047

FILED
SID J. WHITE
MAR 9 1991
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,433

TERRTRIC DOCTOR,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

****

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Bureau Chief
Senior Assistant
Attorney General

SYLVIA H. ALONSO
Assistant Attorney General
Florida Bar No. 767190
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

FLORIDA STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the prosecution in the trial court and the appellee in the district court. Petitioner was the defendant in the trial court and the appellant before the district court below.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal.
"P.B."	Petitioner's Initial Brief.

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State generally accepts Appellant's statement of the case and facts as substantially true and correct except as modified by the facts herein.

SUMMARY OF THE ARGUMENT

The District Court correctly upheld the trial court's denial of petitioner's motion to suppress evidence. The District Court properly found that the narcotics found in petitioner's crotch pursuant to a *Terry* search for weapons could be seized as evidence of a criminal offense where the officer had probable cause to believe that petitioner was trafficking in narcotics.

Moreover, the initial stop of the vehicle in which petitioner was a passenger was a valid traffic stop based on the officers' observations that the tail light of petitioner's vehicle was broken. As such, the District Court properly found that the stop was not an invalid pretextual stop since any citizen committing said violation would have been stopped. Hence, petitioner's assertion that the decision at bar conflicts with Wilhelm v State, 515 So.2d 1343 (Fla. 2d DCA 1987) and Kehoe v State, 521 So.2d 1094 (Fla. 1988), and that this Court should accordingly revisit the District Court's ruling on this issue, is misplaced.

ARGUMENT ON APPEAL

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE FRUITS OF THE OFFICER'S *TERRY* SEARCH WERE LAWFULLY SEIZED AND THAT THE INITIAL STOP OF APPELLANT'S VEHICLE WAS LAWFUL.

A. The Seizure

In Terry v Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967), the United States Supreme Court held that, during a temporary encounter with a citizen, a police officer may conduct a limited pat down search for weapons when the officer reasonably believes that his safety, or that of others, is in danger. However, the Supreme Court has never addressed whether a Fourth Amendment violation occurs when an officer seizes any evidence of a crime found as a result of a Terry search for weapons.

Having been presented with this issue, the District Court below concluded that such a seizure is permissible. Florida has codified the holding of Terry in section 901.151 Fla. Stat. (1987), commonly known as the "Stop and Frisk Law," 23 Fla. Stat. Ann. 67 (1985). Specifically, section 901.151(5) Fla. Stat. provides, in pertinent part, that:

> If a such a search discloses such a weapon or any evidence of a criminal offense, it may be seized.

(Emphasis added). Given its plain meaning, an officer may seize any evidence of a criminal offense found as a result of a stop and frisk, Doctor v State, 573 So.2d 157 (Fla. 4th DCA 1991).

Respondent maintains that the District Court's holding is consistent with both Florida law and federal law.[1]

The search and ensuing seizure at issue arose after the vehicle in which petitioner was a passenger was lawfully stopped by Trooper Burroughs and Deputy Aprea because of a traffic infraction. The stop was effected at 2:20 a.m., and the windows of the vehicle were so darkly tinted that Officer Burroughs was unable to see into the car (R. 8, 10). As a result, petitioner was ordered out of the vehicle. Upon exiting the car, petitioner started walking towards Deputy Aprea in a nervous manner, moving sideways against the vehicle so as to conceal the front area of his person from Deputy Aprea (R. 11). Trooper Burroughs noticed a very large bulge in petitioner's crotch area and suspected that petitioner was carrying a weapon (R. 13, 39). Burroughs estimated that the bulge was eight inches long and four inches wide (R. 13), while Aprea estimated that the bulge was five or six inches in length and in width (R. 47).

Subsequently, Burroughs unsnapped his firearm and yelled to Deputy Aprea who at that time noticed the unusually large bulge in petitioner's pants (R. 13, 47). Deputy Aprea stated that he became nervous, and ordered petitioner to place his hands on the car and to remove whatever was creating the bulge from his pants. When petitioner refused to remove the

---

[1] "This right [to 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." Art. I, §12. Fla. Const. (1980).

object, Aprea conducted a pat down search for weapons (R. 37, 47-48). Immediately upon feeling the bulge, Aprea stated that, based on his training and experience[2], he had no doubt that the bulge was not a weapon and that it was rock cocaine. Aprea described the bulge as having a "peanut brittle type feeling," and that the crotch area was a common area for carrying narcotics (R. 48-49). The Deputy then seized the rocks and arrested petitioner for trafficking in 242 grams of cocaine (R. 50).

As was held by the Fourth District, probable cause gave the deputy the right to seize cocaine rocks as evidence of a criminal offense, 901.151(5), Fla. Stat. (1987). Doctor v State, 573 So.2d at 160. This holding is consistent with the teachings of Professor LaFave in 3 W. LaFave, Search and Seizure, §9.4(c) at 524 (2d ed. 1987) where he recognized:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.

