IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 77,398

GREG ANDERSON,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED CONFLICT

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case arises out of a prosecution for possession of cocaine, possession of drug paraphernalia and misdemeanor possession of marijuana. Respondent moved to suppress the items giving rise to the prosecution and the trial court denied his motion to suppress. (A. 1) The district court reversed. Then it certified the question that is before this court:

> CAN AN ABANDONMENT OF PROPERTY AFTER AN ILLEGAL POLICE STOP BUT NOT PURSUANT TO A SEARCH BE CONSIDERED INVOLUNTARY? (A. 6)

The facts developed at the suppression hearing showed the following. Shortly after midnight an officer observed a man distributing items to others. Anderson had some type of hand transaction with this man. Anderson then went to the front porch of his house and on seeing the marked cruiser placed something in a planter. After the cruiser passed, he retrieved something from the planter and put it into his shoe. An office then detained Anderson and placed him in a cruiser while he ran a warrants check. Finding no warrants the officer released Anderson. A subsequent check of the cruiser found a cocaine pipe where Anderson had been. The office then searched Anderson and found about one gram of marijuana and a dollar bill in his shoe with cocaine residue on it. The officer the arrested Anderson for the crimes at the root of this prosecution. (A. 2)

The district court found that there was not founded suspicion to support the stop, A. 2-4, and then turned its attention to whether the abandoned cocaine pipe could be

considered to have been voluntarily abandoned. (A. 4-5) The district court concluded an abandonment following an illegal detention could not be considered voluntary and ordered the trial court to grant the motion to suppress certifying the question that gives this court jurisdiction. (R. 6)

The court should note that respondent pled nolo contendere to this charge without reserving any question for the appeal. (R. 6-7, 26) All counsel said during the plea hearing was that he would like to make a motion to suppress. (R. 26) He did not file his motion to suppress until some twenty-one days after his plea. (R. 11) The trial court heard it nevertheless. (R. 30-46)

SUMMARY OF THE ARGUMENT

As to Issue I: The district court should not have reached and decided the issues raised by the motion to suppress because respondent had entered an unconditional plea of nolo contendere to the charges.

As to Issue II: This is not just a furtive gesture case. Appellant had been involved in a hand to hand transaction with an individual who had been involved in numerous highly suspicious transactions. And appellant hid and then recovered something in his hand in response to seeing a marked cruiser and its passing.

Because of the factual contours of this case the district court case law is all readily distinguishable. The case law on which the state relied in the district court mandates that this court reverse the finding that there was not an adequate basis for the detention of the respondent.

As to Issue III: The district court's analysis is flawed because it treats Wong Sun as a "but for" case. By its own terms, it is not a "but for" case. For the "fruit of the poisonous tree" doctrine to apply, there must be an exploitation of the primary illegality. Here the police did nothing to exploit the primary illegality that the district court found to exist. The court should have followed the voluntary abandonment cases because that is exactly what happened here. The cases that it chose to follow never really considered the voluntary abandonment theory of why the evidence should not be suppressed.

ARGUMENTS

Issue I

WHETHER THE DISTRICT COURT SHOULD HAVE REACHED AND DECIDED THE ISSUES RAISED BY THE MOTION TO SUPPRESS?

In order to preserve an issue for review in the context of a plea of nolo contendere, it is necessary for the defendant to specifically reserve a dispositive question of law for the court. Fla. Stat. §924.06(3); State v. Ashby, 245 So.2d 225 (Fla. 1971). There was no dispositive question of law before the court when respondent entered his unconditional plea of nolo contendere to the charges. Such a plea preserves only the question of the facial validity of the information, Hand v. State, 334 So.2d 601 (Fla. 1976) and those few issues arising contemporaneously with the plea and thereafter that are discussed in Robinson v. State, 373 So.2d 898 (Fla. 1979). Appellant did not preserve the issues arising out of his motion to suppress for review by the district court.

