OA 2-5-92 OR 8



IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,033

STATE OF FLORIDA,

Petitioner,

vs.

TROY SINGLETON,

Respondent.

**********

ON PETITION FOR DISCRETIONARY REVIEW
CONFLICT

**********

# PETITIONER'S BRIEF ON THE MERITS

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## INTRODUCTION

The Petitioner, The State of Florida, was the Appellee below and the prosecution was the trial court. The Respondent, Troy Singleton was the Appellant below and the defendant in the trial court. The parties will be referred to as they stand before this Court.

Volume I of the record in case 90-2184 is designated by the symbol "R1."

Volume I of the record in case 90-2177 is designated by the symbol "R2."

Supplemental Volume I, which contains the transcripts of the hearing on the motion to suppress and of the sentencing proceeding is designated as "T1." Because the two transcripts have been separately paginated, the transcript of the sentencing proceeding is distinguished by a subscript: "T1s."

Supplemental Volume III, which contains the transcript of the plea colloquy in case 90-2184 is designated by the symbol "T3."

The symbol "A" will designate the Appendix to this brief.

## STATEMENT OF THE CASE AND FACTS

David Cupola, a Canadian citizen, was vacationing in Key West, Florida during January 1990. On January 29, 1990, he rented room 227 at the Best Western, Key Ambassador motel. (T2. 30). When he awoke that morning the room was in disarray and his wallet and video camera were missing. The door to the room was not damaged, but the sliding door screen was cut open. His wallet contained $150 in Traveller's checks, $60 cash and credit cards. (T2. 31-32).

Gus Zapetero was the general manager of the Bayside Resort. As such he lived on the premises in room 102A. On January 29, 1990 after counting the day's receipt, he took them to his room and went to sleep (T2. 43-44). At about 5 A.M., he awoke and saw a man in his room. Zapetero grabbed his gun and ordered the intruder to stop. While grabbing for the gun it discharged and the Respondent ran through the drapes on to balcony and ran away. (T2. 48-50). Later that day, Zapetero was requested to report to the DePoo Hospital emergency room. Once there he identified the Respondent as the man who was in his room the night before. (T2. 51).

Timothy Rolewicz, a police officer with the Key West Police Department, responded to the Bayside Motel. He met with Zapetero, who gave him detailed description of the Respondent and that he discharged his gun at the Respondent. (T2. 64-67).

Rolewicz eventually transported Zapetero to DePoo Hospital to see if he could identify the Respondent. Once there, Rolewicz met with Officer Ron Peteck who told him the Respondent had a gunshot wound to the face (T2. 68-69). He then left the hospital and went to the parking lot where he encountered Sandra Pinder, the Respondent's girlfriend. She was the owner of the vehicle that was parked outside the emergency room. Rolewicz noticed blood on the driver's side of the vehicle. Pinder then consented to allow Rolewicz to search the passenger compartment and the trunk of her car. Upon opening the trunk, Rolewicz observed a video camera and a 35 millimeter camera. (T2. 69-71). The Respondent was then arrested and charged with burglary and filing a false police report. (T2. 72).

Ron Peteck, a police officer with the Key West Police Department, responded to DePoo Hospital to investigate the manner in which Respondent was injured. Upon his arrival, Respondent advised that he received the gunshot wound when another blackman attacked him. He then walked to his girlfriend's house, Sandra Pinder, who then drove him to the hospital. After taking his statement, Peteck went to his car to write his report. While there, he noticed the other officers searching Pinder's car and observed the video camera taken from the trunk. (T2. 76-81). After Peteck finished at the hospital, he responded to the Key Ambassador reference a burglary. There he met the victim David Cupola, who stated that a video camera was stolen from his room. Peteck then realized that this was the same camera that was removed from Pinder's trunk. (T2. 81-82).

Stephen Malinowski, a Detective with the Key West Police Department, was the lead detective and responded to Bayside Resort reference a burglary and a shooting. (T2. 108) After taking Zapetero's statement, he was advised that Respondent was at DePoo's Hospital with a gunshot wound and was under arrest for burglary. (T2. 116). Malinowski eventually met the Respondent at the police station and after being advised of his rights he waived them. (T2. 116-121). Respondent then confessed to the Bayside break-in and stated he left the area in his girlfriend's, Sandra Pinder's, vehicle (T2. 122).