---

[2] Deputy Aprea testified that he had previously made approximately two hundred and fifty arrests for possession of controlled substances, that he had been involved in approximately one thousand narcotics arrests, and that he had felt crack cocaine on at least eight hundred occasions (R. 44-45).

Thus, although a pat down search for weapons provides no justification to search for evidence of a crime, it does not mean that the police must ignore evidence of a crime which is inadvertently discovered while conducting a Terry search.

As a result, the seizure of evidence of a crime discovered during a Terry search is not unreasonable. The government's compelling interest in ferreting out drug traffickers was recognized in United States v Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110, 118 (1983). When considered together with the impractical inconvenience of requiring officers to obtain a warrant in these circumstances, Compare Arizona v Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), the government's interest heavily outweighs the intrusion on petitioner's person where the fruits of the Terry search gives rise to probable cause to effectuate an arrest.

Probable cause to arrest exists when a prudent and cautious police officer in particular circumstances, conditioned by his observations and information and guided by the whole of his police experience, reasonably could have believed that an offense has been committed. State v Melendez, 392 So.2d 587 (Fla. 4th DCA 1981). By the same token, probable cause may arise based on visual recognizance of an unusually large bulge when considered in light of other circumstances. United States v Tomaszecki, 833 F.2d 1532 (11th Cir. 1987); United States v Elsoffer, 671 F.2d 1294 (11th Cir. 1982).

Thus, in State v Rodriguez, 477 So.2d 1025 (Fla. 3d DCA 1985), the seizure of cocaine from the defendant's boot was upheld. The defendant was stopped at Miami International Airport by members of the narcotics interdiction unit. Upon said encounter with the officers, the defendant became very nervous: the defendant was sweating profusely, his stomach was palpitating, and his hands were shaking. When the officer felt the defendant's boot pursuant to the defendant's consent, the officer felt a soft and malleable package inside the boot which led the officer to believe, based on his training and experience, that the package contained cocaine. Given the foregoing circumstances, the officer had probable cause to arrest the defendant. See also Henderson v State, 535 So.2d 659 (Fla. 3d DCA 1988): Based on his training and experience, officer's conclusion that a deodorant container in defendant's luggage contained cocaine, after he had shaken said container and viewed its distinctive packaging, gave rise to probable cause to arrest; Palmer v State, 467 So.2d 1063 (Fla. 3d DCA 1985): Probable cause to arrest established where search of defendant's tote bag at train station revealed a distinctively wrapped, shaped and sized package.

Likewise sub judice, prior to the execution of the Terry search, there were other factors, in addition to the feel of the bulge, which helped to establish probable cause: the suspicious manner in which petitioner exited his vehicle, the size and unique texture of the bulge, its location in

petitioner's crotch area, and the officer's training and experience with narcotics offenses. See Gray v State, 550 So.2d 540 (Fla. 4th DCA 1989). Thus, once Deputy Aprea felt the bulge in petitioner's pants and determined that it was not a gun, but that it was narcotics, Deputy Aprea had the requisite probable cause to arrest petitioner and seize the drugs as a result thereof. That the search preceded the arrest does not invalidate the search. Adams v State, 523 So.2d 190, 193 (Fla. 1st DCA 1988); State v Byham, 394 So.2d 1142 (Fla. 4th DCA 1981).

Had the District Court applied the holding in Dunn v State, 382 So.2d 727 (Fla. 2nd DCA 1980) to the instant case, the cocaine in question would have to have been suppressed since Dunn allows contraband to be seized during a Terry search only when the officer reasonably believes that the contraband seized was a weapon. To apply the holding of Dunn to the facts presented at bar would lead to absurd results. Such a holding would send drug traffickers a message that they have free reign to traffick in drugs so long as the narcotics are concealed on their person. Moreover, the instant case is distinguishable from Dunn insofar as the officer at bar had probable cause to arrest petitioner at the time that the seizure occurred based on the unique and distinguishable texture of the bulge, the officer's training and experience regarding narcotics, the location of the bulge, and petitioner's actions in evading the police officer's line of vision away from the bulge. Contrarily, the circumstances surrounding the search and the results of the

search in Dunn did not reveal anything which would give rise to probable cause that Dunn was in possession of contraband. Indeed, the officer in Dunn merely suspected that the object in the defendant's right front shirt pocket was marijuana, 382 So.2d at 728. Sub judice, Deputy Aprea testified that he had no doubt that the object in appellant's groin area was cocaine (R. 48-49).

Contrary to petitioner's assertions otherwise, the District Court below did not conclude that probable cause was established solely on the basis of a brief touch (P.B. at 16); rather, it was made very clear that "[w]hat the Deputy felt was the additional circumstance that established probable cause for him to believe that appellant's pants contained cocaine rocks." Doctor v State, 573 So.2d at 160 (Emphasis added). By the same token, the Fourth District below did not conclude that officers are authorized to seize any object discovered during a weapons frisk without probable cause (P.B. 14). Instead, the court below gave section 901.151(5) Fla. Stat. (1987) its plain meaning, holding that probable cause gave the deputy the right to seize the cocaine rocks as evidence of a criminal offense. 573 So.2d at 160.

Such an interpretation comports, not only with rules of statutory construction Graham v State, 472 So.2d 464, 465 (Fla. 1985), but with the Fourth Amendments proscription against unreasonable searches and seizures.

B. THE STOP

The instant cause is before this Court because the District Court certified conflict with Dunn v State, 382 So.2d 727 (Fla. 2nd DCA 1980) regarding the seizure of cocaine from petitioner's person pursuant to a pat down for weapons. The District Court did not certify conflict with Wilhelm v State, 515 So.2d 1343 (Fla. 2nd DCA 1987). Nonetheless, petitioner contends that this Court should review the stop of petitioner based on an asserted conflict with Wilhelm, and because the District Court allegedly misapplied this Court's holding in Kehoe v State, 521 So.2d 1094 (Fla. 1988). Respondent maintains that the decision at bar does not conflict with Wilhelm, and that the District Court properly applied the standards enunciated in Kehoe to the facts of the instant case when it concluded that the stop of the vehicle in which petitioner was a passenger was valid.

Respondent initially points out that the trial court's ruling on a motion to suppress is clothed with a presumption of correctness, and the reviewing court shall interpret the evidence and reasonable inferences therefrom in a manner most favorable to sustaining the trial court's ruling. Johnson v State, 438 So.2d 774 (Fla. 1983). The District Court followed this mandate by upholding the trial court's factual finding that the petitioner's tail light was broken. The trial court, relying on the credibility of Trooper Burroughs and Deputy Aprea, specifically found that "...what the officer determined in his own mind on that particular evening and that was he determined that the

left--I believe he said that the left rear tail light was out, as I recall his testimony" (R. 10). In its written order, the trial court reiterated its finding that "the vehicle which the defendant owns and defendant was a passenger in was stopped pursuant to a valid traffic violation" (R. 129).

Nonetheless, petitioner attempts to circumvent the trial court's finding of fact by arguing that the initial stop was invalid because petitioner's rear tail light was not broken in violation of §316.221 or §316.610 Fla. Stat. (1987). Both Trooper Burroughs and Deputy Aprea consistently testified that petitioner's vehicle was stopped because petitioner's rear tail light was broken (R. 9, 23, 40, 45, 51, 55, 62); the officers came to this conclusion because they observed a white light emitting from the cracked tail assembly of petitioner's vehicle (R. 20-21, 56-57). Petitioner has never contested the fact that there was a defect in the rear tail light assembly of his car (R. 20-21, 56-57). Thus, even if petitioner was arguably not in actual violation if §316.221 or §316.610 Fla. Stat. (1987), the stop is not tainted since petitioner was concededly in violation of some traffic law given the officers' uncontroverted testimony that a white light was emitting from petitioner's rear tail light assembly. See §316.224 Fla. Stat. (1987).

Assuming arguendo that petitioner's vehicle was not in actual violation of section §316.221 or §316.610 Fla. Stat. (1987), the stop is nonetheless not rendered invalid since only a reasonable suspicion of a violation based on the officer's visual

or aural perception is necessary. State v Eady, 538 So.2d 96 (Fla. 3d DCA 1989). As stated by the Third District in State v Cobbs, 411 So.2d 212 (Fla. 3d DCA 1982):

> A police officer's hearing may deceive him, but so may his sense of sight, smell, taste and touch. We do not require that an officer's suspicion prove to be right; we require only that the suspicion be founded and articulable...And of course neither we nor any other court will invalidate a lawful stop simply because it turns out that the senses deceive, any more than we will validate an unlawful search by what is found.

411 So.2d at 213-214. Thus, the lawfulness of the initial stop of petitioner is not rendered invalid by the officer's alleged erroneous perception that petitioner's rear tail light was in violation of the law. Consequently, the initial stop of petitioner for faulty tail lights was valid. State v Turner, 345 So.2d 767 (Fla. 4th DCA 1977); State v Ellison, 455 So.2d 424 (Fla. 2nd DCA 1984). See also State v Potter, 438 So.2d 1085 (Fla. 2nd DCA 1983); State v Russell, 557 So.2d 666 (Fla. 2nd DCA 1990).

