IN THE SUPREME COURT OF
THE STATE OF FLORIDA

NORRIS RIGGS,	:	
Petitioner,	:	
vs.		
STATE OF FLORIDA,	:	Case No. SC05-133 L.T. No. 2D03-2961
Respondent.	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND OF THE FACTS

In the early morning hours of January 2, 2003, Deputy Timothy Strickland of the Polk County Sheriff's office was called to assist another deputy because a 4 year old girl had been seen walking around Heartland Circle, in Mulberry at 3:00 A.M. He met one of his supervisors at the apartment complex in question. Together they decided to check the complex to find from which apartment the little girl had come (R 24). He went to the building in which apartment 1424 was located, on the second of three floors. He found the door to that apartment to be "shut, but not latched" (R 25). When he first came to that door, which was Petitioner's apartment, although the door was slightly ajar by 1 or 2 centimeters, he could not see anything in the apartment (R 31). He banged on the door a number of

times and yelled "Polk County Sheriff's Office". Neighbors came out of their apartments, but they received no response from the apartment at which they were banging (R 25). He and another deputy entered the apartment for the stated reason they were concerned about the safety of the child's caregiver, although they did not know at that point the child had come from that apartment (R 26). The deputies knew the child in question was safe in the custody of the Sheriff's office when they entered the apartment (R 31). The child was found a couple of hundred feet from the apartment entered (R 30). Although Deputy Strickland said the door to Petitioner's apartment was slightly ajar, he did not say that was the only apartment in the complex with a door slightly ajar (R 32 and 26). Neither did Deputy Costine, who was with Deputy Strickland, state Petitioner's apartment was the only one in the complex with a door ajar (R 34). Deputy Strickland continued yelling while in the apartment, until they found the occupant. He saw light coming from behind a closed door in the apartment, and walked toward it (R 26). In so doing, he found the marijuana plants and equipment that is the subject of the charge (R 27). He also found Petitioner, and a "young lady". The young woman was the care giver of the child

that had been found outside (R 28).

The trial court granted a motion to suppress (R 16-19; R 43; R 48). The state appealed (R 44). The Second District Court of Appeal reversed, finding the deputies entered Petitioner's apartment out of legitimate concern for the well being of the occupants. In so doing, the Court acknowledged an express conflict with the First District in Eason v. State, 546 So. 2nd 57 (Fla. 1st DCA 1989), and accepted the reasoning of the dissent in that opinion. This petition followed, and this Court has accepted jurisdiction.

ISSUE ON REVIEW

Whether the Trial Court Erred in Granting the Motion To Suppress?

SUMMARY OF ARGUMENT

Exigent circumstances did not exist that would justify the warrantless entry into Petitioner's apartment. The trial court so found, and there is evidence in the record to sustain that finding. The District Court's decision should be reversed.

ARGUMENT

The trial court’s order was presumed correct, Lee v.

State, 392 So. 2nd 615 (Fla. 2nd DCA 1981). An order suppressing the evidence is reviewed under an abuse of discretion standard, San Martin v. State, 717 So. 2nd 462 (Fla. 1998). Also, factual determinations made by the trial court are subject to a competent substantial evidence test on review, Caso v. State, 524 So. 2nd 422 (Fla. 1988).

There is no question the entry into Appellee's home was warrantless. Although a defendant has an initial burden to establish there is an indication a challenged search, seizure, or interrogation is illegal, it is, at least in the case of a search, only necessary to show the search was warrantless. The absence of a warrant in the court file is enough to meet that initial burden, State v. Hinton, 305 So. 2nd 804 (Fla. 4th DCA 1975). The burden was therefore on the prosecution to present the facts that would justify the entry under any exception to the warrant requirement, including "exigent circumstances", State v. Boyd, 615 So. 2nd 786 (Fla. 2nd DCA 1993) and Easom v. State, 546 So. 2nd 57 (Fla. 1st DCA 1989).

