W004

0d7

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,458

JOSE M. CORTEZ & ALEXIS RODRIGUEZ,

Petitioners,

-vs-

STATE OF FLORIDA

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONERS ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 Northwest 14th Street
Miami, Florida 33125
(305) 545-1961

MARTI ROTHENBERG
Assistant Public Defender
Florida Bar No. 320285

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATUTES **CASES**

INTRODUCTION

This is the initial brief on the merits of the petitioners/defendants Jose Cortez and Alexis Rodriguez on conflict jurisdiction from the decision of the Third District Court of Appeal.

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(A) - Appendix attached hereto of Third District's decision

STATEMENT OF THE CASE AND FACTS

The petitioners/defendants (hereinafter defendants) were charged by information in Miami Dade County on May 1, 1996, with burglary of an unoccupied structure in violation of §810.02, Florida Statutes (1995), and grand theft of a chainsaw valued over $300 but less than $5,000 in violation of §812.014(2). (R: 1)

On March 26, 1997, the defendants filed a motion to suppress evidence from an illegal seizure, arrest and search. (R: 29-43, 79) Specifically, the defendants argued the police had no reasonable suspicion to temporarily detain them and no probable cause to arrest them for loitering and prowling. (R: 35-42) The defendants were arrested for loitering and prowling after a citizen called police to report a suspicious white car and two men parked

at his neighbor's house; by the time the officer arrived, the men were gone. The defendants were arrested about an hour later several blocks away when their car, which matched the description of the white car, ran out of gas and another officer stopped to help them and realized they matched the description.

The hearing on the motion to suppress took place on April 15, 1997. (R: 76) At the hearing, only 3 police officers testified; the neighbor did not testify. The state's first witness was Officer Murias who testified that on April 10, 1996, at about 12:30 to 1:00 p.m., he was on routine patrol in the residential area of western Miami Dade County when he encountered both defendants. (R: 82, 92) Officer Murias testified he was driving north on SW 87th Avenue and made a left turn onto 16th Street and saw the defendants parked on the south side of the road facing eastbound. (R: 82-83) The officer did not stop the defendants' car; the car was already stopped and the officer drove up to them without flashing lights. (R: 82-83, 100) Officer Murias testified the defendants' car was parked on the grassy swale beside the road, the grassy swale being an area where cars could pull over if needed to get out of the flow of traffic. (R: 83, 93) He admitted it was not an improper place for the defendants to be. (R: 93) He described the area as a normal middle class residential area. (R: 94) Both defendants

were out of the car, they had a gas can and it "looked like they were putting gasoline into their vehicle." (R: 83, 93) According to the officer, "It looked like they needed some help, so I just came back to see if I could be of assistance." (R: 83)

Officer Murias parked his patrol car behind the defendants' car, got out and walked towards them. (R: 83) He asked what was wrong and whether he could be of any assistance. (R: 84) The defendants replied they had run out of gas and they "were trying to get some gas." (R: 84, 93) Officer Murias asked them where they were headed and they said they were going to a friend's house. (R: 84) The officer asked them the address and they could not give him the address or the name. (R: 84, 104) The officer offered his assistance and they said, "No, it's all right. We're just," you know, "we'll get some gas for the car." (R: 84) Officer Murias walked around the car and noticed a chainsaw in the backseat; he asked the driver who it belonged to and he replied his father. (R: 105) Since the car was registered to the defendant's father, the officer did not consider this suspicious. (R: 105-107)

Officer Murias asked them again if they lived close by and asked them for their ID's so he "could do a Field Interrogation Card." (R: 84, 95) Both men were cooperative and gave him their ID's. (R: 84, 95) According to Officer Murias, he looked at their

ID's and saw "that they didn't live in the area," so he asked them again "where their friend lived, if they lived close by, maybe I could call the friend to come over and help them out, and they couldn't give me any information on that." (R: 84)

Officer Murias testified that "since they didn't live in the area, I just advised them that I was going [to] check them out, see if everything was all right." (R: 85) When the prosecutor asked the officer if he "asked" them if he could check them out, Officer Murias replied: "Well, I advised them that I was going to do this. And they agreed with this, said fine no problems, We have no problems." (R: 85) Officer Murias testified he did not detain the defendants, but that he told them "that as soon as I finish checking them out and filling these things [a Field Interrogation Card], they could leave. I told them. . . . If I check you out and everything comes back, you will be allowed to leave. You can leave. You go ahead and leave." (R: 97) Officer Murias admitted the two defendants were not free to leave until he got back all the information and finished writing down all the information on his Field Interrogation Cards and that the defendants could not leave because he had their ID's and was keeping them until he finished obtaining all his information. (R: 100-101)

Officer Murias returned to his car and started to check both

ID's over the radio and write a Field Interrogation Card. (R: 85) He said this was standard procedure "when you find people that don't live in the area, and they can't give you, you know, basic description of information what they are doing in the area, we do that." (R: 85) Officer Murias admitted there were no crimes being committed in his presence at that time and that he never saw the defendants commit any crimes in his presence. (R: 95, 103)

The radio check advised the officer that both defendants had "a past, substantial past," a "felony misdemeanor past" but no outstanding warrants. (R: 85, 95) At that point, the officer looked at his notes and saw there had been a suspicious vehicle BOLO issued about 20 to 30 minutes earlier of two males in a white Toyota close to the area:

> Q. [by prosecutor] So did you give -- Did you proceed to check their ID's over of the radio?
>
> A. Yes, I did.
>
> Q. And what did you find, if anything?
>
> A. I believe both came back with a past, substantial past.
>
> Q. And what did you do at that point?
>
> A. Well, at that time I just looked at my notes, and I saw that there had been a BOLO issued as far as two a suspicious vehicle in the area.

> And it was a Toyota, white in color. I don't remember if I had the tag down or not. And it was two males. And it was fairly close to the area where they were. So I contacted the officer that was handling the signal. (R: 85-86)

The officer admitted the BOLO was not for any violation of law. (R: 107)[1]

Officer Murias said he had received the BOLO about 20 to 30 minutes prior to encountering the defendants. (R: 86) He had heard the BOLO over his police radio and had written it down at that time "just in case I came up on the subject." (R: 86, 91) He admitted he was not looking for the men mentioned in the BOLO at the time he encountered the defendants. (R: 91) He admitted that he was driving somewhere else when the saw the defendants and that when he pulled his patrol car up behind the defendants, he was not thinking of or "using in his mind" any of the BOLO information.

