ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOCELYN PIERRE

Respondent.
_____/

Case No. 95,222

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

BRIEF OF PETITIONER ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
SR. ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0238538

ERICA M. RAFFEL
Assistant Attorney General
Florida Bar No. 0329150
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR RESPONDENT

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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 went 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) 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.

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)

SUMMARY OF THE ARGUMENT

Although the opinion of the Second District acknowledged the lawfulness of the traffic stop, and acknowledged the officer's observation of the Respondent leaning forward and reaching under the driver's seat while glancing back at the officer, it completely ignored the dictates of State v. Dilyerd, 467 So.2d 301 (Fla. 1985) and Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2nd 201 (1983). The Second District determined the Respondent had not abandoned his vehicle when he ran, and that by running away he withdrew his consent to search. The court held the search illegal finding the trial court erred in failing to suppress the loaded revolver and cocaine found in Respondent's vehicle.

ARGUMENT

ISSUE I

THE SECOND DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN STATE v. DILYERD, 467 SO. 2D 301 (FLA. 1985) AND MICHIGAN v. LONG, 463 U.S. 1032, 103 S. CT. 3469, 77 L. ED. 2ND 201 (1983).

This Court has discretionary jurisdiction to review decisions of District Courts of Appeal that expressly and directly conflict with a decision of another District Court of Appeal or of this Court on the same question of law. Art. V, Sec. 3(b)(3), Fla. Const.

The decision of the Second District Court of Appeal reversing the trial court's order denying Respondent's Motion to Suppress expressly and directly conflicts with this Court's prior decision in State v. Dilyerd, 467 So. 2nd 301 (Fla. 1985) and that of the United States Supreme Court in Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L. Ed. 2nd 1201 (1983).

In its opinion, the Second District Court of Appeal said:

> "we agree with the trial court that there was a 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." (App. A at 2)

In this same opinion, the court earlier observed:

> "While the computer check was being made, two other patrol cars with uniformed officers arrived for back-up. 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." (App. A at 1)

The balance of the opinion addresses only Respondent Pierre's initial consent to search his vehicle, and holds that this consent was withdrawn by his running away; and goes on to hold that he did not abandon his vehicle by running because the officers brought him back to the vehicle; and finally that his arrest for obstructing their search of his vehicle was illegal because it was made pursuant to consent given at a time when Pierre was free to leave.

The opinion fails entirely to address the true basis of the request to search: officer safety. The same officer safety issue existed when Respondent was brought back to his vehicle. In Michigan v. Long, 463 U. S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2nd 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 re-enter his automobile, and he will then have access to any weapons inside. ..... or ..... the suspect may be permitted to re-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 (Fla. 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 the court held that a search of the car was justified where a passenger made a furtive movement reasonably appearing to be an attempt to conceal a weapon.

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 is therefore in conflict with the holding in Michigan v. Long, supra, as well which extended a 'Terry Search' [1] to the interior of an automobile.

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 the rational inferences

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

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.

Here, all of the articulable criteria required was established by the officer's observation of Respondent, addressed in the officer's testimony and although acknowledged by the Second District, completely ignored in its analysis. Because officer safety was the sole purpose of the search, brought about by Officer Montague's observation of the Respondent reaching under the driver's seat while glancing back at the officer, the opinion's failure to adhere to the rulings of this court in State v. Dilyerd, and Michigan v. Long, both supra, conflict in resolution of the issue has been created.

CONCLUSION

WHEREFORE based on the foregoing arguments, citations of authority and references to the record, this Honorable Court should exercise its discretion to resolve this conflict and accept jurisdiction in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Fla. Bar No. 023538

ERICA M. RAFFEL
Assistant Attorney General
Florida Bar No. 0329150
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739
COUNSEL FOR PETITIONER

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 26th day of March, 1999.

COUNSEL FOR PETITIONER