IN THE SUPREME COURT OF FLORIDA

CHAVIS ZIEGLER and
TRISTAN ELLIS,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

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

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioners, Chavis Ziegler and Tristan Ellis, the Appellants in the DCA and the defendants in the trial court, will be referenced in this brief as Petitioner(s) or by proper name(s).

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached, which is to be found at 31 Fla. L. Weekly D706a.

SUMMARY OF ARGUMENT

Petitioner has improperly relied upon the record in the trial court and simply does not acknowledge this case is distinguishable from those he claims conflict with. The appropriate focus upon the operative facts, as contained within the "four corners" of the DCA's decision, reveals no express and direct conflict with a decision of this Court.

ARGUMENT

ISSUE

IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND STATE V. DIAZ, MOODY V. STATE OR FITZPATRICK V. STATE? (Restated)

Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, Jenkins v. State, 385 So.2d 1356 (Fla. 1980)

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and

> modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite this Court's in Diaz, Moody or Fitzpatrick.

The decision below is not in "express and direct" conflict with Diaz, Moody or Fitzpatrick.

The District Court decision below simply and accurately distinguished Diaz and is thus not in conflict with it. As to Moody and Fitzpatrick, neither of those cases appear at all in the decision of the First District below, and thus are not in conflict with this District Court decision upon which review is sought.

This case is nothing more than the District Court's correct observation that the facts in this case are materially different than those in Diaz and thus Diaz was distinguishable. Here, after stopping the vehicle for a temporary tag that turned out to be properly displayed, the deputy approached the vehicle and

immediately smelled the burned marijuana, per the facts as laid out by the First DCA, 31 Fla.L. Weekly D706a:

> Officer Brownfield continued to approach the vehicle and asked to see Appellant's identification. Appellant Ziegler rolled down his window, and almost immediately Officer Brownfield smelled burnt marijuana emanating from the vehicle.

The First DCA applied Diaz as follows, id.:

> According to the supreme court's ruling, Officer Brownfield had the legal authority to make personal contact with Appellants and to be in a position to smell the marijuana. An officer may use his sense of smell from a place where he may lawfully be to develop probable cause for a detention. *See Lara v. State*, 497 So.2d 1311, 1312 (Fla. 1st DCA 1986). Once Officer Brownfield smelled the marijuana, he was entitled to detain Appellants. *See, e.g., State v. Betz,* 815 So.2d 627 (Fla. 2002).

Thus, the decision of the First District can be accurately summarized as follows: the policeman was in a lawful position when he smelled burnt marijuana coming out of the stopped car, and this odor provided a valid basis for detention and investigation.

Respondent specifically rejects the repeated assertion in Petitioners' Second Amended Jurisdictional Brief that "the deputy put his head inside the vehicle and detected an odor of marijuana" (PJB, p. 2), "he stuck his head inside the vehicle and smelled burned marijuana" (PJB, p. 4), and like assertions based on deposition testimony and physical evidence (video)

(PJB, p. 7). Absolutely no mention of any kind is made within the four corners of the decision below that the officer put, stuck, or inserted his head into the car so as to be able to smell the marijuana. For the same reasons, Respondent rejects Petitioners' "Deputy Brownfield was conducting drug interdiction on Interstate 75 late at night" (PJB, p. 1) assertion.

Even assuming the impropriety under Diaz of the deputy asking for identification instead of explaining the reason for the traffic stop and then sending Petitioners on their way, this is of no moment. For, as noted by the First District, once the Officer was in that lawful spot by the car window, whether it be to explain and release or ask for ID, "almost immediately Officer Brownfield smelled burned marijuana emanating from the vehicle."

Thus, even if Diaz had been followed to the letter, "Had Officer Brownfield immediately explained the reason for the stop when he made personal contact with Appellants, rather than asking Appellants for their identification, he would have still smelled marijuana and thus developed probable cause to detain Appellants." 31 Fla. L. Weekly at D706a.

It was the virtually instantaneous presentation of olfactory probable cause when the officer appeared at the driver's side

window that distinguishes this case from Diaz, 850 So.2d at 440:

> Having 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.

