IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.: 78,899

BILLY KEY,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred to herein as "Petitioner" or "the State". Respondent, Billy Key, will be referred herein as "Respondent". References to the record on appeal in the DCA case no. 90-3689 will be referred to herein by the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts set forth in its brief on the merits.

SUMMARY OF ARGUMENT

The district court properly affirmed the trial court's denial of Respondent's motion to suppress evidence uncovered during an inventory search where the Respondent's vehicle was properly impounded and the items therein inventoried due to property being in the open bed of the vehicle and the unreasonable length of time it would take the designated custodian to arrive. The actions were properly taken pursuant to standardized departmental criteria.

ARGUMENT

ISSUE I

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE.

Petitioner adopts the argument set forth in its brief on the merits as to this issue.

ISSUE II

WHETHER THE DISTRICT COURT ERRED IN HOLDING ADMISSIBLE EVIDENCE SEIZED DURING AN INVENTORY SEARCH.

The State would note that this Court issued an order on March 16, 1992, expressly denying Respondent's cross notice to invoke discretionary review on this issue. Nevertheless, because Respondent addressed the issue in his brief on the merits, the State feels compelled to respond.

In affirming the denial of Respondent's motion to suppress evidence, the appellate court below stated that

> 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.

Key v. State, 589 So.2d 348, 350 (Fla. 1st DCA 1991).

Respondent's motion to suppress alleged inter alia that

> 5. Defendant's seizure and the extended search, conducted while defendant was in custody and without his consent, violated defendant's rights under the Fourth and Fourteenth Amendments to the U. S.

> Constitution and Sections 12 and 23 of the Florida Constitution.
>
> 6. The second search, denominated by deputies as an inventory, was conducted on suspicion and not for protection of property. There was no justification for not attempting to secure a search warrant.

(R 37).

The State maintains that the trial court properly denied the motion to suppress and that the appellate court properly affirmed the denial.

Warren McIntyre testified that he was a deputy sheriff when he arrested the Respondent on October 4, 1989 (R 158, 159). McIntyre was travelling west on Highway 30-A when he passed the Respondent driving east. He recognized the Respondent and turned around. Respondent turned off onto an old cable television site road. As there was a cable strung across the road, Respondent could go no further and he stopped (R 159-160).

Respondent exited his vehicle, and when asked for his driver's license, responded that the deputy knew that his license was suspended. At that point McIntyre told Respondent that he was under arrest. Respondent was driving a truck/car type vehicle (R 160). The deputy recognized the vehicle as one Respondent has driven before. The purpose of the stop was that the deputy believed Respondent was driving without a license. It was common knowledge through other officers and teletypes at the substation that Respondent's license had been suspended for ten years (R 161, 170).

The deputy testified that after he arrested the Respondent,

> I explained to Mr. Key the process that we use with the sheriff's department, that we can't leave a motor vehicle sitting beside the road unattended, with property in it that could be damaged or destroyed or stolen. I explained to him the two options that we had. We could either tow it -- or the three options. We could either tow it. He told me about his stepfather. That he could either -- if he could be there within a reasonable amount of time, or one of the officers at the scene could have drove the vehicle to the substation. He told me that his father lived in, I think, Destin or Fort Walton, which, to me, would have been an unreasonable amount of time, probably thirty to forty-five minutes for an officer to sit there. And I explained to him that we had the other two options, that we would have to use one of those two.

(R 164).

McIntyre testified that he drove Respondent's vehicle to the substation pursuant to departmental procedure, general order number 23 (R 166, 167). Regarding general order 23, McIntyre testified that:

> When a vehicle -- The way that I interpret this general order is that when a vehicle is stopped by an officer and that person who is operating that vehicle is incarcerated and that vehicle has been moved by the officer or by a wrecker to a point, a wrecker yard, the substation or the sheriff's impound lot here in DeFuniak Springs, that officer is responsible for its contents and the vehicle and should take due caution and do a vehicle inventory to guarantee that the property in that vehicle is still in the vehicle when the owner or the arrestee comes to claim his property.

(R 168, 169).

General order 23 provides that "whenever a vehicle is towed in, stored or impounded, the investigating officer, or his designee, shall conduct an inventory of the vehicle, its parts and contents (R 170). The order also states that "If legally parked, a vehicle may be left at the location of arrest" (R 166).

The vehicle in this case was a pickup type open bed vehicle. There was a motorcycle and a motorcycle gas tank in the open bed (R 171, 172). The arrest occurred at 8:35 PM (R 173). During the inventory search of the vehicle, one hundred and ten grams of marijuana were found in the back. Prior to the inventory search, another officer had found two small pieces of marijuana cigarettes and a portion of a purple pill in Respondent's pocket (R 173). McIntyre testified that he complied with department policy when he inventoried the vehicle (R 171).

