IN THE SUPREME COURT OF FLORIDA

ROBERT THOMAS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. 93, 070

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts accurate.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal opinion correctly reversed the tr court's denial of the motion to suppress. The officer properly searc Petitioner's vehicle incident to arrest. The officer made a valid arre pursuant to an outstanding warrant. Therefore, the subsequent search of vehicle was proper.

ARGUMENT

WHETHER THE EVIDENCE SEIZED FROM THE PETITIONER'S AUTOMOBILE AFTER HE LEFT THE AUTOMOBILE VOLUNTARILY AND WAS ARRESTED ON A WARRANT WHILE HE WAS OUTSIDE THE VEHICLE SHOULD BE SUPPRESSED.

The law is well settled that when a law enforcement officer has mad lawful custodial arrest of the occupant of an automobile that officer may, an incident of the arrest, search the passenger compartment of that vehic New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed 2d 768 (1981 Florida Courts have consistently applied the rule contained in Bel recognizing that a court may not determine on a case-by-case basis whether interior of an automobile is within the scope of a search incident to arr where the arrestee is an occupant of the automobile. Chapas v. State, 404 2d 1102 (Fla. 2d DCA 1981); State v. Smith, 662 So. 2d 725 (Fla. 2d DCA 199 In other words, there need not be a nexus between the arrest of the occup of a vehicle and the subsequent search of that vehicle. Moreover, a defend need not have been in the vehicle at the time of the arrest and subsequ search, for the search to be valid under Belton. State v. McLendon, 490 2d 1308 (Fla. 1st DCA), rev.denied, 500 So. 2d 544 (Fla. 1986).

As the court in State v. Johnson, 696 So. 2d 880 (Fla. 5th DCA 199 stated, the occupant of a vehicle cannot avoid the consequence of the Bel rule merely by stepping outside the automobile as officers approach. In instant case, Detective Maney observed Petitioner pull into the driveway c residence in which occupants had recently been arrested for narcot offenses. (R. 116). The officer saw Mr. Thomas get out of the vehicle

walk towards its rear, where the officer then met him. Not knowing who he w the officer inquired and asked for Petitioner's driver's license. Mr. Tho handed the officer his license and when a computer check was made, outstanding warrant turned up. Mr. Thomas was arrested, taken inside residence, and the officer then searched the vehicle that Mr. Thomas had dri to the scene. (R. 118). Approximately five minutes passed from the t Petitioner exited the vehicle to the time of the search of the vehicle. 119). These circumstances clearly fall within the Belton rule, and the sea was conducted as a valid search incident to arrest.

Petitioner was clearly a recent occupant of the vehicle. In McLend supra, only a few minutes passed from the time the defendant exited the vehi to the time of the arrest. Therefore, the court determined there had been opportunity for intervention and tampering with evidence. "To distingu between arrests of persons in the car from arrests of persons recently vacat the car serves to severely diminish the purpose of the Belton decisio McLendon, 490 So. 2d at 1310. By contrast, the search of a vehicle in St v. Vanderhorst, 419 So. 2d 762 (Fla. 1st DCA 1982) was improper where driver vacated the vehicle two and one-half hours before being taken i custody and clearly was not a recent occupant of the vehicle. Such is not case here. The consensual encounter occurred immediately upon Petitione exit of the vehicle. The entire process, including the warrant check removal of Mr. Thomas to the residence took a mere five minutes.

Since there is no distinction made between occupants of a vehicle recent occupants, the instant case is analogous to Smith, supra. In Smith,

defendant was the driver of an automobile parked in a motel parking lot. defendant and his passenger were subjects of a consensual police encoun which uncovered two outstanding warrants on the passenger. The subsequ search of the automobile incident to arrest and the discovery of cocaine improperly suppressed by the trial court. The court relied on Belton concluding the search of the passenger compartment was proper incident to arrest of the passenger.

The trial court in the instant case relied on State v. Howard, 538 So. 1279 (Fla. 5th DCA 1989) in granting the motion to suppress. The trial cou reliance on Howard is misplaced. In Howard, supra, the court relied on St v. Bennett,516 So. 2d 964 (Fla 5th DCA 1987). Howard and Bennett are clea distinguishable from the situation in the instant case: Mr. Thomas's arrest not a pretext to carry out a pre-planned warrantless search of the vehic The officer's encounter with Petitioner was a consensual encounter determine who he was. The officer had *no*t followed Mr. Thomas to the Cr residence because he already knew about an outstanding warrant for his arr as in Howard,supra, nor had Mr. Thomas been under surveillance because officer was waiting for an opportune time to effect his arrest as in Benne supra. The trial court, therefore, should not have relied on Howard, sup in granting the motion to suppress.

State v. DeAngelis 578 So. 2d 404 (Fla. 4th DCA 1991) is simila distinguishable. The suppression in DeAngelis was proper because the offi did not have probable cause to make the initial arrest, and therefore, subsequent search was improper. Here, Detective Maney clearly made a law

arrest of Petitioner. Moreover, in DeAngelis, the court found the search the car could not be incident to an arrest, since the arrest occurred in hotel lobby. Such is not the case here. Petitioner was arrested just outs his vehicle, then was brought inside the residence so the officer could cond a search of the vehicle.

In State v. Saufley, 574 So. 2d 1207 (Fla. 5th DCA 1991), the Fi District upheld the search of a vehicle incident to arrest where the defend was observed driving in an erratic manner and after stopping and exiting vehicle, appeared to have difficulty maintaining his balance and exuded strong smell of alcohol. The defendant was arrested for driving under influence, and as the officer was placing him in the patrol car he was accos by the defendant's girlfriend. Two or three minutes elapsed before the offi finally was able to search the vehicle where cannabis was found. The defend argued that the search was not incident to arrest because he was arrested af he was outside the truck. The Fifth District Court disagreed, applying Belt Furthermore, the court noted that the defendant's reliance on Bennett, sup was misplaced because the court had held in Bennett that an arrest which a pretext to carry out a pre-planned, warrantless search of a vehicle could validate the subsequent search.

There clearly was no pretext in the instant case. Detective Ma testified that Mr. Thomas had done nothing wrong when he pulled up in driveway. (R. 117). This was clearly a consensual encounter, which escala upon the discovery of the outstanding warrant.

The trial court clearly felt compelled to suppress the evidence in

instant case based upon the decision in Howard. The court's written or
states "The court must here "buy in" to the law asserted by the defense
controlling." (R. 130). The trial court misapplied Howard which turned on
pretextual nature of the search. No such pretext was presented in the inst
case, and the exigency was not created by the State. The encounter
initiated by the defendant. Mr. Thomas did not walk towards the residence,
instead got out of his car and walked to the rear of the vehicle. (R. 11
At that point the officer walked to the rear of the car, met him, and as
for his license. (R. 117). The search was proper as an "unplann
unanticipated arrest of an occupant, or recent occupant of a motor vehic
thereby confronting the arresting officer with an exigent circumstance wh
he had not created." Bennett, 516 So. 2d at 965.

Accordingly, the trial court erred in suppressing the evidence obtai
during a lawful search incident to arrest, and the Second District prope
reversed the trial court's granting of the motion to suppress, based on Belt

[1] Since the facts in this matter are not in dispute, the standard of review on the motion to suppress is de novo, not presumption of correctness. Butler v. State, 706 So. 2d 100 (Fla. 1st DCA 1998).

CONCLUSION

Based on the foregoing facts, argument, and citations of authori Respondent respectfully requests that this Court affirm the decision of Second District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has b furnished by U.S. mail to Cynthia J. Dodge, Assistant Public Defender, P.O. 9000 Drawer PD, Bartow, Florida 33830, this 22nd day of September, 1998.

____
COUNSEL FOR RESPONDENT

Kennedy and Dubord concede that the filing of this civil action owing out of the criminal prosecution does not itself operate to aive any attorney-client privilege which resulted from obichaud's criminal defense. Instead they advance the remark-le [illegible]ment that Robichaud's uncontradicted trial testimony—hi[illegible]sulted in his eventual acquittal as a matter of law by this ourt—was a fabrication concocted by him as a consequence of onversations with his former criminal defense attorney, in ırtherance of a fraud (upon the criminal court) and the commis-on of a crime (perjury during the criminal trial). To this end ey rely on this exception to the attorney-client privilege: There is no lawyer-client privilege under this section when . . .]he services of the lawyer were sought or obtained to enable or d anyone to commit or plan to commit what the client knew was crime or fraud." § 90.502(4), Fla. Stat. (1995).

To meet this statutory exception, Kennedy and Dubord must lege and produce prima facie evidence that Robichaud affirma-vely sought the advice of counsel to procure a fraud. *See Florida fining & Materials Corp. v. Continental Cas. Co.*, 556 So. 2d 18, 519 (Fla. 2d DCA 1990); *see also Shell Oil Co.*, 638 So. 2d 1050 (holding that "[w]hen communications appear on their ıce to be privileged, the party seeking disclosure bears the bur-en of proving that they are not"). Expansion of this exception to ermit the disclosure of attorney-client communications based pon a mere assertion of a fraudulent design, which is all that our ailable record suggests, would virtually eliminate the attorney-ient privilege in any suit where there was any allegation of aud or misrepresentation. *See Florida Mining*, 556 So. 2d at 19.

Kennedy and Dubord allege in their response to the petition or writ of certiorari that Robichaud "used his communications ith the public defender's office for the purpose of getting advice or his future commission of a fraud or crime" and that these onfidential communications resulted in his "tailored estim[illegible]y" in the criminal trial. They point to no evidentiary asi[illegible] support of this proposition presented to the trial court. nd re[illegible] instead in defense of the trial court's order upon con-usory accusations of criminal conduct on the part of Robichaud. hile not disclaiming criminal complicity as well on the part of ormer defense counsel. With nothing before this court but these xtraordinary allegations, we have no choice but to determine at the trial court's order requiring disclosure of communica-ons presumptively protected by the attorney-client privilege eparted from the essential requirements of law.

Certiorari granted and the order of the trial court requiring isclosure of attorney-client communications quashed. (CAMP-BELL, A.C.J., and WHATLEY and NORTHCUTT, JJ., Con-cur.)

* * *

riminal law—Evidence—Search and seizure—Error to sup-ress methamphetamine and drug paraphernalia obtained dur-ng lawful search of defendant's car incident to arrest on out-tanding warrant—Error to conclude that where an individual as exited a vehicle and subsequently is arrested on outstanding arrant, search of vehicle is unlawful—Circumstances of instant ase clearly fell within *Belton* rule that when a law enforcement fficer has made lawful custodial arrest of occupant of automo-ile officer may, incident to arrest, search the passenger com-artment of that vehicle—Nexus between arrest of occupant of ehicle and subsequent search of that vehicle is not required—efendant does not have to be in vehicle at time of arrest and ubsequent search in order for search to be valid

TATE OF FLORIDA, Appellant, v. ROBERT A. THOMAS, Appellee. 2nd istri[illegible] Case No. 97-03576. Opinion filed May 15, 1998. Appeal from the [illegible]urt for Polk County; Robert E. Pyle, Judge. Counsel: Robert A. [illegible]rth, Attorney General, Tallahassee, and Patricia E. Davenport, Assis-nt Attorney General, Tampa, for Appellant. James Marion Moorman, Public efender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Ap-llee.

(PARKER, Chief Judge.) The State appeals the final order granting Robert A. Thomas's motion to suppress methamphetamine and drug paraphernalia obtained as a result of a search of Thomas's car incident to an arrest on an outstanding warrant. We reverse based upon *New York v. Belton*, 453 U.S. 454 (1981).

The following evidence was adduced at the hearing on the motion to suppress. Detective Maney was sent to the residence of Mr. and Mrs. Crall on information that marijuana was being sold from the residence. Maney knocked on the door, talked to the owners of the residence, and obtained consent to search the residence. Upon arrival, Maney had no intent to make an arrest. After Maney located marijuana inside the residence, the narcotics detectives arrived.

While the detectives were still in the residence, Maney sat outside the residence in his patrol car. Maney observed Thomas drive up to the house, park his car in the driveway, and get out. As Thomas walked toward the rear of the car, Maney got out of his vehicle and met Thomas at the rear of Thomas's car. Maney asked Thomas his name and whether he had a driver's license. Maney made the request because Thomas was in the driveway of a residence where arrests were being made for narcotic offenses. At that time, Maney had no idea that there were narcotics in Thomas's car.

A check of Thomas's driver's license reflected an outstanding warrant. Maney arrested Thomas and took him inside the Crall residence. Maney then went back outside and searched the car incident to Thomas's arrest. As soon as Maney opened the driver's door of the car, he found a baggie with some type of white residue. Maney also found three small bags of a white substance in the glove box. All of the baggies tested positive for methamphetamine. Five minutes elapsed between the time that Thomas exited his car until Maney searched the car.

Following a hearing, the trial court granted the motion to suppress based on *State v. Howard*, 538 So. 2d 1279 (Fla. 5th DCA 1989). The trial court concluded that where an individual has exited a vehicle and subsequently is arrested on an outstanding warrant, a search of the vehicle is unlawful. We conclude that this finding was error.

The law is well settled that when a law enforcement officer has made a lawful custodial arrest of the occupant of an automobile that an officer may, incident to the arrest, search the passenger compartment of that vehicle. *See Belton*, 453 U.S. at 460. This court consistently has applied the rule contained in *Belton* recognizing that a court may not determine on a case-by-case basis whether the interior of an automobile is within the scope of a search incident to an arrest. *See Chapas v. State*, 404 So. 2d 1102 (Fla. 2d DCA 1981); *see also State v. Smith*, 662 So. 2d 725 (Fla. 2d DCA 1995).

There does not have to be a nexus between the arrest of the occupant of a vehicle and the subsequent search of that vehicle. Moreover, a defendant does not have to be in the vehicle at the time of the arrest and subsequent search in order for the search to be valid under *Belton*. *See State v. McLendon*, 490 So. 2d 1308, 1309 (Fla. 1st DCA 1986) (court will not "distinguish between arrests of persons in the car from arrests of persons recently vacating the car . . . ."). As noted by the court in *State v. Johnson*, 696 So. 2d 880 (Fla. 5th DCA 1997), the occupant of a vehicle cannot avoid the consequence of the *Belton* rule merely by stepping outside the automobile as officers approach. The circumstances in this case clearly fall within the *Belton* rule.

In this case, the trial court relied on *Howard*, 538 So. 2d 1279. In *Howard*, the police officer knew that there was an outstanding warrant for the defendant and followed the defendant's vehicle. The defendant stopped at a convenience store and exited his vehicle. At that time, he saw the officer and immediately placed the pouch that he was carrying back into his vehicle and locked the vehicle. The police officer approached the defendant and placed him under arrest. The officer refused to let the defendant's brother, who had just arrived, take the defendant's car keys. A

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:h of the defendant's vehicle revealed contraband. The Fifth rict Court, citing *State v. Bennett*, 516 So. 2d 964 (Fla. 5th A 1987), concluded that the search of the defendant's vehicle no a search incident to a valid arrest. *See Howard*, 538 So. t 1

'he trial court's reliance on *Howard* is misplaced. In a more :nt Fifth District Court decision, *State v. Saufley*, 574 So. 2d 7 (Fla. 5th DCA 1991), the Fifth District upheld the search of :hicle incident to an arrest. The defendant was observed driv- in an erratic manner. After the defendant stopped and exited vehicle, he appeared to have difficulty maintaining his bal- e and exuded the strong smell of alcohol. The defendant was :sted for driving under the influence. When the officer placed 1 in the patrol car, the defendant's girlfriend accosted the icer. Two or three minutes elapsed before the officer finally s able to search the vehicle at which time he found cannabis. *id*. at 1209.

The defendant argued that because he was arrested after he s outside the vehicle, the search was not incident to the arrest. e Fifth District Court disagreed, applying *Belton*. *See id.* rthermore, the court noted that the defendant's reliance on *nnett* was misplaced because the court had held in *Bennett* that arrest which was a pretext to carrying out a preplanned, war- itless search of a vehicle could not validate the subsequent irch. *See id.*

We can think of few incidents where a driver will not be out of : vehicle when an arrest is made. Therefore, as long as the 'est is not under a preplanned pretext to conduct a warrantless arch of the driver, we conclude that the bright line test in *Belton* plies. Thomas's arrest was not a pretext to carry out a pre- nned warrantless search of his vehicle. The officer did not llow Thomas to the Crall residence because the officer knew of outstanding warrant for his arrest, nor was Thomas under rveillance which provided the officer with an opportune time to fec arrest.

Ac dingly, the trial court erred in suppressing the evidence itained during a lawful search incident to an arrest. The order is versed. (CAMPBELL and QUINCE, JJ., Concur.)

* * *

axation—Documentary stamp—Error to assess additional ocumentary stamp tax on conveyances of eight unencumbered ndominium units to corporation formed for purpose of taking :le to condominium units—Because corporation was not pur- iaser within meaning of statute, which provides that purchaser real estate is required to pay documentary stamp tax, no addi- onal taxes were due—Where beneficial ownership of land re- ained unchanged, corporation paid nothing for transfer of ndominiums, and owners received nothing from corporation at they did not already have, conveyances were mere book ansactions and not sales to purchaser as contemplated by stat- :e, even though transactions effected change in legal ownership f property and stock issued by corporation acquired value quivalent to that of real property transferred

URO, INC., Appellant, v. STATE OF FLORIDA, DEPARTMENT OF EVENUE, Appellee. 2nd District. Case No. 97-03021. Opinion filed May 15, 998. Appeal from the State of Florida, Department of Revenue. Counsel: C. amuel Whitehead, Sarasota, for Appellant. Robert A. Butterworth, Attorney eneral, Tallahassee, and James McAuley, Assistant Attorney General, Talla- assee, for Appellee.

THREADGILL, Judge.) Kuro, Inc., challenges a final order of e Department of Revenue (DOR), which assesses an additional ocumentary stamp tax of $4,207, collectively, on conveyances f eight unencumbered condominium units to Kuro. The final rd ncluded that stock issued by Kuro in exchange for the o niums constituted consideration therefor, and that, pur- uant to the applicable statutes and rules, such consideration was qual to the fair market value of the condominiums, which was 618,000. The documentary stamp tax was thus based on that mount. We conclude that the assessment of the additional tax was error and reverse.

The condominiums involved herein were acquired by Kurt and Ronald Rabau, father and son, in 1991. In 1994, the Rabaus incorporated Kuro for the purpose of taking title to the condominium units, so as to avoid exposure to potential personal liability arising from the management of the eight rental units. After forming Kuro, the Rabaus transferred each of the condominiums to Kuro by warranty deed. Each deed recited nominal consideration of $10. Kuro thus paid the minimum documentary stamp tax on each transaction. Thereafter, DOR conducted an audit and determined that additional documentary stamp taxes were due. Kuro filed a protest, which culminated in a formal hearing before an administrative law judge. The administrative law judge found that a taxable exchange occurred and recommended the assessment of additional documentary stamp taxes. The DOR entered a final order, adopting the recommendations of the administrative law judge, and Kuro timely appealed.

Section 201.02(1), Florida Statutes (1993), provides that a purchaser of real estate is required to pay a documentary stamp tax of $.70 on each $100 of consideration paid for the property. Section 201.02(1) further provides:

> For purposes of this section, consideration includes, but is not limited to, the money paid or agreed to be paid; the discharge of an obligation; and the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness is assumed. If the consideration paid or given in exchange for real property or any interest therein includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest therein.

According to DOR rules promulgated pursuant to section 201.02(1), "'[p]roperty other than money' includes, but shall not be limited to, property that is corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." Fla. Admin. Code R. 12B-4.012(2)(b). "A conveyance of realty to a corporation in exchange for shares of its capital stock, or as a contribution to the capital of a corporation, is subject to tax." Fla. Admin. Code R. 12B-4.013(7). Both of the foregoing rules reference the presumption set forth in section 201.02(1), that consideration for property other than money "is equal to the fair market value of the real property." Fla. Admin. Code R. 12B-4.012(2)(a); 12B-4.013(7).

Based on the evidence the parties stipulated to during the administrative proceeding, we conclude that Kuro was not a purchaser within the meaning of section 201.02(1) and, thus, no additional taxes were due. Section 201.02(1) applies to transfers of real estate for consideration to a "purchaser." In *Florida Department of Revenue v. De Maria*, 338 So. 2d 838 (Fla. 1976), the supreme court defined "purchaser" under the statute as "one who obtains or acquires property by paying an equivalent in money or other exchange in value." *Id.* at 840. In this instance, Kuro paid nothing for the transfer of the condominiums. The DOR argues that, under the statute and the rules, the stock issued by Kuro constituted consideration of property other than money, which was presumed to be equal to the fair market value of the condominiums. The presumption enunciated in the statute and the DOR rules, however, is a rebuttable presumption, which Kuro did in fact rebut in this instance.

The record shows that the conveyances here were for the benefit of the Rabaus, who were merely availing themselves of the advantages of incorporation. Though the transactions effected a change in the legal ownership of the property, the beneficial ownership of the land remained unchanged. These were thus mere book transactions and, otherwise, were not sales to a purchaser, as contemplated by section 201.02(1). *See State ex rel. Palmer-Florida Corp. v. Green*, 88 So. 2d 493 (Fla. 1956).

At the time the deeds herein were transferred and recorded, the Rabaus owned all of the real estate and all of Kuro's stock.

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