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OCT 23 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. Case No. 77,684

RUFUS CHARLES CURRY

Respondent.

_____/

Discretionary Review of Decision of
the District Court of Appeal, Second District

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner adopts the facts as set out in the Second District opinion:

> 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.

Because recent case law requires a close examination to determine whether an actual "stop" or "seizure" occurred, Petitioner offers the

following pertinent excerpts from the suppression hearing in the circuit court record:

> [DIRECT EXAMINATION OF OFFICER PETE DESALVO]:
>
> Q. What happened when you approached them?
>
> A. We pulled up and approached them and as we did Mr. Curry started walking away from us, started walking north. (R 10).
>
> . . .
>
> Q. And at what point did he start walking away from you?
>
> A. When we started to exit our vehicles.
>
> Q. And what direction did he go?
>
> A. Basically north. Away from Anderson.
>
> Q. And what direction did you go?
>
> A. I went east, northeast trying to get around them.
>
> Q. Did you say anything to him at that point?
>
> A. I told him repeatedly to stop.
>
> Q. Why did you ask him to stop?
>
> A. I wanted to investigate, you know, see what he was doing, see why he was walking away.
>
> Q. What did he do?
>
> A. He continued walking.
>
> Q. And what did you do after he continued walking?
>
> A. Like I said, I went around to cut him off and when he saw me coming around he turned around and started walking back towards the group.
>
> [CROSS EXAMINATION]
> Q. So as he started you tried to cut him off, he turned and started walking the other direction; is that correct?

A. Yes, sir.

Q. And then Officer Cacciolfi went to stop him at that point, didn't he?

A. Office Cacciolfi was still approaching the group from the south and he just started walking back. (R 12-13).

. . .

[DIRECT EXAMINATION OF OFFICER CACCIOLFI]:

Q. And what did you do after you saw him walking away from you?

A. I more or less told him to stop. I maintained at the original spot because there was other subjects and we was staying out with them.

Q. And were you able to keep an eye on the defendant?

A. Well, he jumped over the wall and started heading toward the apartment complex. That's when Officer DeSalvo attempted to head him off and stop him. (R 14-15).

. . .

[REDIRECT EXAMINATION]

Q. When he was coming back towards you did you say anything to him before he spit out the substance?

A. No. I really never had time. Like I said, he jumped back over that wall, looked up at me and went like that (indicating), he spit it out. (R 17).

[RECROSS EXAMINATION]

Q. But you were going to stop him, weren't you?

A. I was, yes.

. . .

[CROSS-EXAMINATION OF RESPONDENT, RUFUS CURRY]

> Q. When you saw the police officers you started to walk away; is that right?
>
> A. No, sir. I hadn't even seen them. Me and my cousin Pee Wee, we was walking back towards the house to get some more beer. I had a half can of beer in my hand. So we crossed over the wall about this tall (indicating). We crossed over the wall. We was walking toward the house to get some more beer. So by that time I think they was driving up, right, and he was saying stop. It was a whole bunch of peoples out there. I didn't thought he was talking to me and my cousin. We kept walking. He started running behind us and he told me to stop and I turned around and I had beer in my mouth. I came back across the wall. I sat the can down because I knew he was going to take me to jail anyway on an open container. So I spit the beer our and I walked up to him. (R 20).
>
> . . .

The trial court denied the motion to suppress on the basis that no search was conducted. The court stated, "If they had stopped him and searched him and searched his pockets and all that kind of thing and found it there, I agree with you. But that's not what the facts show." (R 23). Defense counsel responded by saying, "No, they're saying he spit it out but only after they were attempting to stop him... It's quite evident. He knew it and they knew it. They were going to stop him." (R 23).

The Second District Court of Appeal reversed the trial court's order denying Respondent's Motion to Suppress. Curry v. State, 596 So.2d 890, 891-92 (Fla.2d DCA 1991). The reasons, as set out in the opinion, are reproduced below:

[1] 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, 576 So.2d 319 (Fla.2d DCA 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 (la. 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."

[2] 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.

SUMMARY OF THE ARGUMENT

The cocaine rock spit out by the defendant was validly retrieved by police officers and should not have been suppressed for two reasons: (1) the evidence was abandoned by the defendant during an attempted invalid police stop and therefore the defendant was not "seized" for Fourth Amendment purposes, pursuant to the recent holding in California v. Hodari D, and (2) even if the defendant was seized, the evidence was discarded in an area in which the defendant had no expectation of privacy and did not result from a search. Therefore, the decision of the Second District Court of Appeals should be reversed.

ARGUMENT

WHETHER THE SEIZURE OF THE COCAINE WAS PROPER WHERE THE DEFENDANT ABANDONED THE EVIDENCE IN AN AREA WHERE HE HAD NO EXPECTATION OF PRIVACY, DURING AN ATTEMPTED INVALID POLICE STOP WHERE NO SEARCH WAS CONDUCTED?