Likewise, the stop was not invalid as a pretextual stop. First, the testimony of Deputy Aprea which petitioner relies on in support of his argument that the stop was pretextual directly conflicted with the testimony of Trooper Burroughs. Deputy Aprea testified that the unmarked scout vehicle first spotted petitioner's automobile and advised Deputy Aprea and Trooper Burroughs of the automobile's defect; based on the

information provided by the scout vehicle, the officers stopped petitioner's vehicle given the defect in its taillight assembly (R. 58-60). Trooper Burroughs, on the other hand, testified that the unmarked scout vehicle did not identify petitioner's vehicle prior to the stop, and that petitioner was not stopped pursuant to any directive from the scout vehicle (R. 16, 40, 64). The trial court did not resolve the conflict in testimony, and solely found that the stop was not pretextual (R. 129).

Secondly, petitioner leaves the erroneous impression that the officers' only mission was to operate a drug interdiction program (P.B. 20). However a reading of the record reveals that the officers' whole purpose was not to interdict narcotics. Deputy Aprea directly refuted such a claim on cross-examination (R. 54); rather, Aprea stated that the unmarked scout car was to spot speeders since the purpose of the program was to enforce the speed laws "and if we came across narcotics, that would be fine, too" (R. 60, 61). Moreover, Trooper Burroughs participated in the program because of his knowledge of the traffic laws such that all traffic violators would be stopped (R. 14, 54). Thus, both Deputy Aprea and Trooper Burroughs unequivocally testified that the only reason for stopping petitioner's vehicle was because of the defect in the rear tail light assembly (R. 9, 51, 55, 61-62).

Based on the foregoing, there is not one scintilla of evidence to support petitioner's claim that the stop of petitioner's vehicle was pretextual since, "...the gravity of [a

defective tail light] offense is such 'that any citizen would routinely be stopped for it if seen committing the offense by a traffic officer on routine patrol." State v Turner, 345 So.2d 767 (Fla. 4th DCA 1977). By the same token, the fact that the officers were conducting a drug interdiction program at the time that petitioner was stopped does not invalidate same since, "a traffic stop and an interdiction program are not mutually exclusive." State v Taylor, 557 So.2d 941 (Fla. 2d DCA 1990).

As a result, petitioner's assertion that the District Court's decision at bar is in conflict with Wilhelm v State, 515 So.2d 1343, is unfounded. The court in Wilhelm did not hold that a traffic stop for inoperable tail lights is always invalid as a pretextual stop; rather, the court held that the stop was an invalid pretextual stop based on the fact that the defendant was not in actual violation of section 316.221 Fla. Stat. (1985), and the officers' admission that they had used the inoperable taillight as a pretext to stop the defendant's vehicle. Contrarily at bar, the tail lights of petitioner's vehicle were concededly defective, and there was no testimony that Deputy Aprea and Trooper Burroughs utilized the defect as a pretext to stop petitioner's vehicle.

Furthermore, the District Court's application of Kehoe v State, 498 So.2d 560 (Fla. 4th DCA 1986) is not in conflict or inconsistent with the standard enunciated by this Court in Kehoe v State, 573 So.2d 1094 (Fla. 1988). The District Court did not hold that the stop of petitioner was valid because the officers

could have stopped petitioner for the traffic infraction absent the alleged additional invalid purpose. Rather, the District Court applied the objective test approved by this Court in Kehoe, 573 So.2d at 1096, to find that the stop was valid even as a pretextual stop since any citizen committing said violation would be stopped for it absent the alleged additional invalid purpose. Id. at 1097.

At bar, the only reason given for stopping petitioner was the faulty tail light assembly; there was no other additional invalid purpose for effecting the stop, as readily admitted by the officers (R. 9, 51-52, 55, 61-62). All traffic violators were being stopped by Deputy Aprea and Trooper Burroughs on the night of the offense in question. As such, the State sustained its burden of establishing that the stop was not pretextual.

Thus, the District Court's holding, which upheld the trial court's denial of petitioner's motion to suppress evidence, should be affirmed. The stop and the ensuing seizure of contraband were not in violation of petitioner's right to unreasonable searches and seizures as provided for under the Fourth Amendment of the United States Constitution and Article I, Section 12 of the Florida Constitution.

CONCLUSION

Based on the arguments and authorities cited herein, the State respectfully requests that the decision below by the Fourth District Court of Appeals be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JOAN FOWLER
Bureau Chief, Senior
Assistant Attorney General

SYLVIA H. ALONSO
Assistant Attorney General
Florida Bar No. 767190
111 Georgia Avenue, Suite 204
West Palm Beach, FL 33140
(407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to Susan D. Cline, Assistant Public Defender, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 6th day of May, 1991.

Of Counsel