---

[1]Although Officer Murias indicated at the suppression hearing that he thought the BOLO also described the suspicious activity, how the car had backed up into the driveway of a house and one man had gotten out and looked into the window of the house, then fled the scene, Officer Ramos testified he was the officer who issued the BOLO and that he did not include any of this activity in the BOLO because the BOLO had to be kept short. (R: 104-106, 116-117) Officer Ramos stated he only sent out the description of the car, that there were two males and that it was a possible burglary. (R: 116-117) The judge specifically found the testimony of Officer Murias on this issue to be not credible. (R: 54; T: 211, 218)

(R: 91)

Officer Murias testified the defendants were in a white Toyota and since "the vehicle more or less matched the description, after I looked at the BOLO, I wasn't very sure, so I had the dispatcher raise Officer Ramos, which was the one handling the signals," for him to stop by. (R: 87-88, 96) Other police arrived at the scene but it took Officer Ramos about 20 to 30 minutes to arrive. (R: 88, 97)

During the 20 to 30 minutes it took for Officer Ramos to arrive, Officer Murias was filling out his Field Interrogation Cards. (R: 97-98) According to the officer, the defendants never indicated they wanted to leave. (R: 88) Officer Murias admitted he told them they were free to leave only after he finished checking them out - so long as everything came back okay. (R: 97-101) He said he was not "detaining" the defendants, but that they could not leave because he had their ID's and was still filling out his Field Interrogation Cards and had not yet received back all the information he needed to complete the cards, that it took time to get back all the information and write it all down. (R: 97-101)

About 20 to 30 minutes later, Officer Ramos arrived on the scene, looked at the car looked at the defendants and "wasn't very sure if they matched the description of the BOLO," so he went back

to get the neighbor witness. (R: 89) Officer Ramos told Officer Murias: "I will go back and bring the witness by. I'll see if they match. If not, we're going to let them go." (R: 98) Officer Ramos returned a few minutes later with the civilian witness in the back of his patrol car; this was the neighbor who had called in the suspicious activity that formed the BOLO. (R: 89, 99) The witness identified the defendants' car, but could not identify the defendants, only that "that the subjects more or less fit the description." (R: 89, 99) The police then contacted the general investigation detectives to respond to the scene and Detective Montero and Detective Crespo arrived later and arrested them for loitering and prowling. (R: 89, 101)

The defendants were transported to the police station for loitering and prowling. (R: 101-103) Officer Murias admitted he never saw the defendants commit any crimes in his presence and never saw them commit loitering and prowling in his presence. (R: 103, 107)

The next witness at the hearing was Officer Ramos. (R: 108) He testified that he was dispatched to 8915 SW 17th Terrace at 1:04 p.m., in reference to "a suspicious vehicle with two males." (R: 110, 114) The dispatch was for "a white Toyota Corolla, older model, '83, '85, two-door with a Florida tag." (R: 110) Officer

Ramos drove to the location and found an unoccupied house, no white car, no men and no burglary. (R: 111, 117-118) The officer checked the house and found no evidence of a burglary and no evidence of tampering; the door was locked, the windows were locked, they were not broken, there were some marks on the door but as he said, "it was hard for me to tell at that moment if they were new or old. Most doors have some sort of mark on them somewhere." (R: 118-119) The neighbor who had called in the complaint was cutting his lawn in front of his house and told Officer Ramos that the car had "backed up into the driveway of this neighbor's house, which he knew that his neighbors were not home. That one male stayed by the car, and another one went by the, by the door by the front of the house. That he could hear him calling out in Spanish Mister, Mister, anybody home, anybody home, and he was knocking loud on the door." (R: 111-112) The neighbor said that when one of the men saw him, they rushed to the car and "left in a hurry." (R: 112) Officer Ramos's testimony as to what the neighbor told him is as follows:

> Q. [by prosecutor] Okay. When you arrived at this house in question, what do you observe?
>
> A. I drove up to the house. The house was unoccupied. The vehicle was no longer there. A neighbor, who insisted on remaining

anonymous, and he had advised that, he was the one that had called the police.

The neighbor was the house immediately west of the house I was dispatched to.

MS. REGO: [prosecutor] Hold on one second.

THE COURT: Go ahead. Continue.

THE WITNESS: And this man was the neighbor witness, the anonymous complainant who was outside on the yard, working on, actually mowing the lawn. He was cutting grass.

And I advised that, yes, he had called; and that there was a car, a white small car, same description. And the car had backed up into the driveway of this neighbor's house, which he knew that his neighbors were not home.

That one male stayed by the car, and another one went by the, by the door by the front of the house. That he could hear him calling out in Spanish Mister, Mister, anybody home, anybody home, and he was knocking loud on the door.

Q. BY MS. REGO: Okay. The neighbor who told you this, once he gave you this information, what did you do?

A. Once he gave me the information and I agreed that it was something suspicious, mainly because it continued. And he told me that once the man, or the male that was by the car, saw him he called the other male that was by the, by the front of the house, he called him and this person rushed to the car, and they both like left in a hurry.

So therefore, I issued a B.O.L.O. that's a "be on the lookout" over the air for the vehicle and occupied by the two subjects. (R:

111-112)

On cross examination, Officer Ramos repeated that the extent of the information that had been given him by the neighbor was that the neighbor saw a car backing into the driveway, two men got out of the car, knocked on the door, and called out "Mister, Mister":

> Q. [by defense attorney Forman] Now, after you got to the, to the residence, is that the time which you first encountered the witness in this case?
>
> A. Yes.
>
> Q. He was mowing the lawn?
>
> A. He was outside in the front of his house.
>
> Q. Okay. Now, what he told you was, which is you have related to us that he saw a car backing into the driveway, two individuals get out of the car, knocking on the door, yelling or saying senior, senior, or Mrs., Mrs., something like that?
>
> A. Yes, sir.
>
> Q. At no time did he relate to you that these individuals had broken into the house, did he?
>
> A. He didn't see.
>
> Q. He didn't see.
>
> Q. He didn't see. He didn't see these individuals take anything either, did he?
>
> A. He couldn't see. He didn't see.

Q. And that was the extent of information that he gave?

A. That was the extent of the information, yes. (R: 119-120)

The neighbor did not see the men break into the house or take anything. (R: 120, 127) Officer Ramos testified that the neighbor never told him that he had seen the men commit any crime, any burglary or theft of any property:

Q. [by defense attorney Ardura] When you went and talked to the victim, did the victim -- Strike that. Did the witness inform you at any time that he had observed them commit any violation of law whether it be Breaking and Entering or Grand Theft, or anything on the property of the neighbor?

A. He did not. (R: 127)

* * *

THE COURT: I have one other question of the officer. Officer, I believe you testified that based on the information that, that the witness who will remain nameless, gave you, he has not stated that any crime had been committed as far as you know; is that correct? Is that your testimony?

THE WITNESS. That's correct. He did not observe any, them actually breaking or doing anything in the house.

THE COURT: So the statement of the witness to you say perform anything suspicious in your own mind as to any activity on the part of anyone regarding this incident, even though he had not described the commission of

any crime?

