IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, CASE NO. SC03-1528

Petitioner, LT Case No. 4D02-1875

v.

ANTHONY FRIERSON,

Respondent.

****
ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the prosecution in the trial court and Appellant the Fourth District Court of Appeal. Petitioner will be referred to herein as “the Petitioner” or “State”. Respondent, Anthony Frierson, was the defendant in the trial court and Appellant in the Fourth District Court of Appeal. Respondent will be referred to as “the Respondent” or “Frierson”.

The following symbols will be used:

R = Record on Appeal

T = Transcript of Trial Court Proceedings

RB = Respondent’s Brief on the Merits

STATEMENT OF THE CASE AND FACTS

The Petitioner relies upon its Statement of the Case and Facts as contained in its Initial Brief.

SUMMARY ARGUMENT

Point I. The trial court and the Fourth District incorrectly concluded that the stop of the Respondent was without lawful basis. Officer Miller had reasonable cause to believe that the Respondent's turn signal was broken based on the Respondent's failure to use the signal and visible damage to the lens on the taillight. Miller was authorized to stop the Respondent pursuant to section 316.610 in order to submit the vehicle to an inspection. Additionally, the Respondent was in violation of section 316.234(1) since a white - - rather than a red or amber - - light emanated from the brake lights of his vehicle.

This Court's decision in Doctor is clearly distinguishable and was misapplied by the lower courts. In Doctor, law enforcement did not have a basis to stop the defendant because a traffic violation was not observed. However, in the instant case, Officer Miller observed a traffic violation and had reasonable cause to believe that the Respondent's turn signal was not in proper repair as required by law.

Since this Court has jurisdiction based on certified

conflict in point II, this Court has jurisdiction to review this issue as well.

Point II. Even assuming the traffic stop was without lawful basis, the Respondent's motion to suppress was properly denied by the trial court. Officer Miller relied in good faith on the outstanding warrant for the Respondent's arrest. The warrant was issued as a result of the misconduct of a private citizen, not through the error of law enforcement. Furthermore, the trial court properly found that the existence of this warrant attenuated the taint of the arguably illegal stop of the Respondent and the Fourth District erred in reversing the order of the trial court.

The exclusionary rule should not be applied to the instant case since the warrant was issued as a result of citizen, rather than police, misconduct. An application of the exclusionary rule would not deter any misconduct and would place an unreasonable burden on law enforcement.

Conflict should be resolved in favor of Foust. The trial court and the special concurrence in Frierson correctly recognize that there is no "but for" test for suppression of evidence seized as a result of an unlawful stop. Rather, the issue is whether there is an intervening event - - such as an outstanding warrant - - which attenuates the taint of the

illegal stop. An application of the factors outlined in the Brown and Green decisions, and approved by this Court in Moody, favors the admission of the firearm which was seized from the Respondent as a result of his arrest on the outstanding warrant.

ARGUMENT

Point I

THE TRIAL COURT AND THE FOURTH DISTRICT INCORRECTLY CONCLUDED THAT THE TRAFFIC STOP WAS WITHOUT A LAWFUL BASIS; DOCTOR WAS MISAPPLIED BY THE LOWER COURTS

The Petitioner respectfully submits that the trial court and the Fourth District Court of Appeal ("Fourth District") misapplied this Court's decision in Doctor v. State, 596 So. 2d 442 (Fla. 1992), and incorrectly concluded that the traffic stop in the instant case was without a lawful basis. In his brief, the Respondent argues that this Court should not reach the merits of this claim since discretionary review was invoked based upon an unrelated certified conflict (RB 7-8). However, "once this Court has accepted jurisdiction in order to resolve conflict, [it] may consider other issues decided by the court below which are properly raised and argued before this Court." Caufield v. Cantele, 837 So. 2d 371, 377 FN5 (Fla. 2002). See

also, Schreiber v. Rowe, 814 So. 2d 396, 398 (Fla. 2002). Therefore, this Court has jurisdiction over this issue.

As to the merits, the Respondent asserts that the trial court and the Fourth District correctly followed Doctor since "[i]n Doctor, just as in the instant case, the state did not present evidence that the light itself was operable" (RB 10). The Petitioner respectfully disagrees; in the instant case, the state presented evidence that the Respondent's tail light was damaged and that his turn signal may not have been operational. Moreover, the critical issue is not whether the Respondent's light was operational, but whether Officer Miller had a reasonable belief that the Respondent was committing a traffic offense. "All that is required for a valid vehicle stop is a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute." Davis v. State, 788 So. 2d 308, 309 (Fla. 5th DCA 2001).

