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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 BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Ave., Ste. A
DAYTONA BEACH, FL 32114
(904) 252-3367

ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, appealed to the Fifth District Court of Appeal, following the lower court's granting of Petitioner's Motion to Suppress. On appeal, the Respondent raised the issue that the trial court erred in suppressing the evidence of the cocaine abandoned by the Petitioner.

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) The unmarked unit containing Deputy Hanton pulled into a grocery parking lot. The Petitioner was standing alone in the center of the lot, while other individuals were located on the porch and another group was situated at the north end of the lot. (R 5) There was a total of seven or eight drug unit officers. (R 10) All were wearing the standard drug unit uniform consisting of a black mask, a sheriff's office smock, gun belt, and flashlight. (R 10)

After the patrol car stopped, Hanton stepped out and

announced that he was a deputy sheriff. (R 5) He walked toward the defendant (R 6), who was standing some three feet from the ground at the north end of the lot. (R 20) He saw the Petitioner place his hand behind his back and then a white tissue fall; at that time he called Detective Chapman and ordered Petitioner to put his hands to the front of himself. (R 7) 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 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.

The state timely filed its notice of appeal. (R 60)

On appeal, the Petitioner 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 Petitioner recognized that to some

extent, the trial court's decision conflicted with the Fifth District Court of Appeal's decision in Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990), and urged that court to recede from that decision. The Petitioner urged the Fifth District Court of Appeal if they chose not to recede from Curry and reverse the trial court's decision, then certify a conflict between the District Courts.

The District Court rejected the Petitioner's argument, holding that their decision in Curry was controlling, and further held that to the extent that other District Court opinions are to the contrary, the court acknowledged conflict.

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 occurred 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 THE DECISIONS OF 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).

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 Court has developed an exclusionary rule to enforce these protection by preventing the admission of evidence obtained through an illegal search or seizure. Under the rationale developed by the Fifth District Court of Appeal in Curry v. State 570 So.2d 1071 (Fla. 5th DCA 1990) and State v. Hollinger, 17 FLW D863 (5th DCA April 3. 1992), 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.

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. Section 901.151, Florida Statutes (1989). In the case sub judice, Deputy Hanton admitted that the defendant was free to leave when he had approached him, there-

fore, conceding that he lacked founded suspicion to detain Petitioner. (R 14) The trial court ignored Deputy Hanton's testimony in this regard, and focused on the fact that two police vehicles were used for a "sweep" in a confined area, that seven or eight officers were involved and dressed in full SWAT regalia, one of whom after announcing that he was with the Orange County Sheriff's Officer, clearly moved in the direction of the Petitioner, held that there was an illegal detention of Petitioner. The trial court thereafter granted Petitioner's motion to suppress the evidence recovered pursuant to this illegal detention.

The trial court's decision is consistent with that 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); Wallace v. State, 540 So.2d 254 (Fla. 4th DCA 1989); Anderson v. State, 576 so.2d 319 (Fla. 2d DCA 1991). Petitioner acknowledges that the United States Supreme Court has provided new authority since the cases cited above in California v. Hodari, 113 L.Ed.2d 690 (1991). 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.

The Court in Hodari recognized the distinction between

defendant's who yield and defendant's who flee as critical in determining whether a seizure 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 it is not the product of an illegal detention. No where in the Hodari opinion does the Court imply that evidence discarded by a defendant during an illegal seizure should not be suppressed unless it becomes a fruit of an illegal search conducted pursuant to that illegal seizure. 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 thus 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 decision 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 Fifth District Court of Appeal further misconstrues Hodari in asserting that Hodari mandates 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 test established in U.S. Mendenhall, 446 U.S. 544, 64 L.Ed.2d 491, 100 S.C.t 1870 (1981) is appropriate in determining whether a seizure had been effective to a show of authority. Hodari at 698. This test is an objective one, i.e. whether a reasonable person would believe that he was free to leave, Mendenhall at 1877. In the instant case, although the Petitioner 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 Petitioner 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 Appeal has ominous repercussions where the fundamental liberties of the people living in this district. 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 apposite to the U.S. Supreme Court's holding in Mendenhall and Hodari and is a 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 exercise its discretionary jurisdiction, 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, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and review the decision of the Fifth District Court of Appeal herein.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

George D.E. Burden

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Ave., Ste. A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR PETITIONER

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 10th day of June, 1992.

