IN THE SUPREME COURT OF FLORIDA

JEREMIAH D. JOHNSON.)
)
Petitioner,)
)
vs.) CASE NO. 91,328
)
STATE OF FLORIDA,)
)
Respondent.)
)

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

The petitioner relies on the statement of case and facts as presented in his initial brief, with the following addition. The state did **not** contest the defendant's standing to raise this issue at trial or even on appeal, until its response to the third and final motion for rehearing, filed a month after the decision under review was issued.

SUMMARY OF ARGUMENT

The decision of the district court directly and expressly conflicts with decisions of this Court and other district courts of appeal on the same issue of law. The appellate court, in reversing the trial court's order of suppression, ruled contrary to this Court's ruling in ***Popple v. State***, 626 So.2d 185 (Fla. 1993), and contrary to numerous decisions of other district courts of appeal. The relinquishment by Ryan of the contents of his pocket was a direct result of the officer's show of authority and hence was involuntary. The unlawful seizure of the marijuana cannot then provide authority for the search of Johnson's automobile, in which Ryan was no longer a passenger.

The defendant has standing to contest the legality of the search of his car and his person, which search was grounded on the unlawful search of Ryan. Moreover, the state has waived the standing issue by failing to present it at all at the trial court level or in the district court of appeal, until responding to the defendant's final motion for rehearing, after the district court's decision had already been issued.

ARGUMENT

POINT I.

THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***STATE V. JOHNSON***, 22 Fla. L. Weekly D1392 (Fla. 5th DCA June 6, 1997), INCORRECTLY REVERSED THE TRIAL COURT'S ORDER OF SUPPRESSION OF EVIDENCE DISCOVERED DURING AN UNLAWFUL SEARCH AND SEIZURE, CONTRARY TO DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL WHERE THE RELINQUISHMENT OF THE CONTRABAND WAS THE RESULT OF A SHOW OF AUTHORITY.

The opinion of the Fifth District in the instant case reversed the order of suppression of the trial court on the grounds that since the police officer characterized his discussion with Ryan as a mere request rather than an order, the seizure was voluntary and consensual. This holding expressly and directly conflicts with cases from this Court and other district courts which specifically rule that it does not matter how it is characterized by the police, but rather must be looked at from the standpoint of whether the direction constituted a show of authority which a reasonable person under the circumstances would believe that he should comply.

In ***K.L. v. State***, 699 So.2d 819 (Fla. 1st DCA 1997), the First District Court of Appeal reversed a trial court's order denying a motion to suppress drugs found in his pocket. In ***K.L.***, the court noted that the police officer, upon encountering the youth, "*asked* the child to remove an item [a cigarette pack] from his pocket," and, in complying, a bag of marijuana also fell out of his pocket. The appellate court found that "the police officer's *demand* that a suspect disclose or produce a concealed object constitutes a search. Because "the appellant

removed the contents of his pockets at the officer's *behest*, the action constituted a search," which the court held was unlawful. ***K.L. v. State, supra***. Similarly, here, the officer's behest that Ryan remove his hands from his pocket, which resulted in the discovery of the cannabis on Ryan, constituted an unlawful search and seizure. This, in turn led to the search of Johnson's car and the search of Johnson. This request or demand, no matter how characterized, constituted an unlawful search. ***Id.***

Additionally, the Fourth District has also ruled in a similar fashion. ***B.T. v. State***, 22 Fla. L. Weekly D2633 (Fla. 4th DCA November 19, 1997). In ***B.T.***, the officer, who encountered the youth riding his bicycle late at night, conducting a pat down and, when the youth could not produce any identification, requested that he empty the contents of his pocket. The appellate court ruled that "the officer had no legal basis to 'request' B.T. to empty his pockets absent his consent," which the state must prove by clear and convincing evidence was freely and voluntarily given. The appeals court analyzed the facts to find that the state had failed to meet its burden. The court ruled that this situation was not akin to an ordinary, casual encounter on a street where a reasonable person might feel free to just walk away. Among the factors cited for this conclusion was the fact that the officers were in uniform and visibly carried guns, both factors present in the instant case. "Even if B.T. had 'consented,' under these facts, we do not believe a reasonable person would have felt free to leave. Therefore, we find that the search was invalid and suppression should have been granted." ***Id.*** at D2634.

The state also argues that the defendant lacks standing to contest the illegal search of Ryan. However, the state never, ever presented this argument to the trial court or to the district court prior to the instant decision under review. It was only on July 1, 1997, in

response to the defendant's motion for rehearing, that the state **for the first time** proposed the issue of standing. As such, the state has waived this claim and cannot now present it. ***See Brown v. State***, 636 So.2d 174, 175-176 (Fla. 2d DCA 1994); ***State v. Wells***, 539 So.2d 464, 468 n. 4 (Fla. 1989).

