O.A. 6-6-91 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,~~286~~ 826

ANTHONY FONTANA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, CRIMINAL DIVISION

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Anthony Fontana was the defendant below and shall be referred to as "petitioner" in this brief. The State of Florida will be referred to as "respondent."

References to the record will be preceded by "R."

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested and charged with possession of cocaine (R 66). A hearing on petitioner's motion to suppress was held on April 21, 1989 (R 3).

Officer Ronald Maresco was the only witness at the hearing (R 4). Officer Maresco testified that he and his partner were patrolling the parking lot of "Tracks West" in the early morning hours of Saturday, October 8, 1988 (R 6). They arrived in the parking lot between 1:30 and 1:45 a.m. (R 8). They were patrolling the lot because there had been problems with minors drinking, gang fights and drugs (R 6-7). It was common for gang members to "hang out" in the area (R 6). The Broward Sheriff's Office had their gang squad there and the officer from the Davie Police Department who deals with gangs was usually there (R 7).

All the parking at that hour was used for Tracks West Lounge (R 8). When the officers arrived, they observed individuals in the parking lot, moving back and forth, inside and outside (R 8). Maresco and his partner observed petitioner going in and out of Tracks West numerous times with different groups of people (R 8, 9, 10). Petitioner was wearing a red jumpsuit with the word "Trooper" written on the back (R 10). He had a large amount of gold on his hands and neck (R 10). After the officers had seen petitioner "in and out of the establishment on difference [sic] occasions," petitioner came out and entered the Mustang a final time (R 27). The last time he came out, it was around two in the

morning (R 10). Petitioner went to a vehicle with another group of people (R 10-11). The vehicle was backed in the parking spot (R 10, initial brief p. 6). They looked around the lot to see if anyone was watching them (R 24, 34). One individual got in the driver's seat and another in the rear seat (R 11). Petitioner got in the front passenger's seat (R 11). The person in the rear seat was only in the car for two or three minutes (R 11). Subsequently, petitioner and the driver got out of the car (R 26, 28). A fourth individual approached the vehicle and spoke with the person on the driver's side (R 11). Petitioner got back in the car (R 26). Before the fourth person got in the driver's seat, he looked over the entire lot to be certain no one was watching (R 11, 18, 25). He appeared nervous (R 11). He wanted to be sure that no one was watching them (R 12).

Based on his training and the totality of the circumstances, Maresco believed that drug deals were taking place from the vehicle (R 12, 22-23, 33). Maresco said that it was not unusual to see individuals standing in a parking lot (R 24). However, it is unusual to see three individuals get in a car, stay there a short time, exit the vehicle and then two individuals get back into the same vehicle and not leave the parking lot (R 25).

Maresco pulled the unmarked car (a Mustang) behind the vehicle petitioner was in (R 12). Maresco went to the driver's side and his partner went to the passenger's side (R 12). The officers were wearing street clothes (R 13). There

was a heavy tint on the windows and Maresco could not see inside, so he went to the front of the vehicle and shined a flashlight through the windshield and announced that he was a police officer (R 13). He identified himself because the officers were in plain clothes and he did not want the occupants to think he was trying to "rip them off." (R 11). If the driver of the car petitioner was in was going to back out, the police vehicle would have been in the way (R 35, 36).

Officer Maresco testified that loitering is not permitted in the lot (R 14). Other officers are assigned to prevent loitering in the parking lot (R 14). The officer looked through the windshield for his safety (R 15). As he shined his flashlight, he saw petitioner make a furtive movement to conceal something under the passenger seat (R 15). Officer Maresco yelled to his partner to inform him of the movement (R 16). His partner banged on the passenger's window and told petitioner to open the door (R 16). He did that because he did not know if petitioner was trying to conceal a weapon (R 17). Petitioner then exited the car (R 17). When petitioner got out, Maresco saw a plastic baggie with a white powdery substance laying on the floor on the passenger's side (R 17, 34).