The decision of the Second District is subject to reversal by this Court on two separate bases: (1) the police action below did not constitute a "seizure" as recently defined by the United States Supreme Court in California v. Hodari D., ___ U.S. ___, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), and (2) the contraband was voluntarily abandoned by Curry prior to any search.[1]

First, in applying the Hodari analysis to the facts of this case, it is clear that no illegal stop or seizure occurred. The facts in that case are as follows:

> Late one evening in April 1988, Officers Brian McColgin and Jerry Pertoso were on patrol in a high-crime area of Oakland, California. They were dressed in street clothes but wearing jackets with "Police" embossed on both front and back. Their unmarked car proceeded west on Foothill Boulevard, and turned south onto 63rd Avenue. As they rounded the corner, they saw four or five youths huddled around a small red car parked at the curb. When the youths saw the officers' car approaching they apparently panicked, and took flight. The respondent here, Hodari D., and one companion ran west through an alley; the others fled south. The red car also headed south, at a high rate of speed.
>
> The officers were suspicious and gave chase. McColgin remained in the car and continued south on 63rd Avenue; Pertoso left

[1] For purposes of this review, the State is not taking the position that the attempted stop in this case was valid.

> the car, ran back north along 63rd, then west on Foothill Boulevard, and turned south on 62nd Avenue. Hodari, meanwhile, emerged from the alley onto 62nd and ran north. Looking behind as he ran, he did not turn and see Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled Hodari, handcuffed him, and radioed for assistance. Hodari was found to be carrying $130 in cash and a pager; and the rock he had discarded was found to be crack cocaine.

113 L.Ed.2d at 695.

The Supreme Court stated that the only issue presented in Hodari was whether, at the time he dropped the drugs, Hodari had been "seized" within the meaning of the Fourth Amendment. The Court held that he had not. To constitute a seizure of the person, there must be either the application of physical force, however slight, or where that is absent, submission to a law enforcement officer's "show of authority" to restrain the subject's liberty. The issue in Hodari, as in the instant case, is whether the defendant submitted to police authority prior to discarding the rock cocaine. The Hodari court, answering this question in the negative, stated, "In sum, assuming that Pertoso's pursuit in the present case constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied." 113 L.Ed.2d at 699.

Similarly, in the case at bar, Rufus Curry failed to submit to the show of authority. Curry did not discontinue walking or in

any other way respond to police directives until after he abandoned the cocaine rock. The facts in this case are not as dramatic as those in Hodari, in that the defendant here did not flee rapidly on foot, necessitating a full-blown tackle to effectuate the seizure. Nevertheless, Curry did not stop walking when called upon to do so by police, and he spit out the cocaine while Officer deSalvo was attempting to circle around Curry and cut him off. The Second District did not have the benefit of Hodari when this case was decided. It was assumed that an attempted stop was as significant as a successful one for Fourth Amendment purposes. That the seizure in this case was an attempted one is borne out by the testimony presented at the suppression hearing. (R 12-15, 17). Moreover, defense counsel himself characterized the police action as an attempted stop during his argument to the trial court. (R 23). As the Supreme Court stated in Hodari, "neither usage nor common-law tradition makes an attempted seizure a seizure." (emphasis in original) 113 L.Ed.2d at 697, n.2.

Counsel for Petitioner has discovered only three Florida cases to date in which Hodari has been applied. In Butler v. State, 579 So.2d 890 (Fla. 3d DCA 1991), the Third District affirmed the denial of the defendant's motion to suppress where the defendant discarded baggies of cocaine while fleeing from the police but before the police officers said anything. In State v. Arnold, 579 So.2d 902 (Fla. 4th DCA 1991), the Fourth District held that cocaine evidence was admissible because the defendant threw the bag onto an apartment roof as he was being chased by

police officers. On the other hand, the Fourth District reversed an order denying suppression in In Interest of J.K., 581 So.2d 940 (Fla. 4th DCA 1991). In that case, the district court determined that there had been submission to police authority because the defendant had actually turned and responded to the officer's command to stop at the time he dropped the illegal substance. Id. at 941.

Petitioner submits that the facts of this case are more similar to those in Butler, Arnold, and Hodari than in J.K., primarily because Curry did not stop when called upon to do so by the officers. Because Curry discarded the cocaine rock prior to his submission to police authority, the contraband was validly seized by the law enforcement officers and should not have been suppressed.

In the event this Court should determine that the police conduct in this case amounted to a seizure, however, Petitioner still maintains that the contraband was validly retrieved by the officers prior to a search. For this proposition, Petitioner relies on the line of cases in the Third, Fourth and Fifth Districts beginning with State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980) which essentially hold that a suspect has no expectation of privacy in property abandoned in a public area.[2] See also Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990); A.G. v. State, 562 So.2d 400

[2] The Second District initially followed Oliver in Patmore v. State, 383 So.2d 309 (Fla. 2d DCA 1980), but later distinguished Patmore on the basis that it involved a valid stop. See Anderson v. State, 576 So.2d 319, 321, n.1 (Fla. 2d DCA 1991).

