ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TYVESSEL WHITE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 88,813

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Tyvessel Tyvorous White, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name,

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

This case is before the court based on a certified question of great public importance from the First District Court of Appeal in White v. State, 21 Fla. L. Weekly D1744 (Fla. 1st DCA July 29, 1996), to wit:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.
> Id. at D1746

Petitioner thereafter filed his notice to invoke discretionary jurisdiction.

SUMMARY OF ARGUMENT

The only issue presented to this court in the certified question concerns the search and seizure provisions of the federal constitution.

The United States Supreme Court has held that no warrant is needed to seize a vehicle under a forfeiture statute when there is probable cause to believe it is carrying drugs and once legally seized, police can search the vehicle without warrant. Controlling precedent of the United States Supreme Court definitively answers no to the certified question.

The second issue presented by petitioner has no relation to the question certified by the First District and this court should decline to address the issue. The Florida Constitution does not contemplate that the discretionary jurisdiction of this Court will be misused as a device for repetitive error review of well-settled law. If addressed, the rationale and decision of the First District should be affirmed.

ARGUMENT

ISSUE I

WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION

This court has previously held that Florida courts are constitutionally obligated to follow United States Supreme Court rulings on search and seizure issue(s), Bernie v. State, 524 So.2d 988 (Fla. 1988), and that Florida's constitutional privacy provision does not alter this requirement, State v. Hume, 512 So.2d 185 (Fla. 1987). Further, this case presents no Fourteenth Amendment due process claim, nor does it present a Fifth Amendment taking for a public purpose without compensation component. Nor could it, for such claims have been specifically rejected. Bennis v. Michigan, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996). Thus, the issue here is a narrow Fourth Amendment one, and under Bernie and Hume, one to be decided on the basis of United States Supreme Court precedent.

There is no question of a nexus between White's automobile and drug dealing which renders it subject to of seizure under Florida's Contraband Forfeiture Act. White's automobile had been seen by

police eyewitnesses and recorded on videotape being used to deliver and sell cocaine, White v. St-ate, 21 Fla. L. Weekly D1744, at 1744 (Fla. 1st DCA July 29, 1996). After seizure and routine inventory search, two pieces of crack cocaine were discovered in the ashtray. Id. Cocaine is contraband controlled by Chapter 893, thus falling under the forfeiture statute', and White's car was used "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." Chapter 932.702(3), Florida Statutes (1993).

There is no Fifth or Fourteenth Amendment issue in this case, Bennis, nor is there any due process issue, Calero-Toledo, infra, nor is there any nexus issue[2]. The only issue properly before this court is whether the police could seize and subsequently search White's car pursuant to the Florida Contraband Forfeiture Act without a warrant based on probable cause to believe that it had been used in drug transactions. Controlling United States Supreme Court decisions, Bernie, Hume, hold that no warrant was needed to effect this seizure and search. This search and seizure did not

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'Chapter 932.701(2)(a)1, Florida Statutes (1993).

[2]Nor did appellant make any type of lack of notice claim below. 21 Fla. L. Weekly at D1745.

violate the Fourth Amendment and the certified question must be answered in the negative.

Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) controls the fourth amendment question presented here. In Cooper, petitioner's vehicle was seized because evidence showed it had been used to transport narcotics. Cooper, 17 L.Ed.2d at 733. It was seized without a warrant under a California forfeiture statute requiring officers to seize a vehicle believed to have been used to facilitate transport of narcotics, and to hold such vehicle for evidence. Id.

The Court held there was no fourth amendment violation under the California Statute, which is virtually verbatim in all pertinent particulars to the procedure laid out by the Florida Contraband Forfeiture Act:

> Section 1611 of the California Health & safety Code provides that any officer making an arrest for a narcotics violation shall seize and deliver to the State Division of Narcotic Enforcement any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics, such vehicle to be held as evidence until a forfeiture has been declared or a release ordered.
> -Cooper, 17 L.Ed.2d at 733, footnote and emphasis deleted

The California statute upheld as not violative of the fourth amendment further provided:

> The interest of any registered owner of **a** vehicle used to unlawfully transport or facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited, or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof or which is used to facilitate the unlawful possession of any narcotic by an occupant thereof, shall be forfeited to the State.
> Cooper, 17 L.Ed.2d at 733, n.1

Cooper's car was searched a week after he was arrested and his car impounded, and evidence uncovered against him as a result of that search was introduced against him at trial. Id. at 732. The State of California held Cooper's car for "over four months after it was **lawfully seized."** Id. at 733. A warrantless seizure two months after the discovery of contraband aboard a conveyance has been upheld by the Supreme Court. Calero-Toledo, infra.

Warrantless seizure and subsequent warrantless search of conveyances under those circumstances and under those time frames has been upheld as lawful the fourth amendment. The same conclusion applies to the seizure of the vehicle in this case. This holding is further supported by South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Opperman's vehicle **was** seized by police for violation of a municipal ordinance proscribing overtime parking. 49 L.Ed.2d at 1000. The Court held there **was** no violation of the fourth amendment in seizing, impounding, and

subsequently searching a vehicle without warrant where a municipal parking ordinance has been violated. The seizure and subsequent search here of a vehicle on probable cause that it had been used to commit a felony is even more strongly warranted.

There are numerous reasons underlying these holdings. Automobiles have for well over half-a-century received a lesser degree of fourth amendment warrant protection. Because of their inherent mobility, the requirement of obtaining a warrant for their search has historically been relaxed. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Further, a person has a diminished expectation of privacy in an automobile, both due to its inherent mobility, Carroll, and the fact that it is subject to pervasive state and federal regulation. New York v. Class, 475 U.S. 106, 106 S.Ct. 960, 965 (1986), citing to Cardwell v. Lewis, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion), Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), and Opperman, supra.

Once police have validly seized a vehicle, it is lawfully subject to routine inventory search, Opperman, supra, as well as search specifically geared to discovery of contraband or fruits of the crime. Chambers v. Maroney, infra, Cooper, supra. The police do

not need a warrant to seize and search a motor vehicle where there is probable cause to believe that the motor vehicle has been or is being used to transport drugs or other contraband.

As set out herein, police eyewitness observation and videotaping of this vehicle showed it being used in the delivery and sale of cocaine. This evidence establishes "probable cause to believe that the property [vehicle] was used, is being used, was attempted to be used, or was intended to be used in violation of the Florida Contraband Forfeiture Act." Chapter 932.703(2)(c), Florida Statutes (1993). Once probable cause exists, the offending vehicle is subject to seizure and forfeiture; there is no requirement that a warrant be first obtained to effect this seizure and subsequent search.

"It is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730, 733-734 (1967). Accord, California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406, 415 (1985): "Under the vehicle exception to the warrant requirement, only the prior approval of the magistrate is waived; the search must be such as the magistrate could authorize." (internal quotations and citation deleted);

Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, 428 (1970): 'For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

Once White's automobile was seen and videotaped being used to consumate the sale and delivery of cocaine, police could have immediately stopped and searched it for contraband without a warrant. This has been settled fourth amendment law for over seven decades. Carroll, supra. The search does not thereafter violate the fourth amendment merely because it occurs at a later time. Chambers v. Maroney, Cooper v. California.'

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[3]Seizure of personal property upon probable cause to believe the Florida Contraband Forfeiture Act has occurred may be done immediately, or at a later time. Indeed, the act itself specifically authorizes post-violation seizures. Chapter 932.703(2) (a), Florida Statutes (1993): "Personal property may be seized at the time of the violation or subsequent to the violation[.]" An aggrieved's due process rights under the act are afforded by certified mail notice of the seizure, and the opportunity to have a post-seizure adversarial preliminary hearing before a judge. Chapter 932.703(2)(a), Florida Statutes (1993). Calero-Toledo, infra specifically approves such a procedure. Under the Florida forfeiture act, any trial on "the ultimate issue of forfeiture" shall be decided by jury. Chapter 932.704(3), Florida Statutes (1993).

That is because in an in ***rem*** property forfeiture proceeding, 'The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." The Palmyra, 12 Wheat. 1, 14, 6 L.Ed. 531 (1827), quoted with approval in Bennis, supra, 116 S.Ct. at 998. Thus, the offender here was not so much petitioner, as his car, and under the fourth amendment the authorities could seize the offending conveyance wherever and whenever found. Note Calero-Toledo v. Pearson Yacht, infra, where the marijuana aboard the boat was discovered on May 6, and the seizure did not occur until July 11, over two months later. 40 L.Ed.2d at 473, Douglas, J., dissenting in part.

It is also settled fourth amendment law that police may transport a validly seized vehicle per Carroll, and later search it at the police station without obtaining a warrant. Chambers, supra, accord, Cooper, supra (warrantless search at the impound yard a week after lawful seizure).

In actuality, that is all the officers in this case did. They seized the vehicle pursuant to the Contraband Forfeiture Act on probable cause at petitioner's place of employment where he was arrested. They then drove the car to the station house and searched

it there. Chambers specifically holds such a practice reasonable, for it may be impracticable or unsafe to conduct a careful search at the seizure spot[4]. Chambers notes the arrested owner, who was also brought to the station house, has his convenience, safety and security interest in the vehicle best served by having his vehicle and the keys brought to the police station. Chambers, 26 L.Ed. at 429, n. 10. (footnote added).

The undeviating nature of the answer is seen in Calero-Toledo v. Pearson Yacht Leasing Co. 416 US 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) specifically permitting ***instanter*** seizure of a vessel[5] believed to have marijuana aboard', thus violating Puerto Rican drug laws, with an adversary hearing only occurring after the

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[4]That conclusion is especially telling here since petitioner's car was seized from the parking lot of Sam's Club. (T. 13). A car in the parking lot of a large retail establishment connected to the public highways to which the public is invited and has ready access has all the factors of ready mobility determinative of the warrant question in Carroll. Further, the lack of security with literally anyone able to access the contents of, or remove this car is the same as in Chambers.