> THE WITNESS: Yes, and also, and I think it's pertinent, the house in question has a lot of shrubbery, and has deep hedges, and is fairly tall.
>
> It is not like the front of the house was open to plain view from where the, from the other side, or even from -- You can not just drive by and see. Like some houses are totally open up front.
>
> This one has the carport, which is part of the structure. And then it has a wall, which is inside. And then has some large big hedges and shrubbery all around the front, which is like I say a circular driveway.
>
> So the witness did not have a very good view of this. (R: 130-131)

Officer Ramos thought the neighbor's description of the men's acts was suspicious enough to issue a BOLO, so he called the dispatcher and issued a BOLO of a "possible burglary" with a "suspicious vehicle that fled, that left the area" with two males. (R: 112, 116) Officer Ramos stated that he did not include in the BOLO any of the activity that he was told about the car backing up into the driveway or the person getting out and looking inside the window of the house, and said that this was specifically not included because they had to keep the BOLO short, with only vehicle and person descriptions and type of possible offense. (R: 112-113, 116-117) Moreover, there was no information in the BOLO from first-hand police knowledge; the BOLO was strictly information

relayed to him by the neighbor. (R: 123-124)

After putting out the BOLO, Officer Ramos learned that a car was stopped that possibly fit the BOLO description. (R: 113) He responded to the scene where Officer Murias was detaining the defendants and saw that the car fit the description the neighbor had given him. (R: 113, 122) He thought some of the clothing, the white T-shirt and jeans, also fit the description. (R: 113) The officer went and picked up the neighbor and brought him back to the scene; the neighbor identified the car as the car he saw, but he could not identify the defendants other than that they looked like the persons. (R: 114, 122) Officer Ramos admitted the defendants committed no crime in his presence. (R: 122-123, 126)

The last witness was Detective Garcia. (R: 135) He testified that he was at the police station between 1:30 and 2:00 p.m., that afternoon and received a call to meet the defendants when they were brought into the station under arrest for loitering and prowling. (R: 136, 143) Detective Garcia went out to the house that afternoon, but could not locate the owner and could not determine if there had been any breaking and entering. (R: 137-138) The neighbor advised him of what he had seen, but the neighbor did not see the men enter the house or take anything. (R: 139, 144) Detective Garcia remained there until the owner returned home later

that afternoon about 5:00 p.m. (R: 140) The owner advised him that a chainsaw was missing from the carport and that prymarks on the door were fresh. (R: 140-141) Detective Garcia testified he returned to the police station and met with the two defendants; after taking their statements, he arrested them for burglary later that evening about 7:30 p.m. (R: 141-142, 145-146)

The neighbor who called the police to begin with did not testify at the hearing. The state rested and the parties argued the motion. (R: 148) The state admitted there was no stop and that the defendants were doing nothing illegal and were not loitering and prowling at the swale where they were putting gas in their car. (R: 148, 153) The state's position was that the police had reasonable suspicion and the right to temporarily detain the defendants for loitering and prowling until Officer Ramos and his neighbor witness came to the swale, and when the neighbor identified the car, even though he could not identify the defendants, the police then had probable cause to arrest them for loitering and prowling and to continue to detain them pending evidence of a burglary. (R: 164-167, 181)

At the conclusion of the hearing, the judge found the police had no probable cause to arrest the defendants for loitering and prowling, which was a misdemeanor offense not committed in their

presence. (R: 55, 218) The judge found the arrest for loitering and prowling was being used as an illegal pretext to continue detaining the defendants until probable cause for burglary could be established. (R: 55, 218) The judge found there was no other reasonable suspicion or probable cause to detain the defendants for any other purpose. (R: 50-55) The court suppressed the evidence and statements from the defendants that flowed from the illegal arrest. (R: 55, 218)[2]

The state appealed the order to the Third District Court of Appeal. (A: 3) On January 28, 1998, the Third District issued its decision reversing the order and finding no Fourth Amendment violation. (A: 1-8) In its decision, the Third District found there was probable cause to arrest the defendants for the misdemeanor offense of loitering and prowling. (A: 3-5) The Third District specifically found the warrantless arrest of the defendants for loitering and prowling was legal even though the police officers did not personally observe the offense being

---

[2]There is an error in the judge's recitation of the facts that should be corrected. In his facts, the judge stated that the neighbor "observed a white passenger vehicle back into the covered carport of his neighbor's home." (R: 45) In fact, there is no evidence at all in the testimony from the suppression hearing that the car backed into "the covered carport." The evidence is that the car backed into the DRIVEWAY, not the covered carport. (R: 111-112, 116-117, 119-120, 127)

committed in their presence. (A: 3-6) The Third District further held that §856.031, Florida Statutes (1997), authorized the warrantless arrest of the defendants for the misdemeanor loitering and prowling, even though the offense was not committed in the officer's presence, because the defendants would have escaped if the officers had left to obtain a warrant. (A: 6) The Third District further analyzed this Court's decision in State v. Ecker, 311 So.2d 104 (Fla. 1975), and concluded that this Court permits warrantless arrests for the misdemeanor offense of loitering and prowling based on information from citizen witnesses even though the arresting officer has not personally observed the defendant commit the offense. (A: 6) And finally, the Third District held that the hearsay observations of the neighbor were sufficient to give the officer probable cause to arrest the defendants for loitering and prowling not committed in the officer's presence. (A: 6)[3]

---

[3]The Third District's opinion contains numerous factual errors:

(1) The Third District stated: "A neighbor observed defendants Jose Manuel Cortez and Alexis Miguel Rodriguez back their car into the victim's enclosed carport." (A: 1) This sentence contains two errors. First the identification of Cortez and Rodriguez as the men is incorrect. The transcript of the suppression hearing shows that both police officers testified the neighbor could identify the defendants' CAR, but COULD NOT identify the defendants themselves. (R: 89, 99, 114) The

The defendants petitioned this Court for discretionary review

---

neighbor never observed Cortez and Rodriguez at the house; the neighbor ONLY observed two men who "more or less fit the description" of the defendants. While for purposes of the motion to suppress they were the men at the house, the Third District's decision makes it sound like there was a positive identification of the defendants by the neighbor -- this was NOT the case.

(2) Second this sentence from the Third District's decision further states the neighbor observed Cortez and Rodriguez "back their car into the victim's enclosed carport." (A: 1) There is NO evidence at all in the record that the car backed into "the covered carport." The evidence is that the car backed into the DRIVEWAY, not the covered carport. (R: 111-112, 116-117, 119-120, 127) Backing into a driveway is less suspicious than backing into a covered carport.

(3) This error is further compounded by other inaccuracies in the Third District's decision on this point. The decision further states this "backing the car into the carport" was an "unusual step" that would "facilitate loading of the trunk unobserved" and "prevent the license plate from being read from the street," which "worked in this case" because the neighbor "could only determine that it was a Florida tag as the car sped away." (A: 4-5) This is all fanciful imagination. There is NO evidence whatsoever in the record to support these statements. There is NO evidence at all that the neighbor observed any tag let alone a Florida tag, NO evidence that any trunk was loaded by anyone, NO evidence at all that anyone engaged in any "tactics" and NO evidence that any tactic worked by backing a car into a carport. The only evidence was that the car backed into the driveway.

(4) The decision states that "[t]he defendants were positioned so that they were partially screened from the street by landscaping and a wall." (A: 2) Again, this implies testimony that the defendants intentionally positioned themselves. In fact, there is no such evidence. Officer Ramos simply testified that the house had "a lot of shrubbery, and has deep hedges, and is fairly tall," and that because of this vegetation and a wall, it was not "totally open up front" and the neighbor could not see everything. (R: 130-131) There is no evidence, however, that the defendants positioned themselves anywhere.

based on conflict jurisdiction. This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The defendants submit the decision of the Third District is erroneous and in conflict with numerous decisions of other district courts of appeal which correctly hold that a police officer may not legally arrest a person later on without a warrant for the misdemeanor offense of loitering and prowling based on a citizen's complaint where the offense was not committed in the presence of the officer. Section 901.15(1), Florida Statutes (1997), provides that an officer may arrest a person for a misdemeanor without a warrant when the person has committed the misdemeanor "in the presence of the officer." Moreover, §856.031, Florida Statutes (1997), does not authorize such an arrest when the offense was committed outside the presence of the officer. Consequently, the decision of the Third District should be quashed and the arrest of the defendants held illegal.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT IS ERRONEOUS AND IN CONFLICT WITH NUMEROUS DECISIONS OF OTHER DISTRICT COURTS OF APPEAL WHICH CORRECTLY HOLD THAT A POLICE OFFICER MAY NOT LEGALLY ARREST A PERSON LATER ON WITHOUT A WARRANT FOR THE MISDEMEANOR OFFENSE OF LOITERING AND PROWLING BASED ON A CITIZEN'S COMPLAINT WHERE THE OFFENSE WAS NOT COMMITTED IN THE PRESENCE OF THE OFFICER AND FURTHER, §856.031, FLORIDA STATUTES, DOES NOT AUTHORIZE SUCH AN ARREST.

