IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. SC03-1528

ANTHONY FRIERSON,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, and the Appellant in the Fourth District Court of Appeal. Petitioner was the prosecution and Appellee in the lower courts. In this brief, the parties will be referred to by name or as they appear before this Court. The following symbols will be used:

R = Record on Appeal

T = Transcript of Trial Court Proceedings

All emphasis has been added by Respondent unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions and clarifications:

1. After being stopped at the intersection, Mr. Frierson made a left turn from Old Dixie Highway onto Northlake Boulevard after the green left turn arrow appeared on the traffic signal (T- 127). When making the turn, he did not affect other traffic (T-22-23, 127-128).

2. Although there was a crack in the red taillight cover on the left side of Mr. Frierson's car, both sets of taillights were operable (T-116, 117, 128-131). The red taillight cover was not completely removed (T-14).

4. Mr. Frierson was driving a red 1981 four door Plymouth. (State Exhibit 1)

3. Approximately 3 months before Miller's stop of Mr. Frierson, West Palm Beach police officer Keith Gorski stopped a 1969 grey 2 door Pontiac. (Defense Exhibit 9). The driver did not present picture identification but instead gave Mr. Frierson's name and date of birth as his own (T-137). Gorski verified the name and date of birth with dispatch (T-147-148). Although Gorski obtained the imposter's address and could have checked this information as well as height and weight, he did not do so (T-148-150). 4. Gorski placed the imposter's

thumb print on the citation in accordance with West Palm Beach Police Department policy and issued the citation to him. (T-35, 136-139).

5. Gorski did not ask the imposter if his fingerprints were on file with the West Palm Beach Police Department (T-147). He did not attempt to verify the latent fingerprint on the citation despite having received false information in the past and being involved in cases where the prints did not match (T-138, 140).

6. Although the West Palm Beach Police Department has AFIS (Automated Fingerprint Identification System), the department does not have a fingerprint verification policy (T-138-139).

7. Mr. Frierson's latent fingerprints were on file with the Palm Beach County Sherif Department as of September 21. 2000 (T-43).

8. When detained by officer Miller, Mr. Frierson produced a valid Florida Driver's licence (T-15). It was not suspended (T-18). However, a records check revealed an outstanding warrant in Mr. Frierson's name for failure to appear for arraignment on the charge of driving while licence suspended/canceled/revoked (T-16, Defense Exhibit 2). Miller did not request the height and weight notations which appeared on the warrant although he could have done so (T-19, 30, Defense Exhibit 2). The imposter

was 5 feet 8 inches tall and weighted 130 pounds as indicated on the warrant. (T-20-21, Defense Exhibit 2). Mr. Frierson is 5 feet 6 inches tall and weighed 185 pounds (T-20).

9. The suspended driver's license charge was nolle prossed after it was determined that Mr. Frierson's thumb prints did not match that appearing on the citation (Defense Exhibit 5).

SUMMARY OF ARGUMENT

POINT I

Both the trial court and the appellate court determined that the traffic stop was illegal. Petitioner is foreclosed from relitigating this claim where it is beyond the scope of the certified conflict. Should this Court hold otherwise, on the merits the evidence supports the trial court's conclusion which was approved by the Fourth District that Mr. Frierson did not commit a traffic infraction when he operated his motor vehicle. He made a left hand turn in accordance with a left turn arrow appearing on the traffic signal and did not interfere with the flow of traffic when doing so. In addition, although there was a crack in the left lens cover, the cover was not completely removed and the light was operational. Therefore, the equipment conformed to the requirements of statute.

POINT II

This Court should exercise its discretion to decline review of the certified conflict between Frierson v. State, 851 So. 2d 293 (Fla. 4th DCA 2003) and State v. Foust, 262 So. 2d 686 (Fla. 3d DCA 1972). The two cases are in harmony and one does not overrule the other. To the contrary, when faced with the same issue decided in Frierson, the Third District Court of Appeal reached the same conclusion. Rozier v. State, 368 So. 2d 379

(Fla. 3d DCA 1979). The sister appellate courts both held that where a defendant is illegally detained, evidence must be suppressed even though an outstanding warrant is discovered.

Next, the warrant was invalid as to Mr. Frierson. It was issued based upon an imposter's failure to appear on the charge of driving without a valid license. The imposter had falsely given Mr. Frierson's name and date of birth when he was stopped. Although the officer obtained the imposter's fingerprint as required by statute because the imposter lacked identification, neither the officer nor his department attempted to verify identity prior to involving the judiciary. Since the department had the means to easily compare fingerprints by way of the Automated Fingerprint Identification System and in light of the prevalence of identity theft in today's society, law enforcement was required to take remedial action. Failure to do so rendered the warrant invalid as to Mr. Frierson.

Turning to the certified conflict, suppression of the evidence seized as a result of the unlawful traffic stop was required by the exclusionary rule. The Fourth Amendment prohibits random motor vehicles stops to check licenses, registrations and temporary tags. Where an officer engages in a personal encounter with a citizen after such a random detention, the information he obtains is subject to suppression.

Thus, the Fourth District Court of Appeal correctly concluded that suppression was required here and its opinion should be affirmed by this Court.

