IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,695

TWANA DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant before the District Court of Appeal, Fourth District, and the defendant in the trial court, Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. Respondent was the Appellee and the prosecution, respectively, in the court's below.

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

The following symbols will be used:

"R" = Record on Appeal

"PMB" = Petitioner's Initial Merits Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as it appears at pages two through four (4) of her Initial Brief on the merits to the extent it represents an accurate, non-argumentative recitation of the proceedings below. However for a complete statement of the facts, the State submits the following additions, modifications and clarifications:

1. Detective Cuttcliffe testified that after she looked at Petitioner's airline ticket and identification, **and before** obtaining Petitioner's consent to search her person, the Detective returned both items to Petitioner (R. 5-6).

2. Detective Cuttcliffe testified that in asking for Petitioner's consent to search "her person" and bag or luggage, Detective Cuttcliffe told Petitioner the search was voluntary, and that Petitioner had the right to refuse to the search (R. 6-7, 16). To Detective Cuttcliffe's request, Petitioner responded by stating: "sure, I don't do drugs." (R. 7, 17).

3. Detective Cuttcliffe testified that she first searched Petitioner's carry-on bag (R. 7). Cuttcliffe bent down to the floor to search the bag, as the officer searched through the contents of the bag, Petitioner became somewhat agitated and nervous, and began to fumble with her hands by pulling at her skirt, "picking it up and down around her hips." As Petitioner fumbled with her skirt, the skirt pressed up against what looked like the corner of an object protruding from between Petitioner's legs. Detective Cuttcliffe stated that since she was squatting down, going through the bag, when Petitioner pulled on her skirt

she was almost at eye level with the "corner of the bag" protruding from under Petitioner's skirt (R. 7).

4. When Detective Cuttcliffe finished searching the bag, she asked Petitioner if she would prefer to step around the corner into the inside of the ladies room (R. 21), so that not everybody in the airport could see "the pat down" (R. 7-8). Appellant voluntarily - and gratefully - went around the corner for privacy with Detective Cuttcliffe (R. 7-8, 20, 22).

5. Detective Cuttcliffe testified that once out of public view, she put her hand on the package that could be seen between Petitioner's legs (R. 8). The package was "clearly visible" (R. 9), since it was on Petitioner's upper thigh, about two or three inches below the crotch (R. 11, 19). Detective Cuttcliffe testified that when she was bending down to search the bag, she saw the package in Petitioner's thigh area (R. 10, 19); therefore, Detective Cuttcliffe's hand did not go in or over Petitioner's crotch when she reached under the skirt for the package she had seen on Petitioner's thigh (R. 11, 18-19).

6. Detective Perry Hendrick's testimony corroborated Detective Cuttcliffe's version, and verified that Petitioner consented to the search of her person and her luggage (R. 28-29), and stated that at no point did Petitioner say no, but instead she acknowledged the words to go ahead and search (R. 30).

7. Petitioner testified that she was 24 years old at the time of her arrest. She is a high school graduate, and attended one year of college -- six months for business management training and six months of basic computer training (R. 33, 35-37).

8. Petitioner conceded that when the Detective asked her, if they could search her person and her baggage, she answered, "sure, I don't mind." (R. 39).

9. Petitioner also conceded that Detective Cuttcliffe said search your "person" and not "purse" (R. 45).

10. At the trial level Petitioner did not contest the validity of the encounter or stop at the Ft. Lauderdale Airport (R. 49). The sole issue before the trial court was whether the consent was voluntary; before the trial court, Petitioner did not argue that the search went "beyond the scope of the consent," rather that she never consented. (See R. 46-49.)

11. The trial court's specific findings were that from the testimony presented at the hearing, "the consent was voluntary." (R. 51)

12. The opinion of the Fourth District Court of Appeal states:

> We affirm appellant's conviction. The trial court found appellant consented to the search which allowed the female police officers (sic) to discover the cocaine carried on appellant's **person.** Although the initial random encounter took place in a public area of the Fort Lauderdale/Hollywood International Airport, the actual search of appellant took place in the privacy of a nearby ladies' restroom. **Given the totality of the circumstances we find no error.** See, State v. Menefield, 16 F.L.W. D576 (Fla. 4th DCA Feb. 27, 1991)(en banc).

13. The Judgment provides that Petitioner was imposed the $200 Trust Fund, pursuant to §27.3455 (R. 80). The District Court's opinion of March 27, 1991, reversed and remanded "for a hearing on the imposition of costs after notice to appellant."

SUMMARY OF ARGUMENT

Point I The State maintains that since the District Court's ruling affirming the trial court's findings of fact without having to decide whether consent to search the "person" included a pat-down or search of "the crotch or groin area of the individual," this Court is **without jurisdiction to consider and decide the question.** See, Revitz v. Baya, 355 So.2d 1170 (Fla. 1977). Accordingly, the writ of certiorari should be discharged as improvidently granted, and this Court should await a case with the appropriate facts.

On the merits, however, the State submits that since the evidence is perfectly clear that Detective Cuttcliffe never touched Petitioner's genitals; and the District Court, based on the totality of the circumstances, could not conclude that the trial court's factual determinations were clearly erroneous, the affirmance of the conviction was warranted and correct under the facts of this case.

Point II - Petitioner is deemed to have constructive notice of court-mandated costs. As such, the District Court erred in reversing the imposition of statutorily mandated costs. The District Court's decision on this issue must be quashed, and the imposition of costs by the trial court affirmed in accordance with Beasley, infra.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO SUPPRESS THE EVIDENCE WHERE THE EVIDENCE IS CLEAR THAT THE DETECTIVE DID NOT EXCEED THE SCOPE OF THE CONSENT TO SEARCH PETITIONER'S PERSON SINCE THE OFFICER DID NOT TOUCH PETITIONER'S GENITAL AREA IN CONDUCTING THE PAT DOWN THAT REVEALED THE COCAINE BEING CARRIED ON PETITIONER'S UPPER THIGH, "TWO INCHES BELOW HER CROTCH AREA."

The instant case is being considered under this Court's discretionary jurisdiction solely on the basis that the District Court certified the following question as being of great public importance:

> CAN A LAW ENFORCEMENT OFFICER PAT-DOWN OR SEARCH THE CROTCH OR GROIN AREA OF AN INDIVIDUAL WHO HAS CONSENTED TO BE SEARCHED?

See Article V, Section 3(b)(3), Florida Constitution; Fla. R. App. P. 9.030(a)(2)(A)(v).

The evidence is abundantly clear that Detective Cuttcliffe never touched Petitioner's genitals when she reached to grab the box containing the cocaine which was protruding from under Petitioner's skirt. Detective Cuttcliffe clearly stated that she simply put her hand on the package (R. 8-9), which was about two or three inches below Petitioner's crotch area (R. 11, 19), and that the Detective's "hand never went in [Petitioner's] crotch" (R. 11). The District Court of Appeal affirmed the conviction, on the basis that the trial court's findings of voluntariness of

the consent were not clearly erroneous; and that given the totality of the circumstances, the District Court found no error justifying reversal.

The State maintains that since the District Court's ruling affirming the trial court's findings of fact, without the need of deciding whether consent to search the "person" included a pat-down or search of "the crotch or groin area of the individual," this Court is **without jurisdiction to consider and decide the question.** See, Revitz v. Baya, 355 So.2d 1170 (Fla. 1977). Accordingly, the writ of certiorari should be discharged as improvidently granted.

Although the State maintains this Court does not have jurisdiction to answer the certified question, it will now address the merits in order to protect its interests. On the merits, Petitioner begins by challenging the "voluntariness of the confession." However, the record clearly shows that after listening to the Officers' and Petitioner's testimony, as well as to the argument of counsel, the trial court found Petitioner gave a free and voluntary consent to search her person (R. 51). It is settled law that the ruling of a trial court on a motion to suppress comes to the appellate courts clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. Smith v. State, 378 So.2d 281 (Fla. 1979); McNamara v. State, 357 So.2d 719 (Fla. 1978). Put another way, a reviewing court must defer to the fact-finding authority of the

trial court and should not substitute its judgment for that of the trial court. Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987); DeConigh v. State, 433 So.2d 501, 504 (Fla. 1983).

In the case at bar, the trial court specifically found that Petitioner's testimony was consistent with the testimony of the officers (R. 51), and based on the evidence, the court found "the consent was voluntary." It is within the trial court's province to determine the credibility of the witnesses and to make factual findings. The trial court's findings are well supported by the record, and as such, the District Court was unable to conclude that based on the totality of the circumstances the trial court's factual determinations were clearly erroneous; and **affirmed** the findings and conviction. Davis v. State, 16 FLW D796 (Fla. 4th DCA March 27, 1991). The State maintains that from the totality of the circumstances it cannot be concluded that the trial court's factual determinations were clearly erroneous. Therefore, the District Court was correct in affirming the conviction because it is clear from the evidence that Detective Cuttcliffe **never** touched Petitioner's genitals in conducting the search of Petitioner's "person." See, Tognaci v. State, 571 So.2d 76 (Fla. 4th DCA 1990); and Alexander v. State, 575 So.2d 325 (Fla. 4th DCA 1991). The voluntariness of the consent having been found against Petitioner by the trial court, and affirmed by the appellate court, the issue is not now before this Honorable Court.

