047

IN THE SUPREME COURT OF FLORIDA

CARL HOLLINGER,

Petitioner,

v. CASE NO. 79,800

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

MERITS BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES

CASES: PAGES:

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal decision in this case presents to conflict. The mere mention of other cases which might have reached a different result does not create conflict. The cases mentioned by the appellate court are all distinguishable on their facts, so it is understandable that those cases may have reached contrary rulings. But the Fifth DCA ruling in the instant case does not create conflict.

The decision below does accurately apply the United States Supreme Court's decisions which define when a seizure has occurred. Based on the facts presented, and applying the current federal law, the Fifth DCA properly concluded that the police never seized the defendant prior to his voluntary abandonment of his cocaine. Nor did the police do anything which led the defendant to submit or yield to a show of police authority.

In short, the Fifth DCA properly applied the law to the sole issue before it -- whether there was an illegal seizure prior to the defendant dropping his cocaine. The court held that there was no seizure, and that ruling is a true and correct application of the current law to the facts of the instant case. Therefore, this court should affirm the ruling of the Fifth District Court Of Appeal.

ARGUMENT

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY APPLIED *CALIFORNIA V. HODARI*, FINDING THAT THERE WAS NO SEIZURE OF THE DEFENDANT PRIOR TO HIS ABANDONMENT OF THE CRACK COCAINE.

This case comes before this court based on the possibility that the Fifth District Court of Appeal decision in *State v. Hollinger*, 596 So. 2d 521 (Fla. 5th DCA 1992)[1] might be in conflict with other Districts. In its opinion published April 3, 1992, the Fifth District Court stated that "[t]o the extent *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." *Hollinger* at 522. Despite what the Fifth District Court stated, however, there is no conflict between the holding in *Hollinger* and any other case decided in Florida.

The issue before the Fifth DCA in *Hollinger* was a narrow one -- whether the defendant was illegally detained before he dropped the crack cocaine. *Id.* The trial court ruled that, based on the facts, a reasonable person would feel that he was not free to go. (Appendix B, p. 36)[2]. Therefore, the defendant was illegally detained prior to dropping the crack. (Appendix A, p. 36). The trial judge never examined whether the abandonment

---

[1] The Fifth District Court opinion is attached to this brief and identified as Appendix A.

[2] The transcript of the suppression hearing, held July 16, 1991, is attached to this brief and identified as Appendix B.

might be voluntary in spite of an illegal detention. He rested his ruling solely on his determination that the police illegally detained the defendant before the defendant abandoned the cocaine.

Based on the lower court's ruling, the sole issue before the appellate court was whether the defendant had been illegally detained. *See Hollinger* at 522. The appellate court turned to the United States Supreme Court decision in *California v. Hodari D.*, _ U.S. _, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) to determine whether the police had in fact **seized** the defendant. Relying on the U.S. Supreme Court's definition of **seizure**, the appellate court held that there had not been a seizure at all, either legal or illegal.

The *Hodari* decision is relatively short and direct. It examines what necessarily defines a seizure of a person. The Court pointed out that the clear meaning of the word seizure is the actual taking of physical possession of the person. *Hodari* at 1549-1550. But because the defendant had never been physically touched by the police before he abandoned the contraband, the Court looked to see what else was required to constitute a **seizure**, such as a "show of authority". *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968)). For purposes of the Court's analysis, the Court assumed that the police officer's foot pursuit of the defendant **was** a "show of authority". *Id.* But the analysis did not stop there.

The Court went on to decide whether a seizure occurred, even when there is a "show of authority", if the defendant does not

yield to such a "show of authority". *Id.* For this purpose, the Court looked to the definition of **seizure** given in the earlier case of *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). In *Mendenhall*, the Court established that the test of whether there was a seizure due to a "show of authority" is an objective one which looks to what a reasonable person would have believed. *Id.* at 1551. In other words, the show of authority must be words and actions that would convey to a reasonable person that he was not free to go. But the Court pointed out that the *Mendenhall* test is only one aspect of the determination of whether there was an unlawful seizure.

The Court went on to describe the kind of situation which did **not** convey the message that a person was not free to go. For instance, a police cruiser slowly following a defendant "did not convey the message that he was not free to disregard the police and go about his business." *Hodari* at 1552 (citing *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988)). And, while police cars with flashing lights in a lengthy chase was clearly a "show of authority", it did not produce a **seizure** solely by that "show of authority". *Hodari* at 1552 (citing *Brower v. Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989)).

In short, the Court held that in cases where there is not an actual physical seizure, a mere "show of authority" is not enough to constitute a seizure. There must additionally be some submission to an act of authority, or a yielding to the authority. So, even assuming that the police chasing the defendant constituted adequate "show of authority", because the

defendant did not submit or yield to anything the officer did, there was no seizure until the police physically tackled the defendant. *Hodari* at 1552.

The Fifth DCA applied, quite properly, the *Hodari* rule in the instant case. The very narrow issue before the Fifth DCA was whether there was a seizure. The evidence clearly showed that the police never physically touched the defendant before he threw down the cocaine. (Appendix B, p. 5-8). So, the question facing the court was whether there was actual submission or yielding to a "show of authority". Applying *Hodari*, the Fifth DCA determined that, by law, there was no seizure.

In the instant case, the "show of authority" consisted of the police officers getting out of their cars dressed in clearly marked police attire and identifying themselves as police officers. (Appendix B, p. 5-8). Then one officer began to walk in the general direction of the defendant, without saying anything to the defendant. (Appendix B, p. 5-8). Before the officer directed the defendant to do anything -- in fact, before the officer could say or do anything at all -- the defendant threw down his crack cocaine. (Appendix B, p. 5-8).

Based on those facts, the Fifth DCA looked to see if there was, by law, a seizure *prior* to the defendant's abandonment of the cocaine. Applying the definitions and analysis of *Hodari*, the appellate court stated

> 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. (cite to *Hodari* omitted). In the instant case, Hanton applied no physical force on appellee nor did appellee submit to any show of authority.

State v. Hollinger, 596 So. 2d 521, 522 (Fla. 5th DCA 1992). In reaching that determination, the appellate court relied on the facts that "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." *Id.*

Just as in *Hodari*, there was no submission or yielding to any police action. The fact that the defendant threw down his cocaine when he merely saw the arrival of police officers did not constitute submission or yielding to a show of police authority. It was the voluntary act of the defendant without any exercise of authority by the police officers.

Petitioner Hollinger attempts to find conflict based on some of the *obiter dicta* found in the appellate court opinion. In the decision, the court remarks that even if there was an illegal detention, the defendant's decision to discard the cocaine "was voluntary because it was not in response to any police request or command." *Hollinger* at 522. It is important for this court to note, however, that this statement is clearly dictum, since it was unnecessary in reaching the outcome of the case. In fact, it does not even go to the issue before the court.

Obiter dicta is not binding authority and therefore cannot provide express and direct conflict between decisions. *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976); *see also*, *Jenkins v. State*, 385 So.

2d 1356 (Fla. 1980); *Reaves v. State*, 485 So. 2d 829 (Fla. 1986); *Continental Assuranse Co. v. Carroll*, 485 So. 2d 406 (Fla. 1986).

Even if it were not dictum, the court's statement is not a misstatement of the law. Nor does it create conflict. This very court, in *State v. Anderson*, 591 So. 2d 611 (Fla. 1992), acknowledged the legal principle that "a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest". *Id.* at 613 (citing *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979)). The Fifth DCA likewise acknowledged that principle -- that even the taint of an illegal seizure can dissipate so as to make an abandonment voluntary. *See Curry v. State*, 570 So. 2d 1071, 1073 (Fla. 5th DCA 1990). That principle is not new, nor has it been overruled by *Anderson*. So, the appellate court's mere acknowledgment of the principle, in dicta, cannot amount to conflict requiring this court to review the instant case.

Likewise, the cases cited by the appellate court as possibly having reached contrary rulings also fail to create conflict, regardless of the appellate court's mention of that possibility. Where cases are distinguishable on their facts, no express and direct conflict exists. *Department of Revenue v. Johnson*, 442 So. 2d 950 (Fla. 1983). Each case cited by the Fifth DCA -- "to the extent [these cases] are contrary" -- includes an actual stop and search without founded suspicion or probable cause. In *Spann v. State*, 529 So. 2d 825 (Fla. 4th DCA 1988), the police officer approached the defendant and told him to "freeze, stop". When the defendant dropped contraband, the officer told the defendant

to put his hands on the hood of his car. The officer picked up the packet, recognized it was cocaine, then completely searched the defendant's person. *Id.* The appellate court held that the officer never had founded suspicion to make such a stop or seizure. *Id.* at 825-826. Additionally, all parties stipulated that the defendant dropped the cocaine as a direct result of the police officer's order. *Id.*

In *Wallace v. State*, 540 So. 2d 254 (Fla. 4th DCA 1989), the State conceded that there was an illegal stop and search. *Id.* The sole issue was "whether there was an abandonment". *Id.* The appellate court 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.'" *Id.* at 255.

Finally, in *Cox v. State*, 586 So. 2d 1321 (Fla. 2d DCA 1991), the police officer stopped the defendant's car without founded suspicion for such a stop. The appellate court specifically found that "[i]t is clear that the appellant's act of abandoning or accidently dropping the marijuana was prompted by or the result of the officer's illegal stop...Since the initial stop was unlawful, the evidence seized as a result of that stop should have been suppressed". *Id.* at 1322.

It is apparent that each case which the Fifth DCA mentioned as possibly having a contrary result is easily distinguishable on the facts. Each one entailed either an actual physical stopping of the defendant's movements or an order by the police officer for the defendant to do something. None of those cases contains

facts similar to the instant case. To the extent that cases which are distinguishable on their facts do not create conflict, nor does obiter dicta create conflict, this court should find that there is no conflict of law presented in the lower court's ruling and opinion.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this honorable court affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief Of Respondent has been furnished by delivery to S. C. Van Voorhees, Assistant Public Defender for Petitioner, this 30th day of December, 1992.

Rebecca Roark Wall
Of Counsel

IN THE SUPREME COURT OF FLORIDA

CARL HOLLINGER,

Petitioner,

v. CASE NO. 79,800

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

INDEX TO APPENDIX

INSTRUMENTS: