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FILED
SID J. WHITE
MAY 22 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

TWANA DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,695

PETITIONER'S INITIAL BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner, Twana Davis, was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida, was the appellee in the appellate court and the prosecution in the trial court. In the brief, the parties will be referred to by name.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner, Twana Davis, charged with possession of more than 400 grams of cocaine (R 71), moved to suppress the evidence seized from her after a search at Ft. Lauderdale International Airport (R 75). She also moved to suppress certain admissions made by her to police following the search (R 78-79).

At the hearing on the motions, Detective Vicky Cutliffe testified that she and her partner, Detective Hendrick, went up to Ms. Davis after seeing her walk past the ladies' room in the Eastern Airlines concourse of the airport (R 5). They identified themselves to Ms. Davis as police officers and asked if she would speak to them, although they had no reason to suspect her of any illegal activities (R 5). Ms. Davis agreed to do so, and she produced her airline ticket and identification when the officers asked for them (R 6). After returning the documents to Ms. Davis, Detective Cutliffe explained that she and Hendrick were narcotics officers and asked Ms. Davis for permission to search her "person." Ms. Davis was told she had the right to refuse (R 7, 8), but she agreed to allow the search to proceed.

Detective Cutliffe was examining Ms. Davis's carry-on bag when she noticed that Ms. Davis was fumbling with her skirt, revealing "what looked like the corner of an object protruding from between her legs." (R 7). Detective Cutliffe than asked Ms. Davis if she would prefer to step inside the ladies' room so that she could be searched in private. Ms. Davis said she would. The detective accompanied Ms. Davis "around the corner" to the entrance of a nearby restroom -- but not inside. There, Detective Cutliffe put

her hand on a package between Ms. Davis's legs (R 8). Based on her experience of having felt kilos of cocaine between women's legs "hundreds of times," Detective Cutliffe believed that the object felt like a kilo of cocaine (R 10). Ms. Davis asked Detective Cutliffe how she knew, and Cutliffe told her it was visible (R 8-9).

Ms. Davis was then placed under arrest and read her rights (R 9). Asked why she did it, she said it was for the money. She was going to sell it to a girl she danced with in Atlanta (R 9). Ms. Davis was taken to the office maintained by the police at the airport, where she was again advised of her rights (R 9). She told the police that she was visiting a friend named Larry and had stolen the cocaine from him (R 9).

Ms. Davis testified in her own behalf that when Detective Cutliffe asked if the police could search her "purse," Ms. Davis thought she was talking about her luggage (R 34).

After hearing the testimony, the trial court found that Ms. Davis voluntarily consented to the search (R 51) and denied the motions to suppress (R 52). Ms. Davis thereupon entered a plea of nolo contendere to the charge against her, specifically reserving the right to appeal the trial court's denial of her motions to suppress (R 52). After accepting the plea (R 57), the trial court sentenced Ms. Davis, on June 27, 1989, to serve the mandatory minimum term of fifteen years in prison. Ms. Davis was also fined $250,000, as required by law (R 64, 82).

On direct appeal, the Fourth District Court of Appeal upheld the trial court's denial of Ms. Davis's motions to suppress.

However, the district court certified the following question to this Court as one 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?

This Court accepted jurisdiction of this cause in an order dated April 24, 1991.

SUMMARY OF THE ARGUMENT

A search justified on the basis of consent is limited by the scope of the consent which is given. Where Ms. Davis consented to a search of her luggage, her patdown by police was not authorized. Even if Ms. Davis consented to a search of her "person," that consent did not extend to permit police to manipulate the private area between her legs.

ARGUMENT

POINT

THE TRIAL COURT ERRED IN DENYING MS. DAVIS'S MOTION TO SUPPRESS THE EVIDENCE WHERE HER CONSENT DID NOT EXTEND TO AUTHORIZE A SEARCH OF HER CROTCH AREA.

In the present case, Ms. Davis was approached by two police officers in the Ft. Lauderdale Airport. Although the officers had no reason to suspect her of any criminal activity, they asked her to consent to a search. Ms. Davis agreed, but the scope of her consent did not include the search of her crotch area to which she was then subjected. Under the totality of the circumstances presented by this case, then, the warrantless search could not be justified by the consent which was given, and the evidence seized as a result thereof should have been suppressed.

A defendant has the right to limit the scope of the search to which he consents. In State v. Wells, 539 So.2d 464 (Fla. 1989), our Supreme Court held that, "A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances." Id. at 467. See also, United States v. Rackley, 742 F.2d 1266, 1271 (11th Cir. 1984). Thus, consent to search a car's trunk, for instance, does not suffice to justify police intrusion into any closed, sealed containers which are found inside the trunk, absent additional consent directed toward those containers. Wells, supra.[1]

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[1]This conclusion was undisturbed by the United Sates Supreme Court's decision reviewing Wells. Florida v. Wells, 495 U.S. __, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990).

Any ambiguity in the consent given must be construed in the light most favorable to the defendant, that is, in the most limited way consistent with a fair interpretation of what was said. Consequently, in Leonard v. State, 431 So.2d 614 (Fla. 4th DCA 1983), the evidence at best established that the defendant consented to a search for a gun, which was completed before a backup officer was called. When the second officer opened a pouch he found in the vehicle and discovered drugs, the evidence was held inadequate to demonstrate that the defendant consented to a blanket continuing search or to a second search by a back-up officer. See also, Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983) [defendant tells agent they can look inside attache case but may not touch "Christmas presents" inside].

By the same token, a defendant's response of "Sure" to an officer's request whether he would mind being searched has been held not to constitute evidence of a valid consent. State v. Kassidy, 495 So.2d 907 (Fla. 3d DCA 1986). And in Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980), the police asked the defendant if he minded whether his tote bag was checked. His answer, "Do you mind if I open it?" and action in holding the bag and removing items from it until the officers reached inside and seized the contraband did not establish his consent to the search. See also, State v. Wells, supra, [this Court rejects State's argument that police receiving an ill-defined or limited consent to be searched, are vested with all the authority conferred by a warrant].

In the present case, Ms. Davis testified that she was asked by Detective Cutliffe whether she consented to having her "purse"

searched. It was to this limited extent that her consent was given (R 34). This understanding was consistent with Detective Cutliffe's testimony that she asked if Ms. Davis objected to a search of her "person" and luggage (R 16, 28), since the word "person" could easily have been misunderstood as "purse." Ms. Davis's response of "Sure" to the officer's inquiry whether she minded if she was searched was at best ambiguous. Horvitz, supra. Coupled with the confusion of "purse" for "person," it cannot be said that Ms. Davis consented to a search of her body at all.

Moreover, even if Ms. Davis's response is construed as a consent to a search of her "person," it did not expressly include agreement to a search of the very private area near her genitals toward which the officer almost immediately directed her attention. Genital searches, after all, intrude upon an area where individuals have special privacy interests. In a case factually similar to that at bench, two defendants were proceeding through the Ft. Lauderdale Airport when they were approached by deputies, who requested permission to search their "persons," even using the phrase "body search." In addition, one of the deputies[2] made gestures toward the defendant's crotch area and asked, "Do you mind." Nevertheless, in United States v. Blake, 718 F.Supp. 925 (S.D.Fla. 1988), Judge Roettger held that even if the consent to search were freely and voluntarily given, the nature of the search conducted, described as "reaching for the crotch area," exceeded the limits of decency, rendering the search unconstitutional.

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[2]Detective Hendrick, who was Detective Cutliffe's partner in the instant case.

This decision was approved by the Eleventh Circuit Court of Appeals in United States v. Blake, 888 F.2d 795 (11th Cir. 1989). The federal appellate court observed that persons standing in a public area such as an airport could not reasonably be held to have construed their authorization of a search of their "person" to extend to a touching of their genitals, which the court viewed as a "serious intrusion into the defendants' privacy." Id. at 800. Indeed, concurring Judge Shoob of the Eleventh Circuit Court of Appeals wrote separately to express his concern at the "outrageous conduct" of the officers in that case.

> A layperson approached in an airport concourse by law enforcement officers making random stops ordinarily would consent to a search of his or her luggage and even a search of his or her person. I do not believe, however, that a layperson who consents to such a search would anticipate the kind of intrusive and intimate contact that occurred in this case. I share the district court's "amazement that there have apparently been no complaints lodged or fists thrown by indignant travelers" subjected to these searches. United States v.Blake and Eason, 718 F.Supp. 925, 927 (S.D. Fla. 1988).

In a footnote, the judge commented that, "This writer would react in that fashion -- especially if the officer was smaller than he." Blake, supra, 888 F.2d at 801, n.1.

In addition, although in the instant case, a female detective searched a female, it should be emphasized that the procedure employed by this specific female detective is not limited to searches of females encountered at the airport. Rather, Detective Cutliffe has conducted numerous "crotch" searches of males she has encountered at the airport as well. See, e.g., Tognaci v. State, 571 So.2d 76 (Fla. 4th DCA 1990). As noted in that case, 571 So.2d

at 78, as well as in United States v. Blake, supra, 888 F.2d at 800, genital frisks of male inmates by female guards are constitutionally impermissible even in the context of a prison setting, where privacy rights are viewed on a lesser scale. See, Sterling v. Cupp, 44 Or. Ap. 755, 607 P.2d 206 (1980), as modified, 290 Or. 611, 625 P.2d 123 (1981); cf., Madyun v. Franzen, 704 F.2d 954, 956-957 & nn. 1-2 (7th Cir), cert. denied, 464 U.S. 996, 105 S.Ct. 493, 78 L.Ed.2d 687 (1983); Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982), cert. denied, 461 U.S. 907, 103 S.Ct. 1879, 76 L.Ed.2d 810 (1983).

