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FILED
SID J. WHITE
SEP 4 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

BRUCE PAYTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 93,~~563~~ 653

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

A. VICTORIA WIGGINS
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FLORIDA BAR NUMBER 0081019

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

On February 8, 1996, the State Attorney for the Twelfth Judicial Circuit in and for Manatee County filed an information charging the Appellant, BRUCE PAYTON, with possession of cocaine in violation of Section 893.13(6)(a), Florida Statutes (1995) (R4-5). This charge arose from events which allegedly took place on January 25, 1995 (R4). Payton filed a motion for suppress on June 21, 1996. On July 18, 1996, the Honorable Janette Dunnigan, Circuit Court Judge, conducted a hearing on Payton's motion to suppress (R23-51).

At the hearing, Officer Kevin Carmichael of Bradenton Police Department testified that he was on road patrol at approximately 8:30 p.m. on January 25, 1995 when he observed Payton's vehicle. Officer Carmichael observed that one of the four taillights on Payton's vehicle was out (R26,31). Officer Carmichael was driving alone in a marked car and wearing an uniform (R26). Officer Carmichael had previously stopped vehicles for having inoperable taillights which was a civil infraction (R26,27). As Officer Carmichael approached the vehicle, Payton got out of the vehicle and started to walk away (R27). Officer Carmichael ordered Payton to return to his vehicle. As Payton entered his car, Officer Carmichael scanned the inside of the car and noticed a container on the floorboard. The contents of the container were little white squares which appeared to be rock cocaine (R28,32). He called for backup, and secured Payton. When the officer opened the container, he found pieces of rock cocaine. After Payton had been advised of

his *Miranda* rights, he admitted to purchasing the cocaine at a party for approximately $15.00 a piece (R29). Officer Carmichael did not issue Payton a traffic citation (R30). Officer Carmichael admitted that he did not see Payton committing a crime or preparing to commit a crime (R31).

The trial court denied Payton's motion to suppress based on the officer's testimony that there was a civil infraction (R35). Payton entered a plea of no contest to the charge of possession of cocaine, reserving the right to appeal the trial court's dispositive ruling (R12-13,44-49). The trial court accepted Payton's plea as being freely and voluntarily given. At that time, the trial court withheld adjudication, and ordered Payton to pay $253.00 in court costs within 60 days (R49-50).[1] Payton timely filed his notice of appeal on July 24, 1996 (R17).

On July 31, 1998, the Second District Court of Appeal dismissed Payton's appeal and certified conflict with the Fourth District's decisions in Waite v. City of Lauderdale, 681 So. 2d 901 (Fla. 4th DCA 1996) and Schultz v. State, 700 So. 2d 56 (Fla. 4th DCA 1997), review granted, 707 So. 2d 1127 (Fla. 1998).

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[1] On December 12, 1997, the trial court filed the Judgment and Sentence *nunc pro tunc* to July 18, 1996, the date of sentencing. (See Appendix).

SUMMARY OF THE ARGUMENT

The trial court's order is appealable even though the trial court withheld adjudication of guilt and did not place Payton on probation or community control. Although the Second District Court of Appeal has held such orders to be non-final which cannot be appealed, the Fourth District Court of Appeal has held that such orders are appealable because the statutory definition of "conviction" is "a determination of guilt regardless of whether adjudication was withheld or whether the sentence was suspended." §921.921.0011, Fla. Stat. (1995); Fla.R.Crim.P. 3.703. Thus, a withhold of adjudication can be scored as a prior conviction. Since the trial court's order in this case could have future consequences, Payton should be granted the right to appeal the trial court's order.

The trial court erred in denying Payton's motion to suppress because the officer lacked reasonable suspicion of criminal activity. The Second District Court of Appeal has held that an investigatory stop is illegal when the defendant is stopped for having one of *four* taillights inoperable. The applicable statute requires a person to have *two* taillights which are operable. The officer in the instant case acknowledged that Payton had *three* taillights which were working. Moreover, the officer did not issue Payton a traffic citation, and admitted that he did not see Payton involved in any criminal activity. Thus, this Court should reverse the trial court's order, and release Payton from any criminal liability arising from this case.

ARGUMENT

ISSUE I

THE TRIAL COURT'S ORDER IMPOSING COURT COSTS WITHOUT IMPOSING PROBATION WHILE WITHHOLDING ADJUDICATION IS AN APPEALABLE ISSUE.

