IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 76,960

DAVID BARTEE,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LAWRENCE M. KORN #0714798
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS

CONSTITUTIONS and STATUTES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v. CASE NO. 76,960

DAVID BARTEE,

Respondent.

_____/

ANSWER BRIEF ON THE MERITS OF RESPONDENT

I. PRELIMINARY STATEMENT

David Bartee was the defendant in the trial court, the appellee in the district court, and will be referred to in this brief as the respondent or by his proper name. The State of Florida was the prosecution and appellant below and will be referred to herein as the state or the petitioner. The record on appeal will be referred to by use of the symbol "R" and the transcript of the trial proceedings by use of the symbol "T," each followed by the appropriate page number in brackets. All trial proceedings in this case were in the Eighth Judicial Circuit Court, in and for Alachua County, Florida, the Honorable Robert Cates, Circuit Judge presiding, while all appellate proceedings were in the First District Court of Appeal. All emphasis in this brief is supplied unless otherwise indicated.

II. STATEMENT OF THE CASE AND FACTS

The respondent accepts the state's recitation of the case and facts in its initial brief, and as stated by the district court in its opinion below, attached hereto. State v. Bartee, __ So.2d __, 15 F.L.W. D2699 (Fla. 1st DCA October 22, 1990).

III. SUMMARY OF ARGUMENT

The trial court correctly granted Bartee's motion to suppress based on Detective Burnett's lack of reasonable suspicion and the forced abandonment of property by Bartee in the face of the illegal exercise of police authority. The trial court correctly ruled that Burnett's order to "stop" constituted a seizure which was not justified by the circumstances of the situation.

Moreover, the stated purpose of the Fourth Amendment Exclusionary rule is to deter police misconduct. As the trial court found, the actions of detectives in this case were clearly illegal. Accordingly, such misconduct cannot be permitted, but rather must be used to deter further illegal police activity.

IV. ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT CORRECTLY GRANTED BARTEE'S MOTION TO SUPPRESS EVIDENCE WHICH WAS RETRIEVED PURSUANT TO AN ILLEGAL SEIZURE AND A FORCED ABANDONMENT IN THE FACE OF THE ILLEGAL EXERCISE OF POLICE AUTHORITY.

The trial court found, and the state does not seriously dispute, that Detective Burnett did not have the requisite reasonable suspicion to stop and detain Bartee under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Thus, it is undisputed that the attempt to stop Bartee was illegal conduct on the part of Burnett. Notwithstanding this illegal conduct, the issue before this Court is "whether the defendant voluntarily abandoned the [controlled substance] when he threw it into the public streets after being ordered to stop by the police or whether such abandonment was involuntary as being fatally tainted by the unreasonable police stop." State v. Oliver, 368 So.2d 1331, 1333 (Fla. 3d DCA 1979).

The state relies heavily on the recent decision of the Fourth District Court of Appeal in State v. Arnold, 15 FLW D292 (Fla. 4th DCA January 31, 1990) for the proposition that even where a stop is blatantly illegal, items discarded by the defendant in the face of improper police authority are considered voluntarily abandoned and thus not subject to the Fourth Amendment.

As a preliminary matter, the state contends that there was no stop here, citing Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). However, even under the

test enunciated in Chesternut, the police conduct in this case constituted a "stop" in terms of the Fourth Amendment. In Chesternut, the Court held that a seizure occurs when, viewing the police conduct as a whole and under the totality of the circumstances, the police had in some way restrained the defendant's liberty so that he was not free to leave.

Here, the trial court ruled as a factual matter, and the record supports the conclusion, that once Detective Burnett yelled for Bartee to stop, and then reached for his weapon, [T 13] Bartee was "seized" as a matter of law. Florida cases have supported this conclusion. Mullins v. State, 366 So.2d 1162 (Fla. 1978); Oliver, 368 So.2d at 1334 ("[T]he police seized the defendant's person in the constitutional sense when they ordered the defendant to stop for the purpose of temporary questioning"). Moreover, the police officer did not "ask" Bartee to stop or raise his hands, rather the totality of the circumstances demonstrates that these actions were ordered. They were not requests. Accordingly, there can be no doubt that Bartee was seized in the constitutional sense.

The state's reliance on the the recent amendments to Article I, section 12 of the Florida Constitution, placing the responsibility of determining search and seizure questions in this State with the United States Supreme Court is badly misplaced. First, even under Chesternut, the police officer's conduct in this case was still blatantly illegal. Second, no United States Supreme Court case is directly on point in this matter. The state's reference to the 1924 case of Hester v.

United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), a moonshine case, is also misplaced. In Hester, the police officers possessed what we now call founded suspicion under Terry, supra. Those police officers observed Hester and another man, Henderson, engaged in an illegal act, namely the exchange of illegal moonshine whiskey. Hester, 265 U.S. at 58. Certainly, the officers in Hester were within their rights to conduct an investigatory stop of Hester and Henderson. Such is not the case herein. The police officer had absolutely no right or ground to stop or seize Bartee in this case. When the state finds a United States Supreme Court case on point with the facts of this case, this Court should properly follow that case. Hester is not such a case.

Once beyond that threshold determination, this Court must determine whether Bartee discarded the pill bottle voluntarily or whether that abandonment was involuntary, a result of improper and illegal use of police authority.

Not surprisingly, the state declines to refer to Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988), in its initial brief on the merits. In Spann, police officers, admittedly lacking founded suspicion to detain the defendant, ordered the defendant to stop, whereupon the defendant dropped an aluminum package near his feet. The district court held that the lack of reasonable suspicion rendered the abandonment of the package involuntary, particularly in light of the fact that the defendant dropped the package as a result of the order to stop. Id. at 826. The Spann case is virtually identical to this one.

Both revolve around the pivotal fact that the defendant in each case discarded the property only after being ordered to stop by the police authorities. In each case, this abandonment was the direct result of the order to stop, which constituted an illegal seizure under the Fourth Amendment to the United States Constitution and Article I, section 12 of the Florida Constitution.

There is an apparent conflict between the Spann opinion and the Arnold decision rendered in January of 1990 by a different panel of the same district court. Each case presumes illegal conduct on the part of the police, but while the Spann panel holds that this conduct forecloses the possibility of voluntary abandonment, the Arnold panel holds the abandonment can still be voluntary, even in the face of illegal use of police authority. The Arnold panel attempted to distinguish Spann on the ground that the parties in Spann stipulated to the fact that the defendant dropped the narcotics as a result of the police order to stop. Arnold, 15 FLW at D293. However, that distinction does not apply in this case. While there was no stipulation in this case to the pivotal fact, the trial court specifically found, as a factual matter, that Bartee's "consequential act of throwing out the crack cocaine was the result of your doing those two things [chasing him and ordering him to stop] which you didn't have the right to do." This factual finding carries great weight on appeal, and cannot be overturned unless there is absolutely no support for the finding on the record. "Appellate courts are precluded from

re-evaluating [abandonment] testimony in the absence of `inherently incredible and improbable testimony.'" State v. Manuel, 526 So.2d 85 (Fla. 4th DCA 1987)(Glickstein, J., concurring specially)(citing State v. Oliver, 368 So.2d at 1336). As such, the finding of fact by the trial court in this case carries precisely the same weight as the stipulation of the parties in Spann. Thus, the distinction relied upon by the court in Arnold has no application in this case since here, as in Spann, the defendant's abandonment was a direct result of the illegal police conduct.

The district court opinions which follow the Oliver reasoning, develope a meaningless distinction between the illegal seizure of the defendant and an illegal search of the defendant. These cases hold that "[o]nly when the police begin an illegal search can a subsequent abandonment of the property be held as being tainted by the prior illegal stop." Arnold, supra at D293, citing State v. Oliver. This semantically based distinction is drawn without good cause. Rather, this Court should look to what caused the abandonment: was it caused by the illegal police conduct? Or, did some intervening act occur which caused the defendant to abandon the contraband? Here, there was no intervening occurrence. The trial court found, and the record bears this out, that the abandonment was directly caused by the police officer's illegal conduct in chasing Bartee down, drawing his weapon, and ordering him to stop.

There is another, perhaps more compelling reason to follow Spann. The acknowledged purpose for excluding evidence

pursuant to the Fourth Amendment is to discourage or deter police misconduct. United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). To permit the admission of evidence recovered pursuant to active police misconduct would obliterate this purpose and the constitutional provisions on which it is based. The opinion in Arnold ignores the most basic premise behind the Fourth Amendment: unlawful conduct by the police authorities, those sworn to uphold and enforce the law, cannot be tolerated to any degree. Here, the police chased and ordered a citizen to stop and raise his hands despite the lack of any legal authority to do so. This conduct was reprehensible and cannot be condoned by this Court. Bartee discarded the pill bottle as a direct result of the misconduct. Had the police officers declined to chase Bartee, as he clearly should have done, Bartee would not have thrown the bottle away. Accordingly, the abandonment was involuntary, a direct result of police misconduct. Such misconduct cannot be rewarded with a conviction, but rather should be punished with a dismissal.