The defendants were arrested and taken to the police station for loitering and prowling. (R: 136, 143) The loitering and prowling was when they backed a car up into the driveway of an unoccupied house, got out of the car, one man staying by the car and the other going by the front door calling out in Spanish, "Mister, Mister, anybody home, anybody home," knocking on the door, and when they saw the neighbor watching them, getting quickly back into the car and leaving in a hurry. (R: 111-112, 119-120)

It is undisputed the police did not personally observe the defendants committing the loitering and prowling; the offense was observed by a neighbor who called the police, told Officer Ramos what he had seen and by then, the defendants were gone. (R: 111-117) Officer Ramos put out a BOLO. About 20 minutes later, another officer, Officer Murias, saw the defendants putting gas in

[illegible] years since the 1972 enactment of the [illegible]

their car, legally stopped on the grassy swale several blocks away. (R: 84) Although Officer Murias had heard the BOLO, he did not recall it and did not connect the defendants to the BOLO. (R: 86-91) Officer Murias stopped to help the defendants, then detained them, ran their ID's through his computer and learned they had prior criminal records. (R: 85-95) He remembered the BOLO and realized the defendants matched the description, so he called Officer Ramos; Officer Ramos brought over the neighbor who positively identified the car. (R: 88-97, 114, 122) The defendants were arrested for the loitering and prowling that took place back at the house. (R: 136, 143)

Both Officer Murias and Officer Ramos admitted the defendants committed no crimes and no loitering and prowling in their presence. (R: 103, 107, 122-123, 126) The trial judge granted the motion to suppress the misdemeanor loitering and prowling arrest made several hours later several blocks away as the offense was not committed in the presence of the officer, was not made immediately or in fresh pursuit, and was a pretext for detaining the defendants until a detective could develop enough probable cause to arrest them for burglary. (R: 50-55, 218)

As noted in the defendants' brief on jurisdiction in this case, for 25 years since the 1972 enactment of the loitering and

prowling statute, Florida courts have unanimously held that in order for a police officer to arrest a person suspected of loitering and prowling, the loitering and prowling must be committed in the presence of the officer and that only the observations of the officer are to be considered in assessing the legality of the arrest. For 25 years, Florida courts have unanimously held that since loitering and prowling is a misdemeanor offense, for an officer to arrest a suspected loiterer and prowler without a warrant, the offense must be committed in the presence of the officer. Here, the loitering and prowling was not committed in the presence of the officer and for 25 years, the officer has not had the authority to later arrest the defendants for that misdemeanor. The trial court's ruling was correct.

The Third District, however, turns aside 25 years of law and holds that the officer may legally arrest the defendants later without a warrant for loitering and prowling not committed in his presence. As its authority, the Third District pulls out a statute that has never been cited as authority on this issue by any Florida loitering and prowling case: §856.031, Florida Statutes (1995).[4]

---

[4]The only loitering and prowling case citing §856.031 is Spears v. State, 302 So.2d 805 (Fla. 2d DCA 1974), which did not discuss the statute but merely referred to it as the "arrest" statute. In Spears, the court held the defendant's arrest for

Indeed, the Third District acknowledges this in its decision and suggests that the legislature cross-reference it so the courts will use it.

The Third District's decision is incorrect and is in irreconcilable conflict with 25 years of Florida loitering and prowling arrest law. It conflicts with numerous decisions of other district courts of appeal on the issue whether a police officer may legally arrest a person later on without a warrant for the misdemeanor offense of loitering and prowling based on a citizen's complaint where the offense was not committed in the presence of the officer.[5]

---

night prowling was unlawful because the officers failed to comply with the provisions of §856.021 by affording the defendant the opportunity to dispel any alarm and by failing to ascertain that in fact the defendant was on the property with the permission of the owner. The propriety of §856.031 was not discussed.

[5]Conflict is established with D.L.B. v. State, 685 So.2d 1340 (Fla. 2d DCA 1996); K.R.R. v. State, 629 So.2d 1068 (Fla. 2d DCA 1994); Freeman v. State, 617 So.2d 432 (Fla. 4th DCA 1993); G.E.C. v. State, 586 So.2d 1338 (Fla. 5th DCA 1991); Lucien v. State, 557 So.2d 918 (Fla. 4th DCA 1990); T.L.F. v. State, 536 So.2d 371 (Fla. 2d DCA 1988); and Springfield v. State, 481 So.2d 975 (Fla. 4th DCA 1986).

ARREST FOR MISDEMEANOR LOITERING AND PROWLING

First, as previously noted, Florida law has unanimously held that since loitering and prowling is a misdemeanor offense, in order for a police officer to arrest a suspected loiterer and prowler without a warrant, the offense must be committed in the presence of the officer. D.L.B. v. State, 685 So.2d 1340, 1342 (Fla. 2d DCA 1996); K.R.R. v. State, 629 So.2d 1068 (Fla. 2d DCA 1994); Freeman v. State, 617 So.2d 432, 433 (Fla. 4th DCA 1993); G.E.C. v. State, 586 So.2d 1338, 1340 (Fla. 5th DCA 1991); Lucien v. State, 557 So.2d 918, 919 (Fla. 4th DCA 1990); T.L.F. v. State, 536 So.2d 371, 372 (Fla. 2d DCA 1988); C.D. v. State, 501 So.2d 170 (Fla. 3d DCA 1987); Springfield v. State, 481 So.2d 975, 977 (Fla. 4th DCA 1986).

The legal underpinning of these loitering and prowling arrest cases is §901.15(1) of the Florida Statutes, which is standard law for all misdemeanors, and which states in pertinent part as follows:

> **901.15 When arrest by officer without warrant is lawful. --** A law enforcement officer may arrest a person without a warrant when:
>
> (1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county

> ordinance shall be made immediately or in fresh pursuit.
>
> (2) A felony has been committed and he or she reasonably believes that the person committed it.
>
> (3) He or she reasonably believes that a felony has been or is being committed and that the person to be arrested has committed or is committing it.

Thus, §901.15(1) provides that an officer may arrest a person for a misdemeanor without a warrant when the person has committed the misdemeanor "in the presence of the officer." In contrast, an officer may arrest a person for a felony under subsections (2) and (3) without a warrant not only when the person has committed the felony in the officer's presence, but also when the officer has probable cause to believe the person committed the felony, even if the officer did not see the felony being committed. There is no such probable cause out-of-presence authority for misdemeanors.

