IN THE SUPREME COURT OF FLORIDA

LORENZO GOLPHIN,	)	
	)	
Petitioner,	)	
	)	CASE No.: SC03-554
vs.	)	Lower Tribunal No. 5D 02-1848
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The Petitioner was detained absent his consent to submit to questioning. There was no reasonable suspicion to support the detention. Once detained, he was compelled to produce identity documentation and to answer inquiries designed to elicit inculpatory information. Upon such facts, the detention was unlawful, and the Petitioner's subsequent "consent" to a search of his person became "fruit of the poisonous tree," so that evidence obtained as the product of the unlawful detention should have been suppressed. The Petitioner therefore submits that the trial court's denial of the Petitioner's motion to suppress should be reversed.

ARGUMENT

IT WAS ERROR TO DENY THE PETITIONER'S MOTION TO SUPPRESS, WHERE THE PETITIONER WAS SUBJECTED TO AN INVESTIGATORY DETENTION ABSENT ANY REASONABLE BELIEF THAT HE WAS INVOLVED IN CRIMINAL ACTIVITY.

The State has suggested that jurisdiction for this Court's review no longer exists in this case, since the ruling of the Fifth District Court is not in conflict with the decision of this Court in ***State v. Baez, 2004 WL 2534352 (Fla. 11-10-04)***. The Petitioner respectfully differs, based upon the following facts and authorities:

Florida Rule of Appellate Procedure ***9.030(a)(2)(ii)***, states that this Court's jurisdiction may be invoked to review decisions of the district court of appeal that "expressly construe a provision of the state or federal constitution." The decision of the district court in this case was founded upon construction of the Fourth Amendment to the United States Constitution. Therefore, this Court has the discretion to undertake review in this case. Moreover, the Petitioner submits that additional justifications for review by this Court now exist:

The Petitioner submits that decision of the Fifth District Court in this case is in express and direct conflict with several decisions of the United States Supreme Court.[1] The Petitioner therefore submits that to the extent that it conflicts with United States Supreme Court decisions, the ruling of the Fifth District Court

in this case should be reversed. ***Arizona v. Evans, 514 U.S. 1, at 8-10 (1995)***

In addition to the ***Evans*** decision, The Florida Constitution requires the courts in this state to avoid conflict with the decisions of the United States Supreme Court in cases involving interpretation of the Fourth Amendment.[2]

In sum, this Court has acknowledged its' inherent authority to review, when justice requires it, even those issues which have not been preserved. ***Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981)*** The Petitioner therefore submits that here, where the issue under review has clearly been preserved, this Court may undertake review of the decision of the Fifth District Court in this case.

Turning to the merits, and as a preliminary matter, the Petitioner offers the following factual clarifications:

The State argues that the record does not support the Petitioner's claim that the Petitioner was confronted by three officers and a police dog. (See Respondent's Brief, pg. 8, n. 3) The Petitioner respectfully differs. First, it is not the Petitioner's burden to prove when, during the encounter, Officer Eisen arrived.[3] Second, so far as the instant record indicates, Officer Eisen and the police dog were summoned to the scene for the express purpose of conducting a search, and

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[1] This conflict of decisions is the substance of the Petitioner's argument on the merits.

[2] ***Art. I, Section 12 Fla. Const.; Miller v. State, 403 So. 2d 1307,1310,1313 (Fla. 1981)***

[3] Officer Eisen did not testify at the suppression hearing. It is the State's burden, not the Petitioner's, to adduce evidence supporting the legality of the warrantless intrusion at issue. ***Palmer v. State, 753 So. 2d 679,680 (Fla. 2nd DCA 2000); State. v. McCarthy, 585 So. 2d 1167***

arrived within "a couple of minutes" - after the Petitioner's license was seized.[4] (R 9,12,15,29,55-57) Given these facts, it is arguable that the presence of a K-9 unit contributed to totality of circumstances that rendered the encounter at issue ***non***-consensual. Moreover, as the Petitioner will show, regardless of whether a police dog was present, the detention of the petitioner absent reasonable suspicion, and the seizure of his identification, are inconsistent with Fourth Amendment protections.

The State's position from the inception has been that the encounter at issue was consensual.[5] The Petitioner respectfully submits that there is no legal or factual basis for invocation of a legal fiction underlying the State's argument - the same legal fiction employed by the lower court to affirm the trial court's ruling: the assumption that a pedestrian, outside the context of a lawful ***Terry*** stop, has neither been seized, nor has he acquiesced to authority, when he surrenders his driver's license in response to a police officer's "request." That legal fiction is contrary to conventional wisdom,[6] contrary to the record facts in this case, and is

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(4th DCA 1991)

[4] Officer Doemer could not remember whether the K-9 unit arrived before or after the outstanding warrant was discovered. (R 29) The Appellant testified that the K-9 unit was "right there" from the start of the encounter. Officer Deschamps testified that the K-9 unit arrived "momentarily" - within "a couple minutes" of the initial encounter. (R 9,12)

[5] At the suppression hearing, the prosecutor stated: "Judge, it's just a consensual encounter. The evidence will show it's nothing but consent..." (R 3)

[6] See, Dissenting Opinion of Chief Justice Pariente, in ***Baez***, ***supra***, ***2004 WL 2534352***, at pp. 5-11.

contrary to the opinions of the United States Supreme Court - the controlling precedent in this case.

A consensual encounter does not begin with interrogation and a demand for identity documents, it begins a request for consent to submit to police inquiries. ***Florida v. Bostick, 501 U.S. 429,434 (1991)***

The Petitioner was never asked if he was "willing to answer some questions" - and that is a crucial distinction. The United States Supreme Court, before and after the ***Bostick*** case, has made clear the legal principle that the surrender of an identity card by a pedestrian, outside the context of a ***lawful Terry stop***, constitutes an seizure of the person[7] for the purposes of Fourth Amendment analysis:

> ***When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment.*** [...] [...] '[***W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,'*** [...] ***and the Fourth Amendment requires that the seizure be 'reasonable.'*** (Citations omitted, emphasis added.)
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> ***Brown v. Texas, 443 U.S. 47, at 50 (1979)***

[7] See also, ***Delaware v. Prouse, 440 U.S. 648 (1979)***, and ***California v. Hodari D., 499 U.S. 621 (1991)***.

The district court here said that the "request by police to see a citizen's license does not implicate the Fourth Amendment" and does not constitute a seizure because the Petitioner had "voluntarily relinquishe[d]" his license. ***Golphin v. State, 838 So. 2d at 707***. The Petitioner submits that the findings of the district court are incorrect interpretations of the ***Bostick*** decision,[8] and ignore the clear mandates of ***Brown v. Texas***, and other decisions as well.

The ruling of the district court here erroneously places the burden on citizens to object, or to request the return of an identity card, when the detention and request for identification were, in themselves, unjustifiable. This misplaced burden is contrary to the United States Supreme Court decisions in the realm of the Fourth Amendment. Citizens untrained in the law are not required, in the midst of an unlawful detention, to attempt to correct unlawful police procedure. That is the function of the courts. Moreover, the events occurring ***after*** a citizen is detained and required to produce identity papers are irrelevant, if there was, as here, no justification for the detention and interrogation in the first place. An officer's "request" for an identity card in such circumstances is not a request at all, and the surrender of an ID card is not a consensual act, it is an accession to apparent

[8] The ***Bostick*** court ***expressly declined any determination as to whether Mr. Bostick had been seized***, and noted that Bostick's freedom of movement was restricted by his decision to board a bus, and ***not by the actions of police officers***. Moreover, Mr. ***Bostick was expressly informed of his right to refuse consent***. ***Id***., ***501 U.S. at 436-438***. The totality of circumstances here is thus nothing like the circumstances in ***Bostick***.

authority in the context of an unlawful detention.[9] Requests for identification are constitutionally permissible in the context of a lawful ***Terry*** stop, but the encounter at issue was not founded upon a reasonable suspicion, nor was it ever consensual.[10] ***Brown v. Texas***, ***Bostick***, ***supra***, and ***Hiibel v. Sixth Judicial Dist. of Nevada***, ***infra***.

[9] ***Popple v. State, 626 So. 2d 185,188 (Fla. 1993)***, (Whether characterized as a request or an order, officer's direction amounted to a seizure, because a reasonable person under the circumstances would believe that he should comply.)

[10] The officers in this case, while they insisted the Petitioner was always free to leave, also testified that the encounter was by no means a simple chat among friends. The so-called casual conversation about Mr. Golphin's life experiences did not take place until after his license had been seized and a warrant check had begun. Also, in that "casual" conversation Mr. Golphin was required to explain his presence in the area, and to recite his criminal history. (R 23,26-28,44,50)

The burden to demonstrate a break in the chain of illegality is a burden that falls upon the State, and the Petitioner submits that it is a burden which cannot be met. One of the decisions of the United States Supreme Court which best illustrates this premise is ***Hiibel v. Sixth Judicial Dist. of Nevada, 124 S. Ct. 2451, 2453 (2004)***.[11] The ***Hiibel*** case involved a valid ***Terry*** stop, and the decision is replete with language limiting the holding to that context:

> ***In Brown v. Texas***, [...] [...] the Court ***ruled that the initial stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity.*** [...] ***Absent that factual basis for detaining the defendant, the Court held, the risk of "arbitrary and abusive police practices" was too great and the stop was impermissible***. [...] [...] The present case begins where our prior cases left off. ***Here there is no question that the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted in Brown***. [...] [...] ***Beginning with Terry v. Ohio,*** [...] ***the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time*** and ***take additional steps to investigate further***. [...] [...] ***Obtaining a suspect's name in the course of a Terry stop serves important government interests***. [...] [...] Although ***it is well established that an officer may ask a suspect to identify himself in the course of a***

[11] The State suggests, (Respondent's Brief, pg. 9, n. 4), that the Petitioner's reference to the syllabus in ***Hiibel*** dissallows reliance on ***Hiibel***. However, while the syllabus is not part of the court's opinion, the language of the ***Hiibel*** opinion supports the Petitioner's argument.

> ***Terry stop***, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer. [...] [...] ***It is clear in this case that the request for identification was "reasonably related in scope to the circumstances which justified" the stop. Terry, supra*** [...].[...]
> Our decisions make clear that ***questions concerning a suspect's identity are a routine and accepted part of many Terry stops.*** [...] [...] ("***[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him***...
> (Citations omitted, emphasis added.)
>
> ***Hiibel, 124 S.Ct., at 2457-2460.***

Other decisions of the Untied States Supreme Court are equally clear in their indication that an encounter which begins not with the consent to answer inquiries, but with interrogation and the surrender of identity papers, is not a consensual encounter:

> Although ***we have yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment,*** our recent decision in Royer, supra, plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.[...] [...] In contrast, ***a much different situation prevailed in Brown v. Texas,*** [...], ***when two policemen physically detained the defendant to determine his identity, after the defendant refused the officers' request to identify himself.*** The Court held that ***absent some reasonable suspicion of misconduct, the detention of the defendant to determine his identity violated the***

> ***defendant's Fourth Amendment*** right to be free from an unreasonable seizure. [...] [...]
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> ***I.N.S. v. Delgado, 466 U.S. 210, 216-217(1984)***

Again, one crucial distinction here is that this encounter did not begin as a consensual one - the Petitioner did not agree to remain where he was and answer questions. The Petitioner's freedom of movement was not restricted, as in ***Royer*** or ***Delgado***, by his decision to board a bus or airplane, or to enter his place of employment.[12] The Petitioner was effectively seized by police officers who approached him,[13] and without obtaining consent, began to interrogate him, and then "requested" the production of identity papers - another key factual distinction in this case.

There is no evidence that the Petitioner was first asked to state his name. Rather, he was asked to produce proof of his identity.[14] At that point, there was no justification to detain the Petitioner and "request" the production of identity papers - because the officers had not yet asked the Petitioner if he would

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[12] In ***Delgado***, officers investigating immigration law violations were acting under the authority of ***a warrant*** issued by a judge, ***and consent*** given by the factory owner to question employees. ***Id., 466 U.S. at 212,217, n. 5.*** No warrant or consent to answer inquiries is on record here.

[13] Officer Doemer stated that she intentionally moved toward the Petitioner - Mr. Golphin did not approach her. (R 26,27)

[14] The two uniformed officers, in a marked cruiser, stopped the car, got out, immediately asked for identification, and asked the men to explain what they were doing in the area. (R 5,7,8,26,27) Officer Doemer approached the defendant, asked for his ID, whereupon Officer Deschamps "grabb[ed]" the Petitioner's ID from Officer Doemer, and began a check for warrants. (R 8,22,27) There is no evidence that the Petitioner refused to give his name, but, so far as the record indicates he was never asked that question. Therefore, all that can be said is that

submit to questioning, nor had they asked him his name. Unless a citizen gives an obviously false name, a detention for the purpose of obtaining proof of identity is unlawful. ***Brown***, ***Hiibel***, ***supra***. For example, the questioning in ***Delgado***, pursuant to a warrant and consent, without the officers restricting freedom of movement, began with officers identifying themselves, and ended once the subject "gave a credible reply." ***Delgado, supra, 466 U.S. at 212-213***.

The Petitioner was not asked his name, he was required to produce identification papers and was questioned both before and after his ID card was surrendered. Mr. Golphin's freedom of movement was not relinquished voluntarily, he acceded initially to the apparent authority of uniformed officers. Any doubt as to the existence of a seizure vanished when he surrendered his

license.[15] Those circumstances are not at all like the circumstances that prevailed in ***Delgado***.

Warrantless encounters are presumed unlawful. Nothing in the law requires citizens to supply documents or provide innocent explanations for their presence in the street, absent some reasonable belief they are engaged in

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he "complied" with the "request" to produce proof of his identity.(R 22,27)

[15] We know, because the record tells us, that there was no reason to detain Mr. Golphin except to check his identity. Therefore, once he supplied it, and the picture was seen to match Mr. Golphin's appearance, the police had no legal basis for detaining Golphin's license to check for outstanding warrants. Likewise, Mr. Golphin was unquestionably seized at that point, because

unlawful activity. Citizens are not required to endure detention without out being asked if they consent, in order to assuage an officer's unfounded suspicions. Calling such an encounter consensual stands Fourth Amendment jurisprudence on its' head. It burdens pedestrians with the threat of detention at the whim of police officers. The United States Supreme Court has clearly stated, (in ***Brown v. Texas***, and afterward), that such unbridled sweeps of apparently innocent citizens cannot withstand Fourth Amendment scrutiny:

> [W]e hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in Terry, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' [...][...] ***To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers***. [...] [...] ***We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic***. [...] [...] ***For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.*** [...] [...] (Citations omitted, emphasis added.)

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no reasonable person would walk away and abandon his driver's license.

U.S. v. Brignoni-Ponce, 422 U.S. 873, 881-887 (1975)

Roving identity checks are thus clearly unauthorized by the Fourth Amendment. Therefore, because the evidence adduced in the trial court shows there was no basis for the initial detention of the Petitioner, the detention was unlawful. The distinctions between the totality of circumstances here, and the circumstances prevailing in the aforesaid authorities, may be subtle. But that in no way detracts from the applicability of those authorities. Indeed, it can be said that those subtleties require additional scrutiny in light of the presumption of unreasonableness that encumbers any warrantless search. ***Schneckloth v. Bustamonte, 412 U.S. 218, 228-230 (1973)***

In light of the authorities cited herein, the Petitioner submits that the district court erred by implying Mr. Golphin's consent to the encounter at issue, and erred by finding that the surrender of his driver's license was a consensual act. The evidence adduced in the trial court, when applied to the applicable law, does not support the district court's findings. The decisions cited above, when read together, make it clear that when a pedestrian is detained by armed, uniformed police officers, and is required to respond to interrogation and surrender a driver's license, absent any reasonable belief that he is involved in criminal activity, he has been unlawfully seized.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, the Petitioner respectfully requests that the rulings of the trial court and the district court in this case be reversed, and that the Petitioner's judgment and sentence be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, in c/o the Fifth District Court of Appeal, and was mailed to Mr. Lorenzo Golphin, c/o George Riley, 551 El Dorado Street, Daytona Beach, Florida 32114, on this 17th day of February, 2005.

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NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY certify that the size and style of type used in this document is

proportionally spaced 14 pt. Times New Roman.

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NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER