this second issue "a more murky issue because of the furtive movement." (R-38).

As to the intent of the officers the trial court found that "without question the intent of the officer was not to search for

weapons. The intent was to search for drugs. It was his view it was a drug transaction going on in the car. There were narcotics being sold out of the car and he was intending on detaining for the purposes of looking for drugs." (R-39).

The standing issue was of concern to the trial court. The petitioner was sitting in a vehicle that was not moving and did not have the engine on at the time the officers approached and ordered the petitioner to get out (R-49-51). This issue was posed by the trial court as follows (R-52-53): "If the vehicle is seized where the vehicle is parked, engine off and not running and the Defendant is a passenger, can the Defendant claim standing."

The trial court ordered memoranda on the question of standing (R-62-63):

> For the purposes of your motion [memoranda] assume everything is illegal. Assume that getting people out of the car is illegal. Assume seizing the car is illegal. Assume every single thing is illegal. The question is irrespective of the legality.
>
> Does a passenger who is in a parked car with the engine turned off have standing to challenge an illegal search of the vehicle. That's the only question you have to answer. It's either yes or no. Either does or doesn't. We'll cross any other bridges that have to be crossed after I have an answer to that question.

The Order of the trial court did not contain findings of fact, but ordered the evidence suppressed (R-73). The state on appeal to the district court asserted a lack of standing, and the court agreed. The order being reviewed stated the facts of the seizure of petitioner as follows (Opinion p.2): "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 district court held that petitioner lacked standing because he was a passenger (Opinion p.2). It was ruled that petitioner would have to contest the search and seizure vicariously in this case and that by being a passenger he had no basis to contest any of the actions of the authorities in this case. The opinion below expressly found no reasonable expectation of privacy in this automobile. The opinion did not address the question of whether the petitioner was seized when the police cornered the vehicle and ordered him out of the vehicle.

Judge Stone, dissenting, would have affirmed the suppression because in his judgment the trial court could have found that "the contraband was uncovered as the fruit of an unlawful stop and detention of appellee." (Opinion p.3).

This Court subsequently granted review. The issue on which there is express and direct conflict is the question whether an officer can routinely order occupants out of a vehicle when conducting an investigation but without any reasonable grounds to detain or search.

STATEMENT OF THE FACTS

A suppression hearing was held on the motion, and at the conclusion the trial court took the matter under advisement pending filing of memoranda by the parties (R-622-64). The court later entered a written order granting the motion (R-73).

One witness testified at the hearing. Officer Marseco of the Davie Police Department was working in plain clothes and in an unmarked vehicle with Det. Sylvestri (R-4-7). They positioned themselves in the parking lot of a shopping center where a local nightspot named Tracks West is located (R-7-8). It is a rather large place where persons frequently come and go (R-8-9). At the time there were a large number of persons in the parking lot going to cars, standing out front of the establishment and going back and forth from vehicles (R-21).

Petitioner was wearing a red warm-up suit with the letters "Trooper" written on the back, and he had a large amount of gold on his hands and around his neck (R-9). The witness could not state the exact number of times petitioner may have gone in or out of the establishment, but he said "certainly times" but could not state and "exact number" except to testify that petitioner "would go from inside the lounge go back outside he's always with a group of people." (R-9).

The last time the witness saw petitioner was about 2:00 a.m. when petitioner walked out with three persons over to a vehicle that had been backed in and one of the persons got into the driver's side while another person got into the passenger side and

take a seat in the rear of the vehicle. Petitioner got in on the passenger side (R-9-10).

The person who sat in the rear of the vehicle sat there for two or three minutes then left the vehicle (R-10). They exchanged some conversation, but the officer never saw any object exchanged (R-10,25). Then another person came over and talked with the person in the driver's seat (R-10). Before he got into the vehicle they took in the whole parking lot as if checking to see if anybody was watching (10). The objection to the speculation contained in that testimony was overruled (R-10). The witness testified that they seemed nervous (R-11).

At this time the witness said to his partner, the Det. Sylvestri, that "they are doing deals out of the vehicle, let's approach the vehicle. At that time we did." (R-11).

