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FILED
SID J. WHITE
JUN 24 1991
CLERK, SUPREME COURT
By _____
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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 REPLY BRIEF ON THE MERITS

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## AUTHORITIES CITED

## PRELIMINARY STATEMENT

Petitioner 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

Ms. Davis relies on her statement of the case and facts as set forth in her initial brief on the merits. Ms. Davis objects to the statement made in paragraph 9 of the State's statement of the case and facts, that she "conceded that Officer Cutcliffe said search your 'person' and not 'purse' (R.45)." To avoid confusion, Ms. Davis sets out the relevant portion of the transcript at R 45:

> Q. Ms. Davis, when you said sure, I don't do drugs, that meant don't search me in your mind?
>
> A. Sort of, yeah. Because I didn't know she was going to search me. I thought she was going to search my bag. Because from what I remember I thought she said purse, I thought she was talking about just my purse.
>
> Q. But you're not sure whether she said purse or person?
>
> A. If I'm not mistaken she -- I think she said your purse, to the best of my knowledge she said your purse.
>
> Q. When I asked you before, I said did you say purse or person you said I'm nervous I'm not sure about it.
>
> A. That's what I'm saying, but she could have said either one. I was nervous. To my knowledge I thought she was talking about my bag.

## SUMMARY OF THE ARGUMENT

1. This Court has jurisdiction to answer the question certified by the district court of appeal, which passed on that question in deciding this cause below. The State should be required to demonstrate that consent to search a suspect's genital area was clearly and unequivocally given. A general request to search a suspect's "person" does not reasonably imply that a genital search is contemplated. Absent a specific consent, contact with the groin or crotch area of a suspect is prohibited under the Fourth Amendment. Since the evidence in the present case did not establish that Ms. Davis clearly and unequivocally consented to the search of her groin area, her motion to suppress should have been granted.

2. State v. Beasley, 16 F.L.W. 310 (Fla. May 9, 1991) applies to the instant case.

## ARGUMENT

### POINT I

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.

The State argues that this Court has no jurisdiction to answer the certified question in the instant cause. The State is mistaken. The State's cited case of Revitz v. Baya, 355 So.2d 1170 (Fla. 1977) does not support its argument. In Revitz, the district court of appeal certified the question of whether a separate action for abuse of process could lie for taking an appeal from a nonappealable consent judgment. In its decision, however, the district court had specifically announced that it did not reach the question of whether it was an abuse of process to appeal any consent judgment. Thus, the question certified was never "passed upon," as required for this Court to exercise jurisdiction.

In the present case, the Fourth District Court of Appeal certified the question of whether "a law enforcement officer could patdown or search the crotch or groin area of an individual who has consented to be searched." Obviously, in ruling that under the "totality of the circumstances" the officers were justified in conducting such a search of Ms. Davis, the appellate court directly "passed upon" that question. Revitz thus has no applicatio to the present appeal.

The appropriate focus when considering whether this Court has jurisdiction over a certified question is suggested in State v.

Causey, 503 So.2d 321 (Fla. 1987), where the defendant pled guilty on remand after the district court of appeal's reversal of his conviction, thus rendering the propriety of the appellate court's ruling moot. Nevertheless,this Court held that it still had jurisdiction to answer the question certified by the district court, which remained a viable issue of great public importance. Similarly, in State v. Suarez, 485 So.2d 1283 (Fla. 1986), this Court answered a certified question because of its importance to sentencing, even though it had become moot as to the defendant. Thus, even where the defendant is in a position where he can receive no ultimate benefit from this Court's disposition of the question certified in his case, the Court does not thereby lose jurisdiction to review the case where the issue is one which has great interest to the legal community.

