IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. SC02-1173

ROBERT BAEZ,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT ON THE MERITS

On Petition for Discretionary Review from
the Fourth District Court of Appeal.

CAROL HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

GARY LEE CALDWELL
Assistant Public Defender
Florida Bar No. 256919

Counsel for Petitioner

TABLE OF CONTENTS

ARGUMENT

AUTHORITIES CITED

FLORIDA STATUTES

STATEMENT OF THE CASE

The lower court set out the facts as follows:

> Around 8:30 p.m., an officer was dispatched to an industrial area to investigate a person who appeared to be asleep in the front seat of a van. When the officer arrived at the parking area, which was open to the public, he observed appellant asleep and tapped on the window.
>
> After appellant sat up, the officer then asked to see identification. Appellant, on his own, got out of the van and gave the officer his driver's license.[1] The officer testified that he had no reason to believe appellant had committed a crime and that this was at all times a "consensual conversation." The officer then called in to have a computer check run, which revealed that there was an outstanding out-of-state warrant for appellant's arrest.
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> The officer then handcuffed appellant and placed him in the back of the officer's vehicle. After backup arrived, the officer placed appellant in a different vehicle, searched the back of the vehicle in which

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[1] I talked to him briefly. I said, is everything okay, are you all right. He said, yeah, I'm sleeping. I said, okay. And at this point, I asked for identification which is standard procedure if I'm speaking to anyone other than a normal everyday circumstance." T 84. He further testified: "He stepped out of the vehicle and yes, I asked him for his identification.", T 91, and "I was in a consensual conversation with Mr. Baez and during that conversation, I requested identification to know what I was talking to, yes, sir. And completed my investigation and move on." T 92. The officer said he did not think he could answer whether he would have let respondent go without giving him the driver's license. T 93. Asked if he "did get the driver's license from him", the officer replied: "Yes, I did." Id. Respondent testified that the officer "order[ed] me to give my driver's license and I did." T 120. Asked if he felt he could say no and drive away, respondent replied: "No. He's a police officer. I gave him my driver's license." Id. The officer "order[ed] me to give him my driver's license and I did." T 121. The officer said it "In a firm way." Id. The record does not reflect that the officer ever returned the license to respondent.

> appellant had been sitting, and found two small plastic baggies containing cocaine.
>
> Appellant testified that he had been up since 4:00 a.m. and that he had gone to pick up his children after work that evening. Because they were not home yet, he had picked up take-out food and eaten it in the parking lot. He was taking a nap while waiting to be called on his cell phone to pick them up.

Baez v. State, 814 So. 2d 1149, 1150-51 (Fla. 4th DCA 2002). The court further wrote that the officer retained Baez's license after inspecting it. Id. at 1151.

SUMMARY OF THE ARGUMENT

The lower court held that the driver of a car cannot leave when the police take his license. Hence, it held that such a driver has been detained. Its decision does not expressly and directly conflict with decisions of this Court or of another district court of appeal on the same question of law and was not legally erroneous. This Court should affirm.

ARGUMENT

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL WAS ERRONEOUS.

The lower court based its decision on the following inarguable propositions: He who is not free to leave is detained. The driver of a car loses his freedom to leave when the police take his license. Hence, he has been detained. It wrote:

> We conclude that, in the present case, at the point in time after the officer had inspected appellant's driver's license, the consensual encounter had ended. When the officer retained it in order to investigate further by running a warrant check, no reasonable person would have felt free to leave. The search which produced the cocaine, accordingly, was the fruit of an unlawful seizure and violated the Fourth Amendment. The court erred in denying the motion to suppress.

Baez v. State, 814 So. 2d 1149, 1152-53 (Fla. 4th DCA 2002). The court further noted that there was no suspect criminal activity. Id. at 1152.

Once the officer took respondent's license (and apparently never returned it), respondent was not free to leave and was therefore detained. See United States v. Thompson, 712 F.2d 1356, 1359-60 (11th Cir. 1983) (stating it is a "common-sense conclusion" that a driver is "effectively immobilized" while a police officer detains his license, so that the driver has been detained for Fourth Amendment purposes); Salt Lake City v. Ray, 998 P.2d 274, 278 (Utah App. 2000) (woman detained when officer held her identification card for five minutes to run warrants check: "a reasonable person in Ray's position would not feel

free to just walk away, thereby abandoning her identification, let alone to approach Officer Eldard, take back her identification, and then leave"); Richmond v. Commonwealth, 468 S.E.2d 708, 710 (Va. App. 1996) ("'what began as a consensual encounter quickly became an investigative detention once the [officer] received [the individual's] driver's license and did not return it to him.'" (quoting United States v. Lambert, 46 F.3d 1064, 1068 (10th Cir. 1995)) ("Furthermore, as a practical matter, if appellant left the scene in his vehicle while Deputy Sizemore had his driver's license, appellant would have violated Code § 46.2-104, which prohibits a vehicle operator from driving without a license."); State v. Daniel, 12 S.W.3d 420, 426 (Tenn. 2000) ("courts have typically held that an encounter becomes a 'seizure' if an officer: ... retains a citizen's identification or other property ... ."); Finger v. State, 769 N.E.2d 207, 215 (Ind. App. 2002) ("a consensual encounter becomes an investigatory stop under the Fourth Amendment when a law enforcement agent retains an individual's driver's license or other identification").

The reasonableness of a detention depends on its legitimate purpose. For instance, "while a law enforcement officer clearly is entitled to stop a vehicle for a traffic violation, the stop must last no longer than the time it takes to write the traffic citation." Thomas v. State, 614 So. 2d 468, 471 (Fla. 1993).