(Fla. 3d DCA 400); State v. Perez, 15 F.L.W. D1355 (Fla. 3d DCA May 15, 1990), jurisdiction accepted, 570 So.2d 1305 (Fla. 1990); State v. Arnold, 15 F.L.W. D292 (Fla. 4th DCA Jan. 31, 1990), opinion withdrawn and substituted with State v. Arnold, 579 So.2d 902 (Fla. 4th DCA 1991).[3]

The court in Oliver opined:

> Until an actual police search has begun, it cannot be assumed that the police will search a person whom they have temporarily stopped on the street or that they will search such a person's car or other personal belongings. Not every temporary detention necessitates such action. As a consequence, a person's abandonment of property subsequent to an illegal police stop can hardly be considered the product of the stop. In any event, no person can have a reasonable expectation of privacy [which is at the core of Fourth Amendment protection] with respect to property which he has decided to discard in the public streets in hope of avoiding a police search. Such a decision precludes him from later asserting Fourth Amendment protection as to such property.

(citations omitted). 368 So.2d at 1336. The court stated further that "[o]nly when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search..." Id.

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[3] Although the original Arnold opinion has been substituted by one with the same result under a Hodari analysis (see P. 11 of this brief), the original opinion still has relevance to this portion of Petitioner's argument. The holding and reasoning in the original opinion is still valid for those situations where the suspect has submitted to a show of authority but has not been searched. Moreover, the original Arnold opinion is in line with previous Fourth District decisions on the issue of reasonable expectation of privacy. See e.g., State v. Davis, 415 So.2d 823 (Fla. 4th DCA 1982); State v. Milligan, 411 So.2d 946 (Fla. 4th DCA 1982).

In the instant case, the law enforcement officers did not physically search Curry and there is no evidence whatsoever that they intended to do so. Nor was Respondant requested or commanded to reveal items in his possession. Compare, Wallace v. State, 540 So.2d 254 (Fla. 4th DCA 1989) (during an illegal detention, police officer asked defendant what he was concealing in his hand.); Williams v. State, 564 So.2d 593 (Fla.2d DCA 1990) (police officer, desiring to see what defendant had in his mouth, told defendant to "spit it out.") Moreover, under the reasoning of Oliver and it progeny, it is irrelevant whether the suspect has submitted to a show of authority at the time he discards the evidence. Curry supra, 570 So.2d at 1073.

The cases holding the contrary view, in addition to the one at bar, are Anderson v. State, 576 So.2d 319 (Fla.2d DCA 1991), review pending, No. 77,398 (Fla. 1991)[4] , State v. Bartee,568 So.2d 523 (Fla.1st DCA 1990), and Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988).[5]

Petitioner, of course, urges this Court to resolve this conflict in favor of the Oliver line of cases, which hold to the more reasonable rule. As the Fifth District Court wisely noted in Curry, supra:

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[4] Anderson is factually distinguishable from the instant case, particularly when applying a Hodari analysis, because Greg Anderson was undoubtedly seized. An officer placed Anderson in a cruiser while he ran a warrants check; after removing Anderson from the cruiser, police found a cocaine pipe in the car. 576 So.2d at 320. The Second District certified the following question as a matter of great public importance:

> CAN AN ABANDONMENT OF PROPERTY AFTER AN ILLEGAL POLICE STOP BUT NOT PURSUANT TO A SEARCH BE CONSIDERED INVOLUNTARY?

> Only when the police begin an actual physical search of a suspect does abandonment become involuntary and tainted by an illegal search and seizure. See Morris v. State, 519 So.2d 706 (Fla. 2d DCA 1988).
>
> . . .
>
> Here, evidence obtained after, or in the course of making an illegal stop, by the defendant's own decision to drop or throw it away, is not per se tainted by the illegal stop. If the police proceed to search a defendant or order him to reveal the contents of his pockets after making an illegal stop, the Fourth Amendment line requiring suppression will be crossed. Because it was not crossed in this case, we affirm and acknowledge conflict with Spann.

570 So.2d at 1073. Similarly, in this case the defendant voluntarily discarded the cocaine rock before the officers caught up with him and long before there was a search or even the threat of a search. Although one might argue that Curry's decision was "prompted by" the conduct of police, it was nonetheless voluntary. The officers neither requested nor commanded that Curry reveal the contraband. Thus, the dividing line for Fourth Amendment purposes was not crossed and evidence should not have been suppressed.

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[5] Spann is often cited by the district courts to support the holding that an unreasonable stop renders an abandonment involuntary. However, the Fourth District itself later distinguished Spann in Arnold by noting that in Spann, both sides stipulated that the defendant dropped the narcotics as a result of an officer's order to stop. Arnold, 15 F.L.W. at D293.

CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, this Honorable Court should reverse the decision of the Second District Court of Appeal, and resolve the conflict of decisions by approving the rationale of the Third, Fourth and Fifth District Courts of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Public Defender's Office, P.O. Box 9000 - PD, Bartow, Florida 33830 on this 21st day of October, 1991.

OF COUNSEL FOR PETITIONER