

IN THE SUPREME COURT OF FLORIDA

Case No. SC03-_____

Third DCA Case No. 3D02-2092

NATHANIEL CHARLES JONES,

Petitioner,

-vs-

THE STATE OF FLORIDA

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The parties shall be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

The respondent, the State of Florida, rejects the statement of case and facts contained in the petitioner's brief because it is argumentative and contains facts that are not included in the district court's opinion.

The facts as contained in the district court's opinion are:

On November 6, 2000 at 9:00 p.m., Officer Rubinson of the Miami-Dade Police Department was in a police cruiser responding to an armed robbery call when he saw a white car proceeding in the opposite direction at a high rate of speed. The priority call described the robbery suspects as two black males in a white Acura. Rubinson pursued the car until his cruiser crashed. He observed the driver of the car whom he later identified as Jones. Approximately one week later, Rubinson saw a 'career criminal auto theft' BOLO flier distributed by automobile theft Detectives Villegas and Fernandez with six photographs including a photograph of Jones. The flier also stated that Jones had previously been arrested for shooting a policeman.

Subsequently, Jones participated in a video tape lineup after he was arrested and charged with several burglaries. Those charges were dropped. Shortly thereafter, Jones was charged with robbery and armed assault after one of the robbery victims identified him. Those crimes had occurred the evening Rubinson observed Jones driving the speeding car.

In the Fall of 2001, Jones disclosed six alibi witnesses. On February 15, 2002, after deposing Jones' alibi witness, the state attorney held a meeting at his office with Rubinson and Detectives Villegas and Fernandez to discuss the case; the detectives had arrested Jones several times for auto theft. At that meeting, the officers discussed their

involvement in the case. After Rubinson's involvement became apparent, he was then shown the video tape lineup in which Jones had participated; Detective Villegas and Fernandez sat at the same table with Rubinson as he viewed the video tape. Rubinson identified Jones as the person he saw driving the speeding car. The state informed Jones of the newly-acquired identification. The trial was continued and Jones sought to suppress the identification based on the detectives' bias against Jones and the detectives' presence while Rubinson viewed the video tape lineup.

The court held an evidentiary hearing at which the officer and detectives testified. The detectives testified that they did not influence Rubinson's video tape identification of Jones in any way. Detective Fernandez denied stating that he was 'going to get [Jones] off the street for good.' Detective Villegas stated that he would say that he would like to get Jones off the street if he committed a crime.

Rubinson testified that he knew that Jones had been charged in the case and what Jones looked like from the BOLO; he stated that he viewed the video tape after chatting with, and in the presence of, the auto theft detectives. Rubinson also testified that he had not told the lead robbery detective that he could identify the perpetrator in this case when she interviewed him just after the chase, that he did not contact her after he saw Jones' picture in the BOLO, and that he did not write a report. Rubinson believed that he told his Captain that he thought that he recognized Jones. He testified that he glimpsed at the driver for only about a second as he drove in the opposite direction at 45 miles per hour. Although it was dark, Rubinson stated that he could see the driver's face as he drove by the cruiser because the cruiser's spotlight and the interior light of the white car were illuminated. Rubinson testified that he identified Jones based solely on what he saw the night of the chase.

The court suppressed the out-of-court identification stating:
With regard to Officer Rubinson's video identification of the defendant, the Court finds that, under all the circumstances of this case, the passage of months between the crime and the viewing of the video lineup, coupled with the presence of two auto theft detectives who had previously arrested the defendant several times

for auto theft and appear to have a bias against the defendant, it does not make for an accurate or believable identification. Rubinson's video identification took place approximately fifteen (15) months after his initial encounter with the defendant on November 6, 2000, and his viewing of the six person photographic BOLO flyer one week later, respectively. Therefore, the Court finds that the criteria laid down in Biggers are not satisfactorily complied with here.