A "conviction" is defined in Chapter 921 of the Florida Statutes as a "determination of guilt that is the result of a plea or trial, regardless of whether adjudication was withheld." § 921.0011(2), Fla. Stat. (1995). Florida Rule of Criminal Procedure 3.703(d)(6) defines a "conviction" for purposes of the sentencing guidelines as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." Fla.R.Crim.P. 3.703 (1995). These definitions suggest that there could be future consequences from an order withholding adjudication of guilt just as there are with orders adjudicating the defendant guilty. For this reason, the Fourth District Court of Appeal has held orders which only impose court costs and withhold adjudication are appealable. Schultz v. State, 700 So. 2d 56 (Fla. 4th DCA 1997); Waite v. City of Ft. Lauderdale, 681 So. 2d 901 (Fla. 4th DCA 1996). These decisions conflict with the Second District Court's decision in Martin v. State, 600 So. 2d 20 (Fla. 2d DCA 1992).

In Martin, the defendant was charged with grand theft. She had a jury trial and was found guilty of petit theft. The trial court withheld adjudication and imposed court costs without ordering the defendant to serve probation or community control.

Martin, 600 So. 2d at 21. The court held that the order was not appealable since it did not place the defendant on probation and was not a final judgment of guilt. Stating that a verdict alone without an adjudication of guilt cannot be appealed, the court cited to McAllister v. State, 418 So. 2d 1203 (Fla. 5th DCA 1982). Id. at 21-22. However, the court in McAllister did not mention whether the trial court withheld adjudication of guilt. In McAllister, the defendant filed a notice of appeal specifying the appeal was from the "final orders of finding guilt by the jury." McAllister, 418 So. 2d at 1203. The court allowed the defendant to file an amended notice of appeal explaining that the verdict alone was not appealable. Id. at 1204.

In the instant case, Payton did not have a jury trial, but pled no contest to the charges after the trial court denied his motion to suppress. Therefore, the trial court's order withholding of adjudication was the only determination of guilt. Since the trial court's order falls within the statutory definition of "conviction" in regards to the sentencing guidelines scoresheet, the trial court's "withhold of adjudication" would be scored as a prior conviction. This Court should grant Payton the right to appeal the trial court's order.

ISSUE II

THE TRIAL COURT ERRED IN DENYING PAYTON'S MOTION TO SUPPRESS WHERE THE OFFICER HAD NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

To make a valid reasonable stop of an automobile, the officer must have a "founded" or a reasonable suspicion that the person committed, is committing, or is about to commit a crime. Popple v. State, 626 So. 2d 185, 186 (Fla. 1993); Wilhelm v. State, 515 So. 2d 1343 (Fla. 2d DCA 1987). In order to protect a citizen's Fourth Amendments rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion will not support a stop. Popple, 626 So. 2d at 186. An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. The decision to stop a vehicle is only reasonable if the police officer believes a traffic violation has occurred. Whren v. United States, __ U.S. ___,116 S. Ct. 1769 (1996); State v. Kinnane, 689 So. 2d 1088 (Fla. 2d DCA 1997); State v. Stachell, 681 So. 2d 802 (Fla. 2d DCA 1996).

In Wilhelm, the officers were parked in front of a bar chatting to a bouncer when the defendant drove by. As the defendant passed the bar, the bouncer informed the officers that the defendant had recently been banned from the bar for selling drugs. Wilhelm, 515 So. 2d at 1343. The officers followed the defendant for seven blocks. Although the defendant's driving was without incident, the officers noticed that one of the four

taillights was inoperable. They stopped the defendant, and all parties exited their vehicles. Another officer arrived on the scene. As one officer questioned the defendant about his license, the other two officers searched the vehicle by shining their flashlights into the window. The officers saw what appeared to be the butt of a hand-rolled cigarette on the floor and a marijuana seed on the front seat. Without advising the defendant of his *Miranda* rights, the officers asked the defendant whether he smoked and whether he rolled his own cigarettes. The defendant answered that he did smoke, but he did not roll his own cigarettes. The officers continued their search, and found several butts of hand-rolled cigarettes, two full-length rolled cigarettes, and a bag containing 60 grams of marijuana. Wilhelm, 515 So. 2d at 1343-1344. The trial court denied the defendant's motion to suppress on the premise that if the defendant had an inoperable taillight, then the stop may have been valid. Id. at 1344. The court held that the trial court erred by denying the motion to suppress because the defendant did not commit a traffic violation. The defendant had three operable taillights which complied with the applicable statute, § 316.221, requiring vehicles to have at least two tail-lights. Id. at 1345.

