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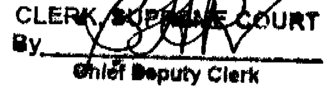

IN THE SUPREME COURT OF FLORIDA

CASE NO.92,458

JOSE MANUEL CORTEZ & ALEXIS RODRIGUEZ

Petitioners,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioners **JOSE CORTEZ** and **ALEXIS RODRIGUEZ**, were the Defendants in the trial court and the Appellees in the Third District Court of Appeal. The **STATE OF FLORIDA** was the prosecution in the trial court and the Appellant in the Third District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbol "A." will refer to the documents attached to the Petitioner's appendix.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's statement of the case and facts as substantially correct with the following additions and or corrections. The defendants state that a neighbor told the police that he observed a car back up into the driveway of the house. The record reveals that a neighbor observed the defendants back their car into the victim's enclosed carport. (A:1).

When Officer Ramos arrived on the scene he interviewed the neighbor. Upon looking in the carport, he found pry marks on the door leading from the carport into the house. (A:2). Approximately twenty minutes after the BOLO announcement, another officer, 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 defendant's did not know the friend's name or address. (A:2). Finding this suspicious, the officer asked for identification. The police computer revealed no outstanding warrants, but defendants appeared to match the BOLO announcement which gave a general description of the occupants, and a description of the car. (A: 2).

The Third District concluded that there was probable cause to arrest the defendants for the offense of loitering and prowling pursuant to Florida Statute 856.021 (1997). The Court citing to State v. Russell, 659 So. 2d 465, 468 (Fla. 3d DCA 1995) (citations omitted), Brinegar v. United States, 338 U.S. 160, 175-176 (1949) and Cross v. State, 432 So. 2d 780, 782 (Fla. 3d DCA 1983), contended that "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." The Court reasoned that the neighbor saw the defendants back their car into the victim's enclosed carport. The Court noted that 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 Court stated that "the unusual step of backing the car into the carport would (a) facilitate loading of the truck unobserved, (b) prevent the license plate from being read from the street, and (c) allow a speedy departure if needed. (footnote omitted). 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." (A:4,5).

The Third District noted that the defendants argued that in this Court's decision in State v. Ecker, 311 So. 2d 104, 111 (Fla. 1975) cert. den. 423 U.S. 1019, 96 S. Ct. 455, 46 L.Ed.2d 391 (1975), this Court determined that only an officer's own observations may be considered in determining whether probable cause existed to make a warrantless arrest for loitering and prowling. The Third District stated that this was not so. The Ecker decision, according to the Third District, actually established that a prosecu-

tion 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, challenged the sufficiency of the evidence to support his conviction for loitering and prowling. Id. at 111. This Court noted that the citizens involved in Ecker who called the police and who were concerned about the defendant's presence in the area did not testify in the case. This Court further contended that the circumstances surrounding the incident should have been testified to by the individual citizens who observed the defendant's conduct. As such, this Court reasoned that the elements of the offense were not properly established by the sole testimony of the arresting officers who did not observe the circumstances that justified the concern for the safety of property of citizens who made the call. This Court in Ecker reversed the conviction, but in so doing, stated that it wished to stress "that the circumstances inferred from this record would constitute a violation of Section 856,021, Florida Statutes, if properly established." 311 So. 2d at 111. The Third District noted that 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. (A. 7).

In the instant case, by contrast, the trial court

proceeding was an evidentiary hearing on a motion to suppress evidence. Hearsay is admissible in such a proceeding, Lara v. State, 464 So. 2d 1173 (Fla. 1985), and the officers' testimony about what the neighbor and victim said came in without objection. The Third District noted that the trial court erroneously felt that the officers were not allowed to arrest the defendants for the misdemeanor of loitering and prowling when the officers suspected and were continuing to investigate a possible burglary. The Court contended that the fact that the officers suspected more serious crimes did not detract from the probable cause that existed to arrest for the misdemeanor offense. The Third District reversed the order under review and remanded the cause for further proceedings. (A. 7,8).

SUMMARY OF THE ARGUMENT

The Third District's opinion in the instant case is not in conflict with any of the loitering and prowling cases cited by the defendant. Those cases do not even cite or discuss Florida Statute 856.031, even though it is directly on point. The decision does not create conflict of controlling precedent by applying the correct statute to the facts at hand, Florida Statute 856.031. The defendants were apprehended at roadside, and most assuredly would have escaped if the officers had left to obtain a warrant. The

warrantless arrest was therefore, authorized by section 856.031.

The record establishes that there was probable cause to arrest the defendants for the offense of loitering and prowling. This Court should therefore decline to accept jurisdiction in this matter.

ARGUMENT

THE OPINION OF THE THIRD DISTRICT IN THIS CASE DOES NOT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THIS COURT ON THE SAME ISSUE OF LAW.

