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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

BILLY T. KEY,

Respondent.

CASE NO. 78,899

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

This Court's decision in State v. Barnes, 17 FLW S119 (Feb. 20, 1992) resolves the issue on which this Court accepted jurisdiction, as acknowledged in Point I. Accordingly, the bulk of this brief concerns the validity of the inventory search leading to this prosecution, which the district court upheld as lawful. Respondent is aware that on March 16 this Court denied, as a Cross Notice to Invoke Discretionary Jurisdiction, his Notice to Invoke Discretionary Review on Separate Issue. The undersigned counsel understands the order to mean that no independent jurisdiction arises on this issue. However, because this Court accepted jurisdiction of the case on the certified Barnes question, it has jurisdiction of the entire case, including the suppression issue. Reed v. State, 470 So.2d 1382, 1383 (Fla. 1985). Accordingly, respondent has raised the issue in this Court, as he did in the district court. The undersigned regards this action as consistent with this Court's precedent, and not in violation of the order of March 16. If he is in error, the mistake was made in good faith.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts, and adds the following record material pertinent to the suppression issue raised herein. This case was consolidated in the district court from two separate appeals. All record references herein are to case number 90-3496.

The state charged respondent with possession of more than 20 grams of cannabis and driving while license suspended. (R204-205) Mr. Key moved to suppress the cannabis as seized during what he claimed was an unlawful search. (R238) Circuit Judge Laura Melvin conducted a hearing on the motion immediately before trial. (R155)

Warren McIntyre, a deputy sheriff, testified during the suppression hearing that he saw Mr. Key as the two passed one another heading in opposite directions in south Walton County. (R159) McIntyre, who knew that Key's license had been suspended, turned to follow as he called in a tag and license check to his dispatcher. (R159-162) Mr. Key had turned onto a dirt road and stopped in front of a cable stretched across the entrance to an abandoned business. (R160) Mr. Key got out of his car and told McIntyre he didn't need this because he was already in enough trouble. (R160) McIntyre asked for his license, and Mr. Key told him he knew it was suspended. (R160) McIntyre arrested him for driving with a suspended license. (R160) Another deputy found two marijuana "roaches" in the defendant's shirt pocket, then transported him from the scene while McIntyre drove Mr. Key's vehicle to a police substation. (R164) Although the car was not

obstructing traffic, McIntyre refused the defendant's request to leave it for his stepfather to pick up. (R163-164, 187) Mr. Key was allowed to call his stepfather to pick up the car "some time after he arrived there [at the substation]." (R167)

At the substation, McIntyre conducted what he called an inventory search of the vehicle, including its rear truck bed. (R171) Its contents included a motorcycle and a motorcycle gas tank, under which the deputy found 110 grams of marijuana. (R173) The car was released to the defendant's stepfather at 12:44 a.m., more than three hours after the arrest. (R173) Johnny Rogers testified that when he received the truck, which he had last seen four or five days earlier, "everything was tore up inside." (R179) McIntyre told him he had conducted inventory. (R179) Additional pertinent facts from the suppression hearing appear in the body of the argument.

At the conclusion of the hearing, the court found the search justified under several theories and denied the motion to suppress the cannabis. (R195-196) Evidence substantially similar to that presented in the suppression hearing was adduced during trial. (R38-106) Defense counsel reasserted the grounds for suppression at trial. (R9) The jury found Mr. Key guilty of both offenses as charged. (R150-151, 246-247)

On appeal, the district court rejected Mr. Key's argument that the seizure of the truck and resulting search violated his Fourth Amendment rights. Key v. State, 589 So.2d 248 (Fla. 1st DCA 1991). The Court wrote:

> We conclude that the deputy acted in accordance with the department's standardized criteria in determining that it would be inappropriate to leave appellant's vehicle containing an unsecured motorcycle, and that it would be unreasonable to require an officer to remain with the vehicle for the period of time it would take appellant's stepfather to arrive at the scene. We further conclude that the subsequent vehicle impoundment and inventory were conducted in compliance with the department's General order No. 23. Therefore, we affirm the trial court's denial of appellant's motion to suppress.

