IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Petitioner

v.

CASE NO.: 76,960

DAVID BARTEE,

Appellee/Respondent.

_____/

REPLY BRIEF OF PETITIONER

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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 either as "Respondent" or by his name. The opinion below is reported as State v. Bartee, ___ So.2d ___, 15 F.L.W. D2699 (Fla. 1st DCA October 22, 1990).

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts set forth in its Brief on the Merits.

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.

At the initial encounter with Respondent Bartee, he exhibited extremely hesitant and nervous behavior while a police officer was conducting an innocent conversation with him. When the officer stepped back slightly, Bartee ran away. It is well-recognized that flight is a circumstance tending to prove consciousness of guilt. U.S. v. Bowers, 458 F.2d 1045, (11th Cir. 1972), cert. den. 409 U.S. 868 (1972). Certainly, the officer was authorized to temporarily detain Bartee for the purpose of ascertaining the circumstances surrounding his flight from the police. See §901.151, Fla. Stat. (the Florida "Stop and Frisk" statute).

When the officer saw Bartee reaching into his pocket while running, the officer, fearing the worst, reached for his gun. 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." (slip opinion at 2). The officer did not tell Bartee to reach into his pocket, retrieve a pill bottle of "crack" cocaine, and throw it away, which is what Bartee did.

It is naive to suggest that Bartee involuntarily discarded the contraband and that he was somehow forced to do so by the officer. He was no more forced to abandon the "crack" than he was forced to flee. The Fourth Amendment was never intended to protect one from his own folly, it was and is intended to deter unreasonable searches and seizures. The contraband in this case was not discovered as the result of an unreasonable search and seizure.

Petitioner reiterates that Hester v. United States, 265 U.S. 57, 68 L.Ed 898, 44 S.Ct. 445 (1924), is controlling for the proposition that there was no seizure in this case as the acts of Bartee himself disclosed the contraband. As the Supreme Court stated, ". . . 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." Hester, 68 L.Ed at 900. Once Bartee himself made the choice to abandon the contraband in an area in which he had no expectation of privacy, the Fourth Amendment's "special protection" ceased to protect him.

Respondent incorrectly states that Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988) is "virtually identical" to the case at bar. The State disagrees. The facts in Spann as stated in the opinion are as follows:

> In this drug possession case, while surveilling a particular area, the police

> noticed a vehicle with a white female driver, and a white male front seat passenger, and appellant, a black back seat passenger, stop near the intersection of 27th Avenue and North Gifford Road in a black neighborhood. The car pulled off the pavement onto the shoulder and the car lights were turned off. Appellant got out of the car, walked down the street, and entered a nearby restaurant. In a few minutes he returned to the car; whereupon, the white male exited the car and, as the police approached, they ordered appellant to "freeze, stop." Appellant stopped and then dropped an aluminum package near his feet; the officers then told him to put his hands on the hood of the car. The police picked up the package and recognized it as cocaine. They then searched appellant and found a bag of marijuana in his rear pocket. Appellant was thereupon arrested for possession of cocaine and marijuana.

Spann, supra at 825.

In contrast, Bartee fled from the police for no apparent reason, alerting the officer that he should inquire into Bartee's reason for fleeing. The officer here was authorized to investigate pursuant to §901.151, Fla. Stat. The facts of Arnold are much closer to those of the instant case. In Arnold, police approached a group of people who did not appear to be engaging in any criminal conduct and the group scattered. Police chased the defendant, who threw away a paper bag which was found to contain cocaine base rocks.

As in Arnold, the chain of events leading to the abandonment in this case began with Bartee fleeing. Had he not fled, the officer's suspicions would not have been aroused and

Bartee would not have felt the urge to divest himself of his illegal contraband. To the extent that Spann and Arnold conflict, Arnold is persuasive authority on the point of law here before the Court. Accord; State v. Perez, 15 F.L.W. D1355 (Fla. 3d DCA May 15, 1990); Curry v. State, 15 F.L.W. D2902 (Fla. 5th DCA November 29, 1990); State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980).

Regardless of whether the police "stop" of the respondent was legal or illegal, Petitioner urges this Court to adopt the position of the Fourth District in Arnold, the Fifth District in Curry, and the Third District in Perez, and Oliver, and hold that:

> . . . the weight of authority is that a person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person. . . Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search . . . and even that result may vary depending on the facts of the case."

Oliver, supra at 1335-36.

CONCLUSION

Based on the above citations of legal authority, Petitioner urges this Honorable Court to quash the opinion of the District Court of Appeal below and remand the case to the trial court with directions to enter an order denying Respondent's motion to suppress evidence.

Respectfully submitted,

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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, this 28th day of January, 1991.

Bradley R Bischoff

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