Q5 w/app.

IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
APR 8 199
CLERK, SUPREME COURT
By _____ Deputy Clerk

OK-per JGW

STATE OF FLORIDA,

Petitioner

v.

Case No. 77,684

RUFUS CHARLES CURRY

Respondent

_____/

Discretionary Review of Decision of
the Second District Court of Appeal

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MICHELE TAYLOR
Assistant Attorney General
Florida Bar No. 0616648
Westwood Center, 7th Floor
Criminal Division
2002 N. Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

STATEMENT OF THE CASE AND FACTS

RESPONDENT, RUFUS CHARLES CURRY, was charged by Information with possession of cocaine and resisting an officer without violence and moved to suppress the evidence.

Evidence presented at the suppression hearing indicated that Officers deSalvo and Cacciolfi were on patrol in uniform and in separate marked vehicles. They had been instructed to watch for drug sales in a certain area. At around 5:00 p.m., Officer deSalvo observed five to seven black males standing around an unpaved parking lot. DeSalvo radioed Officer Cacciolfi. The officers approached the group in their marked vehicles. As they exited their cars, Curry began to walk away. The officers repeatedly told Curry to stop. DeSalvo attempted to cut Curry off and stop him while Cacciolfi remained with the group. Curry turned around and started to rejoin the group. As deSalvo was coming up behind him, Curry spit a substance out of his mouth. The substance was determined to be cocaine, and Curry was arrested.

At the conclusion of the evidentiary hearing, the trial court denied Curry's motion to suppress. Curry then pled nolo contendere and reserved his right to appeal the denial of his motion.

The Second District Court of Appeal reversed the denial of Curry's motion to suppress and remanded the case to the circuit court with instructions to dismiss the charges. This ruling was in agreement with Anderson v. State, 16 F.L.W. D264 (Fla. 2d DCA

Jan. 23, 1991), and State v. Bartee, 568 So.2d 523 (Fla. 1st DCA 1990) and contrary to the decisions of the Third, Fourth, and Fifth Districts as cited in the Curry opinion. The Anderson case, which is currently pending before this Court on a certified question, essentially held that contraband which is abandoned by a suspect as a result of, or prompted by, a police officer's illegal detention may be inadmissible due to the "involuntary" nature of the abandonment.

ARGUMENT

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE ISSUE PENDING IN THIS CASE WHEN THE SECOND DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL, AND WHEN SAID ISSUE IS PRESENTLY PENDING BEFORE THIS COURT IN A SIMILAR CASE?

This case, Curry v. State No. 88-02615 (Fla.2d DCA March 22, 1991) [16 F.L.W. D 781], presents two bases for this Court's authority to exercise jurisdiction. First, pursuant to article V, section 3(b)(3) of the Florida Constitution and Rule 9.030 (a)(2)(A)(iv), of the Florida Rules of Appellate Procedure, this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same question of law. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The written opinion in this case expresses clear conflict on its face on the issue of whether a defendant's act of discarding an illegal substance after the commencement of an unlawful police stop renders the evidence admissible. The Second District in this case and the First District in State v. Bartee, 568 So.2d 523 (Fla. 1st DCA 1990), hold that the discarded evidence is inadmissible, while the other three appellate districts follow the opposite rule. See Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990); State v. Perez, 15 F.L.W. D1355 (Fla.3d DCA May 15, 1990); State v. Arnold, 15 F.L.W. D292 (Fla. 4th DCA Jan. 31, 1990); State v. Oliver, 368 So.2d 1331 (Fla.3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980).

Second, this Court has jurisdiction based upon the fact that Anderson v. State, 16 F.L.W. D264 (Fla. 2d DCA Jan. 23, 1991), which certified, as a matter of great public importance, a question on the same issue as in the instant case, is currently pending on the merits in this Honorable Court as State v. Anderson, No. 77,398. Accordingly, this Court should accept jurisdiction to resolve the conflict among jurisdictions and to answer a question of great public importance.

CONCLUSION

Based upon the foregoing reasons, arguments, and citations of authority, Petitioner respectfully requests this Honorable Court to exercise discretionary jurisdiction to review this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MICHELE TAYLOR
Assistant Attorney General
Florida Bar No. 0616648
2002 N. Lois Ave., Ste. 700
Westwood Center
Criminal Division
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to CAROL C. MURPHY, ESQ., Attorney for Appellant, 58 Morton Drive, Lakeland, Florida 33801 on this 5th day of April, 1991.

OF COUNSEL FOR PETITIONER

APPENDIX

1. Decision of the Second District Court of Appeal in Curry v.State, No. 88-02615 (Fla.2d DCA March 22, 1991) [16 F.L.W. D 781].

