IN THE SUPREME COURT OF FLORIDA

MARK KAIGLER,	:	
Petitioner,	:	
vs.	:	Case SC0**
	No.SC05-2309	DCA 2D04-5520
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE

In the Circuit Court for Pinellas County, the state filed an amended information charging Petitioner, Mark Kaigler, with possession of cocaine, count one; resisting an officer with violence, count two; and battery on a law enforcement officer, count three. [R15-16] Petitioner filed a motion to suppress, arguing that he had been subject to an unlawful seizure. [R10-12] On October 29, 2004, the lower court conducted a hearing on the motion. [T79] The court initially denied the motion. [T116-17;R17,70]

On November 18, 2004, Petitioner appeared for a plea and sentencing hearing. [T121] At this hearing the lower court announced it was vacating its earlier order denying the motion to suppress. [T116-17,127;R17,70] The court then granted the motion as to count one. [T127;R70] Defense counsel then argued that the remaining two counts should be dismissed because the law enforcement officer was not engaged in a lawful duty. [T129-30] The court denied the oral motion to dismiss. [R71;T189] Petitioner entered negotiated pleas of no contest to battery on a law enforcement officer and to the lesser offense of resisting arrest without violence. [T185,190-94] Petitioner reserved the right to appeal his oral motion to dismiss. [T189,190,195] The trial court

adjudicated Petitioner guilty. [R64-65] The court sentenced Petitioner to one year of imprisonment for the resisting conviction and to 28.5 months imprisonment for the battery conviction. [R66-68;T194-95] A sentencing guidelines scoresheet was filed. [R72-73] Petitioner filed a timely notice of appeal on December 6, 2004. [R74] On November 16, 2005, the Second District Court of Appeal affirmed Petitioner's convictions and sentences. Kaigler v. State, 30 Fla. L. Weekly D2589 (Fla. 2d DCA Nov. 16, 2005). (Append. I) Petitioner filed a notice of intent to seek the discretionary jurisdiction of this court.

STATEMENT OF THE FACTS

On August 24, 2003, at about 1:15 a.m., Officer Joel Morley drove into a parking lot at an apartment complex, looking for a specific vehicle. [T84-85,95] Morley testified the apartment complex is known for drug activity. [T86] Morley, who was in uniform, did not find the vehicle. [T86,90,95] Morley did observe another vehicle in which Petitioner was sitting in the driver's seat. [T86,87,96] The car was backed into a parking space. [T87,95] Unsure of whether Petitioner was sleeping or unconscious, Morley parked his patrol car and walked toward the parked vehicle. [T87,88] The vehicle was running but had no lights on. [T88,95] Approaching the passenger side of the car, Morley shined his flashlight on Petitioner. [T90,96] Morley admitted Petitioner appeared alert and had no medical condition. [T97] Morley then proceeded to the driver's side of the vehicle. [T97] As he was in the front of the vehicle, Morley observed Petitioner pick up a clear plastic bag and placed it into a Burger King cup that was on the console. [T90,97-98] The bag was the size of a standard sandwich bag. [T90]

Morley radioed for a backup officer and then asked Petitioner to exit the car. [T91-92,98-99] Petitioner complied. [T91] Morley testified Petitioner was not free to leave. [T99-100]

Other officers arrived within seconds. [T92] According to Morley, Petitioner did not respond to the question of what was inside the cup. [T92] Morley testified Petitioner, who had the cup in his hand, threw it over Morley's head. [T92] Morley alleged Petitioner then pushed him in the chest with both hands and tried to flee. [T92] Morley grabbed Petitioner and forced him to the ground with the assistance of another officer [T93] Morley later observed several crack-cocaine rocks inside the cup. [T93,94]

SUMMARY OF THE ARGUMENT

The decision of the Second District Court of Appeal conflicts with Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999). This court should accept jurisdiction of this case to resolve this conflict.

ARGUMENT

ISSUE

DOES THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL CONFLICT WITH TAYLOR V. STATE, 740 SO. 2D 89 (FLA. 1ST DCA 1999), WHERE THE COURT HELD THAT THE CONVICTIONS MUST BE REVERSED BECAUSE THE OFFICER WAS NOT ENGAGED IN A LAWFUL DUTY?

In the trial court below, defense counsel moved to dismiss the charges of resisting arrest with violence and battery on a law enforcement officer. [T129-30] Counsel argued that Officer Morley was not engaged in a lawful performance of his duties at the time Petitioner used force--a required element of both offenses. The officer was not performing a lawful duty because he had unlawfully detained Petitioner without any probable cause of illegal activity. Both the trial court and the Second District Court of Appeal rejected this argument. In affirming Petitioner's convictions and sentences, the latter court certified conflict with Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999). This court should resolve this conflict by accepting jurisdiction of this case.

Without probable cause to detain Petitioner, Officer Morley was not engaged in a lawful duty at the time Petitioner resisted his detention. The absence of this lawful duty is

fatal to the charged offenses. The offenses of resisting an arrest with violence and battery on a law enforcement officer both have an element requiring that the officer be in the lawful execution of a legal duty at the time of the use of force. State v. Osuji, 804 So. 2d 501 (Fla. 2d DCA 2001). This element is missing because of Morley's unlawful detention. Without this element Petitioner's convictions cannot stand; therefore, the trial court erred in denying the motion to dismiss the charges, and the district court erred in affirming them.

In affirming Petitioner's convictions, the district court followed its earlier decision in Nesmith v. State, 616 So. 2d 170 (Fla. 2d DCA 1993). In that case the defendant was charged with possession of cocaine and resisting arrest with violence. On appeal the district court reversed the possession conviction because the initial detention of the defendant was unlawful. Nesmith, 616 So. 2d at 171. Upholding the resisting conviction, however, the court stated, "The use of force in resisting arrest by a person reasonably known to be a law enforcement officer is unlawful notwithstanding the technical illegality of the arrest." Id. at 171-72.

Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), holds to the contrary to the district court's decision in Nesmith and the present case. In Taylor, the court held that the

defendant did not commit resisting arrest with violence or battery on a law enforcement officer because the investigating officer was not engaged in the lawful performance of his duties. Taylor, 740 So. 2d at 90-91. The officer in Taylor went to the defendant's residence based on a complaint of loud music. Taylor, 740 So. 2d at 89. Another officer had earlier warned the defendant about the volume of the music. At the outside of an open doorway, the officer told the defendant to come outside. Id. at 90. When the defendant refused, the officer went inside the residence and took the defendant by the arm in an attempt to get him outside. The defendant resisted, and a struggle ensued. The defendant was charged with both battery on a law enforcement officer and resisting arrest with violence. In a motion for judgment of acquittal, defense counsel argued the two charges could not stand because the officer was not engaged in the lawful performance of a duty. Id. The appellate court agreed with this argument. Id. The court found inapplicable section 776.051(1), Florida Statutes (1998). The court limited this section to situations where the officer makes an actual arrest, not an investigative detention. Contra, Perry v. State, 846 So. 2d 584 (Fla. 4th DCA 2003), review granted, 894 So. 2d 971 (Fla. 2005), (Court rejects limiting §776.051(1) to arrests and upholds the defendant's convictions based on his using force in response to an arguably unlawful strip search.); Tillman v. State, 807

So. 2d 106 (Fla. 5th DCA 2002), review granted, 835 So. 2d 271 (Fla. 2002), (Court refuses to follow decision in Taylor, holding that §776.051(1) applies to "illegal stops, detentions and even illegal contacts.").

The district court properly recognized the conflict with Taylor. Because a number of courts have addressed this issue and will likely again rule on the issue, this court should determine whether the holding in Taylor is erroneous. This determination will resolve the express conflict in the present case as certified by the Second District Court of Appeal.

CONCLUSION

Based on the above arguments and authorities, Petitioner respectfully requests that this court exercise its discretionary jurisdiction of this case under Florida Rule of Appellate Procedure 9.030(2)(A)(iv).

APPENDIX

PAGE NO.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of December, 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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