IN THE SUPREME COURT OF FLORIDA

SOLOMON WISE,	)	
	)	
Petitioner,	)	
	)	S. CT. CASE NO. SC96760
vs.	)	DCA CASE NO. 5D98-3123
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Petitioner, Solomon Wise, was charged by the state, in an information filed on February 27, 1998, with possession of cocaine and driving with a suspended or revoked license. (R 55) On May 6, 1998, the Petitioner filed a motion to suppress certain evidence seized by the police as a result of an illegal detention and seizure of the Petitioner by the police. (R 81) A hearing was held on the motion to suppress on August 24, 1998, before Circuit Judge Warren Burk. (R 48-53) At the conclusion of the hearing, the trial court denied the Petitioner's motion to suppress. (R 52-53, 99)

Petitioner entered a plea of no contest to both of the charged offenses, specifically reserving his right to appeal the trial court's ruling on the motion to suppress. (R 1-8, 100-101) The Petitioner received two concurrent sentences of 18 months probation for the charged offenses. (R 14-16, 109-116)

The Petitioner timely filed a notice of appeal on November 16, 1998. (R 118) The office of the Public Defender was appointed to represent the Petitioner in this appeal on November 17, 1998. (R 124-125)

On appeal, Petitioner argued that the trial court erroneously denied the Petitioner's motion to suppress and that the trial court erroneously sentenced the petitioner. The Fifth District affirmed the trial court's denial of the Petitioner's motion to suppress and the Petitioner's sentences, citing Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1993) (en banc), rev. granted, 718 So.2d 169 (Fla. 1998). Wise v. State, 24 Fla. L. Weekly D 2113 (Fla. 5th DCA, September 10, 1999) [See appendix] Petitioner filed a notice to invoke this Court's jurisdiction on October 7, 1999. This Court accepted jurisdiction on January 6, 1999.

STATEMENT OF THE FACTS

Deputy Clifton Singleton testified that at approximately 1:30 in the morning he and another deputy investigated a small red Nissan vehicle parked in front of an empty residence. (R 22-23) According to Deputy Singleton, when he and the other deputy began to look through the window of the vehicle with a flashlight, the Petitioner came out of a residence located next to the empty residence and approached the deputies. (R 23) Deputy Singleton further testified that the Petitioner explained he did not know how the vehicle got there and had not had any contact with the vehicle. (R 24) Subsequent to this, Deputy Singleton spoke with the owner of the vehicle, Christina Mick, and who did not have a driver's license. (R 24)

Deputy Singleton next testified that, at approximately 5:30 that same morning, he saw what he thought was the same red Nissan traveling around in another area in Merritt Island which prompted him to stop the vehicle in order to determine if Ms. Mick was driving. (R 24-25) This could not be determined from viewing the vehicle, according to Deputy Singleton, because of the vehicle having tinted windows. (R 25) Deputy Singleton additionally testified that, upon stopping the vehicle, he discovered the Petitioner was actually the driver of the vehicle, who he had previously learned also had a suspended driver's license. (R 25-26) Upon arresting the Petitioner and searching the vehicle, Deputy Singleton discovered a small white tissue under the

driver's seat containing crack cocaine. (R 26-27)

SUMMARY OF THE ARGUMENT

POINT ONE: The Fifth District erroneously affirmed the trial court's denial of the Petitioner's motion to suppress based on the Petitioner being improperly stopped and detained by Deputy Singleton ***without a reasonable suspicion that the Petitioner was committing or about to commit any illegal activity***. The basis offered by Deputy Singleton for detaining the Petitioner was that he had learned, prior to the Petitioner's illegal detention, that the owner of the vehicle, which was being driven by the Petitioner at the time of the detention, had a suspended license. This did not, however, standing by itself, provide a sufficient lawful basis upon which Deputy Singleton could stop the vehicle to "check" to see if the owner of the vehicle was, in fact, driving the vehicle. Under the Fourth Amendment of the United States Constitution and section 951.151, Florida Statutes, an investigatory stop by the police is unlawful unless it is premised upon a reasonable suspicion of criminal activity. Because this suspicion was lacking in the instant case, according to Deputy Singleton's own testimony, the trial court should have granted the Petitioner's motion to suppress.

POINT TWO: The Fifth District erroneously affirmed the Petitioner's sentences of 18 months probation term for a second degree misdemeanor offense of driving with a suspended driver's license. This sentence exceeds the statutory maximum of 60 days permitted under section 775.082(4)(b), Florida Statutes, and

requires remand for resentencing as to the offense of driving with a suspended license. Further, as to both of the Petitioner's charged offenses, the Fifth District erroneously affirmed special conditions b, j, and portions of k of the Petitioner's written probation order which were not orally announced by the trial court and must, therefore, be struck by this Court, irrespective of no objection being made at sentencing.

ARGUMENT

POINT ONE

THE FIFTH DISTRICT COURT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS

The Petitioner filed a motion to suppress based on the police illegally detaining him while driving an other individual's vehicle. (R 81-83) During the hearing on the motion to suppress, Deputy Singleton testified that he initially noticed a red Nissan vehicle parked lawfully on a residential street at 1:30 in the morning. (R 22-23) He subsequently learned, upon knocking on a nearby residence, that the owner of the vehicle, Christina Mick, did not have a driver's license. (R 24) Approximately four hours later, at 5:30 that same morning, Deputy Singleton testified that he saw what he felt was the same red Nissan vehicle traveling in another area of Merritt Island which prompted him to check the vehicle to see if Ms. Mick was driving. (R 24-25) The vehicle had tinted windows, however, which did not permit Deputy Singleton to tell who was driving the vehicle, so Deputy Singleton decided to stop the vehicle. (R 25, 39) This is when Deputy Singleton determined that the Petitioner was driving the vehicle and who was ultimately arrested for possession of cocaine and driving with a suspended driver's license. (R 26-27)

The trial court denied the Petitioner's motion to suppress solely on the basis of

Deputy Singleton investigating whether Ms. Mick was actually driving the vehicle and cited the authority of State v. Barnett, 572 So.2d 1033 (Fla. 2d DCA 1991). (R 35-36) The facts *sub judice* are vastly different, however, from the factual circumstances existing in Barnett. To begin with, the police in *Barnett* were dealing with looking for an individual who had several outstanding warrants, who ***was thought by the police to be found in a certain vehicle, and who the police knew often rode together with Mr. Barnett in the same vehicle***. *Id*., 1034. In the case at bar, Deputy Singleton merely speculated that Ms. Mick ***might be*** driving the red Nissan she owned without a valid driver's license, but candidly acknowledged that this "hunch" was not because he actually saw Ms. Mick driving the vehicle. (R 25) In effect, Deputy Singleton only observed what he believed was the vehicle that he had seen parked several hours earlier, with tinted windows, on the road, but not the driver of the vehicle. (R 25) Moreover, there was no active arrest warrant for Ms. Mick and there were several other people present at the residence where Deputy Singleton had earlier spoken with the Petitioner and Ms. Dick who could have been driving the vehicle. (R 31-32)

Under the Florida Stop and Search statute, section 901.151, Florida Statutes, Article I, Sections 9 and 12 of the Florida Constitution, and the Fourth Amendment of the United States Constitution, an investigatory stop of an individual by the police is not permitted unless there is a **reasonable suspicion** that the individual is committing

or has committed some type of criminal activity. Terry v. Ohio, 392 U. S. 1 (1968); Love v. State, 706 So.2d 923 (Fla. 2d DCA 1998). Such a founded suspicion must be based on more than mere speculation or a "hunch," but must be based on some "minimal level of objective justification" by the police officer for making the stop. United States v. Sokolow, 490 U. S. 1, 7 (1989). See also, Brown v. State, 687 So.2d 13 (Fla. 5th DCA 1996) and McCray v. State, 657 So.2d 1 (Fla. 2d DCA 1994).

Although the trial court felt that Deputy Singleton could stop the vehicle the Petitioner was driving to "check out" whether or not ***Ms. Mick*** was driving, the prosecutor, Deputy Singleton, and the trial court, all failed to cite any factual circumstances which would have caused Deputy Singleton to have reasonably believed that Ms. Mick was actually driving the vehicle. In fact, Deputy Singleton candidly acknowledged that the ***only*** reason he stopped the vehicle with the tinted windows was to see if Ms. Mick ***might*** have been driving and that he had ***no indication prior to stopping the vehicle that any traffic violation had occurred or that any criminal activity had been committed by the unknown driver of the vehicle***. (R 39) In essence, the sole purpose of the Petitioner's detention was investigatory in attempting to ascertain the identity of the driver of the Nissan. Crew v. State, 738 So.2d 352 (Fla. 2nd DCA 1999) Accordingly, there existed no lawful basis, predicated on a founded suspicion, upon which Deputy Singleton could have

stopped the red Nissan, especially since the vehicle may have been driven by any number of people besides the Petitioner or Ms. Mick. Melton v. State, 698 So.2d 1287 (Fla. 5th DCA 1997). The trial court's denial of the Petitioner's motion to suppress was, therefore, incorrect and should have been reversed by the Fifth District without Deputy Singleton providing a founded, lawful suspicion to stop the Petitioner's vehicle.