The requirement that misdemeanors be committed in the "presence" of the officer means that an arresting officer must have a substantial reason at the time of the warrantless arrest to believe that, from his own observation of evidence at the point of arrest, the person was then and there committing a misdemeanor in his presence. State v. McCormack, 517 So.2d 73, 74 (Fla. 3d DCA 1987) (officer had probable cause to arrest defendant for trespass when officer observed defendant on property and officer knew

defendant was not authorized to be on property); State v. Englehardt, 465 So.2d 1366, 1368 (Fla. 4th DCA 1985) (officers had authority to arrest defendant for misdemeanor driving under influence where they personally observed his intoxicated state and he was still behind the wheel of car, though several blocks from accident); State v. Yunker, 402 So.2d 591, 593 (Fla. 5th DCA 1981) (defendant was "then and there" committing misdemeanor trespass in officer's presence when officer saw defendant on premises and knew he had been warned to stay off property).

In addition, to make a warrantless misdemeanor arrest, all the elements of the misdemeanor offense must occur in the officer's presence and only the officer's own observations may be considered in determining whether probable cause exists to make the warrantless misdemeanor arrest. Although the officer may receive hearsay information from citizens, he may not arrest the defendant without a warrant for the misdemeanor based on this hearsay information; instead, he must personally observe sufficient facts and circumstances to give him probable cause to believe the suspects were then and there committing the loitering and prowling. D.L.B. v. State, 685 So.2d 1340, 1341 (Fla. 2d DCA 1996) (officer's arrest of juvenile illegal where officer responded to apartments on complaint of citizens that boy with flashlight was peeking in

windows, but where officer did not see juvenile do anything except run away, even though juvenile matched description); K.R.R. v. State, 629 So.2d 1068 (Fla. 2d DCA 1994) (arrest for loitering and prowling illegal even though officer received report of attempted auto theft and officer saw defendant 300 yards from area of theft ten minutes later where officer never actually saw defendant do anything except walk along railroad tracks); Freeman v. State, 617 So.2d 432, 433 (Fla. 4th DCA 1993) (arrest of defendant for loitering and prowling illegal where officers called to scene on citizen complaint that two men carrying a burlap bag were hanging around parked cars in parking lot, but officer only saw the men jump the fence and run); Lucien v. State, 557 So.2d 918 (Fla. 4th DCA 1990) (arrest of defendant for loitering and prowling illegal where police responded to complaint of citizen that person she did not recognize knocked on her door, but police only saw defendant walking down street three houses away and defendant admitted knocking on door for glass of water); Carter v. State, 516 So.2d 312 (Fla. 3d DCA 1987) (since officer did not witness any of the suspicious acts reported by the citizen, he could not rely on that report or those acts to supply probable cause to arrest defendant for loitering and prowling; officer himself only saw defendant, who matched description, riding a bicycle nearby on public street a

short time later); Towne v. State, 495 So.2d 895, 898 (Fla. 1st DCA 1986) (officer's arrest of defendant for loitering and prowling legal where officer received hearsay report of citizen describing trespasser, officer arrived at scene and personally observed defendant peeking into windows, defendant matched description of trespasser and gave conflicting stories as to his presence in area); Springfield v. State, 481 So.2d 975, 978 (Fla. 4th DCA 1986) (officer's arrest of defendant for loitering and prowling illegal where officer told by citizens they saw male carrying something in their backyard, where officer only saw intoxicated defendant carrying tape recorder walking down public street); T.L.M. v. State, 371 So.2d 688, 689 (Fla. 1st DCA 1979) (officer could not arrest juvenile based on report of hospital employee he was causing disturbance where by time officer arrived, juvenile was standing outside hospital and merely smelled of alcohol and acted under the influence; disturbance not committed in officer's presence). For example, in Steiner v. State, 690 So.2d 706 (Fla. 4th DCA 1997), as in the present case, the police officer did not personally observe the misdemeanor offense but relied on what a citizen told him. In Steiner, the defendant's car stopped near a condominium guardhouse and when the defendant tried to start it, the engine began smoking. The guard called the police, then

noticed the defendant was under the influence of alcohol, so he made the defendant sit down on a chair. When the police came, the defendant was still sitting on his chair. The police arrested him for misdemeanor driving under the influence. The defendant moved to suppress the evidence alleging his arrest was illegal because the misdemeanor was committed outside the presence of the arresting officer. The Fourth District stated that since the officer never saw the misdemeanor driving under the influence, the only way the officer knew the offense was committed was from the statements of the security guard. The Fourth District held this hearsay information by another was insufficient to give the officer probable cause to arrest the defendant for the misdemeanor not committed in his presence. The Fourth District stated:

> Here the officer did not witness one of the essential elements of the crime, namely the control of the vehicle by the petitioner. If we were to permit the security guard's observations which were relayed to the police as sufficient to constitute the *officer's* knowledge of an essential element of a crime, then as to misdemeanors there would be no point in the statutory requirement that the misdemeanor be committed in the officer's presence. Any citizen could walk up to an officer and relate the commission of a misdemeanor by someone, and the officer would have probable cause to arrest. This is clearly inconsistent with the statutory requirements. *See* §901.15(1). Id., at 709.

See also T.L.M. v. State, 371 So.2d 688, 689 (Fla. 1st DCA 1979) (juvenile's warrantless arrest for misdemeanor disorderly conduct illegal where officer was called to hospital on report person was causing a disturbance but when officer arrived, juvenile was standing talking to another; although juvenile smelled of alcohol, disturbance was committed outside presence of officer); Spicy v. City of Miami, 280 So.2d 419, 420 (Fla. 1973) (officer cannot arrest without warrant a person for misdemeanor public drunkenness upon hearsay of intern at hospital who was told by arrestee he had been drinking; only officer's observation and evidence at point of arrest supports officer's belief person committed misdemeanor).[6]

The reason for the presence requirement is the belief that a person should not be arrested and subjected to all the serious consequences of an arrest based solely on the hearsay complaint over a minor misdemeanor transgression of a citizen who may have an ulterior motive in making a false accusation. As the Fourth District noted in Steiner v. State, 690 So.2d 706 (Fla. 4th DCA 1997), if we were to permit a citizen's observations relayed by

---

[6]The Third District's statements in its decision that the hearsay observations of the neighbor were sufficient to constitute the officer's knowledge of the offense of loitering and prowling and to give the officer probable cause to arrest the defendants for loitering and prowling not committed in his presence is simply incorrect. (A: 7)

the citizen to the police as sufficient hearsay evidence for the OFFICER'S knowledge of an essential element of a crime, "then as to misdemeanors there would be no point in the statutory requirement that the misdemeanor be committed in the officer's presence. Any citizen could walk up to an officer and relate the commission of a misdemeanor by someone, and the officer would have probable cause to arrest. This is clearly inconsistent with the statutory requirements." Id., at 709. Thus, authorizing the police to arrest a person for a misdemeanor committed in their presence keeps the arrest "honest" and essentially prevents arrests based on dubious or even spurious complaints over minor problems.