The facts in the instant case are remarkably similar to those in Wilhelm. According to the officer's testimony in the instant case, he did not see Payton commit any crime or preparing to commit a crime. Payton's vehicle had one taillight inoperable which was not a traffic violation because his vehicle had three operable

taillights. Thus, there was no basis for the officer to have a reasonable suspicion of criminal activity to justify stopping Payton. This Court should reverse the trial court's denial of Payton's motion to suppress, and discharge Payton from all criminal liability arising from this case.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reverse the decision of the Second District Court of Appeal.

APPENDIX

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 96-272 F

BRUCE PAYTON,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This matter is before the court on the Defendant's Motion to Suppress. The Court has carefully reviewed the Motion, conducted a hearing on the matter, and is otherwise duly advised in the premises. It is,

ORDERED AND ADJUDGED that the Defendant's Motion is DENIED.

DONE and ORDERED *nunc pro tunc* to July 18, 1996, in Chambers in Bradenton, Manatee County, Florida, this 12 day of Dec, 1997.

Janette Dunnigan, Circuit Judge

Copies provided by Judge's Office to:

- Eduardo Brodsky, Assistant State Attorney
  1112 Manatee Avenue West
  Bradenton, Florida 34206

- Frederick Wernicke, Assistant Public Defender
  920 Manatee Avenue West
  Bradenton, Florida 34205

A

IN THE CIRCD COURT IN AND FOR MANATEE UNTY, FLORIDA

FILED
R. B. SHORE
JUL 18 1996
CLERK OF CIRCUIT COURT

STATE OF FLORIDA
-vs-
Bruce Payton

CASE NUMBER
96-272F

JUDGMENT

YOU, THE ABOVE NAMED DEFENDANT, being now before the Court, being represented by Fred Wernicke, Asst Pub Defender, the attorney of record, and the state represented by Eduardo A. Brodsky, and having:

____ been tried and found guilty by jury/court of the following offense(s

____ entered a plea of guilty to the following crime(s)

_x_ entered a plea of nolo contendere to the following crime(s)

to the offense(s) of:

COUNT	CHARGE	STATUTE	DEGREE
I	Possession of Cocaine	893.13(6)(a)	3F

as set forth or included in the information filed in this Court, the Court ~~(adjudges that you are guilty~~) (withholds adjudication) of said offense(s).

SENTENCE

Inquiry having been made of the defendant why sentence should not now be imposed and the defendant saying nothing that could influence the Court in its decision, it is further ADJUDGED THAT SAID DEFENDANT BE (sentenced to) ~~(placed on probation for a period of)~~ pay court costs of $253.00 within 60 days.

DONE AND ORDERED in open Court at Bradenton, Manatee County, Florida, this 11th day of Dec., 1997.
Nunc Pro Tunc to 7-18-96

FILED
R. B. SHORE
DEC 12 1997
CLERK OF CIRCUIT COURT

JUDGE Janette C. Dunnigan

B

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BRUCE E. PAYTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 96-03127

Opinion filed July 31, 1998.

Appeal from the Circuit Court for Manatee County; Janette Dunnigan, Judge.

James Marion Moorman, Public Defender, and A. Victoria Wiggins, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Johnny T. Salgado, Assistant Attorney General, Tampa, for Appellee.

PATTERSON, Judge.

Bruce Payton appeals from an order which withholds adjudication for possession of cocaine, does not place Payton on probation, and imposes court costs.

C

This court held in Martin v. State, 600 So. 2d 20 (Fla. 2d DCA 1992), that an order withholding adjudication without imposing probation is not an appealable order. Based on Martin, we treat the appeal as a petition for writ of certiorari, strike the $253 in costs, and otherwise dismiss the appeal. In doing so, we certify conflict with the Fourth District's decisions in Waite v. City of Ft. Lauderdale, 681 So. 2d 901 (Fla. 4th DCA 1996), and Schultz v. State, 700 So. 2d 56 (Fla. 4th DCA 1997), review granted, 707 So. 2d 1127 (Fla. 1998).

CAMPBELL, A.C.J., and NORTHCUTT, J., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to John T. Salgado, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 1 day of September, 1998.

Respectfully submitted,

A. Victoria Wiggins

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/avw