Based on his experience and training, Maresco believed the substance was cocaine (R 18). Petitioner and the occupant sitting in the driver's seat were taken to the rear of the car (R 18). The substance field-tested positive for

cocaine (R 18). Thirty-five dollars was found on the floor (R 19). Four hundred sixty-six dollars was found on petitioner's person (R 19). The car petitioner was sitting in was never running (R 29). The trial judge stated that he believed that the officers' act of pulling their car behind the other car did not constitute a detention (R 38). He also found that the officer had a right to shine his light in the vehicle (R 38). The trial judge found that there was a detention at the time that petitioner was told to get out of the car (R 39). The judge said that he was inclined to look at the intent of the officer (R 39). He felt that the officer was looking for drugs, not weapons (R 40). Because the officer was looking for drugs, not weapons, the trial judge said he was inclined to rule in favor of petitioner (R 40).

The judge questioned whether the passenger in a stationary vehicle, with the engine off, has standing to challenge the search of the vehicle (R 46-47). The judge noted that this was not a stop of a moving vehicle or a vehicle that was attempting to leave (R 47). He stated that when you have a vehicle that is not moving, there is no nexus between the passenger and the car (R 49). The judge questioned whether petitioner had standing when the car is not being used as a conveyance, because any seizure of the car is not what is impeding petitioner's travel (R 49, 51-52). He said that (R 59-60):

> The issue is solely a question if he is unlawfully detained is it because of his unlawful detention that

> the evidence is found. And if it's not, if they are separate, the clearest example of all is where he is standing outside of the automobile ten feet away and he is unlawfully detained he can't begin to claim any standing to challenge the search of the automobile at that point because it is not his unlawful detention that is detaining the automobile.

The judge asked that the parties provide him with memoranda of law (R 52). Those memoranda were to assume that the search of the vehicle was illegal (R 52). The trial judge stated that the vehicle was not stopped by the officers (R 53). The judge questioned whether a passenger has standing if a vehicle is parked, with the engine off, when the vehicle is approached (R 54, 56). The judge did not believe petitioner had standing (R 54).

The public defender stated that the entire incident of the officers approaching the car happened very quickly (R 55). The trial judge noted that where the car is already stopped, the evidence is found not as a result of the defendant being stopped, it is the result of the seizure of the vehicle (R 57).

SUMMARY OF THE ARGUMENT

As a passenger in an already stopped vehicle, petitioner lacks standing. Additionally, the officer's action in telling petitioner to open the door was not the cause of the discovery of the cocaine. More important, given the officer's experience and the totality of the circumstances, he was justified in his actions.

ARGUMENT

POINT I

THE FOURTH DISTRICT CORRECTLY CONCLUDED THAT THE TRIAL JUDGE ERRED IN GRANTING PETITIONER'S MOTION TO SUPPRESS.

In moving for the suppression of evidence, it is the defendant's burden to establish a reasonable expectation of privacy in the passenger compartment of another's vehicle. Amoss v. State, 547 So.2d 716, 716-17 (Fla. 1st DCA 1989). Here, petitioner made no such showing. A passenger normally does not have standing to contest the search of the car. Amoss, 547 So.2d at 717, and State v. Sears, 493 So.2d 99, 100 (Fla. 4th DCA 1986).

In State v. Rome, 500 So.2d 255 (Fla. 1st DCA 1989), an officer testified that he was conducting surveillance when he noticed two men in a parked pickup truck. He saw the driver holding what appeared to be a baggie of marijuana. The officer advised the driver and the defendant that they were under arrest and read them their rights. The officer then seized the baggie from a cubbyhole in the dashboard where the driver indicated he had put it. In seizing the baggie, the officer also seized a small, opaque bag, which was later found to contain cocaine. The trial judge granted the motion to suppress, stating that he would have denied it had he believed that the officer saw the contraband before he approached the truck.

