

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

v.

Case No. 95,222

JOCELYN PIERRE,  
Respondent.

ON DISCRETIONARY REVIEW  
FROM THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

**ANSWER BRIEF OF THE RESPONDENT  
ON THE MERITS**

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## STATEMENT OF THE CASE AND FACTS

The state omits a critical fact from its statement of the facts: the police officer who ordered Mr. Pierre from his car testified that Mr. Pierre was free to leave after he returned Mr. Pierre's license and registration. Only after the police officer had determined that Mr. Pierre was free to leave did the officer then request unqualified consent to search the vehicle for drugs and weapons.

The state's rendition of the facts is consistent with its rendition in the briefing to the Second District, but it is biased in favor of the state. The respondent offers the following rendition of Mr. Pierre's statement of the facts slightly modified from his initial brief to the Second District. The facts rendered in the opinion of the Second District, *Pierre v. State*, 732 So.2d 376 (Fla. 2<sup>nd</sup> DCA 1999), are, of course the only ones cognizable vis-a-vis resolving any potential conflict. A copy of the decision is attached to this brief for the convenience of the Court.

Mr. Pierre was charged by information with trafficking in 28-200 grams of cocaine, carrying a concealed firearm, and obstructing n officer without violence. R69-73. He moved to suppress the evidence, R79-82, lost at the hearing, R162-95, filed a motion for reconsideration, R 84-8, which was denied at a later hearing, R196-205. Mr. Pierre entered an open plea of nolo contendere reserving the right

to appeal the denial of the motion to suppress. R93-96. He was sentenced to 52.35 months incarceration, the bottom of the range. R113.<sup>1</sup>

Jocelyn Pierre was stopped by uniformed Tampa Police officer Mark Montague at about 6:30 p.m. on July 27, 1997. R65. Officer Montague stated that he observed Mr. Pierre, driving at 10 miles per hour, pass through a stop sign as he turned right onto Bougainvillea from 11<sup>th</sup> Street. R132. He followed Mr. Pierre for a couple of blocks to stop him at Aster, so that Mr. Pierre would have a place to turn off. R134. Mr. Pierre turned onto Aster when Officer Montague turned on his overhead lights and came to a stop. R135. Mr. Pierre gave Officer Montague the identification requested and Officer Montague ran a check on the ID. R137.

While the ID check was being made, two other patrol cars with uniformed officers pulled up for back up and stopped behind Officer Montague's vehicle. R137. Officer Montague testified he told the other officers that Mr. Pierre appeared to be nervous. R137. Officer McFarlane positioned himself on the passenger side of Officer Montague's patrol car. R138. The driver's license and the license plate check were fine. R138.

Officer Montague told Mr. Pierre the license check was fine. R139. He returned the license and, at that point, Officer Montague stated [in his deposition,

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<sup>1</sup> Mr. Pierre was also sentenced for a violation of probation arising from a 1995 case. The record of the 1995 case is included at R1-58 solely to preserve the adjudication on the violation should this Court reverse the suppression order.

not to Mr. Pierre] that Mr. Pierre was free to leave the scene. R141-42. Officer Montague testified he had no intention to issue a citation for the traffic infraction when he returned the license. R142. Officer Montague asked Mr. Pierre to turn off his engine, and he complied immediately with the instruction. R147. During the stop, a fourth patrol vehicle had arrived. R139.

Officer Montague then asked Mr. Pierre if he could search his vehicle for guns and drugs. Officer Montague testified that Mr. Pierre said “Sure, go ahead,” motioned with his hand towards the car, and made a wide turn as he walked away from Officer Montague. R139, 141. Montague testified he asked Pierre to stand with Officer MacFarlane, and Mr. Pierre said “Yes.” R139.<sup>2</sup> As Montague approached the car, he turned to make sure Mr. Pierre was not close, and he saw Mr. Pierre run away down the street. R139. The police gave chase, including Officer Montague, who got in his patrol car to assist. R139. Officer McFarlane caught Mr. Pierre and brought him back to the car. R156.

Officer Montague and Officer Prebich then searched the car. Montague found hard cocaine under the front seat, but it was not visible from outside the car or from sitting in the driver’s seat. R143-44. Officer Prebich found a gun in the arm rest area of the back seat. R146.

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<sup>2</sup> Mr. Pierre is Haitian and had an interpreter at court hearings. *See, e.g.*, R165.

Officer's Montague and McFarlane testified by depositions which were submitted to the court and considered on the motion to suppress. The state brought in Officer Prebich to testify at the motion hearing. Officer Prebich testified, contrary to the testimony of Officer Montague, that Officer Montague had already begun the search by entering the vehicle when Mr. Pierre ran. R181. Officer Prebich also testified, contrary to Montague's testimony, that Montague stayed with the car during the chase. R182.

Judge Espinosa ruled that Mr. Pierre was detained at the time of the search. R188. However, he found that Mr. Pierre had consented to the search of his car. R188. When Mr. Pierre ran, Judge Espinosa held that Mr. Pierre withdrew any consent to search his person. However, Judge Espinosa ruled that Mr. Pierre's flight did not constitute withdrawal of consent to search the car. Instead, the flight constituted abandonment of the vehicle. R189. Judge Espinosa also held that the search began after Mr. Pierre consented but before he ran.<sup>3</sup> R193. At the hearing on the motion for reconsideration, Judge Espinosa ruled that Mr. Pierre was illegally detained when he was arrested after he ran from the scene. R201. He

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<sup>3</sup> Although not argued in the facts in the brief to the Second District, respondent cited the irrefutable case law, conceded by the state, that consent may be withdrawn after a search has started. The ruling regarding the start of the search is therefore irrelevant other than to suggest the trial court may have grounded its ruling on matters which, in fact, had no bearing on the legality of the search.

reiterated his ruling that the search began before Mr. Pierre ran. R201. He further ruled that the car was on a public roadway and that Mr. Pierre relinquished any expectation of privacy when he ran away. R202.

The Second District reversed. *Pierre v. State*, 732 So.2d 376 (Fla. 2<sup>nd</sup> DCA 1999). The court held:

The single issue to resolve in this case is whether there was a legal basis to conduct a warrantless search of the vehicle. We agree with the trial court that there was a legal basis to stop Pierre's vehicle for running a stop sign. See § 316.640, Fla. Stat. (1997). Also, Officer Montague did not violate Pierre's Fourth Amendment rights by asking him to exit the vehicle following a valid traffic stop. See *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). Because Pierre was free to leave when the officer asked for permission to search the vehicle, we conclude that at this point in the exchange there was only a consensual encounter between Officer Montague and Pierre. See *State v. Albritton*, 664 So.2d 1049 (Fla. 2<sup>d</sup> DCA 1995).

However, after Pierre consented to the search he ran, which requires a determination of whether he withdrew his consent. The supreme court has concluded that running constitutes a nonverbal withdrawal of consent to search. See *Jacobson v. State*, 476 So.2d 1282 (Fla.1985). See also *Nease v. State*, 484 So.2d 67 (Fla. 4<sup>th</sup> DCA 1986). If Pierre withdrew his consent to search when he ran, we know of no existing probable cause present at that moment to permit the officers to chase Pierre and take him into custody. Therefore, we conclude that Pierre's arrest for obstructing an officer without violence cannot stand.

[The Second District then considered and rejected the argument that the search was justified because Mr. Pierre's flight constituted abandonment. The court concluded the vehicle was not abandoned after Mr. Pierre was illegally arrested and returned to his vehicle.]

We reverse the trial court's order denying the motion to suppress because Pierre withdrew his consent when he ran. Thereafter, when Pierre was returned to his vehicle, it could no longer be said that he had abandoned his vehicle. Accordingly, because



there was no probable cause to detain Pierre prior to the search, nor after he was returned, but for the illegal arrest and detention of Pierre, the search of the vehicle could not proceed.

732 So.2d at 378-79.

## **SUMMARY OF THE ARGUMENT**

The critical distinguishing fact in this case is that Mr. Pierre was free to leave after Officer returned his identification documents. The case law cited by the state involves circumstances where the suspects were not free to leave because the police had not completed their investigation or satisfied themselves that the suspect posed no danger. In this case, the officer's testimony that Mr. Pierre was free to leave inherently includes the officer's conclusion that he no longer had a reasonable concern for his safety requiring an involuntary search of the vehicle. This is buttressed by the fact that the officer's next act was to seek an unqualified consensual search of the vehicle for drugs as well as weapons. Had the officer had a continuing concern for safety, he would have conducted an involuntary weapons search of the vehicle rather than unnecessarily seeking the consensual search for drugs.

## ARGUMENT

### ISSUE

**THERE IS NO CONFLICT WITH *STATE V. DILYERD*, 467 SO.2D 301 (FLA. 1985). THE FACTS GIVEN IN THE LOWER COURT DECISION CLEARLY SHOW THAT THE OFFICER HAD RESOLVED ANY SAFETY CONCERN BEFORE SEEKING CONSENT TO SEARCH. INVOLUNTARY SEARCHES ARE PERMITTED ONLY WHEN THE OFFICER HAS A REASONABLE CONCERN FOR SAFETY AT THE TIME HE MAKES THE SEARCH.**

The facts of this case are distinguishable from the facts of *State v. Dilyerd*, 467 So.2d 301 (Fla. 1985) (conflict with *Michigan v. Long*, 463 U.S. 1032 (1983) is irrelevant as this Court's discretionary jurisdiction is confined to conflict with state cases), the cases the state has argued in its jurisdictional brief as being in conflict with the opinion below. In *Dilyerd*, the facts show that a deputy detained two teenagers found trespassing in a car on private property late at night. He testified at the hearing that he initially intended to send the teenagers off the property with a warning. The lone officer observed the passenger make a furtive movement under the seat. Apparently in response to this move, the officer called for back up. He waited until the back up officer arrived before he ordered the two occupants from the car. This apparently was for the sole purpose of searching the car for weapons before continuing the encounter. The officer found contraband and the encounter turned into an arrest.

In the instant case, the encounter between Officer Montague and Mr. Pierre was completed when Officer Montague returned the identification documents. Officer Montague testified that Mr. Pierre was free to leave at that moment. Only after the traffic stop was ended and Mr. Pierre was free to leave did Officer Montague then seek a consensual search of the car for drugs and weapons.

Officer Montague's request that Mr. Pierre exit his vehicle might be compared to the right of any officer to order a traffic offender from his vehicle for officer safety. This right to order an exit when there is a reasonable concern for officer safety is well-recognized in Florida, based on the Supreme Court precedent of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). *See, e.g., Howell v. State*, 725 So.2d 429 (Fla. 2<sup>nd</sup> DCA 1999) (recognizing *Mimms* but holding subsequent pat-down search of occupants illegal when there was no reasonable suspicion the occupants were armed).

However, there are limits to when an officer may order an occupant of a vehicle stopped for a traffic infraction from the vehicle. In *R.H. v. State*, 671 So.2d 871 (Fla. 3d DCA), *rev. denied*, 677 So.2d 841 (Fla. 1996), the officer ordered an occupant from the car because he vocally expressed a hostile attitude during the traffic investigation. Citing to various Florida cases relying on the *Mimms* decision to find various exits to be legal, the court held:

Even if these authorities, however, correctly reflect the law – which we do not directly hold – they do not apply in this case. This is

simply because safety had nothing to do with the command in question. Unlike the officers involved in many of the cited cases, Orenstein did not even suggest that it did. More important, **he did not initially make such an order** and never disturbed the two rear-seat passengers at all. It is therefore obvious that the order was issued to R.H. alone only because of his “hostile attitude.” This is not constitutionally enough.

**Although perhaps de minimis, see *Mimms*, 434 U.S. at 111, an order to exit a vehicle is a Fourth Amendment seizure, see *Popple v. State*, 626 So.2d 185 (Fla.1993); *Cooper v. State*, 584 So.2d 1124 (Fla. 4th DCA 1991), which must be supported – in the absence of a valid safety concern – by a founded suspicion of criminal activity which did not exist here. See also *Evans v. State*, 546 So.2d 1125 (Fla. 3d DCA 1989) (order to remove hands from pocket is seizure). Thus, in the almost identical situation presented in *Cooper*, the court suppressed contraband dropped by a passenger who had been ordered out of a properly stopped vehicle because his **erratic actions provided no reasonable basis either for the officer's professed concerns for his safety or for a suspicion of unlawful conduct.****

671 So.2d at 872 (emphasis added). *R.H.* relies on *Cooper v. State*, 584 So.2d 1124 (Fla. 4th DCA 1991), which advances the issue of when a *Mimms* exit is allowed. In *Cooper*, the suspect was sitting in the back seat, bouncing front to back and not sitting still. The officer stated he had concern for his safety. The *Cooper* court rejected such concern, finding the officer’s fears were raised solely by the rocking motion, which was not enough to justify a seizure by compelling an exit from the vehicle. The court held:

**We have not ignored the officer's testimony of fear for his safety**, nor have we disregarded our concern for that safety about which we have expressed ourselves in other decisions. **Nevertheless, it is incumbent upon a reviewing court to examine the facts –**

**aside from such statement – in the light of a citizen's constitutional protection.** We are less likely to lose such protection by cataclysm as we are by erosion in a case by case progression.

584 So.2d at 1125-26 (emphasis added).

*Cooper*, in turn, relied on *L. W. v. State*, 538 So.2d 523 (Fla. 3d DCA 1989),

which is almost directly on point with the instant case:

At approximately 10:55 on the night of February 19, 1988, a police officer pulled alongside a car occupied by four black males at a North Miami intersection. The defendant, L.W., was in the right rear seat and appeared nervous, according to the officer's testimony. The car pulled away from the intersection slowly, traveling approximately 20 m.p.h. in a 35 m.p.h. zone, which led the officer to believe that the driver might be under the influence of alcohol or drugs. The officer also observed a temporary tag inside the rear window. He testified that he could not read the expiration date on the tag, and that he believed that Florida law requires that a temporary tag be displayed on the rear bumper. He also testified that, as he followed the car, the occupants continued to turn around to look at him. The officer decided to pull the car over and, having so decided, **he then observed L.W. move in a manner which caused him to think that L.W. was hiding something under the rear seat.** The officer called for backup. When he stopped the car, he checked the driver's license and registration with the tag, and, while doing so, observed that the back seat was moved forward somewhat. The driver's documents proved to be in order, and no traffic citations were issued. When backup finally arrived, the officer ordered all occupants out of the vehicle, lifted the rear seat, and found a loaded firearm under L.W.'s seat. All of the occupants of the car were arrested. The Petition was filed and, in due course, appellant's motion to suppress was heard and denied by the court.