George D.E. Burden

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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

A P P E N D I X

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

Criminal law—Search and seizure—Abandonment—Officer pulling into supermarket parking lot in unmarked vehicle with three other officers, exiting vehicle and identifying himself as deputy sheriff, walking toward defendant as other officers walked toward other group of individuals, and observing defendant place one of his hands behind his back and drop white tissue—Defendant voluntarily abandoned cocaine contained in tissue where abandonment was not in response to police request or command—By discarding tissue, defendant forfeited all expectation of constitutional protection he may have claimed regarding possession of tissue and its contents—Defendant was not illegally seized where officer applied no physical force and defendant did not submit to any show of authority—Error to grant defendant's motion to suppress

STATE OF FLORIDA, Appellant, v. CARL HOLLINGER, Appellee. 5th District. Case No. 91-1638. 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.)

* * *

Criminal law—Sentencing—Habitual offender—Findings—PSI relied on by trial court fails to meet statutory requirement of specific findings to support habitual offender status—Ten-year mandatory minimum sentence unauthorized where defendant was only found to be habitual offender rather than habitual violent offender—At resentencing, trial court may reconsider habitual offender status and reimpose status after making specific findings of fact

ROBERT E. POWELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-481. Opinion filed April 3, 1992. Appeal from the Circuit Court for St. Johns County, Richard G. Weinberg, Judge. James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and John W. Foster, Jr., Assistant Attorney General, Daytona Beach, for Appellee.

(COWART, J.) The trial court adjudicated the defendant to be an habitual felony offender but did not make any specific findings of fact to support the adjudication. The trial court then sentenced the defendant as an habitual felony offender on Count I (sale of cocaine within 1,000 feet of a school (§ 893.13(1)(e), Fla. Stat.) (a first degree felony) to a 30 year term of imprisonment with a ten year minimum mandatory sentence citing section 775.084, Florida Statutes. However, in open court, the trial court announced that the defendant was adjudged an habitual felony offender on Count I and was sentenced to 30 years with a minimum mandatory sentence of three years with no parole on Count I for 10 years.

The State argues that although the trial court made no specific formal findings, the imposition of the habitual felony offender status was supported by the PSI relied on by the trial court, citing *Rowland v. State*, 583 So.2d 813 (Fla. 2d DCA 1991). The PSI in the record does not meet the statutory requirements of specific findings to support an habitual felony offender status.

We reverse the trial court's adjudication that the defendant was an habitual felony offender because the trial court did not make the prerequisite findings of fact required by section 775.084(3)(d), Florida Statutes. *Parker v. State*, 546 So.2d 727 (Fla. 1989); *Walker v. State*, 462 So.2d 452 (Fla. 1985); *Eutsey v. State*, 383 So.2d 219 (Fla. 1980); *Power v. State*, 568 So.2d 511 (Fla. 5th DCA 1990); *Smith v. State*, 573 So.2d 194 (Fla. 3d DCA 1991). As stated by the supreme court in *Walker* at 454:

> We hold that the findings required by section 775.084 are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions. Without these findings, the review process would be difficult, if not impossible. It is clear the legislature intended the trial court to make *specific findings* of fact when sentencing a defendant as a[n] habitual offender. Given this mandatory statutory duty, the trial court's failure to make such findings is appealable regardless of whether such failure is objected to at trial. (emphasis added).

The sentence imposed on Count I is unauthorized because the habitual felony offender statute only authorizes a 10 year minimum mandatory sentence for defendants found to be habitual *violent* felony offenders and the defendant was only found to be an habitual offender. (§ 775.084(4)(a) & (b), Fla. Stat.). Therefore, because the defendant was found only to be an habitual felony offender (which finding we also reverse), and not an habitual *violent* felony offender, we vacate that sentence and remand for resentencing.

The trial court, on resentencing, may reconsider the defendant's habitual felony offender status and reimpose that status after making specific findings of fact as required by the statute, *Walker,* and other cases.