087

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
DEC 11 1990
CLERK, SUPREME COURT
By ______ Deputy Clerk

STATE OF FLORIDA,

Appellant/Petitioner

v. CASE NO.: 76,960

DAVID BARTEE,

Appellee/Respondent.

______________________________/

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRADLEY R. BISCHOFF
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 714224

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLANT/
PETITIONER

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

ISSUE

THIS COURT SHOULD REVERSE THE OPINION BELOW AND HOLD THAT AN IMPROPER POLICE STOP WHICH LEADS TO A VOLUNTARY ABANDONMENT OF CONTRABAND CANNOT FORM THE BASIS FOR SUPPRESSION OF THAT CONTRABAND.

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CITATIONS

CASES	PAGE(S)
Curry v. State, ___ So.2d ___, F.L.W. D2902 (Fla. 5th DCA November 29, 1990)	9
Hester v. United States, 265, U.S. 57, 44 S.Ct. 445, 68 L.Ed 898 (1924)	8
Michigan v. Chesternut, 486 U.S. ___, 100 L.Ed.2d 565, 108 S.Ct. ___ (1988)	7
Perez v. State, Case number 76,184	7
State v. Arnold, ___ So.2d ___, 15 F.L.W. D292 (Fla. 4th DCA, January 31, 1990)	5
State v. Bartee, ___ So.2d ___, 15 F.L.W. D2699 (Fla. 1st DCA, October 22, 1990)	4
State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980)	6
State v. Perez, ___ So.2d ___, 15 F.L.W. D1355 (Fla. 3d DCA, May 15, 1990)	5
OTHER AUTHORITIES:	
Article V, Section 3(b)(3) of the Florida Constitution	4
Rule 9.030(a)(2)(A)(vi), Fla.R.App.P.	4

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Petitioner

v. CASE NO.: 76,960

DAVID BARTEE,

Appellee/Respondent.

______________________________/

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, Appellant below, will be referred to herein as "Petitioner." Respondent, David Bartee, Appellee below, will be referred herein as "Respondent". The opinion below, State v. Bartee, ___ So.2d ___, 15 F.L.W. D2699 (Fla. 1st DCA October 22, 1990), is attached hereto.

STATEMENT OF THE CASE AND FACTS

Respondent was arrested for possession of cocaine. (The facts relied on by Petitioner appear in the opinion issued below, infra). The trial court granted respondent's motion to suppress the cocaine. On appeal, the First District Court of Appeal affirmed the order of suppression. State v. Bartee, supra. at D2699. The First District also certified that its opinion was in conflict with State v. Perez, ___ So.2d ___, 15 F.L.W. D1355 (Fla. 3d DCA May 15, 1990), and State v. Arnold, ___ So.2d ___, 15 F.L.W. D292 (Fla. 4th DCA January 31, 1990).

SUMMARY OF ARGUMENT

This Court should reverse the opinion of the First District in this case which conflicts with cases of the Third, Fourth, and Fifth Districts and the U.S. Supreme Court. This Court should hold that where a suspect who may be subject to an improper police stop but not a search decides to abandon contraband in a place where he has no reasonable expectation of privacy, that the voluntarily abandoned property is not subject to suppression pursuant to the Fourth Amendment to the United States Constitution.

ARGUMENT

ISSUE I

THIS COURT SHOULD REVERSE THE OPINION BELOW AND HOLD THAT AN IMPROPER POLICE STOP WHICH LEADS TO A VOLUNTARY ABANDONMENT OF CONTRABAND CANNOT FORM THE BASIS FOR SUPPRESSION OF THAT CONTRABAND.

Petitioner invokes this Court's jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(vi), Fla.R.App.P., to review the opinion of the First District Court of Appeal in this case which is certified to be in conflict with decisions of the Third and Fourth District Courts of Appeal.

In State v. Bartee, ___ So.2d ___, 15 F.L.W. D2699 (Fla. 1st DCA, October 22, 1990), attached hereto, the district court affirmed the trial court's order suppressing physical evidence, i.e. narcotics. The facts as stated in the opinion below are as follows:

> The record reflects that appellee was encountered by officers assigned to execute arrest warrants in a Gainesville 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-resistent 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.

Bartee, supra. at D2699.