ARGUMENT

POINT I

THE TRIAL COURT AND THE FOURTH DISTRICT CORRECTLY CONCLUDED THAT THE TRAFFIC STOP WAS WITHOUT A LAWFUL BASIS; THIS ISSUE IS BEYOND THE SCOPE OF THE CERTIFIED CONFLICT AND SHOULD NOT BE REVIEWED.

Although the trial court and the Fourth District Court of Appeal determined that Officer Miller illegally stopped Mr. Frierson, Petitioner seeks to relitigate this issue in this Court where discretionary review was invoked based upon an unrelated certified conflict. Frierson v. State, 851 So. 2d 293 (Fla. 4th DCA 2003). Petitioner has not offered even a pretense of jurisdictional basis for this claim.

The point was fully reviewed by the Fourth District Court of Appeal and the Circuit Court's findings were affirmed. 851 So. 2d at 295-295. It is outside the parameters of the certified conflict, See Point II, infra, and the merits should not be reached. See, Ross v. State, 601 So. 2d 1190, 1193 (Fla. 1992)("The remaining issues lie beyond the scope of the issue for which jurisdiction lies, and we see no need to exercise our prerogative to reach them."); Salters v. State, 758 So. 2d 667, 669 n.5 (Fla. 2000) ("These additional claims are clearly outside the scope of the certified conflict issue, and we decline to address them."); Welsh v. State, 850 So. 2d 467, 471

n.6 (Fla. 2003) (“We decline to address the other issues raised by Welsh that are not the basis of our jurisdiction.”); Wood v. State, 750 So. 2d 592, 595 n. 3 (Fla. 1999) (declining to address issues beyond the scope of the certified conflict); Raford v. State, 828 So. 2d 1012, 1021 n.12 (Fla. 2002) (“We decline to address the other issues raised by petitioner because they are beyond the scope of the certified conflict in this case.”); Barnett v. Barnett, 768 So. 2d 441 n.1 (Fla. 2000) (“We decline to address petitioner's second issue on appeal because it is beyond the scope of the certified conflict in this case.”); Jones v. State, 759 So. 2d 681, 682 n.1 (Fla. 2000) (“Further, we decline to address Jones' ineffective assistance of trial counsel claim here, as the Third District fully addressed that claim in the decision below and the claim clearly is outside the scope of the certified conflict before us.”); Williams v. State, 759 So. 2d 680 n.1 (Fla. 2000) (“Moreover, we decline to address Williams' claim challenging the Third District's interpretation of section 775.084(1)(c)1., Florida Statutes (1997), which is clearly outside the scope of the certified conflict issue.”). A conservative application of discretionary review in this instance is in keeping with the general premise that, as a case "travels up the judicial ladder, review should 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).

On the merits, both the Circuit Court and the Fourth District Court of Appeal correctly applied this Court's decision in State v. Riley, 638 So. 2d 507 (Fla. 1994), it's progeny and Doctor v. State, 596 So. 2d 442 (Fla. 1992). Neither drew a renegade conclusion.

When the officer observed Mr. Frierson's vehicle stopped at an intersection, the brake lights were operable. The left lens cover was "just damaged," cracked but not completely removed (T-12, 14, 117, 128-131). The crack did not affect the light bulb since white light could be seen (T-128-131). Since a portion of the lens cover was still in place and the light bulb worked, it stood to reason that red light could also be seen.

These facts were characterized as "nearly identical" to those in Doctor in the trial court's written order (R-84) which was quoted in the Fourth's District's opinion:

> The facts in Doctor are also nearly identical to the facts in the present case. Officer Miller did not testify that the red lens cover was missing from the vehicle. Rather, he testified that it was cracked, and as a result, he observed white light emanating through the crack. In Doctor, the Supreme Court held that such a defect was not violative of the law and was not a valid basis to conduct a traffic stop.

Frierson v. State, 851 So. 2d at 295. Approval of the trial court's application of the law to the facts is warranted based upon this excerpt from Doctor:

> It was the reflector that was cracked, rather than one of the lights. Trooper Burroughs confirmed that the vehicle had taillights shining on each side of the rear of the vehicle, despite the cracked lens cover, at the time of the stop. Thus, as Trooper Burroughs conceded, the vehicle had "at least two taillamps" in working order when it was pulled and was not in violation of the law.... [A] reasonable officer would have known that Doctor's vehicle was in compliance with the law since red taillights were visible on both ends of the vehicle.

Doctor v. State, 596 So. 2d at 446-447. Therefore, neither the Circuit Court nor the Fourth District went astray in holding that the officer's observation of the cracked lens cover did not support the traffic stop since part of the cover remained and the light itself was operable.

Petitioner attempts to distinguish Doctor maintaining that it concerned a cracked reflector while the instant case involves a cracked lens cover. (Petitioner's Brief at page 9). This is a distinction without a difference.

In Doctor, just as in the instant case, the state did not present evidence that the light itself was inoperable. Rather and at the risk of being repetitious, the Fourth District's opinion recognized that in Doctor, there was a "crack in the

innermost lens of the left taillight assembly." Frierson v. State, 596 So. 2d at 446. Here, the lens cover was cracked but not removed completely (T-12, 14, 117, 129-130). Since a portion of the red lens covered the left brake light, one can infer red light shone through even though white light also emitted. Therefore, as in Doctor, the equipment was in compliance with the law which requires rear mounted taillamps that emit a red light. § 316.221(1) Fla. Stat.

When the green left turn arrow appeared on the traffic signal, Mr. Frierson made a left turn (T-127). In executing the turn, he did not interfere with traffic but simply followed the signal's direction (T-22-23, 127-128). Based upon State v. Riley, 638 So. 2d at 507, the Fourth District agreed with the Circuit Court that Section 316.155(1) Florida Statute was not violated because the statute requires that the operator activate his turn signal "in the event any other vehicle may be affected by the movement." Frierson v. State, 851 So. 2d at 295-296.

In Riley, this court addressed the requirements of Section 316.155 Florida Statute:

> If no other vehicle is affected by a turn from the highway, then a signal is not required by the statute. If a signal is not required, then a traffic stop predicated on failure to use a turn signal is illegal and any evidence obtained as a result of that stop must be suppressed.

638 So. 2d at 508. Since the instant facts fall squarely within the Riley holding, both the Circuit Court and the Fourth District correctly concluded that officer Miller's traffic stop was illegal.

Last, Petitioner claims that the officer was justified in stopping appellant's vehicle to inspect the equipment. The circumstances, however, did not warrant such a detention. Both sets of brake lights were operable (T-14, 128-130). Taillights were not in question because it was daytime (T-116-117). And the turn signal should not have given cause for concern since Mr. Frierson executed the turn in accordance with the green turn arrow and without impeding other traffic (T-22-23, 127-128)[1]

These facts as found by the Circuit Court distinguish this case from State v. Snead, 707 So. 2d 769 (Fla. 2d DCA 1998) (inoperable taillight and inoperable brake light); Smith v. State, 735 So. 2d 570 (Fla. 2d DCA 1999) (cracked windshield) and Scott v. State, 710 So. 2d 1378 (Fla. 5th DCA 1998)(officer

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[1]On page 11 of its brief, Petitioner quotes from officer Miller's direct examination. The following was omitted by the use of ellipses:

> Q. When you say there was no turn signal can you explain to His Honor more what you mean by that there was not turn signals?
>
> A. Well, appeared from me, from behind the vehicle either, one, he did not turn his signal on; or two, there was maybe some sort of malfunction thing turning it on, or it just wasn't a signal from the back. (T-116).

had probable cause to stop defendant where trial court made factual finding that turn signal was inoperable).

Based upon the evidence adduced at the hearing, the trial court made factual findings and determined that the traffic stop of Mr. Frierson was illegal. The Fourth District Court of Appeal carefully reviewed the issue and determined that the trial court's conclusion was correct. Petitioner has not advanced any reason to disturb the decision of the appellate court. Thus, and bearing in mind that this issue is outside the certified conflict and need not even be reached, the Frierson opinion should be affirmed.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE EVIDENCE MUST BE SUPPRESSED WHERE RESPONDENT WAS STOPPED ILLEGALLY

Conflict with State v. Foust, 262 So. 2d 686 (Fla. 3d DCA 1972) was certified to this Court by the Fourth District Court of Appeal on the question of whether evidence must be suppressed where after an illegal stop of a citizen, an outstanding warrant is discovered. Frierson v. State, 851 So. 2d 293, 300 (Fla. 4th DCA 2003). Respondent suggests that examination of the jurisdictional basis as well as the character of the warrant is prudent prior to reaching this question.

Regarding discretionary jurisdiction, Respondent presented a similar argument by way of motion to dismiss. In reiterating this claim, emphasis is upon the application of Rozier v. State, 368 So. 2d 379 (Fla. 3d DCA 1979) to consideration of whether conflict exists. Rozier, a case out of the Third District Court of Appeal, was not cited by Respondent in the motion to dismiss.

Foust does not conflict expressly and directly with Frierson. The two decisions are in harmony with one another. Absent express and direct conflict, this Court should exercise its discretionary jurisdiction to decline review.

In Frierson v. State, 851 So. 2d at 293, the Fourth District Court of Appeal approved the trial court's determination that

Mr. Frierson was illegally detained based upon an unlawful traffic stop. After the illegal detention, the arresting officer determined that there was an outstanding warrant for "Anthony Frierson" which was issued when an imposter failed to appear in court for a no valid driver licence charge. A search incident to arrest based upon the invalid but outstanding warrant yielded a firearm. The appellate court held that the firearm was fruit of the illegal detention and should have been suppressed.

In Rozier v. State, 368 So. 2d at 379, the Third District Court of Appeal which had already decided Foust, reached the same conclusion as the Frierson court. Mr. Rozier was unlawfully stopped without founded suspicion. An outstanding bench warrant was discovered and a search of the defendant's person ensued. The Third District held that the motion to suppress should have been granted because initial stop was illegal.

In 1999, the Third District cited its Rozier opinion in Hernandez v. State,784 So. 2d 1124, 1133-1134 (Fla. 3d DCA 1999) for the proposition that "[t]he subsequent discovery of this incriminating evidence by other police officers simply does not vitiate the illegality of the initial stop of Hernandez by Officer Surlow. See Libby v. State, 561 So. 2d 1253 (Fla. 2d DCA 1990); Kimbrough v. State, 539 So. 2d 619 (Fla. 4th DCA

1989); Rozier v. State, 368 So. 2d 379 (Fla. 3d DCA 1979)." Thus, when squarely faced with the effect of the discovery of an outstanding warrant after an illegal detention, the Third District, like the Fourth District, has held that the evidence must be suppressed.

Unlike the Frierson and Rozier opinions, the Third District in Foust did not address the issue of whether the initial detention was unsupported by a founded suspicion and the opinion does not set forth the underlying facts. After holding that a search incident to arrest based upon outstanding bench warrants was lawful, the Third District wrote:

> [T]he reasonableness of the search after arrest was not affected by the fact that the original stopping of appellee may have been without probable cause.

Foust v. State, 262 So. 2d at 688. It is this sentence which was relied upon by the Fourth District to certify conflict. Frierson v. State, 851 So. 2d at 300.

To conclude that the cases are in conflict, however, one must **assume** that Foust's initial detention was unsupported by founded suspicion. Absent a discussion of the legality of the detention, one can not speculate that the stop was illegal as unsupported by founded suspicion. Instead, it appears that the Third District simply rejected an incorrect defense argument

that a stop requires probable cause to be valid. It is well settled that a stop need not be supported by probable cause but only requires a founded suspicion to detain. Terry v.Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Because the stop in Foust may have been valid as supported by a founded suspicion although not probable cause, a conflict does not exist with the instant cause. If Foust was lawfully detained and the officer had probable cause to search him incident to arrest, there would be no basis to suppress the evidence. By contrast, in Frierson, suppression was required because the initial detention was unlawful. Thus, the two cases rely upon different propositions of law to reach divergent outcomes.

Article V, Section 3(b)(4) of the Florida Constitution reads in pertinent part:

> The supreme court may review any decision of a district court of appeal ...that is certified by it to be in direct conflict with a decision of another district court of appeal.

In light of this constitutional grant of authority and although a District Court of Appeal certifies that its decision conflicts with a decision of another District Court of Appeal, this court has made its own determination of whether it should exercise its discretion to review the cause . See, King v. State, 790 So. 2d

477 (Fla. 5th DCA 2001), review improvidently granted and dismissed, 820 So. 2d 941 (Fla. 2002); State v. Clark, 770 So. 2d 237 (Fla. 4th DCA 2000) review improvidently granted and dismissed, 804 So. 2d 1247 (Fla. 2001); Sanders v. State, 765 So. 2d 778 (Fla. 1st DCA 2000) review improvidently granted and dismissed, 796 So. 2d 533 (Fla. 2001); State v. Hogan, 753 So. 2d 570 (Fla. 4th DCA 1999) review improvidently granted and dismissed, 775 So. 2d 288 (Fla. 2000); Gulley v. State, 730 So. 2d 386 (Fla. 3d DCA 1999) review improvidently granted and dismissed, 758 So. 2d 635 (Fla. 2000); Curry v. State, 656 So. 2d 521 (Fla. 2d DCA 1995) review improvidently granted and dismissed, 682 So. 2d 1091 (Fla. 1996); State v. Walker, 580 So. 2d 281 (Fla. 4th DCA 1991) review improvidently granted and dismissed, 593 So. 2d 1049 (Fla. 1992).

Conflict jurisdiction only arises where the cases address the same proposition of law. Curry v. State, 682 So. 2d at 1092. "A conflict might conceivably arise either from adoption of opposing rules or from the application of the same principle to reach a different result upon the same facts." Florida Power & Light Co. v. Bell, 113 So. 2d 697, 698 (Fla. 1959). In those limited circumstances, this court will exercises its jurisdiction to "stabilize the law by a review of decisions which form patently irreconcilable precedents." Id. at 699 As this court

wrote in Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958):

> A limitation of review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.
>
> Similar provisions in the court systems of other states have been so construed: 'A conflict of decisions ... must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions.' 21 C.J.S. Courts § 462

The Frierson decision would not overrule the precedent set by the Third District Court of Appeal in State v. Foust, 262 So. 2d at 686. To the contrary, when faced with the same circumstances as those at bar, the Third District Court of Appeal of Appeal drew the same conclusion as the Fourth District Court of Appeal. Rozier v. State, 368 So.2d at 379.

Since Foust and Frierson can be easily reconciled, express and direct conflict does not exist. Respondent therefore submits that this court should decline to review the instant cause.

Turning to the character of the warrant, consideration should be given to law enforcement's responsibility to thwart identity theft. The warrant issued when an imposter, not surprisingly, failed to appear in court:

> The warrant arose from a uniform traffic

> citation issued on April 11, 2001. Officer Keith Gorski of the West Palm Beach Police Department made a traffic stop. The person stopped did not have a driver's license. The person gave Frierson's name, address, and birth date as his own.
>
> Officer Gorski ran the name through his dispatcher for a computer check to see if the person stopped had a warrant or if his license was valid. The name, address, and date of birth matched the information on Frierson's driver's license. The computer check indicated that Frierson's driver's license was suspended.
>
> Officer Gorski issued the driver a uniform traffic citation and notice to appear charging him with driving while his license was suspended or revoked. Also, he affixed the driver's thumbprint on the original of the citation that was filed with the court clerk. The citation set an initial court appearance for April 26, 2001.
>
> The person who received the citation failed to appear on April 26 and an arrest warrant issued for Frierson. After Frierson's arrest in this case, the state attorney's office had Frierson's thumbprint compared to the one on the original citation and they did not match. The state nolle prossed the driving under suspension charge against Frierson on September 25, 2001.

Frierson v. State, 851 So. 2d at 297 (footnotes omitted).

Although the officer testified that it was departmental policy to place the latent thumb print on the citation where the driver of a vehicle does not have identification (T-35, 136-139), in actuality, the fingerprint is a required by statute. Section 322.15 (2) Florida Statute “License to be carried and

exhibited on demand; fingerprint to be imprinted upon a citation," reads:

> Upon the failure of any person to display a driver's license as required by subsection (1), the law enforcement officer or authorized representative of the department stopping the person **shall** require the person to imprint his or her fingerprint upon any citation issued by the officer or authorized representative.

As a consequence of law enforcement's statutory obligation to obtain the latent fingerprint, it had the responsibility to endeavor to verify identity before bringing an accusation. See, IV, XIV Amends., U.S. Const. ("The right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing ...the persons or things to be seized"); Art. 1 §12 Fla. Const.

Law enforcement is aware that persons often provide false information when they are stopped for a traffic infraction and do not present identification (T-138, 140). In light of this historical fact, the imposter is analogous to an anonymous tipster. His motives may not be pure and he is very likely to be unreliable. See, Florida v. J.L., 529 U.S. 266, 270 (2000) ("Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn

out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.") The false information is offered to avoid prosecution and hinder, not aide, law enforcement. Compare, State v. Maynard, 783 So. 2d 226 (Fla. 2001). Therefore, before law enforcement can act on information provided by the imposter, the police should, by their own observation, corroborate at least innocent details provided by the source. See, Kimball v. State, 801 So. 2d 264 (Fla. 4th DCA 2001).

This could have been readily accomplished in the instant case. When officer Miller was advised by dispatch that there was an outstanding warrant in Mr. Frierson's name, he could have requested the height and weight of the suspect appearing on the warrant (T- 19, 30). Had he done so, he would have learned that the citation was issued to a 5 feet 8 inches tall, 130 pound male (T-20-21, Defense Exhibit 2). He could have compared the height and weight description to Mr. Frierson who was 5 feet 6 inches tall and weighed 185 pounds (T-20). The height and weight discrepancies would have alerted the officer that the warrant was issued for someone other than Mr. Frierson. The officer failed to make even this minimal effort to corroborate the information on the warrant despite Mr. Frierson's protestations that he did not have any outstanding warrants (T-41-42).

Law enforcement has the means to determine identity based upon the thumb print and correct any error before involving the judiciary. Corroboration is easily accomplished by presenting the thumb print on the citation for comparison through the Automated Fingerprint Identification System (AFIS). See, http://www.oppaga.state.fl.us/profiles/1069/01/default.asp?bookma rk=AFIS[2]; http://www.fdle.state.fl.us/publications/statementofagencyorganization.pdf

Here, the record reflects that officer Gorski through the West Palm Beach Police Department had the means to correct any

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[2] The relevant portion of the Florida Monitor, A Service of the Florida Legislature's Office of Program Policy Analysis and Government Accountability website relating to AFIS explains:

> AFIS is an automated system for searching fingerprint files and transmitting fingerprint images. The system scans or analyzes fingerprint impressions and allows for the identification of distinguishing characteristics unique to an individual. FDLE collects and stores fingerprint identification information received from arresting agencies, either from fingerprint cards or electronically through AFIS Livescan units. Using AFIS Livescan units, local law enforcement can receive a positive identification of a suspect within 10 minutes of scanning his fingerprints. As of December, 2001, 68% of all fingerprint submissions are submitted electronically through AFIS Livescan units.

error before the citation was forwarded to the court system. First, officer Gorski obtained the imposter's height, weight and address. He could have verified this information but did not do so. (T-148-159). Furthermore, the West Palm Beach Police Department had AFIS (Automated Fingerprint Identification System) at the time of Mr. Frierson's case but no efforts were taken by law enforcement to utilize the system (T-138-139, 140).

Had the thumb print been submitted for identification, it would have been determined that it belonged to someone other than Mr. Frierson. Mr. Frierson's standard fingerprints were on file (T-43). Since law enforcement was on notice that false information was provided in these circumstances and it has the capability to verify identity, the error in issuing a warrant in Mr. Frierson's name must be attributed to its negligence in failing to investigate and correct the error.

The prevalence of identity theft[3] in today's society and the need to protect the unsuspecting public supports this conclusion. Our Attorney General Charlie Crist recognizes as much:

> Identity theft is the criminal use of an individual's person identification information. Identity thieves steal information such as your name, social security number, driver's license information, or bank and credit card accounts and use the information

[3]Identity theft is a third degree felony in Florida. § 817.568 Fla. Stat.

> to establish credit, make purchases, apply for loans or even seek employment.
>
> The statistics are staggering. According to the Federal Trade Commission, Florida was ranked sixth in the nation for identity theft in 2002, with over 10,000 reported victims. Victims of identity theft can come from any lifestyle regardless of race, gender, age or socioeconomic status.

http://myfloridalegal.com/pages.nsf/Main/3C2A3BA3C2DA5C6F85256DBE006C1B30?OpenDocument. The Attorney General is so concerned about this problem that a direct link to "Identity Theft" appears in the right hand column of his website. http://myfloridalegal.com/

As the Palm Beach Post reported on September 4, 2003:

> Identity theft is a rapidly growing problem, with nearly one out of 10 Americans victimized in the past five years, according to a survey released Wednesday by the by the Federal Trade Commission.
>
> Close to 10 million people were victims of identity theft last year and 27.3 million have had their identities stolen in the past five years, the FTC calculated from the random survey of 4,057 adults.
>
> * * *
>
> Beales [Director of the FTC"s Bureau of Consumer Protection] said he hoped the information would galvanize federal, state and local law enforcers, the business community and consumers to work together to combat "this menace."

Palm Beach Post, Sept. 4, 2003, at 1A, 4A.

Placing the burden on law enforcement to uncover the error is not only required by law and public policy but acknowledges the realities of the situation. The citizen is not in a position to correct the error. The citizen is unaware that a citation had been issued to someone masquerading as him. He does not know that a court date come and gone or that a warrant has been issued for his arrest for failure to appear. He is caught unawares when he is subsequently arrested. Perhaps he must post a bond then hire a lawyer and miss time at work to have the mistake corrected and his name cleared, all at considerable financial and emotional cost.

This entire scenario is easily avoided by recognizing that since Florida Law obligates police to obtain a fingerprint when a person does not exhibit a driver's licence and Florida has the capabilities to compare that print to verify identity, its failure to do so brings its action within the ambit of the exclusionary rule. State v. White, 636 So. 2d 664 (Fla. 1995); Shadler v. State, 761 So. 2d 279 (Fla. 2000).

In White, the defendant was stopped for a defective taillight. A computer check revealed an outstanding warrant for failure to pay child support. After confirming the existence of the warrant, the defendant was arrested and a search yielded contraband. Further investigation showed, however, that the

warrant had been served 4 days before and was thus, invalid. This Court reaffirmed the validity of the fellow officer rule which requires law enforcement to generate accurate information. Consequently, where an arrest stems from law enforcement's failure to maintain accurate computer records, the exclusionary rule applies. Accord, Shadler v. State, 761 So. 2d at 279 (exclusionary rule applies to Department of Highway Safety and Motor Vehicle records.)

Similarly, here, the exclusionary rule applies because the existence of the invalid warrant was the result of law enforcement's blind reliance upon unverified information provided by an imposter. See, Carter v. State, 817 So. 2d 992, 994 (Fla. 4th DCA 2003) (although original mistake in records was caused by defendant, police should have corrected: "The arresting officer admitted that if the dispatcher had given him full information...he would have clarified the conflict before proceeding further.")

The Fourth District Court of Appeal rejected this argument after discussing Arizona v. Evans, 514 U.S 1, 115 S.Ct. 1185, 131 L.Ed.2d 1934 (1995) which held that the exclusionary rule does not apply to clerical errors of the judicial branch and the good faith exception of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). 851 So. 2d at 297-298. The

Fourth District concluded that the error could not be attributed to law enforcement because the false information was supplied by a citizen. While at first blush, this holding has some appeal, it overlooks a salient fact present in Leon which does not appear in the instant case.

In Leon, a **judge** issued a search warrant which was later determined to be legally invalid because it was based upon an affidavit that failed to establish probable cause. Law enforcement executed the warrant and discovered contraband. The United States Supreme Court held that the exclusionary rule did not apply because the police officers could in good faith rely upon the warrant issued by a magistrate. Law enforcement was not expected to question the magistrate's determination that there was sufficient probable cause to issue the search warrant.

The Leon court recognized, however, that good faith is not a blanket exception to the exclusionary rule in every case in which there is a warrant:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.

United States v. Leon, 468 U.S. at 923. The circumstances at

bar fall within the ambit of this statement.

At the risk of belaboring the facts, the individual to whom the citation was issued did not provide any identification. The officer who issued the citation was aware that in similar situations, the information proved false and caused the erroneous issuance of warrants (T-139-140). The officer and his agency made no effort to compare the fingerprint on the citation to known fingerprints during the 3 months between the time the citation was issued and Mr. Frierson was erroneously arrested. Further, the arresting officer did not verify that Mr. Frierson's height and weight matched that indicated on the warrant despite Mr. Frierson's proclamation of innocence and his request for corroboration. In light of the technological advances in fingerprint identification and the rise of identity theft, such minimal safeguards are required to prevent the wrongful arrest of citizens by law enforcement and the exclusionary rule should be applied to the invalid warrant.

Assuming that the warrant was valid, the exclusionary rule remains applicable because the stop was illegal. Any conflict must be resolved in favor of the decision in Frierson v. State, 851 So. 2d at 299-300.

The Fourth District held that suppression was required under Kimbrough v. State, 539 So. 2d 619 (Fla. 4th DCA 1989); Rollins

v. State, 578 So. 2d 850 (Fla. 2d DCA 1991) and Solino v. State, 763 So. 2d 1249 (Fla. 4th DCA 2000). In each of these cases, the defendant was unlawfully stopped in a motor vehicle. A computer check revealed an outstanding warrant. In Kimbrough v. State, 539 So. 2d at 619, the appellate court held that suppression of the physical evidence was required because the initial detention was illegal. In Rollins v. State, 578 So. 2d at 851, the appellate court held that subsequent discovery of the warrant did not validate the illegal stop. Accord, Libby v. State, 561 So. 2d 1253 (Fla. 2d DCA 1990). Similarly, the Third District Court of Appeal held in Rozier v. State, 368 So. 2d at 379, that evidence must be suppressed even though an outstanding warrant was discovered after an illegal detention.[4]

The decisions of the Second, Third and Fourth District Courts of Appeal are based upon well-settled Fourth Amendment principles which require suppression of evidence seized after an illegal detention of the driver of an automobile. To hold otherwise, would be to permit law enforcement to engage in random spot checks of motorists in the hopes that a computer check will reveal an outstanding warrant after access to their identification was illegally obtained. The Fourth Amendment

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[4]Wigfall v. State, 323 So. 2d 587 (Fla. 3d DCA 1976) does not impact upon this line of cases because the initial contact was held lawful as a consensual encounter.

forbids this conduct by police where the detention is not otherwise lawful. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); State v. Perkins, 760 So. 2d 85 (Fla. 2000); State v. Diaz, 850 So. 2d 435 (Fla. 2003).

In Delaware v. Prouse, the United States Supreme Court held that police can not stop a vehicle simply to ascertain the status of the driver's license and registration without having a founded suspicion to support the detention. The Supreme Court reasoned:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations – or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered – we can not conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.
>
> This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. (footnote, citations omitted)

440 U.S. at 661, 99 S.Ct. at 1400. The Court held:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an

> automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

440 U.S. at 663, 99 S.Ct. at 1401.

This Court relied upon Delaware v. Prouse when deciding whether suppression of one's identification and driving record were required where this information was revealed after an illegal traffic stop. State v. Perkins, 760 So. 2d at 88. Perkins held that the exclusionary rule applied:

> Consistent with this treatment of the exclusionary rule, we hold that when, as in the instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended license, that officer's post-stop observation of the defendant behind the wheel must be suppressed. (footnote omitted)

760 So. 2d at 88.

Likewise, the exclusionary rule was recently applied by this Court in State v. Diaz, 850 So. 2d at 435. An officer ostensibly stopped a vehicle because the temporary tag was not legible from a distance. As he approached the vehicle, however, the officer was able to discern the validity of the temporary tag. Although the basis for the stop has been satisfied, the officer made contact with the driver and gained the information which gave rise to a felony DUS charge. This Court held that the officer could not continue to detain the defendant to check his

licence information once it was determined that no tag violation occurred. This court wrote:

> To hold otherwise would permit law enforcement officers to randomly stop any and all vehicles having temporary license plate designed and created by the State and conduct a further examination and interrogation of the driver, and later justify the stop by simply claiming the tag, a product created by the State was unreadable. **Such random stops and extended detentions, having no basis are unconstitutional under Prouse.**

850 So. 2d at 438. As this Court observed:

> It would be dangerous precedent to allow overzealous law enforcement officers to place in peril the principles of a free society by disregarding the protections afforded by the Fourth Amendment. To sanction further detention after an officer has clearly and unarguably satisfied the stated purpose for the initial stop would be to permit standardless, unreasonable detentions and investigations. Further, detentions such as that which occurred here are not sufficiently productive for law enforcement purposes, any more so than the random stops declared unconstitutional in Prouse. Allowing such investigations would result in boundless interrogations by law enforcement officers, unrecognized by the Court before, and also an erosion of Fourth Amendment protections.

850 So. 2d at 439-440.

Random stops of motorists to determine if there is an outstanding arrest warrant no more comports with the Fourth Amendment than random stops to check driver's licenses, vehicle registrations or temporary tags. In each instance, the officer

would not have been in a position to have the personal encounter with the driver had he not stopped the driver without legal justification. Thus, suppression of evidence discovered as a result of the illegal detention is required in each instance. Delaware v. Prouse; Perkins; Diaz.

Petitioner relies upon United States v. Green, 111 F.3d 515 (7th Cir.1997).[5] The Seventh Circuit held that the defendant's detention was the result of an illegal traffic stop. The appellate court also held that "the continued detention of the Greens while the police ran the computer search for arrest warrants also violated the Fourth Amendment." 111 F.3d at 520. However, when an outstanding warrant was discovered, the taint of the Fourth Amendment violation was attentuated.

