IN THE SUPREME COURT OF FLORIDA

ANTHONY H. JERRY,

Petitioner,

v. CASE NO. 95,866

STATE OF FLORIDA, DCA No.: 97-2638

Respondent.

_____/

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner's sentence was affirmed on appeal based on the precedent of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998).

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier New.

SUMMARY OF ARGUMENT

Since the decision of the Fifth District Court of Appeal relies on a case currently pending in this court, this Court has jurisdiction to accept the appeal.

ARGUMENT

THIS COURT HAS THE DISCRETION TO ACCEPT JURISDICTION IN THE INSTANT CASE.

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court held that when a district court issues a decision where the controlling precedent is presently pending in this Court, there is "prima facie express conflict (which) allows this court to exercise its jurisdiction." Id. at 420. The decision of the Fifth District Court of Appeal in the instant case relied on Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998), which is currently pending review before this Court. This Court therefore has discretion to entertain the review sought by Petitioner.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court accept jurisdiction in this case pursuant to the holding in Jollie.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Susan A. Fagan, counsel for the Petitioner, 112 Orange Ave. Ste A., Daytona Beach, FL 32114, this 21st day of July 1999.

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(CASANUEVA, Judge.) Cornell Horsley appeals the denial of his motion to suppress, alleging his warrantless arrest was without probable cause or a reasonable suspicion. We concur and reverse.

Cornell Horsley, standing near the walk-up window of a take-out restaurant in St. Petersburg, was arrested for violation of a municipal ordinance banning the possession of open containers of alcoholic beverages. A police officer found an open bottle of beer on the ground ten feet away from Mr. Horsley in this public area. We reverse on the ground that no police officer observed Mr. Horsley actually committing a misdemeanor in his presence. The fruit of the search incident to the arrest–two rocks of crack cocaine–should have been suppressed.

Two officers were instrumental in Mr. Horsley's arrest. The events began when Sergeant Lightfield, riding in an unmarked car, spotted Mr. Horsley carrying a bottle wrapped in a brown paper bag as he walked along the sidewalk. Sergeant Lightfield, from a distance of five or six feet, could see that the object was a bottle with a label, but he could not discern what was written on the label or whether the bottle contained any liquid. His experience led him to conclude that the bottle contained beer or malt liquor. Sergeant Lightfield then radioed all of this information, including a description of the "suspect," to a nearby uniformed officer.

Officer Herron, the recipient of the dispatch, discovered Mr. Horsley within a minute outside a business known as the Snow Peak. Mr. Horsley, who stated that he was ordering food from the window, was not carrying a bottle of any kind, but Officer Herron found an open container of Colt 45 malt liquor on the ground ten feet away. He then arrested Mr. Horsley for possessing an open container of alcohol, a violation of a municipal ordinance.[1]

According to section 901.15(1), Florida Statutes (1997), an officer may arrest a person without a warrant for violation of a municipal ordinance committed "in the presence of the officer. An arrest for the . . . violation of a municipal or county ordinance shall be made immediately or in fresh pursuit." The courts have strictly construed the "presence of the officer" language, requiring that the arresting officer actually see or otherwise detect by his senses that the person has violated the ordinance. *See Malone v. Howell*, 192 So. 224 (Fla. 1939); *Peterson v. State*, 578 So. 2d 749 (Fla. 2d DCA 1991); *Steiner v. State*, 690 So. 2d 706 (Fla. 4th DCA 1997).

In this case, however, the State has urged that the observations of Sergeant Lightfield may be imputed to Officer Herron under the "fellow officer" rule, which "allows an arresting officer to assume probable cause to arrest a suspect from information supplied by other officers." *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997). The collective knowledge of the two officers, according to the State, provided probable cause for the arrest of Mr. Horsley.

Although the general proposition advanced by the State is true and operative in the context of arrests for misdemeanors, *see State v. Eldridge*, 565 So. 2d 787 (Fla. 2d DCA 1990), we must reject the State's argument because neither Officer Lightfield nor Officer Herron actually observed Mr. Horsley committing an open container violation. Sergeant Lightfield did not know what the label stated nor whether the bottle contained alcohol; Officer Herron did not see Mr. Horsley carrying the container. Furthermore, we decline to hold that Mr. Horsley constructively possessed the container, found ten feet away, because the area was open and accessible to the public. Although Officer Herron stated that no other person was nearby when he arrested the defendant, both officers described the area as normally busy, where people tended to congregate and where businesses sold food and beverages. All of the circumstances in the officers' collective knowledge provided only a mere suspicion that Mr. Horsley possessed an open container of alcohol. Accordingly, we reverse the court's denial of the motion to suppress and vacate the judgment and order of probation. (PARKER, C.J., and GREEN, J., Concur.)