Even on the merits of the standing issue, the state's claim must fail. It is the results of the search of the ***defendant's*** car and the ***defendant's*** person which the defendant seeks suppression. It is clear that the defendant has a legitimate privacy in these areas and thus has standing. ***Minnesota v. Olson***, 495 U.S. 91, 96 (1990); ***Rakas v. Illinois***, 439 U.S. 128, 143-144 (1978); ***Nelson v. State***, 578 So.2d 694 (Fla. 1997) (defendant driving stolen car had standing to contest his unlawful seizure while driving the car); ***State v. LaGree***, 595 So.2d 1029 (Fla. 1st DCA 1992) (a passenger in a car has standing to contest the legality of the stop of the driver). It is the state who seeks to justify the intrusion into the defendant's privacy rights by use of the unlawful search and seizure of Ryan. The illegal search and seizure of Ryan is what caused (and what the state is seeking to use as justification for) the warrantless and unlawful search and seizure of defendant Johnson's automobile and person. Thus, Johnson is permitted standing to contest the lawfulness of the basis for the violation of his Fourth Amendment privacy rights. ***See*** Choper, Kamisar & Tribe, *The Supreme Court: Trends and Developments 1978-1979*, (1979) at 160-161, wherein Professor Kasimar commented on ***Rakas***: "The passenger in a car shares with the driver a privacy interest in continuing his travels. If the search of the vehicle is a product of the prior illegal stopping, then the passenger should be able to challenge the search because it was brought about as a consequence or fruit of the prior invasion of his personal liberty." ***See also*** the warning of Justices

Marshall, Brennan, and Blackman that the government not be permitted "to turn the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person." ***United States v. Payner***, 447 U.S. 727, 738 (1980) (Marshall, J., dissenting). The state here is attempting to do precisely that, turn the shield of standing and the Fourth Amendment into a sword to utilize evidence illegally obtained as a direct result of a constitutional violation against the defendant. This cannot be countenanced. The defendant's privacy rights in his car and on his person cannot be swept away by an illegality. Even if the illegality is perceived as being committed against another, that illegality is what caused the unconstitutional invasion of the defendant's personal privacy rights. It is not the drugs found on Ryan that the defendant Johnson is attempting to suppress. It is the illegal search of the defendant and his car and the fruits of that invasion of the defendant's Fourth Amendment rights which the defendant is seeking suppression. It is the state which is seeking to justify the invasion of Johnson and his car on the basis of the illegal seizure from Ryan. Johnson has standing (and/or the state has waived the issue).

The direction of the deputy for Ryan to remove his hands from his pocket constituted a show of authority and a violation of Forth Amendment rights. ***See*** Petitioner's Initial Brief on the Merits, pp. 6-10 and the cases cited therein. The **resulting** searches of Johnson's automobile and his person were fruits of the unlawful seizure; the evidence must be suppressed, as the trial court correctly ruled. The decision of the Fifth District Court of Appeal must be reversed.

POINT II.

THE ARREST OF A FORMER PASSENGER OF AN AUTOMOBILE UNDER CIRCUMSTANCES WHICH HAVE NOTHING TO DO WITH THE CAR DOES NOT JUSTIFY THE SEARCH OF THE VEHICLE; EVIDENCE DISCOVERED DURING THE UNLAWFUL SEARCH MUST BE SUPPRESSED UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS.

In addition to the argument favoring suppression in Point I, petitioner also submitted in his initial brief (as well as at the trial and district court level) that the trial court correctly suppressed the evidence since the arrest of Ryan, who at all times during the police encounter was outside of Johnson's vehicle, could not constitutionally provide a basis to search the contents of Johnson's vehicle. The state contends in its answer brief that this Court somehow lacks jurisdiction to hear this issue since it was not the basis for the invocation of discretionary review. However, once this Court has exercised jurisdiction to hear a case, it may consider the case as a whole and decide other issues in the case. ***See Savoie v. State***, 422 So.2d 308, 310 (Fla. 1982); ***Tingle v. State***, 536 So.2d 202 (Fla. 1988) (wherein the Court also ruled on the merits of an additional issue which was not the basis for conflict jurisdiction). This Court should do so here, it is submitted, since the issues are so intertwined.

New York v. Belton, 453 U.S. 454 (1981), as argued in the initial brief at pp. 11-14, does not apply to the facts of this case; the trial court correctly distinguished it. There was no other proposed justification for the search of the vehicle other than the arrest of Ryan outside the vehicle, and the ruling of the trial court suppressing the fruits of the search was correct. The opinion of the Fifth District Court of Appeal must be reversed and the case remanded to reinstate the trial court's order of suppression.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, and remand with instructions to reinstate the trial court's order suppressing the evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Jeremiah D. Johnson, 501 South Street, Fern Park, FL 32730, this 30th day of January, 1998.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER