IN THE SUPREME COURT OF FLORIDA

CHAVIS ZEIGLER and
TRISTAN ELLIS,

Petitioners.

V.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. SC06-589
1st DCA Case Nos. 1D05-314 (Zeigler) and 1D05-315 (Ellis)

INITIAL BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

Petitioners Chavis Zeigler and Tristan Ellis were the appellants in the First District Court of Appeal and the defendants in the trial court. They will be referred to in this brief as petitioners, or by their proper names. Respondent, the State of Florida, was the appellee in the First District Court of Appeal and the prosecution in the trial court. The state will be referred to herein as the state or as respondent.

This case involved two separate and complete appellate records. Those cases were consolidated by the district court, and one opinion was issued for both petitioners. The appellate records in both cases are identical in all material respects, but have different page numbers.

In this Court, references to the record will be the record in Chavis Zeigler=s case. That record consists of four volumes. The supplemental record will be referred to as volume IV; all others will be referred to by the number assigned by the clerk of the circuit court. There is also a videotape of the entire traffic stop that was taken from Deputy Brownfield=s car.

References to the record on appeal will be made by use of the symbol AV,@ followed by the appropriate volume and page numbers.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Petitioners were charged by information with trafficking in cocaine and misdemeanor possession of marijuana (V1 9-10).

Petitioners moved to suppress the contraband seized from their automobile by Deputy Brownfield (V1 27-28). Each petitioners adopted the other=s arguments in their motion to suppress (V2-109).

Petitioners argued that the reason for their traffic stop dissipated shortly after the stop began and that their continued detention was without legal authority.

The state argued that Deputy Brownfield made contact with the petitioners after he discovered that they in fact had a valid, and properly posted, temporary tag in their rear window Ato tell them the purpose of the stop, that he could not see the tag@ (V2-101).

The trial judge denied the motion (V1 56-57). That court found that the temporary tag did not meet the requirements of Section 320.131(4), Florida Statutes, which requires a temporary tag to be conspicuously displayed in the rear license plate bracket or attached to the inside of the rear window in an upright position so as to be clearly visible from the rear of the vehicle.

Thereafter, both petitioners entered pleas of nolo contendere to the charges in return for seven year terms of imprisonment. They also reserved their right to appeal the denial of their motion to suppress (V3-132).

Thereafter, the First District Court of Appeal affirmed their convictions and sentences. Zeigler v. State, 922 So. 2d 384 (Fla. 1st DCA 2006). In so doing, the district court found that Aa temporary tag was properly displayed,@ but that Deputy Brownfield was within his rights to continue petitioners= detention and ask for identification on authority of this Court=s decision in State v. Diaz, 850 So. 2d 435 (Fla. 2003). Zeigler v. State, supra. The district court went on to opine that even if Diaz did not authorize the petitioners= continued detention, the contraband in their vehicle would have been inevitably discovered. Id.

Petitioners petitioned this Court to review the decision in Zeigler v. State, supra, as asserted that it was in direct and express conflict with this Court=s decision in State v. Diaz, supra. Petitioners also asserted that the inevitable discovery ruling was in express and direct conflict with this Court=s decisions in Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005, and Moody v. State, 842 So. 2d 754 (Fla. 2003).

On August 7, 2006, This Court accepted jurisdiction and directed the instant brief be filed.

STATEMENT OF THE FACTS

The petitioners were charged by information with trafficking in cocaine and misdemeanor possession of marijuana (V1 9-10).

The contraband was discovered in the car petitioners were traveling in after Deputy Brownfield stopped that vehicle because he did not see their lawfully posted temporary tag in the rear window.

Before trial, they moved to suppress the contraband (V1 27-28), and argued that they were illegally detained after Deputy Brownfield determined that they had a valid temporary tag on their car. Thus, they argued, all evidence obtained during the continued detention must be suppressed as the fruit of the poisonous tree.

At an evidentiary hearing on the motion to suppress, the parties stipulated that depositions of Deputies Brownfield and Jackson would be admissible as evidence as would the videotape of his stopping the petitioners (V2-91). Thereafter, Deputy Brownfield authenticated a videotape of his stopping petitioners= vehicle that was taken from his car (V2-91).

In his deposition, Deputy Brownfield testified that he was patrolling Interstate 75, doing drug interdiction when the petitioners passed him. Brownfield Acouldn=t see a tag on the

vehicle, at which time [he] pulled behind the vehicle in order to try to find a tag on it@ (V1-34). Because it was a dark stretch of roadway, according to Brownfield (V1-34), he followed the car Aa little bit trying to find a tag@ (V1-34).

Brownfield activated his emergency lights and stopped the vehicle once he Agot to a rest area, or lighted area@ (V1-35). He testified, A[T]he first time when I first seen a tag I was passing by the vehicle, near the passenger side, walking up to the car@ (V1 35-36).

The videotape shows Deputy Brownfield walk to the passenger side of the vehicle, knock on the window with his flashlight and direct the occupants to produce their identification cards. The passenger is seen rolling down his window in response to the officer=s directive.

He continued, AAnd as I stuck my head through the window that=s when I detected the odor of marijuana; went ahead and asked for ID and all that@ (V1-36). The videotape, however, shows Brownfield immediately demanding identification and the passenger window being lowered in compliance with his demand.

The petitioners were removed from their vehicle and held at gunpoint (V1-41) while deputies searched the vehicle. The search was conducted after Mr. Ellis purportedly gave consent (V1-40). Neither party argued that the search was consensual.

The search of the vehicle revealed approximately 50 grams of crack cocaine and a misdemeanor amount of marijuana (V1 42-43).

The state conceded that, AThe first time you see the tag is once [Brownfield] pulls over, he pulls in behind him and his lights hit squarely on the back of that window, then you can see the tag@ (V2 100-101). Although the tag is admittedly in plain view when Deputy Brownfield stopped behind the petitioners= car, Brownfield Adoesn=t notice the tag until [he] gets out and [is] walking up to make contact with the driver and occupant@ (V2 101-102). Even though the reason for the stop had ceased to exist, the state argued that Brownfield had Ato make some contact with them to let them know I didn=t see your tag, make sure it is on there correctly and that type of thing and let them go@ (V2-102). Once he tapped on the window with his flashlight and demanded that the occupants identify themselves, Brownfield smelled burned marijuana which justified their continued detention, according to the prosecutor.

Appellant argued that Brownfield made no genuine attempt to locate the temporary tag on petitioners= vehicle and pointed out that once he shined his spotlight on the rear of the

vehicle, the temporary tag was clearly visible and in the place designated by statute for it to be (V1-105).

Petitioner continued:

> A[Brownfield] doesn=t begin the stop by telling them why he stopped them, he begins by asking them for identification and license and registration and things like that.
>
> He spends about 90 seconds at the window before he ever explains to them why he has stopped the vehicle as he is required. That=s approximately two minutes after he stops the vehicle that he explains to them the purpose for the stop. It is during that time, that illegal period of detention, that Officer Brownfield testified at deposition that he observed the odor or cannabis from the vehicle... the only reason he was put in the position to observe the odor of cannabis in the vehicle was because that illegal period of detention prior to him informing them for the reason for the stop.

(V2 106-107).

Petitioners also pointed out that the videotape proved the roadway immediately before the area in which the stop was made was well illuminated@ (V2-107). Petitioners concluded:

> A[O]nce the officer determines that there is a tag, the only reason he can make contact with the vehicle is to explain the reason for the stop. There [are] two minutes in there where Deputy Brownfield is making contact with the vehicle and doing exactly the things in Diaz that the Court found unacceptable, asking for identification, asking for people=s names and things of that nature. Those are the

> exact facts in Diaz and that=s the two minutes that we=re talking about.@

(V2-108).

Defense counsel adopted each other=s arguments for the purpose of the motion to suppress (V2-109).

The state conceded that the tag was visible once Deputy Brownfield Ais pulled over and puts the spotlight on there,@ referring to petitioners= rear window, but added that Brownfield Adidn=t even notice it@ until he was walking by the vehicle (V2-111).

The trial court denied the petitioners= motion to suppress (V1 56-57), and held that the tag was not Aconspicuously displayed... as to be clearly visible from the rear of the vehicle,@ so that Deputy Brownfield had probable cause to stop the car. The trial judge went on to hold that it was reasonable for Brownfield to Awalk up to the car and make an explanation@ as to why he stopped the car. When the deputy smelled burned marijuana, he had probable cause to arrest the petitioners and search their vehicle.

Thereafter, both petitioners entered no contest pleas (V3-120, 124), and reserved their right to appeal the denial of their motions to suppress (V3-122, 124).

The court sentenced both men to seven years in prison.

SUMMARY OF ARGUMENT

First issue: The trial court erred by denying petitioners= motion to suppress, and the district court erred by affirming the order denying petitioners= motion to suppress.

Petitioners were stopped because Deputy Brownfield did not see their properly displayed temporary tag until after the cars pulled to the side of the interstate.

After determining that petitioners had a valid temporary tag, Brownfield approached the passenger window, tapped on it with his flashlight and, AGot some ID on you, man?@ See, videotape of traffic stop.

In response to the officer=s demand for identification, the passenger rolled down his window to explain that he had none. As soon as the window was lowered, Brownfield put his head inside the vehicle where he detected the odor of burned cannabis. Based on that odor, the petitioners= were removed from the vehicle which was searched and the contraband at issue was discovered.

State v. Diaz, infra, is directly on point. There, a deputy could not read the expiration date of a temporary tag so he stopped the vehicle. Before he made personal contact with the driver, he determined that the temporary tag was valid. Nevertheless, he made contact with the driver to check

his license. The driver was then arrested for felony driving with a suspended license.

This Court held that once the reason for the traffic stop dissipated, the deputy had no lawful authority to continue his detention of the motorist and demand identification. This Court held that the officer could only make contact with the drive to explain why he stopped the car, and that Aanything more than an explanation of the stop was a violation of Mr. Diaz=s Fourth Amendment rights.@ State v. Diaz, infra.

Based on the authority of State v. Diaz, infra, both of the lower courts erred by not granting the petitioners the relief to which they were constitutionally entitled.

Second issue: The district court erred by applying the inevitable discovery doctrine to the instant case because (1) there was no on-going investigation into the petitioners= drug trafficking at the time the constitutional violation occurred, Moody v. State, infra, and (2) because the conclusion that Deputy Brownfield would have inevitably smelled burned cannabis required one to assume petitioners would have lowered their car window absent being required to do so. Jeffries v.State, infra.

In Moody v. State, infra, this Court ruled that for the inevitable discovery doctrine to apply Athe State must show

›that at the time of the constitutional violation an investigation was already under way.:@ There was no such investigation under way in the instant case.

In Jeffries v. State, infra, this Court held that Amere assumptions@ are not enough to meet the reasonable probability standard for application of the inevitable discovery doctrine to illegally seized evidence.

Here, Deputy Brownfield positioned himself at the passenger window and demanded identification. The petitioners obviously heard Brownfield=s demand because they responded to it by winding down their car window and telling him they had none. Brownfield then Astuck [his] head through the window [and] that=s when [he] smelled the odor of marijuana@ (V1-36). Had Brownfield simply explained why he erroneously stopped the petitioners= vehicle, there is no reason to believe the car window would have been lowered and he would have been able to stick his head inside the car and smell the cannabis. Thus, to conclude Brownfield would have inevitably discovered the odor or marijuana, one must assume petitioners would have lowered their car window for no apparent reason. Such an assumption violates this Court=s holding in Jeffries v. State, infra.

Accordingly, the inevitable discovery doctrine was inapplicable to the instant case.

ARGUMENT

FIRST ISSUE PRESENTED

THE DISTRICT COURT ERRED BY AFFIRMING THE TRIAL COURT=S ORDER DENYING PETITIONERS= MOTION TO SUPPRESS WHEN THIS COURT=S DECISION IN STATE V. DIAZ, 850 SO.2D 435 (FLA. 2003) REQUIRED REVERSAL OF THE TRIAL COURT=S ORDER.

Standard of Review

In Riggs v. State, 918 So. 2d 274 (Fla. 2005), this Court wrote, AWhen reviewing rulings on motions to suppress, we >accord a presumption of correctness... to the trial court=s determination of historical facts, but [we] independently review mixed questions of law and fact that ultimately determine constitutional issues.=@

The Merits

This case raises the question of whether it is legally permissible to continue to detain a motorist to check his identification when the reason for a traffic stop has ceased to exist.

The trial judge found that petitioners= car tag was not displayed in accordance with Section 320.131(4), Florida Statutes because Athe temporary tag on the vehicle was not >conspicuously displayed... as to be clearly visible from the rear of the vehicle=@ (V1-56).

The District Court of Appeal, presumably after viewing the videotape of the stop filmed from Deputy Brownfield=s car, concluded Athat a temporary tag was properly displayed.@ Zeigler v. State, 922 So. 2d 384 (Fla. 1st DCA 2006).

Petitioners contend that the district court=s factual determination is correct and is supported by the videotape of the stop as well as Deputy Brownfield=s testimony that he saw the tag when he walked up behind the car (V1 35-36).

Section 320.131(4), Florida Statutes, provides in pertinent part:

> (4) Temporary tags shall be conspicuously displayed in the rear license plate bracket or attached to the inside of the rear window in an upright position so as to be clearly visible from the rear of the vehicle.

In this case, petitioners= state issued temporary tag was clearly visible as it was attached to the inside of the rear window in an upright position for all the world to see. The temporary tag is visible throughout the videotape including before the vehicles actually came to a stop on the side of the interstate.

Nevertheless, Deputy Brownfield testified that he could not see the state issued temporary tag until he pulled petitioners= car over and approached it on foot (V1 35-36). Thus, by the time Brownfield actually made contact with the

petitioners, he was aware that they had a valid temporary tag on their car, and had no valid reason to continue to detain them. State v. Diaz, supra.

Despite having determined that petitioners had a properly displayed, valid temporary tag, Brownfield knocked on the vehicle=s closed window, and demanded that both petitioners provide him with identification. See videotape of traffic stop.

When the passenger opened the car window to hand out his identification, Brownfield put his head inside the car and detected the smell of burned marijuana. He then ordered both petitioners out of their car.

Petitioners contend that Brownfield=s continued detention of them after the reason for the traffic stop ceased to exist violated their right to be free from unreasonable governmental seizure, and that the subsequent search of their car was the fruit of the original illegal detention, and thus should have been excluded from evidence at trial. U.S.C.A. amend. 4; Art. 1, s. 12, Const. of Fla; State v. Diaz, supra.

An officer=s stop of an automobile constitutes a seizure within the meaning of the Fourth Amendment to the united States Constitution. See, Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

Once a police officer has satisfied the purpose for which he has initially stopped and detained a motorist, absent a reasonable, articulable suspicion of illegal activity, the officer no longer has any reasonable ground or legal basis for continuing the detention of the motorist. See, eg., Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

In State v Diaz, supra, a Hillsborough County Deputy observed a vehicle driven by Diaz pass by with a temporary tag on the top of the rear window. Because he could not read the tag, the deputy initiated a traffic stop. At the suppression hearing, the deputy testified that as he approached the car he could clearly read the tag including the expiration date and found nothing improper. He walked up to the driver=s side of the car and obtained information from Diaz, the driver, which ultimately led to the charge against Diaz of felony driving with a suspended license.

This Court ultimately held that the officer had no justification for continuing the restraint of Diaz and obtaining information from him after it was clearly determined that no question remained concerning a violation of law, or the validity of the car=s temporary license plate.

This Court characterized the reason for the stop as being Apremised upon the very slimmest of rationales,@ but

nevertheless concluded Athe initial stop by the deputy sheriff was legitimate, albeit based upon a barely justifiable purpose.@ Id, at 437.

The Court also found Athat 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. Citing Delaware v. Prouse, supra, the Court noted that Astopping an automobile and detaining the driver in order to check his driver=s license and registration of the automobile are unreasonable under the Fourth Amendment.@ Following the Prouse decision, the Court further held that Aunder the Fourth Amendment, a citizen >may not be detained even momentarily without reasonable, objective grounds for doing so.=@ State v. Diaz, supra.

This Court concluded that Athe continued detention of Mr. Diaz after full knowledge had been acquired that totally removed any articulated question constituted an infringement upon his Fourth Amendment rights.@ This Court wrote:

> AUpon approaching the vehicle and prior to personal contact, the deputy was able to read the tag, which was in a proper location, and clearly determined it to be valid. Therefore, under Royer, when the officer clearly determined the validity of the tag, the purpose for the stop was satisfied, and the continued detention of Mr. Diaz was improper. The investigative procedures and personal examination,

> requiring the production of further information, was beyond that which was necessary or reasonable to satisfy the stated purpose of the stop. Before the personal encounter ever occurred the officer had totally and completely satisfied the purpose for the stop.@

State v. Diaz, supra, at 4439.

The Court reasoned:

> AIt would be dangerous precedent to allow over zealous law enforcement officers to place in peril the principles of a free society by disregarding the protections afforded by the Fourth Amendment. To sanction further detention after an officer has clearly and unarguably satisfied the stated purpose for an initial stop would be to permit standardless, unreasonable detentions and investigations. Further, detentions such as that which occurred here are not sufficiently productive for law enforcement purposes, any more so than the random stops declared unconstitutional in Prouse. Allowing such investigations would result in boundless interrogations by law enforcement officers, unrecognized by the Court before, and also an erosion of Fourth Amendment protections.@

The Court concluded:

> AHaving verified the total validity of Mr. Diaz=s temporary tag, the sheriff=s deputy could lawfully make personal contact with Mr. Diaz only to explain to him the reason for the initial stop. Because the sheriff=s deputy had no justification for further detention, anything more than an explanation of the stop was a violation of Mr. Diaz=s Fourth Amendment rights.

Id. at 440.

In the case at bar, petitioners= tag is clerly visible on the videotape as their car passed a well lighted rest stop or weigh station. Nevertheless, Deputy Brownfield, who was on drug interdiction patrol (V1-33), activated his overhead lights and the petitioners immediately pulled to the side of the interstate. Once both cars came to a complete stop, petitioners= tag is still cleraly visible in the back window of their vehicle.[1]

Deputy Brownfield is then seen walking to the passenger side of petitioners= vehicle where he shined his flashlight inside, tapped on the window, and requested AID and registration.@ See videotape of traffic stop admitted in evidence in this case. Brownfield then says to the passenger, through the closed window, AGot some ID on you, man?@ The passenger responds by winding down his window, at which pont

[1] There is no requirement that someone be able to read a temporary tag from any particular distance. As the Diaz opinion points out, the state manufactures temporary tags. Consequently, it is not the petitioners fault if the state sold them a tag that could not be read from a particular distance as long as the tag was Ainside the rear window in an upright position and clearly visible from the rear of the vehicle.@ S. 320.131(4), Fla. Stat. The prosecutor and deputy did not dispute that petitioners= tag was properly displayed, notwithstanding the trial judge=s finding that the tag was not properly displayed. The videotape is the best evidence of this.

Brownfield physically inserts his head inside the vehicle where he smelled burned marijuana.

Approximately one minute later, Brownfield explained to the petitioners why he stopped their car.

The state conceded the tag was clearly visible when the petitioners' vehicle pulled to the side of the interstate and Brownfield's headlight shone squarely on it (V2 100-101). Brownfield admitted that he observed a valid temporary tag posted on the rear window of the petitioners' car before he made contact with the petitioners (V1-35-36).

Under these circumstances, the purpose for the stop was satisfied and the continued detention of the petitioners was improper. State v. Diaz, supra. That is, Brownfield no longer had reasonable grounds or any other basis, legal or otherwise, to further detain the petitioners. Id.

Brownfield's continued detention of the petitioners to check their licenses and registration was as improper under the Fourth Amendment as it was in Delaware v. Prouse, supra.

The passenger in the vehicle could clearly hear Brownfield's voice through the closed window. He responded to Brownfield's demand for license and registration by winding down the window and explaining that he had none. Only after the passenger rolled down the window and Brownfield put his

head inside the vehicle did the aroma of burned cannabis become evident (V1-36).

Under the dictates of State v. Diaz, supra, the only lawful contact Brownfield could make with the occupants of the car was to give an explanation why he stopped their vehicle. But here, during Brownfield's initial contact, he demanded identification and vehicle registration. Certainly neither occupant of the vehicle would feel he was free to go under such circumstances. It was only after petitioners responded to the demand for identification papers that the car window was lowered and the officer inserted his head inside the vehicle where he smelled cannabis. There is no reason to believe that petitioners would have lowered their car window without being ordered to produce identification. They obviously heard Brownfield's command as they responded to it. There was no evidence Brownfield smelled burned cannabis until after the window was lowered and he stuck his head inside the car. Had he not directed the petitioners to produce identification, they would not have lowered the window and Brownfield would not have smelled cannabis.

The detection of that contraband was the fruit of the illegal detention that occurred once Brownfield discovered that the reason for the stop was satisfied and he nevertheless

requested identification, rather than simply explaining the reason for the stop. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Both lower courts erred by denying relief to the petitioners in this case. U.S.C.A. amend. 4; State v. Diaz, supra.

SECOND ISSUE PRESENTED

THE DISTRICT COURT ERRED BY HOLDING THAT THE CONTRABAND IN THE PETITIONERS= VEHICLE WOULD HAVE BEEN INEVITABLY DISCOVERED.

Standard of Review

Whether the Ainevitable discovery@ doctrine was applicable in the instant case is a question of law that is subject to the de novo standard of review. See eg., State v. Gandy, 766 So. 2d 1234 (Fla. 1st DCA 2000).

After holding that Deputy Brownfield=s conduct in detaining the petitioners passed constitutional muster, the First District Court, in the alternative, went on to rule that Brownfield would have inevitably discovered the contraband whether he was demanding identification or explaining why he erroneously stopped petitioners= car. Zeigler v. State, 922 So. 2d 384 (Fla. 1st DCA 2006).

Petitioners contend that the inevitable discovery doctrine was inapplicable to this case, Moody v. State, 842 So. 2d 754 (Fla. 2003). Furthermore, to conclude that the inevitable discovery doctrine would have resulted in the discovery of the contraband at issue, one must assume that the petitioners would have lowered their car window to listen to Deputy Brownfield=s explanation for the stop. Mere assumptions

are not enough to meet the reasonable probability standard for application of the inevitable discovery doctrine to illegally seized evidence. Jeffries v. State, 797 So. 2d 573 (Fla. 2001).

The burden is on the prosecution to establish by a preponderance of the evidence that the drugs in petitioners= car would have been inevitably discovered. Id.

In Moody v. State, 842 So. 2d 754 (Fla. 2003), police stopped Moody because he did not have a valid driver=s license. A routine inventory search revealed a firearm. Moody was issued a citation for driving with a suspended license and released. A day later, it was determined that the gun found in Moody=s car had been taken during a murder.

Moody was arrested and charged with possession of a firearm by a convicted felon. Police searched his house and seized evidence that was ultimately used at Moody=s murder trial. Moody moved unsuccessfully to suppress that evidence. He was found guilty of first degree murder and sentenced to death.

On appeal, this Court determined that the trial judge erred by not granting Moody=s motion to suppress. The Court wrote:

> AAlthough the stop was illegal, the fruit of the poisonous tree doctrine does not

> automatically render any and all evidence inadmissible. A court may admit such evidence if the State can show that (1) an independent source existed for the discovery of the evidence (cites omitted); or (2) the evidence would have inevitably been discovered in the course of a legitimate investigation.
>
> * * *
>
> AIn making the case for inevitable discovery, the State must show >that at the time of the constitutional violation an investigation was already under way.: (Cites omitted.) Inevitable discovery involves no speculative elements. In other words, the State cannot argue that some possible further investigation would have revealed the evidence. See, State v. Duggins, 691 So. 2d 566, 568 (Fla. 2d DCA 1997); Bowen v. State, 685 So. 2d 942 (Fla. 5th DCA 1996)(holding that speculation may not play a part in the inevitable discovery rule and that the focus must be on demonstrated fact capable of verification). In other words, the case must be in such a posture that the facts **already** in the possession of the police would have led to this evidence notwithstanding the police misconduct. In this case, however, the police had not initiated any investigation of Moody for the Mitchell murder prior to the traffic stop, and the police had no reason to suspect Moody had any involvement in the murder.@

Id. at 759.

In the case at bar, there is noting in the record to show that at the time of the constitutional violation, an investigation was already under way into petitioners: trafficking in drugs. Thus, the state failed to prove that

the facts already in the possession of the police would have led to this evidence being discovered.

In addition, the state cannot rely upon speculation that petitioners would have lowered their car window even if Deputy Brownfield had not demanded identification. After all, Brownfield candidly admitted that he did not smell burned cannabis until after AI stuck my head through the window that=s when I detected the odor of marijuana@ (V1-36). There is no reason to believe petitioners, who had apparently recently smoked marijuana in the car, would wind down the window unless the deputy required them to do so. There was no need to do that since they could obviously hear the deputy with the window up - they responded to his command for identification.

Accordingly, the First District Court erred when it held that the contraband in petitioners= car would have inevitably been discovered. This is because (1) there was no on-going investigation of the petitioners drug trafficking at the time of the constitutional violation, and (2) it would require one to speculate that petitioners would have opened their car window absent being given an order by police that required them to do so.

CONCLUSION

Based on the foregoing arguments, reasoning, and citations to authority, this Court must reverse the decisions of the First District Court and trial court, and direct that the petitioners be discharged from further liability for these offenses.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to **Robert R. Wheeler**, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to appellants, **Chavis Zeigler**, DC #124866, New River Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-3000, and to **Tristan Ellis**, DC #880137, Liberty Correctional Institution, 11064 N.W. Dempsey Barron Road, Bristol, Florida 32321-9711, on this 21st day of August, 2006.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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INITIAL BRIEF OF APPELLANT

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