W00A 017

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 77,684

RUFUS CHARLES CURRY, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

TIMOTHY A. HICKEY
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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE FACTS

Mr. Curry accepts the states version of the case and facts with the following additions:

On direct-examination by the state, Officer Cacciolfi testified:

> He (Mr. Curry) was walking back towards me and I saw him looking up and then I saw him turn his head to the side and spit something out. (R 15)

Mr. Curry's trial attorney argued before the trial court that the officers illegally stopped and detained Mr. Curry. (R 22)

The trial court stated: "If they'd searched him I would have suppressed the evidence..." (R 22-23)

SUMMARY OF THE ARGUMENT

The state waived the issue of whether Mr. Curry was seized by failing to raise the issue before the Circuit Court or the District Court of Appeal. If the state had not waived the issue, Mr. Curry was still seized by the police officers when he yielded or submitted to their authority by turning around and beginning to walk back to one of the officers in response to their order to stop.

Because Mr. Curry abandoned the instant evidence as a result of an illegal police seizure and there was no clear break in the chain of illegality, Mr. Curry's involuntary abandonment does not remove the taint of the illegal seizure.

ARGUMENT

ISSUE I

WHETHER ABANDONMENT OF PROPERTY AFTER AN ILLEGAL POLICE SEIZURE BUT NOT PURSUANT TO A SEARCH MAY BE CONSIDERED INVOLUNTARY? (rephrased by Appellee)

The Second District Court of Appeal correctly suppressed the instant evidence as tainted fruit of Mr. Curry's illegal seizure. Contrary to the state's argument, an unlawful seizure may still taint property subsequently abandoned. Therefore, this court should affirm the decision of the Second District Court of Appeal.

By failing to raise the issue before the trial court or the Second District Court of Appeal, the state has effectively waived the issue of whether Mr. Curry was seized.[1] In Tillman v. State, 471 So.2d 32, 35 (Fla. 1985), this court held:

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved. (citations omitted)

Tillman, 471 So.2d at 35.

The Tillman petitioner argued before both the trial court and the District Court of Appeal that the offense of attempted manslaughter did not exist. Id. at 34-35. However, before this court, the Tillman petitioner for the first time argued that he

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[1] Respondent has filed a motion before this court to supplement the record with copies of the briefs filed in the Second District Court of Appeal.

should be retried and the jury charged with the instruction subsequently approved by this court in Taylor v. State, 444 So.2d 931 (Fla. 1983). Id.

This court held by failing to argue the jury instruction issue before the trial court or the District Court of Appeal the Tillman petitioner effectively waived any jury instruction issue. Id. Because Taylor was derived from legal precedents and not a fundamental departure in the law, the Tillman petitioner contention had the opportunity to raise the jury instruction issue before the District Court of Appeal. Id.

In the instant case, the state may not raise for the first time before this court the issue of whether Mr. Curry was seized. Although the state did not have the benefit of California v. Hodari D., -- U.S. --, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), in its argument before the Second District Court of Appeal, Hodari D. is based upon common law and legal precedents and is not a fundamental departure in Fourth Amendment law. See, Tillman. Therefore, the state waived the issue of whether Mr. Curry was seized.

Even if the state had not waived the seizure issue, the Second District Court of Appeal correctly held the police officers unlawfully seized Mr. Curry. The Second District Court of Appeal found Mr. Curry initially walked away from a group of men as the officers approached. Curry v. State, 576 So.2d 890 (Fla. 2d DCA 1991). However, when ordered to stop, Mr. Curry turned around and started to walk back toward Officer Cacciolfi and the group of men. Curry, 576 So.2d at 891. Several times in its opinion, the Second

District Court of Appeal labelled the instant police officers' conduct an "illegal stop" and an "illegal dentention." Curry, 576 So.2d at 891-892.

Because the Second District Court of Appeals' finding is supported by competent evidence in the record, this court should affirm the finding that Mr. Curry was seized. See, Mathews v. State, 363 So.2d 1066, 1069 (Fla. 1978), cert. denied, 442 U.S. 911, 61 L.Ed.2d 276, 99 S.Ct. 2825 (1979) ("If there is competent evidence in the record before the District Court of Appeal... to support its conclusion, and if that court does not misapply the correct rule of law, its decision must be affirmed.").

Although the Second District Court of Appeal did not have the benefit of Hodari D., recent decisions applying the Hodari D. standard to very similar facts have found a seizure did occur. In In the Interest of J.K., 581 So.2d 940 (Fla. 4th DCA 1991), the court held a seizure did occur, under Hodari D., when the defendant turned around and responded "What?" to an officer ordering him to stop.