The first district reversed, stating that the defendant, as a passenger, had not demonstrated standing to contest the

search. The court found it unnecessary to reach the question of the legality of the search. See also State v. Bartz, 431 So.2d 704, 704-05 (Fla. 2d DCA 1983) and Acebo v. State, 415 So.2d 909 (Fla. 2d DCA), review denied, 424 So.2d 760 (Fla. 1982). Since petitioner lacked standing, he cannot contest the officer's actions.

State v. Beja, 451 So.2d 882 (Fla. 4th DCA 1984), cause dismissed, State v. Lennon, 469 So.2d 750 (Fla. 1985), is not applicable to the present case. In Beja, this Court found that a passenger had standing to challenge the search because it was the result of an unlawful stop of the vehicle. Here, the trial judge found that this was not the stop of a moving vehicle or a vehicle that was attempting to leave (R 47). The trial judge correctly questioned whether petitioner had standing, because unlike Beja, the seizure of the car was not impeding petitioner's travel. He correctly noted that when the vehicle is not moving, there is no nexus between the passenger and the vehicle (R 49). Cf. Williams v. State, 428 So.2d 764, 764-65 (Fla. 3d DCA 1983) (no unlawful stop where vehicle is stationary).

Assuming that this Court disagrees, the Fourth District's decision was still correct. As stated by the court in State v. LeCroy, 435 So.2d 354, 357 (Fla. 4th DCA), rehearing denied, opinion modified, 441 So.2d 1182 (Fla. 4th DCA 1983), approved in part, quashed in part, 461 So.2d 88 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3532, 87 L.Ed.2d 656 (1985):

> [t]he exclusionary rule does not come into play merely because the proffered evidence is in fact the product of an illegal act. If . . . the illegal act merely contributed to the discovery of the allegedly tainted information and . . . such information would have been acquired lawfully even if the illegal act had never transpired, the presumptive taint is removed, and the apparently poisoned fruit is made whole. In other words, if . . . the illegal act was not an indispensable cause of the discovery of the proffered evidence, the exclusionary rule does not apply (emphasis supplied).

The only arguably illegal action by the officer was telling petitioner to open the car door. Since petitioner lacked standing regarding the car, the officer could have simply opened the door, without talking to petitioner, and searched the car. The officers also could have ordered the person in the driver's seat out of the car and searched for the cocaine from that side.

More important, the discovery of the cocaine was not the result of the allegedly illegal act of telling petitioner to open the door. The officer did not tell petitioner to get out of the car (R 17-18). Petitioner did that on his own. The cocaine was found when petitioner exited the vehicle (R 17-18). It was spotted by Maresco, who was on the driver's side of the vehicle at the time (R 17, 18). Petitioner certainly had no standing to contest Maresco's entry of the vehicle from the driver's side.

Accordingly, the order to open the door was not the cause of the discovery of the evidence. Cf. State v. Mendez, 540 So.2d 930, 930 (Fla. 4th DCA 1989) (where defendant was simply asked for identification and he then stepped from his

vehicle revealing drugs, no founded suspicion was necessary). See also See Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) and LaFave, Search and Seizure, § 11.4 (1987).

Assuming arguendo that petitioner has standing, the result would not change. "To justify a temporary detention, only 'founded suspicion' in the mind of the detaining officer is required." State v. Stevens, 354 So.2d 1244, 1247 (Fla. 4th DCA 1978). "A 'founded suspicion' is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in light of the officer's knowledge." Id. at 1247.

Here, the officers had a founded suspicion, justifying the investigation. The officers were patrolling an area known for gang fights, drugs and illegal drinking (R 6-7). Petitioner was adorned with gold and wore a red jumpsuit with the "Trooper" insignia on the back (R 10). There was a virtual parade of people with petitioner going in and out of the Lounge to the car over a very short period. Officer Maresco observed petitioner walking back and forth from the parking lot to the club, with different groups of people, at least three times over a period of fifteen to thirty minutes (R 6, 8, 9, 10, 27).

