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IN THE SUPREME COURT OF FLORIDA

BRUCE PAYTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,653

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

The trial court's order is not appealable when the trial court withheld adjudication of guilt and did not place the Petitioner on probation. Such an order by the trial court in this case was non-final because the trial court offered to withdraw probation if the Petitioner guaranteed payment of court costs. Therefore, the trial court's non-final order should not be appealable.

As to Petitioner's Issue II, the State's position is the following. The officer conducted a traffic stop because the vehicle had an inoperable taillight. Appellant stopped his vehicle, got out of it, and began to walk away from his car. The police officer properly requested the Appellant to return to his vehicle. When the officer approached the car, he observed cocaine in plain view on the car's floorboard. The trial court correctly found that the traffic stop was valid, and the denial of the motion to suppress was properly affirmed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S ORDER IMPOSING COURT COSTS WHILE WITHHOLDING ADJUDICATION AND WAIVING PROBATION IS AN APPEALABLE ISSUE?

(as restated by respondent)

A trial court in Florida has authority to refrain from entering any judgment of guilt at all. It may withhold an adjudication of guilt if the judge places the defendant on probation. In the instant case, the Petitioner was neither placed on probation nor adjudicated. The trial court found the Petitioner's plea to be entered freely, voluntarily, and intelligently, and accepted it. The trial court withheld adjudication on the offense of possession of cocaine and ordered the Petitioner to pay court costs.

After the Petitioner entered his plea, the trial court informed the Petitioner that if he failed to pay court costs, Petitioner would be held in contempt and sentenced to six months in the county jail. (R. 46). During the plea, the trial court provided a deal for the Petitioner that, if he guaranteed payment of the court costs, he would be spared probation. (R. 39, 43). It is the State's position that since the Petitioner's order was conditional, the order was nonfinal and therefore not appealable.

Although the two decisions from the Fourth District[1] conflict with the Second District Court's decision in Martin v. State,[2] they do not conflict with the case at bar, Payton v. State, because Payton is factually distinguishable. In Payton, the case involved the Petitioner entering a plea of no contest in which the trial court withheld adjudication and waived probation. This was done because of an agreement reached between the State and defense counsel that court costs be in imposed in lieu of probation with the condition that the defendant guarantee payment within sixty days. The trial court approved the conditions agreed upon between counsel and obtained the Petitioner's assurances that he would pay the court costs within sixty days. (R. 43). Consequently, the trial court's act created a nonfinal order because it became conditional based on the Petitioner paying court costs.

Under Florida Rule of Appellate Procedure 9.140, a defendant in a criminal case may only appeal the following types of orders: A final order adjudicating guilt; an order granting probation (whether or not guilt has been adjudicated); orders entered after final judgment or finding of guilt (including orders revoking or modifying probation); an illegal sentence; or a sentence when required or permitted by law.

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[1] 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).

[2] 600 So. 2d 20 (Fla. 2d DCA 1992)

The Second District Court of Appeal held in Martin that the lower court order withholding adjudication but imposing court costs was a nonfinal order and hence nonappealable. Moreover, the order in Martin, as in Payton, did not place the appellant on probation. Martin cites McAllister v. State, 418 So. 2d 1203 (Fla. 5th DCA 1982) for the proposition that a jury verdict alone without an adjudication of guilt may not be appealed. The State concludes, as did the Second District in Martin, that no final judgment became final in the case at bar so as to permit an appeal. Therefore, the appeal was properly dismissed.

ISSUE II

THE TRIAL COURT PROPERLY DENIED THE PETITIONER'S MOTION TO SUPPRESS WHERE THE OFFICER HAD REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

(As restated by Respondent)

Respondent adopts the same argument to this issue that the State submitted to the Second District Court of Appeal. That argument is the following: "In determining whether an officer possesses a reasonable or well-founded suspicion of criminal activity so as to justify an investigatory stop, 'the totality of the circumstances--the whole picture--must be taken into account.'" Freeman v. State, 559 So. 2d 295 (Fla. 1st DCA 1990); State v. Anderson, 591 So. 2d 611 (Fla. 1992).

In the instant case, Officer Carmichael testified that he was on road patrol when he observed that one of the taillights on Appellant's vehicle was out. (R. 26). As Officer Carmichael approached Appellant's vehicle, Appellant got out and started walking away. (R. 27). Officer Carmichael testified that he ordered Appellant to return to the car. (R. 28) After several requests, the officer had the Appellant get back in his vehicle. When the officer approached Appellant, he noticed, inside Appellant's car on the floor, a container that contained rock cocaine.

Officer Carmichael believed Appellant's behavior, of walking away from his car when stopped for a traffic infraction, was suspicious. The State must prove that a reasonable officer, under

the same circumstances, would have stopped the vehicle absent an additional invalid purpose. Kehoe v. State, 521 So. 2d 1094 (Fla. 1988). "To justify such a stop and detention, a law enforcement officer must have a 'founded suspicion' based upon factual observations in light of his knowledge and experience that the person has committed, is committing, or is about to commit a crime." Curry v. State, 532 So. 2d 1316 (Fla. 1st DCA 1988); Section 901.151, Fla. Stat. (1993).

Defense counsel argued that the stop was pretextual and that Wilhelm v. State, 515 So. 2d 1343 (Fla. 2d DCA 1987), was controlling and mandated that Appellant's motion to suppress be granted because "This is a car with four rear taillights. Three of the four were operating. I clearly asked the officer if -- I asked him does it have four lights, and he said yes and that one of them was out. The car still has lights on either side." (R 33).

The prosecutor responded that:

> "the officer testified that the right side taillight was out, and when he was asked to particularly describe the make and the model, he couldn't remember. And so I don't think that he said that there were more taillights that were on. He said that the right-side taillight side was out, and that's the reason he stopped the car."

(R 34)

The prosecutor went on to note that the U.S. Supreme Court had recently held that a law enforcement officer's subjective reason for stopping a motor vehicle does not matter so long as "the officer is

making a stop based on a traffic infraction." (R 34-35). The trial court then stated that, based on the evidence presented, "I do not feel that this was -- there was no evidence that this was a pretextual stop." (R 35).

Defense counsel then stated that he was not arguing that the stop was pretextual but rather that there was no traffic infraction, adding, "And what the officer clearly did state was that it had four taillights, regardless of what type of car it was, and one taillight was out." (R 35).

The trial court replied: "And I find that the officer testified to my satisfaction that there was a civil infraction and that this was a valid stop." (R 35). Petitioner pled nolo contendere pursuant to a plea agreement that adjudication be withheld but that he pay court costs of $253.00. (R 13, 36, 38-44, 48). In the negotiations with the prosecutor, it was contemplated that Appellant would be placed on probation, subject to early termination, upon payment of the court costs, but defense counsel asked if there was "a way of doing it" without placing Appellant on probation, and the trial court stated that it could do that. (R 38-39).

The trial court's finding that a civil infraction had occurred was supported by the evidence presented at the suppression hearing. The arresting officer testified that Appellant's car had a taillight out on the right side. (R 26). He did *not* testify either that

Appellant's car had two taillights on each side or that Appellant's car had one working taillight on the right side as well as one that was not working, nor was evidence to this effect presented through any other witness or any physical evidence. Defense counsel had ample opportunity to more fully cross-examine the officer on these factual issues and/or to present evidence on Appellant's behalf relating to these issues and chose not to do so.

Moreover, there was not even so much as a suggestion that the officer was actually motivated by an expectation of finding drugs in Appellant's car, thereby rendering suspect his veracity or his lack of certainty as to how many taillights Petitioner's car had. The trial court's ruling is clothed with a presumption of correctness, and this Court must review the evidence in the light most favorable to the trial court. E.g., Smith v. State, 378 So. 2d 281 (Fla. 1979); State v. Baldwin, 686 So. 2d 682 (Fla. 1st DCA 1996).

Under the circumstances of this case, the trial court could properly find, as it did, that the officer had probable cause to believe that Appellant had committed a traffic infraction and that the stop of Appellant's car was therefore valid. Because competent substantial evidence supports the trial court's factual finding, this Court is bound by it. See: Marsh v. Marsh, 419 So. 2d 629, 630 (Fla. 1982); Lynch v. State, 293 So. 2d 44 (Fla. 1974); State v. Moses, 480 So.2d 146 (Fla. 2d DCA 1985).

Based on the foregoing, the stop was proper and the trial court properly denied Appellant's motion to suppress. Since the traffic stop was legal, the subsequent search that discovered the crack cocaine was valid. Appellant continually ignored the officer's request to return to his vehicle. The officer's fear for his safety justified his request to have Appellant return to his car; whereupon the officer observed in plain view what was on the floor board of Appellant's car.

This evidence together with Appellant's suspicious behavior sufficiently establishes probable cause for the officer to believe that cocaine was in plain view. Once the probable cause requirement was met, it was proper for Officer Carmichael to seize the cocaine. State v. Stregare, 576 So. 2d 790 (Fla. 2d DCA 1991). Appellee respectfully requests that the instant appeal be denied as to the challenge to the trial court's denial of Petitioner's motion to suppress. A trial court in Florida has authority to refrain from entering any judgment of guilt at all.

CONCLUSION

WHEREFORE, Based on the foregoing facts, arguments, and authorities, the the decision of the district court should be upheld.

Respectfully submitted,

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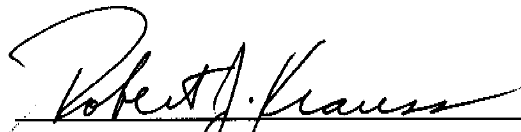

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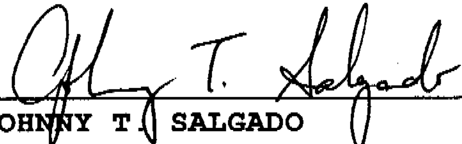

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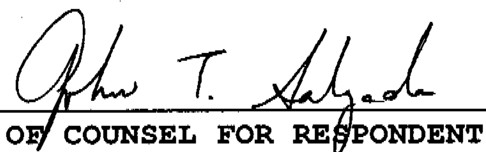
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been furnished by U.S. mail to A. Victoria Wiggins, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, FL 33831, on this 18th day of September, 1998.



OF COUNSEL FOR RESPONDENT