IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 24 1991
CLERK, SUPREME COURT
By
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

Case No. 77,713
2DCA No. 88-03465

THURSTON McCLAIN,

Respondent.
_____/

DISCRETIONARY REVIEW OF THE DECISION OF THE
SECOND DISTRICT COURT OF APPEAL
SECOND DISTRICT

# AMENDED BRIEF OF PETITIONER ON THE MERITS

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## PRELIMINARY STATEMENT

The present case comes to this Court as a certified question by the Second District Court of Appeal which is identical to the question certified to this Court in Anderson v. State, No. 77,398.

## STATEMENT OF THE CAST AND FACTS

Officer Durden was on uniformed patrol in an area of Lakeland known to him for its "high drug use and sale" when he observed Respondent "leaning into the driver's window of [a] ...vehicle parked to the rear of the Blue Bar" (R 13-14). Based upon his past experiences, Durden believed that Respondent was then engaged in a narcotics transaction (R 14-16). As Officer Durden made this observation, someone yelled "fire in the hole." Durden testified that this is common street parlance meaning police are in the area (R 17). Immediately after the alert was given, Respondent pulled out of the driver's window and he briskly walked away (R 18). Durden pulled in front of Respondent, and he ordered Respondent to stop (R 19). Respondent continued to walk towards Durden with his hands in his jacket pocket. Durden again ordered Respondent to stop and take his hands out of his pocket. When Respondent removed his hand, Durden observed him drop a small object. Durden inspected the object and concluded that it was "crack" cocaine (R 20-21). Respondent was thereupon arrested.

The trial court denied Respondent's motion to suppress.

On appeal, the Second District reversed the order denying Respondent's motion to suppress. The District Court, however, certified the same question that it certified in Anderson v. State, 16 F.L.W. D624 (Fla. 2d DCA Jan. 23, 1991). This appeal ensues.

## SUMMARY OF THE ARGUMENT

The Second District's decision reversing the trial court's denial of Respondent's motion to suppress is in error and must be revesed for the following reasons:

One, the trial court did not base his ruling on a consensual encounter; rather, he found that there were sufficient facts to justify a founded suspicion to effect the stop. This finding was correct and supported by the evidence.

Two, the United States Supreme Court case of California v. Hodari D., *infra,* supports the conclusion that Respondent was not seized under the Fourth Amendment when he abandoned the cocaine because he had not yet stopped pursuant to the officer's command.

Three, the police did not exploit the primary illegality to cause the abandonment.

## ARGUMENT

### ISSUE

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

The Second District reversed the trial court's denial of Respondent's motion to suppress finding that the "stop" was not a consensual encounter, that the stop was unlawful and that the abandonment was therefore not voluntary.

The district court's decision is curious because the trial court predicated his ruling not on the fact that there was a consensual encounter, but on the fact there was reasonable suspicion to effect the stop which resulted in the abandonment of the cocaine.

Indeed, the trial court made the following findings:

> the total circumstances observed by the officers that interpreted in light of the officer's knowledge and training reasonably indicate that there was possible presence of criminal activity and that the officers did have the right to stop and detain and make an inquiry. But the Court further finds that this was not a search, that it was an abandonment of the property since he threw it down in the officer's presence and the officer observed that. The officers had every right to secure this, the officers had probable cause to effect an arrest. Motion is denied.

(R 37).

The State does not concede that the stop was improper. It asserts now, as it did below, that there was sufficient facts articulated by the arresting officer to establish probable cause

that Respondent was dealing in drugs. Namely, the officer's observation of the interplay between Respondent and the driver was consistent with the street sale of drugs[1] in an area known to the officer for the sale of drugs[2] along with Respondent's breaking off the transaction and attempting to flee upon learning of the officer's presence[3] clearly supported a finding of probable cause.

Since there was sufficient facts to establish probable cause, then the facts were clearly sufficient to establish a reasonable suspicion under Terry v. Ohio, 392 U.S. 1 (1968).

Should this Court determine that the facts are insufficient to establish either probable cause or founded suspicion, then the State contends that the recent United States Supreme Court case of California v. Hodari D., 5 Fed.L.W. S249 (Apr. 26, 1991), supports the conclusion that Respondent was not seized within the meaning of the Fourth Amendment when he abandoned the cocaine because he had not yet stopped pursuant to the officer's command. Thus, the abandonment was a voluntary act prior to the actual seizure of the person.

Should this Court disagree with this analysis, then the State relies upon the abandonment argument presented to this Court in State v. Anderson, No. 77,398, that the police did not exploit the primary illegality to cause the abandonment.

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[1] Carroll v. United States, 267 U.S. 132 (1925); United States v. Jimenez, 780 F.2d 975 (11th Cir. 1986).

[2] Blanding v. State, 446 So.2d 1135 (Fla. 3d DCA 1984).

[3] Sibron v. New York, 392 U.S. 40 (1968).

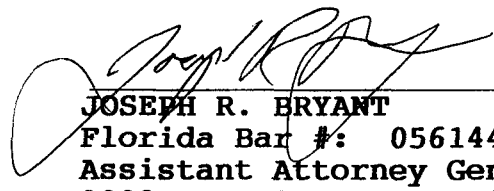
In conclusion, the Second District's decision reversing the trial court's order denying suppression is in error. As such, it must be reversed.

## CONCLUSION

Based on the foregoing arguments and citations of authority, the Petitioner respectfully requests this Honorable Court to reverse the decision of the Second District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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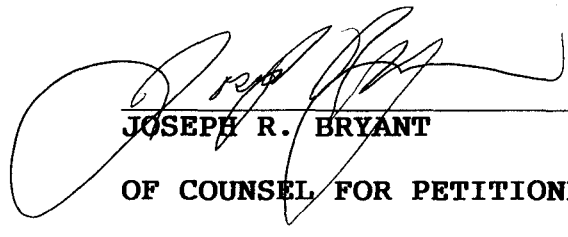
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to SUZANNE CONSAGRA, ESQUIRE, 58 Lake Morton Drive, Lakeland, Florida 33801, on this 19th day of June, 1991.



JOSEPH R. BRYANT

OF COUNSEL FOR PETITIONER

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AMENDED BRIEF OF PETITIONER ON THE MERITS

A P P E N D I X

Case No. 88-03465 - Second District Court of Appeal
Opinion filed March 8, 1991

B/V

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

THURSTON McCLAIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 88-03465

Opinion filed March 8, 1991.

Appeal from the Circuit Court for Polk County; J. Dale Durrance, Judge.



Suzanne Consagra, Lakeland, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph R. Bryant, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Appellant entered a plea of nolo contendere on the charge against him of possession of cocaine. He reserved his right to appeal the denial of his motion to suppress the cocaine that he dropped to the ground after being detained by investigatory officers. We do not agree with the trial judge that the evidence in this case leads to the conclusion that the

"stop" of appellant was a consensual encounter. The facts did not give the officers a well-founded suspicion that appellant had committed, was in the process of committing or was about to commit a crime. Under these circumstances, we cannot conclude that appellant's abandonment of the cocaine was a voluntary act not induced by his encounter with the officers.

We, therefore, must reverse. Anderson v. State, 16 F.L.W. D264 (Fla. 2d DCA Jan. 23, 1991). We certify the same question we certified in Anderson.

Reversed.

CAMPBELL, A.C.J., and THREADGILL and PATTERSON, JJ., Concur.