On appeal, the State argued that nothing suggestive happened during Rubinson's viewing of the video tape lineup. Jones answered contending that the lineup procedure was unduly suggestive, and that the lineup was without notice or counsel's presence, relying on Cox v. State, 219 So. 2d 762 (Fla. 3d DCA 1969), and State v. Gaitor, 388 So. 2d 570 (Fla. 3d DCA 1980). In its reply, the state requested that this court recede from Cox and Gaitor in light of United States v. Ash, 413 U.S. 300 (1973).

A panel of this court heard oral argument and referred the case to the court for en banc consideration. The en banc court directed the parties to file supplemental briefs addressing whether the court should recede from Cox in light of Ash.

State v. Jones, 2003 Fla. App. LEXIS 10826, 28 Fla. L. Weekly D1625 (Fla. 3d DCA July 16, 2003).

The district court of appeal granted hearing en banc and reversed the trial court's suppression order. The court receded from *Cox* and *Gaitor*, and followed *Ash* in holding that the petitioner did not have a right to counsel when the officer viewed the video taped lineup. The court also held that the procedure for viewing the lineup was not suggestive.

The holding of the district court is the subject of this jurisdictional brief on discretionary review.

QUESTION PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL'S
OPINION EXPRESSLY CONSTRUES A PROVISION OF THE
STATE OR FEDERAL CONSTITUTION

SUMMARY OF THE ARGUMENT

The respondent submits that the petitioner's application for discretionary review should be denied because the opinion at issue in no way expressly construes a provision of the state or federal Constitution.

ARGUMENT

THE PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW SHOULD BE DENIED BECAUSE THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY CONSTRUE A PROVISION OF THE STATE OR FEDERAL CONSTITUTION

The petitioner contends that the Third District Court of Appeal's opinion in the instant case expressly construes a provision of the state or federal Constitution by holding that "a witness' viewing of a video taped lineup is not a crucial or critical stage triggering a defendant's right to have counsel present under either section 16 of Article I of the Florida Constitution, or the Sixth Amendment of the federal constitution." *State v. Jones*, 2003 Fla. App. LEXIS 10826, 28 Fla. L. Weekly D1625 (Fla. 3d DCA July 16, 2003). The respondent submits that the Third District's opinion does not expressly construe a provision of the state or federal Constitution, but merely applies a clear-cut constitutional provision to the facts of this case. Therefore, the respondent respectfully requests that this Court deny the petitioner's application for discretionary review.

This Court may invoke discretionary jurisdiction to review opinions of the district courts of appeal which "expressly construe a provision of the state or federal constitution." Fla. R. App. P. 9.030(a)(2)(A)(ii). As this Court explained in *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958), in order for a lower court to be

considered to have construed a constitutional provision, the lower court:

must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the [lower court] examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution.

See also Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973) (holding that the court lacked jurisdiction because the lower court's decision failed to explain or define any constitution terms or language).

The Third District Court of Appeal's opinion in *State v. Jones* does not expressly construe any provision of the state or federal Constitution. The district court merely examined whether a witness' viewing of a video taped lineup is a crucial or critical stage triggering a defendant's right to have counsel present. The court determined that a video taped lineup is analogous to a photographic array, and followed *Ash* in determining that counsel need not be present for the viewing of a video taped lineup. The district court never undertook to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision itself. Instead, the court merely "examine[d] into the facts of a particular case and then appl[ied] a recognized, clear-cut provision of the Constitution." *Armstrong v. City of Tampa*, 106 So. 2d at 409 (holding that the trial court did not "construe" constitutional language by examining whether Avon employees were engaged in transactions that would require the application of interstate commerce

provisions of the federal Constitution, or the Declaration of Rights of Florida).

As the Third District's opinion does not expressly construe the state or federal Constitution, the respondent respectfully requests that this Court deny the instant petition for discretionary review.

CONCLUSION

Based on the foregoing argument and authorities, the respondent submits that the petitioner's application for discretionary review by this Court should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was provided by U.S. Mail to Billie Jan Goldstein, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 NW 14th Street, Miami, FL 33125, this __ day of August, 2003.

ERIN K. ZACK
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font utilized herein is proportionally spaced 14 point Times New Roman in compliance with Fla. R. App. Pro. 9.210(a)(2).

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