The trial court determined the prosecution had, under Easom, failed to meet the burden to prove the existence of

sufficient exigent circumstances to justify the warrantless entry into Appellee's home. There is ample evidence to support that determination. First, there was not even any clear indication the child in question was in any way associated with Appellee's apartment until after the deputies had entered and questioned the occupants. In Easom, at least the child in question had pointed to the door of the residence and said "my mommy's in there" or words to that effect. In the instant case, the child was totally disoriented and did not give any indication of from where she had come. Therefore there was even less justification for the entry in the instant case than in Easom. Although the door was cracked open about 1-2 centimeters (less than an inch), there was no testimony that other doors in the complex, which may have contained as many as 50 units, were not ajar. There was testimony that Appellee's apartment was the only door ajar on the second floor, but there was nothing to show doors were not ajar on the other floors, and nothing to show any association of the child with the second floor instead of the other floors.

Of course, as we now know, fortune favored the

deputies that night, and the apartment they chose to enter was in fact the one from which the child had emerged. However, the courts of this state and other jurisdictions have held that the fruits of an illegal search or seizure can not be used to justify that search or seizure, U.S. v. McKim, 509 F. 2nd 769 (5th Cir. 1975).

Another fact, which is undisputed, supporting the trial court's determination, is that at the time the deputies decided to enter Appellee's apartment, the child was safe and secure. Although the deputies said they were concerned about the caregiver, there was no evidence of any danger to the caregiver. As already mentioned, there was no real evidence the child's caregiver was in the apartment. In fact, there was no indication anyone at all was in the apartment. Exigent circumstances typically include immediate threats to the safety of the police or the public, or immediate danger of destruction of evidence, Easom, supra.

Appellant argues the contraband was observed by the deputies as soon as they entered the apartment. However, the plain view exception to the usual need for a warrant is

only applicable if the law enforcement officer has a legal right to be where he or she is when the object in question comes into "plain view", Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2nd 564 (1971) and Pomerantz v. State, 372 So. 2nd 104 (Fla. 3rd DCA 1979). The issue is therefore not whether the object was in plain view, but whether the police officer was doing what he or she was legally entitled to be doing at the time the object was observed in "plain view", Coolidge, supra. If the object comes into plain view when the officer is not doing what he or she is entitled to do, then the evidence seized must be suppressed. As has already been stated, the entry into Appellee's home was invalid.

Finally, the illegal entry into the home taints the subsequent actions of the law enforcement officers, and renders them invalid, Maggard v. State, 736 So. 2nd 763 (Fla. 2nd DCA 1999). This would include not only the seizure of the contraband, but also obtaining Appellee's admissions.

It is submitted the District Court erred in reversing the trial court's ruling. First, as stated previously, the

trial court made a factual determination the officers lacked sufficient exigent circumstances to enter the apartment. Since there was evidence in the record to support such a determination it should have been upheld on appeal, Caso, supra. The evidence sustaining that finding is the evidence that the officers knew the child was safe, and the total lack of any known connection between the child and the apartment entered, as well as the lack of indication anyone was even present in the apartment. The District Court found it was logical to surmise the child came from the apartment to which the door was ajar. It is submitted that deduction can not be made unless there was some indication no other doors in the large complex were also ajar. The District Court also found the failure of anyone to answer the door gave the officers a "justifiable" belief exigent circumstances existed to justify entry into the apartment. It is submitted the failure of anyone to answer indicates nothing more than a desire to not be disturbed or even that nobody at all is present. There had been no reports of a disturbance or other signs of distress. The trial court found the officers feelings that exigent circumstances existed were not justified, and that determination should be upheld.

CONCLUSION

There is ample evidence in the record to support the trial court's order excluding the evidence in question. The District Court's decision should be reversed.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Office of the Attorney General at 3507 East Frontage Rd. Ste. 200., Tampa, Fl. 33607, on this the _____ Day of April, 2005.

THIS BRIEF IS PRINTED IN "COURIER NEW" 12 POINT TYPE

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APPENDIX