These considerations inspired the Fourth District Court of Appeal to disapprove genital searches absent specific consent, based on the authority and reasoning of Blake, in State v. Melefield, 16 F.L.W. D576 (Fla. 4th DCA February 27, 1991), receding from State v. Thomas, 536 S.2d 341 (Fla. 4th DCA 1988). In Melefield, the district court held:

> If the Fourth Amendment means anything, it means that we citizens should be free of unreasonable searches of the most private areas of our bodies.

Id., at 77.

In the present case, as in Blake, Detective Cutliffe's encounter with Ms. Davis took place in an airport, "a setting in which particular care needs to be exercised to ensure that police officers do not intrude upon the privacy interests of individuals." Blake, supra, 888 F.2d at 800, citing United States v. Berry, 670 F.2d 583, 596-598 (5th Cir. Unit B 1982) (en banc). See also, United States v. Espinosa-Guerra, 805 F.2d 1502, 1507-1508 & n. 18 (11th Cir. 1986). Moreover, although the area where the present

search took place was not in the middle of the concourse, it was in a place of, at best, only relative privacy: "around the corner," at the entrance to the doorway to a restroom (R 8). The concerns expressed in Blake and Melefield cannot, therefore, be completely assuaged by the particular location of the instant search.

Finally, as this Court stated in Wells, supra, "When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent." Two Fourth Amendment concerns are implicated: first, the scope of any consent is to be narrowly drawn, and second, it must be interpreted in light of the consenting person's expectation of privacy. Wells. Certainly, Ms. Davis gave no express permission in the instant case to an intimate search of her person.

Consequently, this Court should answer the certified question in the instant case by clarifying that searches based upon a defendant's consent may not extend to the genital area unless express authorization therefor is obtained. Because Ms.Davis's ambiguous response to Detective Cutliffe's request to search below was insufficiently explicit to justify the officer's intrusion into Ms. Davis's private body areas, the officer's search of Ms. Davis's crotch area and seizure of the package she found there must be deemed unreasonable, and the trial court erred in denying her motion to suppress the illegally seized evidence. Since Ms. Davis's statements upon discovery of the package were the fruit of the illegal search, they should also have been suppressed. Ms. Davis's conviction and sentence must therefore be reversed and this

cause remanded with directions to grant Ms. Davis's motions to suppress.

CONCLUSION

Based on the foregoing argument and the authorities cited, Ms. Davis requests that this Court reverse the judgment and sentence below and remand this cause with directions that her motions to suppress should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 20 day of MAY, 1991.

Of Counsel

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1991

TWANA DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 89-1914.

Opinion filed March 27, 1991

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

Appeal from the Circuit Court for Broward County; Patti Englander Henning, Judge.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

GARRETT, J.

We affirm appellant's conviction. The trial court found appellant consented to the search which allowed the female police officers 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).

However, we reverse and remand for a hearing on the imposition of costs after notice to appellant. Mays v. State, 519 So.2d 618 (Fla. 1988) (reassessment of Mays sought via certified question in Beasley v. State, 565 So.2d 721 (Fla. 4th DCA 1990)); see also Jenkins v. State, 444 So.2d 947 (Fla. 1984).

Further, we certify the following question to be 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?

AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

ANSTEAD and STONE, JJ., concur specially with opinions.

ANSTEAD, J., concurring specially.

Since we have adopted a "totality of the circumstances" test for evaluating personal pat-downs it would appear to me that we have little authority to disturb a trial court's conclusion as to the extent of a consent. That also means, however, that these cases may be decided inconsistently at the trial court level and inconsistent results will be approved on appeal. However, the certification of this issue should alleviate this problem and remedy the impasse reflected in Bankowski v. State, No. 88-1199 (Fla. 4th DCA Dec. 19, 1990).

STONE, J., concurring.

I concur separately to note that in Menefield this court recognized that a simple consent to search, standing alone, does not include consent to a search of the genital area absent knowledge that such a personal intrusion is intended. The scope of consent is determined by examining the totality of the circumstances. Here, applying the standard of review recognized in Menefield, where the officer went so far as to ask appellant if she would prefer to step into the ladies room so that she could be searched in private, I cannot say that the trial court ruling is "clearly erroneous." However, I must add that although I concurred in Menefield as a correct statement of the law, I would prefer that the supreme court adopt a rule imposing a tougher standard of review where the state seeks to justify a search of such a personal area of the anatomy based on consent to the search of the "person." Such a rule should require that the consent to search an intimate area of privacy be clear and unequivocal. See State v. Wells, 539 So.2d 464 (Fla. 1989), aff'd, ___ U.S. ___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990); State v. Thomas, 536 So.2d 341, 343 (Fla. 4th DCA 1988)(Stone, J., dissenting). See also United States v. Blake, 888 F.2d 795, 801 (11th Cir. 1989)(Shood, J., concurring).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Appendix has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 20th day of MAY, 1991.

Tanja Ostapoff

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