As far as the officer's right to initiate or conduct an investigatory stop is concerned, the observations relied upon by the officer were not sufficient to form a founded suspicion that criminal activity existed. *See Kehoe v. State*, 521 So.2d 1094 (Fla.1988). **We find that whatever justification the officer had to make the initial**

**traffic stop, based upon his inability to read the tag's expiration date, dissipated once the officer determined that the driver's license and registration documents were in order. At that point, L.W. should have been allowed to proceed on his way.** The evidence derived from the search at issue should have been excluded, and the trial court erred in denying appellant's motion to suppress.

538 So.2d at 524-25 (emphasis added).

Thus, even when an officer observes a nervous suspect make a furtive movement, the officer is not necessarily justified in ordering the individual from the vehicle. The facts are sufficiently similar that *L.W.* and *R.H.* would have to be deemed in conflict with the outcome sought by the state in the appeal to this Court.

In *L.W.*, even though the officer observed furtive movements giving rise to a concern for his safety, he continued the traffic stop to its conclusion. But, instead of allowing the car to leave, the officer kept the car and its occupants at the scene until back up arrived and he could order the occupants from the vehicle to conduct a search. In *R.H.*, the officer continued the stop even after the purported safety concern arose, refuting any legitimate claim to a concern for safety.

In the instant case, Officer Montague completed his traffic stop, returned the identification, and completed the traffic stop. Just as in *L.W.*, after the traffic stop was completed, there was no further basis for pursuing a search for officer safety. In *L.W.*, the suspects remained in the vehicle and could easily have retrieved the suspected gun and shot at the officer as they pulled away. But the fact that the

officer pursued his traffic investigation and completed it without conducting a search for safety eliminated any further need for a search to ensure safety, just as in this case, where Officer Montague's own testimony was that the traffic stop was completely over, and Mr. Pierre was free to leave. If anything, the completion of the traffic stop and the cessation of any justification for a safety search is even more clear in this case than in *L.W.*, thanks to the candor of Officer Montague.

In the instant case, Judge Espinosa correctly ruled that Mr. Pierre was detained when he was ordered from his car. However, he had to have been free to leave at the time he consented to the search of his car, or his consent would have been coerced, the search nonconsensual. Thus, Officer Montague believed he had to testify that Mr. Pierre was free to leave after he returned the identification. He had no right to have ordered Mr. Pierre from the car, based on the rationale of *L.W.* It is difficult to believe that the officer ever had any concern for safety after the initial stop, since several marked patrol cars and a number of armed and uniformed police officers were at the scene and around the vehicle. Any possible concern for safety which could conceivably have justified the order to exit the car was dissipated at the time the officer returned the identification. Mr. Pierre was free to leave, the concern for safety was dissipated, and the only way the officer could then search the car was to get the consent of Mr. Pierre to do so. The officer understood this at the scene, and his testimony is consistent with this.



Further, Mr. Pierre is a Haitian native who required a translator at every court hearing. He gave his purported voluntary consent after he had been ordered to turn off his ignition and exit from his vehicle. The order to exit came after the officer had already decided he was not going to charge Mr. Pierre for the traffic infraction.

Even if the order from the car was justified for purposes of officer safety, that purpose was achieved when Officer Montague returned the identification and Mr. Pierre (unbeknownst to him) was free to leave. Officer Montague no longer had a concern for officer safety, as he then (correctly) believed that the only justification to search Mr. Pierre's car after he was free to leave was to seek and receive voluntary consent.

The state now seeks to have the cake, eat it, and own the bakery as well. The officer testified Mr. Pierre was free to leave, a necessary prerequisite to rendering the consent voluntary. Such release was never communicated to Mr. Pierre. Now the state wants to ignore the "mental release" Officer Montague undertook in his own mind, and argues that no such release existed, that a valid concern for safety remained, and that the search of the vehicle could have been justified on that ground alone.

None of this was argued in the Second District, as the state failed to make any concerted argument vis-a-vis officer safety. The portion of the Second

District brief quoted in the merits brief to this Court indicates only a fleeting concern for safety justifying Officer Montague's order that Mr. Pierre form his vehicle. There was no argument that the officer safety rationale continued after the officer returned the identification papers, or after Mr. Pierre consented to a search. The Second District rejected the state's argument. It held that the encounter became a consensual encounter at the moment Mr. Pierre became free to leave. Inherent in that conclusion is acceptance of the unrefuted evidence that Mr. Pierre was indeed free to leave at that moment, pursuant to the testimony of Officer Montague. Officer Montague never testified that whatever concern he had for officer safety continued beyond the point he considered Mr. Pierre to be free to leave.