Thereafter, Malinowski, went to search Pinder's car, which had been impounded based on the discovery of stolen property by Officer Rolewicz. The search uncovered Traveller's checks in David Cupola's name, and a video camera. (T2. 122-126).

Subsequently Respondent was charged in Circuit Court Case 90-274 with burglary of Zapetero's room at the Bayside Resort, armed burglary of Cupola's room at the Key Ambassador Motel and grand theft of the video recorder and Traveler's checks (R2. 6, 27-29). In Circuit Court Case 90-541, Respondent was charged with grand theft of a 35mm Minolta camera belonging to Mr. and Mrs. Hoffman. (R1. 1). The Respondent plead not guilty and requested trial by jury. (R1. 9, R2. 7, 20).

Prior to trial, Respondent filed a consolidated motion to suppress the video camera, the Traveller's checks and the 35

millimeter camera, all of which were seized from Sandra Pinder's car (R2. 47-50, R1. 27). Respondent contended that search of the car was illegal since Sandra Pinder's consent to search was not voluntary. (R2. 47-50).

At the hearing on the Motion to Suppress, the Respondent testified on his own behalf. He stated that his girlfriend was Sandra Pinder and that he was in possession of her automobile on January 30, 1990. (T1. 5) Respondent admitted that on the night in question he did not have permission to drive the car (T1. 9) and, in fact, he took the car without asking, even though Pinder was available. (T1. 10).

Detective Malinowski testified that Pinder advised that she did not give Respondent permission to use the car and that he stole the car. (T1. 14). It was also ascertained that Respondent had the car key without Pinder's permission (T1. 15).

Sandra Pinder testified that on January 30, 1990, Respondent did not have permission to drive her car (T1. 20). She also stated that, without her permission, he had taken a set of keys to the car. (T1. 19).

The trial court then held that the Respondent, having taken the car without the permission or consent of the owner, did not have standing to contest the seizure. Therefore, he denied the motion to suppress. (T1. 32, R1. 28, R2. 54).

The Respondent then went to trial in Circuit Court Case 90-274. At the conclusion thereof the Respondent was found guilty of burglary of an occupied dwelling as charged in count I, burglary of a dwelling as lesser included offense of count 2, and grand theft as charged in count 3. (R2. 63, T2. 233). Adjudication and sentencing were deferred until the completion of a presentence investigation. (T2. 235).

In the interim, in Circuit Court Case 90-541, Respondent changed his plea to nolo contendere to the grand theft charge, reserving his right to appeal the denial of the motion to suppress. (R1. 31-34, T3. 3-8). The State stipulated that the stolen 35mm camera was found in Pinder's car trunk and was dispositive. (R1. 33, T3. 6).

Thereafter, Respondent was adjudicated guilty in both cases. (R1. 38-39) (R2. 81-82). In case 90-274, he was sentenced to 35 years in prison as a habitual offender. (R2. 79-80, 83-86). In case 90-541 he was sentenced to a concurrent 3 year term of imprisonment. (R1. 40-41).

Respondent then appealed to the Third District Court of Appeal of Florida. He claimed that the trial court erred in finding that Respondent did not have standing because the evidence established that he had reasonable expectation of privacy. The Third District agreed and held that even though

Respondent did not have the permission or consent of the owner of the vehicle and was not driving said vehicle at the time of the search, the Respondent had standing to challenge the search of the vehicle. The Third District relied on this Court's opinion in Nelson v. State, 578 So.2d 694 (Fla. 1991) which held the driver of a stolen vehicle has standing to challenge the stop and search of his person.

The Petitioner then filed a notice to invoke discretionary jurisdiction based on conflict and a motion to stay mandate. The motion to stay was granted and so was jurisdiction.

## POINT ON APPEAL

WHETHER THE DRIVER OF AN AUTOMOBILE WHO DOES NOT HAVE THE PERMISSION OR CONSENT OF THE OWNER OF THE AUTOMOBILE TO DRIVE THE AUTOMOBILE AND WAS NOT PRESENT AT THE TIME OF THE SEARCH OF THE AUTOMOBILE HAS THE REQUISITE LEGAL STANDING TO CHALLENGE THE SEARCH OF THE AUTOMOBILE.

## SUMMARY OF THE ARGUMENT

The Third District held that a driver of a stolen vehicle has standing to challenge both the seizure of his person and the lawfulness of the search of the vehicle. This is erroneous since a defendant never has a legitimate expectation of privacy in a stolen vehicle and therefore regardless of the lawfulness of the stop, he can never challenge he search of the stolen automobile.

## ARGUMENT

THE DRIVER OF AN AUTOMOBILE WHO DOES NOT HAVE THE PERMISSION OR CONSENT OF THE OWNER OF THE AUTOMOBILE TO DRIVE THE AUTOMOBILE AND WAS NOT PRESENT AT THE TIME OF THE SEARCH OF THE AUTOMOBILE DOES NOT HAVE THE REQUISITE LEGAL STANDING TO CHALLENGE THE SEARCH OF THE AUTOMOBILE.

On January 29 and 30, 1990, the Respondent drove, without permission or consent, Sandra Pinder's car. While in possession of Ms. Pinder's car, Respondent committed burglaries and grand thefts and placed the bounty from his crimes in Ms. Pinder's car trunk. During one of the burglaries, Respondent received a gunshot wound to the face and was taken to the DePoo Hospital, emergency room. Once Respondent was there Officer Peteck, as is customary whenever a gunshot victim shows up at the emergency room, responded. After advising Respondent of his Miranda rights, the Officer spoke to him while Respondent was still in the emergency room. At this time, Respondent stated that he received the wound after being jumped by a black male. Thereafter, Officer Rolewicz arrived at the emergency room. He observed blood on the driver's side of Ms. Pinder's car and then received consent form Ms. Pinder to search her car. The search uncovered the video camera and the 35mm camera and thereafter Respondent was arrested for burglary. Only after Respondent was transported to the police station, and was once again read his Miranda rights, did he confess to committing the burglaries.

Prior to trial Respondent moved to suppress the cameras found in Ms. Pinder's trunk on the ground that her consent to search was not voluntarily given. After the testimony established that Respondent did not have either Ms. Pinder's permission or consent to use the vehicle on January 29 and 30, 1990 and that the Respondent was not driving the car or even present when it was searched, the trial court held that the Respondent lacked standing to challenge the search of Ms. Pinder's vehicle.

On appeal therefrom, the Third District reversed. The court reasoned that this Court's decision in Nelson v. State, 578 So.2d 694 (Fla. 1991), which held that the driver of a stolen vehicle had standing to challenge the stop and the search of his person, also stood for the proposition that the driver of a stolen vehicle had standing to challenge the search of the vehicle.

The search and seizure in the instant case involves two very different privacy interests: (1) the Respondent's interest in his person and, (2) the Respondents interest in the automobile. The State submits that pursuant to Nelson v. State, 578 So.2d 694 (Fla. 1991), Respondent has standing to challenge his stop and a search of his person. However, the State submits that, regardless of the lawfulness of the stop, Respondent never has standing to challenge the search of the automobile since it was stolen and therefore he had never had a legitimate expectation of privacy in the automobile.

A defendant must have standing based on a reasonable expectation of privacy to assert violations of constitutional prohibitions against unreasonable searches and seizures and to seek relief through suppression of evidence. United States v. Saluvicci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); Katz v, United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). To establish standing, the defendant must prove either that he has proprietary or possessory interest in the area search or that there are other factors which create an expectation of privacy which society is willing to recognize as reasonable. Rakas v. Illinois, supra.

In Rakas, the Court reaffirmed the principle that one wrongfully on the premises cannot move to suppress evidence obtained as a result of searching them. Id. at 488 U.S. 141 N. 9.

> The Court in Jones was quite careful to note that "wrongful" presence at the scene of a search would not enable a defendant to object to the legality of the search. 362 US, at 267 4 L.Ed.2d 697, 80 S.Ct. 725, 78 ALR2d 233. The Court stated: "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by ways of a motion to suppress, when its fruits are proposed to be used against him. *This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched.*" Ibid.

> (emphasis added). Despite this clear statement in Jones, several lower courts inexplicably have held that a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile. See, e.g., Cotton v. United States, 371 F2d 385 (CA9 1967); Simpson v. United States, 346 F2d 291 (CA10 1965).