The district court held that the "stop" by the officer was improper and thus the Appellee's abandonment of the contraband was rendered involuntary, and consequently the contraband was properly suppressed. The district court certified that its decision is in conflict with State v. Perez, ___ So.2d ___, 15 F.L.W. D1355 (Fla. 3d DCA, May 15, 1990), and State v. Arnold, ___ So.2d ___, 15 F.L.W. D292 (Fla. 4th DCA, January 31, 1990). Bartee, supra. at D3700. Petitioner agrees.

The facts of the Perez case as stated in the opinion are as follows:

> Two uniformed City of Miami police officers were on patrol in an area known to be high in narcotics activity. They observed Perez and another male, who appeared to be passing an object between them. Believing that the two might be engaging in a narcotics transaction, one officer exited the police car and started to walk toward Perez. He either told Perez to freeze, or to stop. Perez fled on foot and the officer chased him. Perez ran into a alley while pulling something from his waistband. The officer heard a loud, metallic noise of something dropping in the alley. The officer caught Perez who, after being given Miranda warnings, volunteered that he became nervous and ran "because he knew the gun that he had was stolen." A revolver was recovered in the alley. Perez was charged with carrying a concealed firearm and carrying a concealed firearm by a convicted felon.

Perez, supra at D1355. The Third District reversed the trial court's suppression of the firearm stating that ". . . a person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person. . ." Perez, supra at D1355, citing State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980).

Similarly, in State v. Arnold, supra, the Fourth District reversed the trial court's order suppressing physical evidence. The facts of that case are as follows:

> While conducting a drug sweep in a residential area known for crack cocaine dealing, police officers approached a group of people, of which appellee was a member. The group was standing in front of an apartment complex and did not appear to be involved in any illegal activity. At the sight of the approaching officers, the group scattered. One of the officers began chasing appellee and another assisted in the pursuit. During the chase, the officer saw appellee throw a paper bag on the roof. When the officer retrieved the bag he found it contained individually wrapped cocaine base rocks and arrested appellee.

Arnold, supra. at D292. The district court held 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.

In the instant case, however, the district court held in essence that a mere stop alone renders property abandoned subsequent thereto involuntarily abandoned and thus subject to suppression. The instant case is clearly in conflict with Perez and Arnold, supra.

Petitioner would note that this Court has accepted review of Perez v. State, case number 76,184.

Petitioner would further note that the district court's opinion in the instant case is in conflict with Michigan v. Chesternut, 486 U.S. ___, 100 L.Ed.2d 565, 108 S.Ct. ___ (1988). In that case the Respondent, on observing the approach of a

police car on routine patrol, began to run. The police followed him "to see where he was going", and after catching up with him and driving alongside him for a short distance, observed him discarding a number of packets. Surmising that the pills subsequently discovered in the packets contained codeine, the police arrested him.

The Court held that the officers' pursuit of the respondent did not constitute a "seizure" implicating Fourth Amendment protections. The narcotics were thus not involuntarily abandoned.

The opinion below also disregards the case of Hester v. United States, 265, U.S. 57, 44 S.Ct. 445, 68 L.Ed 898 (1924). In Hester, U.S. Supreme Court held that where a suspect fled from the police who were pursuing him and the police fired a pistol whereupon the suspect dropped a jug of moonshine whiskey in an "open field", the Fourth Amendment did not mandate the suppression of the whiskey. The Court stated:

> . . . The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible; it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after

> it had been abandoned. This evidence was not obtained by the entry into the house, , and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the jurisdiction, the special protection accorded by the 4th Amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

Hester, 68 L.Ed at 900.

Article I, Section 12, of the Florida Constitution specifically states that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures "... shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." (emphasis supplied). Pursuant to the U.S. Supreme Court's decisions in Chesternut and Hester, supra, the First District reached an erroneous conclusion and the opinion below must be reversed as the opinion is in contravention of the Article I, Section 12 mandate.

