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 THE MERITS

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CERTIFICATE OF TYPE AND STYLE

This brief is printed with Courier New, 12 point font style, a font not proportionately spaced, in accordance to this Court's recent administrative order.

Undersigned counsel apologizes to this Court for not knowing the specific number of the administrative order since this Court's administrative order was issued the same day that this brief was written and undersigned counsel has learned of the order's existence but has yet to actually read the order.

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 Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellant in the Third District Court of Appeal. The parties shall be referred to as they stood in the trial court. The letter "R" will be used to refer to the clerk's record on appeal. The letter "A" will refer to the appendix attached to the Third District's decision as well as the Petitioner's brief on the merits.

STATEMENT OF THE CASE AND FACTS

On May 1, 1996, an information was filed against Jose Manuel Cortez and Alexis Miguel Rodriguez, the defendants in this case, for burglary and grand theft in the third degree. (R. 1-3). On March 16, 1997, the defendants filed a motion to suppress evidence. (R. 29-44). A hearing was conducted on the motion before the Honorable Emmanuel Crespo, Circuit Court Judge. (R. 76-222).

Officer Pedro Murias testified that he was on uniform patrol on April 10, 1996 when he encountered the defendants parked in the grass swale on approximately 87th Court and 16th Street. (R. 82-83). The officer stated that it appeared as though the defendants were putting gasoline into their vehicle. He stated that it looked as though the defendants needed some help so Officer Murias parked his vehicle behind the defendant's car and walked towards the defendants. (R. 82-83). Officer Murias identified the defendants in court as those individuals that he attempted to help that day. (R. 83). Officer Murias stated that he asked the defendants whether he could be of any assistance to them. The defendants informed Officer Murias that they had run out of gas and that they were trying to get some gas. Officer Murias testified that he asked the defendants where

they were headed. The defendants informed the officer that they were going to a friend's house, although they did not know the address of where their friend lived. Officer Murias testified that he offered the defendants his assistance. The defendants told the officer that they were okay, and that they would just go to get some gas. (R. 84). Officer Murias testified that he asked the defendants if they lived nearby, he also asked them for some identification. Officer Murias looked at the defendant's I.D's and saw that the defendants did not live in the area. Officer Murias stated that he asked the defendants again, at that point, where their friend lived and told the defendants that if the friend lived nearby then the officer would call the friend to come over and help the defendants. The defendants couldn't give the officer any information.

Officer Murias testified that since the defendants didn't live in the area, and they couldn't give him any information as to why they were in the area, or where their friend lived, where they were allegedly going, or even what their friend's name was, Officer Murias decided that he would advise the defendants that he was going to check them out and see if everything was alright, as a matter of routine. (R. 104). The officer testified that when asked if there was anything suspicious to him, he responded

that one should know his friend's name and where he lived if one was actually on his way to his friend's house. (R. 104). The defendants agreed to the routine by which the officer would check them out by calling the police dispatch and in fact, the defendant's responded, "fine", "no problem".

According to Officer Murias, after the defendants stated "fine", "no problem", he returned to his vehicle and proceeded to check out their I.D's over the radio. Officer Murias stated that he learned that each of the defendants had a substantial past. (R. 85). At this point, Officer Murias looked over his notes and saw that a B.O.L.O. had been issued only 20 minutes earlier for two male individuals who were in a suspicious white Toyota. The vehicle had allegedly backed up into a driveway and then the carport of a house. One of the subjects had gotten out of the vehicle and had looked into the window of the house. As soon as the men saw the person who had called the police and who later identified the vehicle, the two men jumped into the car and fled the scene. (R. 105). Officer Murias stated that since the defendants were located fairly close to the area of the B.O.L.O., and since the individuals and the car matched those given in the B.O.L.O., he decided to contact the officer who had handled the B.O.L.O. signal. (R. 86). Officer Murias called the police

dispatcher in order for her to ask the officer who handled the B.O.L.O. signal to come to Officer Muria's location. (R. 87-88).

While they waited for the Officer Ramos, the officer who had issued the B.O.L.O., to arrive the defendants never indicated any desire to leave, according to Officer Murias. (R. 88-89). In fact, during cross-examination, Officer Murias testified that the defendants at that point in time weren't being detained, they were free to go. Officer Murias stated that he in fact, told the defendants that they were free to leave as soon as he checked everything out on the radio. (R. 97). Officer Murias stated that at the time that he stopped behind the defendant's vehicle, his lights were not on and they were not flashing at the time. (R. 100).

Officer Ramos then looked at the vehicle and the subjects and since he wasn't sure if they matched the description of the B.O.L.O., Officer Ramos decided to get the witness who had called the police to give them information about the subjects which is why the B.O.L.O. was issued in the first place. Officer Ramos then, according to Officer Murias, returned with the civilian witness. Officer Ramos informed Officer Murias that the civilian witness identified the vehicle, and the subjects and that both

fit the description. The officers then contacted the general investigation detectives in order for them to respond to the scene. (R. 89). Officer Murias testified that Officer Montero and Detectives Montero and Crepo responded to the scene. (R. 89).

The trial judge then questioned Officer Murias. (R. 90). The trial judge specifically asked the officer if he had the B.O.L.O. information at the time that he stopped or whether the officer stopped because he saw that the men were in need of some assistance. Officer Murias responded that he had written down the B.O.L.O. information, in case he happened to see the subjects. Officer Murias stated that he wasn't specifically looking for the suspects. (R. 91).

On re-direct examination, Officer Murias testified that he transported one of the defendants to the police station. (R. 103). Officer Murias was asked whether there was anything in the car which led him to believe that that vehicle was the vehicle that was described in the B.O.L.O. Officer Murias stated that he noticed a chain saw in the backseat of the defendant's vehicle. The officer asked the defendant if the chain saw belonged to him and the defendant indicated that it belonged to his father. (R. 106).

Officer Robert Ramos also testified at the hearing on the defendant's motion to suppress. Officer Ramos stated that he was performing his patrol duties when he was dispatched, via the police radio, to the location where the defendants were located in order to look at a suspicious vehicle and two suspicious males who were in a white Toyota Corolla which was either a two-door 1983 or a 1985 model, with a Florida license tag. (R. 108, 110). The dispatch mentioned that the suspects were in front of a house. Officer Ramos testified that he drove to the location and observed that the house was unoccupied and that the vehicle was no longer there. A neighbor informed Officer Ramos that he was the one who had called the police. (R. 111).

Officer Ramos testified that the neighbor had informed him that he had been mowing his lawn when he observed the car, back into the driveway of his neighbor's home. The neighbor witness gave Officer Ramos all the information about the vehicle, as appears above, and proceeded to tell the officer that his neighbors were not at home. The witness informed Officer Ramos that one of the suspects stayed in the car and that the other suspect went to the front door of the house. That same suspect called out in Spanish, "Mister, Mister, anybody home, anybody home." The witness who wanted to remain anonymous informed

Officer Ramos that the suspect was knocking very loudly on his neighbor's door. (R. 112).

Officer Ramos testified that he became suspicious when the witness told him that once the witness who was in front of the house saw the neighbor witness he rushed back to the car and the car left in a hurry. (R. 112). Officer Ramos stated that he issued a B.O.L.O., indicating that a suspicious vehicle had fled. (R. 112). Officer Ramos further testified that he then received notice that a car was stopped which could possibly fit the description of the vehicle in the B.O.L.O. (R. 113). Officer Ramos stated that he responded to the location where the car was stopped and observed two men outside the white Toyota Corolla. The car was older than the one given in the B.O.L.O., but it did match the description, as did some of the clothing that the suspects were wearing (white T-shirt, and jeans). (R. 113).

Officer Ramos testified that Officer Murias was already talking to the gentlemen, who informed them that they were in the area and had run out of gasoline. (R. 113-114). Officer Ramos stated that he left to pick up the neighbor witness. The witness identified the car and even though he could not identify the persons, the suspect's clothing, hair and general description did match those that he had seen at his neighbor's house. (R. 114).

The trial judge asked Officer Ramos what the information was that he had relayed in the dispatch which was ultimately used in the B.O.L.O. Officer Ramos responded that he gave a description of the suspicious vehicle, and also informed the dispatch that the vehicle was possibly involved in a burglary. (R. 116).

On cross-examination, Officer Ramos stated that the neighbor witness could not see whether the suspects had broken into his neighbor's house. The witness also could not see whether the suspects had taken anything from his neighbor's house. (R. 120). Officer Ramos later informed the court that the house had a lot of shrubbery and deep hedges in front of it. The front of the house was in other words, not "open to plain view." (R. 130).

Officer Freddy Garcia testified that he was on duty on April 10, 1996, when he was informed over the radio that there had been a suspicious incident and that two subjects were being brought to the police station. Officer Garcia stated that he was working with Detective Crespo on the day in question. (R. 136). Officer Garcia's job was to investigate a possible burglary. (R. 147). Officer Garcia testified that he went to the house where the possible burglary occurred and noticed that the house had an enclosed carport. Officer Garcia testified that he noticed that

there were tools in the carport. There were pry marks on the door of the house which faced the carport. (R. 137-138). Officer Garcia, in addition to speaking with the neighbor witness, also spoke with the gentleman who lived directly next door to the house in question. (R. 139). After his conversation with the next door neighbor, Mr. Delriego, Officer Garcia remained on the scene and waited for someone to come home to the house in question. (R. 139-140).

The homeowner of the house, Mr. Fromar, returned at approximately 5:00 p.m. Officer Garcia walked around the home with Mr. Fromear. Officer Garcia asked the homeowner if he noticed anything missing from the property. The homeowner stated that an electric chain saw was missing. The homeowner told Officer Garcia the brand name and the color of the chain saw which was missing. (R. 140). Officer Garcia asked Mr. Fromar, the homeowner, about the pry marks on the door, and Mr. Fromar responded that the pry marks were fresh and that they had not been there before that day. (R. 141).

Officer Garcia further stated that he returned to the police station after meeting with the owner of the house and looked for the two suspects who were in custody for loitering and prowling. Officer Garcia stated that he and Detective Crespo later took

statements in the case from the defendants and later arrested the defendants for burglary. (R. 141-142).

The prosecutor for the State summarized the facts for the trial court. The prosecutor elaborated that after Officer Murias realized that the vehicle matched the description given in the B.O.L.O., a temporary detention at roadside took place. The State submitted that Officer Murias' actions were reasonable since he had a match to the B.O.L.O. In addition, the prosecutor argued that the suspects were unable to provide a name or address to where they were allegedly going. Officer Murias, the State argued, was correct in temporarily detaining the suspects in order to get further corroboration. (R. 154). The prosecutor continued that when Officer Ramos brought the civilian witness to the scene and that witness made the identification, there was then probable cause for the officers to detain the suspects by taking them to the police station in order to investigate a possible burglary. (R. 156). There was then probable cause to involve the general investigation unit, Officer Garcia, to investigate. (R. 156-157). Officer Garcia investigated the scene, spoke to the civilian witness, the next door neighbor, and then the homeowner. As a result of the investigation he

interviewed the suspects at the police station, took their statements and made a formal arrest for burglary. (R. 158-159).

The prosecutor later reiterated that probable cause arose at the point that the witness identified the car, and was able to identify certain features of the suspects, such as clothing and hair. (R. 165).

The trial court ultimately found that there was no probable cause to arrest the defendants for loitering or prowling, that the arrest was pretextual for the purpose of allowing Detective Garcia sufficient time to speak to the property owner/victim when he arrived home from work for the more serious charges of burglary and grand theft. The court also found the arrest of the defendants for loitering and prowling illegal and held that the evidence and statements which flowed from the illegal arrest should be suppressed. The trial court suppressed the defendant's confession and the chain saw which was recovered from the defendant's vehicle. (R. 45-55, 219).

The State filed a motion for rehearing or reconsideration of the motion in limine which was denied. The State appealed to the the Third District Court of Appeal. On January 28, 1998, the Third District issued its decision reversing the order and finding no Fourth Amendment violation. (A. 1-8). 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 Third District 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 © 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).

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 prosecution for loitering and prowling can be based on citizen witnesses even if the arresting officer did not observe the defendant commit the offense. The Third District noted that Ecker was a consolidated appeal in which one defendant, challenged the sufficiency of the evidence to support his conviction for loitering and prowling. 311 So. 2d at 111. (A: 6). The Third District 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. The Third District noted that in Ecker, this Court found that 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 Third District noted, 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. (A. 7). The Third District further 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. (A: 7-8). The Third District reversed the order under review and remanded the cause for further proceedings. (A: 7-8).

The defendants petitioned this Court for discretionary review based on conflict jurisdiction. This Court accepted jurisdiction.

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 Florida Statute 856.031.