Even if the officer had done only that which was permissible under Diaz: "Sorry to bother you. I stopped you because I thought your temporary tag was bad, but walking up to your car I could see it was good. You're free to go," in so imparting the reason for the stop, the officer would have smelled the burnt marijuana.

That Petitioners here wanted **no** contact whatsoever with law enforcement, not even a Diaz authorized explanation for the initial stop, is made clear by the First District's rejection of Petitioners' extreme position: "We also reject Appellants' argument that Officer Brownfield was constitutionally required to make personal contact with Appellants through a closed vehicle window." 31 Fla. L. Weekly D706a. Because literal adherence to Diaz would produce the result that the officer would be presented with aromatic probable cause from the Petitioners' car, the First DCA properly found Diaz distinguishable and discovery inevitable.

Petitioners' claim of conflict between the First District decision below with those of this Court in Moody v. State and Fitzpatrick v. State is unpersuasive. As noted prior, neither Moody nor Fitzpatrick appear in the First District decision. This puts petitioners in the posture of arguing some sort of express and direct *sub silentio* conflict. Even reaching out beyond the four corners of the District Court decision below to these non-relied upon, non-mentioned cases, there is no conflict.

As to Moody, notably, four sentences later in the very same paragraph Petitioners source for the inevitable discovery quote, this Court states: "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." Moody v. State, 842 So. 2d 754, 759 (Fla. 2003).

That is precisely what happened here. The case would be in the same posture (Petitioners' car mistakenly stopped for a temporary tag thought to be bad which turns out good), then the facts already in possession of police (smelled aroma of burned marijuana after police arrival at the car door) constituted a lawful basis for continued detention and search, "notwithstanding the police misconduct" (which in this case was

asking for identification rather than an explanation for the stop and release per Diaz). Irrespective of what the officer asked for or stated upon contacting the vehicle occupants, when that contact was made, the marijuana odor was detected. When that odor was detected, the lawful basis for further detention and investigation came into existence. It would have come into existence whether the officer explained the basis for the stop, or asked for identification.

As to Fitzpatrick, review of that case shows no conflict with the First District decision below. Fitzpatrick sets out the same general principles as Moody regarding inevitable discovery. The segment Petitioners seize on, apparently, is the requirement of an on-going investigation for inevitable discovery to be a viable legal vehicle for admission of evidence. However, just as it did in Moody, this Court in Fitzpatrick made it clear that the on-going investigation requirement is just one way of expressing the matter. In Fitzpatrick, this Court stated, 900 So. 2d 495, 514, as to the inevitable discovery doctrine:

> Under this exception, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." Maulden v. State, 617 So. 2d 298, 301 (Fla. 1993).

The facts here show discovery of the same evidence ultimately

via legal means: The officer approaches the stopped car to explain, per Diaz, the reason for the stop. Upon reaching the car window, opened so as to allow communication, the officer smells burned marijuana.

Alternatively, even under the "on-going investigation" requirement, the on-going investigation here started *instanter* when the officer walked to the car, and at that point smelled burned marijuana. As soon as the officer smelled burned marijuana, an investigation was afoot. From the First DCA's decision, 31 Fla.L.Weekly D706a:

> Appellant Ziegler rolled down his window, and almost immediately Officer Brownfield smelled burnt marijuana emanating from the vehicle. Thereafter, Officer Brownfield detained Appellants and called for back-up assistance.

Thus, no matter what angle the question is viewed from, the fact that Officer Brownfield "almost immediately" "smelled burnt marijuana" upon coming into contact with the occupants of the stopped car renders this case outside of Diaz. The officer was in a lawful position to detect this olfactory probable cause. Once he did, an investigation began. There is thus no conflict with Moody or Fitzpatrick: there was an investigation underway as soon as the aromatic probable cause revealed itself.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Phil Patterson, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on May 18, 2006.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

Daniel A. David
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APPENDIX

Ziegler and Ellis v. State, 31 Fla.L.Weekly D706 (Fla. 1st DCA March 7, 2006)

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