In Doctor, this Court found that the traffic stop was illegal because, based on the observations of the arresting officer, it was clear before he was ever stopped that the defendant was not committing a traffic violation; " 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." Id. at 447. Moreover, the "officers conceded that **they had no reasonable suspicion of criminal activity until after the stop** when Doctor exited the vehicle . . ." Id. at 446 (emphasis added).

However, in the instant case, Officer Miller testified that he stopped the Respondent because it appeared that his turn signal was not working as required by sections 316.222(2) and 316.234(2), Florida Statutes. The signal was not used while the Respondent was making a turn and there was obvious damage to the tail lights (T 12-14, 22-23). This is a justifiable basis for a traffic stop. See section 316.610(1), Florida Statutes[1]. Additionally, the Respondent was apparently in violation of section 316.234(1), Florida Statutes, since there was a white light, rather than a red or amber light, illuminating from the Respondent's brake lights (T 115-118, 128-131).

Although there was no legal basis to make the traffic stop in Doctor, there was clearly reasonable suspicion in the instant case that the Respondent was violating the traffic laws; therefore, the stop was justified. The rulings of the trial

[1] "Any police officer may at any time, upon reasonable cause to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of the vehicle to stop and submit the vehicle to an inspection and such test with reference thereto as may be appropriate."

court and the Fourth District are misapplications of Doctor and those rulings should be reversed by this Court.

Finally, the Respondent correctly states that in State v. Riley, 638 So. 2d 507, 508 (Fla. 1994), this Court held that the use of a turn signal is not required if no other vehicles are affected by the turn and that "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." (RB 11-12) Although the Respondent may not have been legally obligated to use his turn signal in the instant case, his failure to use the signal while actually making a turn, coupled with the obvious damage to the tail lights, gave Officer Miller reasonable cause to believe that the Respondent's turn signal was not in proper repair. Consequently Riley is not controlling since the instant case has additional factors supporting the stop which were not present in Riley. The holdings of the trial court and the Fourth District that the instant stop was illegal should therefore be reversed.

Point II

EVEN ASSUMING THE STOP OF THE RESPONDENT WAS WITHOUT LEGAL BASIS, THE RESPONDENT WAS PROPERLY ARRESTED ON THE OUTSTANDING WARRANT AND IT WAS ERROR TO SUPPRESS THE FIREARM DISCOVERED AS A RESULT OF A SEARCH INCIDENT TO THE ARREST; CONFLICT SHOULD BE RESOLVED IN FAVOR OF FOUST

Although the Fourth District certified conflict with State v. Foust, 262 So. 2d 686 (Fla. 3d DCA 1972), Frierson v. State, 851 So. 2d 293, 300, the Respondent asserts that the cases "are in harmony with each other" (RB 13). In the instant case, the Fourth District, departing from the conclusion of the trial court, found that the existence of an outstanding warrant did not purge the taint of (what the Fourth District held to be) the illegal traffic stop and that suppression of the firearm found as a result of a search incident to the Respondent's arrest on the warrant should have been suppressed. Id. at 299-300. The Foust Court reached the opposite conclusion:

> We hold that the arrest of the appellant was valid under the bench warrants which were revealed to the officer by radio check . . . Further, the search of appellant's person incident to such arrest was reasonable. It is also our view that the reasonableness of the search after arrest was not affected by the fact that the original stopping may have been without probable cause.

Id. at 688 (internal citation omitted). In both Foust and Frierson, the district courts held that the traffic stops in question were illegal. In both cases, there was an outstanding warrant for the arrest of the person stopped. In Foust, the Court held that the search incident to arrest was reasonable notwithstanding the illegal stop and that the evidence seized as

a result of that search should not have been suppressed; however, in Frierson, the Fourth District held that the evidence seized as a result of the search incident to arrest should be suppressed because the stop was illegal. These conclusions are clearly contradictory and conflict was properly certified by the Fourth District. Although conflict was not certified with Wigfall v. State, 323 So. 2d 587 (Fla. 3d DCA 1975), the Petitioner submits that the instant decision is in conflict with that case as well.