POINT TWO

THE FIFTH DISTRICT COURT ERRONEOUSLY AFFIRMED THE PETITIONER'S ILLEGAL SENTENCES

The Petitioner received a sentence of 18 months probation for the second degree misdemeanor offense of driving a vehicle with a suspended driver's license. (R 14-16, 109-116) Under section 322.34(2)(a), Florida Statutes, the first offense of driving with a suspended driver's license is a second degree misdemeanor punishable by a maximum of 60 days imprisonment. See Section 775.082(4)(b), Florida Statutes. Accordingly, the Petitioner's 18 month probation term exceeds the 60 day statutory maximum for a second degree misdemeanor offense of driving with a suspended driver's license and remand for resentencing is required for that offense.

In addition, the Fifth District should have struck special conditions b, j, and portions of k of Petitioner's written probation order as to both of the charged offenses. (R 114) Because the trial court did not orally pronounce special probation conditions b and j, pertaining to prohibiting the Petitioner from consuming alcohol or going to a bar without the permission of his probation officer, these special conditions should be stricken by this Court. (R 14) Burch v. State, 724 So.2d 718 (Fla. 1st DCA 1999). As for special condition k of the Petitioner's written probation order, the trial court orally pronounced that the Petitioner would only be financially responsible for ***paying for random urinalysis***. (R 14) Therefore, those portions of special condition k,

which require the Petitioner to be financially responsible for ***any breathalyzer tests and blood tests***, should be stricken since they were not orally pronounced by the trial court at sentencing. (R 14, 114) State v. Williams, 712 So.2d 762 (Fla. 1998). The aforementioned unpronounced special probation conditions on the Petitioner's written probation orders should, therefore, have been stricken by the Fifth District as to both of the charged offenses.

The Fifth District relied on its decision in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), rev. granted, 718 So.2d (Fla. 1998), in affirming the Petitioner's aforementioned sentences. Wise v. State, 24 Fla. L. Weekly D 2113 (Fla. 5th DCA September 10, 1999). Specifically, the Fifth District held in Maddox, supra, that any sentencing errors, even those previously held by the district courts and this Court to be "fundamental" in nature, are waived on direct appeal under Section 924.051, Florida Statutes (Supp. 1996), if they are not objected to at sentencing or 30 days thereafter. Petitioner would submit that this analysis by the Fifth District is incorrect, particularly when dealing with fundamental sentencing errors.

As pointed out by the Second District in Bain v. State, 730 So.2d 296 (Fla. 2d DCA 1999):

> "...appellate review of fundamental error is, by its nature, an exception to the requirement of preservation...no rule of preservation can impliedly abrogate the fundamental error doctrine because the doctrine is an exception to every such rule. It makes no difference this particular rule is codified." [Emphasis added] Id. at 302

Petitioner would submit that this is the appropriate reasoning which this Court should adopt in lieu of that adopted by the Fifth District in Maddox, and relied on by the Fifth District in resolving the instant case. See also, Marrero v. State, 24 Fla. L. Weekly D2242 (Fla. 3rd DCA September 29, 1999); Nelson v. State, 719 So.2d 1230 (Fla.1st DCA 1998), Sanders v. State, 698 So.2d 377, 378 (Fla. 1st DCA 1997), and Powell v. State, 719 So.2d 963 (Fla. 4th DCA 1998). Accordingly, the Fifth District's holding in the case sub judice that, under Maddox, supra, Section 924.051, Florida Statutes (Supp. 1996), bars appellate review of the aforementioned sentencing errors is erroneous. This cause should, therefore, be remanded for resentencing as to each of the instant offenses, for the imposition of corrected written probation orders, which accurately reflect the trial court's oral sentencing pronouncements, and to conform the sentence for the driving with a suspended license offense within the statutory maximum of 60 days for a second degree misdemeanor.

CONCLUSION

Based on the authorities cited herein, Petitioner respectfully requests that this Honorable Court, reverse the Fifth District's affirmance of the trial court's denial of the Petitioner's motion to suppress and the Petitioner's sentences, and, as to Point One, vacate the Petitioner's judgments and sentences, and order that the Petitioner be discharged as to the instant offenses, or alternatively, as to Point Two, to remand the driving with a suspended license second degree misdemeanor offense for resentencing within the 60 day statutory maximum, as well as striking special conditions b, j, and portions of k of the Petitioner's written probation orders for both of the charged offenses which were not orally pronounced by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Solomon Wise, 8767 Live Oak Ct., Cape Canaveral, FL 32920, on this 31st day of January, 2000.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

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A P P E N D I X

Wise v. State, 24 Fla. L. Weekly D 2113 (Fla. 5th DCA, September 10, 1999)

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