IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC01-319

KELLEN LEE BETZ,

Respondent.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The record on appeal is divided into three volumes, the first two are sequentially numbered with stamped numbers on the lower right of each page, from 1 to 70 and will be designated as (R __). Supplemental volume one (the third volume) containing the transcript of the hearing on the motion to suppress, is separately numbered by the court reporter pages 3 through 51. The transcript of the hearing will be delineated as (V III/T __) using the page numbers printed on the upper right of the page.

STATEMENT OF THE CASE AND FACTS

Kellen Lee Betz was arrested by police officers of the Clearwater Police Department on March 9, 1998 for possession of marijuana. (R 1) On March 19, 1998 notice of appearance, plea of not guilty, etc., was filed. (R 3) A one count information, charging Mr. Betz with possession of over 20 grams of marijuana, a third degree felony, was filed on April 2, 1998. A motion to suppress was filed on August 21, 1998 (R 9-22) and a hearing on the motion was heard on October 2, 1998. The trial court denied Respondent's motion to suppress evidence of marijuana found at the time of his arrest. (The record does not show when the motion was denied.) A plea of nolo contendere to the information was made on March 11, 1999 and Mr. Betz was sentenced to two years probation with a two year drivers license suspension. A motion for reconsideration of sentence was filed on May 10, 1999 (R 36) and a hearing to reconsider sentence was held on May 28, 1999, at which time, based upon an oversight at the change of plea hearing, the record was made to reflect that a condition of the plea included that the motion to suppress was dispositive and it was so ordered. (R 69) A timely notice of appeal was filed. (R 37)

The Second District Court of Appeal reversed the trial court's order denying Mr. Betz's motion to suppress in part. The Second District held, though the search of Mr. Betz and the passenger compartment of Mr. Betz's vehicle was lawful, the search of the

trunk was illegal. The Court concluded, "[N]o facts articulated by the officer suggested that he had probable cause to believe that Mr. Betz had concealed additional contraband in the trunk, and without those additional facts a search of the trunk was unreasonable under the Fourth Amendment." Betz v. State, 26 Fla. L. Weekly D 304 (Fla. 2nd DCA January 24, 2001).

At the hearing on the motion to suppress in the trial court, only Officer Harrold testified. Officer Harrold had participated in about 700 to 800 narcotics investigations in his ten years as an officer (V III/T. 7). At the time of the encounter with Mr. Betz, he was a field training officer. As part of those duties he trains recruit officers on narcotics investigations (V III/T 8). The training includes training on how narcotics are packaged, including marijuana, which is most often packaged in plastic sandwich bags (V III/T 8-9). When he encountered Mr. Betz, he had Recruit Romanus with him. (V III/T 9)

Officer Harrold initiated a traffic stop on Mr. Betz's vehicle for driving with one headlight out. As soon as Mr. Betz stopped, he jumped out his vehicle, closed the driver's door and waited for the officer. (V III/T 9-10) When Officer Harrold approached the car, he could smell a strong odor of marijuana emanating from inside the vehicle through the open window. He told Mr. Betz he smelled marijuana coming from the vehicle and put his face up to the open window and confirmed the smell of marijuana coming from

the interior. Mr. Betz said, “I don’t know what you are talking about.” (V III/T 12) Mr. Betz then became nervous and jittery. Officer Harrold could also smell marijuana on Betz’s clothing and told him that “based on the odor of marijuana coming out of the car” he was going to search the vehicle. Mr. Betz then told the Officer that he did not give permission to search the vehicle, to which the officer replied he did not need it, he had probable cause. (V III/T 13)

Prior to initiating the search of the vehicle, based upon the Mr. Betz’s activity, the way he was getting excited, the officer wanted to pat him down for weapons and contraband. (V III/T 13-14) Officer Harrold told Mr. Betz to put his hands on the car for a pat down search. When Officer Harrold began to do a pat down search of Mr. Betz, as his hands reached around to his front, Mr. Betz pushed off his car and brought his hands down to his waist. Officer Harrold told Mr. Betz to again put his hands on the car and went to pat down the area in his front, but Mr. Betz again came off the car. Officer Harrold then said that the situation had become a safety issue, so he told Mr. Betz to put his hands behind him and the officer held his fingers and performed a pat down(V III/T 14-15).