The Court reasoned that a legitimate expectation of privacy is more than a subjective expectation of not being discovered. When a defendant's presence is wrongful, his subjective expectation of privacy is not one that society is prepared to recognized as reasonable. Id. at 488 U.S. 143 N.12.

Based on the foregoing, a driver of a stolen automobile, has standing to contest the stop and search of his person. This is based on the defendant's liberty interest. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 899 (1968). He does not have standing to challenge the search of the stolen automobile since, as a wrongful possessor, he has no legitimate expectation of privacy in the stolen automobile. This is based on the principle that a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. Rakas v. Illinois, supra 439 U.S. at 134. See also Tongue v. State, 544 So.2d 1173 (Fla. 5th DCA 1989).

Despite the clear holding of Rakas that the driver of a stolen automobile, based on a lack of a legitimate expectation of privacy, never has the right to challenge the search of the stolen vehicle, some courts have permitted a challenge where it was found that the initial stop was unlawful. The rationale of these holdings is that if the initial detention of the defendant was unlawful then any evidence secured form the search of the automobile is suppressable as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Rakas is circumvented by finding that since it did not involve a challenge to the constitutionality of the initial stop or arrest, it implicitly permits such a challenge. LaFave, Search and Seizure 2d.Ed §11.3 (1987).

This argument fails because it is based on the erroneous merging of two very different privacy interests involved in seizure and searches of stolen automobiles. As stated hereinbefore, the two interests involved are a defendant's interest in his person and his interest in the stolen automobile. It is only with the merger of the interest in the stolen automobile within the defendant's interest in his person, is a reasonable expectation of privacy in stolen automobile conferred upon the driver-thief. Such a merger entirely negates Rakas' holding that regardless of the legality of the stop, driver-thief never has a reasonable expectation of privacy in the stolen automobile. See United States v. Pitts, 588 F.2d 102 (5th Cir. 1979). (Mere possessor-driver of a stolen automobile which was

illegally detained had no legitimate expectation of privacy in the stolen automobile).

This Court's decision in Nelson supports the State's position. Nelson correctly permits the driver of a stolen vehicle to challenge the reasonableness of his seizure. In rejecting the State's position that Nelson lacked standing to challenge his seizure, this Court recognized the great distinction between the seizure of the person and the search of the stolen automobile.

> The cases relied upon by the state, *United States v. Lanford*, 838 F.2d 1351 (5th Cir. 1988); *United States v. Hensel*, 672 F.2d 578 (6th Cir.), *cert. denied*, 457 U.S. 1107, 102 S.Ct. 2907, 73 L.Ed.2d 1346 (1982); and *United States v. Hrgrove*, 647 F.2d 411 (4th Cir. 1981), involve the search and seizure of the property in which the defendant had no ownership or possessory interest, therefore the defendant lacked standing to assert a fourth amendment right to privacy in the property. The instant case, by contrast, involves the seizure of Nelson himself. This obvious distinction was recognized in *Lanford*, where the court, while holding that *Lanford* lacked standing to challenge the search of property not his own, noted that: "Lanford does, of course, have standing to challenge the search of his person." *Lanford*, 838 F.2d at 1353.

Id. 578 So.2d at 695. This Court's reliance in Nelson on State v. Conger, 183 Conn. 386, 390-91 439 A.2d 318, 384 (1981) poses no bar to the State's position. Although Conger applies the

merger theory to stolen automobiles, this Court in adopting Conger only adopted the portion of the decision regarding seizure of the person and not the search of the automobile.

Applying the two separate privacy interests to the instant case, it is clear that the trial court correctly found that Respondent did not have a legitimate expectation of privacy in the stolen automobile. The Respondents seizure occurred after he was no longer driving the automobile and therefore no stop occurred. His seizure was lawful because it occurred after the police had probable cause to believe that Respondent had committed a burglary. When the Respondent was in possession of the automobile such possession was without the permission or consent of the owner. Therefore he never could have standing to challenge the search of the automobile since he never had a reasonable expectation of privacy in it. Therefore, its search, regardless of whether he was illegally stopped or not, was not challengeable by the Respondent.

