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 RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case and Facts with the following addition and clarification.

Although there were no specific words used to reserve a right to appeal at the time of Respondent's plea of nole contendere, a Motion to Suppress was discussed. (R26) At the subsequent motion hearing, the trial court was made aware of the prior plea and sentencing, but continued to hear the motion, which hearing would have been out of order as moot in absence of a reservation of appeal. (R30-46)

SUMMARY OF THE ARGUMENT

As to Issue I: This issue was not raised below at the district court level. At the trial court, although the word "reservation" was not used, all parties understood that the plea was conditional on that reservation. The fact that the motion was later heard fully establishes the reservation of appeal was intact.

As to Issue II: The factual analysis by the district court is correct and the facts did not rise to a founded suspicion of any criminal activity by Respondent. Therefore the district court was correct in ruling it an illegal stop.

As to Issue III: The district court does not treat Wong Sun as a "but for" case; rather it determined that the abandonment was involuntary. Deciding whether an abandonment is involuntary after an illegal detention is parallel with Wong Sun's determination of the voluntariness of a subsequent confession. If it is not voluntary, then it is by definition an exploitation of the primary illegality, to-wit: the stop.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT SHOULD HAVE REACHED AND DECIDED THE ISSUES RAISED BY THE MOTION TO SUPPRESS?

Petitioner maintains that the substantive issue decided by the District Court and certified to this Court should not have been considered at all because of a procedural shortfall by Respondent: The manner in which his plea of nolo contendere was entered. (Petitioner's Brief on the Merits at 4). Petitioner correctly cites Florida Statutes Section 924.06 (3) as the jurisdictional grant of Respondent's right to seek review after entering his plea of nolo contendere while reserving a right to appeal. This 1976 Statute codified this Court's ruling in State v. Ashley 245 So.2d 225 (Fla. 1971) which originated the procedure "since it expedites resolution of the controversy and narrows the issues to be resolved." Id at 228.

Since this is a jurisdictional matter for purposes of having the appeal heard, Respondent concedes that Petitioner's point would be well taken if Respondent had entered a nolo plea without the reservation of a right to appeal. Respondent further concedes that at the time of entry of the plea Respondent's counsel did not use the magic words, "specifically reserves the right to appeal." Nevertheless, the nolo contendere plea was indeed a plea conditioned on the right to appeal the issue before this court although it was entered in a most unorthodox and confusing manner.

The record reflects that Respondent appeared at a scheduled court docket, the trial court appointed a public defender to his case and passed the matter until later on the same docket. (R 25,26) When Respondent's case was recalled, Respondent's counsel addressed the Court:

> I have a plea, Your Honor. It's a probation case. I have filled out a plea of no contest. I would like to make a Motion to Suppress.

(R27). The plea was accepted by the Court and Respondent was immediately placed on probation. (R28).

At first glance this matter would appear just the kind of situation governed by Jackson v. State 294 So.2d 114 (Fla. 4th DCA. 1974) which stands for the premise that a defendant must make a specific reservation of his intention to appeal. However, a full reading of Jackson's excellent analysis goes on to state the reason for such a rule.

> (T)here should be a complete understanding among the trial court, the State, and the defendant, together with counsel as to what is intended, inasmuch as the trial court is authorized to refuse to accept such a plea... The trial court and all concerned must understand and agree upon the record that the plea is conditional upon the appeal and its outcome.

Id.

In the case at bar, the parties and the trial Court all understood and agreed that Respondent was reserving his right to appeal a suppression issue. If this is not readily apparent from the plea itself, then the motion hearing held a month later erases all doubt. When the motion hearing was called up, Petitioner's counsel clarified this situation for the trial court by reminding the Court, "Your Honor, the defendant is this case has already pleaded and is in or rather on probation." The Court's reaction was to proceed immediately with the motion hearing. (R32). If there had been any misunderstanding by either the trial court or Petitioner, the motion would not have been heard since after an unconditional nolo plea it would have been moot. The fact that all parties and the Court proceeded with the hearing fully establishes that Respondent's nolo plea was conditional on his right to appeal and that such reservation was made to the satisfaction of all. Petitioner is therefore estopped to make this novel argument at this, the second appellate level since it did not so claim either at the trial level or at the District Court. Beaty v. Beaty 177 So. 2d 54 (Fla. 2d DCA 1965).

Concerning the irregularity in the manner of entering his plea, Respondent maintains that Petitioner's argument elevates form over substance when it is obvious from the record that all parties understood Respondent properly entered the appeal so as to preserve this appellate right. If this Court should agree with Petitioner that a proper reservation of a right to appeal was not made, this Court should remand the case to the trial court to entertain Respondent's motion to withdraw plea on the grounds that he understood the plea was made specifically reserving his right to appeal. Skimmer v. State 399 So.2d 1064 (Fla. 5th DCA 1981). Respondent respectfully suggests that such action would run contrary to judicial economy and would unnecessarily cause Respondent to jump through procedural hoops to get back to this same place he is now: before this Court on the merits of the issue.

Respondent further relies on the settled rule of strict construction of penal statutes in favor of the individual sought to be penalized. Ex Parte Bailey 39 Fla. 734, 23 So. 552 (1897).

ISSUE II: WHETHER THERE WAS FOUNDED SUSPICION FOR THE STOP IN THIS CASE?

Petitioner contests the district court's ruling that Respondent's stop by police was illegal. (Petitioner's Brief on the Merits, at 5). Petitioner holds fast to Blanding v. State 446 So.2d 1135 (Fla. 3d DCA 1984) as a similar fact case which mandates that the facts at bar warranted Respondent's stop by police. The facts in Blanding are indeed distinguishable from the instant facts as pointed out by the Court below: The defendant in Blanding was selling something as was evidenced by three hand-to-hand transactions in quick succession; two completed transactions were seen by police who also saw the defendant handing plastic bags (which the police knew to commonly contain contraband), and receiving cash from motorists on the street; the defendant broke off one of these transactions and attempted to flee on seeing the arresting officer approach. Id. at 1136,1137.

At bar, Respondent was seen on foot in his own neighborhood in contact with an unknown man (who had been seen in several other unknown transactions) at midnight, one time, but no cash nor package was seen, thus no information is available about the nature of their contact. (R33). Furthermore, Respondent returned to his own porch, was seen to place something into a planter as a police cruiser passed, and retrieve something after the cruiser was gone. (R41,42). Respondent did not flee police, was not involved in numerous visualized transactions, did not leave his neighborhood in a car to contact a drug dealer, nor grab for some part of his person as if he might have been armed. (R33-46)

Petitioner has correctly stated that the totality of the circumstances, viewed together by a trained law enforcement officer is what is looked to in determining whether a stop is lawful in this situation. Cresswell v. State 564 So.2d 480,482 (Fla. 1990). However, the presence of law enforcement

officers does not usurp the Court's duty to objectively evaluate what those circumstances were, hence the continuing need for a case by case analysis.

Petitioner argues that some cases cited as authority by the Court below lack the cumulative number of factors to be evaluated in the case at bar. That may appear correct at first glance, however the District Court Opinion herein uses a shorthand analysis which does not fully set out all the facts in each case. Those cases are as follows:

Peabody v. State 556 So. 2d 826 (Fla. 2d DCA 1990) found no reasonable suspicion to detain a suspect when the defendant, the only white person in a neighborhood known for its drug activity, approached several males, then approached another man in a car who extended his hand to the defendant, palm up. No money or package was seen. The driver of the car fled the scene. Id. at 827. The totality of these circumstances equalled a bad stop. Id. at 828.

The police in Walker v. State 514 So. 2d 1149 (Fla. 2d DCA 1987) were walking between cottages in a high crime area in the early evening. They approached the defendant on a porch who made a quick movement as if to conceal something behind his hip. Id. 1150. The Court held the police had no founded suspicion.

The Sheriff's officer in Dames v. State 556 So. 2d 51 (Fla. 1st DCA 1990) was patrolling a well known drug area and saw the defendant standing in the center of the street leaning into a car. The car sped away, and the defendant tried to walk away from the Sheriff's officer. No cash nor package was seen in the transaction. The Court held the stop was not legal. Id. at 52.

In Daniels v. State 543 So.2d 363 (Fla 1st DCA 1989) an officer approached a group of 20 or 30 people standing at a known drug transaction location at 2:20 A.M. The defendant looked nervous and surprised on seeing the officer and ran. Then ensuing stop was ruled illegal. Id. at 364.

The final authority cited by the District Court is Gipson v. State 537 So. 2d 1080 (Fla. 1st DCA, 1989). The plainclothes police in Gipson were patrolling a high drug area at 10:00 A.M. looking for a robbery suspect. They saw three people huddled together one-half block away in what the officers believed to be a drug transaction. The officers got out of their car, but all three suspects fled before they could identify themselves as police. The defendant's subsequent stop was found to be illegal.

No courts have ever opined that some magic number of factors exists that will automatically determine founded suspicion; such a position is a foolish suggestion. In each case the totality of the circumstances must be weighed together. Nevertheless, certain factors have special weight within such a totality. In the instant case, the unknown nature of the contact by Respondent, to-wit: that no drugs, package nor money was seen, is a heavy factor towards a finding of no reasonable suspicion. Certainly the fact that the observation occurred at midnight is strongly tempered by the additional fact that Respondent was on foot in his own neighborhood and returned to his own house. The District Court properly followed the applicable case law by determining Blanding distinguishable and that the facts in this case constituted an illegal detention.

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

The conflicting cases on this issue covers a wide range of analysis and approaches, nevertheless they can be catalogued somewhat.

The most thoughtful analysis supporting Petitioner is found in State v. Oliver 368 So.2d 1331 (Fla. 3d DCA, 1979) which turns on voluntary abandonment not constituting a search. Id at 1333. The Third, Fourth, and Fifth District Courts have followed this analysis. A.G. v. State 562 So.2d 401 (Fla. 3d DCA, 1990), State v. Arnold 15 FLW D292 (Fla. 3rd DCA, 1990), State v. Perez 15 FLW D1355 (Fla. 3d DCA, 1990), Curry v. State 15 FLW D2902 (Fla. 5th DCA, 1990).

The First and Second Districts have ruled that there can be involuntary abandonment after an illegal stop. State v. Bartee 568 So.2d 523 (Fla 1st DCA, 1990), and this case, Anderson v. State. 16 FLW D 264 (Fla. 2d DCA, 1991).

In other cases, abandoned property has been suppressed even though the issue of voluntariness was not per se decided. Spann v. State 529 So.2d 825 (Fla. 4th DCA, 1988), Stanley v. State 327 So.2d 243 (Fla. 2d DCA, 1976) Mattier v. State 301 So.2d 105 (Fla. 4th DCA, 1974), Dames v. State 566 So.2d 51 (Fla. 1st DCA, 1990).

The best reasoned approach would seem to indicate that there can be such a thing as an involuntary abandonment after an illegal stop, and that it should be detemined on a case by case basis. The decision would turn on whether the abandonment was a direct result of the illegal detention, i.e. would a reasonable defendant objectively believe he was about to be searched?

The merit of the suggested method of analysis is that it successfully applies Wong Sun v. United States according to the guidelines of Brown v. Illinois. Wong Sun v. United States 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d

441 (1963), Brown v. Illinois 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975). Wong Sun establishes that evidence which is the fruit of illegal police activity is not admissible unless there has been an intervening independent act of free will to purge the primary taint. Wong Sun v. United States, supra at 486. The Wong Sun court goes on to say that the voluntariness of the defendant's subsequent statement "was considered to judge whether it was sufficiently an act of free will to purge the primary taint." Id. at 486 (emphasis added).

Brown v. Illinois turned on whether a subsequent Miranda warning per se broke the causal chain of inadmissibility from an illegal police action, and ruled that it did not do so. Brown v. Illinois, supra at 603. The Court opinion states:

> The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex and the possibilities of misconduct too diverse to permit protection of the Fourth Amendment to turn on such a talismanic test.

Id. at 603.

Just as a subsequent Miranda is an talisman for a statement after an illegal detention, so also the mere fact of abandonment is likewise a talisman for tangible evidence. The court must look to the mind of a defendant to determine whether the abandonment was voluntary or involuntary. If an abandonment is involuntary then it is by definition an exploitation of the primary illegality, to-wit: the illegal detention, and therefore quite inadmissible under Wong Sun.

It is protection against police misconduct which is the root of Wong Sun. If this Court decides that any abandonment after an illegal stop results in admissible evidence, then police are approved of picking up suspects on mere

suspicion, and putting them in the back of patrol cars in hopes that they will abandon contraband in the car. Neighborhood sweeps of all persons in an undesirable area become permissible on the probability that someone in the detained crowd will throw down contraband. It is just such police excess that our Constitutions prohibit, and that Wong Sun enforces against.

According to the suggested analysis, the Respondent's confinement for some period of time in a patrol car is of such nature as to lead him to believe he was going to be searched and to make his abandonment of the cocaine pipe involuntary. (A2).

In support of the suggested analysis and its result in this case, see In Re Hodari D. 216 Cal.App.3d 745, 265 Cal.Rptr. 79 46 Cr.L. 1293 (1989). In Hodari D., police on patrol saw four young black males in an area of high drug activity who scattered and ran after seeing the cruiser. The officers had seen no faces nor observed any transactions but suspected drug activity. One officer ran around the block in another direction to cut off the fleeing individuals. When the defendant first saw the uniformed officer he was 11 feet away running toward the defendant. The defendant discarded a single cocaine rock on the sidewalk. He was arrested and the abandonment was ruled involuntary. The court opined:

> Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discarding of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; ...the defendant's act of abandoning the evidence when confronted by the running officer was not mere coincidence.

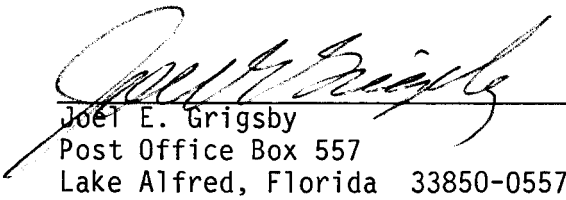
Id.

Respondent's abandonment was a direct result of an illegal stop and his detention in a police car. It was therefore an involuntary abandonment, and the evidence abandoned should have been suppressed as the district court ruled.

CONCLUSION

Wherefore Respondent asks the court to affirm the decision of the district court and remand the case for discharge of Respondent.

Respectfully submitted,



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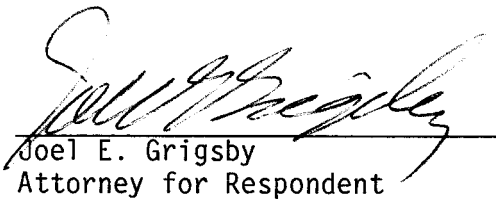
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits has been sent by regular U.S. Mail to Davis G. Anderson, Jr., Esquire, Assistant Attorney General, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607-2366 this 11th day of April, 1991.



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