IN THE SUPREME COURT OF FLORIDA

CHAVIS ZEIGLER and
TRISTAN ELLIS,

Petitioners,

VS. **CASE NO. SC06-589**
1ST DCA Case Nos. 1D05-314
(Zeigler) and 1D05-315

(Ellis)
STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

The parties and the record will be referred to herein by use of the same names and symbols as were used in petitioners= initial brief, with one addition. The answer brief of the state will be referred to by use of the symbol AAB,@ followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicate.

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.

Deputy Brownfield stopped petitioners= automobile because he did not see their lawfully posted temporary tag in the rear window. Before he made contact with the petitioners he discovered his mistake. Nevertheless, he proceeded to the passenger window, knocked on it with his flashlight, and said, AGot any ID on you, man?@ See, videotape of traffic stop in evidence.

The state has argued that this Court=s decision in State v. Diaz, 850 So. 2d 435 (Fla. 2003) authorized Deputy Brownfield to make personal contact with the petitioners, including demanding identification, and that while doing just that, Brownfield smelled burned marijuana which gave him probable cause to seize the petitioners and search their vehicle. The state, however, later admitted that Deputy Brownfield=s conduct Aruns afoul of Diaz@ because of Awhat the deputy said during this permissible encounter (asking for ID as opposed to explaining the basis fo the stop and releasing)@ (AB-18).

Petitioner respectfully asserts that the state has cherry picked facts to argue this issue, and ignored the unambiguous holding in Diaz, supra.

The Diaz decision authorized Brownfield to make personal contact with the petitioners to explain why he erroneously stopped their vehicle. The Diaz decision expressly forbid Brownfield from requesting identification and continuing the detention of petitioners longer than was necessary to explain his mistake and to tell petitioners they were free to go. Id.

Here, Brownfield is seen and heard on videotape tapping on petitioners= car window and demanding identification. When the passenger opened the car window to explain that he had no identification, Brownfield, by his own admission, stuck his head inside the vehicle. Only then did the officer detect an order of burned marijuana.

Brownfield did not detect an odor of burned marijuana until he gave a command that required the passenger to roll down the car window, and until after he inserted his head inside the petitioners= car (V1-36). Brownfield had no lawful authority to command petitioners to produce identification. What=s more, he had no lawful authority to enter the petitioners= car at that point.

Thus, respondent=s argument that Athe deputy had every right to be: on a public roadway, at the window of the stopped car, where he was supposed to, under Diaz, make personal contact, explain the reason for the stop, and send the car on its way (AB-9).

The flaw in the state=s version of events is that Brownfield did not simply explain why he stopped the vehicle and then send it on its way. He issued a command for identification that an ordinary citizen would not feel free to ignore and drive away. He had no lawful authority to detain the petitioners and issue the command for identification. State v. Diaz, supra.

Next, the state claims that Brownfield approached the petitioners= car and Asays, in effect, >I at first couldn=t see your temporary tag, but I now can and it is good. You=re free to go on your way.= During that explanation period he can smell the burnt marijuana from the stopped car while he is doing exactly what Diaz commands@ (AB-10). That version of events is a complete re-write of the facts of this case.

What happened, and what is clear to see and hear is Deputy Brownfield walking up to the passenger window, by which time he admitted he had seen the lawfully posted temporary tag (V15-36). He then knocks on the passenger=s window with his

flashlight and says, AGot some ID on you, man?@ See videotape of traffic stop in evidence. In response to Brownfield=s demand for identification, the passenger window is rolled down, at which time Brownfield puts his head inside the petitioners= vehicle and, for the first time, smells burned marijuana (V1-36).

It is significant that Brownfield never said he could smell marijuana until the car window was lowered, and he inserted his head into the vehicle (V1-36). He did not indicate whether the odor he smelled was a faint odor of burned marijuana or a strong one. But the evidence is clear. Brownfield did not detect an odor of marijuana until he directed the petitioners to show identification, the petitioners responded by rolling down their car window, and he put his head inside their vehicle (V1-36).

Since Brownfield did not have lawful authority to demand identification at that point, State v. Diaz, supra, his continued detention of the petitioners to check their identification constituted an illegal seizure of the vehicle=s occupants, and the subsequent seizure of contraband inside constituted the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 721, 89 S.Ct. 1394, 9 L.Ed.2d 441 (1963).

Respondent also claims that AOnce a valid stop is effected, the officer or officers could order both the driver, Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 554 L.Ed.2d 331 (1977) and the passenger, Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) out of the car with no specific or articulable reason to do so, just on the basis of officer safety@ (AB 10-11).

That is a correct statement of law. The problem with relying on those two cases is that they are immediately distinguishable from the case at bar in that here, Brownfield was not working a lawful traffic stop at the point he demanded the petitioners= identification.[1] State v. Diaz, supra. The reason for the stop had been satisfied already, and all Brownfield could legally do is advise the petitioners of his error and tell them they were free to go. Id. He did not do that. He further detained the petitioners to check their papers. See also, Popple v. State, 626 So. 2d 185 (Fla. 1993) where this Court, citing Pennsylvania v. Mimms, supra, noted Awe do not hold today that >wherever an officer has an occasion

[1] In Pennsylvania v. Mimms, supra the accused was validly stopped and detained for driving with an expired license plate. In Maryland v. Wilson, supra, the accused was stopped and detained for speeding.

to speak with the driver of a vehicle, he may also order the driver out fo the car.:@

If Pennsylvania v. Mimms, supra and Maryland v. Wilson, supra, were applicable here, then any officer could make a bogus traffic stop and demand the occupants of the car exit their vehicle, presumably while he or she checked the occupants: paperwork. Fortunately, Americans are not subject to such treatment by their government officials.

Last, respondent concludes that it is Aimmaterial@ that Brownfield asked for identification rather than telling petitioners they were free to go because that was a Apermissible encounter under Diaz for identification rather than telling the car occupants why they were stopped and that they were free to go@ (AB-11).

In State v. Diaz, supra, this Court, citing Deleware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1970), and Florida V. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), opined that Aonce a police officer has totally satisfied the purpose for which he has initially stopped and detained the motorist, the officer no longer has any reasonable grounds or legal basis for continuing the detention of the motorist. Here, as soon as the officer determined the validity of Mr. Diaz:s temporary tag, he no longer had

reasonable grounds or any other basis, legal or otherwise, to further detain Mr. Diaz.@ State v. Diaz, supra.

The Court explained, Adetention must be limited to satisfying the purpose for the initial intervention.@ The Court concluded, APermitting an officer to further detain and interrogate a motorist, after the office is fully satisfied that the motorist has not committed a violation of the laws of the State of Florida, violates the precepts established in Prouse and Royer.@ Id.

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.@ Id.

Thus, under Diaz, Deputy Brownfield had two options: make no contact with the petitioners and simply drive away, or he could explain the reason for the stop and tell the petitioners they were free to leave. In this case, Brownfield did exactly what the officer did in Diaz. He demanded identification, which required petitioners to open the window of their vehicle, at which point Brownfield entered their vehicle without a warrant or probable cause, and smelled burned marijuana.

Brownfield's conduct in this case was exactly the same as the officer in State v. Diaz, supra. For exactly the same reasons as were stated in Diaz, this Court should find that the petitioners' right to be free from unreasonable governmental seizures and searches was violated, and remand this cause to the First District Court of Appeal with directions to quash the decision of the trial judge and to grant the petitioners' motion to suppress.

SECOND ISSUE PRESENTED

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

Respondent has misrepresented petitioners= argument on this issue, assumed facts not in evidence, and has misapplied the inevitable discovery doctrine.

Petitioners assert that the inevitable discovery doctrine does not apply to the case at bar because at the time of the constitutional violation there was no on-going criminal investigation into petitioners drug trafficking. Moody v. State, 842 So. 2d 754 (Fla. 2003).

Respondent claims that petitioners= argument is AEssentially, because the deputy, upon walking up to the car, was satisfied there was no issue as to the temporary tag, there was no criminal investigation afoot@ (AB-14). That was not what petitioner=s asserted in their initial brief, and that is not what petitioners assert now.

The Moody case involved a traffic stop that resulted in the police finding a gun that, a day later, they determined was involved in a murder. Based on this discovery a search warrant was issued for Moody=s car and home. Evidence linking Moody to the murder was found when the search warrant was

executed. Moody moved to exclude that evidence from trial, but the trial judge denied the motion.

The case eventually was heard by this Court where it was held that the original traffic stop of Moody was illegal. The Court then went on to discuss the inevitable discovery doctrine at length. This Court found the inevitable discovery doctrine was not applicable and explained what was required before it would be:

> AIn 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, the police had not initiated any investigation of the petitioners for drug trafficking prior to the traffic stop, and the police had no reason to suspect the petitioners were involved in drug trafficking. Thus, as in Moody, the inevitable discovery doctrine was not applicable. That is, there is no reason to believe the police would have inevitably found what they were not looking for and did not, at that point, know existed.

Next, respondent claims that Aa narcotics investigation was triggered as soon as the deputy smelled the burnt marijuana coming from the car@ (AB-16), and Aeven if Diaz had been followed[2] to the letter during this personal encounter, the olfactory probable cause would have presented itself@ (AB-17).

The fallacy of the state=s position is that Deputy Brownfield did not smell burnt marijuana when he walked up to petitioners= vehicle; he did not smell burnt marijuana when he demanded the petitioners provide their identification, and; he did not smell burnt marijuana when the passenger rolled down the window in response to Brownfield=s demand for identification. Brownfield freely admitted that he did not smell burnt marijuana until after he Astuck [his] head through the window that=s when [he] detected the odor of marijuana@ (V1-36).

Thus, the state=s argument that Brownfield would have smelled burnt marijuana had he complied with the dictates of Diaz, is refuted by Brownfield=s own testimony.

Last, the state makes a series of arguments to try to persuade this Court that the exclusionary rule does not apply

[2] Again, the state tacitly admits that Deputy Brownfield=s conduct violated this Court=s holding in Diaz.

because AA police request or directive to roll down a window during a traffic stop is *de minimus* and, it is submitted, something that a reasonable motorist would expect during such stop@ (AB-23).

Respondents disagree. Police may not lawfully detain someone by ordering them to take their hands out of their pockets, Palmer v. State, 625 So. 2d 1303 (Fla. 1st DCA 1993). Respondents argument that police may continue an illegal detention to make a motorist open their vehicle for further investigation is no different. Once police discover they have no lawful authority to detain a motorist, they must let that motorist go. They can not continue an illegal detention simply because their demands seem to be *de minimus* to respondent.

Deputy Brownfield had no lawful authority to detain the petitioners any longer than it took to realize his error. State v. Diaz, supra. The state argues that this Court should permit officers who make invalid traffic stops to continue their illegal detention by Achatting up@ the motorist they stopped and by having the motorist open their car windows in hopes of finding something incriminating. Fortunately, the Fourth Amendment and this Court=s prior decisions protect

citizens from such arbitrary and capricious detentions. State v. Diaz, supra; Popple v. State, supra.

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 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 ____ day of September, 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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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

CONSTITUTIONS

TABLE OF AUTHORITIES

PAGE(S)