Maxwell v. State, 785 So. 2d 1277 (Fla. 5th DCA 2001), is illustrative on this point. An officer legitimately stopped Rusty Maxwell to issue him a warning for speeding, but prolonged the detention by questioning Maxwell until another a K-9 officer arrived and the dog alerted on the vehicle. The Fifth DCA found the officer's questioning of Maxwell improper under Thomas, and wrote that the "questioning was purposeless unless its purpose was a fishing expedition and a delaying tactic to allow time for the K-9 unit to arrive." 785 So. 2d at 1279.

At bar, there was no lawful basis for a detention, hence a detention of any duration was unreasonable. When the officer got respondent's license, he had no reason to suspect that respondent had committed any crime or was in any trouble at all. T 93. He disavowed any investigation to determine whether respondent was under the influence of alcohol or drugs. T 93-94. Hence, any detention at that point was purposeless except as a fishing expedition and delaying tactic under Maxwell.

Respondent submits that a police-citizen encounter turns into an investigative detention as the encounter becomes less like a conversation and more like an investigative interrogation of a suspect. In a normal conversation, one does not ask one's interlocutor to produce identification,[2] and one does not

[2] Thus, the officer testified: "And at this point, I asked for identification which is standard procedure if I'm speaking to anyone other than a normal everyday circumstance." T 84 (e.s.). His only apparent reason for taking the license was

normally detain the other's identification in order to run a warrants check. At bar, the lower court did not err in determining that the encounter crossed the line and became a detention when the officer got respondent's license and ran a records check.

Instructive in this regard is Popple v. State, 626 So. 2d 185 (Fla. 1993). An officer approached Tedd Popple, who was lawfully parked car on the side of a desolate street near a high crime area. The officer noticed furtive movements, and asked Popple to get out of the car. This Court wrote at pages 187-88:

> Although there is no litmus-paper test for distinguishing a consensual encounter from a seizure, a significant identifying characteristic of a consensual encounter is that the officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer inquiries, and the person may not be detained without a well-founded and articulable suspicion of criminal activity. State v. Simons, 549 So. 2d 785 (Fla. 2d DCA 1989). This Court has consistently held that a person is seized if, under the circumstances, a reasonable person would conclude that he or she is not free to end the encounter and depart. Jacobson v. State, 476 So. 2d 1282 (Fla. 1985). Whether characterized as a request or an order, we conclude that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show of authority which restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply.

The situation at bar presented a situation in which one would similarly feel that he had to comply with the police. In

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investigative: "... I requested identification to know what I was talking to, yes, sir. And completed my investigation and move on." T 92.

fact, under section 322.15 (1), Florida Statutes, respondent was compelled to show the officer his license upon request.[3] Accordingly, the Fourth DCA was correct in its ruling.

Petitioner's brief contends that the opinion expressly and directly conflicts with other Florida appellate decisions on the same question of law and should be reversed. Petitioner's brief does not state by what standard this Court is to review the opinion.

Although this Court has apparently not articulated a standard of review in conflict jurisdiction cases, respondent submits that the standard should be: 1) whether the lower court's opinion expressly and directly conflicts with the decision of another state appellate court as to a specific question of law; and 2) whether the lower court's legal analysis of that question of law was erroneous.

Such a standard would be in keeping with the general premise that, as a case "travels up the judicial ladder, review should

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[3] The statute provides:

> Every licensee shall have his or her driver's license, which must be fully legible with no portion of such license faded, altered, mutilated, or defaced, in his or her immediate possession at all times when operating a motor vehicle and shall display the same upon the demand of a law enforcement officer or an authorized representative of the department.

Of course, the fact that there is a statute requiring persons to identify themselves on request does not ipso facto make every request for identification reasonable or constitutional. Cf. Brown v. Texas, 443. U.S. 47 (1979).

consistently become narrower, not broader." Haines City Community Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995); The Florida Bar re Williams, 718 So. 2d 773, 778, n. 5 (Fla. 1998).

At bar, petitioner has not clearly identified the precise point of law on which a conflict supposedly lies. Its brief sets out a generalized discussion of various cases involving a wide variety of factual situations, and essentially asks this Court to act as a second appellate court. The specific issue decided by the lower court was whether an officer's retention of a motorist's driver's license is improper where there is no suspicion of criminal activity. Petitioner does not show a conflict of state decisional law on that point.

Petitioner's brief claims that the district court's decision conflicts with Lightbourne v. State, 438 So. 2d 380 (Fla. 1983). Although the facts of Lightbourne are somewhat unclear, it appears that Officer McGowan received a report of a suspicious car, and, approaching the car, spoke with its driver, Ian Lightbourne. This Court wrote that this contact was consensual "prior to" Lightbourne's giving his license to McGowan: "There is nothing in the record that would indicate that prior to defendant voluntarily relinquishing his driver's license to Officer McGowan he was not free to express an alternative wish to go on his way." Id. at 388. At some point, Lightbourne's furtive movements and nervous appearance led the officer to form

a reasonable belief that he was armed and potentially dangerous, so that the officer patted him down. The pat down apparently revealed a gun on Lightbourne's person. This Court ruled that the initial contact was consensual and that Lightbourne's suspicious behavior justified an investigative detention and search.