One can see this is especially true of the misdemeanor offense of loitering and prowling. Loitering and prowling is an unusual crime. It is a "here-and-now" crime, strictly dependent on the moment for its being. It is committed when a defendant loiters or prowls in a place, at a time, or in a manner not usual for law-abiding citizens, and when such loitering and prowling is under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. State v. Ecker, 311 So.2d 104, 106 (Fla. 1975); D.A. v. State, 471 So.2d 147, 150 (Fla. 3d DCA 1985). It must be established that the defendant IS engaged in "incipient criminal

behavior," not that he WAS so engaged sometime in the past, and the defendant's behavior must point to "immediate future criminal activity," NOT to suspicious after-the-fact criminal behavior from prior, already completed criminal acts. D.A. v. State, supra at 151; K.R.R. v. State, 629 So.2d 1068, 1070 (Fla. 2d DCA 1994) (evidence insufficient to support finding that defendant who was found walking on railroad tracks at 12:30 a.m. near site of reported attempted auto theft ten minutes later committed offense of loitering and prowling). It is said "the statute is forward-looking, rather than backward-looking in nature. Its purpose is to punish a certain type of incipient criminal behavior before it ripens into the commission or attempted commission of a substantive criminal act." D.A. v. State, supra at 151. In Ecker, this Court said "[t]he whole purpose of the statute is to provide law enforcement with a suitable tool to prevent crime. State v. Ecker, supra at 110. Moreover, it must be more than mere "future" criminal activity; it must be "imminent" future criminal activity that is alarming in nature, an immediate threat to the physical safety of persons or property in the area. D.A. v. State, supra at 152. Thus, the gist of the crime is catching the criminal as he is just about to act and the essence of the crime is preventing imminent future criminal activity - i.e., crime prevention. And an

arrest for loitering and prowling is not to be used as a catch-all or pretext to hold the defendant until probable cause can be developed for a more serious crime. State v. Ecker, supra at 111; D.A. v. State, supra at 155; T.L.F. v. State, 536 So.2d 371, 372 (Fla. 2d DCA 1988); L.C. v. State, 516 So.2d 95, 96 (Fla. 3d DCA 1987).

Thus, when loitering and prowling is being committed in the presence of an officer, the arrest for loitering and prowling is logical and permissible to prevent imminent criminal activity from taking place. But if the officer does not see the loitering and prowling (only a citizen sees it and then reports it to an officer), the crime is often over before the police arrive. This is, however, the way this particular offense is designed. Loitering and prowling was specifically enacted in 1972 to replace the old vagrancy law and when enacted, it was designed to overcome the unfair deficiencies of vagrancy which permitted unfettered police arrest of undesirable persons who were not engaged in any imminent criminal activity. State v. Ecker, 311 So.2d 104, 107 (Fla. 1975). The intent of loitering and prowling was immediate crime prevention and this has always been the sound constitutional basis for it. Id., at 107. Therefore, when a person is no longer engaged in that suspicious, incipient criminal behavior, the person

is no longer loitering and prowling.

Thus, when police are called to the scene of a suspected loitering and prowling and given information about the suspicious acts from a citizen, the legality of the subsequent warrantless misdemeanor arrest of the offender depends on the officer's own observations of all the elements of loitering and prowling. The citizen's information may complement the officer's own observations and help provide background for the probable cause needed for the arrest, but the arrest may not be based on the citizen's information without sufficient confirmation by the officer's own observations. See e.g., Towne v. State, 495 So.2d 895, 898 (Fla. 1st DCA 1986) (although officer received hearsay information from citizen describing trespasser, officer arrived at scene and found defendant who matched description and personally observed defendant peeking into windows and defendant gave conflicting stories as to his presence in area). Moreover, the arrest must be made "immediately or in fresh pursuit," §901.15(1), and must not be a pretext to hold the offender until more serious charges can be developed.

In the present case, the loitering and prowling was not committed in the presence of the officers and the officers had no probable cause to arrest the defendants for loitering and prowling.

The trial court's ruling was correct.[7]

---

[7]In its decision, the Third District states that this Court's discussion of defendant Worth in its decision State v. Ecker, 311 So.2d 104 (Fla. 1975), "establishes that a prosecution for loitering and prowling can be based on citizen witnesses even if the arresting officer did not observe the defendant commit the offense," and the Third District then uses that to hold that an officer's probable cause to arrest for misdemeanor loitering and prowling not committed in their presence can be based on hearsay evidence from citizens. (A: 6-7) The use of Worth and Ecker is not accurate.

In Ecker, this Court discussed the sufficiency of the evidence of defendant Worth's loitering and prowling conviction. Id., at 111. This Court reversed Worth's conviction for loitering and prowling. However, this Court's reason for reversing the conviction was NOT because Worth had been illegally arrested for loitering and prowling, was NOT because Worth was not loitering and prowling, and was NOT because the elements of loitering and prowling were not present. Instead, this Court reversed the conviction on the grounds the elements of loitering and prowling were not properly established at the trial; the state had simply failed to prove its case by competent evidence because the state had not called as witnesses the lay citizens who saw the defendant loitering and prowling. Instead, the state had called only the police officers as witnesses, but the police had not personally observed the defendant at his loitering and prowling. This Court found insufficient proof for conviction.

Ecker did not say that IF the citizens had testified, there would have been sufficient proof even though the officers did not see the offense. And Ecker never said that hearsay testimony of citizens may be used in a trial or in a motion to suppress to supply the probable cause OF THE OFFICER to make a warrantless arrest for a misdemeanor not committed in his presence.

The issue here is the ARREST, not the prosecution or the conviction. The issue regarding Worth in Ecker was the sufficiency of the evidence. The ARREST of Worth was never challenged and not discussed.

APPLICATION OF §856.031 TO LOITERING AND PROWLING ARREST

In the present case, the third District acknowledges §901.15 and its caselaw, but applies §856.031 instead to justify the warrantless arrest for the misdemeanor loitering and prowling not committed in the presence of the officer. Section 856.031, Florida Statutes (1997), states in full as follows:

> **856.031 Arrest without warrant. —** Any sheriff, police officer or other law enforcement officer may arrest any suspected loiterer or prowler without a warrant in case delay in procuring one would probably enable such suspected loiterer or prowler to escape arrest.

The Third District held that pursuant to §856.031, a warrantless arrest for the misdemeanor offense of loitering and prowling may be made after the fact by an officer who did not personally observe the offense when the officer feels the suspects would escape if he left to obtain a warrant. The Third District acknowledges that loitering and prowling cases "so frequently overlook" §856.031. (A: 6) That is an understatement, since no loitering and prowling case has cited §856.031 for this rule.[8] The reason is that

[8]There are several early vagrancy cases that cite to §856.03, the predecessor statute that specifically applied to vagrancy. Sutherland v. State, 167 So.2d 236 (Fla. 2d DCA 1964); Roberts v. State, 142 So.2d 152 (Fla. 3d DCA 1962); Rinehart v. State, 114 So.2d 487 (Fla. 2d DCA 1959). Both the vagrancy statute and §856.03 were repealed in 1972 when the loitering and

§856.031 does not apply and should be laid to rest along with its companion vagrancy statute.

First, it is obvious that §856.031 does not address the issue of "presence." The statute says nothing about "presence" and importantly, does not say that an officer may arrest a suspected loiterer and prowler without a warrant if they are escaping even when the offense was not committed in the officer's presence. The statute is silent on presence, whereas §901.15(1) specifically addresses presence and requires presence for the warrantless arrest of a misdemeanant. Section 856.031 does not eliminate the presence requirement for a warrantless misdemeanor loitering and prowling arrest.[9] Indeed, a review of the facts in most loitering and

---

prowling statute was enacted. Section 856.031 is simply §856.03 with the vagrancy language and vagrancy warrants taken out.

