IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,534

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERT SMITH,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

****

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the Appellee in the District Court. The Respondent, **ROBERT SMITH**, was the Appellant below. The parties will be referred to as they stand before this Court. The symbol "R" will designate the record on appeal and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Respondent, Robert Smith, was charged jointly with Rudolph Flowers by information filed in the Nineteenth Judicial Circuit in and for Indian River County with trafficking in cocaine in an amount greater than 200 grams, a first-degree felony. R 52.

Pre-trial, Respondent moved in writing to suppress both the suspected cocaine and any statements, R 74-76. Hearing was had before Circuit Court Judge Charles Smith on July 3, 1991. The testimony of Indian River County Deputy Sheriffs Michael Brandes and Donald Hart was presented.

Deputy Brandes and a trainee were driving on I-95 just south of SR 60 on March 20, 1991 shortly after 3 P.M. when Brandes observed a car driving very erratically down I-95 and the driver (Flowers) with both hands in front of his face. R 5,10,14. The driver was not maintaining a single lane. R 14. Initially Deputy Brandes suspected Flowers of being under the influence of alcohol or being tired. R 10,18. Brandes pulled out, turned around and went after the vehicle. R 14. It took about a mile for the Deputy to catch up with the vehicle. R 14.

Deputy Brandes pulled the vehicle over and he asked the driver for his drivers license and vehicle registration. Respondent was a passenger in the car. R 5-6. Flowers explained that he was driving erratically because he was splashing himself with water from a cup that was allegedly on the console of the car. This was why both hands were in

his face. R 10. Deputy Brandes told Flowers that he would rather Flowers drink coffee or pull off the side of the road and take a little nap. R 10. A warning for failure to drive within a single lane was issued. R 7.

Flowers was told he was free to leave. R 7. Flowers began walking toward his vehicle and Brandes began walking toward the patrol car. Brandes then turned around and asked permission to search Flowers' vehicle. Flowers' consented. R 7. Both the Respondent and Flowers were placed in the back of the patrol car primarily for their safety so that they would not get hit by a passing vehicle. R 10.

By this time Deputy Hart had arrived on the scene. Deputy Brandes and Deputy Hart proceeded to search the vehicle pursuant to Flowers' consent. When Deputy Hart opened the glove compartment, he could see a white paper towel protruding from behind the glove compartment. When he took a second look he could see a brown oblong-shaped thing taped up. R 27. Brandes looked and it appeared to be a taped package. R 11. He touched it and found it to be a soft substance wrapped in tape. R 24-25. The package was removed. R 11. Brandes made a small cut on top of the package and took a small amount of a white substance and field tested it. It field tested positive for cocaine. He then placed both subjects under arrest. R 31.

Brandes had a tape recorder in his patrol vehicle which he used to tape the conversations of Respondent and Flowers. While they were in the rear of the patrol car the Respondent

and Flowers had a conversation wherein they wanted to know if the deputies had located the package yet, referring to the package that was found in the glove compartment. R 12-13. Respondent and Flowers were not told that their conversation in the patrol car was being recorded. R 33.

After argument of counsel the trial court issued the following oral order:

> Based on the testimony presented in this case on the Defendant, Robert Smith's, Motion to suppress the evidence the Court finds and determines that Officer Michael Brandes was patrolling I-95 about three p.m. on March 22, 1991, when he noticed a car driving erratically northbound on I-95. It was weaving back and forth in the lanes. He turned around and pursued it and stopped it as soon as possible. He suspected that he might be under the influence or and anyway there was no suspicion of other criminal activity or trafficking in drugs. The -- from the evidence presented the Court finds and determines that it was not a pretextual stop. It was a valid traffic stop. The [sic] after Brandes stopped the car he found out the driver of the car Rudolph Flowers, he asked him to check the rental papers, found that there was some discrepancies but he told Mr. Flowers that he was free to go after he had issued -- after the other officer, the training officer, had issued a traffic warning.
>
> After he was told he was free to go to Flowers, Officer Brandes then asked him if he would mind if he would search the car and the Flowers gave permission freely and voluntarily for the office to search the car including the contents. The Robert Smith and well first Flowers,

> was placed in the patrol car for Flowers' protection and for the Officer's protection and then Robert Smith, the defendant in this case, the passenger was placed in the patrol car for his own safety. Deputy Hart after the consent then was freely and voluntarily given found a taped package which field tested for cocaine and found money in the glove compartment in a duffel bag.
>
> The Court finds and determines from the evidence that it as I said is a valid traffic stop. It was not a pretextual stop. Consent was freely and voluntarily given. There was no suspicion of drug activity at the time the vehicle was stopped. The tape recording was in the patrol car. There is no expectation of privacy in a patrol car under *Moreland v. State* and other cases.
>
> For those reasons the Motion to Suppress the evidence, the cocaine and the tape recording, are denied. R 42-44.

On July 9, 1991, Respondent appeared before the court and pursuant to a written plea agreement (R 81-83) entered a plea of nolo contendere to the charge of trafficking in cocaine in an amount between 28 to 200 grams, reserving his right to appeal the denial of the motion to suppress. SR 2-3. The trial court adjudicated Respondent guilty and sentenced him to 25 years in the Department of Corrections followed by five (5) years on probation, with a three (3) year minimum mandatory term and a $50,000 fine. Respondent was given credit for time served and was ordered to serve

this sentence consecutive to any active sentence being served. R 49-50.

The Respondent appealed the trial court's ruling on his motion to suppress. The Fourth District Court issued its opinion on March 17, 1993. See Appendix. The Fourth District Court agreed with the trial court that the stop of the vehicle in which the Respondent was a passenger was not a pretextual stop.

The Fourth District Court found that the "police asked appellant to sit in the rear of a police vehicle solely for safety and comfort reasons." Consequently, the Fourth District Court found that the Respondent had not demonstrated that the police "illegally detained him in the police vehicle."

However, the Fourth District Court, citing to its decision in Springle v. State, 18 Fla.L. Weekly D283 (Fla. 4th DCA Jan 13, 1993), found that the "secret and unauthorized tape recording constitute an invasion of the right of privacy and a violation of section 934.03, Florida Statutes, (1991). Therefore, the contents of the tape recording and any evidence derived therefrom are inadmissible under section 934.06, Florida Statutes (1991)."

Nevertheless, the Fourth District Court held that the "illegal tape recording did not assist the police in their discovery of the suspected cocaine. Therefore, the trial court did not err when it denied appellant's motion to suppress as to the seized physical evidence."

In sum, the Fourth District Court held that the stop was not pretextual; that the Respondent was not illegally detained when he was placed in the back of the patrol car for his safety; that the tape recording of the Respondent's conversation with Flowers made in the back of the patrol car violated his right of privacy; that the tape recording did not assist the police in their discovery of the contraband; that the tape recording should have been suppressed by the trial court but that the trial court did not err in not suppressing the contraband, which was found pursuant to the consent given for the search.

The Petitioner moved for a rehearing on the issue of the tape recording. Petitioner requested that the Fourth District Court certify the same question that was certified in Springle and to stay mandate. On April 9, 1993 the Fourth District Court stayed mandate and certified the following question:

> WOULD SOCIETY CONCLUDE THAT THE EXPECTATION OF PRIVACY, UNDER THE FACTS PRESENTED, WAS REASONABLE?

The State now seeks review by this Court solely on the issue certified by the Fourth District Court.

QUESTION PRESENTED

WOULD SOCIETY CONCLUDE THAT THE EXPECTATION OF PRIVACY, UNDER THE FACTS PRESENTED, WAS REASONABLE?

SUMMARY OF ARGUMENT

It has been repeatedly held that there is no expectation of privacy in the back seat of a police car for oral conversations. Respondent does not have broader rights pre-arrest than post-arrest. There is no persuasive distinction between pre-arrest and post-arrest situations. Therefore, under the circumstances of this case, the oral conversations surreptitiously taped in the back seat of the patrol car were admissible at trial.

ARGUMENT

THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN THE BACK SEAT OF A POLICE VEHICLE

The Fourth District recognized that the general rule is that there is normally no Fourth Amendment expectation of privacy in a police car and that conversations surreptitiously taped therein were not subject to Fourth Amendment protections. Moreover, it has been repeatedly held that recording conversations of defendants in the back seat of a police car does not violate a defendant's statutory or constitutional rights because there can be no expectation of privacy in a police car. Brown v. State, 349 So. 2d 1196 (Fla. 4th DCA 1977), *cert. denied,* 434 U.S. 1078, 98 S.Ct. 1271, 55 L.Ed. 2d 487 (1978); DiGuilio v. State, 451 So. 2d 487 (Fla. 5th DCA 1984), *approved and remanded,* 491 So. 2d 1129 (Fla. 1986); State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990). Sub judice, the Fourth District Court held that

defendants, who were not under arrest or articulable suspicion, did have a subjective and reasonable expectation that their conversation would be private.[1] Therefore,

[1]Respondent's defense counsel told the trial court that if the Respondent had voluntarily sat in the patrol car then the Respondent would have had no expectation of privacy. (R 37-38,42). Respondent's appellate counsel argued that whether Respondent sat in the patrol car voluntarily or involuntarily makes no difference regarding the result. Appellate counsel argues that "What is significant is whether Appellant was in custody at the time he was placed in the car." Reply brief page 4. Appellate counsel argues that if an individual is not under arrest he should have a reasonable expectation of privacy "in his communications despite the location where they occur." Initial Brief page 16,18. Thus Respondent is clearly arguing that it is the status of

secretly recording that conversation in the back seat of a patrol car violated the defendant's right of privacy.

The Fourth District Court's ruling clearly holds that a person has an expectation of privacy in the back of a patrol car if that person is not arrested or not under an articulable suspicion. Springle v. State, 18 Fla. L. Weekly D283 (Fla. 4th DCA Jan. 13, 1993), *on review* in the Florida Supreme Court, Case No. 81,138. Nevertheless, the Fourth District Court recognizes that there is no expectation of privacy in the back seat of a patrol car. Thus, the Fourth District Court's ruling turns on the status of the defendant. Petitioner maintains that this is an incorrect analysis. The focus of a Fourth Amendment analysis does not depend on the pre-arrest or post arrest status of a person but rather on the reasonable expectation of privacy the individual has in the area where the search was conducted.

In Hoffa v. United States, 385 U.S. 293, 301-302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966) the United States Supreme Court stated that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into the "security a man relies upon when

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the Respondent that creates the expectation of privacy in the police vehicle. In contrast, the State argues that a person has no expectation of privacy in the back of a police car regardless of the pre-arrest or post-arrest status of the person or whether the person was placed in the back seat of the police vehicle voluntarily or involuntarily. The only exception to this rule is if there is an affirmative oral statement which conveys to the individual that his conversations in the police vehicle are private.

he places himself or his property within a constitutionally protected area." The focus is on whether the person is in a constitutionally protected area. As Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576 (1967) points out, the person must have a reasonable or justifiable expectation of privacy in the area searched. The Fourth District Court has stated:

> It seems appropriate to conclude that the quantum of reasonableness that society will ascribe to an expectation of privacy has a direct albeit undefined relationship to the geographical location of the individual at the time of the alleged violation of his constitutional right. Such an analysis seems implicit in Katz, supra, and, indeed, is explicit in Justice Harlan's concurring opinion in that case.

Morningstar v. State, 405 So. 2d 778, 781 (Fla. 4th DCA 1081). Justice Harlan stated in Katz:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 11 L.Ed. 2d 576 (1967). Justices Harlan's twofold test was

adopted by this Court in State v. Inciarrano, 473 So. 2d 1272 (Fla. 1985). Consequently, what constitutes a "reasonable expectation of privacy" in a given situation is a function of the location of the conversation.

As noted above, it has been repeatedly held that there can be no statutory or constitutional expectation of privacy in a police car. Brown, supra; McAdams, supra. A right of privacy cannot be conferred by virtue of a defendant's status, pre-arrest or post-arrest. Or by virtue of the police placing an individual into the back of a police car for safety reasons.