Indeed, it is absurd to suggest that any action on the part of Bartee could be construed as voluntary. He is being chased by a police officer who has ordered him to stop. The officer is, of course, armed with a weapon, and that weapon is drawn. At that point, Bartee discards the pill bottle. As the district court in this case noted, "it is the trial court's prerogative to evaluate and weigh the testimony as to whether the abandonment was voluntary or involuntary." State v.

Bartee, 15 F.L.W. D2699, D2700 (Fla. 1st DCA October 22, 1990) (citation omitted).

In State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), the Third District Court of Appeal reversed a trial judge's order granting the defendant's motion to suppress, holding that the defendant had voluntarily abandoned the contraband. However, the court expressed the following reservation: "This decision in no way authorizes open season by the state on people who walk or drive in the public streets." Id. at 1336. It is most unfortunate that police officers seem to believe that open season is exactly what has been declared by these decisions. Police officers obviously do not feel restrained by the constitution so long as they get the drugs they are after, as well as the individuals carrying them. By permitting police officers to exceed the scope of their authority and utilize conduct which is illegal, and then failing to deter that misconduct, the open season feared by the third district is officially declared.

The state asks this Court to not only condone misconduct on the part of police officers, but to reward illegal activity with a conviction. It is not now, nor has it ever been the policy of this state to do so. This Court should declare the season closed. Any abandonment caused directly by illegal police action must be per se involuntary. Any evidence seized as a result of this involuntary abandonment must be suppressed, as it was drawn from the poisoned well of police misconduct.

V. CONCLUSION

For the foregoing reasons, the respondent respectfully requests this Court to approve the opinion of the district court affirming the trial court order granting his motion to suppress evidence seized as a result of police misconduct.

Respectfully submitted,

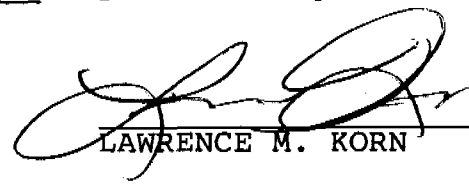
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LAWRENCE M. KORN #0714798
Assistant Public Defender
Leon County Courthouse
Fourth Floor North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing answer brief on the merits of respondent has been furnished by hand-delivery to Mr. Bradley Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Mr. David Bartee, Route 3, Box 111, Gainesville, Florida, 32601, on this 7th day of January, 1991.



LAWRENCE M. KORN

A P P E N D I X

residential area. Appellee was not the subject of an arrest warrant. One of the officers approached appellee and asked if he had seen the direction taken by a suspect who had fled upon sight of the officer. The officer wore a bullet-resistant vest and a raid jacket with a sheriff's star pinned on it, and he carried a firearm which was covered by his raid jacket. Appellee pointed to a duplex, and said the person in question had gone into the duplex. The officer described appellee as very nervous, and very hesitant to talk to him. The conversation was brief, and when the officer stepped back slightly, appellee ran, whereupon the officer ran after him. The officer testified that he told appellee to stop, and asked why he was running.

Appellee continued to run, followed by the officer. When the officer was approximately twenty yards from appellee, he saw appellee reach into his right pocket. At that point, the officer reached for his gun. The officer then observed appellee throw a pill bottle. He retrieved the bottle, determined that it contained crack cocaine, and radioed to a fellow officer to arrest appellee for possession of cocaine. When asked if he ever told appellee to put his hands in the air, the officer stated, "I told him I wanted to see his hands. I didn't know if he was going for a gun or what."

The trial court ruled that the officer was without cause to chase appellee or to order appellee to stop, that such acts constitute seizure under the Fourth Amendment, and that appellee's subsequent act of throwing the contraband resulted from the officer's unlawful conduct. After making such determination, the trial court granted the motion to suppress evidence.

Where a police chase or "stop" is unjustified, the question becomes whether contraband seized as a result of the unlawful stop was abandoned voluntarily, or whether the abandonment was an involuntary act directly attributable to the unlawful stop. State v. Arnold, 15 F.L.W. D292 (Fla. 4th DCA Jan. 31, 1990); State v. Oliver, 368 So.2d 1331, 1334-35 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980). If the abandonment was voluntary, no search of the person occurred. Arnold, 15 F.L.W. at D292-293; Oliver, 368 So.2d at 1334. If the abandonment was involuntary as being tainted by the unreasonable police stop, "such a search has taken place under the fruit of the poisonous tree doctrine." Oliver, 368 So.2d at 1334-1335, citing Wong Sun v. U.S., 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