The opinion below is also in direct conflict with the recent case of Curry v. State, ___ So.2d ___, F.L.W. D2902 (Fla. 5th DCA November 29, 1990). The facts of Curry are technically identical to the facts of the Bartee opinion:

> At approximately 11:00 p.m., Officer Harting and others undertook a "sweep" for narcotics in a known high drug activity area. Some of the police patrol approached a closed bar, the Silver Shadow, from the front. Harting and his partner approached the Silver Shadow from the back, intending to catch anyone who ran from the front to the rear. All members of the police team wore bluejeans, green T-shirts labeled "Deputy Sheriff," and had their badges showing on their gun belts.
>
> When Curry saw the police officers in front of the bar, he walked rapidly to the back towards Harting's partner. Curry had been standing in front of the Silver Shadow with two other black males. No exchange of money or contraband was observed by the police officers.
>
> Harting walked up behind Curry and said, "Stop, police." Curry continued to walk away, but he threw a pill bottle on the ground. Harting was about ten feet away from Curry. He quickly picked up the pill bottle and then grabbed Curry. Harting opened the pill bottle and saw the rocks of cocaine. He arrested Curry and searched him.

Curry, supra at D2902, 2903.

The Fifth District affirmed the trial court's order denying the defendant's motion to suppress. The court held that although the officer lacked a founded suspicion to detain Curry, Curry's independent act of throwing down the contraband without being ordered to do so did not implicate Fourth Amendment protections. The court stated:

> We choose to follow *State v. Oliver*, 368 So.2d 1331 (Fla. 3d DCA 1979) and *A.G. v. State*, 562 So.2d 400 (Fla. 3d DCA 1990), which we think states the better rule. In *Oliver*, as well as *A.G.*, the police ordered

the defendants to "Stop, police," under circumstances which gave the police no founded suspicion to make an investigatory stop. In response, the defendants threw down contraband and ran. They were caught and arrested.

The Third DCA held that although the initial police stop order was invalid, that did not constitute an illegal search when the defendant, after stopping or while still running away, threw down contraband. Rather, the defendants' act of throwing down the drugs was "voluntary abandonment." The drugs, in turn gave the police sufficient grounds to stop and arrest the defendants.

Only when the police begin an actual physical search of a suspect does abandonment become involuntary and tainted by an illegal search and seizure. See *Morris v. State*, 519 So.2d 706 (Fla. 2d DCA 1988). Nor can the police, after making an illegal stop, order a defendant to empty his pockets or open his fist, without founded suspicion. *Daniels v. State*, 543 So.2d 363 (Fla. 1st DCA 1989); *State v. Crum*, 536 S.W.2d 507 (Mo.App. 1976). Any evidence obtained under those circumstances would be subject to the exclusionary rule.

This rule appears to us to be more consistent with the one developed in the consent to search cases, after an illegal *Terry* stop. Evidence discovered after consent to search is given, is not per se tainted, if consent was freely given (although the state has higher burden of proof in such cases). *See Jordan*. Here, evidence obtained after, or in the course of making an illegal stop, by the defendant's own decision to drop or throw it away, is not per se tainted by the illegal stop. If the police proceed to search a defendant or order him to reveal the contents of his pockets after making an illegal stop, the Fourth Amendment line requiring suppression will be crossed.

Curry, supra at D2903.

It has long been accepted that the law in Florida is that where no search has occurred and an individual discards contraband in a public place in the hope of avoiding arrest with out any police order or request to do so, that contraband is not subject to suppression. In State v. Oliver, 368 So.2d 1331, 1335 (Fla. 3d DCA 1979), the court stated:

> It is not a search, however, for the police to retrieve property which a defendant has voluntarily abandoned in an area where he has no reasonable expectation of privacy, *Freyre v. State*, 362 So.2d 989, 991 (Fla.3d DCA 1978), as where a person discards property (a) in the open fields while being pursued by the police, *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed 898 (1924), or (b) in the public street either prior to an attempted police stop, *Mitchell v. State*, 60 So.2d 726 (Fla. 1952); *Holliday v. State*, 104 So.2d 137 (Fla. 1st DCA 1958); *State v. Jackson*, 240 So.2d 88 (Fla. 3d DCA 1970), or after such a stop has been attempted or completed, *State v. Nittolo*, 317 So.2d 748 (Fla. 1975; *State v. Padilla*, 235 So.2d 309 (Fla. 3d DCA 1970), or (c) in a hotel room or shack which has been vacated, *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); *Jones v. State*, 332 So.2d 615 (Fla. 1976). Central to this line of cases is the court's conclusion that the police seizure of such evidence does not invade a reasonable expectation of privacy belonging to the person in question. In each case, the person has made a voluntary decision to avoid a police search by discarding evidence in an area where he has no Fourth Amendment protection. As a consequence, he cannot later claim that, notwithstanding his conduct, he was the victim of a police search as to the evidence he discarded.