It has been held that standing to assert a Fourth Amendment right turns on the defendant showing lawful possession or control (of the patrol car, in this case) giving rise to a legitimate expectation or privacy. United States v. Alonso, 790 F. 2d 1489 (10th Cir. 1986). In Alonso the Tenth Circuit held that "[s]tanding may not be conferred by the government's activity, no matter how warrantless or illegal it might be, where no constitutionally protected right is violated." Alonso at 1495.

In Alonso the defendant claimed that the government violated his right to privacy by placing an illegal transponder on the airplane he used to fly marijuana into the United States. It was uncontested that the airplane was owned by another person. The court held that the defendant

did not have any expectation of privacy due to the government's use of an illegal transponder.

> ...the analysis, however, is not altered by the fact that the use of the transponder was essentially warrantless. If the defendant has no privacy expectation on the plane, due to want of ownership or the airplanes' presence in public airways, he has no standing to assert a Fourth Amendment claim. Standing may not be conferred by the government's activity, no matter how warrantless or illegal it might be, where no constitutionally protected right is violated.

United States v. Alonso, 790 F. 2d at 1495. See United States v. Miller, 425 U.S. 435, 441, 98 S. Ct. 1619, 48 L. E. 2d 71, 78 (1976) (Defendant does not obtain a Fourth Amendment right to privacy because of the government's use of a defective subpoena). In other words, the focus is on the reasonable expectation of privacy that a defendant may have in a constitutionally protected area NOT the status of the defendant. Furthermore, the government's activity cannot confer standing where there is no constitutionally protected right. Consequently, the placing of the Appellant into the back seat of the patrol car "solely for safety and comfort reasons" does not confer standing where no constitutionally protected right is violated.

This issue was recently addressed by the Eleventh Circuit Court of Appeals in United States v. McKinnon, 7 Fla. L. Weekly Fed. C90 (11th Cir. March 9, 1993). In that case the defendants were stopped for a traffic violation.

After successfully performing sobriety tests, the driver signed a form signifying his consent for the officers to search his car. Defendants were placed in the back of the police patrol car for their safety while the search of their car commenced. Unbeknownst to the defendants there was a tape recorder running in the back of the patrol car. Incriminating conversations were recorded. The sole issue addressed by the Eleventh Circuit was "whether the district court erred in denying the motion to suppress the tapes resulting from the secret recording of [defendant's] pre-arrest conversations while he sat in the back seat of the police car."

Defendant argued that the recordings violated his Fourth Amendment right to privacy. Defendant contended that "society is willing to recognize this subjective expectation of privacy because the government violated his rights because it did not have probable cause to conduct this secret search."

The Eleventh Circuit Court of Appeal stated that "[t]hough we have no controlling authority in this circuit, one federal district court and several state courts have held that no reasonable expectation of privacy exists in the back seat area of a police car." Two cases the Court cited by the Eleventh Circuit is State v. McAdams, 559 So. 2d 601,602 (Fla. 5th DCA 1990) and Brown v. State, 349 So. 2d 1196, 1197 (Fla. 4th DCA 1977), *cert. denied,* 434 U.S. 1078, 98 S.Ct. 1271, 55 L. Ed. 2d 785 (1978). The Eleventh

Circuit Court then held that the defendant did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the back seat of a police car. Furthermore, the Eleventh Circuit Court held that there is no distinction between pre-arrest and post-arrest situations. Both situations require the same test.

McKinnon is right on point to this case. It again supports the United State Supreme Court cases wherein the analysis rests on the reasonable expectation of privacy in the constitutionally protected area not the pre-arrest or post-arrest status of the person. In other words standing cannot be conferred by the government's activity, no matter how warrantless or illegal it might be, where no constitutionally protected right is violated.

The back seat of a patrol car is tantamount to a police officer's office where there is no expectation of privacy. It is also the equivalent to a jail, and no reasonable expectation of privacy exists in a jail cell. McKinnon, supra. Thus, Respondent, while in the back seat of the patrol car, has no reasonable or justifiable expectation of privacy.

Under Section 934.03, Florida Statute (1991), a crime occurs where a person willfully intercepts a private conversation where there is an expectation of privacy in that conversation. See Section 934.02(2), Florida Statute (1991) defining oral communication as any oral communication uttered by a person exhibiting an expectation that such

communication is not subject to interception under circumstances justifying such expectation. Oral communications fall within the statutory scheme where the citizen has an actual subjective expectation that his communication is private, coupled with society's recognition that that expectation is reasonable. Katz, supra; Inciarrano, supra; McKinnon, supra. Since individuals do not have a constitutional expectation of privacy in the back seat of a police patrol car, oral communications which occur in the back seat of a patrol car also do not have an expectation of privacy pursuant to Section 934, Florida Statute (1991). See Brown v. State, supra; McKinnon, supra.

Furthermore, contrary to the Respondent's contentions, oral communications in the back seats of a patrol vehicle are also not protected by Article I, Section 23 of the Florida Constitution. In State v. Hume, 512 So. 2d 185 (Fla. 1987) this Court explained that Florida's right of privacy provision, Article I, section 23, does not modify the applicability of Article I, section 12, particularly since section 23 was adopted prior to the present section 12. Article I, Section 12 requires this Court to construe Fourth Amendment issues in conformity with rulings of the United States Supreme Court. State v. Jimeno, 588 So. 2d 233 (Fla. 1991). Since the passage of Section 12 this Court is "bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment, and provide no greater protection than those interpretations."

Bernie v. State, 524 So. 2d 988, 990-1 (Fla. 1988). Therefore, the 1982 amendment to article I, section 12, of the Florida Constitution brings this state's search and seizure laws into conformity with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment. Bernie, 525 So. 2d at 992. Consequently, the only time Article I, Section 23 can be used to suppress evidence is when the Fourth Amendment to the United States Constitution, and thereby Article I, Section 12, is not implicated. Shaktman v. State, 529 So. 2d 711 (Fla. 3rd DCA 1988), approved 553 So. 2d 198 (Fla. 1989) (use of a pen register does not constitute a search or require a warrant under the Fourth Amendment and Article I, Section 12, therefore Article I, Section 23 protections were considered.) See also, Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544 (Fla. 1985) (Bank records, subpoenaed by the government without notice to a depositor under investigation were not private papers within the ambit of the Fourth Amendment and Article I, Section 9, therefore, Article I, Section 23 protections were considered). Since the Fourth Amendment applies to searches and seizures, Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), Article I, Section 12 is the exclusive State Constitutional provision under which the validity of search and seizures can be challenged. In sum, Article I, Section 23 is preempted from the field by Article I, Section

12 and the Fourth Amendment of the United States Constitution.

In conclusion, Petitioner maintains that no expectation of privacy exist in a police vehicle, which is the equivalent to a police officer's office or a jail or a police department's interrogation room. Article I, Section 12 is the exclusive State Constitutional provision under which the validity of search and seizures can be challenged. That Section brings Florida's search and seizure laws into conformity with all decisions of the United States Supreme Court. The pre-arrest or post-arrest status of a defendant does not extend a right of privacy where none exists. In other words standing cannot be conferred by the government's activity, no matter how warrantless or illegal it might be, where no constitutionally protected right is violated. The Respondent has no right of privacy in a police car. Consequently, the trial court was correct in denying Respondent's motion to suppress the tape of Respondent's conversation with Flowers in the back seat of the patrol car.

CONCLUSION

Based on the foregoing points and authorities the State respectfully requests this Court to answer the certified question in the negative, and reverse the Fourth District Court of Appeal and to reinstate the Respondent's judgment and convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by courier to **SUSAN D. CLINE**, Assistant Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida 33401 this 10th day of June, 1993.

CAROL COBOURN ASBURY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 81,534

ROBERT SMITH,

Respondent.

_____/

APPENDIX

counsel, Fraser abandoned his self-incrimination privilege. His motion in limine to prevent disclosure of the earlier invocation of the privilege was denied and at trial the jury learned that Fraser had invoked the Fifth Amendment. The first issue on appeal is whether this was reversible error. We hold that it was not.

In *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976), the United States Supreme Court held that it was not error to permit adverse inferences to be drawn from a party's silence in a civil case. The Court stated:

> Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a *civil cause*." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). In criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.

Id. at 318-19 (emphasis in original).

Such a rule is both logical and utilitarian. A party may not trample upon the rights of others and then escape the consequences by invoking a constitutional privilege—at least not in a civil setting. Particular circumstances may give rise to the necessity for protecting such a party's interests, as, for example, granting a continuance because of pending criminal charges, *see, e.g., Kerbin v. Intercontinental Bank*, 573 So. 2d 976 (Fla. 5th DCA 1991), however, that does not and should not impinge upon the general rule.

Nor are we persuaded that the fact of invocation of the privilege is irrelevant and immaterial. In another context, Mr. Justice Brandeis in *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154, 44 S. Ct. 54, 56, 68 L. Ed. 221, 224 (1923), observed that "Silence is often evidence of the most persuasive character."

The second point on appeal suggests that the jury verdict rests upon ambiguous testimony and therefore was against the manifest weight of the evidence. We have already decided this issue adversely to Fraser's position in the first appeal where we stated:

> As to the civil theft claim, a jury could conclude that Fraser committed the acts described with the intent to deprive Aspen of its property and appropriate it to his own use knowing that he was not entitled to do so. *See* section 812.014(1), Florida Statutes. Although intent may be shown by circumstantial evidence, civil theft must be established by clear and convincing evidence. Section 812.035(7). Here, the evidence, although conflicting, meets the standard. *Cf. Slomowitz v. Walker*, 429 So.2d 797 (Fla. 4th DCA 1983).

Aspen Investments, 507 So. 2d at 1376 (footnote omitted). We have been given no persuasive reason to revisit that conclusion.

Finally, Fraser contends that lack of evidence of reasonableness of attorney's fees constituting one element of damages on the slander of title claim precludes a finding that the jury verdict, to that extent, is supported by competent, substantial evidence. We agree, and reverse for retrial on this aspect of the final judgment. When the matter was before us initially, we found sufficient evidence to avoid a directed verdict. Explaining, we said:

> The record reflects some evidence of attorney's fees incurred by Aspen in attempting to remove the cloud and in defense of the mortgagees' claims. It is undisputed that no objection was raised at the time the evidence was accepted concerning Aspen's failure to prove the reasonableness of the attorney's fees incurred. We are not concerned with the weight of the evidence that the fees were, in fact, incurred, but only with the cross-plaintiffs' failure to introduce testimony that the fees incurred were reasonable. Certainly, Fraser was entitled to require that reasonableness be proved as a predicate to admitting the evidence of the fee incurred. Still, Fraser's failure to object to the evidence on this ground waived any right to have it subsequently considered on a motion for directed verdict. To hold otherwise would allow a party to lure the other side into believing that evidence on a necessary element of proof is before the court by not objecting to its introduction and then permitting that party to subsequently ask the court to disregard that evidence after the opponent has rested.

Id. at 1377 (footnote omitted). The issue before us now is different. There was *some* evidence as to attorney's fees. There was *no* evidence as to reasonableness. Thus the verdict, in this respect only, is not supported by competent substantial evidence. It is therefore against the manifest weight of the evidence, requiring reversal.

We affirm the final judgment with the exception of the issue of damages on the slander of title count, which will require a retrial on the question of reasonableness of attorney's fees included as an element of those damages.

AFFIRMED IN PART; REVERSED IN PART; REMANDED. (DELL, J., and DOWNEY, JAMES C., Senior Judge, concur.)

* * *

Criminal law—Right to confrontation of witnesses violated by introduction of deposition to perpetuate testimony at which defendant was not present

JOHN WALL, Appellant/cross-appellee, v. STATE OF FLORIDA, Appellee/cross-appellant. 4th District. Case No. 91-1658. L.T. Case No. 90-985 CF A02. Opinion filed March 17, 1993. Appeal and cross appeal from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge. Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant/cross-appellee. David H. Bludworth, State Attorney, and Robert S. Jaegers, Assistant State Attorney, West Palm Beach, for appellee/cross-appellant.

(PER CURIAM.) The State concedes that Appellant's right to confront witnesses was violated by the introduction of a deposition to perpetuate testimony at which Appellant was not present. *Brown v. State*, 471 So. 2d 6 (Fla. 1985). Its use constitutes fundamental error. Regarding the other issue raised, we find no error in the denial of Appellant's motion for judgment of acquittal.

We reverse and remand for a new trial. (STONE, FARMER, JJ. and WALDEN, JAMES H., Senior Judge, concur.)

* * *

Criminal law—Search and seizure—Trial court erred when it failed to suppress secret tape recording of defendant's conversation in back seat of police vehicle where police had asked defendant to sit solely for safety and comfort reasons—Cocaine seized from vehicle not inadmissible where illegal tape recording did not assist police in their discovery of the cocaine—Stop of vehicle was not illegal pretextual stop—Defendant not illegally detained in police vehicle

ROBERT SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-2513. L.T. Case No. 91-284-CF-A. Opinion filed March 17, 1993. Appeal from the Circuit Court for Indian River County; Charles E. Smith, Judge. Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant entered a plea of nolo contendere to the charge of trafficking in cocaine. He expressly reserved his right to appeal the trial court's denial of his motion to suppress physical evidence and a secret tape recording of his conversation in the back seat of a police vehicle. We reverse and remand.

Appellant contends the trial court erred when it failed to suppress the tape recording. We agree. The police asked appellant to sit in the rear of a police vehicle solely for safety and comfort reasons. At that time, appellant was neither under arrest nor under articulable suspicion. Without appellant's consent or other authorization, the police recorded his conversation. In *Springle*

v. State, 18 Fla. L. Weekly D283 (Fla. 4th DCA Jan 13, 1993), this court held such secret and unauthorized tape recordings constitute an invasion of the right of privacy and a violation of section 934.03, Florida Statutes (1991). Therefore, the contents of the tape recording and any evidence derived therefrom are inadmissible under section 934.06, Florida Statutes (1991).

Appellant has not demonstrated reversible error in his arguments that the police conducted a purely pretextual traffic stop and illegally detained him in the police vehicle. The record shows the illegal tape recording did not assist the police in their discovery of the suspected cocaine. Therefore, the trial court did not err when it denied appellant's motion to suppress as to the seized physical evidence.

Accordingly, we reverse appellant's conviction and sentence and remand for further consistent proceedings.

REVERSED and REMANDED. (ANSTEAD, LETTS and DELL, JJ., concur.)

* * *

Criminal law—Revocation of community control and probation—Evidence supports trial court's oral pronouncement finding that defendant had violated conditions of community control and probation by failing to seek work and failing to receive substance abuse evaluation—Reference to violation which was not charged in affidavit of violation to be omitted on remand—Written order of violation to be corrected to conform to trial court's oral pronouncement specifying conditions violated by defendant—Sentencing—Error to sentence defendant to term of imprisonment on misdemeanor count for which defendant had initially been sentenced only to time served

ANDREW JOSEPH, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-3356. L.T. Case No. 90-1752-CF-A. Opinion filed November 17, 1993. Appeal from the Circuit Court for St. Lucie County; Dwight L. Geiger, Judge. Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

(OWEN, WILLIAM C. Jr., Senior Judge.) Appellant was sentenced to prison following the revocation of his community control and probation. Contrary to his contention here, we conclude that the evidence adequately supports the trial court's oral pronouncement finding appellant had violated certain conditions of his community control and probation. *See Brill v. State*, 32 So. 2d 607 (Fla. 1947). We approve the revocation of community control and probation, but remand the order of revocation for the court to amend it consistent with this opinion. We affirm the sentence on Count I, but vacate the illegal concurrent sentence on Count II.

Appellant was adjudged guilty of possession of cocaine, a lesser included of Count I, and was sentenced to time served, followed by two years of community control and one year of probation. The affidavits of violation of conditions of community control and probation charged, among other violations, appellant's failure to seek work, and his failure to receive substance abuse evaluation. At the hearing the state amended the warrant to add the violation of failure to complete community service hours, but failed to amend the affidavit. The court stated that it found appellant in violation for failure to seek work, failure to receive substance abuse evaluation, and *failure to complete community service hours*. An order of revocation may not be based upon a violation not charged in the affidavit, *Harrington v. State*, 570 So. 2d 1140 (Fla. 4th DCA 1990), and upon remand the amended order shall omit this violation as a basis of revocation.

The court's written order of revocation, rather than specifically listing the violations upon which it was based, instead referred to violations by paragraph numbers only. While that might be expedient in some instances, here it only created confusion because the paragraph numbers in the order for community control and the paragraph numbers in the order for probation did not correspond. On remand, except for omitting appellant's violation for failure to complete community service hours, the written order of revocation must conform to the court's oral pronouncement. *Archie v. State*, 558 So. 2d 183 (Fla. 3d DCA 1990); *Earle v. State*, 519 So. 2d 757 (Fla. 1st DCA 1988).

Upon revoking community control and probation the court sentenced appellant to concurrent terms in prison for Count I, as well as Count II. The latter was a misdemeanor for which appellant had initially been sentenced only to time served. We vacate the sentence as to Count II. Upon remand the court should enter a corrected sentence reflecting that it is on Count I only. Appellant does not need to be present for this clerical correction on Count I. (GUNTHER and STONE, JJ., concur.)

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Torts—Damages—Remittitur—Evidence was insufficient to provide basis upon which jury could, with reasonable certainty, determine amount of medical expense minor plaintiff would be likely to incur in future other than estimated charge for electrocauterization procedure—Error to deny defendant's motion for remittitur of damages awarded for future medical expense

BROWARD COMMUNITY COLLEGE, Appellant, v. MICHAEL SCHWARTZ and GRETCHEN SCHWARTZ, individually and as parents and natural guardians of JAMES SCHWARTZ, a minor, Appellees. 4th District. Case No. 91-3127. L.T. Case No. 90-13065 (14). Opinion filed March 17, 1993. Appeal from the Circuit Court for Broward County; Paul M. Marko, III, Judge. William O. Solms, Jr. of Solms & Price, P.A., Coral Gables, for appellant. Joseph J. Huse and Claudia J. Willis of Romanik and Lavin, Hollywood, for appellees.

(OWEN, WILLIAM C., JR., Senior Judge.) Appellees, parents of thirteen year old James Schwartz, recovered a money judgment against appellant, Broward Community College, to compensate for the severe personal injuries sustained by James as a result of his walking through a clear plate glass window in appellant's library building. The sole issue here is whether the trial court erred in denying appellant's motion for remittitur as to that portion of the itemized jury verdict awarding damages for future medical expense. We hold that it did and reverse.

The verdict included itemized amounts for the several elements of appellees' damages. Among those was the amount of $60,000 for future medical expense to be incurred over the ensuing seven years, the present value of which was set at $30,000.

The only evidence of future medical expenses for James came from the pretrial deposition testimony of his two treating physicians. One, a Dr. Shampain (who had not seen James during the year preceding his deposition), opined that there was a present need for electrocauterization, the estimated cost of which was $300, and that probably dermabrasion would be needed in the future, the cost of which was not stated. This witness admitted on cross examination that until he had had a chance to examine James again, his opinion concerning need for future treatment would be speculative to some extent. The other, a Dr. Wald, (who had last seen James three months before his deposition), testified that he could not give an opinion within reasonable medical probability as to whether James would need any additional medical treatment without first reevaluating him. For that reason Dr. Wald did not feel that he could give an opinion as to what the future medical expense would be.

Only medical expenses which are reasonably certain to be incurred in the future are recoverable. *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953). While the evidence in this case could furnish a basis from which the jury could infer the need for some limited future medical *treatment*, it does not provide a basis upon which the jury could, with reasonable certainty, determine the amount of medical *expense* James would be likely to incur in the future other than the estimated $300 charge for the electrocauterization procedure. *See, DeAlmeida v. Graham*, 524 So. 2d 666 (Fla. 4th DCA), *review denied, Reid v. Graham*, 519 So. 2d 988 (Fla. 1987). We conclude that the evidence is insufficient to support the jury's award for future medical expenses in excess of $300.

We reverse the final judgment and the order denying appel-

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S APPENDIX** was furnished by courier to **SUSAN D. CLINE**, Assistant Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida 33401 this 10th day of June, 1993.

Assistant Attorney General