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IN THE SUPREME COURT OF FLORIDA

CARL HOLLINGER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

DCA CASE NO. 91-1638

Supreme Court Case No. 79,800

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

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CARL HOLLINGER, Petitioner,	)	
vs.	)	DCA CASE NO. 91-1638
STATE OF FLORIDA, Respondent.	)	Supreme Court Case No.79,800

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

At the trial level this was a possession-of-cocaine case (R 44) in which the defendant threw down cocaine upon approach of police officers wearing SWAT regalia. (R 6) The trial court granted a defense motion to suppress. (R 36) The State of Florida appealed to the Fifth District Court of Appeal. (R 60) The issue on appeal was whether the cocaine had been abandoned, and therefore legally seized by the police, or been the fruit of an illegal detention and therefore suppressible.

The Fifth District Court of Appeals reversed the Trial Court's decision to grant the motion to suppress. In doing so they took the position that even though the detention might be illegal, evidence discovered as a result should not be suppressed unless it had come to light through some additional illegal action of the police (such as an illegal search) during the course of the illegal detention.

The 5th DCA acknowledged conflict to the extent it's ruling was contrary to named precedents. State v. Hollinger, Fla. 5th DCA, 17 FLW D863 (April 3, 1992).

The Appellant filed a notice to invoke discretionary jurisdiction on May 1, 1992. Jurisdictional pleadings were filed, and this Court accepted jurisdiction by order dated October 13, 1992.

STATEMENT OF THE FACTS

On February 20, 1991, at approximately 9:45 p.m., the drug unit of the Orange County Sheriff's Office was conducting a "sweep". (R 4-5) When the two unmarked police cars pulled into the parking lot, the Petitioner was standing alone in the center of the paved area and three or four other persons were located on a nearby porch. Another group was situated at the north end of the lot. (R 5) A total of seven or eight drug unit officers known locally as the "Duke Boys" took part in the raid. (R 10) They were operating as a take-down arrest team. (R 25) They were all wearing SWAT-team-type uniforms consisting of black masks, bullet-proof vests, smocks, gun belts, handcuffs and flashlights. (R 10)

Deputy Hanton's police unit pulled to a stop about ten feet from the defendant. (R 6) Hanton stepped forth from the car wearing a full SWAT costume (R 10) and carrying a 13-inch aluminum alloy flashlight (R 13). He announced to all present that he was a deputy sheriff. (R 5) Another police unit containing several team members in SWAT regalia was engaging other people in the parking lot. (R 25) After exiting his car and bellowing "Orange County Sheriff's Office", Hanton walked directly toward the defendant (R 6). The defendant stayed right where he was. As Hanton neared the defendant, he saw the defendant place his hand behind his back and observed a white tissue fall to the ground. (R 12) The tissue was recovered and contained six rocks of cocaine. (R 8)

Deputy Hanton was the only witness who testified at the suppression hearing. The state argued that there was no detention and that the defendant had abandoned the cocaine. (R 28-29, 34-35) The court announced its ruling rejecting the state's position at the conclusion of the hearing:

> It appears to me from all the evidence that's been presented at this point that we do have an illegal detention here.
>
> We've got two police vehicles there, undercover vehicles that come up to a rather confined area; seven or eight officers exit those in SWAT regalia, with the masks, announce that they are Orange County Sheriff's Office.
>
> The officer begins a direction toward a crowd beyond the defendant, but clearly in the direction of the defendant. I think a reasonable person under those circumstances would feel that he was not to move, and I, there being no basis for a stop or a detention, I think we have an illegal detention at this point.
>
> Motion to suppress will be granted. (R 36)

On appeal, the State argued that the trial court's decision is consistent with the decisions of the Second and Fourth District Courts of Appeal in Florida and the recent decisions of the U.S. Supreme Court in California v. Hodari, 113 L.Ed.2d 690 (1991).

The defendant agreed that, to some extent, the trial court's decision granting the motion to suppress was in conflict with the Fifth District Court of Appeal's decision in Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990). However, the defendant argued that Curry was in conflict with reason, justice and named prece-

dents, and urged the court to recede from that decision, or, if they chose not to recede from Curry and did reverse the trial court's decision, then to certify a conflict between the District Courts.

The Fifth DCA rejected the defendant's argument, holding that their decision in Curry was controlling. They did, however, acknowledge conflict to the extent that other named District Court opinions were to the contrary.

A notice of intent to seek discretionary review was timely filed. This proceeding follows.

SUMMARY OF THE ARGUMENT

The opinion of the Fifth District Court of Appeal in the instant case conflicts with cases of other District Court's wherein a different result was reached on essentially the same facts, so as to cause confusion among precedents.

ISSUE

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN STATE V. HOLLINGER, 17 FLW 863 (5th DCA April 3, 1992), EXPRESSLY AND DIRECTLY CONFLICTS WITH FEDERAL PRECEDENT AND OTHER DISTRICT COURT DECISIONS.

The Fourth Amendment of the United States Constitution and Article I, Section 12 of the Florida Constitution, protects citizens from unreasonable searches and seizures by government agencies. The courts have developed an exclusionary rule to enforce these protections by preventing the admission of evidence obtained through an illegal search or seizure. Running contrary to this policy is a developing rationale of the Fifth District Court of Appeal exemplified by the recent decisions of Curry v. State 570 So.2d 1071 (Fla. 5th DCA 1990), and State v. Hollinger, 17 FLW D863 (5th DCA April 3. 1992). Under the reasoning of these cases, the state is free to use evidence obtained pursuant to an illegal detention as long as it is not derived from an illegal search. This approach essentially eviscerates the protection offered to citizens against unreasonable seizures by the United States and Florida Constitutions by making exclusionary rules inapplicable to illegal seizures.

Section 901.151, Florida Statutes (1989), the Florida Stop and Frisk Law, provides that in order to justify even a temporary detention, a police officer must have a founded suspicion that the person has committed, is committing or is about to commit a crime. In the case sub judice, the trial court found that there was an illegal detention of the defendant by officers of

the state, and granted the defendant's motion to suppress the evidence recovered pursuant to this illegal detention.

The trial court's decision is consistent with decisions of other Florida Appellate Courts which have held that when a police officer stops a defendant in his tracks without founded suspicion, and the defendant drops something, "The state's abandonment theory is not persuasive". Spann v. State, 529 So.2d 825, 826 (Fla. 4th DCA 1988) (Where officer's order to "freeze" issued without reasonable suspicion caused the defendant to drop cocaine); Wallace v. State, 540 So.2d 254 (Fla. 4th DCA 1989) (No abandonment arose where the officer, without well-founded suspicion, ordered defendant to reveal what was in his hand, and defendant spilled the contents of bottle on ground); Anderson v. State, 576 So.2d 319 (Fla. 2d DCA 1991) (Abandonment which is product of illegal stop is involuntary and abandoned property must be suppressed). State v. Fortunato, 581 So.2d 651 (Fla. 4th DCA 1991) (Where defendant was stopped without probable cause and ordered to lie on the ground at gun point, evidence was properly suppressed because this was a "stop then drop" case as opposed to a "drop then stop case"); Grant v. State, 596 So.2d 98 (Fla. 2d DCA 1992) (Where stop was without reasonable suspicion it was unlawful, and because the defendant had submitted to the stop before the officer saw him discard the bottle, the evidence was to be suppressed as the product of an illegal seizure).

The defendant acknowledges that the United States Supreme Court has provided new authority since some of the cases cited

above in California v. Hodari, 113 L.Ed.2d 690 (1991), however, in reaching their decision in the case presently under consideration, the Fifth District Court of Appeal misreads Hodari as being supportive of their position. On the contrary, Hodari compels the Fifth DCA to reject the notion that only when police begin an actual physical search on a suspect does abandonment become involuntary and tainted by an illegal seizure.

In the instant case the defendant did not flee, but remained riveted to the same spot on the earth's surface from the time the officer announced that he was a sheriff's deputy until he was arrested. The U.S. Supreme Court in Hodari has drawn a clear distinction between those defendant's who yield to the authority of the police and those defendant's who flee. A person who flees from a show of authority has manifestly not been seized by it in any meaningful way. (See State v. Wilson, 595 So.2d 1107 (Fla. 3d DCA 1992). Conversely, a person who does not flee and instead remains fixed in place and submissive to the officer's show of authority has been effectively seized by it. This distinction is seen as critical in determining whether a Mendenhall-type seizure by show of authority has occurred. Hodari at 699. In Hodari, the defendant discarded evidence while the police were chasing him. Id. at 695. The United States Supreme Court affirmed the denial of the defendant's motion to suppress the evidence. Id. at 699. The Court held that evidence discarded by a suspect fleeing from the police should not be suppressed because, since factually there has been no detention, the evidence can not be