[9]Indeed, in two of the three cases decided under the predecessor statute, §856.03, the officers arrived at the scene and observed the loitering and prowling being committed in their presence. In Sutherland v. State, 167 So.2d 236 (Fla. 2d DCA 1964), a citizen called the police and notified them that a car with its lights off had driven into a closed gas station. The officers arrived and observed the car with its lights off parked on the side of the gas station. The officers observed a lady standing outside the car and two men standing near the vending machines. Upon seeing the police, the lady immediately got into the car and one man walked hurriedly back to the car and handed the lady a small bag and a ring of many keys. When the officer asked him what the objects were, the man refused to answer and they were arrested. Thus, the suspicious behavior deemed sufficient to arrest the defendants for vagrancy under §856.03

prowling cases shows suspected loiterers and prowlers in various stages of leaving the scene or "escaping" when the officers arrived pursuant to the citizen's call, yet the arrests were nonetheless illegal because the loitering and prowling was not committed in the presence of the officer.

Second, a review of the history of §856.031 suggests it is a vestige of old vagrancy law. The current statute was enacted in 1972 along with the reforms that enacted the current loitering and prowling statute, §856.021. As explained by this Court in State v. Ecker, 311 So.2d 104 (Fla. 1975), the loitering and prowling statute was enacted by the legislature "in an attempt to cure the infirmities" of the old vagrancy law, §856.02, which gave the police "unfettered discretion" to arrest all "rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers,

---

WAS committed in the presence of the police.

In Rinehart v. State, 114 So.2d 487 (Fla. 2d DCA 1959), the citizens caught the defendant committing vagrancy in a hotel and held him for the officers. The defendant then initially denied being in the hotel, then when confronted with evidence he had been in the building he admitted he was in the hotel visiting a married woman whose name he would not reveal. Thus, the defendant was caught in the act by the citizens and the officers observed the continuing offense.

In Roberts v. State, 142 So.2d 152 (Fla. 3d DCA 1962), the court found that the offense of vagrancy was not committed in the officer's presence and consequently, the defendant's arrest without a warrant was probably illegal.

persons who use juggling, or unlawful games or plays, common pipers and fiddlers . . . common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and misspend what they earn without providing for themselves or the support of their families, persons wandering or strolling around from place to place without any lawful purpose or object . . . persons able to work but habitually living upon the earnings of their wives or minor children, and all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness." The loitering and prowling statute, §856.021, eliminated the types or status of vagrants and instead proscribes conduct that threatens public safety or a breach of the peace or causes justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. It was an entirely new statute and is completely different from its vagrancy predecessor.

Accompanying the old vagrancy statute in the books was §856.03, the predecessor statute to §856.031, the statute at issue here. Section 856.03 stated in full as follows:

> **856.03 Arrest of vagrant without written warrant.--**
> (1) Upon proper information made upon

> oath before an officer authorized to act in such cases he shall issue his warrant for the arrest of any person therein named or described who is charged therein with being a vagrant under any of the provisions of §856.02, and such warrant shall be executed by any sheriff, constable, policeman, or by private person duly authorized thereto by the officer issuing such warrant.
>
> (2) Any sheriff, constable, policeman or other lawful officer may arrest any vagrant described in §856.02 without a warrant in case delay in procuring one would probably enable such alleged vagrant to escape arrest. Any person so arrested by virtue of a warrant or without a warrant shall be given a speedy trial, and upon conviction shall be guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.

Thus, subsection (2) allowed an officer to arrest a vagrant when a delay in procuring a warrant would "probably enable such alleged vagrant to escape arrest." In 1972, when the vagrancy statute was repealed and the loitering and prowling statute was enacted, the legislature simply crossed out all the vagrancy language and vagrancy warrants from §856.03 and substituted loitering and prowling language in §856.031.

Thus, §856.031 appears to be a vestige of old vagrancy law and should be laid to rest along with vagrancy. The Third District's interpretation of this statute would permit unfettered police arrests of virtually all suspected loiterer and prowlers who never engaged in any suspicious behavior in the presence of the police.

They could be arrested and subjected to all the serious consequences of a formal arrest, booking and incarceration on the mere hearsay accusations of a citizen. The Third District's interpretation of this statute essentially eliminates the presence requirement for warrantless misdemeanor arrests as per §901.15(1) for loitering and prowling, since most if not all suspected loiterers and prowlers leave the area (or "escape") if not arrested by the police.

REQUIREMENTS OF §856.031 NOT MET

And finally, even if §856.031 does apply and the police were entitled to arrest the defendants for loitering and prowling that was not committed in their presence, the provisions of §856.031 were not met in this case.

Section 856.031 clearly requires a showing that the delay in procuring a warrant would probably enable the defendants "to escape arrest." A review of the record in this case contains no testimony and no evidence that the defendants were going to escape arrest. Even if the defendants drove away from the swale where they were stopped, the officers had all the information they needed to make an arrest: names, addresses, license tag, etc. The requirements of the statute were not met and it was impermissible to arrest the defendants pursuant to it.

CONCLUSION

Based upon the foregoing, the petitioners/defendants submit the decision of the Third District is erroneous and is in conflict with numerous decisions of other district courts of appeal and this Court, and request that this Court quash the decision of the Third District and hold the arrest of the defendants was illegal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14 Street
Miami, Florida 33125
TEL: (305) 545-1961

By: Marti Rothenberg
MARTI ROTHENBERG #320285
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this 22nd day of June, 1998.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1998

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 97-1369

JOSE M. CORTEZ, and ALEXIS RODRIGUEZ, **

LOWER
** TRIBUNAL NO. 96-11158

Appellees. **

Opinion filed January 28, 1998.

An appeal from the Circuit Court for Dade County, Manuel A. Crespo, Judge.

Robert A. Butterworth, Attorney General, and Roberta G. Mandel, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Marti Rothenberg, Assistant Public Defender, for appellees.

Before SCHWARTZ, C.J., and COPE and GERSTEN, JJ.

COPE, J.

The State appeals an order suppressing evidence. As there was no Fourth Amendment violation, we reverse.

I.

A neighbor observed defendants Jose Manuel Cortez and Alexis Miguel Rodriguez back their car into the victim's enclosed carport.

The homeowner victim was at work. While one defendant stood by the car, the other defendant peered into a window while calling out to ask if anyone was home. The defendants were positioned so that they were partially screened from the street by landscaping and a wall. The neighbor did not recognize the defendants and called the police. When the defendants saw the neighbor watching, they jumped into the car and fled.

A few minutes later, Officer Ramos arrived and he interviewed the neighbor. Upon looking in the carport, he found pry marks on the door leading from the carport into the house. He could not determine from looking, however, whether the pry marks were fresh. The officer sent a be on lookout ("BOLO") announcement regarding a possible burglary, with a description of the car and a general description of the occupants.

A few blocks away, the defendants ran out of gas. At about 1:30 p.m., approximately twenty minutes after the BOLO announcement, a different officer, Officer Murias, noticed the defendants' car alongside the road, where the defendants appeared to be attempting to add gasoline. The officer stopped to render assistance. The defendants explained that they needed gas. During their conversation, the defendants told the officer that they were on the way to visit a friend nearby, but when the officer offered to call the friend, it turned out that the defendants did not know the friend's name or address. Finding this suspicious, the officer asked for identification. The police computer revealed no outstanding warrants, but defendants appeared to match the BOLO.

A:2

Officer Murias contacted Officer Ramos (author of the BOLO), who brought the neighbor to the roadside location. The neighbor identified the car as being the one he had seen. At about 2:00 p.m. the defendants were placed under arrest for loitering and prowling in violation of section 856.021, Florida Statutes (1995).

Detective Garcia was sent to the victim's residence to investigate further. At 5:00 p.m., the victim arrived home. He confirmed that the pry marks on his door were new, and found that his electric chain saw was missing from the carport. The defendants had an electric chain saw on the back seat of the car they were driving. They had told Officer Murias, however, that the chain saw belonged to the driver's father.

Defendants were arrested for burglary and criminal mischief. They moved to suppress their confessions, claiming that they were the product of a Fourth Amendment violation. Defendants contended that the arrest for loitering and prowling was illegal, and that there was neither probable cause nor a founded suspicion to justify their detention on the charge of burglary. The State has appealed.

II.

We conclude that there was probable cause to arrest defendants for the offense of loitering and prowling. Section 856.021, Florida Statutes, defines the offense as follows: "It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity."

A:3

Id. § 856.021(1).

"Probable cause to arrest exists when the totality of the facts and circumstances within the officer's knowledge would cause a reasonable person to believe that an offense has been committed and that the defendant is the one who committed it." State v. Russell, 659 So. 2d 465, 468 (Fla. 3d DCA 1995) (citations omitted); see also Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Cross v. State, 432 So. 2d 780, 782 (Fla. 3d DCA 1983). "The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based." Shriner v. State, 386 So. 2d 525, 528 (Fla. 1980) (citation omitted). "An officer is permitted to take a realistic view of the facts in making a probable cause determination, 'for probable cause is a matter of practicalities, not technicalities.'" State v. Russell, 659 So. 2d at 468 (citations omitted).

Here, the neighbor saw the defendants back their car into the victim's enclosed carport. As a general matter, a homeowner may be deemed to extend an implied invitation to legitimate visitors to approach the house by use of the sidewalk, and to park the car in the driveway or at the roadside. But certainly there is no implied invitation for a stranger to park his car in a homeowner's enclosed carport and peer in the windows. The unusual step of backing the car into the carport would (a) facilitate loading of the trunk unobserved, (b) prevent the license plate from being read

from the street,[1] and (c) allow a speedy departure if needed. Upon seeing that the neighbor was watching, defendants did not approach the neighbor to ask the whereabouts of the homeowner. Instead, defendants took flight. In the subsequent roadside encounter with Officer Murias, defendants lied about their destination and reason for being in the area. Whether or not the pry marks are taken into consideration, the officers had probable cause to arrest the defendants for loitering and prowling.

Defendants contend, however, that the officers were not entitled to make a warrantless arrest for the misdemeanor offense of loitering and prowling because the misdemeanor was not committed in the officers' presence. Defendants rely on such cases as Chamson v. State, 529 So. 2d 1160, 1161 (Fla. 3d DCA 1988), and Carter v. State, 516 So. 2d 312, 313 (Fla. 3d DCA 1987), which, on the basis of section 901.15(1), Florida Statutes, hold that an officer cannot make a warrantless arrest for the misdemeanor of loitering and prowling where the officer did not personally observe the misdemeanor offense and relied instead on a report by a citizen witness.[2] Those cases reach that result because subsection 901.15(1), Florida Statutes, authorizes the warrantless arrest of a person who "has committed a felony or misdemeanor . . . in the

---

[1] That tactic worked in this case. The neighbor could only determine that it was a Florida tag as the car sped away. The neighbor did not obtain the license number.

[2] Other cases relied on by defendant include K.R.R. v. State, 629 So. 2d 1068, 1070 (Fla. 2d DCA 1994); T.T. v. State, 572 So. 2d 21 (Fla. 4th DCA 1990); and Springfield v. State, 481 So. 2d 975, 977 (Fla. 4th DCA 1986).

A:5

presence of the officer." If the officer did not observe the misdemeanor, then section 901.15 in general does not authorize the officer to make a warrantless arrest.[3]

The cases relied on by defendants do not cite or discuss section 856.031, Florida Statutes, which states:

> 856.031 Arrest without warrant. - Any sheriff, policeman, or other law enforcement officer may arrest any suspected loiterer or prowler without a warrant in case delay in procuring one would probably enable such suspected loiterer or prowler to escape arrest.

Here, the defendants were apprehended at roadside, and assuredly would have escaped if the officers had left to obtain a warrant. The warrantless arrest was authorized by section 856.031.[4]

Defendants argue that in State v. Ecker, 311 So. 2d 104, 111 (Fla. 1975), the Florida Supreme Court held that only an officer's own observations may be considered in determining whether probable cause exists to make a warrantless arrest for loitering and prowling. That is not so.

The Ecker decision actually establishes that a prosecution for loitering and prowling can be based on citizen witnesses even if the arresting officer did not observe the defendant commit the offense. Ecker was a consolidated appeal in which one defendant, Worth, challenged the sufficiency of the evidence to support his conviction for loitering and prowling. Id. at 111. The court

---

[3] There are exceptions, see, e.g., id. § 901.15(5),(6), and (7), which do not apply here.

[4] Because the decided cases so frequently overlook section 856.031, the legislature should, at the least, cross reference it in section 901.15, Florida Statutes.

stated:

> In Worth v. State, the record reflects that the defendant was in a warehouse area at 9:30 p.m. He was stopped by three lay citizens, who called the police. The testimony at the trial relates primarily to statements that were made by the defendant after Miranda[5] warnings had been given to him. **The citizens who called the police and who were concerned about his presence in the area did not testify in the cause.** There is a clear inference from this record that the defendant was in the area for the purpose of stripping an automobile located near one of the warehouses. **The circumstances surrounding this incident should have been testified to by the individual citizens who observed the defendant's conduct.** The elements of this offense were not properly established by the sole testimony of arresting officers who did not observe the circumstances that justified the concern for the safety of property by the lay citizens who made the call. The admissions and explanation of the defendant are not in and of themselves sufficient for conviction on this record. We must reverse the conviction, but in so doing **we wish to stress that the circumstances inferred from this record would constitute a violation of Section 856.021, Florida Statutes, if properly established.**

See id. (emphasis added). In Ecker, it was necessary for the citizen witnesses to testify in person at trial, because the hearsay rule prohibited the officers from repeating what the citizen witnesses had said.

In the present case, by contrast, the trial court proceeding was an evidentiary hearing on a motion to suppress evidence. Hearsay is admissible in such a proceeding, see Lara v. State, 464 So. 2d 1173 (Fla. 1985), and the officers' testimony about what the neighbor and victim said came in (quite properly) without objection.

The trial court also felt that the officers were not allowed

---

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

to arrest defendants for the misdemeanor of loitering and prowling when the officers suspected (and were continuing to investigate) a possible burglary. We disagree. The fact that the officers suspected more serious crimes did not detract from the probable cause that existed to arrest for the misdemeanor offense.[6]

III.

The order under review is reversed and the cause remanded for further proceedings consistent herewith.

[6] Although we need not decide the point, it may well be that the officers also had probable cause to arrest for the offense of attempted burglary, or at the least, had a founded suspicion to justify detaining defendants until the homeowner could be located.