When Officer Harrold was able to feel Mr. Betz’s right crotch area, he felt an object. As soon as he grabbed the object, he could hear plastic crinkling and rustling, and due to his training

and experience, he thought it to be a baggie of drugs (V III/T 15). Officer Harrold found a baggie of green vegetable matter that looked and smelled like marijuana. He then placed Mr. Betz under arrest. (V III/T 15).

Officer Harrold directed the trainees (the record is silent as to when or how recruit Ingram came upon the scene) to search the interior of the car. The Recruit Officer Engram told him she found some marijuana inside the car at which time the officer looked and saw what it was. Mr. Betz moved to strike this testimony as hearsay and the court agreed (V III/T 16-17). On cross examination, Officer Harrold was asked if any contraband was found in the interior of the car and he responded only what the other officer had found. He was then asked if the other officer removed it from the car, to which he responded that she showed it to him first and he instructed her to remove it (V III/T 25).

Officer Harrold personally viewed the car's trunk and saw a black briefcase, which he opened and searched. Inside the briefcase was a metal box, which he opened and inside the box he found another baggie of marijuana. (V III/T 17-18) The baggie found on the Appellee weighed approximately 12.6 grams and the one found in the trunk weighed 10.7 grams. (VIII/T 18)

Officer Harrold was asked on redirect if he called for a drug dog to come to the scene, to which he indicated that he did not call for a drug dog because he had already found marijuana and that

the odor of marijuana was so overpowering that the dog would have alerted to anything in the car (V III/T30).

SUMMARY OF THE ARGUMENT

The officer who stopped Mr. Betz, prior to any pat down or search, had probable cause to believe that Mr. Betz’s car, which had been lawfully stopped, contained contraband, based upon the strong odor of marijuana emanating from it.

ARGUMENT

ISSUE

THE SECOND DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING MR. BETZ'S MOTION TO SUPPRESS THE MARIJUANA FOUND IN THE TRUNK OF HIS VEHICLE, BASED UPON THE TOTALITY OF THE EVIDENCE.

The facts of this case are not in dispute. Mr. Betz's vehicle was properly stopped for a traffic infraction. The Officer, a very experienced narcotics investigator, upon approaching Mr. Betz, who had exited his vehicle in response to the traffic stop, smelled a strong odor of marijuana coming through the vehicle's open window and also coming from Mr. Betz. Based upon his personal observations, the officer determined he had probable cause to conduct a search of the car. Prior to looking inside the car, the officer told Mr. Betz that based upon the odor of marijuana coming out of the car, he was going to search it. (V III/T. 13) Because Mr. Betz was getting excited, Officer Harrold decided to pat him down first for weapons and contraband. As a result of the pat down, he discovered marijuana. A further search of the car produced additional marijuana.

A reviewing court must interpret the evidence and reasonable inferences therefrom in a manner to sustain the trial court's ruling on a motion to suppress. See Murray v. State, 692 So.2d 157, 159 (Fla. 1997) (A trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness and, as the

reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court’s ruling.)

Mr. Betz did not dispute that the initial traffic stop of his vehicle was proper, but rather attempted below to bootstrap all that followed on a theory that the ultimate search was beyond the scope of the officer’s authority. Factually, this argument does not hold up. From the moment the officer arrived next to Mr. Betz’s automobile, his ultimate actions were justified by the facts.

Though Mr. Betz jumped out of his car upon being stopped, and closed the door, he left the window open. Officer Harrold, upon reaching the car, smelled a strong odor of marijuana emanating from the inside of the car. (V III/T 12). Prior to initiating any search of Mr. Betz, the officer advised him that he smelled marijuana coming from the car and he was going to search it. When advised that the Appellee would not consent, the officer told him he did not need his consent because he had probable cause. (V III/T 13)

After searching Mr. Betz, Officer Harrold directed his recruit officer to search the car. Inside she found additional marijuana, though Harrold’s testimony regarding what the recruit told him was stricken as hearsay. Though this ruling may have been erroneous because of the fellow officer doctrine, the fact that contraband

was found inside the car was brought out by Mr. Betz through the cross examination of the officer. Regardless, the fact that marijuana was found in the car was properly before the trial court because recruit Ingram was a fellow officer acting under Harrold's supervision.

> The "fellow officer" rule was adopted by the United States Supreme Court in Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). The Whiteley Court stated that "police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." Id. at 568, 91 S.Ct. 1031. This Court adopted the "fellow officer" rule in the context of an arrest in Johnson v. State, 660 So.2d 648 (Fla.1995), wherein we explained:
>
> "The issue here is whether an officer who himself lacks any personal knowledge to establish probable cause, who has not been directed to effect an arrest, and who does not know a valid warrant has been issued nevertheless can lawfully arrest a suspect. In broad terms, the collective knowledge of police investigating a crime is imputed to each member under a rule of law often called the "fellow officer rule" or "collective knowledge doctrine." The exact contours of the rule are not entirely clear. Florida courts have tended to frame this doctrine in very sweeping terms, e.g., Carroll v. State, 497 So.2d 253 (Fla. 3d DCA 1985), review denied, 511 So.2d 297 (Fla.1987), though we obviously are bound by any contrary federal law in the Fourth Amendment context. Perez[v. State, 620 So.2d 1256 (Fla.1993)]."
>
> ...

State v. Peterson, 739 So.2d 561, 565 (Fla. 1999)

Though the record does not indicate how much marijuana was found inside the passenger compartment, or in what form it was in, it is clear that additional contraband was found inside the car's interior. After the interior was searched, the trunk was opened, the briefcase found and opened, the metal box found and opened and additional marijuana was found.

A. PROBABLE CAUSE TO SEARCH MR. BETZ'S VEHICLE

In 1998, the Fifth District Court of Appeal said:

> [I]n a number of cases, [footnote omitted] this court has held that to a trained and experienced police officer, the smell of cannabis emanating from a person or a vehicle, gives the police officer probable cause to search the person or the vehicle.

State v. Reed, 712 So.2d 458 (Fla. 5th DCA 1998).

The question here, and the issue below, was whether the probable cause which Officer Harrold had authorized him to search the trunk of the car.

B. HOLDING OF THE SECOND DISTRICT COURT OF APPEAL

The Second District Court of Appeal, in its revised opinion below said:

> [1] We first resolve the matter of the search of Mr. Betz's person. The Fiero was validly stopped for an extinguished headlight. See Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Once the experienced officer detected the smell of cannabis emanating from the car's interior as well as from Mr. Betz's clothing, he had probable cause to search Mr. Betz and the interior of the car for contraband and weapons. See New York v. Belton, 453 U.S.

454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); State v. Smith, 662 So.2d 725 (Fla. 2d DCA 1995); Chapas v. State, 404 So.2d 1102 (Fla. 2d DCA 1981). The Fifth District held as follows in State v. Wells, 516 So.2d 74, 75 (Fla. 5th DCA 1987):

> The mere possession of marijuana is illegal. When a police officer who knows the smell of burning marijuana detects that odor emanating from a vehicle, or from a person who has recently exited a vehicle, he has probable cause to believe that a crime has been committed and that such person committed it. This probable cause authorizes the warrantless arrest of such person and a warrantless search, either before or after the arrest, of the passenger compartment of the vehicle, and closed containers therein, for evidence of the crime.

Betz v. State, 26 Fla. L. Weekly D304 (Fla. 2nd DCA January 24, 2001)

C. THE DISTRICT COURT APPLIED THE WRONG FOURTH AMENDMENT TEST

The Second District Court of Appeal misapprehended the factual basis for the search in this case. Belton, Smith, and Chapas, cited as authority for their finding that Officer Harrold was only authorized to search Mr. Betz and the passenger compartment of his car, are all cases dealing with the permissible scope of a search incident to a valid arrest of someone in their car or who had just exited from it.

In Wells, a case that predates State v. Jarrett, 530 So. 2d 1089 (Fla. 5th DCA 1988), the vehicle involved was a van and only the passenger compartment was searched. No issue was presented in that case as to whether the probable cause the officer had would

have justified searching other areas of the van.

In the case at bar, based upon the facts presented, the scope of the search at issue is mandated by the automobile exception and not by a search incident to a valid arrest.

D. UNITED STATES SUPREME COURT HOLDINGS

In accordance with article I, section 12, of the Florida Constitution, searches and seizures are construed in conformity with United States Supreme Court decisions interpreting the Fourth Amendment.

The United States Supreme Court, in the 1999 case of Wyoming v. Houghton, 119 S.Ct. 1297, 526 U.S. 295 (1999), said:

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. See Wilson v. Arkansas, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); California v. Hodari D., 499 U.S. 621, 624, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Where that inquiry yields no answer, we must [526 U.S. 300] evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. See, e.g., Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).
>
> It is uncontested in the present case

that the police officers had probable cause to believe there were illegal drugs in the car. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), similarly involved the warrantless search of a car that law enforcement officials had probable cause to believe contained contraband--in that case, bootleg liquor. The Court concluded that the Framers would have regarded such a search as reasonable in light of legislation enacted by Congress from 1789 through 1799--as well as subsequent legislation from the Founding era and beyond--that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to a duty. Id., at 150-153, 45 S.Ct. 280. See also United States v. Ross, 456 U.S. 798, 806, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Boyd v. United States, 116 U.S. 616, 623-624, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Thus, the Court held that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant" where probable cause exists. Carroll, supra, at 153, 45 S.Ct. 280.

We have furthermore read the historical evidence to show that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers within an automobile. In Ross, supra, we upheld as reasonable the warrantless search of a paper bag and leather pouch found in the trunk of the defendant's car by officers who had probable cause to believe that the trunk contained drugs. Justice STEVENS, writing for the Court, observed:

"It is noteworthy that the early legislation on which the Court relied in Carroll concerned the enforcement of laws imposing duties on imported merchandise.... Presumably such merchandise was shipped then in containers [526 U.S. 301] of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs

> officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country--whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile--it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." Id., at 820, n. 26, 45 S.Ct. 280.
>
> Ross summarized its holding as follows: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Id., at 825, 102 S.Ct. 2157 (emphasis added). And our later cases describing Ross have characterized it as applying broadly to all containers within a car, without qualification as to ownership. See, e.g., California v. Acevedo, 500 U.S. 565, 572, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) ("[T]his Court in Ross took the critical step of saying that closed containers in cars could be searched without a warrant because of their presence within the automobile"); United States v. Johns, 469 U.S. 478, 479-480, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) (Ross "held that if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any containers found inside that may conceal the object of the search").

Houghton, at 1300-1301

E. PRIOR FLORIDA DISTRICT COURT HOLDINGS

This precise issue has been addressed by a Florida District Court prior to this case.

> The record in the instant case establishes that Trooper Santiago had probable cause to believe that defendant's automobile contained contraband since, as he approached the automobile, he detected the odor of burnt cannabis emanating from the automobile. See State v. Langer, 516 So.2d 310 (Fla. 3d DCA 1987); State v. Wells, 516 So.2d 74 (Fla. 5th DCA 1987). It necessarily follows, therefore, that based upon this probable cause Trooper Santiago was authorized to conduct a warrantless search of defendant's automobile and, under Ross, this authority to search included the authority to search the trunk of the automobile. See State v. Bennett, 481 So.2d 971 (Fla. 5th DCA 1986); State v. Scotti, 428 So.2d 771 (Fla. 4th DCA 1983). Accordingly, the order of the trial court which granted the motion to suppress the cocaine seized from the trunk of defendant's automobile is reversed and this case remanded to the trial court for proceedings consistent with this opinion.