the product of an illegal detention. Nowhere in the Hodari opinion does the Court imply that evidence discarded by a defendant during an actual illegal seizure should not be suppressed. They have set out no requirement that evidence must become the fruit of an illegal search conducted pursuant to that illegal seizure before it becomes suppressible. Thus, by refusing to suppress evidence discovered as a result of an illegal detention, Hollinger goes beyond the limits imposed by the Hodari Court and is inconsistent with the interpretation of the Fourth Amendment of the United States Supreme Court. Under Article I, Section 12 of the Florida Constitution, Florida Appellate Courts are mandated to decide Fourth Amendment issues in conformity with the decisions of the United States Supreme Court. Accordingly, this Court's decision in Hollinger is inconsistent with both the United States and Florida Constitution and this Court should recede from that decision and affirm the ruling below.

The Florida Supreme Court has construed Hodari and related federal authorities in the case of State v. Anderson, 591 So.2d 611 (Fla. 1992), saying that an abandonment which is the product of an illegal stop is involuntary, and the abandoned property must be suppressed.

The Fifth District Court of Appeal further misconstrues Hodari in asserting that Hodari mandates them to find that Appellee was not seized in the instant case. Such is not the case. In Hodari, the Court held that a seizure occurs when either physical force is used, or where that is absent, there is

submission to a show of authority. Hodari at 697. Furthermore, in the absence of the use of physical force, Hodari acknowledges that the objective test established in U.S. v. Mendenhall, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.C.t 1870 (1981), is appropriate in determining if a seizure has been effectuated by a show of authority. Hodari at 698. This test is an objective one in the sense that, if a reasonable person would not believe that he was free to leave, a seizure has occurred. Mendenhall at 555. In the instant case, although the defendant was not physically seized, the trial court correctly found that, under the particular facts of this case, the defendant submitted to a show of police authority by staying put as the officer approached him:

> THE COURT: It appears to me from all the evidence that has been presented at this point that we do have an illegal detention here. We have two police vehicles, undercover vehicles that come up to a rather confined area; seven or eight officers exit those in SWAT team regalia, with the masks, and announce that they are with the Orange County Sheriff's Office. The officer begins a direction towards a crowd beyond the defendant, but clearly in the direction of the defendant. I think a reasonable person under those circumstances would feel that he was not to move, and I, there being no basis for a stop or detention think we have a legal detention at this point. (R 36)

The trial court finding that the police conduct was sufficient for a reasonable person to believe they were not free to leave, and the defendant correspondingly not moving, satisfies the objective test set forth in Mendenhall.

The most chilling language in the Fifth District Court of Appeal's opinion in Hollinger is the following:

> Even assuming, arguendo, that Appellee was illegally detained, Appellee precipitately discarded the cocaine by dropping the tissue containing the cocaine in order to prevent the officers from finding incriminating evidence upon his person. This abandonment was voluntary because it was not in response to any police request or command. By discarding the tissue Appellee forfeited all expectation of constitutional protection which he may have claimed regarding possession of the tissue and its contents.

The above analysis set forth by the Fifth DCA has ominous repercussions where the fundamental liberties of the people living in this district are concerned. The Fifth DCA is stating that there is no protection of the exclusionary rule to prevent law enforcement from conducting unlawful detention. The Fifth DCA's reading of the Fourth Amendment is simple: Only where physical searches are done by police does the Fourth Amendment apply. This rationale is opposite to the U.S. Supreme Court's holdings in Mendenhall and Hodari and the reasoning of the Florida Supreme Court in State V. Anderson, 591 So.2d 611 (Fla. 1992). It is an assault on contemporary notions of liberty and freedom in this country.

In conclusion, the decision of the Fifth District Court of Appeal in the instant case is in direct conflict with decisions of other District Courts of Appeal. The opinion also ignores case law from the United States Supreme Court and allows for police to conduct unlawful detention of suspects without the protection of the exclusionary rule to suppress evidence that is obtained as a result of that detention. This Court should vacate the decision of the Fifth DCA, and in so doing restore full

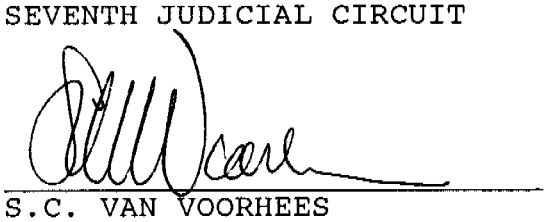
Fourth Amendment protection to the citizens of the Fifth DCA.