Like the questions in Causey and Suarez, the question posed in the present case is one which involves issues of importance both to the conduct of law enforcement and the right of citizens in this State to be free from unreasonably intrusive police action. Officer Cutcliffe's actions in the present case of conducting a search in a suspect's genital area based on a general consent is far from unique to the instant case. To the contrary, United States v. Blake, 888 F.2d 795 (11th Cir. 1989), State v. Menefield, 575 So.2d 296 (Fla. 4th DCA 1991) (en banc), Alexander v. State, 575 So.2d 325 (Fla. 4th DCA 1990), Tognaci v. State, 571 So.2d 76 (Fla. 4th DCA 1990), and Bankowski v. State, 570 So.2d 1152 (Fla. 4th DCA 1990), demonstrate that such procedure is quite

common in South Florida, and presumably will continue unless conclusively addressed. Yet the issue raised by these cases has, up till now, escaped review by this Court: based on various factors, none of the cases cited, supra, have successfully made it to Tallahassee for review.

Consequently, whatever this Court's ultimate decision on the precise facts before it in the instant case, it should nevertheless determine the appropriate test to be utilized when a challenge to a "crotch" search is made, so that the courts of this State, as well as law enforcement officers and the general public, will be accurately apprised of the scope of permissible police intrusion into privacy areas.

Turning to the merits, the State does not, apparently, challenge the validity of the reasoning of United States v. Blake, supra, which requires that, in order to uphold a genital area search, the State must establish that the defendant expressly consented to such action by the police. Further, although the State does not refer to it, the recent decision of the United States Supreme Court in Florida v. Jimeno, 59 U.S.L.W. 4471 (May 23, 1991) presents no basis for disturbing the holding of Blake. In Jimeno, the United States Supreme Court addressed the question of whether a suspect's Fourth Amendment right to be free from unreasonable searches and seizures is violated when, after he has consented to a search of his automobile, the police open a closed container found in the car. Justice Rehnquist, writing for the Court, noted that, "The touchstone of the Fourth Amendment is

reasonableness." Id. The test, then, in determining whether a search will pass constitutional muster is one of "objective" reasonableness: whether a typical, reasonable person would have understood that the exchange between the suspect and the police officer culminated in consent to the broader search or not.

In the specific circumstances presented by Jimeno, the suspect was asked if he consented to a search of his vehicle for drugs. As the Supreme Court noted, "A reasonable person may be expected to know that narcotics are generally carried in some form of container." Id. Thus, it was objectively reasonable for the police to conclude that the general consent to search the suspect's vehicle included consent to search containers within the car which might hold drugs, including the closed paper bag in which the contraband was found.

It is important to note that the United States Supreme Court did not thereby disapprove this Court's decision in State v. Wells, 539 So.2d 464 (Fla. 1989), affirmed on other grounds, 495 U.S. ___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990). To the contrary, the Court applied the same objective reasonableness test to the facts in Wells and concluded that the consent given to the vehicle search in that case did not justify the further search of the container, a locked briefcase found in the trunk of the car. As Justice Rehnquist noted, "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag." Id.

Thus, the question for this Court's resolution in the instant case is whether it is objectively reasonable for a suspect who has consented to a search of his "person" to believe that such consent also authorizes the police to examine and manipulate his private genital area. Ms. Davis submits that the only "reasonable" answer is, No. The particular anatomical area at issue here is, after all, designated as a person's "private parts." A citizen is certainly entitled to a greater expectation of privacy in that region of his body than in the area which will be disclosed to public view when he wears a swimsuit. It was the affront to "reasonableness" of any broader reading of the consent given which inspired the Eleventh Circuit Court of Appeals to hold that consent given in a public area cannot reasonably be held to extend to an authorization to touch the genital area. United States v. Blake, 888 F.2d 795, 800 (11th Cir. 1989). This conclusion is in no way diminished by the United States Supreme Court's explanation of its decision in Florida v. Jimeno, supra.

Consequently, the Eleventh Circuit Court of Appeal's delineation of the reasonable scope of a general consent to search should be adopted by this Court. Further, as urged by the two concurring district judges in the present case, this Court should clarify that more is required when determining whether there hasbeen a valid consent to a genital search than a mere review of the "totality of cricumstances," as announced in State v. Menefield, supra. The concurrences of Judges Anstead and Stone below, and the decision in Blake, supra, suggest, instead, that it must be established that

the consent to search an intimate area of privacy is clear and unequivocal.