Similarly, in United States v. Morgan, 936 F.2d 1561 (10th Cir. 1991), the court found a brief seizure under Hodari D. where a police officer ordered the defendant to stop and the defendant responded "What do you want?" before backing up and fleeing.

Under J.K., Morgan, and Hodari D. itself, a seizure occurs when the defendant yields or submits by responding to a police officer's assertion of authority. See, Hodari D., 113 L.Ed.2d at 697. A defendant need not freeze motionless in his tracks to yield

or submit to police authority. Mr. Curry was initially walking away from the police officers and the group of other men. However, when ordered to stop he responded by turning around and walking back towards Officer Cacciolfi and the group of other men. At that point, Mr. Curry submitted to the officer's authority by returning to Officer Cacciolfi and the group, rather than continuing to walk away from the officers. Because Mr. Curry gave up trying to avoid from the police officers, he was illegally seized before he abandoned the instant evidence.

The real issue before this court is whether an illegal police seizure, absent an unlawful search, may still taint evidence subsequently abandoned. If the abandonment is caused by the illegal seizure, the evidence remains tainted under Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). However, a truly voluntary abandonment may remove the taint of an illegal seizure. United States v. Beck, 602 F.2d 726, 729 (5th Cir. 1979) (citing United States v. Colbert, 371 F.2d 174, 176 (5th Cir. 1973 (en banc)).

In the instant case, the Second District Court of Appeal correctly held abandonment may be the product an illegal police seizure, depending upon the specific facts. Curry, 576 So.2d at 891-892. An abandonment prompted by an illegal seizure does not remove the taint because such an abandonment is not truly voluntary or independent of the prior illegal seizure. Id. at 892. Both the Second and Fourth District Courts of Appeal currently hold an unlawful seizure may render a defendant's subsequent abandonment

involuntary. e.g., State v. Fortunato, 581 So.2d 651 (Fla. 4th DCA 1991); In the Interest of J.K., 581 So.2d 940 (Fla. 4th DCA 1991); Anderson v. State, 576 So.2d 319 (Fla. 2d DCA 1991).

However, the First, Third, and Fifth District Courts of Appeal follow the contrary rule of State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980), which holds "abandonment of property cannot be tainted or made involuntary by a prior illegal police stop...". Oliver, 368 So.2d at 1335; See also, e.g., Wade v. State, 16 F.L.W. D2656 (Fla. 1st DCA October 8, 1991)[2]; Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990); State v. Perez, 15 F.L.W. D1355 (Fla. 3rd DCA May 15, 1990), jurisdiction accepted, 570 So.2d 1305 (Fla. 1990). Under Oliver, only an illegal search can render abandonment involuntary. Id. at 1336. Id. Thus, a defendant who is illegally seized and discards evidence in a public or unprotected area before an illegal search looses any reasonable expectation of privacy under the Fourth Amendment. Id.

Oliver and its progeny correctly recognize a defendant's voluntary abandonment of property in an unprotected public area may remove the taint of a prior illegal seizure. Hester v. United

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[2] In Wade, the First District Court of Appeal withdrew its original opinion, at 16 F.L.W. D2190, which held that a prior illegal seizure made the subsequent abandonment involuntary and tainted the resulting evidence. Based upon Hodari D., the First District Court of Appeal decided to follow the Oliver line of cases holding all abandonments are voluntary, absent an illegal search. Wade, 16 F.L.W. at D2657. The First District Court of Appeal's reliance upon Hodari D. is misplaced because Hodari D. was a drop then stop case which addressed only the seizure issue. See, State v. Fortunato, 581 So.2d 651, 652 (Fla. 4th DCA 1991).

States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). However, Oliver fails to recognize that to remove the taint of an illegal seizure a defendant's abandonment must be truly voluntary, rather than merely the result of prior illegal police activity. United States v. Beck, 602 F.2d 726, 729-730 (5th Cir. 1979); See also, Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Illegal police conduct cannot cause a defendant to loose their standing to challenge a search. See, United States v. Maryland, 479 F.2d 566, 568 (5th Cir. 1973) (citing Fletcher v. Wainwright, 399 F.2d 62 (5th Cir. 1968)). By making the unrealistic presumption that all abandonments are voluntary, absent an illegal search, Oliver ignores the prior illegal police seizure and sanctions police violation of defendants' Fourth Amendment rights.

The better reasoned decisions of the Second and Fourth District Courts of Appeal consider the nexus, if any, between an illegal seizure and a subsequent abandonment. In United States v. Beck, 602 F.2d 726 (5th Cir. 1979), the court found an undeniable nexus between the illegal stop of the defendant's automobile and the defendant subsequently discarding a marijuana cigarette out of the automobile window. The Beck court reasoned

> these acts of abandonment do not reflect the mere coincidental decision of Beck and his passenger to discard their narcotics; it would be sheer fiction to presume they were caused by anything other than the illegal stop. Beck, 602 F.2d at 730.

Because the nexus between the illegal seizure and the abandonment of the evidence was not so attenuated to dissipate the taint, the Beck court suppressed the abandoned marijuana cigarettes. Id.[3]

The Second District Court of Appeal found a similar nexus between the illegal police seizure and the subsequent abandonment in the instant case. Curry, 576 So.2d at 892. The Second District correctly found Mr. Curry's abandonment of the evidence was "prompted by" and directly connected to the prior illegal police seizure. Id. See also, Cox v. State, 16 F.L.W. D2583 (Fla. 2d DCA October 4, 1991); McClain v. State, 576 So.2d 372 (Fla. 2d DCA 1991).

Both Florida and federal courts apply the same nexus test to determine whether a defendant voluntarily abandons property by disclaiming any interest in it after an illegal police seizure. In Daniels v. State, 576 So.2d 819, 823 (Fla. 4th DCA 1991), the court recognized a defendant loses standing to contest the search of luggage he has voluntarily disclaimed. However, a disclaimer prompted by an illegal police seizure is not voluntary and does not remove the taint of prior police misconduct. Daniels, 576 So.2d at 823 (citing United States v. Tolbert, 692 F.2d 1041, 1045 (6th Cir. 1982), cert. denied, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983)). The Daniels court held:

> To determine whether an abandonment is voluntary and not a product of police misconduct, the court must look to see if there is a causal nexus between the unlawful conduct and

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[3] The Beck court specifically rejected Oliver. Beck, 602 F.2d at 730 n. 2.

> a defendant's abandonment... Daniels, 576 So.2d at 823 (citing United States v. Roman, 849 F.2d 920, 922 (5th Cir. 1988)).

See also, Monahan v. State, 390 So.2d 756 (Fla. 3rd DCA 1980) (disclaimer of ownership of suitcase did not remove the taint of a prior illegal seizure).[4]

Similarly, in United States v. Morin, 665 F.2d 765 (5th Cir. 1982), the court suppressed disclaimed luggage as the product of an illegal police seizure because there was "a clear nexus between the illegal arrest of Morin and the subsequent verbal disclaimer of his luggage." Morin, 665 F.2d at 770. Although Mr. Curry physically discarded the instant evidence after an illegal seizure, rather than disclaiming any interest in luggage after an illegal seizure, the same nexus test applies.

This court and federal courts also apply similar nexus tests to determine whether a defendant's consent to search removes the taint of a prior illegal seizure. Florida v. Royer, 460 U.S. 491, 75 L.Ed.2d 299, 103 S.Ct. 1319 (1983); Norman v. State, 379 So.2d 643, 647 (Fla. 1980) (consent following an illegal seizure is presumptively involuntary and may become voluntary "only if there is a clear and convincing break in the chain of illegality sufficient to dissipate the taint of prior official illegal action.").

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[4] In State v. Perez, 15 F.L.W. D1355 (Fla. 3d DCA May 15, 1990), jurisdiction accepted, 570 So.2d 1305 (Fla. 1990), the court attempts to distinguish Monahan as a search rather than seizure case. Perez, 15 F.L.W. at D1355. However the police officers in Monahan never searched or threatened to search the disclaimed piece of luggage. Monahan, 390 So.2d at 757.

Applying a nexus test to determine whether an abandonment is prompted by, or the result of, a prior illegal seizure would not render all abandonments following illegal seizures involuntary. The state retains the opportunity to show a sufficient break in the chain of illegality to remove the taint of an illegal seizure. See, Norman, 379 So.2d at 647. Furthermore, defendants would not benefit by discarding evidence prior to a legal search because abandoned evidence may be tainted only by an illegal seizure. By ignoring the taint attached to evidence resulting from an illegal seizure, Oliver invites police to conduct illegal seizures anticipating defendants will discard incriminating evidence.

CONCLUSION

Based upon the foregoing authority and argument, this Honorable Court should affirm the decision of the Second District Court of Appeal, and resolve the conflict of decisions by approving the rationale of the Second and Fourth District Courts of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michele Taylor, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 15 day of November, 1991.

Respectfully submitted,

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