CONCLUSION

For the reasons expressed herein, the defendant respectfully requests that this Honorable Court vacate the decision of the Fifth District Court of Appeal herein.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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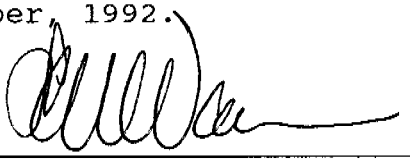
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114, via his basket at the Fifth District Court of Appeal and mailed to: Carl Hollinger, 4412 Ivey Court, Orlando, FL 32802, this 3rd day of November, 1992.



S.C. VAN VOORHEES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

CARL HOLLINGER, Petitioner vs. STATE OF FLORIDA, Respondent.	)	DCA CASE NO. 91-1638 Supreme Court Case No. 79,800

A P P E N D I X

State v. Hollinger, 17 FLW D863 (Fla. 5th DCA April 3, 1992)

JMC 8/3

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 91-1638

CARL HOLLINGER,

Appellee.

Opinion filed April 3, 1992

Appeal from the Circuit Court
for Orange County,
Gary L. Formet, Sr., Judge.

Robert A. Butterworth, Attorney General,
Tallahassee, and David S. Morgan,
Assistant Attorney General,
Daytona Beach, for Appellant.

James B. Gibson, Public Defender,
and James M. Cadwell,
Assistant Public Defender,
Daytona Beach, for Appellee.

DIAMANTIS, J.

The state appeals the order of the trial court granting appellee's motion to suppress cocaine. We reverse.

On February 20, 1991, at approximately 9:45 p.m., the drug unit of the Orange County Sheriff's Office was conducting a drug sweep. The sweep consisted of seven or eight drug unit officers who wore outfits consisting of a black mask, sheriff's office smock, gun belt and flashlight. An unmarked automobile containing Deputy Hanton and three other officers pulled into a

grocery parking lot. Appellee was standing alone in the middle of the lot while other persons were located on the front porch of the grocery store and another group of individuals was situated at the north end of the lot.

After Hanton's vehicle stopped within ten feet of appellee, Hanton exited and announced that he was a deputy sheriff. Hanton then proceeded to walk toward appellee, who was standing about three feet from the group of individuals located at the north end of the lot. The other officers proceeded toward the other individuals located in that area with the exception of an officer who remained in an automobile at that time. Hanton observed appellee place one of his hands behind his back and drop a white tissue. Hanton initially said nothing else to appellee other than identifying himself -- he neither ordered appellee to drop the tissue nor to drop whatever was in appellee's hand. Hanton then asked appellee to place his hands in front of himself. Hanton retrieved the tissue which contained six rocks of a substance which field-tested positively as cocaine.

The trial court suppressed the cocaine because it concluded that under these circumstances appellee was illegally detained. Specifically, the trial court concluded that the appellee was not free to move. Even assuming, *arguendo*, that appellee was illegally detained, appellee precipitately discarded the cocaine by dropping the tissue containing the cocaine in order to prevent the officers from finding incriminating evidence upon his person. This abandonment was voluntary because it was not in response to any police request or command. By discarding the tissue appellee forfeited all expectation of constitutional protection which he may have claimed regarding possession of the tissue and its contents. Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990); A.G. v. State, 562 So.2d 400 (Fla. 3d DCA 1990); State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979).

We reject the conclusion that appellee was illegally seized. To constitute a seizure there must be either application of physical force by the officer or submission by the suspect to a show of authority. California v. Hodari D, ____ U.S. ____, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). In the instant case, Hanton applied no physical force on appellee nor did appellee submit to any show of authority.

Accordingly, we reverse the trial court's order granting appellee's motion to suppress the cocaine. To the extent that Cox v. State, 586 So.2d 1321 (Fla. 2d DCA 1991); Wallace v. State, 540 So.2d 254 (Fla. 4th DCA 1989); and Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988) are contrary, we acknowledge conflict.

REVERSED.

COWART, J., concurs.

GOSHORN, C.J., concurs in result only.