Issue II

WHETHER THERE WAS A FOUNDED SUSPICION FOR THE STOP IN THIS CASE?

Petitioner does not concede that the stop in this case was illegal. This case involves more than just furtive behavior on respondent's part. The context in which he threw the substance in his hand into the planter and then recovered it after the marked cruiser passed makes the difference. Appellant had been involved in a hand to hand transaction with an individual who had been repeatedly involved in several highly suspicious transactions with people on foot and in cars. (R. 33-34) This gave probable cause to believe that the individual was involved in narcotics transactions. Blanding v. State, 446 So.2d 1135 (Fla. 3d DCA 1984).

The district court sought to distinguish Blanding on the facts pointing out that what the officer observed in that case was known to him to be the type of container used for contraband drugs in the area. But, that distinction is not meaningful. While the police in this case might not have known what the man with whom appellant had the hand transaction was giving out, it became clear that it was some sort of contraband when appellant threw the substance in his hand into a nearby planter on sighting the marked cruiser. (R. 41)

Any reasonably prudent person would conclude that appellant had received narcotics from the man involved in the multiple transactions, hid them when he saw the police and then recovered

them after the car had passed. That is what the totality of the circumstances in this case say. And, it is to the totality of the circumstances that this court must look in deciding if there was an adequate basis for the stop. That is the test. The assessment of whether an officer has a founded suspicion is made in the light of the "totality of the circumstances -- the whole picture". Tamer v. State, 484 U.S. 583, 584 (Fla. 1986). As this court has said in commenting on the totality of the circumstances test, "Although facts . . . facts viewed individually could be consistent with legal behavior, when viewed together by a trained law enforcement officer such facts 'meaningless to the untrained can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion'" Cresswell v. State, 564 So.2d 480, 482 (Fla. 1990), quoting, United States v. Cortez, 449 U.S. 411, 419, 101 U.S. 690, 66 L.Ed.2d 621 (1981). The court can not discount that the observed circumstances spoke to trained eyes. And those trained eyes saw fit to detain respondent.

The cases on which the district court relied are the ones that a meaningfully distinguishable from the facts that are presented by the record in this case. Peabody v. State, 56 So.2d 826 (Fla. 2d DCA 1990) only involved a suspicious transaction between a man in a car in a high crime area and a man the street who approached the car with whom there was an apparent transaction. It did not involve the follow up furtive behavior seen in this case. Walker v. State, 514 So.2d 1149 (Fla. 2d DCA

1987) involved only furtive behavior on the sighting of the police. Unlike this case it did not involve any antecedent suspicious behavior. Dames v. State, 566 So.2d 51 (Fla. 1st DCA 1990) is much the same as Peabody and is distinguishable for the same reason. Daniels v. State, 543 So.2d 363 (Fla. 1st DCA 1989) and Gipson v. State, 537 So.2d 1080 (Fla. 1st DCA 1989) too are distinguishable. Daniels is just a flight in a high crime area case. While Gipson did involve a situation where she had been seen in an apparent drug transaction it did not involve the kind of situation presented here, respondent's transaction with a man making many transactions and then the furtive behavior on sight of the marked police cruiser followed by recovery of what had previously been hidden.

And, it appears that this case law is suspect as well because at least two justices of the Supreme Court are prepared to hold that unprovoked flight is a sufficient basis for a stop. Michigan v. Chesternut, 486 U.S. 567, 576-77, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988)(Kennedy and Scalia concurring).

Issue III

CAN AN ABANDONMENT OF PROPERTY AFTER AN ILLEGAL POLICE STOP BUT NOT PURSUANT TO A SEARCH BE CONSIDERED INVOLUNTARY?

As the trial court pointed out while hearing the motion, "If he discarded the matters, there is nothing to have seized from him." (R. 43) The analysis offered by the district court purports to demonstrate that the detention of the appellant was illegal. It then declined to follow the State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980) line of cases and followed instead Stanley v. State, 327 So.2d 243 (Fla. 2d DCA), cert. denied, 336 So.2d 604 (Fla. 1976) and Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988) alluding to the discussion of the issue in State v. Bartee, 568 So.2d 523 (Fla. 1st DCA 1990).