Such a ruling would be consistent with prior case law, which has required that an equivocal or ambiguous consent to a search is insufficient to render the ensuing search reasonable for Fourth Amendment purposes. Thus, for instance, in Torres v. State, 513 So.2d 1316 (Fla. 3d DCA 1987), a police request to search the defendant's luggage "con su permisso" could be interpreted either as a bona fide request for permission or as a command to submit to lawful authority, according to an expert witness. Where the State had adduced no evidence showing that the defendant believed the words were merely a request, the consent to search was held invalid. See also, Leonard v. State, 431 So.2d 614 (Fla. 4th DCA 1983) [consent to search for gun did not demonstrate consent to continuing, blanket search of vehicle or to second search by backup officer]; State v. Kassidy, 495 So.2d 907 (Fla. 3d DCA 1986) [defendant said, "Sure," in response to police request whether he would mind being searched]; Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980) [defendant holds tote bag and removes items from it until the officer reached inside and seized contraband]. Certainly, it is well-established that mere acquiescence to authority is not sufficient to justify a warrantless search. Hutchinson v. State, 505 So.2d 579 (Fla. 2d DCA 1987); Hunt v. State, 371 So.2d 205 (Fla. 2d DCA 1979). So, standing silently by while police commence a search or even quietly complying with an officer's request to hand over a object for inspection does not establish

The State's assertion to the contrary, it cannot be said that, employing this standard, Ms. Davis's consent to Officer Cutcliffe's inspection of her groin area was sufficiently "clear and unequivocal" to allow a conclusion that she voluntarily consented. At best, Ms. Davis responded, "Sure, I don't do drugs," when Officer Cutcliffe asked her if she "minded" if the officer searched her "person" (R 17, 39). Her affirmative answer to the question of whether she "minded" being searched was the same type of response ruled too ambiguous to support a search in State v. Kassidy, supra. In addition, Blake teaches that a consent to a search of someone's "person" does not reasonably include a consent to a police inspection of the crotch or groin area. While Officer Cutcliffe testified that she thought a search of someone's person automatically included a full "body" search (R 17), the test for the validity of a consent is not what the officer believes, but what a reasonable person would believe when confronted with that question.

The State's contention that the search in the instant case was not one of the groin area is likewise unfounded. The package ultimately recovered from Ms. Davis never hung "below Petitioner's skirt," as stated by the State, answer brief at page 9. Rather, Officer Cutcliffe testified that she observed what "appeared to be the corner of a squared package" "[a]bout two inches below [Ms. Davis's] crotch area. So it was down onto her thighs, the inner thighs" (R 11). But there is no caliper test for determining the precise boundary of a protected genital area. Are an officer's hands to be allowed to go two inches from a suspect's genitalia,

hands to be allowed to go two inches from a suspect's genitalia, but no further? How about one inch? Is half an inch far enough away? The motion to suppress the evidence filed below was not intended to substitute for an anatomy lesson or a course on physiognomy. It was based on Ms. Davis's perceptions, as well as those of the trial judge, who stated in making his ruling on the motion:

> I think [Ms. Davis] did, indeed, consent to the search of her bags and her person, or at least agreed, she said she would do it. Any comments she made afterwards obviously she testified it was after the finding of the bulge in her crotch.

(R 51-52, emphasis added). It was agreed below that the area examined by Officer Cutcliffe was, indeed, a private one. The same conclusion cannot be escaped on appeal.

Since the State was unable to establish that Ms. Davis gave "clear and unequivocal" consent to the search of her genital area, the trial court erred in denying her motion to suppress the evidence against her. The judgment and sentence below must therefore be reversed and remanded with directions to grant the motion to suppress.

## POINT II

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

Insofar as the costs imposed against Ms. Davis were assessed pursuant to mandatory statutory authority, Ms. Davis agrees that this Court's recent decision in State v. Beasley, 16 F.L.W. 310 (Fla. May 9, 1991) is controlling.

## CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court reverse the judgment and sentence below and remand this cause with directions that her motion to suppress 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 20th day of JUNE, 1991.

Of Counsel