[1]Although the parties have not provided this court with the ordinance that Mr. Horsley allegedly violated, the appellant's attorney verified that such an ordinance does exist. No challenge to this ordinance has been raised in this appeal.

* * *

STATE v. WRIGHT. 1st District. #98-4511. May 27, 1999. Appeal from the Circuit Court for Union County. AFFIRMED. *State v. Holland*, 689 So. 2d 1268 (Fla. 1st DCA 1997). We certify conflict with *State v. Hayes*, 720 So. 2d 1095 (Fla. 4th DCA 1998) and *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996).

WEEKS v. STATE. 1st District. #98-4078. May 27, 1999. Appeal from the Circuit Court for Walton County. AFFIRMED. *See Baker v. State*, 714 So. 2d 1167 (Fla. 1st DCA 1998).

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VALMOND v. STATE. 3rd District. #98-3060. May 26, 1999. Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County. Affirmed. *Strickland v. Washington*, 466 U.S. 668 (1984); *Maharaj v. State*, 684 So. 2d 736 (Fla. 1996); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989).

WRIGHT v. STATE. 3rd District. #96-3070. May 26, 1999. Appeal from the Circuit Court of Dade County. Affirmed. *See Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Hooper v. State*, 476 So. 2d 1253, 1256 (Fla. 1985); *Smellie v. State*, 720 So. 2d 1131, 1132 (Fla. 4th DCA 1998); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998).

* * *

BAKER v. STATE. 4th District. #98-2766. May 26, 1999. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County. We affirm defendant's conviction without prejudice to raise the gain time issue in a 3.850 motion.

DOSS v. LAMBDIN. 4th District. #98-2392. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed. The appellant has failed to exhaust his administrative remedies.

FERGUSON v. JENSEN. 4th District. #98-1951. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed. *See Siegel v. Deerwood Place Corp.*, 701 So. 2d 1190 (Fla. 3d DCA 1997), *review denied*, 717 So. 2d 537 (Fla. 1998).

MALMQUIST v. STATE. 4th District. #98-1413. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed. *See State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991).

T.H. v. FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. 4th District. #98-2387. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. We affirm the trial court's detailed order terminating parental rights. Termination was justified under section 39.464(1)(c), Florida Statutes (1997).

ZAMBUTO v. STATE. 4th District. #s 98-0436 and 98-0492. May 26, 1999. Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County. We affirm without prejudice for the appellant to file a motion pursuant to Florida Rule of Criminal Procedure 3.800.
AFFIRMED

* * *

JERRY v. STATE. 5th District. #97-2638. May 28, 1999. Appeal from the Circuit Court for Orange County. AFFIRMED. *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA), *review granted*, 718 So. 2d 169 (Fla. 1998).

CARMONA v. STATE. 5th District. #98-1873. May 28, 1999. Appeal from the Circuit Court for Lake County. AFFIRMED. *See State v. Brown*, 725 So. 2d 441 (Fla. 5th DCA 1999); *State v. Johnson*, 695 So. 2d 771 (Fla. 5th DCA), *rev. denied*, 705 So. 2d 9 (Fla. 1997).

ROBINSON v. ROBINSON. 5th District. #98-3185. May 28, 1999. Appeal from the Circuit Court for Brevard County. AFFIRMED. *Doerflein v. Doerflein*, 724 So. 2d 153 (Fla. 5th DCA 1998).

CRAWFORD v. STATE. 5th District. #99-1100. May 28, 1999. 3.850 Appeal from the Circuit Court for Seminole County. AFFIRMED on the authority of *Dixon v. State*, 1999 WL 46629 (Fla. Feb. 4, 1999).

CLARK v. STATE. 5th District. #99-174. May 28, 1999. Appeal from the Circuit Court for Orange County. AFFIRMED on the authority of *McKnight v. State*, 727 So. 2d 314 (Fla. 3d DCA 1999).

FLORENCE v. STATE. 5th District. #99-356. May 28, 1999. Appeal from the Circuit Court for Sumter County. AFFIRMED on the authority of *Alachua Regional Juvenile Detention Center v. T. O.*, 684 So. 2d 814 (Fla. 1996).

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