IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,738

STATE OF FLORIDA,
Appellant,

vs.

LARRY LAMAR GAINES,
Appellee.

****

ON APPEAL
FROM THE FOURTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
****

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Appellee, Larry Lamar Gaines, was the defendant in the trial court the appellee in the Fourth District Court of Appeal. Appellant, the State of Florida, was the prosecution in the trial court and the appellant in the Fourth District Court of Appeal. Appellee, in this brief, will be referred to as he stood before the trial court and Appellant will be identified as the State or prosecution. The symbol "R" will be used to refer to the record on appeal and the symbol "T" will be used to refer to the transcript of the trial proceedings. The symbol "Ex." refers to the exhibits contained in the Appendix attached to this brief, which contain the opinions of the Fourth District Court of Appeal rendered in this mattered. Unless otherwise stated, all emphasis has been supplied by Appellant.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

STATEMENT OF THE CASE AND FACTS

By information filed on May 26, 1998, Defendant was charged with the offense of possession of cocaine with the intent to sell. (R 3). The cocaine, which was in a ziplock plastic baggie containing five smaller plastic baggies, was thrown to the ground by Defendant while being chased by officers of the Riviera Police Department. (R 2).

At trial, Officer Jamie Roussel of the Riviera Beach Police Department testified that on the date of Defendant's arrest, April 17, 1998, he was an undercover officer assigned to the Weed and Seed Task Force, which is a federally funded unit consisting of multi agencies that investigate narcotics, prostitution and gambling. (T 13-14). While travelling with agent Peter Reynolds on routine patrol at about 9:00 at night, he and Reynolds observed a group of individuals "hanging out" on the north corner of a labor pool business that closed at 9:00 at night. (T 16). The police had received numerous complaints about that area concerning illegal drug activity, people hanging out, and drinking. (T 16). As the officers approached the group of individuals, Defendant started to ride off on a bicycle. (T 16). In an effort to question Defendant, Officer Roussel pulled up alongside Defendant in his vehicle and told Defendant to stop, but Defendant proceeded to

pedal faster westbound. (T 16-17). Officer Roussel testified that he didn't think that he identified himself as a police officer when he pulled alongside Defendant at this time. (T 17, 26). The officer told Defendant to stop again, but Defendant continued to pedal faster and then jumped off his bike and ran before Officer Roussel had a chance to talk with him. (T 17-18). As Officer Roussel chased Defendant on foot, he observed Defendant reach into his front pocket just prior to hitting a fence and make a motion as if he was throwing something. (T 17, 28). Thereafter, Defendant jumped over the fence and other officers proceeded to chase him on foot. (T 17-18). Defendant fled into a church and was ultimately taken into custody by Officer Roussel. (T 19, 32). Thereafter, Officer Roussel walked back along the course Defendant had run and recovered a plastic bag containing suspected crack cocaine rocks in the backyard of a residence where the chase had initially started. (T 19-20, 35, 37). The location where the officer found the bag was consistent with the movement he had seen Defendant make earlier. (T 20). Over no defense objection, the bag containing the cocaine was admitted into evidence. (T 20-21). The defense stipulated that the substance in the bag was cocaine. (T 21).

Officer Peter Reynolds testified that as the police pursued

Defendant, he observed that when Defendant came upon the fence in the backyard, Defendant made a throwing motion before he hit the fence. (T 42, 46-47).

Officer Sean Casey, a member of the Weed and Seed Task Force, testified that he was present when the cocaine was recovered and that the area where he recovered it did not show any signs of contamination. (T 55). No other persons were present at the residence where the cocaine was found. (T 55).

After the State had rested its case at trial, Defendant's counsel moved orally for a judgment of acquittal and to suppress the cocaine as evidence against Defendant. (T 59-60). The trial court denied the motion for judgment of acquittal but stated that it wished to hear from the State with regard to the motion to suppress. (T 60). As to this motion, the prosecutor claimed surprise and lack of prior notice. (T 61). After hearing further brief argument from counsel, the trial court granted Defendant's suppression motion. (T 59-67). The trial judge found that there was no reasonable suspicion of criminal activity on the part of Defendant so as to justify a detention by the police, and that the drugs discovered by the police constituted the "fruit of the poisonous tree." (T 66). The court found that the drugs were discarded prior to the time Defendant was taken into custody. (T

67). In light of this ruling, the court announced that it was dismissing the charge against Defendant. (T 68). The trial court subsequently entered a written order and amended order granting Defendant's suppression motion, finding that Defendant was invalidly detained and that the recovered contraband was therefore the fruit of the poisonous tree. (R 35, 41). In its amended order, the court also dismissed the case. (R 41).