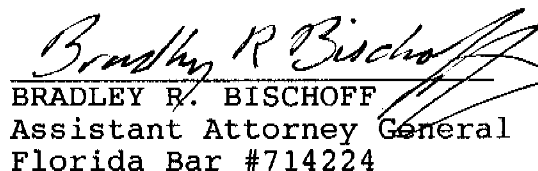
The First District's opinion below in State v. Bartee, represents a departure from this established rule of law. In order that the First District's view of the law in this area may be harmonized with that of the Third, Fourth, and Fifth District Courts of Appeal and the U.S. Supreme Court, Petitioner urges this Honorable Court to reverse the opinion below and direct the trial court to deny the Respondent's motion to suppress physical evidence.

<u>CONCLUSION</u>

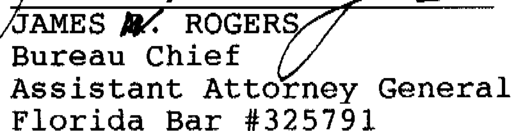
Petitioner urges this Honorable Court to reverse the opinion below and issue an opinion recognizing that where a suspect who may be subject to an improper police stop but not a search decides to abandon contraband in a place where he has no reasonable expectation of privacy, that such voluntarily abandoned property is not subject to suppression pursuant to the Fourth Amendment to the United States Constitution.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



BRADLEY R. BISCHOFF
Assistant Attorney General
Florida Bar #714224



JAMES W. ROGERS
Bureau Chief
Assistant Attorney General
Florida Bar #325791

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLANT/
PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Lawrence M. Korn, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of December, 1990.

BRADLEY R. BISCHOFF
Assistant Attorney General

against double jeopardy. Although recognizing that this same contention has heretofore been rejected in *Glass v. State*, 556 So.2d 465 (Fla. 1st DCA 1990), appellant's motion for rehearing calls to our attention that we have, in *Glass* as well as in *Betsey v. State*, 559 So.2d 202 (Fla. 1st DCA 1990), and *Buckley v. State*, 558 So.2d 534 (Fla. 1st DCA 1990), certified the following question:

> DOES A DOUBLE JEOPARDY VIOLATION RESULT FROM THE IMPOSITION OF A PROBATIONARY SPLIT SENTENCE WHEN THE LEGISLATURE HAS NOT EXPLICITLY AUTHORIZED THAT DISPOSITION IN THE SENTENCE ALTERNATIVES OF SECTION 921.187, FLORIDA STATUTES?

We hereby certify that same question to the Florida Supreme Court as a question of great public importance.

The motion for rehearing is otherwise denied. (WIGGINTON and ZEHMER, JJ., CONCUR.)

* * *

Criminal law—Search and seizure—Abandonment—Officer assigned to execute arrest warrant stopping defendant who was not subject of arrest warrant to inquire whether defendant saw direction taken by fleeing suspect and subsequently chasing defendant when defendant ran after officer had stepped back slightly at end of conversation—Defendant reaching into pocket and throwing aside a pill bottle containing crack cocaine—Whether defendant voluntarily abandoned contraband turns upon whether search had commenced prior to abandonment and not upon whether initial stop of defendant was unreasonable—No error in trial court's ruling that officer was without cause to chase defendant or order defendant to stop, that officer's acts constituted a seizure under the Fourth Amendment, and that defendant's abandonment of contraband resulted from officer's illegal conduct and was involuntary—Conflict certified

STATE OF FLORIDA, Appellant, v. DAVID BARTEE, Appellee. 1st District. Case No. 89-3329. Opinion filed October 22, 1990. An Appeal from the Circuit Court for Alachua County. Robert P. Cates, Judge. Robert A. Butterworth, Attorney General, and Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellant. Barbara M. Linthicum, Public Defender, and Lawrence M. Korn, Assistant Public Defender, Tallahassee, for Appellees.

(JOANOS, J.) The state appeals an order granting appellee's motion to suppress physical evidence, i.e., contraband. The narrow issue in this case is whether the contraband was abandoned voluntarily. We affirm.

The record reflects that appellee was encountered by officers assigned to execute arrest warrants in a Gainesville 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.)