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

RUFUS CHARLES CURRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 88-02615

Opinion filed March 22, 1991.

Appeal from the Circuit Court for Lee County; William J. Nelson, Judge.

Carol C. Murphy, Lakeland, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Michele Taylor, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

The appellant, Rufus Charles Curry, challenges the judgments and sentences imposed upon him after he pled nolo contendere to the charges of possession of cocaine and resisting an officer without violence and reserved his right to appeal the denial of his motion to suppress. We reverse.

Evidence presented at the suppression hearing indicated that Officers deSalvo and Cacciolfi were on patrol in uniform and in separate marked vehicles. They had been instructed to watch for drug sales in a certain area. At around 5:00 p.m., Officer deSalvo observed five to seven black males standing around an unpaved parking lot. DeSalvo radioed Officer Cacciolfi. The officers approached the group in their marked vehicles. As they exited their cars, the appellant began to walk away. The officers repeatedly told the appellant to stop. DeSalvo attempted to cut the appellant off and stop him while Cacciolfi remained with the group. The appellant turned around and started to rejoin the group. As deSalvo was coming up behind him, the appellant spit a substance out of his mouth. The substance was determined to be cocaine, and the appellant was arrested.

At the conclusion of the evidentiary hearing, the trial court denied the appellant's motion to suppress. The appellant then pled nolo contendere and reserved his right to appeal the denial of his motion. The appellant filed a timely notice of appeal from the judgments and sentences imposed upon him on the basis of his plea.

We first conclude that the stop of the appellant was unlawful because there was no founded suspicion of criminal activity. Mosley v. State, 519 So.2d 58 (Fla. 2d DCA 1988). This case involves a defendant discarding evidence after the commencement of an illegal stop. The issue we must decide is whether the appellant's act of discarding cocaine after the

commencement of the unlawful police stop renders the evidence admissible. The courts are divided and have phrased the issue by asking whether the "abandonment" after the illegal stop is "voluntary" or not.

In Anderson v. State, 16 F.L.W. D264 (Fla. 2d DCA Jan. 23, 1991), this court noted the split of decisions and certified the question of whether an abandonment of property after an illegal police stop but not pursuant to a search may be considered involuntary. Anderson held that based on the facts of that case, Anderson's abandonment of evidence was a result of his illegal detention and directed the trial court to enter an order suppressing the evidence. Anderson was based on Stanley v. State, 327 So.2d 243 (Fla. 2d DCA), cert. denied, 336 So.2d 604 (Fla. 1976). Stanley suppressed evidence which had been thrown out of a car after commencement of an illegal stop and ruled that "fruits of the improper exercise of police power should have been suppressed." See also State v. Bartee, 568 So.2d 523 (Fla. 1st DCA 1990).

The courts that follow the opposite rule find that the abandonment is voluntary and the evidence admissible if the illegally stopped person discards the evidence before an actual police search is begun. Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990); State v. Perez, 15 F.L.W. D1355 (Fla. 3d DCA May 15, 1990); State v. Arnold, 15 F.L.W. D292 (Fla. 4th DCA Jan. 31, 1990); State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980). In Oliver, the defendant

was riding his bicycle when the police illegally ordered him to stop. After being told to stop, the defendant tossed a paper bag containing marijuana onto the street. The Oliver court said that this abandonment was in no sense prompted or tainted by the illegal police stop.

We disagree with the Oliver line of cases. We feel that the Anderson rule is the more reasoned approach. As stated by LaFave, Search & Seizure, section 2.6(b), note 62, page 472 (1987): "The question is not whether, but for the throwing away of the objects, the police would have found them in an illegal search. Rather, the question is whether the prior illegality has promoted the disposal, . . . Oliver is an invitation to police to engage in illegal stops."

In this case, it is clear that the appellant's act of spitting out the cocaine was prompted by or the result of the officer's illegal detention. There was a direct connection between the unlawful police conduct and the challenged evidence, as there was in Anderson and in United States v. Beck, 602 F.2d 726 (5th Cir. 1979). In Anderson, the police found a cocaine pipe in the back seat of a police cruiser after illegally stopping Anderson and detaining him there. In Beck, the police pulled along side a parked vehicle, and after talking to the occupants, they stopped the car without any founded suspicion. After the stop was made, the defendant threw marijuana out of the car window.

Since the appellant's act of discarding the cocaine was a result of his illegal detention, the cocaine should have been suppressed. Anderson. Accordingly, the trial court erred by denying the motion to suppress.

Reversed and remanded with instructions to the trial court to dismiss the charges.

SCHOONOVER, C.J., and LEHAN and ALTENBERND, JJ., Concur.