The officers pulled their vehicle behind the vehicle that petitioner and the other persons were sitting in and blocked its ability to exit (R-11,27). The officers then rushed toward the vehicle, and since they were in plain clothes they announced their authority and showed their badges (R-122-13). Officer Marseco went to the front of the vehicle to shine his light inside because the windows were tinted and they could not see inside, and when he did the interior was well lit (R-12). He saw petitioner place something under the passenger seat in the front of the vehicle, and he called to his partner who banged on the window where petitioner was sitting and demanded that petitioner open the door (R-12-16). As petitioner got out of the vehicle the witness saw a brown paper bag that had not made it under the seat and out of the bag had

fallen a clear plastic baggie containing a white powdery substance (R-16).

The engine in the vehicle petitioner was occupying was not running at any time during these events (R-28). "From the beginning to the time we took them out of the car the vehicle was never started." (R-28).

The circumstances that prompted the officers to detain the persons in the vehicle were the movement of the persons and the conversation that the officers had observed (R-32). Twice the officer acceded to the description of their actions as based upon hunch due to the total circumstances as interpreted by the officers based upon their experience (R-27,32).

These officers were not assigned to the detail that has the duty "to keep the kids moving in and out" (R-13). Those officers did not alert the two officers of any suspicious activity in reference to petitioner or of any narcotic activity there (R-19). On this particular night the officers were there on their own (R-6). The officers in this case went into the parking lot to see "what type of activity is going on" (R-20). There are sometimes gang fights, underage drinking, but the other departments and units are assigned to that detail (R-6). The officers had no reason to believe that petitioner was a gang member (R-20).

SUMMARY OF ARGUMENT

This case presents the issue of whether officers may order a passenger out of a vehicle when there is no basis for a detention of the passenger. The circumstances were such that the trial court ruled that the evidence, in the form of cocaine, should be suppressed. The district court of appeal reversed on the basis that petitioner as a passenger could not claim any right of privacy in the vehicle and thus could not contest the fruits of the stop or detention.

Petitioner submits that he can contest the seizure of his person, due to the unlawful detention and removal from the vehicle, and since the contraband was discovered as a direct consequence and result of this seizure he can properly move to suppress the contraband.

The facts show that petitioner was seized when he was ordered to open the door and was removed from the vehicle. The facts further show that the detention and seizure of petitioner were, as the trial court impliedly found was unlawful.

The contraband was discovered directly as petitioner was being required to open the door and leave the vehicle. This discovery was not unrelated but was a direct result of the seizure of petitioner.

The cases are in dispute whether the U.S. Supreme Court has approved the removal of a passenger in a vehicle whenever a vehicle ia stopped by an officer. Petitioner submits that the correct view of this question is that a passenger enjoys personal rights against

unreasonable seizures that do not evaporate just because the person is enjoying the position of a visitor or passenger in another's vehicle.

In the present case the right of petitioner to be free from unreasonable detention and seizure of his person requires that the order of the trial court be affirmed and the decision of the district court of appeal be quashed.

ARGUMENT

The issue in this case is whether a person sitting in a passenger seat in an automobile has standing to challenge the seizure of his person that occurs when he is ordered out of the vehicle by an officer who lacks a valid basis to detain or arrest the person.

Petitioner was seized at the time two officers, although in plain clothes, rushed the vehicle where petitioner was sitting, announced their identity and showed their identification, and while one officer shined lights into the vehicle another officer banged on the window and ordered petitioner to open the door of the vehicle (R-12):

> Q. (By the Prosecuting Attorney) When you approached the vehicle and you were looking into the windshield, did you have a flashlight with you?
>
> A. (By Officer Marseco) Yes, I did.
>
> Q. What did you do with that flashlight?
>
> A. I shone it through the front windshield so I would have I [sic] a clear view inside the vehicle.
>
> Q. As a result of shining your flashlight through the windshield did you see anything?
>
> A. Yes. The purpose for looking through the front windshield was for my own safety. Approaching the vehicle is not a very good tactical move but I couldn't see through the side windows.
>
> I shone my flashlight, identified myself as a police officer. As I did that I saw the Defendant make an overt move to conseal [sic] something underneath the passenger seat. At that time I yelled to my partner stating he was moving something under the seat.