* * *

Torts—Plaintiff allegedly sustaining hearing loss and tinnitis as result of loud music played by disc jockey at defendant's lounge—Assumption of risk—Trial court erred in granting summary judgment in favor of defendant based upon finding that, as matter of law, plaintiff was precluded from recovering for injuries as result of assumption of risk—Jury should have been permitted opportunity to evaluate claim under principles of comparative negligence—Proximate cause—Evidence of causal relationship between loud music and plaintiff's tinnitus sufficient to preclude summary judgment

DIANE BOOTZ, Appellant, v. CROWN LEISURE CORPORATION, a Florida corporation, f/k/a PAPPA'S ENTERTAINMENT, INC., Appellee. 1st District. Case No. 89-1264. Opinion filed November 6, 1990. An appeal from the Circuit Court for Duval County; Virginia Beverly, Judge. Clyde M. Collins, Jacksonville, for appellant. Stephen C. Bullock and Melanie W. Boyajian of Marks, Gray, Conroy & Gibbs, Jacksonville, for appellee.

(WOLF, J.) Bootz appeals from a final summary judgment entered in favor of the defendant/appellee, Crown Leisure Corporation. The trial court entered a summary judgment finding that: (1) As a matter of law, the plaintiff was precluded from recovering for her injuries as a result of assumption of risk, and (2) that the uncontroverted facts failed to establish any alleged permanent injury proximately caused by the conduct of the defendant. We find these rulings to be in error and reverse.

The plaintiff/appellant, Diane Bootz, a 34-year-old woman, attended Pappa's Lounge (owned by Crown Leisure Corporation) three to four times a week between September 1984, and September 1986. On each of these occasions, loud dance music was being played. Upon leaving Pappa's, the appellant would always have ringing in her ears, but after sleeping through the night, the ringing would disappear.

On Saturday, September 14, 1986, appellant went to Pappa's with her sister and several friends. About 1:00 a.m., Bootz entered the dance floor to dance to a song entitled "Hey Bartender." During the song, the disc jockey turned the volume of the music up on the words "hey bartender." While dancing in front of a loudspeaker, Bootz stated that she felt a sudden sharp pain in her left ear. The appellant immediately left the lounge with her ear ringing. When the ringing persisted for over a week, Bootz sought medical attention.

The disc jockey testified at deposition that he would periodically check the noise level, that the decibel level was usually 95 to 105, and that "just about all clubs play it that way just because that is what people go for." He did not check the decibel level during the song "Hey Bartender."

Ms. Bootz reported that her hearing was perfect before the incident at Pappa's Lounge. Dr. Castelli found a hearing loss in her left ear consistent with noise exposures. The doctor testified that repeated incidents of loud music over a period of time was a contributing cause to her tinnitus. Dr. Ramesh also examined and treated Ms. Bootz, and said that it was possible that dancing in front of a loud speaker which was blaring loud music could be a cause of tinnitus. Dr. Schwaber also examined Ms. Bootz and found her to be suffering from a high frequency loss in her left ear and tinnitus.

The trial judge ruled that the appellant's claim was precluded by the doctrine of assumption of risk, finding that Bootz fully appreciated and assumed the risk of exposure to loud music. The trial judge, however, did not have the benefit of the supreme court's ruling in *Mazzeo v. City of Sebastian*, 550 So.2d 1113 (Fla. 1989), at the time she entered summary judgment.

In *Mazzeo*, the supreme court held that the plaintiff's foolhardy behavior of diving into four feet of water did not constitute an express assumption of risk which would preclude recovery.[1] The court found that Mazzeo's unreasonable conduct constituted secondary assumption of risk which did not preclude recovery by the plaintiff, but rather should be evaluated by a jury under principles of comparative negligence. *Id.* at 1117.

As in *Mazzeo*, the conduct of the plaintiff in the instant case may be determined to be unreasonable, but it cannot be said thatBootz returned to the lounge with the express intention of injuring herself. In light of *Mazzeo*, the jury should have had the opportunity to evaluate the claim under the principles of comparative negligence.

Further, the evidence of the causal relationship between the loud music and the appellant's tinnitus was sufficient to preclude summary judgment and require that the question be submitted to the jury. *Atkins v. Humes*, 110 So.2d 663 (Fla. 1959).

Reversed and remanded. (WIGGINTON and MINER, JJ., concur.)

---

[1]The court held that the defense of express assumption of risk was only available in situations where the plaintiff expressly agrees in writing to absolve the defendant of liability, and where the plaintiff knowingly and voluntarily participates in a contact sport.

* * *