IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **Case No. 95,222**

JOCELYN PIERRE

Respondent.
_____/

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

BRIEF OF PETITIONER ON MERITS

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STATEMENT REGARDING TYPE

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

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STATEMENT OF THE CASE

On July 18, 1997, the State filed its three count Information charging Respondent Pierre with Trafficking in Cocaine, Carrying a Concealed Firearm and Obstructing or Opposing an Officer Without Violence. (R. 69-71) Respondent filed a Motion to Suppress (R. 79-81) which, after a hearing thereon (R. 162-195, 129-149, 150-161) was denied. (R. 201-202) The Respondent filed his Notice of Appeal on March 26, 1998 (R. 114) and after briefs were filed and oral argument presented, the Second District court of Appeal issued its opinion on March 3, 1999. The State moved for rehearing on March 8, 1999, that motion was denied on March 18, 1999. On March 26, 1999, the State filed its Notice to Invoke the Discretionary Jurisdiction of this Court and its Motion to Stay Mandate.

STATEMENT OF THE FACTS

Officer Mark Montague stopped Respondent after observing him drive through a stop sign without stopping. (R. 132)

When Officer Montague first approached Respondent's vehicle, Respondent was sitting in the driver's seat looking straight ahead. Montague had to knock on the window and tell him to roll it down in order to request his driver's license and registration. Montague said at that point Respondent appeared to be nervous. (R. 136) When Officers Prebich and McFarlane arrived, Montague told them that Respondent appeared nervous. (R. 137) The license and tag check came back fine. (R. 138) When Montague wished to return Respondent's license to him, he approached Respondent who was still sitting in the driver's seat of his vehicle and observed Respondent bending over going underneath the driver's seat with his right hand. (R. 138) (The arrest affidavit indicates "he kept trying to reach under the driver's seat." (R. 66)) Montague testified in his deposition that Respondent gave a half look back at Officer Montague who approached and said that for his safety he requested that Respondent exit his vehicle. Montague testified that when Respondent got out of the car, he was actually shaking. (R. 139) After Montague requested and received consent to search Respondent's vehicle, Montague told Respondent "go stand by Officer McFarlane, sir" and pointed to Officer McFarlane indicating he was "the one on the other side of my vehicle". Montague said that

Pierre responded by looking at Montague and nodding his head and smiling and stating “yes”. (R. 139) As Montague approached Respondent Pierre’s vehicle to commence the search, he looked back at Pierre to make sure that Pierre was not too close to him and he observed Pierre take off running right up the middle of the street. (R. 139)

Officer McFarlane testified that he heard Officer Montague tell Respondent to stand with the other officers while Montague searched the car. (R. 155) McFarlane said he was standing on the sidewalk along side a patrol car and he asked Respondent to step out of the middle of the street and stand by him so he would not get hit by a car. At that point, McFarlane said Respondent kind of looked around and then started running and Officer McFarlane began chasing him. (R. 155) Both Officers Montague and McFarlane indicated there was little discussion between themselves and Appellant. However, Officer Montague testified that Appellant understood and complied with his request to roll down the window, to present his driver’s license (R. 136), to exit his vehicle (R. 139), that he responded “sure, go ahead” to Montague’s request to search the vehicle (R. 141), and that it appeared to Montague that he understood English. (R. 142-143) Montague further indicated that when he asked Appellant to turn off his engine, Appellant immediately turned it off. (R. 148) At the hearing upon Respondent’s Motion to Suppress (R. 162-194), an interpreter was

sworn to translate on behalf of Respondent. (R. 165). [1]

Officer Prebich testified he responded to the location where Officer Montague had stopped Respondent. (R. 177) Officer Prebich was riding in the same car with Officer McFarlane. (R. 178) Officer Prebich said he head Officer Montague ask Respondent for consent to search and observed Pierre give his consent and directed Officer Montague with a hand gesture pointing toward the vehicle. (R. 179-181) Pierre was standing by the back door of the vehicle and Officer Montague was standing by the driver's side door. Prebich said shortly after Officer Montague had begun to enter the vehicle to search that Respondent ran. At that point, Prebich and officer McFarlane began to chase him and brought him back. They then arrested him for obstructing an officer and searched the car finding a loaded revolver and cocaine. (R. 181)

[1]Petitioner only makes reference to the specific acknowledgments regarding the Respondent's understanding of English and the presence of a translator because in his brief, Respondent argues in part that the request for consent itself was tainted based on Respondent's limited English.