> Q. What did you think this person was doing at that time?
>
> A. Well we already had our suspicions they were dealing out of the vehicle.
>
> Q. Were you in fear for your safety when you saw those movements?
>
> MS. KEATING: Objection, leading question because she seeing an answer is going to come forward about drugs.
>
> THE COURT: Don't lead, counselor.
>
> Q. Did you think about anything else at the time when you saw --
>
> A. At that time my partner cannot see into the vehicle and he wasn't aware of what was going on. I shouted to him, told him what was taking place.
>
> At that time he banged on the passenger side window again and stated for him to open the door. At that time after the move was made to conceal underneath the passenger side the Defendant opened the door and exited the vehicle.

This was a seizure of petitioner's person. It was a also a detention because, even if petitioner and his friends were intending to drive off, the vehicle petitioner occupied was blocked by the officers' vehicle (R-35):

> THE WITNESS (Officer Marseco): They were parked in around - there was the rear of the vehicle. We came with the front of our vehicle and parked there. In other words if they were going to back out I would have to say our vehicle would have been in the way so they would not have been able to back out.

A seizure occurs when a reasonable person would not have felt free to leave or to ignore the requests of law enforcement officers under the circumstances. Nelson v. State, __So.2d__, 16 FLW S225 (Fla. March 28, 1991):

> Terry v. Ohio, 392 U.S. 1, 16 (1968), teaches us that there is a seizure whenever a police officer accosts an individual and restrains his freedom. See also Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (stopping an automobile and detaining its occupant, even briefly, constitutes a seizure within the meaning of the fourth amendment to the United States Constitution); State v. Jones, 483 So.2d 433, 435 (Fla. 1986) (same).

A person has standing to challenge the use of evidence obtained during an illegal seizure of his person. Griggs v. State, 565 So.2d 361 (Fla. 1st DCA 1990). Griggs concerned similar facts where a passenger had been dislodged from a vehicle in circumstances where there was lawful no basis for the seizure. In Griggs 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.

There is one factual difference between Griggs and the present case, the vehicle in Griggs was parked at a laundromat with the engine was running at the time of the detention. Sub judice the vehicle was also parked and occupied, but the engine was not running. Petitioner submits that the difference of the engine running, or not running, should not be a basis for distinguishing between the right of a person to be free from a detention and seizure. The right of persons to be free from unreasonable seizures should not be demarcated by whether the engine in the vehicle is running or not. The result of a rule permitting an

officer to detain a person in a parked vehicle without a motor running, but not to detain persons in a vehicle similarly parked where the motor is running, would permit arbitrary seizures. This kind of distinction would miss the point of the right to be free from unreasonable seizures exists whether or not the person is in transit.

In Nelson v. State, supra, this Court distinguished between a reasonable expectation of privacy on another's premises, such as a stolen vehicle, and the right of a person, wherever located, to be free from an unreasonable seizure of the person. The Court quoted from United States v. Lanford, 838 F.2d 1351 (5th Cir. 1988), at 1353, and stated: "This obvious distinction was recognized in Lanford, where the court, while holding that Lanford lacked standing to challenge the search of property not his own, noted that: 'Lanford does, of course, have standing to challenge the search of his person.'" Nelson v. State, supra, 16 FLW at S225.

The contraband in the present case was discovered as a result of the order for petitioner open the door where he was sitting in the vehicle. The facts are clear on this point (R-16):

> Q. (By prosecuting attorney) What happened at that point when your partner banged on the window and said police?
>
> A. After the Defendant exited the vehicle with the position I was in I had the flashlight on actually with the door open and the lighting from around the parking lot the inside of the vehicle was well lit.
>
> I saw a brown paper bag laying on the floor which did not make it underneath the passenger seat. What fell out of the that [sic] brown paper bag laying in plain view was a clear

plastic baggie containing a white powdery substance.

Griggs v. State, supra, held that such discovery of an item in the area where the passenger was sitting before being unlawfully detained is unlawfully obtained evidence.