State v. Jarrett, 530 So.2d 1089, 1090, 1091 (Fla. 5th DCA 1988)

E. WHY THE SECOND DISTRICT COURT WAS WRONG

The Second District Court of Appeal discounts the Jarrett holding (see footnote, page 5 of the revised opinion) since California v. Acevedo, 500 U.S. 565 (1991) was decided after Jarrett. However, this is not a correct reading of Acevedo. Jarrett relied on the line of cases stemming from Carroll:

> The Supreme Court of the United States, in the case of Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 284, 69 L.Ed. 543 (1925), held that "if the search and seizure [of an automobile] without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search

> and seizure are valid." Thus, the law is clear that a police officer is authorized to conduct a warrantless search of an automobile when the police officer has probable cause to believe that the automobile contains contraband. The Supreme Court further held, in the case of United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982), that, "if probable cause justifies the search of a lawfully stopped automobile, it justifies a search of every part of the automobile and its contents that may conceal the object of the search." (emphasis supplied).

Jarrett at 1900

In Acevedo, the Supreme Court set the stage for its ruling by first stating what the lower court decided:

> The California Court of Appeal, Fourth District, concluded that the marijuana found in the paper bag in the car's trunk should have been suppressed. 216 Cal.App.3d 586, 265 Cal.Rptr. 23 (1990). The court concluded that the officers had probable cause to believe that the paper bag contained drugs but lacked probable cause to suspect that Acevedo's car, itself, otherwise contained contraband. Because the officers' probable cause was directed specifically at the bag, the court held that the case was controlled by United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), rather than by United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Although the court agreed that the officers could seize the paper bag, it held that, under Chadwick, they could not open the bag without first obtaining a warrant for that purpose. The court then recognized "the anomalous nature" of the dichotomy between the rule in Chadwick and the rule in Ross. 216 Cal.App.3d, at 592, 265 Cal.Rptr., at 27. That dichotomy dictates that if there is probable cause to search a car, then the entire car--including any closed container found therein--may be searched

> without a warrant, but if there is probable cause only as to a container in the car, the container may be held but not searched until a warrant is obtained.

Acevedo, 500 U.S. at 568

In Acevedo, the issue before the court was whether the officers could look in the bag which they followed and saw placed in the trunk of an automobile, which bag they had probable cause to believe contained marijuana. Since the officers did not have probable cause to suspect that the car otherwise contained contraband, the question became whether the bag in the trunk could be searched without a warrant, or had to be secured until a warrant to search it could be obtained.

> This Court in Ross rejected Chadwick's distinction between containers and cars. It concluded that the expectation of privacy in one's vehicle is equal to one's expectation of privacy in the container, and noted that "the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." 456 U.S., at 823, 102 S.Ct., at 2172. It also recognized that it was arguable that the same exigent circumstances that permit a warrantless search of an automobile would justify the warrantless search of a movable container. Id., at 809, 102 S.Ct., at 2165. In deference to the rule of Chadwick and Sanders[1], however, the Court put that question to one side. Id., at 809-810, 102 S.Ct., at 2165. It concluded that the time and expense of the warrant process would be misdirected if the police could search every cubic inch of an automobile until they discovered a paper sack, at which point the Fourth Amendment required them to take the sack to a magistrate for permission

[1] Arkansas v. Sanders, 442 U.S. 753 (1979)

> to look inside. We now must decide the question deferred in Ross: whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car. We conclude that it does not.

Acevedo, 500 U.S. at 573

Fourth Amendment law has been developing along a consistent path since Carroll was decided in 1925. Nothing in Acevedo, nor any later case, changes the core holding of Ross.

> Ross summarized its holding as follows: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

Houghton, 526 U.S. at 301

By its ruling, the Second District Court of Appeal has carved out a new and unjustified exception to Ross and would require that an officer not only have probable cause to search every nook and cranny of a vehicle, but to expressly state why he felt he had probable cause to go into the trunk, glove box, or any other imaginative container a resourceful contraband transporter might create in a vehicle. Nothing in Ross, or the cases affirming Ross up to the present, puts this kind of burden on law enforcement.

Based upon the foregoing, the trial court properly denied appellant's motion to suppress.

CONCLUSION

Petitioner respectfully requests that Respondent's conviction and sentence be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831-9000, this ___ day of July, 2001.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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APPENDIX

A . . . . Betz v. State, 26 Fla. L. Weekly D304 (Fla. 2nd DCA January 24, 2001)