This might have been a different case if Officer Montague had not testified that Mr. Pierre was free to leave, and if Officer Montague had conducted a search for officer safety before allowing Mr. Pierre to re-enter his car or before seeking voluntary consent to search further (if contraband had not been found in the limited search permitted for officer safety). Had that been the case, the task for the courts would have been to determine whether the concern for officer safety was reasonable and whether the actions of the officer were the minimum reasonable response. *See, e.g., King v. State*, 696 So.2d 860 (Fla. 2<sup>nd</sup> DCA 1997) (reasonable concern for safety allows such minimum action as will allay officer's concerns).

The factual rendition offered by the Second District in its opinion shows that the district court relied on the factual assumptions that the officer claimed a concern for officer safety when he ordered Mr. Pierre to turn off the engine and exit his car and that Mr. Pierre was free to leave before he returned to his vehicle.

The district court held that the stop was valid, and that Officer Montague's order to exit the vehicle was justified by *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). *Mimms* addresses officer safety in the general context of the right of the officer to order a detainee from his car **during** a traffic stop. The Second District made no finding that the officer had the further right to conduct a nonconsensual search for weapons. Instead, the district court accepted the unrefuted testimony of Officer Montague that Mr. Pierre was free to go after the officer returned his identification papers: "Because Pierre was free to leave when the officer asked for permission to search the vehicle, we conclude that at this point in the exchange there was only a consensual encounter between Officer Montague and Pierre." *Pierre v. State*, 732 So.2d at 378.

The only legitimate inference from this factual situation is that Officer Montague no longer had a concern for the safety of himself or others at the moment he decided Mr. Pierre was free to leave, or he would have testified that Mr. Pierre was not free to leave because of the continuing concern for officer safety which could only be dispelled by an involuntary search of the vehicle.

Obviously, Officer Montague in this case believed the circumstances at the scene were closer to *R.H., Cooper*, and *L.W.*, rather than *Dilyerd*, and that consent was required to conduct the search. His testimony indicates that he had taken the minimum action necessary to allay his fears pursuant to *King*, and no further action was necessary. The Constitution permits the minimum reasonable intrusion necessary to allay an officer's reasonable fears, but no more. Officer Montague obviously felt that once he had removed Mr. Pierre from his vehicle, his fears were allayed. Mr. Pierre exited his car on an urban street during daylight hours after committing a minimal traffic infraction, surrounded by marked patrol vehicles and armed officers. That is a far cry from the facts of the cases relied on by the state, in which the circumstances justified a continued concern for officer safety.

In *State v. Louis*, 571 So.2d 1358 (Fla. 4<sup>th</sup> DCA 1990), cited by the state, a lone officer stopped a car for a traffic infraction. As he approached the driver roadside, the passenger exited the car and walked back and forth, disobeying repeated orders to stop moving. When the suspect placed his hands in the pockets of his bulky jacket which the officer reasonably feared might conceal a weapon, the officer drew his weapon and regained control of the situation. In the instant case, on the other hand, multiple armed officers backed up Officer Montague, Mr. Pierre obediently complied with every instruction given, there is no indication

there was any cause to suspect he had a weapon on his person, and he otherwise gave no cause for further concern for safety.

In citing to *State v. Kinnane*, 689 So.2d 1088 (Fla. 2<sup>nd</sup> DCA 1996), the state appears to argue that there is a per se rule that furtive movements always and under all circumstances justify an unlimited vehicle search for officer safety. However, in *Kinnane* the officer had more than sufficient cause to fear for safety. The occupants of the car had just exited a house which police were preparing to search pursuant to warrant. A surveillance officer ordered the car stopped on the pretext that it was speeding. While the court held the furtive movements justified a search of the vehicle for weapons, the court cited to *State v. Dilyerd*, 467 So.2d 301 (Fla. 1985), and in the parenthetical appended to the citation characterized the justification for a furtive movement search thus: “search of car justified where passenger made furtive movement **reasonably** appearing to be attempt to conceal weapon.” 689 So.2d at 1088-89 (emphasis added). A reasonable fear is still required.

In *Dilyerd*, the fear was reasonable when a lone officer discovered two men in a vehicle trespassing in an isolated orange grove at night. While an additional officer arrived to back up the first deputy, the scene remained isolated, in the dark, with only an even match between two officers and two suspects. In the instant case the lone suspect on an urban street was surrounded by armed officers in the

daylight after being stopped for a minor traffic infraction. There was a reasonable safety concern in *Dilyerd*, none existed after Mr. Pierre exited his car in this case.

The state quotes the controlling principle of *Michigan v. Long*, 463 U.S. 1032 (1983) that a search is warranted only if the officer has a reasonable belief that reasonably warrants the officer in believing that the suspect is dangerous and may gain immediate control of a weapon. No reasonable fear existed in this case. The time of day, the location, the substantial firepower present, and the officer's own state of mind, seeking consent to search for drugs and weapons, all argue against a continuing reasonable fear. It is also possible that Mr. Pierre's immediate compliance with the orders to turn of the engine and exit the vehicle also eased the officer's safety concerns, as compared to the refusal to comply in *Louis*.

The state asserts in its brief that the "real" reason Officer Montague sought permission to search Mr. Pierre's vehicle was because he still had a concern for officer safety. The more reasonable surmise of the reason for the request to search was that Officer Montague had no fear for his safety, but that he had a hunch that Mr. Pierre had drugs in his car. The officer's testimony and the state's argument in the trial court focus on Mr. Pierre's heightened anxiety during the stop. Officer Montague testified Mr. Pierre was free to leave. This was a necessary prerequisite to getting a valid voluntary consent to search for drugs and weapons. Even if

Officer Montague suspected Mr. Pierre had a gun under the driver's seat, he had no concern for safety. But he did have concern that Mr. Pierre had drugs under the seat. And he needed consent to look for that, or even to look for a gun if he had no reasonable fear for his safety.

There is an additional rationale for rejecting the argument that the search was justified because of a continuing reasonable concern for officer safety. The reason the state now seeks to establish a right to search based on officer safety is because the search of the vehicle made after Mr. Pierre was captured and returned to the scene was done without Mr. Pierre' consent. There is no need to establish a need for officer safety before Mr. Pierre fled, as that search would have been conducted pursuant to the valid consent the Second District found to have been given (although Mr. Pierre continues to assert no such consent was given, or if it was, that it was voluntary under the circumstances).

Even if there was a concern when Officer Montague started to approach the car to conduct an ostensibly consensual search, when Mr. Pierre fled the scene he was no longer in any possible position to pose a threat of retrieving a weapon from the car and threatening police, and any possible consent was withdrawn. When he was brought back to the scene after the wrongful arrest, he was fully restrained and again no longer posed a threat. Officer safety cannot justify the search.

## CONCLUSION

Mr. Pierre has been bound by Officer Montague's unrefuted testimony that Mr. Pierre was free to leave when the officer returned the identification documents. The state fought hard to prove this at hearing. It is the fundamental fact necessary to establish that Mr. Pierre's consent to search was voluntary. Officer Montague testified accordingly. Now, when Officer Montague's state of mind inconveniently turns out to be the start of a chain of events leading to suppression of the evidence, the state asks the appellate courts to disregard Officer Montague and essentially call him a liar – that he did not believe Mr. Pierre was free to leave. Now that the fundamental fact necessary to sustain the search is Officer Montague's reasonable belief that Mr. Pierre posed a threat, Officer Montague's unrefuted testimony that Mr. Pierre was free to leave is inconsistent with the state's position and the state seeks to avoid the consequences of that testimony.

No justice will be served by taking exercising jurisdiction in this case, as there is no conflict to be resolved. In no other case has the officer at the scene testified that the suspect was free to leave and then raised a claim of officer safety to justify a subsequent unconsented-to search.



Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this date, November 15, 1999, to

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DAVID R. GEMMER  
Counsel for Respondent

### **CERTIFICATE OF TYPEFACE AND STYLE**

I HEREBY CERTIFY that this document was prepared in WordPerfect 8 using Times New Roman set at 14 points, pursuant to *In Re: Briefs in the Supreme Court of Florida Administrative Order* of this Court dated 7/13/1998.

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732 So.2d 376  
24 Fla. L. Weekly D604  
(Cite as: 732 So.2d 376)

**Jocelyn PIERRE, Appellant,**  
v.  
**STATE of Florida, Appellee.**

**No. 98-01217.**

District Court of Appeal of Florida,  
Second District.

March 3, 1999.

Rehearing Denied March 18, 1999.

Defendant was convicted in the Circuit Court, Hillsborough County, Jack Espinosa, Jr., J., of trafficking in cocaine, obstructing officer without violence, and carrying concealed firearm. Defendant appealed. The District Court of Appeal held that: (1) defendant's act of running following valid traffic stop was nonverbal withdrawal of consent to search vehicle; (2) police officers did not have probable cause to chase and apprehend defendant; and (3) warrantless search of vehicle was not permissible under theory of abandonment.

Reversed and remanded with directions.

**[1] AUTOMOBILES k349(2.1)**

48Ak349(2.1)

Police officer had legal basis to stop defendant's vehicle for running stop sign. West's F.S.A. § 316.640.

**[2] AUTOMOBILES k349(16)**

48Ak349(16)

Police officer did not violate defendant's Fourth Amendment rights against unreasonable searches and seizures by asking defendant to exit vehicle following valid traffic stop. U.S.C.A. Const.Amend. 4.

**[3] AUTOMOBILES k349(10)**

48Ak349(10)

"Consensual encounter" between police officer and defendant occurred when officer asked for

permission to search defendant's vehicle following valid traffic stop, as defendant was free to leave. See publication Words and Phrases for other judicial constructions and definitions.

**[3] SEARCHES AND SEIZURES k171**

349k171

"Consensual encounter" between police officer and defendant occurred when officer asked for permission to search defendant's vehicle following valid traffic stop, as defendant was free to leave. See publication Words and Phrases for other judicial constructions and definitions.