SUMMARY OF THE ARGUMENT

When the circumstances create a founded suspicion to search a vehicle for weapons, the defendant's consent to search is no longer meaningful, so that his flight, should it be interpreted as a withdrawal of consent is irrelevant. Although the State does not agree that Respondent's flight was a withdrawal of consent to search his car, even if the Respondent handed the deputies a signed notarized statement withdrawing his consent, it would be as irrelevant as his flight. Neither his flight, nor presence, nor consent or lack thereof is a factor to be considered. Should he return to the vehicle, 'officer safety' requires a search of the vehicle as imperative as if he had remained at the scene. Following the suggestion of the Second District Court of Appeal and just leaving a vehicle for which there is a founded suspicion has a weapon hidden inside in the road is as dangerous to public safety as the facts presented are to officer safety.

ARGUMENT

ISSUE I

THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE IGNORES THE ISSUE OF OFFICER SAFETY, WHICH WAS PROPERLY PRESENTED ON DIRECT APPEAL, AND IN REVERSING THE TRIAL COURT BY DIRECTING THAT RESPONDENT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED ON THE BASIS OF WITHDRAWN CONSENT, CONFLICTS WITH STATE V. DILYERD, 467 SO.2D 301 (FLA. 10985) AND MICHIGAN V. LONG, 463 U.S. 1032, 103 S.CT. 3469, 77 L.ED.2D 201 (1983).

Respondent has urged in his Jurisdictional Brief before this Court at page 10 therein, that the State failed to make any argument regarding officer safety before the Second District Court of Appeal. However, in its Answer Brief before the Second District Court of Appeal at pages 8-9, the State presented the following.

> "Here, the officer requested Mr. Pierre to get out of his vehicle for safety reasons after observing him reaching under his seat. Again, it is not the item itself, but the container itself; the car itself posed the threat if a weapon was concealed under the seat. After complying with the request to exit, Appellant gave Officer Montague consent to search. Under these circumstances after observing an obviously nervous individual leaning forward and reaching under the car seat, the officer did not have to stand there in harms way; it was reasonable to request Appellant to exit his vehicle. When he did so, Montague testified that Appellant was so nervous that he was actually shaking. Therefore the totality of these circumstances presented an adequate predicate for a search absent consent.

> In Mitchell v. State, 522 So.2d 1003 (4th DCA 1988), the court held that a police officer properly looked in a console area where he saw the driver place something as he approached the car pursuant to a traffic stop. Once the officer in Mitchell discovered cocaine, he was authorized to seize it even though Mitchell was outside the car at the time of the search. The officer's concern was in letting Mitchell back into the car where there may have been a weapon. ...."

Petitioner has therefore established that this issue was presented and preserved before the Second District Court of Appeal.

In State v. Simons, 549 So.2d 785 (2nd DCA 1989), the court outlined the levels of encounters between police and members of the public. The court held that a consensual encounter involves only minimal police contact but not seizure and therefore does not intrude on any constitutionally protected interest under the Fourth Amendment. The court went on to address the second level which involves an investigative stop and sometimes a frisk. At this level, the court held, an officer may stop a person if the officer has a well-founded suspicion that criminal activity is afoot. The court said that an officer in such a situation my conduct a limited search or frisk of the individual for concealed weapons where the officer is justified in believing the person is armed and dangerous to the officer or others citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In State v. Wilson, 566 So.2d 585 (2nd DCA 1990), the initial contact between the officer and Wilson was a consensual encounter during which the officer developed a reasonable suspicion to effect a stop and frisk. The facts in Wilson did not involve a traffic stop but rather Wilson's presence at a motel where the officer was aware that drugs were sold, and Wilson's indication that he was going into a room where the officer was aware that this activity was ongoing. While the officer was speaking to Wilson during the encounter, Wilson kept touching the waistband of pants. The court held that by the time the officer asked Wilson if he could frisk him, the situation had evolved into a stop and that by that time, Wilson's responses provided the officer with a well-founded suspicion that the defendant was about to become involved in illegal drug activity. The court held "the defendant's body movements and nervous demeanor during the consensual encounter gave the officer reasonable suspicion to conduct a pat-down search. He had reasonable suspicion to believe the defendant had a weapon, and thus the frisk and seizure of the crack pipe were proper." Id. at 587. In State v. Louis, 571 So.2d 1358 (4th DCA 1990), the officer stopped an automobile for a traffic infraction and the court held that he had the right to stop a passenger in that car and frisk him for weapons when the passenger jumped out of the stopped vehicle, walked quickly around the car, ignored the officer's request to stop and placed his hands out of sight inside

his jacket. The court held:

> "During a temporary encounter with the a citizen, an officer, while engaged in a traffic investigation may conduct a limited protective search of that citizen for weapons, even without probable cause to believe that a crime has been committed. The officer needs only to have reason to believe, based on articulable facts, that his safety is in danger. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), Graham v. State, 495 So.2d 852, 854 (4th DCA 1986). Tragically, roadside shootings of police officers in this State and Country are frequent enough to be on the mind of every officer who makes a traffic stop. A person's unusual body movements and demeanor during an encounter with an officer gives the officer reason to believe the person has a weapon. State v. Wilson, 566 So.2d 585, 587 (2nd DCA 1990)." Id. at 1359. (Emphasis added).

In State v. Cromatie, 688 So.2d 1075 (2nd DCA 1996), the court held that either during a valid traffic stop, or even if a valid traffic stop has had its lawful function completed and turns into a citizen encounter, there is no reason a police officer cannot ask for consent to search. Id. at 1077. In the instant case, it is clear that during a consensual encounter, Officer Montague lawfully requested consent to search Respondent's vehicle for officer safety reasons. Therefore it was reasonable to ask Respondent to exit the vehicle in order for him to do so. Because Montague testified that when Respondent complied and got out of the driver's seat, he was actually shaking, the totality of the circumstances developed into a reasonable suspicion for Montague to search Respondent's car without consent. The Opinion of the

Second District Court of Appeal acknowledged this by stating:

> We agree with the trial court that there was legal basis to stop Pierre's vehicle for running a stop sign. See Section 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.

In the same Opinion, the court earlier observed:

> While the computer check was being made, two other patrol cars with uniformed officers arrived for backup. Officer Montague told the 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.

The Opinion of the Second District Court of Appeal entirely fails to address the true basis for the request to search, which is obviously officer safety. Because the facts as presented established a founded suspicion to search absent any consent, the reasoning employed by the Second District Court of Appeal is faulty and should be reversed by this Court. The Second District Court of Appeal's theory was that this was but a consensual encounter and since Pierre was free to leave, the officers had no right to run after him and the Second District determined that a search incident to Pierre's arrest for resisting or obstructing the officers by

running was unlawful since he had every right to run, to leave the scene during a consensual encounter; and the court also ruled out abandonment as a basis for the search because the police brought Pierre back to his vehicle. The State's position is merely that a protective search pursuant to State v. Louis, supra, was warranted so that Respondent's consent was unnecessary; therefore his flight was in fact obstructing or opposing and bringing him back to his vehicle was lawful, and a search pursuant either to his arrest for obstruction, or on the basis of founded suspicion to believe he had a weapon in the vehicle and for officer safety, was proper. In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the court said:

> In addition, if the suspect is not placed under arrest (as Respondent was not at that time), he will be permitted to reenter his automobile, and he will then have access to any weapons in inside ... or .... the suspect may be permitted to enter the vehicle before the Terry investigation is over, and again, may have access to weapons. Id. at 103 S.Ct. 3482.

In State v. Kinnane, 689 So.2d 1088 (2nd DCA) reh. den. (1997), the Second District itself held that an officer's observation of a defendant making furtive movements toward the floorboard of his car entitled the officer to search the vehicle for their safety citing this Court's Opinion in State v. Dilyerd, 467 So.2d 301 (Fla. 1985) where it was held that a search of a vehicle is justified where a passenger made a furtive movement

reasonably appearing to be an attempt to conceal a weapon. The Opinion of the Second District Court of Appeal is therefore in conflict with State v. Dilyerd and with the holding in Michigan v. Long, supra, which extended a "Terry search" [2] to the interior of an automobile.

In that case, the high court observed that roadside encounters are especially hazardous to police officers and held "the search of the passenger compartment of an automobile, limited to those areas where a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts, when taken together with rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." Id. at 103 S.Ct. 3481 and citing Terry v. Ohio, supra.

Article I, Section 12 of the Florida Constitution construes search and seizure law in conformity with the interpretation thereof as applied by the United States Supreme Court. The Opinion of the Second District Court of Appeal conflicts with the law as set out in Michigan v. Long, supra, as well as the law set out by this Court in State v. Dilyerd, supra.

Because the articulable criteria required was established by the officer's observation of Respondent, and addressed in the

[2]Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

officer's testimony as well as acknowledged by the Second District Court of Appeal, but completely ignored in its analysis, this Court should reverse that opinion. Because officer safety was the sole purpose of the search, based on the level of nervous behavior displayed by Respondent and his reaching under the driver's seat while glancing back at the officer as Montague approached the vehicle to return the license, a founded suspicion to search to the vehicle absent any consent was established.

In State v. Dilyerd, supra, the owners of an orange grove were redeveloping the area into private housing and had been bothered by teenagers using the grove for drinking parties. The police had been asked to check the area and remove trespassers. On the night in question, a deputy sheriff noted a car parked in the area with two male occupants, one of whom was sitting in the driver's seat. When the deputy shined his spotlight into the car, the passenger leaned forward and appeared to do something with his hands on the floorboard. The deputy summoned a backup deputy and approached the car from the passenger side. He obtained identification from the occupants and waited for the backup deputy who arrived within a minute. When the backup deputy arrived, the occupants were ordered from the car. The deputy then searched under the passenger seat while the backup deputy watched the two males. The deputy discovered a vial of cocaine under the passenger seat, and, after the arrests, a later search of the trunk revealed marijuana.

Dilyerd move to suppress the evidence saying there was no warrant or probable cause to believe a crime had been committed and the search could not be justified as incident to the officer's safety because both occupants had been removed from the vehicle. Like Officer Montague in the instant case, the deputy in Dilyerd testified that initially he had not intended to arrest the trespassers, only to warn them off. The trial court denied the Motion to Suppress, and Dilyerd appealed. The District Court of Appeal reversed the denial of the Motion to Suppress finding that Florida Stop and Frisk Law Section 901.151, Fla. Stat. (1981) was applicable only to persons and not to cars, and that the furtive stuffing of unknown objects under a seat of a car may make one curious or even suspicious but does not give the police a right to search based on probable cause. This Court reversed based upon the definitive statement of the United States Supreme Court in Michigan v. Long, supra, stating that investigative detentions involving suspects in vehicle are especially fraught with danger to police officers, and that suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed. This Court held that those principles compelled the conclusion that the search of the passenger compartment of an automobile, limited to those areas which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable

facts, which taken together with rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

The facts in the instant case presents the Respondent's flight from the scene. But that did not diminish the established founded suspicion. The Opinion of the Second District Court of Appeal suggests perhaps the police should have let him run off and wait until enough time had elapsed for his car to be deemed abandoned so that it could be impounded and a inventory search in that manner would have been lawful. The police cannot allow a vacant vehicle for which they have a founded suspicion contains weapons to sit in the street just in case its fleeing owner decides to return. On that basis, the Second District Court of Appeal should have recognized the search was lawful despite Respondent's location. How long must the police wait before the car can be considered abandoned? Although the Second District suggested if Respondent failed to return, the car could be impounded as abandoned, it gave no insight as to a time frame. Since there was a founded suspicion the vehicle contained weapons, should the Respondent return, or a curious ten year old happen by there was no requirement they wait for Respondent to decide whether and when he will return. Requiring that jeopardizes public safety as well as officer safety.

The Opinion of the Second District Court of Appeal fails to

adhere to both the rulings of this Court in State v. Dilyerd, and the United States Supreme Court in Michigan v. Long, both supra, which should be corrected by a reversal of the Opinion of the Second District; should this Court decline to reverse the opinion under scrutiny, the safety of uniformed law enforcement officers may be compromised throughout the State in the common factual scenario as presented herein. Public policy demands nothing less than this Court's ruling to protect their safety.

CONCLUSION

WHEREFORE based on the foregoing arguments, citations of authority and references to the record, the Opinion of the Second District Court of Appeal in this cause should be reversed and the Motion to Suppress the cocaine and the firearm denied.

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 to David Gemmer, Esquire, P. O. Box 390, St. Petersburg, Florida 33731 this _____ day of October, 1999.

COUNSEL FOR PETITIONER