The last time petitioner came out, he went to a vehicle with another group of people (R 10-11). They looked around the lot to see if anyone was watching them (R 34). One individual got in the driver's seat and another in the rear

seat (R 11). Petitioner got in the front passenger's seat (R 11). The individual in the rear seat was only in the car two or three minutes (R 11). Subsequently, petitioner and a person sitting in the driver's seat got out of the car (R 36). A fourth individual approached the vehicle and spoke with the person on the driver's side (R 11). Petitioner got back in the car (R 26). Before the fourth individual got in the driver's seat, he looked over the lot to be certain no one was watching (R 11, 18, 25). He appeared nervous (R 11). Based on his training and the totality of the circumstances, Maresco believed that drug deals were taking place from the vehicle (R 12, 33).

At this time there was a founded suspicion. See cases on pp. 12-14, infra; In Interest of G.A.R., 387 So.2d 404, 408 (Fla. 4th DCA 1980) (trained law enforcement officer may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."). "A temporary detention is permissible if the facts available to the deputy at the time would warrant a person of reasonable caution in believing that the action taken was appropriate." State v. Spurling, 385 So.2d 672, 674 (Fla. 2d DCA), rev. denied, 392 So.2d 1379 (Fla. 1980).

Maresco then went to the driver's side and his partner went to the passenger's side (R 12). The tint on the windows was so heavy that Maresco could not see inside, though it was night in a lighted parking lot (R 17, 13). As a result, he shined a flashlight through the front windshield

and announced that he was a police officer (R 13). He identified himself so that the occupants knew he was not trying to "rip them off." (R 11).

The vehicle's engine was not running (R 28). It is also important to note that the car was not blocked in. Maresco testified that the car had backed into the parking space (R 10, initial brief p. 6). He said that the police car would be blocking the other vehicle if it chose to back out (R 35, 36). However, there is no indication that the car was impeded in any way if it were simply to pull forward out of the spot. This conclusion is supported by Maresco's testimony regarding how he approached the car. Maresco said that he parked his vehicle behind the other car (R 12). Maresco, as the driver, went to the driver's side of the other car (R 12). The other officer approached the passenger side (R 12).

The trial judge stated that he was inclined to hold that there was no detention of the defendant at the time the officer pulled behind the other car (R 43). The fact that Maresco identified himself as an officer did not constitute a seizure requiring some level of objective justification. See State v. Jones, 454 So.2d 774, 775 (Fla. 3d DCA 1984).

The officer looked through the windshield for his safety (R 15). As he shined his flashlight, he saw petitioner make a furtive movement to conceal something under the passenger seat (R 15). At that point, there was obviously a founded suspicion, considering the totality of the circumstances.

Cf. Sears, 493 So.2d 99, 100 (Fla. 4th DCA 1986) (founded suspicion for a search where passenger made furtive movement after routine traffic stop); State v. Van-Nostrand, 456 So.2d 948, 949 (Fla. 3d DCA 1984) (officer justified in asking defendant to get out of car and produce identification where he pulled into driveway of house under surveillance) and State v. Kibbee, 513 So.2d 256 (Fla. 2d DCA 1987) (officer justified in stop where he observed two men slouched in car parked at closed business in area where thefts had occurred in the past year).

In Wilson v. State, 324 So.2d 700, 701 (Fla. 4th DCA 1976), the officer observed two men standing in a dark area behind a drug store twenty minutes before closing. The defendant was trying to conceal himself. His companion was backing away toward a motorcycle that was parked behind the store, although vehicles customarily parked in front of the store. The court held that there was a founded suspicion for the stop.