**[4] SEARCHES AND SEIZURES k186**

349k186

Defendant's act of running following valid traffic stop was nonverbal withdrawal of consent to search vehicle.

**[5] AUTOMOBILES k349(8)**

48Ak349(8)

Police officers did not have probable cause to chase and apprehend defendant who ran following valid traffic stop and prior to search of vehicle, and thus, defendant's arrest for obstructing officer without violence could not stand.

**[6] AUTOMOBILES k349.5(1)**

48Ak349.5(1)

Warrantless search of defendant's vehicle was not permissible under theory of abandonment, after officers apprehended defendant, who ran following valid traffic stop, and returned defendant to vehicle.

\*377 David R. Gemmer, St. Petersburg, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Erica M. Raffel, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Jocelyn Pierre appeals the final judgment imposed after he pleaded nolo contendere to trafficking in cocaine, obstructing an officer without violence, and carrying a concealed firearm. We reverse.

The State charged Pierre with these three crimes; thereafter, Pierre filed a motion to suppress the evidence. At the suppression hearing, the following evidence was adduced.

Officer Montague stopped Pierre's vehicle at 6:30 p.m., for passing through a stop sign. Upon request, Pierre gave Officer Montague his driver's license. Officer Montague ran a computer check on the driver's license and possibly a check on the vehicle registration.

While the computer check was being made, two other patrol cars with uniformed officers arrived for back-up. Officer Montague told the other officers that Pierre seemed to be nervous. Officer Montague observed Pierre appear to reach under his seat with his right hand, and look back at the officer. When the computer check was completed, Officer Montague went back to Pierre's car and asked him to turn off the engine and to exit the vehicle. Officer Montague requested Pierre to exit his vehicle for officer safety because he saw Pierre reach under his seat. Pierre promptly complied, at which time, Officer Montague noted that Pierre was visibly shaking.

Officer Montague testified that he advised Pierre that the license check was fine. Additionally, he had no intention of issuing a citation for the traffic infraction when he returned the license to Pierre. When he returned the license to Pierre, he \*378 was free to leave in his vehicle. However, Officer Montague then asked Pierre if he could search his vehicle for guns and drugs. Pierre said, "[ahead," and motioned with a hand gesture toward the car to indicate consent.

Officer Montague instructed Pierre to stand by Officer McFarlane. As Officer Montague approached the vehicle to start the search, Pierre ran.

The officers chased Pierre and eventually apprehended him and returned him to the vehicle. Officer Montague and Officer Prebich then searched the vehicle. Officer Montague found hard cocaine under the front seat, and Officer Prebich found a firearm in the arm rest area of the back seat.

In his motion to suppress, Pierre swore under oath that the vehicle did not belong to him. After the trial court denied the motion, Pierre entered a nolo contendere plea to the charges, reserving the right to appeal the denial of his motion to suppress.

[1][2][3] The single issue to resolve in this case is whether there was a legal basis to conduct a warrantless search of the vehicle. We agree with the trial court that there was a legal basis to stop Pierre's vehicle for running a stop sign. See § 316.640, Fla. Stat. (1997). Also, Officer Montague did not violate Pierre's Fourth Amendment rights by asking him to exit the vehicle following a valid traffic stop. See *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). Because Pierre was free to leave when the officer asked for permission to search the vehicle, we conclude that at this point in the exchange there was only a consensual encounter between Officer Montague and Pierre. See *State v. Albritton*, 664 So.2d 1049 (Fla. 2d DCA 1995).

[4][5] However, after Pierre consented to the search he ran, which requires a determination of whether he withdrew his consent. The supreme court has concluded that running constitutes a nonverbal withdrawal of consent to search. See *Jacobson v. State*, 476 So.2d 1282 (Fla.1985). See also *Nease v. State*, 484 So.2d 67 (Fla. 4th DCA 1986). If Pierre withdrew his consent to search when he ran, we know of no existing probable cause present at that moment to permit the officers to chase Pierre and take him into custody. Therefore, we conclude that Pierre's arrest for obstructing an officer without violence cannot stand.

Next, we must consider whether the search of the vehicle was proper under a theory of abandonment of the vehicle. In *State v. Wynn*, 623 So.2d 848 (Fla. 2d DCA 1993), this court addressed when a defendant could, through abandonment of a vehicle, forfeit his right to an expectation of privacy in the vehicle. In *Wynn*, the defendant left his vehicle unlocked and illegally parked for forty-five minutes. See *id.* There was no record of the license tag, which indicated to the officer that the

vehicle might be stolen. See *id.* at 849. This court held that when a car is voluntarily abandoned and is illegally parked, the officer is allowed to search the car and "seize any illegal substance whether it was in plain view or not." *Id.*

In *State v. Lawson*, 394 So.2d 1139 (Fla. 4th DCA 1981), the Fourth District Court concluded that a defendant's act of leaving a vehicle parked in a "no loitering" zone without saying a word to an officer who was present sufficiently evidenced the defendant's intention to abandon the vehicle. Therefore, it was proper for the officer to search the vehicle for ownership papers and to seize any illegal substance. See *id.* at 1140.

The issue in this case is whether a search is proper under a theory of abandonment after the officers apprehended Pierre and returned him to the vehicle. Unlike *Wynn*, there is no indication that this vehicle was stolen, nor was there any indication from the police department computer that Pierre had any outstanding warrants. If Pierre had failed to return to \*379 the vehicle or the officers had failed to apprehend him and return him to his vehicle which was stopped on the street, apparently with the keys in the ignition, then *Wynn* would support a search of the vehicle.

Other states have recognized that an abandoned vehicle may be searched without a warrant. In *Thom v. State*, 248 Ark. 180, 450 S.W.2d 550 (1970), the court stated:

Sometimes an automobile takes on the characteristics of a man's castle. Other times an automobile takes on the characteristics of an overcoat—that is, it is movable and can be discarded by the possessor at will. If appellant in his endeavors to avoid the clutches of the law had discarded his overcoat to make his flight more speedy, no one would think that an officer was unreasonably invading his privacy or security in picking up the overcoat and searching it thoroughly. In that situation most people would agree that the fleeing suspect had abandoned his coat as a matter of expediency as well as any rights relative to its search and seizure. What difference can there be when a fleeing burglar abandons his automobile to escape from the clutches of the law? We can

see no distinction and consequently hold that when property is abandoned in making a search thereof do no violate any rights or security of a citizen guaranteed under the Fourth Amendment.

450 S.W.2d at 552. [FN1] See also *United States v. Walton*, 538 F.2d 1348, 1354 (8th Cir.1976) (held that a warrantless search was not unreasonable when the occupants fled the vehicle when it was approached by the police officer, thus abandoning the car); *Hudson v. State*, 642 S.W.2d 562, 565 (Tex.App.1982) (car was deemed abandoned and subsequent car search not unreasonable where driver consented to a search of the trunk of his car and thereafter ran away).

FN1. In *LaFave*, *Search and Seizure*, § 2.5(a) (1996), in commenting upon *Thom*, it states:

The *Thom* reasoning overshoots the mark somewhat, and thus should not be taken to mean that a vehicle is abandoned in the sense in which that word is here being used, whenever it is left parked in the vicinity of the place where a crime was committed. The fact of the matter is that a car and an overcoat are different; one can hardly expect privacy in an overcoat left on the street, but cars are regularly parked on the street for brief periods of time without an expectation that they will thereby be subject to entry.

[6] We reverse the trial court's order denying the motion to suppress because Pierre withdrew his consent when he ran. Thereafter, when Pierre was returned to his vehicle, it could no longer be said that he had abandoned his vehicle. Accordingly, because there was no probable cause to detain Pierre prior to the search, nor after he was returned, but for the illegal arrest and detention of Pierre, the search of the vehicle could not proceed.

The irony is that had Pierre managed to get away, this search and contraband seizure could have been sustained under a theory of abandonment. See *Wynn*. Furthermore, if the officers had not caught Pierre, they could have impounded the vehicle, and the subsequent discovery of the cocaine and the firearm during an inventory search

upon impoundment would have been admissible against Pierre. See *State v. Wells*, 539 So.2d 464, 469 (Fla.1989).

We reverse with directions to the trial court to dismiss the obstruction charge and to grant the motion to suppress. Upon remand, the trial court must address whether this court's decision affects Circuit Court Case No. 97- 16862, another case in which Pierre is the defendant.

PARKER, C.J., and BLUE and NORTHCUTT, JJ., Concur.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

v.

JOCELYN PIERRE,  
Respondent.

Case No. 95,222

**MOTION TO ACCEPT BRIEF AS TIMELY FILED**

The defendant/respondent, Jocelyn Pierre, respectfully requests this Court to accept the enclosed Answer Brief on the Merits as timely filed. In support of the motion the defendant says:

1. The state served its brief by mail October 6, 1999. The due date for the Answer Brief on the Merits was October 26, 1999.
2. Respondent is incarcerated and has not made adequate provisions to pay undersigned counsel.
3. Undersigned counsel suffered a severe respiratory infection from October 7 with acute symptoms for a week, severe symptoms an additional week, and residual problems including fatigue continuing to date. The respiratory problems aggravated undersigned counsel's chronic bronchitis and asthma

necessitating an emergency room visit for diagnosis and treatment October 10, 1999.

4. Oral argument is scheduled February 10, 2000, such that the instant delay should cause no prejudice to the petitioner.
5. Undersigned counsel conferred with opposing counsel for the state, Erica Raffel and Robert Krauss, and is authorized to state that they take no position on the instant motion.

WHEREFORE the respondent respectfully request this Court accept the Answer Brief on the Merits in this proceeding be accepted as timely filed.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this date, November 15, 1999, to  
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