United States v. Mimms, 434 U.S. 106 (1977), concerned an order for a motorist, who had been stopped for a violation of the law, to step out of the vehicle while a citation was being issued. The Fifth District Court of Appeal in Jenkins v. State, 567 So.2d 528 (Fla. 5th DCA 1990), fn.2 stated that the question was reserved of whether a person, who is not being detained or arrested for any violation of law, may similarly be ordered to step out of a vehicle in which he is a passenger: "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. Mimms, 434 U.S. 106, 111 n.6,....(1977)." On the other hand the court in State v. Barcenas, 559 So.2d 70 (Fla. 3rd DCA 1990), cited Mimms differently to stand for the proposition that occupants may be ordered out of a vehicle during a lawful investigation. Barcenas, however, involved a lawful detention based upon ample grounds for an investigative stop, where a tip had led along with a telephone call, to Barcenas (the driver of the vehicle) being investigated for drug activity. The citation to Mimms was followed by dicta that it supported removing passengers, while the case involving Barcenas did not require the court to rule on that question.

Thus, the Mimms case has not authoritatively been applied to support routine removal of passengers from a vehicle during an

investigation where there is not positive reason to do so. The grounds that might lead to a valid order of removal of a passenger do not include the passenger putting something under the seat. See Dees v. State, 564 So.2d 1166 (Fla. 1st DCA 1990), where a passenger had placed something under the seat as the officer approached. There were not reasonable grounds to order the passenger out of the vehicle thus the court in Dees held that the order was unreasonable. This holding requires a valid basis for such an order. The court rejected a blanket rule permitting such orders to passengers whenever a vehicle is involved in a stop or other encounter.

The trial court found that the petitioner had standing. The above cases indicate that the trial court was correct. Petitioner was detained initially when the officers blocked the vehicle he was in and rushed the vehicle in the manner indicating to any reasonable person that the occupants were not free to leave. The additional detention occurred when the officers ordered banged on the window on petitioner's door with a flashlight and ordered him to open the door of the vehicle and indicated that he was required to step out.

The only other question on these facts is simply whether the officers had any reasonable legal basis to detain petitioner. The cases below uniformly hold that the circumstances here, where the officers had mere suspicion akin to a hunch, that the occupants were engaged in some criminal activity, thought to be drug dealing, that the facts do not support a detention.

Dees v. State, supra, held that a passenger placing something under the seat is an insufficient basis to detain. The holding is in keeping with common sense that every person who places something under a seat is not necessarily either committing a crime or posing a threat to the safety of an officer who approaches. The passenger may simply not want the object to be seen, and the object may be any number of common innocent items that people may ordinarily carry under seats in vehicles such as maps, umbrellas, purses, wallets, keys, notes, radios, tapes, although certainly in some cases the item may be contraband. The possibility that the object may, in some cases, be an illegal substance, or even a firearm, is not a legal basis to detain all occupants of vehicles on bare suspicion alone. Pat down approved in Terry v. Ohio, 392 U.S. 1,16 (1968), must be based upon a reasonable ground for the officer to fear for his safety, and the order for an occupant to exit a vehicle must also be based upon similar grounds.

State v. Beja, 451 So.2d 882 (Fla. 4th DCA 1982), correctly stated the requirement of founded suspicion that the person has committed, is committing, or is about to commit a crime before a detention may properly take place. See also State v. Stevens, 354 So.2d 1244,1246 (Fla. 4th DCA 1978). A "founded suspicion" must be based upon "specific or articulable facts, together with rational inferences from those facts that reasonably warrant" suspicion of specific criminal conduct. Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989). An officer's "bare" or "gut" feeling the a person may be involved in a criminal activity is insufficient to authorize an investigatory stop. Daniels v. State,

543 So.2d 363 (Fla. 1st DCA 1989).

In Beja v State, supra, the court applied this principle to a passenger in permitting him to challenge a seizure of the person and the resulting seizure of incriminating evidence based upon the invalid detention. This is the correct rule that petitioner would have the Court adopt and apply to passengers in a vehicle. The court in Beja, supra, 451 So.2d at 883-884, set forth the following:

> We believe the reasoning in People v. Kunath, 99 Ill.App.3d 201, 54 Ill.Dec. 6212, 425 N.E.2d 486 (1981), to be the better position. In Kunath, the court stated:
>
> > Regardless of whether defendant had a legitimate expectation of privacy in the contents of the automobile so as to challenge successfully the search thereof, as a passenger he can challenge the stopping of the vehicle since his personal liberty and freedom were intruded upon by that act. .... And, for the evidence seized as a result of that stop to be admissible, the stop must not have been unreasonable. (Emphasis supplied).