Thus Lightbourne did not hold that one is still free to go after surrendering one's license. Hence, it never addressed the point of law on which the lower court based its decision at bar: that one is not free to drive away, and therefore is detained, once one has given the police one's license. Thus there is no direct and express conflict between the two cases on the same point of law. Further, the officer's actions in Lightbourne were reasonable in light of the facts that he was investigating a report of a suspicious car whose driver began to make furtive movements leading the officer to believe he was armed and possibly dangerous. There is no conflict between Lightbroune and the case at bar.[4]

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[4] In this regard, petitioner puts great reliance on the officer's testimony at bar that he had been responding to "a call to assist Broward County EMS with a suspicious incident where a subject may be passed out behind the wheel of a vehicle." Initial brief, page 10 (citing to transcript page 82). Although the deputy used the word "suspicious", he did not say that there was a report of suspected criminal activity. In fact, as he testified, he had no reason to suspect that respondent had committed any crime. T 93. Hence, as the lower court observed, the case at bar is unlike Lightbourne in that at bar the officer "was not responding to a tip of suspicious activity." 814 So. 2d at 1152.

In the middle of its discussion of Lightbourne, petitioner places considerable reliance on U.S. v. Mendenhall, 446 U.S. 544 (1980), and notes that this Court is bound to follow United States Supreme Court precedent respecting the Fourth Amendment pursuant to article I, section 12 of our constitution. In U.S. v. Mendenhall, the officers returned Mendenhall's ticket and license to her before asking her to go with them, and that she was specifically told that she had the right to refuse the search, and she said "Go ahead.", and then she was again asked by another officer if she consented to the search, and she again consented. Id. at 548 (plurality opinion). Hence, the search was not coerced. U.S. v. Mendenhall has no bearing on the case at bar.

At bar, respondent was compelled by section 322.15 (1) to show the officer his license.[5] Under the circumstances, it is highly unlikely that he would have reasonably thought that he had any right to depart the scene, or that he could demand the license back from the officer. Since the officer did not return the license, and since he did not advise respondent that he

[5] Although it is generally assumed in the case law, on the basis of Florida v. Royer, 460 U.S. 491 (1983) and Florida v. Bostick 501 U.S. 429 (1991), that an officer's request to see identification is not coercive and may be refused, the cases do not address the effect of statutes which compel drivers to display their licenses upon request. Neither Florida v. Royer nor Florida v. Bostick involved a motorist, so that one cannot draw from them the conclusion that motorists are free to refuse a request to show their licenses and go about their way.

could get the license back and go on his way, the case at bar presents a situation completely different from U.S. Mendenhall.

In Florida v. Royer, the fact that the officers detained Royer's identification and property turned the encounter into a seizure (460 U.S. at 503 (n. 9)) (plurality opinion):

> The case before us differs [from U.S. v. Mendenhall] in important respects. Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them.

Respondent was similarly immobilized at bar. The officer had his license, so that as a practical matter he could not drive away.

I.N.S. v. Delgado, 466 U.S. 210 (1984) involves a situation completely different from the facts at bar. The plaintiffs in that case were at work and could have refused to answer the officers and continued with their work. The Supreme Court rejected the lower court's ruling that the entire work force of the factories were seized for the duration of the surveys when INS placed agents near the exits. Id. at 218. It wrote that the conduct of the agents "should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer." Id.

The defendant in Michigan v. Chesternut, 486 U.S. 546 (1988) was not only free to proceed on his way, he did proceed on his way, with no restriction on his liberty until the officers saw him drop contraband on the ground.

Florida v. Bostick, does not support petitioner's case. When confronting Terrance Bostick on a bus, the officers "immediately returned" his identification after looking at it, 501 U.S. at 431-32, and "specifically advised" him that he had the right to refuse consent to a search. Id. at 432. The Court wrote that "Bostick's freedom of movement was restricted by a factor independent of police conduct - i.e., by his being a passenger on a bus." Id. at 436. Accordingly, there was no detention of Bostick, so that "the 'free to leave' analysis on which Bostick relies is inapplicable." Id. The case at bar presents the opposite situation: the officer retained the license, did not advise him of his right to refuse, and respondent's freedom was restricted by the officer's action.

Hence, with respect to article I, section 12, it is noteworthy that there is no on-point United States Supreme Court case which this Court is compelled to follow. The state constitutional exclusionary rule existed long before Mapp v. Ohio, 367 U.S. 643 (1961) applied the federal exclusionary rule to the states. See, e.g., Mathis v. State, 153 Fla. 750, 751-52, 15 So. 2d 762 (1943) (citing cases). Absent a United States

Supreme Court decision dictating a particular result, this Court should first rule on the issue as a matter of state constitutional law pursuant to the federalist doctrine of primacy articulated in Traylor v. State, 596 So. 2d 957, 961-963 (Fla. 1992), and then rule on the federal constitutional issue only if necessary. See also State v. Hoggins, 718 So. 2d 761 (Fla. 1998) and State v. North Fla. Women's Health And Counseling Ser., 2001 WL 111037, 26 Fla. L. Weekly D419 (Fla. 1st DCA Feb 09, 2001).

The next Florida case cited by petitioner is State v. Chang, 668 So. 2d 207 (Fla. 1st DCA 1996). Anthony Chang was on foot in a residential area. After encountering Chang and others in front of a vacant house, an officer ran a check using Chang's identification, but then "gave Chang's driver's license back to him". Id. at 208. Thereafter, Chang consented to a search of his car, which was parked in front of the house. Thus, Chang is unlike the case at bar. Chang's license had been returned to him, so that he was free to go at the time that he consented to the search.[6]

Petitioner's initial brief relies on the following dicta at page 209 of Chang:

> There was no constitutional violation in Officer Schwab approaching Chang, asking for identification,

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[6] Since officers saw a companion of Chang throw a bag of marijuana to the ground, one would think that a brief investigative detention would be justified in any event.

> receiving Chang's driver's license, and running a check for warrants. State v. Y.B., 659 So. 2d 323 (Fla. 1st DCA 1994) (see cases cited therein). The contact between Officer Schwab and Chang was nothing more than a consensual encounter between a police officer and a citizen. [Cit.]

The statement was dicta because the identification had been returned to Chang before he consented to the search. Regardless, Chang was on foot in a residential area, so that it does not appear that the officers limited his ability to move about it. State v. Y.B., on which Chang relied, has no application to the question at bar. In that case, the police stopped a car illegally driven by Richard Abrams. Attempts to communicate with the passenger, Y.B., were rendered difficult by the fact that his mouth was full, apparently with chewing gum. When the officers could not understand what Y.B. was saying, they told him to spit out the gum, at which time they saw baggies of contraband in his mouth. State v. Y.B. has nothing to do with the question of whether the police's detention of a driver's license curtails the freedom of the driver of a car to leave the area.

Petitioner next relies on State v. Robinson, 740 So. 2d 9 (Fla. 1st DCA 1999). There, an officer encountered Maurice Robinson standing near a fence where dogs were barking late at night. The officer "asked for identification, whereupon Robinson produced a Florida driver's license that came back negative for outstanding local warrants." Id. at 11. The

opinion specifically noted that, so long as a reasonable person would feel free to leave, the encounter is consensual. Id. at 12. It ruled that the trial court had erred in assuming that the officer needed "some articulable basis for approaching Robinson, for asking his purpose for being there, and for requesting to see some identification", id. at 13 (e.s.), and remanded the case to the trial court to resolve some factual disputes. Since Robinson was on foot, the court did not decide the issue at bar, which concerns an officer taking custody of the license of the driver of a car, depriving him of his ability to leave.

Petitioner next relies on State v. Arnold, 475 So. 2d 301 (Fla. 2nd DCA 1985), in which Deputy Hollingsworth, while responding to a report of a suspicious boat, saw a shrimp boat in an isolated area. A car was driving on a marl road leading from the boat. Turning on to the road, the officer came across the car parked on the road with the motor running. The occupants gave a suspicious story, and the officer asked for identification. After the driver, Jeffrey Arnold, "produced his driver's license, Hollingsworth ran a warrant check on him. Although no warrants were found, the dispatcher told Hollingsworth that Arnold had a prior trafficking conviction or arrest. At this point Deputy Kunkle arrived at the scene. Hollingsworth asked Kunkle to remain with these three people as

he proceeded to the river." Id. at 304. Hollingsworth went to the boat, where he found a hundred bales of marijuana. Id.

The Second DCA determined that the initial questions to Arnold and the request for identification did not amount to a detention. Id. at 307. It concluded that, based on the totality of the circumstances, including the implausible explanation of the car's occupants and Arnold's criminal record, the detention of Arnold after the records check was proper. Id. The opinion in State v. Arnold does not state that the officer detained Arnold's license. Hence, it has no bearing on the issue decided by the court below.

Petitioner also cites State v. Mitchell, 638 So. 2d 1015 (Fla. 2nd DCA 1994). In that case, Mitchell was found in a car late at night at a closed gas station which had been burglarized repeatedly, in an area which had "been the target of scores of recent burglaries." Although Mitchell said he was waiting for a woman, he did not know when she would arrive, and the officer thought he was "very evasive." Mitchell produced a Florida identification card, so that it appears that he was not the car's driver. It does not appear that the officer kept Mitchell's identification card while running the records check, and, in any event, the officer testified that Mitchell was free to leave. State v. Mitchell does not concern the legal question

involved at bar: whether the officer's detention of a car driver's license detains the driver himself.

Petitioner also relies on McClane v. Rose, 537 So. 2d 652 (Fla. 2nd DCA 1989). There, officers saw Ansell Rose's car at a duplex where they found a gun and drug paraphernalia. A resident did not recognize Rose's car. Later, Rose's car returned to the area, and, on seeing the officers, Rose backed the car up, but then stopped. The officers asked Rose for his license. While they were running a check, the passenger began trying to conceal something and a weapons search turned up cocaine. The appellate court noted that, absent an articulable suspicion of wrong-doing justifying a stop, an individual "is under no duty to remain and answer the officer's questions; he may not be detained against his will or frisked but may refuse to cooperate and go on his way." Id. at 654. It wrote: "The officers' conduct was reasonable under the facts of this case and nothing in the record indicates that the appellee was not free to leave or ever expressed a desire to leave prior to relinquishing his driver's license to the officers. The evidence in the record, therefore, indicates that a permissible consensual encounter occurred." Id. (e.s.).[7] It also wrote: "Any detainment of the appellee occurred after the officers had

[7] The court did not consider the fact that, under section 322.15 (1), a motorist may not refuse an officer's request that he display his license. Given that statute, one is hard put to see how Rose was free to ignore the officer's request and leave.

properly discovered cocaine and paraphernalia within the vehicle and ordered the appellee out of the vehicle. At this time, if not before, the officers were aware of facts which provided a well founded suspicion sufficient to detain the appellee." Id. (e.s.).

Thus, there were ample grounds for a detention, but the court held that no detention occurred before Rose gave the officers his license. The court did not decide the question decided by the lower court at bar, which involved an officer's detention of a driver's license where there was no suspicion of criminal activity.

Petitioner also relies on Watts v. State, 788 So. 2d 1040 (Fla. 2nd DCA 2001) (en banc), which involves a situation completely different from the case at bar. Officers saw Watts walking toward a drug house in a high crime area. They spoke with him, and ran a warrants check, then gave the license back. He then consented to a search. The issue on appeal was whether the consent to search was consensual, a different legal issue from the issue at bar. Since Watts was on foot in a residential area, his license was returned to him, and he consented to the search, his case has no bearing on this issue at bar.

The opinion in Parsons v. State, 825 So. 2d 406 (Fla. 2nd DCA 2002), does not reflect that the officer retained Parsons' license. In any event, the discussion of the records check was

dicta because the officer illegally ordered Parsons from his car.

Petitioner's discussion of the foregoing state cases does not show how they resolved the legal point which formed the basis of the decision at bar: whether an officer's retention of a motorist's driver's license is improper where there is no suspicion of criminal activity. In fact, the foregoing cases did not address the legal point at bar in any authoritative manner, except insofar as one may draw inferences from dicta.

At page 14 of its brief, petitioner shifts its focus to various federal cases.

Respondent has already discussed Florida v. Bostick above, and will not rehash that discussion here.

Petitioner next places considerable reliance on U.S. v. Weaver, 282 F.3d 302 (4th Cir. 2002), a case which refutes its argument. A bank teller reported seeing a person, Otis Lee Weaver, who matched the description of a bank robber on a "wanted" poster, and an officer saw Weaver on foot about five seconds later.[8] The officer approached Weaver and spoke with him, and held his license while running a warrant check.

The Fourth Circuit wrote that there was no detention because Weaver was on foot and had been traveling by bus, and wrote that

[8] Under these facts, a brief investigatory stop would certainly have been justified, so that it is hard to understand why the court went to such lengths in determining whether there was a stop.

the case would have been different if Weaver had been the driver of a car: "In those situations, the retention of one's driver's license would have effectively seized the individual because it is illegal to drive without a license in one's possession." Id. at 311 (e.s.). Since, however, "Weaver was traveling by bus, ... he could legally go about his business without his driver's license." Id. at 312. "Had Officer Leeds retained Weaver's bus ticket as he was about to board a bus, the result in this case might be different." Id. at 310, n. 4.

Thus, while one may certainly think there is something lacking in common sense in the court's belief that one is not detained even though the police have hold of "one of the most valuable pieces of personal identification possessed by any citizen", id. at 312,[9] and the court acknowledged that its view is contrary to that held by the D.C., Seventh, Eleventh, and Fifth Circuits, id. at 313, it specifically wrote that, in

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[9] Compare the opinion of the Tennessee Supreme Court in State v. Daniel, 12 S.W.3d at 427, which stated: "Abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society. [Cit.] Contrary to the State's assertion, when an officer retains a person's identification for the purpose of running a computer check for outstanding warrants, no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification."

One can hardly imagine Sam Adams or John Hancock agreeing that one must abandon valuable property to the authorities in order to be free to move about.

situations such as those at bar, the retention of the license does detain its owner.

Petitioner relies on U.S. v. De La Rosa, 922 F.2d 675 (11th Cir. 1991). Officers followed De La Rosa as he drove to his apartment complex, parked his car, got out and began walking to his apartment. They then went up and spoke with him, requesting identification, and he gave an officer his license. Before returning the license, the officer asked for and received consent to search his car. De La Rosa "had returned home for the evening, and was not anticipating using the automobile in the immediate future." Id. at 678 (e.s.). The court noted that under the circumstances, De La Rosa was not detained by the fact that the officer temporarily retained his license: he could have ended the encounter by entering his residence.

The court noted that the result would have been different under U.S. v. Thompson, supra, had De La Rosa not already been out of his car and at home: "unlike the defendant in Thompson, appellant had already exited his vehicle and was proceeding toward his home for the evening. Thus, temporary retention of the license did not preclude appellant from terminating the encounter by going into his apartment." 922 F.2d at 678, n. 2.

In U.S. v. Thompson, an officer approached Thompson, who was in a parked car at an airport, and asked for identification. While holding Thompson's license, the officer asked for an

object that Thompson had in his car. The court held that Thompson was detained because the officer had his license (712 F.2d at 1359):

> ... . When Kier retained Thompson's license, the encounter matured into an investigative stop protected by the Fourth Amendment. Without his driver's license Thompson was effectively immobilized. A reasonable person in these circumstances would not have believed himself free to leave. If Thompson had tried to drive away he could have been arrested for driving without a license. Fla.Stat.Ann. Sec. 322.15 (West Supp.1983).

At bar, respondent was parked in an industrial area at night. He was not near his home, and it would be unreasonable to say he could or should walk away, leaving his vehicle and driver's license in the hands of the police. Although he briefly got out of his car to speak with the officer, he was more isolated than Thompson, who at least could have walked into the airport terminal. Hence, respondent was detained under U.S. v. Thompson and U.S. v. De La Rosa.

