IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC05-1844

DCA CASE NO.4D04-2442

STATE OF FLORIDA,

Petitioner,

vs.

GREGG CAMPBELL,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

PRELIMINARY STATEMENT

Petitioner, THE STATE OF FLORIDA, was the prosecution and Respondent, GREGG CAMPBELL, was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statements of the Case and Facts as set out in the Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

The question certified by the Fourth District Court of Appeal must be answered in the affirmative and the district court's holding in this case must be reversed. The Fourth District erred in upholding the trial court's ruling on the motion to suppress and finding that Respondent's consent to search his vehicle was tainted because the deputy retained possession of his driver's license when the consent to search was given. However, the court failed to consider the totality of the circumstances surrounding the encounter. This Court has held that a detention does not arise from law enforcement asking for a driver's license and running a check on it. Therefore the fact that the detective in this case briefly retained the license for a warrants check should not have been dispositive on the issue of whether Respondent's consent to search his vehicle was voluntary. Rather, had all of the circumstances been reviewed, the court would have had to find that the consensual nature of the encounter never changed. Respondent voluntarily provided his identification, he continued the encounter, he voluntarily consented to the search of his vehicle and he was free to leave at any time. The detective did not act in any way to make a reasonable person feel as if he could not end the encounter.

ARGUMENT

THE QUESTION CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL MUST BE ANSWERED IN THE AFFIRMATIVE. THE DISTRICT COURT ERRED IN DETERMINING THAT RESPONDENT'S VOLUNTARY CONSENT TO SEARCH HIS VEHICLE WAS TAINTED BECAUSE THE CONSENT WAS OBTAINED WHILE THE POLICE RETAINED RESPONDENT'S DRIVER'S LICENSE IN ORDER TO RUN A WARRANTS CHECK.

Petitioner would note that much of Respondent's argument relies on cases decided prior to this Court's opinion in *State v. Baez*, 894 So. 2d 115 (Fla. 2004) (AB 5-23, 25-26) Obviously this Court was well aware of these cases when it decided *Baez*. That being the case, Petitioner maintains Respondent's cases have no adverse implication on the case at bar.

Respondent contends that "it can scarcely be reasonably argued that when an officer retains one's driver's license when one is seated in the driver's seat of an automobile, that this person is "free to leave." (AB. 6) This assertion improperly presumes that Respondent was not free to leave. The circumstances, though, indicate that not only was Respondent never told this, it just was not the case.

Indeed, citing to § 322.15(1), *Fla. Stat.*, Respondent suggests that he was obviously compelled to provide his license because the statute required him to display it. However, the statute only requires a person to display his license upon "demand." As Detective Catalano testified in this case, he asked Appellee "do you mind if I see your license and registration." He did not demand it. Detective Catalano did not raise his voice. (T. 9, 10, 31, 37) The officer never referenced the statute.

Respondent takes extensive liberties with the record in concluding the police used his license "as leverage to realize their "high hopes" that they could obtain consent to search." As well as claiming "[t]he police deliberately chose not to advise Respondent that he could have his license returned to him at any time, that he was free to leave, or free to refuse their request for consent to search." (AB 7) This is pure subjective speculation on Respondent's part. "As the United States Supreme Court has recognized, "while most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *People v. Jenkins*, 472 Mich. 26, 33 (Mich. 2005) *citing Immigration & Naturalization Service v Delgado*, 466 U.S. 210, 216; 104 S. Ct. 1758; 80 L. Ed. 2d 247 (1984). In fact, in *Jenkins*, the court responded to a similar argument made by the

dissent. Referencing *United States v Mendenhall*, 446 U.S. 544, 554 n 6; 100 S. Ct. 1870; 64 L. Ed. 2d 497 (1980), the *Jenkins* court stated "Mendenhall simply recognizes that an officer's subjective intent may be relevant if it is objectively manifested. In other words, it restates the principle that only objective conduct and circumstances are relevant for Fourth Amendment purposes." *Jenkins*, 472 Mich. At 33. (Emphasis supplied)

Respondent also seems to question whether the officer had any reason to request identification in this first place. (AB 6) This point is irrelevant for a request to see identification has never required justification. *Florida v. Royer*, 460 U.S. 491, 501 (1983). Regardless, under the circumstances in this case, the officer wisely decided to verify to whom he was speaking. After all, Respondent was sitting in his car, parked in an area where the police had experienced problems in the past. (T. 3-5)

Curiously, Respondent seems to assume that all circumstances must be optimal to an individual's ability to walk away from an encounter with an officer before it can be said that he is free to leave. However, "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *U.S. v. Mendenhall*, 446 U.S. 544, 553-554 (1980). For instance, in

Delgado, supra, the factory workers would have to walk away from the inspecting officers and then past two more officers standing at the door of the factory in order to leave. Moreover, in *Michigan v. Chesternut*, 486 U.S. 567 (1988), the police followed alongside the defendant after he left the area where he was first observed. Given these cases, the State disagrees with the sweeping conclusion in *State v. Daniel*, 12 S.W. 3d 240, (Tenn. 2000), cited by Respondent, that a person whose license is in the process of being checked would never believe that he could simply terminate the encounter. (AB 11-12, 17)

Respondent suggests that his freedom to leave was restricted because he had a vehicle and the officer had his license. Of course, Respondent gave the officer his license. The fact that it was needed to leave by car is a factor independent of police conduct, such as the fact that the defendant in *Florida v. Bosti*ck, 501 U.S. 429 (1991) was a passenger on a bus at the time he was approached by officers. In *Bostick*, the court explained that where there are restricting factors not due to police conduct, then the inquiry is not whether the defendant is free to leave, but whether he is free to decline the officer's requests or otherwise terminate the encounter. 501 U.S. at 436. Here, Respondent was free to decline to hand over the license or to ask for the license back so that he could drive away.

Unfortunately, most of the cases relied on by Respondent applied a "free to leave" analysis instead of the *Bostick* standard of whether the individual was free to decline. *See, e.g., U.S. v. Jordan*, 958 F. 2d 1085 (D.C. Cir. 1992); *U.S. v. Thompson*, 712 F. 2d 1356 (11th Cir. 1983); *Salt Lake City v. Ray*, 998 P.2d 274 (Utah App. 2000)("fee to leave" standard applied to pedestrian; no inquiry as to whether could decline or ask for identification back). (AB 8, 12) In fact, in *O.A. v. State*, 754 So. 2d 717, 720 (Fla. 4th DCA 1998), the majority questioned whether *Thompson* is still good authority because *Bostick* makes clear that "per se rules are out."

As in this case, the question should have been whether the defendants were free to decline cooperating with the officers. After all, as noted in citations to numerous cases in the initial brief, courts have found that seizures have not occurred where identification of pedestrians, passengers, or persons near home are involved. The factor caused by police action in all of these cases is the same, the retaining of identification to run a check. Thus, the fact of a vehicle is an independent factor.

Oddly, the court in *U.S. v. Jordan*, 958 F. 2d 1085 (D.C. Cir. 1992) applied the *Bostick* standard, but did so in a pointed way. It said that the "crucial" focus was on what the person's immediate business is when deciding whether he could disregard the police and go on with his business.

958 F. 2d at 1088. In *Jordan*, the individual's clear intent was to enter his car, next to where he stood with his keys out, and leave**.** Here, it appeared that Respondent's immediate intent at the time he was approached was to remain at the scene and wait for his baby's mother.

Petitioner agrees that in this case there was no ground for detention but continues to maintain that the encounter remained consensual. (AB 5). The United States Supreme Court has held that an officer may request identification in a consensual encounter, regardless of whether it is "normal" or not. *See Florida v. Royer*, 460 U.S. 491, 501 (1983).

Respondent muddles this court's analysis in *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983) (AB 15-16). Contrary to Respondent's claim otherwise, this court in *Lightbourne* did hold that the defendant was free to leave up until the point that the officers conducted the pat-down search: "In the case sub judice we find that no "stop" or "seizure" of the defendant within the meaning of *Terry* and its progeny occurred prior to his removal from the car by Officer McGowan to conduct the pat-down search. *Id*. at 388. This court artfully explained:

> We find, under the circumstances of this case, that no unlawful intrusion occurred when Officer McGowan approached Mr. Lightbourne for the purpose of investigating a suspicious car called to his attention b a concerned citizen of the community. Although defendant is correct in his assertion

> that the officers had no probable cause or well-founded suspicion that the defendant was about to commit or had committed any crime under the instant facts such a showing was not necessary. The officers were responding to a call and were not acting on their own "hunch" as in the "roving patrol" cases.
>
> .....
>
> Officer McGowan simply approached the parked car, asked defendant a few simple questions as the reason for his presence there, his current address, and then ran a routine check on defendant's car and identification. Surely the average, reasonable person, under similar circumstances, would not find the officer's actions unduly harsh. There is nothing in the record that would indicate that prior to defendant voluntarily relinquishing his driver's license to Officer McGowan he was not free to express an alternative wish to go on his way.

Id. at 387-388.

This court referred to the time *prior to* the request for the license only to show that there was no reason for the defendant to believe that he had to produce the license, so that the defendant voluntarily relinquished it. In other words, just as an individual can decline a request to accompany officers somewhere, *U.S. v. Mendenhall,*446 U.S. 544 (1980), so can an individual decline to provide identification or converse with an officer. Notably, there is no indication in *Lightbourne* as to how long the officer held the license to run the check. Here it was no more than ten minutes. (T. 6-7)

Finally, the cases referenced by Respondent that have been decided since *Baez*, are readily distinguishable from this case. (AB 23-24) In each of

those cases, the initial encounter was based on a traffic stop not consensual in nature as it was here. Appellant does not disagree that under those circumstances "Florida law is clear that an officer may not detain a driver following a traffic stop once the initial alleged purpose for the stop has been satisfied and removed. *Lanier v. State,* 30 Fla. L. Weekly D 2373 (Fla. 2d DCA October 7, 2005) citing *State v. Diaz,* 850 So.2d 435, 437 (Fla.2003). (Additional citations omitted) Unlike the encounters in *Fernandez v. State*, 917 So. 2d 1022 (Fla. 2006); *Lanier and Diaz,* a consensual encounter, is where the police approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away. *Mendenhall,* 446 U.S. at 554, 100 S.Ct. 1870, 64 L. Ed. 2d 497. A request to examine one's identification does not make an encounter nonconsensual. *Florida v. Rodriguez* (1984), 469 U.S. 1, 4-6, 105 S. Ct. 308, 83 L. Ed. 2d 165; *Immigration & Naturalization Serv. v. Delgado,* 466 U.S. at 221-222. The Fourth Amendment guarantees are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter. *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870, 64 L. Ed. 2d 497.

In conclusion, the State notes that the number of instances that Respondent attempts to distinguish this case from others relied on by Petitioner because of one factor or another shows the need to consider the totality of the circumstances on a case by case basis. Significantly, many of the factors pointed to by Respondent are independent of the brief retention of identification to run a warrants check, thus indicating that the retention of identification in and of itself is not a dispositive factor regardless of whether the police inquire about a search while still in possession of the identification. The Petitioner disagrees with Respondent (AB 25) and urges this court to continue the totality of the circumstances test under the standard of whether a reasonable person could decline a police request or end an encounter when an officer holds identification to run a check and simply asks that person whether he would consent to a search before the officer has returned the identification. *See State v. Mennagar*, 787 P. 2d 1347 (Wash. 1990), rejected on other grounds, *State v. Hill*, 870 P. 2d 313 (Wash. 1994)(passenger of vehicle not seized when officer asked to see license and ran computer check at patrol car; officer acting as community caretaker in determining whether valid license). After all, if a person can say no to a request for identification in one instance, all other facts being the same, he should be able to do so when his mode of transportation is his vehicle.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, the decision of the Fourth District Court of Appeal should be QUASHED and the certified question answered in the affirmative.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Samuel R. Halpern, Esquire, 2856 E. Oakland Park Blvd., Fort Lauderdale, Florida 33306-1814 this ____ day of _____, 2006.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately.

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MONIQUE E. L'ITALIEN

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