ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,458

DCA NO. 97-1369

JOSE MANUEL CORTEZ & ALEXIS RODRIGUEZ,

Petitioners,

-vs-

STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW
CONFLICT JURISDICTION

PETITIONERS' BRIEF ON JURISDICTION

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INTRODUCTION

This is the brief of the petitioners/defendants Jose Cortez and Alexis Rodriguez on petition for discretionary review based on conflict jurisdiction from the decision of the Third District Court of Appeal. Citations are to the Appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

The defendants were charged with burglary of a structure. Prior to trial, they moved to suppress evidence contending their initial arrest for loitering and prowling was illegal. (A: 3)

The trial court held a hearing on the motion to suppress at which several police officers testified. (A: 1) Officer Ramos testified he was dispatched to a house about 1:00 p.m., in reference to suspicious activity and that he interviewed the neighbor. (A: 2) The homeowner was not home at the time. (A: 2) The neighbor told Officer Ramos that he observed a car back up into the driveway of the house; the neighbor saw one man get out and stand by the car while another man peered into a window while calling out to ask if anyone was home. (A: 1-2) The neighbor did not recognize the men and called the police. (A: 2) The car was partially screened from the street by landscaping. (A: 2) The men saw the neighbor watching and got into their car and left. (A: 2)

After interviewing the neighbor, Officer Ramos looked around; he found pry marks on a door, but admitted he could not determine whether they were fresh. (A: 2) The officer sent out a BOLO for a possible burglary with a description of the car and the men. (A: 2)

About twenty minutes later, a different officer, Officer Murias, noticed a car alongside the road several blocks away from the house. (A: 2) The car had run out of gas and the defendants were attempting to add gas to the car. (A: 2) Officer Murias stopped to help them and the defendants explained they needed gas. (A: 2) The officer noticed an electric chainsaw in the back seat of the car; the defendants told him it belonged to the driver's father. (A: 3) During their conversation, the defendants told the officer they were on the way to visit a friend nearby, but when

the officer offered to call the friend, they were unable to give his name or address. (A: 2) Finding this suspicious, the officer asked for identification; the computer showed no warrants. (A: 2)

Officer Murias then remembered the BOLO he had heard and realized the defendants appeared to match it. (T: 2) He contacted Officer Ramos (the author of the BOLO) who brought the neighbor to the roadside location about 20 minutes later. (A: 3) The neighbor identified the car as the one he had seen back at the house. (A: 3) About 2:00 p.m., the defendants were placed under arrest for loitering and prowling. (A: 3)

A third officer, Detective Garcia, went to the homeowner's home to investigate further. (A: 3) At 5:00 p.m., the homeowner arrived and said the pry marks were new. (A: 3) He also determined that his chainsaw was missing from the carport. (A: 3) The detective returned to the police station and charged the defendants with burglary. (A: 3)

The defendants moved to suppress evidence based on an illegal arrest for loitering and prowling. (A: 3) Following a hearing, the trial court agreed and granted the motion. (A: 1, 3)

The state appealed the order to the Third District. (A: 3) On January 28, 1998, the Third District issued its decision reversing the order suppressing evidence. (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, specifically finding the warrantless arrest for loitering and prowling was legal even though the officers did not observe the offense being committed in their presence. (A: 3-6) The Third District 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 held 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) The Third District also analyzed this Court's

decision in State v. Ecker, 311 So.2d 104 (Fla. 1975), and concluded this Court would permit warrantless arrests for the misdemeanor loitering and prowling based on information from citizens even though the arresting officer did not observe the defendant commit the offense. (A: 6)

SUMMARY OF ARGUMENT

The defendants submit that conflict jurisdiction is established in four ways. First, the Third District's decision, holding that an officer could legally arrest the defendants later without a warrant for the misdemeanor loitering and prowling not committed in his presence, reaches a different result than other Florida loitering and prowling arrest cases with identical facts, thereby conflicting 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).

Second, the Third District's decision fails to apply the same well-established rule of law grounded on §901.15, Florida Statutes, that other district courts of appeal always apply to this identical factual situation of a warrantless misdemeanor arrest for loitering and prowling not in the officer's presence, and instead applies §856.031, Florida Statutes, to justify the warrantless arrest, thereby creating actual conflict of controlling precedent of the same above-cited cases which will create real confusion in the court.

Third, the Third District's decision conflicts with Steiner v. State, 690 So.2d 706 (Fla. 4th DCA 1997). Steiner holds that hearsay information by another was insufficient to give an officer probable cause to arrest a defendant for a misdemeanor offense not committed in his presence, whereas the Third District's decision holds that the hearsay observations of the neighbor were sufficient to give the officer probable cause to arrest the defendants for the misdemeanor not committed in his presence, in clear conflict with Steiner.

Fourth, the Third District's decision incorrectly interprets and conflicts with this Court's decision in State v. Ecker, 311 So.2d 104 (Fla. 1975). The Third District incorrectly holds that Ecker would permit warrantless arrests for the misdemeanor loitering and prowling based on information from citizen witnesses even though the arresting officer has not personally observed the defendant committing the offense.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THIS COURT ON THE ISSUE WHETHER AN OFFICER MAY LEGALLY ARREST A SUSPECT 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.

The Third District has issued an unusual decision 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 an 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.

In the present case, it is undisputed the police did not personally observe the defendants committing the loitering and prowling; the offense was observed by a neighbor who told the police what he had seen and by then, the defendants were gone. 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 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 a statute out of the woodwork, a statute that has never been cited as authority on this issue by any Florida loitering and prowling case: §856.031, Florida Statutes (1995).[1] Indeed, the Third District acknowledges this in its decision and suggests that the legislature cross-reference it so the courts will use it.

We thus have an open invitation for this Court to consider this issue. Indeed, it is imperative that this Court accept jurisdiction of this case because this decision is now in irreconcilable conflict with 25 years of Florida loitering and prowling arrest law. And at the risk of sounding like we are "throwing in the kitchen sink" with this conflict, in fact the Third District's decision has four separate areas of conflict on this issue that would each independently support jurisdiction in this Court.

1. CONFLICT RE: MISDEMEANOR ARREST NOT IN OFFICER'S PRESENCE

First, as noted, the Third District's decision simply reaches a different result than all other Florida loitering and prowling arrest cases with identical relevant facts. In 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), and in Springfield v. State, 481 So.2d 975, 977 (Fla. 4th DCA 1986), as in the present case, the officer was called to the scene by a citizen's complaint of a prowler or suspicious person. By the time the officer arrived, the suspect was no longer engaged in the suspicious activity and was either gone or doing something else in the area. In each of those cases, as in this case, the suspicious acts did not occur in the presence of the officer; nonetheless, the officer arrested the suspect without a warrant for loitering and prowling.

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[1]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. The propriety of §856.031 was not discussed.

On identical facts to this case, those other district court of appeal held the suspect's arrest for loitering and prowling was without probable cause and was illegal. Each case held that since loitering and prowling is a misdemeanor offense, in order for the officer to have arrested the suspected loiterer and prowler without a warrant, the offense had to be committed in the officer's presence and that only the observations of the officer were to be considered in assessing the legality of the arrest. Here, however, the Third District reached a different result on identical facts and held the officer could legally arrest the defendants later without a warrant for loitering and prowling not committed in his presence. Conflict is therefore established with those cases.

2. CONFLICT RE: §856.031 AND CONTROLLING PRECEDENT

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); 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 provides "[w]hen arrest by officer without warrant is lawful" and specifically states that an officer may arrest a person without a warrant when the person has committed a misdemeanor "in the presence of the officer," but that a warrantless arrest for a felony may be made on probable cause even if the officer did not see the offense.

In the present case, however, the Third District acknowledges §901.15 and its caselaw, but applies §856.031 instead to justify the warrantless arrest. The Third District held that pursuant to §856.031, a warrantless arrest for the misdemeanor 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.[2]

The Third District admits that loitering and prowling cases "so frequently overlook" §856.031. (A: 6) That is an understatement, since no loitering and prowling case has ever cited §856.031 for this rule.[3] The reason is that it does not apply to the issue of "presence." The statute is silent on presence and understandably so, since §901.15 specifically requires presence for the warrantless arrest of a misdemeanant. Section 856.031 does not eliminate the presence requirement for a warrantless misdemeanor arrest, whether the suspect is leaving the area or not. Indeed, a review of the facts in each of the cases cited for conflict in parts 1 and 2 of this brief 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.

Thus, the Third District's decision fails to apply the same well-established rule of law that other district courts of appeal always apply to these identical factual situations. There is now actual conflict of controlling precedent which will create real confusion in the courts. Simply stated, if the Third District is correct, 25 years of loitering and prowling arrest law, which is based on §901.15, is incorrect. And if 25 years of loitering and prowling arrest law based on §901.15 is correct, then

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[2]Section 856.031, Florida Statutes (1995), states as follows: "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."

[3]As earlier noted, 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. The propriety of §856.031 was not discussed. Also, 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 prowling statute was enacted. Section 856.031 is simply §856.03 with the vagrancy language and vagrancy warrants taken out and as such, appears to be a vestige of old vagrancy law.

the Third District's decision cannot stand. It is imperative that this Court take jurisdiction and settle the conflict with the cited cases in this section.

3. CONFLICT RE: HEARSAY SUPPLYING PROBABLE CAUSE FOR ARREST

In its decision, the Third District acknowledges the loitering and prowling was not committed in the presence of the officers, but holds that since the proceeding was only a hearing on a motion to suppress based on an illegal arrest, and not a trial where hearsay would be inadmissible, the officers could properly rely upon the hearsay statements of the neighbor at the hearing to support the legality of their warrantless arrest. (A: 7)

The Third District's decision conflicts with Steiner v. State, 690 So.2d 706 (Fla. 4th DCA 1997). In Steiner, as in the present case, the officer did not personally observe the misdemeanor, but relied on what a citizen told him and 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 officer. The Fourth District agreed and held the hearsay information from the citizen was insufficient to give the officer probable cause to arrest the defendant for the misdemeanor not committed in his presence:

> 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.

The Third District, however, held that the hearsay observations of the neighbor were sufficient to give the officer probable cause to arrest the defendants for the misdemeanor loitering and prowling not committed in his presence. This is in clear conflict with Steiner.

4. CONFLICT RE: STATE V. ECKER

And finally, the Third District's decision conflicts with this Court's decision in State v. Ecker, 311 So.2d 104 (Fla. 1975), which the Third District incorrectly interprets. In Ecker, this Court discussed the elements and proof of loitering and prowling, then applied its analysis to the four defendants consolidated in its appeal. One of the defendants was Worth, who challenged the sufficiency of the evidence to support his loitering and prowling conviction. This Court reversed Worth's conviction because the state failed to prove its case by competent evidence by failing to call the citizens who saw the defendant loitering and prowling, and instead, only called the officers, who had not seen what happened. (This Court noted that what Worth did - hanging around a warehouse at 9:30 p.m. to strip a car - would constitute loitering and prowling if properly proven.)

The Third District states that Ecker "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 then applies this to hearsay information from a citizen at a motion to suppress, concluding that Ecker would permit a warrantless arrest for loitering and prowling based on information from a citizen witness even though the arresting officer has not personally observed the defendant committing the offense. (A: 6)

The Third District misinterprets Ecker. This Court's discussion of defendant Worth was clearly a sufficiency of evidence for conviction issue. The legality of Worth's ARREST was not discussed and appears to not have been an issue in Ecker. This Court never stated in Ecker that hearsay testimony of citizens may be used in a motion to suppress to supply the probable cause of the OFFICER to make a warrantless ARREST for the misdemeanor loitering and prowling not committed in his presence. Indeed, the conflict case law cited in this brief shows otherwise. The Third District misinterprets Ecker and extends it incorrectly to this case, thereby conflicting with it.

CONCLUSION

We thus have four separate areas of conflict in this case. For the foregoing reasons, the petitioners request that this Court exercise its conflict jurisdiction and take discretionary review of this important case.

Respectfully submitted,

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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 26th day of February, 1998.

By: Marti Rothenberg
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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.

APPENDIX: A:1

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.

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."

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

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[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).

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

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[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

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[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.

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[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.