Respondent must respectfully disagree with petitioner's factual discussion of U.S. v. Dunigan, 884 F.2d 1010 (7th Cir. 1989). That opinion does not show that one of the officers "took the licenses to do a status check" as stated at page 17 of the initial brief. It appears from the opinion that police officers received a report of a suspicious van in a high crime area around 3 a.m. When they parked near the van, its occupants got out and walked toward the officers. One of the men said "they had given a friend from Kankakee a ride to Chicago to get

some money, and that he was in one of the apartment buildings, but they were unsure which building it was. Nor were they able to tell the officers the last name of their friend." Id. at 1012. The officers "requested that the two produce their driver's licenses", and, while one officer "called in to check the status of" the licenses, another officer noted a number of air conditioners in the van. Id. The men did not give a good explanation regarding the air conditioners. The dispatcher then reported that the driver's license was suspended, at which point the officers took the men to the station for questioning. The men sought to suppress the testimony of the officer who looked into the van.

Under the facts of the case, the court determined that suppression was not required, writing at page 1014: "The officers did nothing that could objectively lead Dunigan and Berry to believe that they were not free to leave, at least up until the point that the police discovered that Dunigan's license was suspended." The opinion does not show that the licenses were retained, so that the court did not consider what effect a retention of the driver's licenses might have had on the men.[10]

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[10] Compare U.S. v. Dunigan with another Seventh Circuit opinion, U.S. v. Cordell, 723 F.2d 1283, 1285 (7th Cir. 1983) ("However, when O'Connor handed Cordell's driver's license and airline ticket to Abreu [another officer], and told Cordell they were conducting a narcotics investigation, the encounter had become a detention.").

As to the unpublished opinion of U.S. v. Himes, 25 Fed.App. 727, 2001 WL 1241136 (10th Cir. 2001), for whatever precedential value it may have, it presents a situation unlike that at bar. Himes was in a car which had died on the interstate. It was the inoperability of his car which detained him, not the actions of the police. Id. at n. 2. The officer returned the license to him and he consented to the search only later during the encounter.

Respondent's car was not disabled on an interstate highway. The only thing restricting his ability to leave was the fact that the officer had got his license.

As to U.S. v. Jordan, 958 F.2d 1085 (D.C. Cir. 1992) and U.S. v. Jefferson, 906 F.2d 346 (8th Cir. 1990), petitioner does not explain how one would feel more detained by the fact that an officer is asking one questions than if an officer is running a warrants check while retaining one's license. A person would feel detained in either circumstance. In U.S. v. Tavolacci, 895 F.2d 1423 (D.C. Cir. 1990), Tavolacci was already on a train so that the officer was not interfering with his liberty. It was in this context that the court wrote that the officer's "the initial holding and review" of Tavolacci's documents did not per se constitute a seizure. U.S. v. McManus, 70 F.3d 990 (8th Cir. 1995) involved facts completely different from the facts at bar. There the defendant went to a State Police station to clear up

a VIN problem concerning his car. The officer ran computer checks on McManus's license, which revealed a warrant for violation of probation. Under these circumstances, there was no detention.

Petitioner's brief next discusses various out-of-state cases. In McCain v. Commonwealth, 545 S.E. 2d 541 (Va. 2001), an officer responded to a report of drug activity around 2:00 a.m. in a residential area. McCain was seated in a car with a passenger, and a woman leaned in the window. The woman walked away when the officer approached. The officer ran a records check on McCain's license, and then returned it to him. After McCain had his license back, his behavior became more and more suspicious as he got out of his car and moved around the residential area, where his brother lived, apparently disposing of a gun and drug paraphernalia. At bar, by contrast, respondent was not in a residential area, the officer was not investigating a report of criminal activity, and the officer did not return the license to him. Respondent was detained while the officer retained his driver's license.[11]

In People v. Paynter, 955 P.2d 68 (Colo. 1998) presents facts similar to those at bar, but a different legal issue. The

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[11] Since petitioner's brief relies on unpublished decisions, respondent will mention that a later unpublished Virginia appellate case explains that McCain does not apply to a situation such as that at bar. See Cartwright v. Commonwealth, 2001 WL 506751 (Va.App. May 15, 2001).

trial court there had concluded that the officer's act of asking for identification turned the encounter into a detention. The supreme court decided only that issue: "Our decision today is limited therefore to reversing the trial court's ruling that when a police officer asks for identification, 'at that point,' and solely on that factual basis, a consensual encounter is converted into a stop, a seizure that implicates the Fourth Amendment." Id. at 74-75. "We hold here only that the trial court erred when it concluded that a police officer's request for identification, alone, constitutes a seizure implicating Fourth Amendment protections." Id. at 76 (e.s.). The court noted authority holding that retaining the license could turn the encounter into a detention, id. at 75, and remanded for consideration of whether the officer's retention of the license converted the encounter into a detention.

State v. Higgins, 884 P.2d 1242 (Utah 1994) has no bearing on the case at bar. Higgins had been the passenger in a car whose driver was being arrested. She agreed to drive the car home for the arrested driver, but did not have her license with her. There was nothing the officers did which detained her in any way except that they said she could drive the car without her license if they could verify that she had a valid license. The officers did not detain her license because she did not have

it. Further, since she was at a convenience store, she could have arranged alternative transportation.