The Respondent also asserts that he was a victim of identity theft and argues that the exclusionary rule should be applied since law enforcement should have ascertained that the person who was issued a citation several months earlier and who identified himself as the Respondent was actually an imposter (RB 18-28). The Respondent suggests that the imposter's thumb print should have been submitted for identification wherein it would have been discovered that it did not belong to the Respondent, whose fingerprints were on file[2] (RB 22). The Fourth District correctly rejected this portion of the Respondent's argument and agreed with the trial court that:

[2] The Respondent does not opine whether or not most ordinary citizens would have their fingerprints "on file."

> . . . to require such action[3] by police agencies for all persons who are arrested would place an undue and unreasonable burden on them. Th[e] Court does not believe that the exclusionary rule was intended to impose such extreme burdens upon law enforcement authorities, nor does th[e] Court believe that law enforcement's failure to institute such a burdensome procedure constitutes "the type of police negligence . . . the exclusionary rule was designed to deter."

Frierson at 299. In this regard, the trial court and the Fourth District correctly relied on United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984), and Arizona v. Evans, 514 U.S. 1, 1185 S. Ct. 1185 (1995). The exclusionary rule should not apply in the instant case because Officer Miller reasonablely relied on the existence of an outstanding warrant when he arrested the Respondent. Officer Gorski, the officer who wrote the original ticket, also acted reasonably:

> . . .an officer has the discretion to issue a notice to appear for a criminal traffic offense such as driving under a suspended license. Here, the counterfeit Anthony Frierson provided Officer Gorski with a name, address, and date of birth that matched the driver's license record on the computer. This provided the officer with an adequate basis for believing that the driver had "sufficiently identif[ied] himself" to allow the issuance of a notice to appear instead of a custodial arrest.

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[3] " . . . checking fingerprints obtained from the arrested individuals against the police agencies' fingerprint databanks." Frierson at 299.

Frierson at 299. Since law enforcement acted reasonably, the exclusionary rule should not be applied in the instant case. "The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern . . . Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." Leon, 468 U.S. at 907-908. Moreover, the exclusionary rule should only be applied when it will deter police misconduct. See, Evans, 514 U.S. at 11 (where the exclusionary rule does not result in appreciable deterrence, its use is unwarranted). Certainly an application of the exclusionary rule in this case would not deter the imposter who used the Respondent's name instead of his own. The Respondent, a convicted felon in unlawful possession of a loaded semiautomatic handgun (R 2-4; T 245), should not be the beneficiary of its application in this case.

The Respondent also makes the unsubstantiated assertion that a holding contrary to his position would "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" (RB 28). This

contention is without merit. The Supreme Court of the United States in its decision in Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963), forecloses this result. Not all evidence is "fruit of the poisonous tree" simply because it comes to light as a result of illegal actions by the police. Id., 371 U.S. at 487-488. "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id. The Respondent's scenario would fail the Wong Sun test since it would be found to be an exploitation of an illegality. As Judge Gross notes in his special concurrence:

> In Brown v. Illinois, 422 U.S. 590, 603-604, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), the Supreme Court set forth three factors for determining whether the causal chain has been sufficiently attenuated to dissipate the taint of the illegal conduct: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

Frierson at 301 (Gross, J., concurring specially). Certainly, the random stopping of motorists in the hopes that they have outstanding warrants, without more, would fail the third factor announced above.

Even if the stop in this instant case was illegal, it was not an example of flagrant official misconduct. "A finding of no reasonable suspicion to make a traffic stop requires a close reading of the traffic statutes and applicable case law. It is not unusual to find police officers who are unable, on the street, to parse the nuances of statutes with the precision of trained jurists." Id. But for Fourth District precedent[4], Judge Gross notes that he would affirm the ruling of the trial court finding that the existence of an outstanding warrant sufficiently attenuated the connection between the illegal stop and the search incident to the arrest which revealed the firearm. Id. In doing so, he would follow the factually similar case of United States v. Green, 111 F. 3d 515 (7th Cir. 1997), where the Court held that:

> It would be startling to suggest that because the police illegality stopped an automobile, they cannot arrest an occupant who is found to wanted on a warrant - in a sense requiring an official call of "Olly, Olly, Oxen Free." Because the arrest is lawful, a search incident to the arrest is also lawful. The lawful arrest of [the defendant] constituted an intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop.

Id. at 521. Frierson at 301. The Petitioner respectfully

[4] Kimbrough v. State, 539 So. 2d 619 (Fla. 4th DCA 1989) and Solino v. State, 763 So. 2d 1249 (Fla. 4th DCA 2000).

submits that the special concurrence in the instant case is a fair application of Wong Sun and Brown and sets forth a reasonable standard to be followed in cases (such as the instant case) where there is no showing of bad faith on behalf of law enforcement.

