OA 2-1-99

FILED
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SEP 14 1998
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

ROBERT A. THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 93,070

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On February 28, 1997, Detective Maney of the Polk County Sheriff's Office was sent to the residence of Mr. and Mrs. Crall on information that marijuana was being sold from the residence. (R23, 24) Maney obtained consent to search the residence and marijuana was eventually found inside. (R31, 32-33) At that point, narcotics detectives arrived, and Maney went outside and sat in his patrol car. (R116)

While Maney was in his patrol car, the Petitioner, ROBERT A. THOMAS, drove up to the house, parked his car in the driveway, and got out. (R116-117) As the Petitioner walked toward the rear of the car, Maney got out of his vehicle and met the Petitioner at the rear of the car. (R117, 119) Maney asked the Petitioner his name and whether he had a driver's license. Maney made the request because the Petitioner was in the driveway of a residence where arrests were being made for narcotics offenses. At that time, Maney had no idea that there were narcotics in the Petitioner's car. (R117-118, 119)

A check of the Petitioner's driver's license revealed an outstanding warrant. (R118) Maney arrested the Petitioner and took him inside the Crall residence. (R118, 120) Maney then went back outside and searched the car as incident to the Petitioner's arrest. (R121) As soon as Maney opened the driver's door, he found a baggie with some type of white residue. (R118) Maney also found three small bags of a white substance in the glove box. Id. All of the baggies tested positive for methamphetamine. (R120)

Five minutes elapsed between the time that the Petitioner exited his car until Maney searched the car. (R119)

The State Attorney for the Tenth Judicial Circuit for Polk County, Florida, filed an information on March 21, 1997, charging the Petitioner with possession of cannabis with intent to sell, possession of cannabis, possession of methamphetamine, and two counts of possession of paraphernalia. (R2-5)

Following a hearing, the trial court granted the Petitioner's motion to suppress based on State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989), concluding that where an individual has already exited a vehicle and subsequently is arrested on an outstanding warrant, a search of the vehicle is unlawful. (R129-130)

The state appealed the order of the trial court and the Second District Court of Appeal reversed. (131); State v. Thomas, 23 Fla. L. Weekly D1208a (Fla. 2d DCA May 15, 1998). The Second District held there does not have to be a nexus between the arrest of the occupant of a vehicle and the subsequent search of that vehicle. Citing New York v. Belton, 453 U. S. 454 (1981), the court justified the search because it was not a preplanned pretext to conduct a warrantless search of the driver. Thomas.

The Petitioner timely filed his notice to invoke the jurisdiction of this Court to review the decision of the district court on May 21, 1998. This Court accepted jurisdiction to review the decision of the Second District on August 11, 1998.

SUMMARY OF THE ARGUMENT

The trial court was correct in granting the Petitioner's motion to suppress evidence found in his car. The Petitioner had driven into a driveway of a house in which officers had found contraband. The Petitioner got out of his car voluntarily, and went to the rear passenger side. The officer had not yet attempted contact with the Petitioner, and the Petitioner did not get out of the car as a consequence of any contact initiated by the officer. The officer, knowing he did not have any basis to detain the Petitioner, asked the Petitioner for identification. The officer radioed the information and discovered an outstanding warrant for the Petitioner. The Petitioner was taken into custody and brought into the house. The car was then searched. The search of the automobile cannot be justified under Belton because the Petitioner was outside the car before the officer approached, and there was no evidence to show the Petitioner exited the car upon seeing the officer. Belton allows law enforcement to presume the entire interior and containers of the car are in reach of a suspect only if the suspect is approached by the officers while he is still in the automobile. In this case, because the Petitioner was outside the automobile before the officer approached, the Chimel analysis applies, and the Petitioner's car could not have been searched because it was not within the immediate surrounding area into which he could have reached.

ARGUMENT

ISSUE

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 trial court was correct in granting the Petitioner's motion to suppress the evidence in this case. The trial court's order comes to this Court with a presumption of correctness. Savage v. State, 588 So. 2d 975 (Fla. 1991); DeConingh v. State, 433 So. 2d 501 (Fla. 1983). The appellate court must interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining the trial court's ruling. Owens v. State, 560 So. 2d 207 (Fla. 1990), cert. denied, 498 U.S. 855 (1990).

In this case, the Petitioner had parked his automobile in the driveway. He got out of the car and went to the rear passenger side of the vehicle. The officer then initiated contact with the Petitioner as the Petitioner stood at the rear passenger side of the vehicle. (R117) The trial court granted the motion on the authority of State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). (R129-130) In Howard, the officer followed a defendant for whom he knew a warrant had been issued. The defendant got out of the car with a pouch in his hand. He saw the police officer, put the pouch back into the car, and locked it. The officer then detained the defendant to verify the warrant. When the officer obtained verification, the defendant was arrested. The defendant asked his

brother to take his keys and not to let the police search the car. The officer got the keys first and searched the vehicle which contained contraband. The court held that the search was not incident to arrest because there was "no valid need or reason" to search the defendant's car incident to arrest. The facts in this case are better than in Howard, because in Howard the officer knew of the warrant while the defendant was in the car. In the instant case, the officer did not even know of the existence of the warrant until the Petitioner was voluntarily outside of his car for a period of time. The trial court was correct in concluding that Howard was "on all fours." (R130-131) That is because the Petitioner had gotten out of the vehicle he had parked and closed on his own before the officer approached.

In the instant case, the Second District grounded its decision on language in New York v. Belton, 453 U. S. 454 (1981), stating, "[t]he law is well settled that when a law enforcement officer has made a custodial arrest of the occupant of an automobile that an officer may, incident to the arrest, search the passenger compartment of that vehicle." State v. Thomas, 23 Fla. L. Weekly D1208a (Fla. 2d DCA May 15, 1998). The Second District then states 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 a lawful arrest." The Second District is correct in its declaration that a court need not determine whether or not areas in the interior of a vehicle are within the grasp of an arrested suspect. However, what the court assumes is that an officer may

search an automobile even though the officer had no reason to conduct a Terry[1] stop or apprehend a suspect until after he has voluntarily left the vehicle. The district court fails to appreciate that the Belton rule is inapplicable when the suspect's decision to leave the vehicle is not prompted by any contact initiated by the officer.

In Belton, an officer in an unmarked car lawfully stopped a car carrying four men for travelling at an excessive rate of speed. The officer asked to see the driver's license and registration and discovered that none of the occupants of the car owned the car or were related to the owner. During the stop, the officer smelled burnt marijuana and saw an envelope on the car floor marked "Supergold." The officer knew that "Supergold" was associated with marijuana. At that point, the officer directed the men to get out of the car and placed them under arrest for possession of marijuana. After the men were escorted away from the car, the car was searched. The officer found marijuana in the envelope and cocaine inside a zippered pocket of Belton's jacket on the back seat of the car. Belton, 453 U. S. at 455-456. In Belton, the United States Supreme Court first noted that a lawful custodial arrest "creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." Belton at 457. The Court further noted that its own decision in Chimel v. California, 395 U. S. 752 (1969), limited the scope of such searches to the "area from within which [an arrestee]

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[1] Terry v. Ohio, 392 U. S. 1 (1968).

might gain possession of a weapon or destructible evidence." Id. at 453 U. S. 457-458. Chimel prohibits the routine search of any room other than that in which the arrest occurs and prohibits the search of desk drawers or other closed or concealed areas in the room itself. Id.

The Belton Court was concerned with the ambiguity inherent in the phrase, "the area within the immediate control of the arrestee" as applied to automobiles. Belton at 459-460. Given these limitations on the scope of a search incident to a lawful arrest, the Supreme Court created a "bright line" rule governing the scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants. That rule states that "when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Belton did not concern, nor did it attempt to clarify, the term "recent occupant."