The Third District correctly noted that the legislature should, at least, cross reference Florida Statute 856.031 in Section 901.15, Florida Statutes, since the cases frequently overlook that statute. Florida Statute 856.031, regardless, has been recognized as authority on this same issue, for almost thirty years. See Florida Attorney General Opinion 072-379-October 30, 1972.

Defendant's contention 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 is not valid since defendant relies on

such cases as Steiner v. State, 690 So. 2d 706 (Fla. 4th DCA 1997), which, on the basis of section 901.15(1), Florida Statutes, held that an officer cannot make a warrantless arrest for the misdemeanor of loitering and prowling where the officer did not personally observe the misdemeanor. If the officer did not observe the misdemeanor, then section 901.15, in general, doesn't authorize the officer to make a warrantless arrest. The Steiner decision, and other cases relied upon by the defendant, are not based upon Florida Statute 856.031, as is the case at hand, and as such, there is no conflict. The defendants in this case were apprehended at roadside, and would have escaped if the officers had left to obtain a warrant. The warrantless arrest, in this case was authorized by Section 856.031

The State would respectfully submit that the record establishes that there was probable cause to arrest the defendants for the offense of loitering and prowling. The decision of the Third District Court of Appeal should be affirmed.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME ISSUE OF LAW, AND FURTHER FLORIDA STATUTE 856.031 DOES AUTHORIZE THE DEFENDANT'S ARREST FOR LOITERING AND PROWLING.

The defendants 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 the legal underpinning of the loitering and prowling arrest cases is Section 901.15(1) of the Florida Statutes but that the Third District, nevertheless, relied upon Section 856.031, Florida Statutes, which has never been cited as authority on this issue by any Florida loitering and prowling case. In a footnote,

the defendants acknowledge that one loitering and prowling cases does, in fact, cite to Section 856.031, but notes that the propriety of that Section was never discussed in 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 a "suspected loiterer or prowler" under the authority of Florida Statute 856.031, 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.

A review of the Third District's decision, in any case, makes clear that the decision does not expressly and directly conflict with the cases relied upon by the defendants, as cited above. The above aforementioned cases as the Third District properly noted do not cite or even discuss Florida Statute 856.031. This, however, does not invalidate this section which clearly authorizes a warrantless arrest and which is directly on point with the facts at hand. Florida Statute 856.031 provides 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 Third District noted, would have escaped if the officers had left to obtain a warrant. The warrantless arrest, was clearly authorized by Section 856.031. The Third District correctly applied the statute and 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 Third District properly concluded that there was probable cause to arrest the defendants for the offense of loitering. The Third District 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." State v. Russell, 659 So. 2d 465, 468 (Fla. 3d DCA 1995)

The facts in the case reveal that minutes after receiving a B.O.L.O. announcement, the police noticed the defendant's car alongside the road. The officer stopped to render assistance as the defendants appeared to be adding gasoline to their vehicle. 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 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 description of the suspects given in the B.O.L.O. Officer Murias, contacted Officer Ramos who was the

author of the B.O.L.O., who brought the neighbor to the roadside location. According to the B.O.L.O., a suspicious white Toyota had backed up into the driveway and then the carport of a house. One of the subjects had gotten out of the vehicle and had looked into the window of the house. On page three of their brief, defendants argue that the Third District erred in finding that the neighbor observed the defendant's back their car into the victim's enclosed carport. The defendant's argue that there is no evidence that the car was backed into the enclosed carport. The State would point to page 105 in the record, where Officer Murias testified that the suspicious vehicle had "backed up into the driveway of a carport of a house" (R. 105). In any regard, as the Third District properly noted, 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. The State would respectfully submit that there is no implied invitation for a stranger to park his car in a homeowner's carport, enclosed or otherwise, and peer in the windows. Upon seeing that the neighbor was watching them, the defendants did not approach the neighbor to ask the whereabouts of the homeowner, they instead jumped into their vehicle and fled the scene. (R. 105).

In the subsequent roadside encounter with Officer Murias, the defendants lied about their destination and the reason for being in the area. The Third District properly noted that whether or not the pry marks were taken into consideration, the officers had probable cause to arrest the defendants for loitering and prowling. (A: 5).