Id. at 350.

SUMMARY OF THE ARGUMENT

I. This Court has recently answered the certified question in the negative.

II. The deputy sheriff disregarded his department's official policy in seizing Mr. Key's truck, which was not unlawfully parked, and in conducting an inventory search. A general order of the sheriff's department conferred on arrestees the discretion to choose to leave a lawfully parked vehicle at the scene of the arrest. The deputy failed to comply with this order, rendering the resulting inventory search unlawful. Under the Fourth Amendment, police are given broad authority to exercise discretion when acting within standard regulations. That authority does not extend, however, to conduct outside the regulations, or to regulations interpreted so broadly as to permit almost unfettered discretion, as here.

ARGUMENT

I. SEQUENTIAL PRIOR CONVICTIONS ARE NOT A NECESSARY PREDICATE FOR A SENTENCE UNDER SECTION 775.084, FLORIDA STATUTES (1989).

Respondent recognizes that this Court has decided this issue adversely to him in State v. Barnes, 17 FLW S119 (Feb. 20, 1992).

II. THE DISTRICT COURT ERRED IN HOLDING ADMISSIBLE EVIDENCE SEIZED DURING AN INVENTORY SEARCH CONDUCTED CONTRARY TO THE EXPRESS POLICY OF THE LAW ENFORCEMENT AGENCY OF THE OFFICER WHO CONDUCTED THE SEARCH.

Warren McIntyre of the Walton County Sheriff's Department discovered several ounces of marijuana in the back of Mr. Key's vehicle during what he characterized as an inventory search. Mr. Key had asked to leave the truck where it sat, not obstructing traffic, until his stepfather could retrieve it. The officer refused this request, drove the car to the police substation, and searched it.

Seizure and search of the truck violated the Fourth Amendment for two reasons. First, the deputy violated department regulations in impounding the truck unnecessarily. Second, the regulations themselves afforded the officer so much discretion that they provided an inadequate substitute to the probable cause and warrant requirements of the Fourth Amendment. Thus, a search conducted pursuant to the regulations violated Mr. Key's right to be free of unreasonable searches and seizures.

In Colorado v. Bertine, 479 U.S. 367 (1987), the Supreme Court held that reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment. The Court noted and approved its earlier decisions adhering to requirements that inventories be conducted according to standardized criteria. Id. at 374, citing to Illinois v. Lafayette, 462 U.S. 640, 648 (1983); and South Dakota v. Opperman, 428 U.S. 364, 374-375 (1976). In Bertine, police department regulations gave officers discretion to choose between

impounding a vehicle and locking it in a public parking place. The officer chose impoundment. On this aspect of the case, the Supreme Court held:

> Nothing in Opperman or Lafayette prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

479 U.S. at 375-376.

Here, testimony during the suppression hearing established that, at the time of the arrest and search, the officer's actions were governed by General Order Number 23 of the Walton County Sheriff's Department. That order provides, in pertinent part:

B. Arrest Made - Vehicle Not Evidence Nor Subject to Seizure
   1. If the owner or possessor of a vehicle is arrested, and can provide no reasonable alternative to impoundment:
      a. The officer must establish a necessity for impounding.
      b. The officer must advise the owner or possessor of the vehicle of the intent to impound.
      c. The officer must give the arrested person a reasonable amount of time to provide an alternative to impoundment.
         1) The arrested person may request a wrecker of his choice.
         2) The arrested person may designate another responsible person to take custody of the vehicle.
         3) If legally parked, the vehicle may be left at the location of the arrest.