The defendants initially argue that the Third District's decision reaches a different result than other Florida loitering and prowling arrest cases. The defendants argue that the legal underpinning of the loitering and prowling arrest cases (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) reversed and discharge ordered, Freeman v. State, 634 So. 2d 1152 (Fla. 4th DCA 1994) G.E.C. v. State, 586 So. 2d 1338, 1340 (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, 977 (Fla. 4th DCA 1986)) is Florida Statute 901.15(1). The defendants argue that even though the Third District acknowledges Florida Statute 901.15 and

its caselaw, the Court applies Florida Statute 856.031 instead to justify the warrantless arrest.

A review of the Third District's decision indicates that the decision does not expressly and directly conflict with the cases relied upon by the defendants, as cited above. The above forementioned cases as the Third District properly noted do not cite or even discuss Florida Statute 856.031. The Statute states as follows:

> **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.

In the instant case, the defendants were apprehended at roadside, and as the Court noted, would have escaped if the officers had left to obtain a warrant. The warrantless arrest was, therefore, authorized by Section 856.031. Florida Statute 856.031 is directly on point with the facts at hand, and as such, the Third District correctly applied that statute. The Court in a footnote noted that the decided cases frequently overlook Florida Statute 856.031, and as such the legislature should, at the least, cross reference it in section 901.15, Florida Statutes. (A.6).

The defendants argue that the Third District "pulls a statute out of the woodwork, a statute that has never been cited as authority on the issue by any Florida loitering and

prowling case: Florida Statute 856.031".[1] This is not the case. In Florida Attorney General Opinion 072-379-October 30, 1972, the following questions were posed:

1. In order for a law enforcement officer to be authorized to arrest a "suspected loiterer or prowler" under the authority of Florida Statute 856.031, Florida Statute must the officer have probable cause to believe that the arrested person is a loiterer or prowler within the contemplation of Florida Statute 856.021?

2. When the person to be arrested pursuant to said Florida Statute 856.031 has left the scene by the time the officer arrives, may the officer arrest such person within a reasonable time and within a reasonable distance away from the scene upon the basis of credible hearsay information?

Both questions were answered in the affirmative. Clearly, almost thirty years ago, Florida Statute 856.031 was recognized as authority on this same issue.

The officers, in the instant case, clearly had probable cause to arrest the defendants given the totality of the facts and the circumstances. See State v. Russell, 659 So. 2d 465, 468 (Fla. 3d DCA 1995) Minutes after receiving a "BOLO" announcement, the police noticed the defendants' car alongside the road. The officer stopped to render assistance as the defendants appeared to be adding gasoline. The defendants explained to the police that they needed gas. They also informed the officer that they were on the way to visit a friend nearby, but when the officer offered to call

[1] **Petitioner's Brief on Jurisdiction, page 5.**

the friend, 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 the defendants appeared to match the BOLO. Officer Murias, contacted Officer Ramos who was the author of the BOLO, who brought the neighbor to the roadside location. The neighbor identified the car as being the one he had seen. The defendants were properly were placed under arrest for loitering and prowling in violation of section 856.021, Florida Statutes (1995). (A:2-3).

The defendants further argue that the Third District's decision conflicts with this Court's decision in State v. Ecker, 311 So.2d 104 (Fla. 1975), cert. denied, 423 U.S. 1019, 96 S. Ct. 455, 46 L.Ed.2d 391 (1975). As the Third District correctly pointed out, this decision in Ecker 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. 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. (A:7). In this case, the trial 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. (A:7). The officers properly arrested the defendants for the misdemeanor of loitering and prowling when the officers suspected and were continuing to investigate a possible burglary.

The State would submit that there is no conflict in the which would necessitate this Court to accept jurisdiction in this matter. See Reaves v. State, 485 So. 2d 829 (Fla. 1986) ("conflict must be express and direct, i.e., it must appear within the four corners of the majority decision....") No such conflict has been shown to exist and jurisdiction should be declined.

CONCLUSION

WHEREFORE, based upon the authorities and arguments cited herein, this Court should decline to exercise its discretionary jurisdiction.

Respectfully Submitted,

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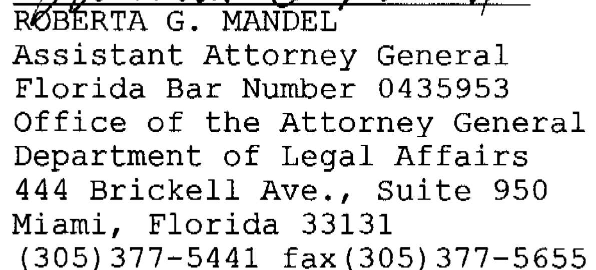

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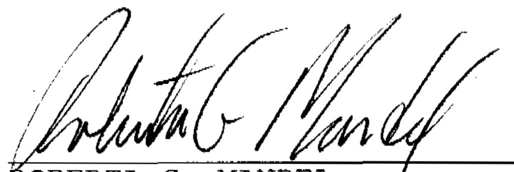
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this 9th day of April, 1998 to **MARTI ROTHENBERG,** Assistant Public Defender, Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125.



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