The Seventh Circuit purported to rely upon Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 416 (1975). Brown v. Illinois, however, considered the admissibility of a confession taken after an illegal arrest but with waiver of constitutional rights. The Brown court was concerned with the interplay of the Fourth and Fifth Amendments rather than a strict Fourth Amendment issue like that presented in the instant

[5] Although no reminder is necessary, this Court is not bound to follow a decision of a Circuit Court of Appeal applying the Fourth Amendment but only those of the United States Supreme Court. Art. I § 12 Fla.Const.

case. It emphasized that the role of the exclusionary rule is different in the context of a Fourth Amendment violation than in the context of a Fifth Amendment violation. 422 U.S. at 600-602; 95 S.Ct. at 2260-2261. The High court wrote:

> The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without Miranda warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth, Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation. (footnote omitted)

Id. The Supreme Court rejected a *per se* approach to whether the giving of Miranda warnings renders admissible a statement taken after an illegal arrest. Instead, the Court approved a multi-factor test which included whether Miranda warnings had been given as well as the length of time that elapsed between the arrest and the statement, the existence of intervening events, the reason for the police misconduct and the voluntariness of the statement. 422 U.S. at 603-604; 95 S.Ct. at 2261-2262. Applying these factors, the Supreme Court determined that the statement was inadmissible as the fruit of an illegal arrest

even though constitutional rights had been advised and waived. The court instead relied upon the fact that the statement was taken only 2 hours after the arrest, there was no significant intervening event such as the defendant's release from custody, and the officer's motives were impure.

Although Brown dealt with circumstances surrounding the giving of a statement after an illegal arrest, the Green court endeavored to apply the factors to a pure Fourth Amendment issue. Review of the decision reveals that its factor analysis, however, was quickly abandoned in favor of a *per se* rule that anytime an outstanding warrant is discovered, the taint of an illegal detention is attenuated. 111 F.3d at 521

Where this Court to follow Green, this Court would effectively overrule its decisions in Perkins and Diaz. It could just as easily be argued that discovery of a suspended licence attenuates the taint of the illegal detention as it can be argued that the discovery of an outstanding warrant attenuates the taint of the initial illegality. Court's have long rejected this ends justifies the means approach to the Fourth Amendment. Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 416 (1963)citing Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927)

For similar reasons, the Green court's use of the phrase,

“Olly, Olly, Oxen Free” has no place in Fourth Amendment law. 111 F.3d. at 521. In many instances in which evidence of a crime is excluded based upon a violation of the right to be free from unlawful search and seizure, a potentially guilty defendant avoids prosecution. The exclusionary rule recognizes this as a cost of enforcing our constitutional rights:

> [T]his case re-establishes what many search and seizure cases have reminded us of in the past, that the preservation of certain constitutional principles sometimes results in the escape of a scoundrel. This is old news. See Rakas v. Illinois, 439 U.S. 128, 137, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) ("[E]ach time the exclusionary rule is applied it exacts a substantial cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected"); Stone v. Powell, 428 U.S. 465, 490, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) ("Application of the [exclusionary] rule thus deflects the truth-finding process and often frees the guilty"); Kopf v. Skyrm, 993 F.2d 374, 379-80 (4th Cir.1993) ("One who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply"); Owens v. State, 322 Md. 616, 589 A.2d 59, 67 (Md.1991) ("[I]n order to safeguard that most fundamental value of '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' it is sometimes necessary that the scoundrel go free").

R.A. v. State, 725 So.2d 1240, 1242-1243 (Fla. 3d DCA 1999). “Oxen-free” thus applies to each instance where the exclusionary

rule requires suppression of evidence resulting from a violation of a citizen's Fourth Amendment rights.

Finally, this Court should not reverse the decision of the Fourth District Court of Appeal based upon Petitioner's absurd result argument which references a hypothetical homicide case. (Petitioner's Brief on 17). Just recently, this Court reversed a defendant's first degree murder conviction and death sentence in Moody v. State, 842 So. 2d 754 (Fla. 2003).

Mr. Moody was illegally stopped based upon an officer's speculative belief that he drove with a suspended driver's licence. Once stopped, Moody admitted to the officer that he did not have a driver's licence. Moody was arrested and a search of the vehicle yielded a firearm, albeit not the one used in the homicide. The illegal stop, however, set into motion a chain of events which led to other evidence ultimately implicating Moody in the murder. This court addressed the "fruit of the poisonous tree" doctrine:

> Although the stop was illegal, the fruit of the poisonous tree doctrine does not automatically render any and all evidence inadmissible. A court may admit such evidence if the State can show that (1) an independent source existed for the discovery of the evidence, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); or (2) the evidence would have inevitably been discovered in the course of a legitimate investigation, Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377

> (1984); or (3) sufficient attenuation existed between the challenged evidence and the illegal conduct, Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). None of these three exceptions are supported in this record.

842 So. 2d at 759. Likewise, no exception to the exclusionary rule applies here and the decision of the Fourth District Court of Appeal should be affirmed.

CONCLUSION

The decision of the Fourth District Court of Appeal should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to DANIEL HYNDMAN, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, this _____ day of December, 2003.

MARCY K. ALLEN
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Courier New, 12 point.

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