The Second District does not address the issue raised by the Petitioner at trial and on appeal that he was not a "recent occupant" of the vehicle for purposes of the Belton rule. Instead the Second District held the search was justified because the arrest was not a "pretext" to conduct a search of the car. The Second District attempts to distinguish State v. Bennett, 516 So. 2d 964 (Fla. 5th DCA 1987), saying that the arrest of the Petitioner was not a pre-planned pretext to carry out a warrantless search of the vehicle. In Bennett, the police had obtained information

the defendant was involved in a controlled buy of narcotics. The police kept the defendant under surveillance for 30 days. About a week before the arrest, the arresting officer learned that Bennett's driver's license had been suspended. On the day of the arrest, the officer watched Bennett drive to a parking space at his apartment. The officer pulled in behind Bennett and blocked his exit. Bennett got out of the car and started to walk toward his apartment. He was intercepted by the officer and arrested.

What the opinion does not mention, however, that the Bennett court rejected the state's argument that the search was lawful under Belton because the officer knew the defendant was driving with a suspended license. The Bennett court disapproved of the holding in State v. McLendon, 490 So. 2d 1308 (Fla. 1st DCA 1986),[2] stating:

> The distinction between Belton and the instant arrest of Bennett for the driving offense is that Bennett was not the occupant of the vehicle at the time of his arrest as were the defendants in Belton. Bennett had left his car and was en route on foot to his apartment when arrested. The state has adduced no evidence of the distance between Bennett and his vehicle at the time of his arrest. Given a warrantless search, this burden at all times was upon the state.
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> State v. McLendon, 409 So. 2d 1308 (Fla. 1st DCA), review denied, 500 So. 2d 544 (Fla. 1986), extended Belton to justify the search of a truck where its driver was arrested within a service station some 20 to 30 feet away from the door of the truck and about three minutes after he had been in the service

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[2] McLendon, was also cited by the Second District for the proposition that a "court will not 'distinguish between arrests of persons in the car from arrests of persons recently vacating the car.'" Thomas.

> station. There is nothing in Belton or in the prior Chimel[3] or Carroll[4] cases to justify this extension.

The reasoning of both Howard and Bennett is correct. In these cases, and in the instant case, there existed "no valid need or reason" to search the vehicle. This is because Chimel, and not Belton, applies to a situation in which a person leaves a vehicle and is then approached by police and eventually arrested.

In the instant case the Second District implies that Howard is no longer good law in light of State v. Saufley, 574 So. 2d 1207 (Fla. 5th DCA 1991). However, Howard has never been overruled. More importantly, Saufley is easily distinguished from Howard because in Saufley the defendant was seen driving the car that was eventually searched in excess of the speed limit and weaving back and forth across the road. In that case, the defendant was pursued by the officer and did not stop his vehicle for two miles even thought the officer had turned on his lights and siren. When the defendant stepped out of the car, he had trouble with his balance, smelled of alcohol, and appeared flushed with bloodshot eyes. Although the officer did not search the car immediately, this case can be distinguished because Saufley committed a crime in the car as the officer pursued.

In State v. McLendon, 490 So. 2d 1308 (Fla. 1st DCA), review denied, 500 So. 2d 544 (Fla. 1986), an officer in another state was alerted to the fact that the defendant, who was wanted for murder,

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[3] Chimel v. California, 395 U.S. 752 (1969).

[4] Carroll v. United States, 267 U.S. 132 (1925).

would be driving a Ford truck with a specific license plate to a specific gas station to go to a specific pay phone. The First District upheld the search of the automobile even though the arrest took place 20 to 30 feet from defendant's truck, about three minutes after the defendant exited his truck and entered the convenience store. The reasoning of the court that Belton applied is wrong; however, the facts of McLendon make it clear that the defendant could have been pulled over and arrested because the officer had probable cause to believe the defendant committed a murder. Assumedly for the safety of the officers and the public, the officer followed the defendant in an inconspicuous manner and waited until he got out of the truck and away from innocent bystanders before apprehending him.

In this case, the Petitioner was not suspected of any crime when he voluntarily got out of the car. He could not have been stopped or arrested in the car, and the office admitted as much. Another fact in McLendon distinguishes this case. Although not the basis of the opinion, the facts of McLendon show the arresting officer knew the homicide had been committed with a .25 caliber automatic weapon. When McLendon was apprehended, the officer brought him back between his car and the defendant's car. At that time, the officer saw a box of .25 caliber shells in plain view.

Other courts have found that once a person exists his vehicle voluntarily and is arrested outside, an officer does not have the authority to search the vehicle. In State v. DeAngelis, 578 So. 2d 404 (Fla. 4th DCA 1991), the court held that the search of the

defendant's BMW could not be justified as a search incidental to arrest (even if the arrest had been valid) because the defendant had left his car in the parking lot and was arrested in the hotel lobby.

Although to date, no Florida court other than the Bennett court has defined the issue, other jurisdictions have. For example, in Lewis v. United States, 632 A. 2d 383 (D.C. App. 1993), the defendant parked his car, got out of it, and locked it, and started to walk away before the officer initiated contact with him. The court held the search of the glove compartment incident to an arrest for driving without a license was invalid. In Lewis, the officer was actually approaching the car when the defendant got out of it. The two met about 15 to 20 feet away from the car. In Lewis, the court stated:

> the rule of Belton is confined to cases where the police confront, or at least signal confrontation, while a person is an "occupant of an automobile," 453 U. S 460, 101 S. Ct. at 2864, although the police may remove the occupant from the vehicle before actually making an arrest or conducting a search. See id. at 459, 101 S. Ct. at 2863. Cases that fall outside the scope of Belton are subject to the case-by-case analysis inherent in Chimel's test of the "area within [an arrestee's] immediate control." 395 U.S. at 763, 89 S. Ct. at 2040.

Id. at 385-386. The Lewis court then went on to conclude that since the passenger compartment of the automobile was not within the immediately surrounding area where the defendant could reach to obtain a weapon or destroy evidence, the search was not valid under Chimel. Lewis at 388, n. 10. The same is true in this case

because the Petitioner was outside the car and behind it when probable cause arose to arrest him and he was handcuffed. Lewis cites Bennett for the proposition that Belton is inapplicable when the defendant is already walking away from his car at the time he is first encountered and arrested by the police. Lewis, 632 A. 2d at 386 n. 7.

In United States v. Fafowora, 865 F. 2d 360, cert. denied, 493 U. S. 829 (1989), cited in Lewis, the defendants were unaware that their car was being followed when they sped away after their companion was arrested. They parked the car and got out of it before law enforcement agents confronted them and arrested them about one car length away. The agents immediately searched the car and found drugs. The court stated as its rationale:

> By applying a bright-line rule that the passenger compartment lies within the reach of the arrested occupant, Belton sought to "avoid case-by-case evaluations" of whether the defendant's area of control within the automobile extended to the precise place where the policeman found the weapon or evidence. No such ambiguity exists, however, where the police come upon the arrestees outside of an automobile. Under such circumstances, the rationale for Belton's bright-line rule is absent; instead, the normal framework of Chimel applies.

Id. at 362 (citations omitted). The Fafowora court concluded its analysis saying that because the passenger compartment of the car was not within the immediate surrounding area into which either of the defendants may have reached when the DEA agents caught up with them, the search of the car was not valid as incident to the arrest. Id.

In United States v. Hudgins, 52 F. 3d 115 (6th Cir. 1995), cert. denied, 116 S. Ct 237 (1995), the court explained the difference between a situation in which an occupant exits a car voluntarily and one in which an officer stops a car. In Hudgins, the officer followed a car that had run a stop sign. Using a loud speaker, the officer ordered the man get out of the car and told him to go to the rear of the car. When stopped, Hudgins did not have a valid license. He was arrested and placed in the patrol car handcuffed. His car was searched. The court rejected the defendant's argument the search was not proper as incident to the arrest, saying that a search of an automobile is generally reasonable even if the defendant has already been removed from the automobile and is under the control of the officer. The court stated:

> Where the officer initiates the contact with the defendant, either by actually confronting the defendant or by signalling confrontation with the defendant, while the defendant is still in the automobile, and the office subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of Belton and will be upheld as reasonable. [citations omitted.] . . . Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the automobile. . . . However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-

> line rule, and a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary.