In its notice of appeal to the Fourth District Court of Appeal, the State appealed the trial court's order granting Defendant's ore tenus motion to suppress during trial "and Dismissal of case." (R 39-41). Thereafter, Defendant moved to dismiss the appeal on the ground that any error in the suppression of evidence was moot because, having been in jeopardy, he could not be retried. The Fourth District thereafter granted Defendant's motion to dismiss. (Ex. A). Upon the State's motion for rehearing, the Fourth District denied the motion. (Ex. B). In doing so, citing to this Court's decision in *State v. Smith*, 260 So. 2d 489 (Fla. 1972), the Fourth District held that section 924.07(1)(l), Fla. Stat. (1997), is unconstitutional since there is nothing in the Florida Constitution which authorizes the legislature to allow review of "non-final" orders by district courts of appeal. (Ex. B). This appeal followed.

Any additional facts which the State seeks to bring to the attention of the Court are contained in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

POINT I

Section 924.07(1)(l), Fla. Stat. (1997), is constitutional since the statute allows the state to appeal, as a final order, an order suppressing evidence made during trial. Indeed, at bar, it is clear that the trial court's order was not a non-final order, but rather a final order of suppression and dismissal which the State was permitted to have reviewed under either §924.07(1)(l) or rule 9.140(c)(1)(A), Fla. R. App. P. Since the Fourth District's declaration of §924.07(1)(l) as being unconstitutional was therefore unnecessary, its decision should be vacated.

POINT II

The trial court erred in granting Defendant's motion to suppress evidence since, at the time Defendant threw the drugs, he had not been "seized" within the meaning of the Fourth Amendment. Indeed, Defendant did not comply with the officer's requests to stop, i.e., the officer's "show of authority." Thus, the cocaine Defendant discarded while he was running was not the fruit of a seizure.

ARGUMENT

POINT I

§924.07(1)(l), FLA. STAT. (1997), IS CONSTITUTIONAL SINCE THE STATUTE ALLOWS THE STATE TO APPEAL, AS A FINAL ORDER, AN ORDER SUPPRESSING EVIDENCE MADE DURING TRIAL. (Restated).

The State first acknowledges this Court's holding in *State v. Smith,* 260 So. 2d 489 (Fla. 1972), that jurisdiction of the district courts of appeal to entertain interlocutory appeals is dependent upon this Court providing for such review by rule. However, in contrast to *Smith*, which dealt with the constitutionality of §924.07(8), Fla. Stat.(1971), authorizing appeals by the State from "pretrial" orders, the present case involves the constitutionality of §924.07(1)(l), Fla. Stat. (1997), which authorizes the State to appeal "an order or ruling suppressing evidence or evidence in limine ***at*** trial." As such, since the statute permits the State to appeal a ruling suppressing evidence made ***during*** trial and, hence, ***after*** the jury is sworn, the nature of such an order is *not* interlocutory but rather final. Indeed, it is well established that the distinguishing factor between an interlocutory order and a final order, for purposes of review, is that an interlocutory order is one that is rendered in the middle of the cause and which does not finally determine or

complete the cause, while a final order is one that determines the rights of the parties and disposes of the cause on its merits, leaving nothing more to be done in the cause. "The test, therefore, of a final decree is whether the judicial labor is at an end." *See Blount v. Hansen,* 116 So. 2d 250, 251 (Fla. 2d DCA 1959), citing *Hollywood, Inc. v. Clark,* 153 Fla. 501, 15 So. 2d 175, 179 (1943), *et al.*; *accord McGurn v. Scott,* 596 So. 2d 1042, 1043 (Fla. 1992) (judgment attains degree of finality necessary to support appeal when it adjudicates merits of cause and disposes of action between parties, leaving no judicial labor to be done except execution of judgment); *compare Osteen v. Seaboard Coast Line Railroad Co.,* 283 So. 2d 379, 380-381 (Fla. 1st DCA 1973) (review by "interlocutory appeal" is an accelerated procedure intended to speed up the appellate review so that the issue in question may be properly resolved and the case returned to the trial court for further proceedings without unnecessary delay).

At bar, the trial court entered an order ***dismissing*** the drug charge pending against Defendant after granting the motion to suppress. (R 41). At this point, the judicial labor as to Defendant's case had undisputably come to an end. As such, it is clear that the trial court's order was not a non-final order, but rather a final order of suppression and dismissal which the State

was permitted to have reviewed under either §924.07(1)(l), Fla. Stat. (1997), or rule 9.140(c)(1)(A), Fla. R. App. P., which provides in pertinent part that the State may appeal an order "dismissing an indictment or information or any count thereof." Similar to 9.140(c)(1)(I), Fla. R. App. P., which allows the State to appeal a ruling on a question of law if a convicted defendant appeals the judgment of conviction, i.e., a final order, §924.07(1)(l), Fla. Stat. (1997), permissibly authorizes the State to appeal rulings suppressing evidence at trial.

In light of the foregoing, the State submits that the Fourth District, in holding that the Florida Constitution does not authorize the legislature to allow review of "non-final" orders by district courts of appeal, misconstrued the trial court's order as being a "non-final" order. (Ex. B). The Fourth District's declaration of the unconstitutionality of §924.07(1)(l), Fla. Stat. (1997), being unnecessary given the facts of this case, therefore constituted error. *See In re Forfeiture of One Cessna 337H Aircraft,* 475 So. 2d 1269, 1270-71 (Fla. 4th DCA) (quoting *Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 2997, 86 L.Ed.2d 664 (1985) ("It is a fundamental maxim of judicial restraint that 'courts should not decide constitutional issues unnecessarily.'"), *cause dismissed sub nom. City of Pompano Beach v. Enroute Ltd.,* 480

So. 2d 1293 (Fla. 1985).

Furthermore, in light of the foregoing, the State submits that the prohibition against double jeopardy does not prevent the State from retrying Defendant should this Court vacate the Fourth District's opinion invalidating §924.07(1)(l), Fla. Stat. (1997), and reverse the trial court's ruling. Indeed, since ***Defendant's*** conduct, i.e., his belated *ore tenus* motion to suppress made *after* the State had rested its case at trial, was the sole cause of the trial court's dismissal of the charge against Defendant, the State should not fairly be foreclosed from appealing the instant order suppressing evidence and dismissing the case. As such, Defendant's belated suppression motion in this drug possession case constituted, in effect, a motion for mistrial. Furthermore, it cannot be said that the prosecution acted in bad faith in any manner with regard to the ruling on Defendant's suppression motion. Thus, even under the rationale of *State v. Livingston,* 681 So. 2d 762, 763 (Fla. 2d DCA 1996), a case upon which Defendant relied below, no double jeopardy violation is implicated here. *See D'Angelo v. State,* 541 So. 2d 706 (Fla. 4th DCA 1989) (retrial of narcotics defendant did not violate double jeopardy; mistrial declared in first trial was based upon defendant's motion for the same, and was not shown to be the result of prosecutorial

misconduct); *State v. Zamora,* 538 So. 2d 95, 96 (Fla. 3d DCA 1989) (where a mistrial is granted at the defendant's request, reprosecution is not barred on double jeopardy grounds absent a showing of intentional prosecutorial bad faith or judicial conduct designed to produce the mistrial) and cases cited therein.

Even assuming *arguendo* that the State would be foreclosed in the instant case from retrying Defendant due to the prohibition against double jeopardy, other circumstances could exist in other cases which would allow the State to appeal an order suppressing evidence during trial under §924.07(1)(l), Fla. Stat. (1997), that would not infringe upon the prohibition against double jeopardy. For example, despite a trial court's order suppressing certain evidence at trial, the jury could still convict a defendant based on other evidence adduced at trial. At this point, the State could appeal the trial court's ruling suppressing evidence under §924.07(1)(l). Furthermore, the trial court could grant Defendant's motion for judgment of acquittal notwithstanding the verdict, which order the State would be entitled to appeal without double jeopardy implications. *See* Fla. R. App. P. 9.140(c)(1)(E).

The State alternatively asserts that the instant order suppressing the cocaine as evidence and dismissing the charge was, in effect, a pretrial order properly appealable under rule

9.140(c)(1)(B), Fla. R. App. P.[1], based upon the analogous decision of the First District in *State v. Stevens,* 563 So. 2d 188 (Fla. 1st DCA 1990). There, the First District took jurisdiction of an appeal of an order granting a pretrial motion to suppress under rule 9.140(c)(1)(B), Fla. R. App. P., where it was not entered until *after* trial had commenced, and a mistrial was granted after the suppression ruling in the absence of any objection by the prosecution. Nonetheless, the First District held that in light of the subsequent mistrial, the order granting the motion to suppress was, in effect, pretrial for purposes of rule 9.140(c)(1)(B), Fla. R. App. P., and thus appealable. *See also Savoie v. State,* 422 So. 2d 308 (Fla. 1982).

Clearly, the rationale of the *Stevens* decision supports a finding that the Fourth District had appellate jurisdiction in this case. Further, the mere fact that a mistrial followed the granting of the motion to suppress in *Stevens* as opposed to the dismissal involved here is a distinction without any legal difference. To be sure, while the defense moved for a mistrial in *Stevens,* the defense here obviously interposed no objection to the dismissal of the charge against him and, in doing so, essentially consented to

[1] Fla. R. App. P. 9.140(c)(1)(B)provides that the State may appeal an order "suppressing before trial confessions, admissions, or evidence obtained by search and seizure."

the dismissal. In any event, since the order at bar was, in effect, a pretrial order as argued above, the prohibition against double jeopardy would not be implicated so as to foreclose a retrial of Defendant.

Alternatively, assuming this Court approves the Fourth District's decision herein, given the fact that the legislature enacted §924.07(1)(l), Fla. Stat., *after* this Court's decision in *State v. Smith,* 260 So. 2d 489 (Fla. 1972), thereby evidencing the legislature's intent to enable to the State to appeal from orders suppressing evidence or evidence in limine *at* trial, the State respectfully requests this Court to promulgate this statutory provision as a rule of appellate procedure under Fla. R. App. P. 9.140(c)(1). *See Carlile v. Game & Fresh Water Fish Commission,* 354 So. 2d 362, 364 (Fla. 1977) (in making material changes in the language of a statute, the legislature is presumed to have intended some objective or alteration of the law).

Finally, should this Court vacate the Fourth District's opinion declaring §924.07(1)(l), Fla. Stat. (1997), to be unconstitutional, considering the fact that the propriety of the granting of Defendant's suppression motion was briefed in the Fourth District and is dispositive of the case, the State requests this Court to determine the propriety of the trial court's ruling below.

See Savoie v. State, 422 So. 2d 308, 312 (Fla. 19820 ("..., once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal). The merits of the suppression issue are argued in point II, *infra.*

POINT II

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SINCE, AT THE TIME DEFENDANT DROPPED THE DRUGS, HE HAD NOT BEEN "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT.

While the State is mindful that the ruling of a trial court on a motion to suppress comes to the appellate court clothed with a presumption of correctness, *McNamara v. State*, 357 So. 2d 410, 412 (Fla. 1978), a trial court's factual findings can be disturbed on appeal if shown to be without basis in the evidence or predicated upon an incorrect application of the law. *See Davis v. State,* 594 So. 2d 264, 266 (Fla. 1992); *State v. Riocabo,* 372 So. 2d 126 (Fla. 3d DCA 1979).

Relying solely on this Court's decision in *Popple v. State,* 626 So. 2d 185 (Fla. 1993), the trial judge in the instant case ruled that Defendant was invalidly detained by the police and, hence, suppressed the cocaine as evidence. Since the trial court's finding was predicated upon an incorrect application of the law, the State asserts that the order granting Defendant's *ore tenus* suppression motion should be reversed.