There is considerable case law holding that a prerequisite to involuntary abandonment is the commencement of an illegal search prior to the abandonment. See, e.g., State v. Perez, 15 F.L.W. D1355 (Fla. 3d DCA May 15, 1990); State v. Arnold, 15 F.L.W. D292 (Fla. 4th DCA Jan. 31, 1990); Oliver, 368 So.2d at 1335, and cases cited therein; United States v. Collis, 766 F.2d 219, 222 (6th Cir.), cert. denied, 474 U.S. 851, 106 S.Ct. 150, 88 L.Ed.2d 124 (1985); United States v. Jones, 707 F.2d 1169, 1172 (10th Cir.), cert. denied, 464 U.S. 859, 104 S.Ct. 184, 78 L.Ed.2d 163 (1983). In this vein, the inquiry has been whether the defendant had a reasonable expectation of privacy in the area where the property was abandoned, "as where a person discards property (a) in the open fields while being pursued by the police, ... or (b) in the public street either prior to an attempted

police stop, ... or after such a stop has been attempted or completed, ..." Oliver, 368 So.2d at 1335. See also Perez, 15 F.L.W. D1355; Collis, 766 F.2d at 222; Jones, 707 F.2d at 1172.

At the outset, the record in this case supports the trial court's conclusion that the stop was improper, and the state does not seriously contest this determination. Moreover, the facts of this case are remarkably similar to the facts in Arnold. Citing Oliver, the fourth district court of appeal in Arnold concluded that the voluntariness of an abandonment turns upon whether a search had commenced prior to the abandonment, and not upon whether there was an unreasonable police stop. Thus, under the Oliver/Arnold rationale, a search occurs when "police demand that an individual hand over or disclose a concealed object," but it is not a search for police to retrieve property which an individual abandoned in an area where he has no reasonable expectation of privacy." Arnold, 15 F.L.W. at D293. The Arnold court found the abandonment in that case was not in response to the commencement of an illegal search, and the narcotics were not retrieved from a place where the defendant had a reasonable expectation of privacy.

A different result obtained in Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988). In Spann, officers on surveillance noticed a vehicle with a white female driver, a white male front seat passenger, and a black male back seat passenger. The car stopped on the shoulder of the road in a black neighborhood. The black male exited from the vehicle, and entered a nearby

restaurant. He returned to the car in a few minutes, and the white male exited from the car. The police approached and ordered appellant (the black male) to "freeze, stop." Appellant stopped, then dropped an aluminum package near his feet. The officer retrieved the package, recognizing it as cocaine. In the subsequent search, a bag of marijuana was found in appellant's rear pocket. At the suppression hearing, the officer testified that he had seen whites use black people to make drug purchases, to avoid being cheated. The court held that notwithstanding the officer's experience and knowledge, his observations were insufficient to justify a stop under section 901.151, Florida Statutes. In view of the unlawful stop, and based upon the parties' stipulation that the defendant dropped the cocaine packet as a result of the officer's order to stop, the court rejected the state's abandonment theory and reversed the trial court's denial of the motion to suppress. 529 So.2d at 826.

In Perez, as in Spann, the officer ordered the defendant "to freeze" or to stop. The trial court in Perez granted the motion to suppress, reasoning that the defendant's abandonment of a firearm was a product of the attempted illegal stop. The appellate court reversed, finding that since the case involved an illegal stop, as opposed to an illegal search, the police were entitled to seize the firearm as abandoned property and the motion to suppress should have been denied. The court then went on to certify conflict with the fourth district's decision in Spann, as being factually similar to Perez.

We recognize that body of case law which holds that a voluntary abandonment of contraband is not rendered involuntary by a prior unlawful stop. However, we are also cognizant that it is the trial court's prerogative to evaluate and to weigh the testimony as to whether the abandonment was voluntary or involuntary. See State v. Manuel, 526 So.2d 85, 86 (Fla. 4th DCA 1987). In this vein, we find that the trial court's ruling on the motion to suppress in this case is consistent with decisions of this court on the same principle, see, e.g., Dames v. State, 15 F.L.W. D2147 (Fla. 1st DCA Aug. 24, 1990); Gipson v. State, 537 So.2d 1080 (Fla. 1st DCA 1989), and is in accord with the decision of the fourth district in Spann.

Accordingly, we affirm the order granting the motion to suppress evidence, on the basis of Dames v. State and Spann v. State. However, we certify that this decision is in conflict with decisions in State v. Perez and State v. Arnold, both of which reversed the grant of motions to suppress on facts similar to those in the instant case.

ERVIN and BARFIELD, JJ., CONCUR.