In order to have this Court answer the question as certified by the District Court, Petitioner also argues that the

consent she gave Detective Cuttcliffe to search her "person" did not include "an agreement to a search of the very private area near her genitals toward which the officer almost immediately directed her attention." (PMB 8). The transcript of the hearing before the trial court clearly shows that Detective Cuttcliffe testified that once she squatted down to search Petitioner's bag, she noticed Petitioner became very agitated and nervous and began to fidget with her skirt. The Detective testified that from this vantage point, the officer observed a package between Petitioner's legs as Petitioner pulled her skirt up and down. When the officer observed the package hanging below Petitioner's skirt, Detective Cuttcliffe asked Appellant if she would prefer to step around the corner into the ladies room so that the "pat-down" could be conducted in private. Petitioner "gratefully" told the Detective she would prefer that, and willingly stepped into the ladies room with Detective Cuttcliffe. Once inside the ladies room, Detective Cuttcliffe, simply put her hand on the package that was taped to Petitioner's leg, two or three inches below the "crotch," and plainly visible to the officer. Detective Cuttcliffe testified she did not touch Petitioner's crotch (R. 20). The testimony was clear that there was no need to touch Petitioner's genital area since Detective Cuttcliffe obtained the package from Petitioner's thigh by reaching the package from under the hem line of Petitioner's skirt.

The State submits that the conviction was properly affirmed by the District Court under the facts of this case. And that this disposition of the case is consistent with United States v. Blake, 888 F. 2d 795 (11th Cir. 1989). The Blake Court held:

> Our conclusion, of course, does not imply that such an intrusive search may never be consensual; it merely requires that an officer obtain proper consent. ... One might even reasonably expect the traditional frisk search, described in *Terry v. Ohio*, ..., as a "thorough search ... of ... arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet."

888 F.2d at 800-801. Under the facts and circumstances of this particular case, at most it can be said that Detective Cuttcliffe conducted a Terry patdown of "the entire surface of the legs down to the feet;" which is clearly permissible under Blake. As such, the District Court's factual finding that the search here was **within the scope** of the consent actually given is not clearly erroneous; therefore, the decision of the District Court must be approved affirming the conviction, without answering the certified question.

POINT II

THE TRIAL COURT DID NOT ERR IN IMPOSING STATUTORILY MANDATED COSTS.

On appeal to the District Court, Petitioner argued that the trial court erred in assessing court costs against her without notice or an opportunity to be heard. The District Court, without the benefit of this Court's decision in State v. Beasley, 16 FLW S310 (Fla. May 9, 1991), agreed with Petitioner, and reversed and remanded for a hearing on the imposition of costs after notice, Davis v. State, 16 FLW D796 (Fla. 4th DCA March 27, 1991).

The record herein shows that the only costs imposed on Petitioner where the "$200 Trust Fund pursuant to F.S. 27.3455." (R. 80). In Beasley, this Court reiterated its holding in Jenkins v. State, 444 So.2d 947 (Fla. 1984) that 1) an indigent defendant must be given adequate notice that costs will be assessed; and 2) **prior to enforcing the collection** of assessed costs, the court must make a determination of the defendant's ability to pay. Beasley provides that **constructive**, rather than actual notice, is sufficient; and that the defendant's ability to pay statutorily mandated costs does not become an issue until the State seeks to enforce payment of those costs. Id., at 311.

The State maintains that since the only costs imposed on Petitioner were the $200 Trust Fund pursuant to §27.3455, Fla. Stats., Petitioner had **constructive** notice that these costs would be imposed on her by virtue of §27.3455 being the law in the State. Beasley. Therefore, in light of Beasley, the District

Court's reversal and remand on the issue of costs should be quashed, and the trial court's imposition of statutory costs affirmed.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court **DISCHARGE** the Writ of Certiorari since this Court is without jurisdiction to answer the certified question. In the alternative, the decision of the District Court of Appeal, Fourth District, filed March 27, 1991, should be **APPROVED** as affirming the conviction, without answering the certified question as being improperly presented to this Court under the particular facts and circumstances of the case; but **QUASHED** to the extent it reverses the imposition of statutorily mandated costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Answer Brief on the Merits" has been furnished by courtier to: TANJA OSTAPOFF, Assistant Public Defender, Counsel for Petitioner, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, FL 33401,this 7th day June, 1991.

Georgina Jiménez-Orosa
Of Counsel