The defendants argue that the offense of loitering and prowling must be committed in front of a police officer in order for the suspected loiterer and prowler to be arrested for that offense without a warrant. They argue that the decision conflicts with Steiner v. State, 690 So. 2d 706 (Fla. 4th DCA 1997). In Steiner, however, unlike the instant case, on the basis of Section 901.15(1), Florida Statutes, the court held 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. That case, and the others relied upon by the defendant, however, reached 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 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.

The Third District, in this case, relied on Section 856.031, Florida Statutes, not Section 901.15. The warrantless armrest was properly found to have been authorized by section 856.031, as will be explained herein in greater detail. As such, the decision in Steiner, and the other loitering and prowling cases cited by the defendant, were relying on a completely different statute, do not conflict with the case at hand.

The defendants further argue, in footnote number 7, that the Third District's decision's use of this Court's decision in State v. Ecker, 311 So. 2d 104 (Fla. 1975), cert. den. 423 U.S. 1019, 96 S. Ct. 455, 46 L.Ed.2d 391 (1975) is not accurate. The State does not agree. As the Third District correctly pointed out, the decision in Ecker actually established 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 defendant further argues that Florida Section 856.031 doesn't apply and should be "laid to rest". See brief page 38. The defendant argues that the statute doesn't say anything about "presence", and therefore, the section does not eliminate the presence requirement for a warrantless misdemeanor loitering and prowling arrest.

The law is clear, an arrest without a warrant under Section 856.031 may be made upon credible hearsay. It may be made at any time within the statute of limitations but should be made as soon as practicable... Op. Atty. Gen., 072-379, Oct. 30, 1972. As noted earlier, it was in that opinion, that the Attorney General answered in the affirmative the following question: "When the person to be arrested pursuant to said Section 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?" Clearly,

the silence of the "presence" requirement eliminates the presence requirement for a loitering and prowling arrest under Section 856.031.

The argument that the presence requirement was not eliminated in Section 856.031, is not valid. For purposes of Section 856.021 defining loitering and prowling, the gist of the element of loitering and prowling are those circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. It is unreasonable to conclude that there exists a presence requirement under Section 856.031 where an officer has a justifiable and reasonable alarm or a concern for the safety of persons or property.

The defendant's argument that the Third District's interpretation of Section 856.031 will permit unfettered police arrests, is without merit. In State v. Ecker, this Court explained that under Section 856.021, where an accused gives a voluntary explanation of his presence and such explanation dispels any alarm, no charge can be made. This Court in State v. Ecker, specifically stated that Florida's loitering statute, Section 856.021 did NOT authorize officers to use unbridled discretion to arrest whomever they pleased. 311 So. 2d at 110.

The defendant further argues that even if Section 856.031 does apply and the police were entitled to arrest the defendants for loitering and prowling, the provisions of the Section were still not met. The defendant argues that the record reveals no testimony that the defendants were going to escape arrest. The State would respectfully submit that the police officer in making such determination, looks to specific and articulable facts and his own rational inferences. The defendants in this case were apprehended at roadside and as the Third District properly noted, would most assuredly have escaped if the officers had left to obtain a warrant. The defendants had already lied to the police officer about their destination and their reason for being in the area. Clearly, the officer could rationally have concluded that the defendants would have escaped had he left to obtain a warrant.

The defendant argues that it was impermissible to arrest the defendants where the police could later have made an arrest given the fact that the police had their names, license tag, etc. The State would submit that this is irrelevant. An arrest under Section 856.031 can be made upon credible hearsay, at any time. In Op. Atty. Gen., 072-379, Oct. 30, 1972, it was noted that an arrest should be made "as soon as practicable". Clearly, allowing the

defendants to leave in the hope of later being able to find and arrest the defendants is not "as soon as practicable".

CONCLUSION

Based upon the preceding authorities and arguments, the Respondent respectfully requests that this Court enter an opinion affirming the Third District's well-reasoned decision.

Respectfully submitted,

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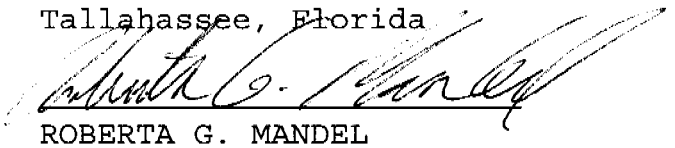

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MARTI ROTHENBERG, Assistant Public Defender, Public Defender's Office, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, Florida 33125 Florida, on this 15th day of July, 1998.

ROBERTA G. MANDEL
Assistant Attorney General