However, the Respondent contends that to follow this approach would be to effectively overrule this Court's decisions in State v. Perkins, 760 So. 2d 85 (Fla. 2000) and State v. Diaz, 850 So. 2d 435 (Fla. 2003). The Petitioner respectfully disagrees with this contention. Perkins is completely distinguishable and therefore inapplicable. In that case, this Court held that the observations of a police officer who stopped the defendant unlawfully should have been suppressed. In Perkins, unlike the instant case, there was no intervening circumstance (such as an outstanding warrant) which would have purged the taint of the unlawful stop; "the evidence required to prosecute the charge of driving with a suspended license came directly from the exploitation of the unlawful stop." Id. at 88. Moreover, in Perkins, the officer stopped the defendant solely to determine whether he had a suspended license. Id. In the instant case, Officer Miller stopped the Respondent because he believed that he had committed a traffic violation and had reason to believe that the Respondent was driving with broken or

unsafe equipment.

Diaz is also distinguishable. In that case, a deputy sheriff stopped the defendant because his temporary tag was illegible; however, as the sheriff approached the car, he could clearly read the tag and found that nothing was improper; "it is without question that before the personal encounter between Mr. Diaz and the deputy sheriff occurred, the initial alleged purpose for the stop had been satisfied and removed." Id. at 436-437. This Court found that the continued detention of the defendant was a violation of his Fourth Amendment rights because "once a police officer has totally satisfied the purpose for which he initially stopped and detained a motorist, the officer no longer has any reasonable grounds or legal basis for continuing the detention of the motorist." Id. at 437. However, in the instant case, the officer's purpose for stopping the Respondent was not satisfied before his personal encounter with the Respondent. Officer Miller stopped the Respondent because he had reasonable cause to believe that he had committed a traffic infraction; furthermore, Miller was authorized to inspect the Respondent's vehicle pursuant to section 316.610(1) since it appeared that the Respondent's turn signal was not working. Unlike Diaz, there was an intervening circumstance (the outstanding warrant) that arose before the purpose for the

traffic stop was satisfied. Consequently, Diaz is not controlling.

The Respondent also cites to Moody v. State, 842 So. 2d 754 (Fla. 2003)(IB 35-36); however, that case is likewise distinguishable. In that case the officer stopped the defendant based on stale information - three years old - that the defendant had a suspended license. Id. at 757-759. Because the officer was acting on a hunch, or on mere suspicion, the stop was illegal and the evidence seized should have been suppressed. Id. at 758. By contrast, in the instant case, Officer Miller stopped the Respondent based on his current observations. Moreover, the Moody decision supports the Petitioner's position. This Court held that: "Although the stop was illegal, the fruit of the poisonous tree doctrine does not automatically render any and all evidence inadmissible." Although the Respondent argues that none of the three exceptions discussed in Moody exist in the instant case[5], the existence of the outstanding warrant in the instant case sufficiently attenuated the illegal stop from the discovery of the firearm.

[5] "A court may admit such evidence if the State can show that (1) an independent source existed for the discovery of the evidence . . . or (2) the evidence would have inevitably been discovered in the course of a legitimate investigation . . . or (3) sufficient attenuation existed between the challenged evidence and the illegal conduct . . ." Moody at 759 (internal citations omitted).

Furthermore, in Moody, this Court approved of the three factors cited in Brown that must be considered to determine if evidence is sufficiently attenuated:

> . . . In order to determine if evidence is sufficiently attenuated, the court must consider three factors: (1) the temporal proximity of the arrest and the discovery of the evidence sought to be suppressed; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the police misconduct.

Moody at 760. As the Petitioner has previously argued, an application of these factors to the instant case supports the admission of the firearm discovered in the search incident to the Respondent's arrest.

The Fourth District incorrectly held that the firearm seized from the Respondent should have been suppressed; that portion of the decision should be reversed by this Court. Additionally, conflict should be resolved in favor of Foust.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests this Honorable Court reverse the decision of the lower court as argued above and resolve conflict in favor of Foust.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by courier to Marcy K. Allen, Assistant Public Defender, 421 Third Street, West Palm Beach, FL 33401, on this ____day of January, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier

New 12 point type and complies with the font requirements of Rule 9.210.

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Of Counsel