## CONCLUSION

Based on the foregoing points and authorities, Petitioner respectfully requests that this Court quash the decision of the Third District and reinstate the judgment and sentence imposed by the trial court.

**ROBERT A. BUTTERWORTH**

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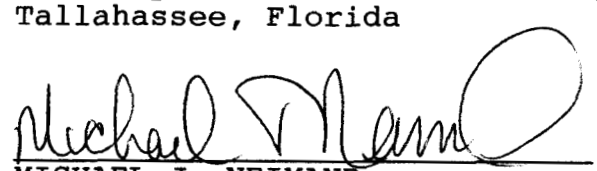

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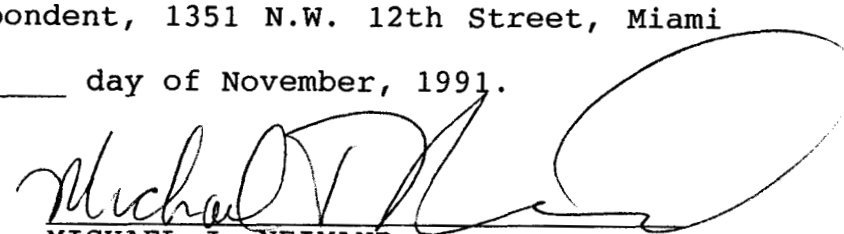
## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF ON THE MERITS** was furnished by mail **LOUIS CAMPBELL**, Attorney for Respondent, 1351 N.W. 12th Street, Miami Florida 33125 to on this 1 day of November, 1991.



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Assistant Attorney General

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,033

TROY SINGLETON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

**APPENDIX**

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1

**Jerome THOMPSON, Appellant,**

v.

**The STATE of Florida, Appellee.**

**No. 90–2053.**

District Court of Appeal of Florida, Third District.

May 7, 1991.

An Appeal from the Circuit Court for Dade County; Phillip W. Knight, Judge.

Bennett H. Brummer, Public Defender, and N. Joseph Durant, Jr., Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Mark Katzef, Certified Legal Intern, and Michael J. Neimand, Asst. Atty. Gen., for appellee.

Before NESBITT, JORGENSON and GERSTEN, JJ.

PER CURIAM.

Affirmed. *Johnson v. State*, 564 So.2d 1174 (Fla. 4th DCA 1990), *rev. denied*, 576 So.2d 288 (Fla.1991).


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**Troy SINGLETON, Appellant,**

v.

**The STATE of Florida, Appellee.**

**Nos. 90–2184, 90–2177.**

District Court of Appeal of Florida, Third District.

May 7, 1991.

Appeals from the Circuit Court for Monroe County; Richard G. Payne, Judge.

Bennett H. Brummer, Public Defender, and Louis Campbell, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Patricia Ann Ash, Asst. Atty. Gen., for appellee.

Before BARKDULL, NESBITT and LEVY, JJ.

PER CURIAM.

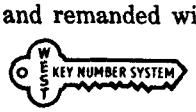
This is an appeal from a conviction for grand theft, entered after a nolo contendre plea, and convictions for burglary and grand theft, entered after a jury trial.

Prior to the Supreme Court's opinion in *Nelson v. State*, 578 So.2d 694 (Fla.1991), the trial court denied a Motion to Suppress, finding no standing. The Order reads in part as follows:

> "ORDERED AND ADJUDGED that said Motion be, and the same is hereby denied. Defendant did not have the permission or consent of the owner of the subject vehicle and was not driving said vehicle at the time of said search and therefore lacks the requisite legal standing to challenge the search thereof. *U.S. v. Peters*, 791 F.2d 1270." [(7th Cir. 1986)]

We reverse upon the holding in *Nelson v. State, supra*, and return the matter to the trial court for further proceedings, commencing with a hearing on the Motion to Suppress. We also reverse the Order denying the return of the appellant's property, in light of our initial ruling, without prejudice.

Reversed and remanded with directions.




3

**Aida R. TINOCO, f/k/a Aida R. Tinoco De Lafaurie, Appellant,**

v.

**Carlos Ernesto LAFAURIE, Appellee.**

**No. 90–2315.**

District Court of Appeal of Florida, Third District.

May 7, 1991.

An Appeal from the Circuit Court for Dade County; Margarita Esquiroz, Judge.