State v. Ott, 584 A.2d 1266 (Md.App. 1990), quashed 600 A.2d 111 (Md. 1992), is unlike those at bar. Ott was sitting in a parked car around 1:40 in the deserted mall parking lot where prior acts of theft and vandalism had occurred. A records check revealed (incorrectly) that there was an outstanding warrant. While the intermediate appellate court held that the use of Ott's license in making the record check did not detain him, and that the officer acted in good faith, the state supreme court found that the failure to the police to maintain accurate records resulted in an illegal arrest. The state supreme court did not discuss the question regarding the driver's license. Since the intermediate appellate court's decision was quashed, it apparently has no precedential value.[12]

Petitioner's brief cites three Ohio cases at page 21 of its brief. In Warrensville Hts. v. Mollick, 607 N.E.2d 861, 863 (Oh. App. 1992), an officer saw a suspicious motorist who had gotten out of his car at 3:00 a.m. in a "high drug activity

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[12] As in Florida, cf., Dream Inn, Inc. v. Hester, 691 So. 2d 555, 556 (Fla. 5th DCA 1997) ("the order granting new trial is quashed as void"), the quashing of a judgment in Maryland has the effect of making it void, cf. Lambson v. Moffett, 61 Md. 126 (1884) ("we are clearly of opinion there is nothing ... which makes [the writs] void, or renders them liable to be quashed."). An order or decision which has been quashed has the same status as if it "had never been entered". See Snyder v. Douglas, 647 So. 2d 275, 279 (Fla. 2d DCA 1994) (quoting State v. Florida East Coast Ry. Co., 176 So. 2d 514, 515 (Fla. 1st DCA 1965)).

location", went up to him and asked to see his identification. Although one would think that the circumstances were sufficient to justify a brief investigatory stop since, as the court wrote, the defendant's actions amounted to "suspect criminal activity", id. at 862-63, the intermediate appellate court held that there was no detention while the officer ran a check on the defendant's license. The court did not discuss or explain how the defendant was free to leave while the officer had his license. Regardless, it appears that the defendant was waiting for his passenger, who had entered an apartment, so that his freedom was essentially restricted by a factor unrelated to law enforcement activity. As for the unpublished opinions of State v. Glen, 2002 WL 31719351 (Oh. App. 2002) and State v. Morgan, 2002 WL 63196 (Oh. App. 2002), Glen was an apparent trespasser who was on foot at an apartment complex, and Morgan was the passenger in a car which was lawfully detained for a traffic violation. Hence, those cases did not address the issue now before this Court.

In People v. Smith, 640 N.E.2d 647 (Ill. App. 1994), Smith was a passenger in a lawfully stopped vehicle. The officer ran a check on Smith's identification while writing the traffic ticket for the car's driver. Hence, Smith was not delayed because of the check on his identification.[13] His argument was

[13] Thus, the court observed that Smith "was 'otherwise lawfully stopped' as a result of his being a passenger in the

that the officer's request for identification in and of itself constituted a seizure, a question which is not now before this Court. Regardless, as a different Illinois appellate court recently pointed out, People v. Smith was based on a misreading of Florida v. Bostick. See People v. Gonzalez, 753 N.E.2d 1209, 1217 (Ill.App. 2001). In Florida v. Bostick, the officer told Bostick that he had the right to refuse to cooperate. People v. Gonzalez, id. (discussing facts of Florida v. Bostick). "There is nothing in Smith or this case to indicate that the defendants were told that they could refuse to cooperate. Thus, Smith mistakenly relied on Bostick." People v. Gonzalez, id. See also People v. Bunch, 764 N.E.2d 1189, 1193 (Ill.App. 2002) (discussing People v. Gonzalez with approval). Finally, People v. Cole, 627 N.E.2d 1187 (Ill.App. 1994), did not involve the retention of Cole's driver's license, and hence does not involve the issue at bar.

As to the mass of unpublished California opinions cited at page 23 of petitioner's brief, respondent will merely say that none of them involve the legal issue now before this Court. For instance, in People v. Purdy, 2002 WL 31689735 (Cal.App. 2002), Purdy was a passenger in a car which Officer Brown found parked near a school after midnight. The court ruled that Purdy, as the passenger, was not detained by the fact that Brown ran a

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vehicle the officer pulled over for a traffic violation." Id. at 650.

check on the licenses of both her and the driver, Aguwiga, since the fact "that the vehicle Aguwiga was driving could no longer transport Purdy is the result of her choice of companions, not unlawful conduct by Brown." People v. Terrell, 82 Cal.Rptr.2d 231 (Cal.App. 1999), involves an encounter at a park bench. It does not involve the issue at bar.

Petitioner argues at pages 24-25 of its brief that the officer was acting out of concern for respondent's safety, and acted only as a community caretaker. Petitioner does not explain, however, how his investigation into respondent's identity and delaying him by running a warrant check evinced concern for respondent's safety. To repeat, this investigative activity "was purposeless unless its purpose was a fishing expedition" under Maxwell, 785 So. 2d at 1279.

In its discussion of U.S. v. Mendenhall, petitioner overlooks that the officers returned Mendenhall's ticket and license to her before asking her to go with them, and that she was specifically told that she had the right to refuse the search, and she twice consented to the search. Id. at 548. Hence, the search was not coerced. The Supreme Court did not intend, and hardly could have intended, that the list of circumstances listed at page 25 of petitioner's brief was exclusive and exhaustive of all possible bases for determining that there was coercion. It wrote that they were merely

"[e]xamples of circumstances that might indicate a seizure". Id. at 554.

Petitioner argues at pages 25-26 of its brief that the deputy acted out of concern for the community, and was involved in an investigation. If such were the case, however, he would have asked respondent what he was doing in the area instead of taking his license and calling in for a warrants check. More importantly, the officer's actions, given that he had no reason to believe that criminal activity was afoot, simply amounted to a fishing expedition. Finally, petitioner does not show that it ever made this argument in the lower court.