The validity of the original stop, considering both the blocking of the vehicle and the seizure of the petitioner when he was effectively ordered out of the vehicle must be measured by the adequacy of the facts supporting the officers' actions. The facts support the trial court's discretion in entering an order of suppression.

The fact that petitioner went to and from the lounge where young persons commonly came and went, and that he looked around the parking lot before getting into the car, were the specific articulable facts to support the actions in seizing petitioner in

this case. The act of looking around is not even remotely inconsistent with looking for a friend in the parking lot area. Nor is coming and going from the lounge. These actions were conceded by the officer as not peculiar to petitioner and were typical and normal for that time and place (R-23-24). The officer did think it was unusual for three individuals to get into a vehicle and stay there a short while, get out, then get back in again without going anywhere (R-24). However, the officer never saw any exchange take place nor anything else to specifically identify an illegal act such as a drug transaction or drug usage by petitioner or the friends he was with. This is the crucial difference in the determination of whether there were reasonable grounds to detain these occupants. The finding of the trial court is a permissible view of the facts, as Judge Stone would have found below. The trial court was not acting contrary to the evidence in its ruling based upon a view that these facts were insufficient to support the detention and subsequent intrusion into the space petitioner occupied in the vehicle before the illegal detention.

In Mosley v. State, 519 So.2d 58 (Fla. 2nd DCA 1988), a person was observed by the officer in a high crime area talking with an alleged drug dealer then walking away with a closed fist. The Court held there was a lack of founded suspicion because the officer observed nothing more specific such as a transfer of some object. Simply talking to a drug dealer was not grounds to detain.

In Martin v. State, 521 So.2d 260 (Fla. 2nd DCA 1988) and

King v. State, 521 So.2d 334 (Fla. 4th DCA 1988), both courts reviewed cases similar to Mosley, where the officers observed suspicious yet ambiguous actions of a person in a high crime area. In Martin, the person was observed walking back and forth several times from a vehicle and the porch of a house. In King, an officer observed two white males parked in a high crime area between known drug houses talking to a Mexican and a black male. While those facts alone may have aroused a bare suspicion, nothing was observed exchanging hands. These facts were held to be legally short of the founded suspicion of specific criminal activity needed to detain.

In Gipson v. State, 537 So.2d 1080 (Fla. 1st DCA 1989), officers were patrolling an area for a robbery suspect when the defendant and two other people were observed huddled behind a bar engaged in what the officers believed might be a drug transaction. The Court held there was nothing more than a hunch where the Officers did not observe any exchange.

In Daniels v. State, 543 So. 2d 363 (Fla. 1st DCA 1989), a scenario existed similar to Gipson. The court summarized that neither suspicions nor furtive movements are sufficient to constitute the specific articulable facts needed to support a lawful detention. Id., at 365:

> Suspicions or furtive movements are not reasonable grounds to justify a stop and detention, even when combined with flight in a high crime area.

The trial court had the power to find the facts, and a reviewing court should defer to the fact finding authority of the trial court because its order comes to an appellate court with the

same presumption of correctness normally given to jury verdicts. DeConingh v. State, 433 So.2d 501 (Fla. 1983). The district court was incorrect in reversing on the basis that petitioner lacked standing. He had standing to challenge his own seizure, and the trial court's finding that there was a seizure of the person of petitioner is well supported by evidence that the trial court necessarily accepted as the basis of the order of suppression. It was this seizure of petitioner that directly led the officers to learn of the identity of the substance that petitioner was placing under the seat. This discovery was during the unlawful detention and seizure of petitioner and was properly suppressed as evidence by the trial court. The opinion below should be quashed and the order of the trial court affirmed.

CONCLUSION

WHEREFORE, the Court should quash the decision below and remand with direction for the order of the trial court to be AFFIRMED.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JAMES CARNEY, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 8th day of April, 1991.

LOUIS G. CARRES
Assistant Public Defender