In denying the motion to suppress evidence, the trial court stated:

> All right, sir. Mr. Mooneyham, your motion to suppress will be denied, the Court finding that the search of the vehicle by the officers was reasonable and well-founded based on several different theories. I recognize the officer's testimony, but I also am allowed to look at the totality of the circumstances, and I don't feel that I'm bound to the label that the officer placed solely on that search.

> I think that the search can be justified, as I said, under several different theories. I think that under the sheriff's department general order number 23 that the search would be justified. But I think more significantly that, first, there was probable cause to believe that Mr. Key did not have a license, and I would not require that the officer be certain that Mr. Key had no license, but just that he would have reason to believe, or probable cause to believe.
>
> So I find that the initial stop was a valid stop; and having then made the stop, it was for a law violation as distinguished from simply a traffic stop. And from that arrest for driving while license suspended, I find that a search could lawfully flow. But, in addition, I recognize from the testimony and from the -- your motion to suppress that prior to the actual inventory search of which you now complain, marijuana was recovered from Mr. Key's person and your paragraph 3 of the motion to suppress implies that marijuana may have further been recovered from the vehicle there at the site of the stop.
>
> I find that the actions of the officer was -- were reasonable, particularly in light of the nature of this, this type of vehicle, where it did have an open bed and it had personal property in the rear of that bed. So, for those reasons, the motion to suppress will be denied.

(R 195-197).

Respondent recognizes that the U.S. Supreme Court has held that inventory searches conducted pursuant to standardized criteria satisfy the Fourth Amendment. Colorado v. Bertine, 479 U.S. 367, 93 L.Ed.2d 739, 107 S.Ct.

738 (1987).[1] Respondent contends, however, that the arresting officer in this case failed to follow departmental procedure.

General Order Number 23 of the Walton County Sheriff's Department states in Section I(A):

> PURPOSE AND SCOPE OF VEHICLE INVENTORIES
>
> A. In the course of duty on a day to day basis, it is necessary for the protection of the Officer and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner become the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents. The contents of the vehicle include, but are not limited to, all packages and containers located within the passenger compartment, the trunk, or any other secured area of the vehicle. To ensure that liability does not attach for property located within any package or container, the contents of said package or container, whether it is opened or closed, is to be ascertained and inventoried. (State v. Wells, 13 F.L.W. 686 (Fla. Dec. 1, 1988).

(R 241).

Section III(B) states:

> B. Arrest Made - Vehicle Not Evidence Nor Subject to Seizure

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[1] See also Florida v. Meyers, 466 U.S. 380, 80 L.Ed.2d 381, 104 S.Ct. 1852 (1984).

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.

(R 242, 243).

In this case, the arresting officer told the Respondent that he would drive the vehicle to the substation and it would be released to Respondent's stepfather upon his arrival (R 167, 168). The officer stated that he could not leave the vehicle where it was because pursuant to the general order the officer is responsible for the vehicle and property (R 165). There was property in the open bed of the vehicle (R 171, 172). The officer testified that Respondent could not provide someone to drive the vehicle home within a reasonable amount of time (R 164).

Pursuant to General Order 23, the determination of what amount of time is reasonable to wait for someone designated

to take custody of the vehicle is necessarily a determination to be made by the individual officer based on the circumstances at hand. Such a determination involves the officer's discretion, and there is nothing in the record to show that a 30 to 45 minute wait would have been reasonable or that the officer abused the discretion afforded him under the departmental order.

In Colorado v. Bertine, supra, the Court approved the exercise of police discretion in such matters, stating:

> Bertine finally argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. 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.

93 L.Ed.2d at 748.

In the case at bar, the officer's discretion was exercised according to standard criteria and on the stated basis of something other than suspicion of evidence of

criminal activity, and was related to the feasibility and appropriateness of stationing a deputy to do nothing but attend the vehicle for however long it would take the designated custodian to arrive.

Under these circumstances it was clearly proper to take Respondent's vehicle to the substation in light of the property in the open bed of the vehicle and the unreasonable length of time it would take the designated custodian to arrive. These actions were done pursuant to standardized departmental criteria.

The denial of Respondent's motion to suppress was thus properly denied by the trial court and affirmed by the district court.

CONCLUSION

Petitioner urges this Honorable Court to reverse Respondent's habitual offender sentence on the authority of State v. Barnes, and to let stand the district court's affirmance of the denial of Respondent's motion to suppress.

Respectfully submitted,

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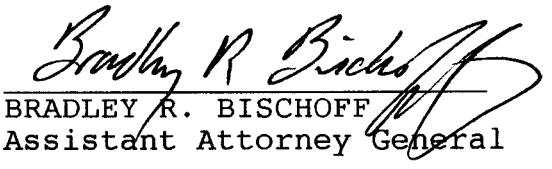
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to GLEN P. GIFFORD, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 26th day of May, 1992.



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