In State v. King, 485 So.2d 1312 (Fla. 5th DCA 1986), three occupants of a vehicle "gawked" at the officer as he passed them. They were in a rental car driving slowly and came to a stop as the officer passed. The vehicle parked at a bar known for drugs and prostitution. The car was parked in a manner, with the engine running, which would provide a quick exit. One passenger went in the bar while the others waited in the car. The Fifth District reversed, finding the detention valid.

In Adams v. State, 523 So.2d 190 (Fla. 1st DCA 1988), the officer was patrolling a high-crime area known for drugs. He saw a black male enter a white male's car. The car made several turns and appeared to be headed in no particular destination. The black male was bent over during most of the trip. A person entering a car in this area fit a modus operandi observed by police in identifying narcotics transactions. The first district reversed, finding the detention valid under the circumstances.

Since there was a founded suspicion, the police officer properly told petitioner to open the door. In State v. Williams, 371 So.2d 1074 (Fla. 3d DCA 1979), cert. denied, 381 So.2d 771 (Fla. 1980), the officer responded to a disturbance call, possibly involving an automobile accident. When he arrived an unknown man told the officer that the man's brother thought there might be a gun in the car. The officer ordered the occupants out of the vehicle. The trial judge granted the motion to suppress, finding that the officer was not justified in ordering the occupants out of the vehicle. The third district reversed, stating:

> Two recent and extremely able decisions of our sibling courts for the second and fourth districts, have explored the question of when a tip given a police officer contains sufficient indications of reliability to justify a stop and frisk. If this were the criteria applicable to the case at bar, we might readily agree with the defendant's position . . .. But no such stop is involved in this case. The vehicle and the occupant in question were already "stopped" or at least stationary, for reasons unrelated to police activity. In Pennsylvania v. Mimms, supra, the Supreme Court of the United States clearly and specifically held that very different and much more lenient standards are

> applicable in determining the propriety of the only police action which is challenged here--the act of ordering one out of a vehicle. In Mimms, the court held that a police officer, with no indication of unlawful activity whatever, could validly order a driver who had been properly stopped for a mere traffic violation to exit his vehicle. The court variously characterized that action as "de minimus," as one "which hardly rises to the level of a 'petty indignity'" and as "at most a mere inconvenience [which] cannot prevail against legitimate concern for the officer's safety." (citations omitted).

371 So.2d at 1076. See also Williams v. State, 428 So.2d 764 (Fla. 3d DCA 1983); State v. M.N.M, 423 So.2d 987 (Fla. 3d DCA 1982) (where police saw juveniles exchanging verbal threats, officer was justified in ordering juvenile out of the car); New York v. Class, 475 U.S. 106, 115, 106 S.Ct. 960, 966, 89 L.Ed.2d 81 (1986) (during proper investigatory stop police officer may order person to exit vehicle even if officer has no reason to believe occupant is armed); State v. Mahoy, 575 So.2d 779, 780 (Fla. 5th DCA 1991) (same); United States v. White, 648 F.2d 29, 37 (U.S.D.C.), cert. denied, 454 U.S. 924, 102 S.Ct. 424, 70 L.Ed.2d 233 (1981) (courts have routinely allowed officers to insist on reasonable changes of locations during stop based on founded suspicion); and State v. Ruiz, 526 So.2d 170, 172 (Fla. 1st DCA 1988) (same).

Assuming arguendo that this Court disagrees with the above, the seizure of the cocaine was still valid. The officer testified that loitering was not allowed in the lot (R 14). The officer was justified in approaching the car to investigate the possibility that petitioner was loitering. See Spurling, 385 So.2d at 675. The de minimus intrusion

involved in telling petitioner to open the door was not improper. M.N.M, 423 So.2d at 988 and Williams, 371 So.2d at 1076. Before Officer Maresco had an opportunity to question petitioner, he saw the cocaine, which established probable cause to arrest.

CONCLUSION

Based on the preceding argument and authorities, this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to Louis G. Carres, Esquire, 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach FL, 33401, this 2 day of May, 1991.

Of Counsel