The Stanley court ordered the suppression of evidence thrown from a car that was being chased without any consideration of the voluntary abandonment analysis. Spann involved a package dropped in response to an order to stop. And, it involved a stipulation that the package was dropped as a result of the order to stop. The Spann court did not discuss Oliver or voluntary abandonment at all. Bartee is the only one of the cases that the district court followed that discusses Oliver and voluntary abandonment. And, it ultimately turned on the trial court's prerogative to evaluate the testimony and determine whether an abandonment is voluntary or involuntary. The district court opinion also distinguishes Patmore v. State, 383 So.2d 309 (Fla. 2d DCA 1980) on the ground that it did not involve an illegal stop.

While they do not say it in so many words, the cases on which the district court relied treat Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) as a "but for" case. Wong Sun is not a "but for" case. The decision itself makes that clear. It states the following:

> We need not hold that all is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather the more apt question in such a case is 'whether granting the establishment of the primary illegality' the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. 371 U.S. at 487-488

It is worthy of note that the courts of the country have not treated Wong Son as a "but for" case. Rather, the analysis has focused around the policies the rule serves. See generally W. LaFave, Search and Seizure §11.4(j) (2d ed. 1987)(hereinafter LaFave). For example, an offer of a bribe in response to an illegal arrest is not suppressed. People v. Puglisi, 51 A.D.2d 695, 380 N.Y.S.2d 221 (1976)(cited in LaFave at 458). The policy served by the Wong Sun rule is to prevent exploitation of the primary illegality. Hence, the cases like Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) that look to the dissipation of the primary taint in refusing to apply the exclusionary rule. Where there is no exploitation of the primary illegality, the "fruit of the poisonous tree" doctrine does not apply.

It is clear that respondent abandoned the rock cocaine pipe in the police car. It did not get there because of police exploitation of any primary illegality. The "fruit of the poisonous tree" doctrine has no application to these facts. Another way of analyzing is to look at whether the abandonment of the pipe was voluntary. This is the mode of analysis used by the Oliver line of cases.

The court should approve this line of authority because it is in keeping with Wong Sun. Even when there is an illegal detention, contraband items voluntarily abandoned are admissible in evidence because the police have done nothing to exploit the illegal detention like threaten a search. Not every stop or detention involves a search. There was certainly no search threatened in the instant case. The police did nothing in this case to prompt appellant to abandon the pipe. Applying the exclusionary rule under these circumstances would do nothing to deter illegal searches.

Finally, the court should be aware that the United States Supreme Court is considering a case that may well shed light on the factual pattern presented by the record in this case. The case is California v. Hodari D., cert. granted 48 Crim. L. Rep. (BNA) 3001. An account of the oral argument case appears at 48 Crim. L. Rep. (BNA) 3129. If it turns out that the decision in Hodari D. sheds light on the issues in this case, the state will furnish a copy of it to the court as supplemental authority.

CONCLUSION

WHEREFORE Petitioner asks the court to reverse the decision of the district court and remand the case with instructions to affirm because the issues were not preserved in the trial court or in the alternative to affirm because there was a founded suspicion for the stop and detention of respondent or in the alternative to affirm because even given an illegal stop the abandonment of the cocaine pipe was voluntary.

Respectfully Submitted,

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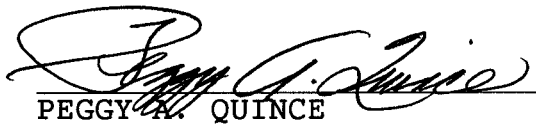

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Appellee has been furnished to, Joel E. Grigsby, Post Office Box 557, Lake Alfred, Florida 33850-0557, Attorney for Appellant, by United States Mail, postage prepaid, this 13th day of March, 1991.

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