The state's argument at page 25-26 is contrary to law insofar as it puts on the citizen the onus of trying to leave. The question is whether a person would reasonably believe that he was compelled to stay, not whether he tried to test the issue by risking the possibility of an arrest for fleeing a law enforcement officer. One is hard put to see what policy object could be served by encouraging the citizen to challenge the officer's apparent authority.

O.A. v. State, 754 So. 2d 717 (Fla. 4th DCA 1998) helps petitioner not at all. There the court explicitly relied on the fact that the case did not involve the relinquishing of a driver's license to an officer. Id. at 718. O.A. was on foot, and did not give the officer any physical identification card or

license, and merely gave the officer his name. Hence, O.A. has no bearing on the case at bar.[14]

In State v. Hansen, 994 P.2d 855 (Wash.App. 2000), the officers were investigating a group near a gas station, and approached Hansen who was seated at the curb, waiting for a ride. One officer handed Hansen's license to another officer, who returned it after about 5 to 30 seconds. After the license was returned to him, the officers received a report of an outstanding warrant for Hansen. Thus Hansen has no bearing on the case at bar.

A subsequent Washington decision presents a situation closer to that at bar. In State v. Crane, 19 P.3d 1100 (Wash. App. 2001), Crane was a passenger in car that stopped at a house that was under surveillance while officers were seeking a search warrant. An officer approached Crane and his companions, pulling his car behind their car, and asked or told them to stop. When a woman came out of the house, the officer said the police were not letting anyone in or out of the house. Crane said he wanted to get his half-brother's stuff out of the house. Asked for identification, he produced an identification car issued by his Indian tribe. The officer "testified that he was 'identifying everybody' because his sergeant had told him to do

[14] It is noteworthy that Judge Farmer, the author of O.A., concurred in the decision at bar, which fact indicates that he did not think that the situations were comparable.

so and that he had no specific reason to request identification from Crane." Id. at 1103. While holding the identification card, the officer used his hand-held radio to call for a warrants check, which revealed in a few minutes that there was a warrant for Crane.

The court held that the retention of the license during the brief warrants check amounted to a detention of Crane, observing: "Here, although Green did not specifically tell Crane that he was not free to leave or that he must wait during the warrants check, the circumstances would cause a reasonable person to conclude that he was not free to leave or to terminate contact until the officer completed the warrants check and found the detainee had a clear record.", id. at 1106, and that the officer "seized Crane at the latest when Green held Crane's identification and ran the warrants check." Id.

The Court distinguished Hansen because in that case the officer returned the license before the warrants check was run. Id. See also State v. Aranguren, 711 P.2d 1096, 1098 (Wash.App. 1985) (officer detained bicyclists by holding their alien identification cards while running warrants check: "In this case, once the officer retained the appellants' identification and took it with him to his car, the appellants would not reasonably have believed they were free to leave.").

Again, since petitioner's brief relies on unpublished decisions, respondent will mention that a recent unpublished Washington case, State v. Cruz-Arias, 2002 WL 31081999(Wash.App. Sept. 13, 2002) (unpublished), explained Hansen, Crane, and Aranguren as follows:

> Key to the holding in Hansen, however, was that the officers returned the license to the suspect before running the warrants check. Because the officers did not retain the license for a lengthy period or while they conducted the warrants check, no unlawful detention occurred. Hansen, [cit.]. But here, as in Crane and Aranguren, the officer retained the identification while running the warrants check. And as in those cases, the officer seized Cruz-Arias by holding his identification.

Respondent must disagree with petitioner's discussion of Florida v. Bostick at page 27 of its brief. The relevant discussion in Florida v. Bostick is as follows (501 U.S. at 438-40):

> The dissent also attempts to characterize our decision as applying a lesser degree of constitutional protection to those individuals who travel by bus, rather than by other forms of transportation. This, too, is an erroneous characterization. Our Fourth Amendment inquiry in this case--whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter--applies equally to police encounters that take place on trains, planes, and city streets. It is the dissent that would single out this particular mode of travel for differential treatment by adopting a per se rule that random bus searches are unconstitutional.
>
> The dissent reserves its strongest criticism for the proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions. But this proposition is by no means novel; it has been endorsed

> by the Court any number of times. Terry, Royer, Rodriguez, and Delgado are just a few examples. As we have explained, today's decision follows logically from those decisions and breaks no new ground. Unless the dissent advocates overruling a long, unbroken line of decisions dating back more than 20 years, its criticism is not well taken.
>
> This Court, as the dissent correctly observes, is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a "war on drugs." [Citation to dissent.] If that war is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime. By the same token, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful. The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation. The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary. We cannot agree, however, with the Florida Supreme Court that this single factor will be dispositive in every case.
>
> We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus. The Florida Supreme Court erred in adopting a per se rule.

Thus, the Court was merely writing that the mere fact that the encounter occurred in a bus did not in and of itself turn the encounter into a detention. The case does not stand for the proposition that a single factor can never be determinative of the question of whether there has been a detention. For

instance, if an officer points a gun at a person, or handcuffs the person, or locks the person in a patrol car, that single fact will inarguably amount to a detention.

From the foregoing, the lower court did not err in its opinion. This Court should affirm.

Finally, respondent notes that the lower court did not address his argument that the evidence was insufficient to support the conviction. Should this Court reverse the decision of the lower court, it should remand with instructions for the lower court to consider that issue.

CONCLUSION

This Court should affirm the ruling of the lower court.

Respectfully submitted,

CAROL HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

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GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda L. Melear, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, by courier 21 January 2003.

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Of Counsel

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with 12-point Courier New type, a font that is not spaced proportionately.

_____
Of Counsel