(R242-243)

The officer did not follow this procedure. Mr. Key wanted to leave the vehicle, which was parked at the entrance of an

abandoned cable television facility, not obstructing traffic, until his stepfather could come to pick it up. The officer would not allow this option, although expressly authorized by department policy, because the 30 to 45 minutes it would take the stepfather to arrive was not a reasonable amount of time and because the officer himself would be responsible in the interim for the vehicle and its contents. (R164-165) However, General Order 23 provides that officers are responsible only for impounded vehicles; it does not confer on them responsibility for vehicles not impounded. Contrary to the department policy in Bertine, General Order 23 permitted the arrestee to choose among alternatives to impoundment, including leaving it at the scene of the arrest.

There is no necessity to impound a vehicle which an arrested person decides to leave at the scene of arrest. In so doing, the arrestee accepts the consequences of his actions. Responsibility for damage to the vehicle or theft of its contents falls to the arrestee who has consciously decided to bear that risk and not on the arresting officer. Thus, the district court's conclusion that the officer followed department policy in deciding it would be unreasonable to remain with the vehicle until it was picked up rests on the assumption that the deputy would have been responsible for damage to an unattended vehicle. This assumption finds no support in General Order 23. Only impounded vehicles become the responsibility of the officer. In expressly providing that the arrestee may choose to leave the vehicle at the scene, the order places responsibility for that decision on him alone.

Mr. Key may reasonably have decided that he would rather risk damage to the vehicle or loss of its contents (whose worth to him as its owner only he could assess) during the 30 to 45 minutes the vehicle would be left unattended before his stepfather could collect it. Thus, Mr. Key elected two of the three alternatives under General Order 23, precluding the necessity for impoundment.

This Court has cited Bertine for the proposition that police need not provide alternatives to impoundment. State v. Wells, 539 So.2d 464 (Fla. 1989), affirmed, Florida v. Wells, 109 L.Ed. 2d 1 (1990). However, Bertine affords officers discretion in this regard only if they are following standardized criteria. 479 U.S. at 375. In its determination that the deputy followed the criteria, the district court necessarily interpreted General Order 23 so broadly that it provides almost unfettered discretion. For instance, the officer is given wide latitude to determine what is a "reasonable alternative" to impoundment and a "reasonable amount of time" to provide that alternative. The standardized criteria are thus transformed into a nebulous rule of reason.

The purpose of standardized criteria is to circumscribe just this type of discretion. As the U.S. Supreme Court has stated, "standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." Delaware v. Prouse, 440 U.S. 648, 661 (1979). In Bertine, the Court noted that the directive followed by the Boulder Police Department in that case established several

conditions that had to be met before the officer could pursue the park-and-lock alternative. For instance, the alternative was not available where there was reasonable risk of damage or vandalism to the vehicle or where the approval of the arrestee could not be obtained. The Court noted that these conditions served to circumscribe the discretion of the officer as well as protect the vehicle and minimize claims of property loss. 479 U.S. at 376 n.7. Here, General Order 23 afforded much broader discretion. Alone and equipped only with nebulous guidelines, the officer enjoyed wide discretion to determine whether leaving the vehicle at the scene of the arrest was, in his view, a reasonable alternative to impoundment.

The broad discretion given to officers acting under department policy under Bertine and its antecedents does not extend to officers violating the policy, or to those following a policy that may be interpreted so broadly that almost unbridled discretion is available in its application. For these reasons, the search of Mr. Key's vehicle was not a permissible inventory search under the Fourth Amendment.

The trial court upheld the search on several theories, including as an incident to arrest. Obviously, this search was not validly conducted incident to arrest as that concept has been defined by the U.S. Supreme Court in New York v. Belton, 453 U.S. 454 (1981). The Belton court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile". Id. at 460. This

search was neither a contemporaneous incident to the arrest nor confined to the passenger compartment of the vehicle. Just as obviously, the police lacked probable cause for the search. The officer testified that he did not believe he was conducting a search based on probable cause.

For these reasons, the trial court erred in denying the motion to suppress the 110 grams of cannabis seized pursuant to an unlawful search, and the district court erred in affirming the conviction.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, respondent requests that this Honorable Court quash the order of the district court affirming his cannabis conviction, and order that the conviction be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 4 day of ~~April,~~ May 1992.

for K Rowe
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