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FILED
SID J. WHITE
JUN 10 1991
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

TERRTRIC DOCTOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,433
DCA No. 88-3358

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida. Respondent was the Appellee and the Prosecution, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" = Record on Appeal

"SR" = Supplemental Record

"RB" = Respondent's Answer Brief

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts contained in his Initial Brief on the Merits.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AS THE STOP WAS INVALID AND THE DEPUTY EXCEEDED THE LIMITED PERMISSIBLE SCOPE OF A WEAPONS SEARCH.

Petitioner primarily relies upon his Initial Brief for a thorough discussion of the issues for review.

A. The seizure of the cocaine was illegal because Deputy Aprea exceeded the limited permissible scope of a weapons search.

Although Respondent seeks to have this Court uphold the lower court's decision, even Respondent appears to have arrived at two different interpretations of the fourth district decision in the case at bar: 1) that the court held that an officer may seize any evidence of a criminal offense found as a result of a stop and frisk (RB 4), and 2) that the court held that probable cause gave the deputy the right to seize the cocaine rocks as evidence of a criminal offense (RB 10).

Petitioner asserts that as the fourth district certified conflict with Dunn v. State, 382 So.2d 727 (Fla. 2d DCA 1980), a plain reading of the two cases reveals that the only possible basis for conflict is that the fourth district arrived at the first conclusion, which is clearly erroneous. Although the fourth district also happened to determine that probable cause existed in this cause to justify the seizure, Petitioner asserts that the fourth district's holding is not just limited to situations where probable cause exists. If it were, there would be no conflict with Dunn.

Respondent has also clearly misinterpreted Justice Grimes'

opinion in Dunn v. State (RB 9). As the Dunn case did not involve probable cause, the case does not hold that in a situation where probable cause is developed in the course of a lawful stop and frisk, that a police officer cannot seize evidence of a crime even if it is not a weapon. See Dunn v. State, 382 So.2d at 728, n. 1.

In any event, for the reasons fully set forth in Petitioner's Initial Brief, probable cause did not exist to justify the seizure at bar.

Petitioner must point out that contrary to Respondent's assertion (RB 6), the record reflects that Deputy Aprea testified he had seen or felt, not just "felt," rock cocaine approximately 800 times (R 45). This is a significant difference when the state is primarily relying on the deputy's "feel" of the bulge in order to find that he had probable cause to seize the package from the crotch area of Petitioner's pants. It is also significant that although the deputy claimed he believed the bulge to be cocaine rock when he touched it, the deputy was engaged with the trooper and several other deputies in a drug interdiction program at the time he frisked Petitioner. This is not just an ordinary situation where an officer is conducting a lawful frisk for a weapon. Obviously the deputy had his mind "set" on the fact that they were out there to locate drugs. It is entirely possible that because of that, it was purely a hunch that caused the deputy to think that the bulge was cocaine.

Trooper Burroughs testified that they were there for the purpose of interdicting drugs on I-95. Their primary mode of

conducting this operation was to find traffic violators and stop them, even minor traffic violators (R 14-16). It is also interesting to note that although Deputy Aprea later stated that they were there to "observe the speed laws, and if we came across narcotics, that would be fine, too," Petitioner was not stopped for speeding.

Petitioner notes that the following third district court cases relied upon by Respondent all deal with consent, not Terry[1], searches. State v. Rodriguez, 477 So.2d 1025 (Fla. 3d DCA 1985), Henderson v. State, 535 So.2d 659 (Fla. 3d DCA 1988), and Palmer v. State, 467 So.2d 1063 (Fla. 3d DCA 1985).

Additionally, United States v. Tomaszewski, 833 F.2d 1532 (11th Cir. 1987), and United States v. Elsoffer, 671 F.2d 1294 (11th Cir. 1982), cited by Respondent, are limited to the facts presented therein and are distinguishable from the case at bar. In Tomaszewski, the officers had an extended opportunity to observe the defendant and the bulge that was located in the front of his pants. Before he was approached by the officers, the defendant kept looking at them and when he walked, the bulge did not move with the rest of his body. When they were talking to him, he was nervous and perspiring and kept pulling his jacket as if trying to conceal the bulge. Tomaszewski, 833 F.2d at 1534. In Elsoffer, officers observed a good sized bulge in the shape of a soft bound book in the front of the defendant's pants that ran from his waist to his

[1] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967).

crotch. Elsoffer, 671 F.2d at 1295. The Elsoffer court specifically limited its holding to the facts presented therein after viewing photographs of the package and based on the odd size and shape of the bulge with respect to its position on the defendant. Id. at 1299, n.10.

Under the facts sub judice, it was impossible for the deputy to know that it was cocaine such that presumably he would have had probable cause to arrest Petitioner at that time and conduct a lawful search incident to the arrest. Dunn v. State, 382 So.2d at 728, n. 1. Otherwise the intrusion was not justified in the context of an extremely limited protective search for weapons permitted pursuant to Terry v. Ohio.

B. The initial stop was invalid on two bases: no traffic violation had occurred and it was a purely pretextual stop.

Petitioner must first correct any misapprehension that this Court may be laboring under concerning what type of an offense the fourth district was referring to in State v. Turner, 345 So.2d 767 (Fla. 4th DCA 1977), when it stated that the gravity of the offense was such that any citizen would be routinely stopped. Contrary to Respondent's Answer Brief (RB 15), the offense was not a "defective tail light." The defendant's taillights were completely out. Id. at 768. That is a significantly different offense which causes great risk to the public, as opposed to a defective tail light, or in this case a cracked reflector lens or even a cracked lens on one out of four functioning taillights, depending on which version this Court accepts.

In addition, the following cases relied upon by Respondent are distinguishable from the instant case.

State v. Taylor, 557 So.2d 941 (Fla. 2d DCA 1990) (defendant stopped where tag light was out and defendant ticketed for infraction); State v. Potter, 438 So.2d 1085 (Fla. 2d DCA 1983) (involved DUI).

Petitioner thus contends that there was no traffic violation, and even if one existed, Petitioner was subjected to a purely pretextual, and therefore invalid, stop.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District and remand this cause with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Senior Assistant Attorney General Joan Fowler and Assistant Attorney General Sylvia Alonso, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 6th day of June, 1991.

Of Counsel