Hudgins at 119 [emphasis added].

In United States v. Tobon-Sierra, 954 F. Supp. 73 (S.D.N.Y. 1997), the defendant was involved in an undercover purchase of contraband. The defendant accompanied the buyer in a separate car and stayed in his car while the buyer went inside a McDonald's to speak to an informant. While the buyer was still inside, the informant came out to talk to the defendant. Soon DEA agents began arresting the conspirators. Agents in DEA jackets began moving toward the defendant's car. The defendant turned around and saw the agents and got out of the car. The court in Tobon-Sierra, adopted the reasoning of Hudgins, concluding that the defendant left the car as a result of contact initiated by the DEA agents.

In Commonwealth v. Santiago, 575 N.E. 2d 350 (Mass. 1991), the officers had obtained a search warrant for the defendant's residence. They waited outside the residence in unmarked vehicles for the defendant to arrive. The defendant drove up and parked his car on the street in front of his apartment. He opened his car door and began to step out, making a motion underneath the driver's seat. After the defendant was out of the automobile, an officer grabbed him and escorted him away from the vehicle. Another officer was then told to look under the seat where he discovered contraband. The Massachusetts Supreme Judicial Court held that the search could not be upheld as incident to the arrest because the defendant was already out of his car by the time the officers

approached and apprehended him. He was inside the apartment when the actual search of the car took place. For that reason, the automobile was no longer within the defendant's immediate control and there was no danger that he could draw a weapon or attempt to conceal or destroy evidence within the car. Santiago, at 353-354.

In United States v. Strahan, 984 F. 2d 155 (6th Cir. 1993), officers followed the defendant whom they knew was wanted for robbery. They watched as he parked his car behind a lounge. The officers believed the defendant rushed out of the car because they recognized the police vehicle. An officer flew out of his car in time to intercept the defendant who was headed for the lounge. The officer apprehended the defendant about thirty feet from his car. The car was then searched. The court held that because the defendant was apprehended away from his vehicle, Belton did not apply. The court reasoned that the police did not make an arrest of an occupant of the vehicle. For that reason, Chimel governed the search of the car. Because the passenger compartment was not within the defendant's immediate control at the time of the arrest, the search was not incident to a lawful arrest.

In the instant case, the District Court cites State v. Johnson, 696 So. 2d 880 (Fla. 5th DCA 1997),[5] for the proposition that the occupant of a vehicle cannot avoid the consequences of the

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[5] The Florida Supreme Court has accepted jurisdiction to review Johnson. Johnson v. State, Case no. 91,328, review granted November 17, 1997. Although review was granted on another issue (the request for the defendant to remove his hands from his pockets), the Supreme Court has jurisdiction to review the entire decision.

Belton rule by stepping outside of the automobile as the officer approaches. While this may be true if the officer confronts a suspect while he is in the car, or signals a confrontation while the suspect is still in the car, or if the record is clear the suspect jumped out of the car at the sight of the officers, the rational does not apply in this case. In Johnson, the vehicle was parked in a parking garage. As officers on bicycles approached, the occupants of the vehicle got out of the car. The officer asked if he could talk to the driver. The driver approached and placed his hand in his pocket. When the officer asked the driver to remove his hand from his pocket, the driver actually emptied his pocket to reveal contraband. Id. at 882. Johnson can be distinguished from this case because it seems the occupants in Johnson got out of the car at the sight of the officers approaching. That would be the logical conclusion to be drawn from the court's statement that the "occupants" could not avoid the consequences of Belton by exiting the vehicle.[6]

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[6] See People v. Savedra, 907 P. 2d 596 (Colo. 1995), in which an officer was looking for a suspect with outstanding warrants. He drove into the apartment complex where the suspect lived and saw two men sitting in a pick up truck backed into a parking space. The two men got out of the truck when they saw the officer. The officer pulled in front of the truck and made contact with the men in the area in front of the truck and asked for identification. The officer took the men's identification cards and discovered a warrant for the defendant and that his license had been revoked. He returned to the men and arrested the defendant. By that time, approximately five minutes had passed. The defendant was handcuffed and placed in the patrol car. The officer then looked under the driver's seat and discovered contraband. Id. at 597-598.

The Savedra court reasoned that because the men jumped out of the truck at the sight of the officer, they could not avoid the consequences of Belton.

In this case, when the Petitioner drove up to the house the officers were already there. (R117) Detective Maney said he was parked outside the residence when the Petitioner arrived. (R117) He was in uniform. (R25) The Petitioner got out of the car and approached the right rear of the car before the detective got out of his car and approached. (R117) Maney arrested the Petitioner, placed him in handcuffs, and took him in the house. (R120) Maney then returned to the car to search it. (R118, 121)

What is important in this case, however, is the fact we do not know if the door to the car was locked. We also do not know, but can assume, that the Petitioner did not jump out of the car at the sight of the officers as in and Johnson and Savedra (907 P. 2d 596). The Petitioner drove up to a house at which an officer was parked and there is no evidence to suggest he exited the car because of the officer. The state had the burden of establishing these facts but failed to do so.[7] Bennett at 966; Belton. In this case, what is clear is that the officer did not confront the Petitioner while he was in the car, nor did the officer signal confrontation while the Petitioner was in the car. Under the

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[7] The burden is on the state to show that a warrantless search comes within one of the recognized exceptions to the warrant requirement, e.g., pursuant to a lawful arrest. Engle v. State, 391 So. 2d 245, 146 (Fla. 5th DCA 1980). The defendant's sole burden is to show the absence of a warrant. The burden then shifts to the state to demonstrate that the police acted within a recognized exception to the warrant requirement. Irons v. State, 498 So. 2d 958 (Fla. 2d DCA 1986); Woolley v. State, 459 So. 2d 1101, 1102 (Fla. 2d DCA 1984), petition for review denied, 466 So. 2d 218 (Fla. 1985); Walker v. State, 433 So. 2d 644, 645 (Fla. 2d DCA 1983); Morales v. State, 407 So. 2d 321, 325 (Fla. 3d DCA 1981); See also, Forrester v. State, 565 So. 2d 391, 393 (Fla. 1st DCA 1990).

appropriate Chimel analysis, the officer could not search the car. The officer admitted that at the time he approached the Petitioner he could only request identification because the Petitioner had not done anything wrong. (R117) The officer had no idea narcotics would be in the vehicle. (R118) The officer was standing with the Petitioner at the rear of the vehicle when he arrested the Petitioner. (R120) The officer placed the Petitioner in handcuffs and took him inside the house. (R120) The car was not searched until after the Petitioner was taken into the house. Chimel allows an officer to search the person taken into custody and only the immediate surrounding area into which he or she might reach in order to obtain a weapon or destroy evidence. Chimel 395 U. S. at 763. The Petitioner could not reach into the car.

For these reasons, the decision of the Second District Court of Appeals should be reversed. The Petitioner was clearly away from the car before any probable cause arose to arrest him. At the time of his arrest the car was not within his immediate control.

CONCLUSION

In light of the foregoing arguments and authorities, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Second District Court of Appeals with instructions that the case be remanded to the trial court for discharge of the Petitioner.

APPENDIX

Kennedy and Dubord concede that the filing of this civil action rowing out of the criminal prosecution does not itself operate to vaive any attorney-client privilege which resulted from obichaud's criminal defense. Instead they advance the remarkble argument that Robichaud's uncontradicted trial testimony—hich resulted 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 urtherance of a fraud (upon the criminal court) and the commision 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 id 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 llege and produce prima facie evidence that Robichaud affirmavely sought the advice of counsel to procure a fraud. *See Florida lining & 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 ace to be privileged, the party seeking disclosure bears the burden 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 vailable record suggests, would virtually eliminate the attorneylient privilege in any suit where there was any allegation of raud 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 r his future commission of a fraud or crime" and that these onfidential communications resulted in his "tailored stimony" in the criminal trial. They point to no evidentiary asis in support of this proposition presented to the trial court. nd rely instead in defense of the trial court's order upon conlusory accusations of criminal conduct on the part of Robichaud, hile not disclaiming criminal complicity as well on the part of rmer 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 communicaons presumptively protected by the attorney-client privilege parted from the essential requirements of law.

Certiorari granted and the order of the trial court requiring sclosure of attorney-client communications quashed. (CAMPELL, A.C.J., and WHATLEY and NORTHCUTT, JJ., Concur.)

* * *

riminal law—Evidence—Search and seizure—Error to supress methamphetamine and drug paraphernalia obtained durg lawful search of defendant's car incident to arrest on outnding warrant—Error to conclude that where an individual s exited a vehicle and subsequently is arrested on outstanding arrant, search of vehicle is unlawful—Circumstances of instant se clearly fell within *Belton* rule that when a law enforcement ficer has made lawful custodial arrest of occupant of automole officer may, incident to arrest, search the passenger comartment of that vehicle—Nexus between arrest of occupant of hicle and subsequent search of that vehicle is not required—fendant does not have to be in vehicle at time of arrest and bsequent search in order for search to be valid

ATE OF FLORIDA, Appellant, v. ROBERT A. THOMAS, Appellee. 2nd trict. Case No. 97-03576. Opinion filed May 15, 1998. Appeal from the cuit Court for Polk County; Robert E. Pyle, Judge. Counsel: Robert A. terworth, Attorney General, Tallahassee, and Patricia E. Davenport, Assis: Attorney General, Tampa, for Appellant. James Marion Moorman, Public fender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appee.

(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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rch of the defendant's vehicle revealed contraband. The Fifth trict Court, citing *State v. Bennett*, 516 So. 2d 964 (Fla. 5th A 1987), concluded that the search of the defendant's vehicle s not a search incident to a valid arrest. *See Howard*, 538 So. at 1280.

The trial court's reliance on *Howard* is misplaced. In a more ent Fifth District Court decision, *State v. Saufley*, 574 So. 2d 07 (Fla. 5th DCA 1991), the Fifth District upheld the search of ehicle 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 ested for driving under the influence. When the officer placed n *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- ntless search of a vehicle could not validate the subsequent arch. *See id.*

We can think of few incidents where a driver will not be out of e vehicle when an arrest is made. Therefore, as long as the rest is not under a preplanned pretext to conduct a warrantless arch of the driver, we conclude that the bright line test in *Belton* pplies. Thomas's arrest was not a pretext to carry out a pre- anned 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 fect his arrest.

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

* * *

xation—Documentary stamp—Error to assess additional cumentary 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- aser within meaning of statute, which provides that purchaser real estate is required to pay documentary stamp tax, no addi- nal 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 property and stock issued by corporation acquired value uivalent to that of real property transferred

JRO, INC., Appellant, v. STATE OF FLORIDA, DEPARTMENT OF EVENUE, Appellee. 2nd District. Case No. 97-03021. Opinion filed May 15, 98. Appeal from the State of Florida, Department of Revenue. Counsel: C. muel Whitehead, Sarasota, for Appellant. Robert A. Butterworth, Attorney neral, Tallahassee, and James McAuley, Assistant Attorney General, Talla- ssee, for Appellee.

HREADGILL, Judge.) Kuro, Inc., challenges a final order of e Department of Revenue (DOR), which assesses an additional cumentary stamp tax of $4,207, collectively, on conveyances eight unencumbered condominium units to Kuro. The final der concluded that stock issued by Kuro in exchange for the ndominiums constituted consideration therefor, and that, pur- ant to the applicable statutes and rules, such consideration was ual to the fair market value of the condominiums, which was 18,000. The documentary stamp tax was thus based on that ount. 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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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia E. Davenport, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 8th day of September, 1998.

Respectfully submitted,

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/cjd