'Boats and automobiles have long been considered identical from the mobility perspective in terms of exemption from the fourth amendment's warrant requirement. Indeed, the seminal Carroll rationale speaks directly to the inherent mobility of "a ship, motor boat, wagon or automobile" 267 U.S. at 153, 45 S.Ct. at 285. Thus Calero-Toledo is equally applicable to an automobile case.

'Apparently, one marijuana cigarette. 40 L.Ed.2d at 474, Douglas, J., dissenting in part.

seizure. Calero-Toledo notes that forfeiture laws serve an important governmental interest by preventing further use of the conveyance for illicit purposes, and by forfeiture of the conveyance, making the illegal enterprise as a whole unprofitable. 40 L.Ed.2d at 470.

No United States Supreme Court decision requires a warrant for seizure and subsequent search of a motor vehicle believed on probable cause to be used to transport drugs. What petitioner wants from this Court is that which is not required by the Fourth Amendment -- issuance of a warrant before the offending vehicle is seized and searched[7].

This Court should answer no to the certified question and reiterate that the fourth amendment does not require a warrant to seize vehicles under the Florida Contraband Forfeiture Act[8]. No warrant being required for lawful seizure, there is thus no

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[7]The ultimate decision on forfeiture after seizure affords petitioner all that due process requires --notice, hearing before a neutral judge, and the opportunity to be represented by counsel.

[8]As to whether a forfeiture statute is "fair," as Justice Thomas cogently noted in his concurring opinion in Bennis, not all things are proscribed or regulated by the federal constitution, and this question is thus entrusted to the legislative and executive branches, not the judiciary.

requirement for a warrant to search that lawfully seized conveyance.

ISSUE II

SHOULD THIS COURT ADDRESS THE IRRELEVANT ISSUE OF WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO SUPPRESS PETITIONER'S STATEMENT THAT "HE HAD JUST GOTTEN BACK INTO THE BUSINESS?" (Restated)

This issue is unrelated to the question certified by the District Court and involves only the simple application of well-settled law by a court of final jurisdiction, the district court below. While this court has discretionary jurisdiction, Tillman v. State, 471 So.2d 32 (Fla. 1985) it should decline review. The analysis and decision of the First District on this issue is unexceptionable and the jurisprudence of this state would not be advanced by further explication. Alternatively, if the question is revisited, the rationale and decision of the First District should be affirmed.

As laid out in the facts of the District Court decision, petitioner asked the officer why he was being arrested, 21 Fla. L. Weekly at D1747, and the officer responded by reading the arrest affidavits to explain the charges. Id. at D1746. While the officer was reading the arrest affidavits, petitioner made his incriminating statement that he had just gotten back into the business. Id.

The First District correctly concluded that reading the arrest affidavits as an explanatory answer to White's question of why had he been arrested did not constitute 'express questioning or its functional equivalent." Id., citing to Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). As noted by the First District,

> in the instant case, it is undisputed that White's statement was not made in response to direct questioning. Further, it cannot be fairly concluded that White was subject to he 'functional equivalent" of questioning. The arresting officer's act of explaining the charges to White was reasonable and understandable given that White had just been placed under arrest and had asked to know why.
> Id. at D1747.

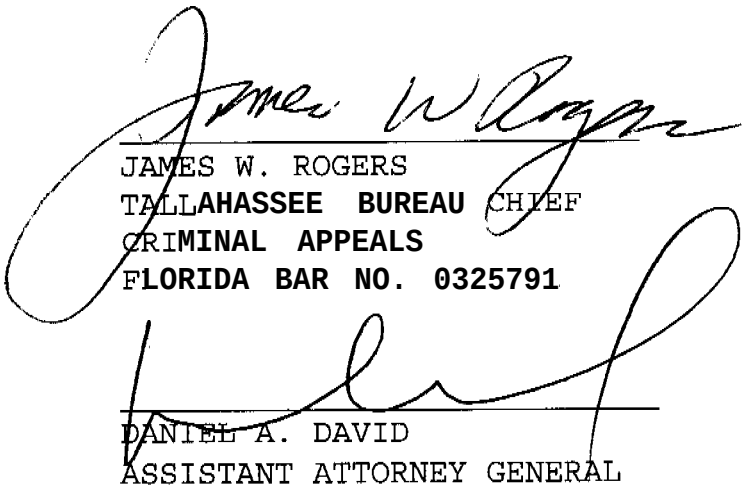
Adopting appellant's unpersuasive argument would simply transform Miranda warnings into wholly irrational obstacles to legitimate police activity. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

CONCLUSION

The certified question should be answered no. This Court should decline to address the unrelated and uncertified question raised by petitioner.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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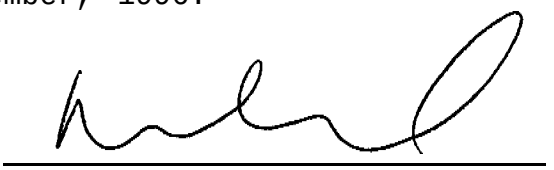
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to David P. Gauldin, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301 this 7 day of November, 1996.



Daniel A. David
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