In *Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993), this Court explained that there are three levels of police-citizen encounters: (1) a consensual encounter invoking no constitutional

safeguards: (2) an investigatory stop or detention, requiring a reasonable or founded suspicion of criminal activity; and (3) arrest, which must be supported by probable cause that a crime has been or is being committed. In holding that the police officer's direction for defendant Popple to exit his car was a "seizure" requiring that the officer have a reasonable suspicion to detain Popple, the court in *Popple* significantly concluded that the officer's direction constituted a show of authority "which restrained Popple's freedom of movement." 626 So. 2d at 189. Consequently, the *Popple* court held that Popple was seized for Fourth Amendment purposes "by virtue of *submitting* to Deputy Wilmoth's show of authority." 626 So. 2d at 189.

In the case at bar, unlike the facts in *Popple,* the officer's direction for Defendant to stop did not restrain Defendant's freedom of movement. To be sure, in response to the officer's request, Defendant simply rode and subsequently ran away from the officers. In stark contrast to Popple, at no time did Defendant submit to the officers' show of authority. As such, under the Supreme Court's controlling decision in *California v. Hodari D.,* 499 U.S. 621, 111 S.Ct. 1547 (1991), the actions of the police in pursuing Defendant here did not constitute a "seizure" within the meaning of the Fourth Amendment. Further, since Defendant abandoned the

cocaine prior to being detained by the police, the cocaine was not illegally seized.

In *Hodari*, the Supreme Court held that in order for a "seizure" to have occurred within the meaning of the Fourth Amendment, there must either be some application of physical force, even if extremely slight, *or* a show of authority *to which a subject yields*. *Id.,* 111 S.Ct. at 1550. **A show of authority, to which the subject does not yield, is not a seizure.** *Id.* The Supreme Court opined that the police officer's show of authority in pursuing a defendant who fled at the approach of an unmarked police car did not constitute a "seizure" absent any physical contact with the defendant or evidence that the defendant yielded to any show of authority involved in the police chase. Thus, the high court concluded that even if the police officer's pursuit of the defendant was a "show of authority" enjoining the defendant to halt, the defendant was not "seized" until the officer physically tackled him since the defendant did not comply with that show of authority. Therefore, the cocaine abandoned by the defendant as he was running from the police was not the "fruit of a seizure" and was not subject to exclusion. *Id.,* 111 S.Ct. at 1552.

Applying *Hodari* and its progeny to the instant case, it is clear that no illegal detention or "seizure" of Defendant occurred

here. Like the defendant in *Hodari*, Defendant did not comply with the officer's requests to stop, i.e., the officer's "show of authority." Thus, the cocaine Defendant discarded while he was running was not the "fruit of a seizure." *Hodari*, 111 S.Ct. at 1552. Accordingly, the trial court's order granting Defendant's *ore tenus* motion to suppress should be reversed. *See State v. Woods*, 680 So. 2d 630, 631 (Fla. 4th DCA 1996) (suspect was not unlawfully seized before he dropped handgun and bags of cocaine while fleeing officer, where sole testimony at suppression hearing was that suspect did not yield to officer's direction to stop nor in any way submit to the officer's authority) and cases cited therein; *Johnson v. State*, 689 So. 2d 376, 377 (Fla. 4th DCA 1997) citing *D.E. v. State*, 605 So. 2d 574 (Fla. 3d DCA 1992); *Curry v. State*, 570 So. 2d 1071, 1073 (Fla. 5th DCA 1990) (defendant's act of throwing down pill bottle containing rock cocaine while walking away after police ordered him to halt constituted voluntary abandonment); *State v. Canada*, 715 So. 2d 1164 (Fla. 5th DCA 1998) (where police officer asked defendant to show him what he had in his hand, but defendant threw away object and attempted to run away, there was no seizure and trial court therefore erred in suppressing container defendant threw away on the ground that the container was the fruit of prior illegal police conduct).

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the Fourth District Court of Appeal declaring §924.07(1)(l), Fla. Stat. (1997), unconstitutional should be quashed, and the trial court's order granting Defendant's motion to suppress evidence and dismissing the case should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was furnished by U.S. mail to Bernard S. Fernandez, Asst. Public Defender, 421 3rd Street, West Palm Beach, FL 33401, on this ___ day of July, 1999.

DOUGLAS J. GLAID
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APPENDIX