IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC07-1453**
Lower Tribunal Case No. 3D05-2599

GEORGE BAPTISTE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FLORIDA THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The opinion below accurately and succinctly set forth the facts as follows:

> The defendant's primary point on this appeal from a jury conviction for possession of a firearm by a convicted felon challenges the denial of his motion to suppress the firearm which he claims was unconstitutionally secured.
>
> Baptiste was Terry-stopped by police after a then-anonymous informant dialed 911 to report that a person who matched his description was "waving" a firearm in the vicinity. Immediately after the stop, the person who called came to the scene and, without giving his name, identified himself as the caller and Baptiste as the person he saw with a gun. A subsequent pat-down and search of Baptiste's person indeed revealed that he was carrying a nine-millimeter Taurus handgun. The defendant's argument is based on the fact that when Baptiste was first observed and stopped by the police, he was merely walking down the street and neither had a weapon in plain view or was apparently otherwise violating the law.

Baptiste v. State, 32 Fla. L. Weekly D1650 (Fla. 3d DCA, July 5, 2007). (App. 2).

Baptiste argued on appeal that the police had insufficient information to support the investigatory stop and subsequent search and seizure, citing *Florida v. J.L.*, 529 U.S. 266 (2000). (App. 2). The Third District disagreed, distinguishing *J.L.* in "two vital respects." *Id*. First, the content of the tip itself revealed location and basis of knowledge which "rendered it reasonable for the officer to effect the stop necessary to inquire further." (App. 3). Second, the caller was properly categorized as a citizen informant, rather than an anonymous tipster, because he

"came to the scene and identified himself to the officers." *Id*. Therefore, the court considered the information provided by the caller "constitutionally reliable." *Id*.

Baptiste now argues that the Third District's opinion conflicts with *Rivera v. State*, 771 So. 2d 1246 (Fla. 2nd DCA 2000).

SUMMARY OF THE ARGUMENT

The questions of law and statements of rules applied in the Third District's opinion, now before this Court, do not conflict with any questions of law or statements of rules applied in *Rivera v. State*, 771 So. 2d 1246 (Fla. 2nd DCA 2000). Both cases examined the reliability of information supplied by a witness, whose identification was ultimately never established for the record, in order to determine if the information as provided established a legal basis for an investigatory stop and subsequent search.

The *Rivera* opinion cites to cases that set forth the same questions of law and apply compatible legal reasoning to that applied in the *Baptiste* opinion. However, the *Rivera* opinion relies entirely upon a direct analogy drawn between the facts of its case and those of two of the cited cases, without any independent reasoning or analysis, to reach its result. Because the facts in *Baptiste* are distinguishable in important respects from each of the cases that reach an opposing result, there is no conflict that would support a finding of jurisdiction in this Court.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *Rivera v. State*, 771 So.2d 1246 (Fla. 2nd DCA 2000).

"The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv); *see also*, Art. V, § 3(b)(3) - (4), Fla. Const. This Court's discretionary review is limited to the facts contained within the four-corners of the lower court decision. *See*, *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). "[J]urisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." *Mancini v. State*, 312 So.2d 732, 733 (Fla. 1975).

Petitioner argues that *Rivera v. State*, 771 So. 2d 1246 (Fla. 2nd DCA 2000), conflicts with the Third District's opinion affirming his jury conviction, *Baptiste v. State*, 32 Fla. L. Weekly D1650 (Fla. 3d DCA, July 5, 2007). In *Rivera*, an unidentified motorist informed Tampa police that he had observed a gun battle between the occupants of two cars at the intersection of West Gandy Boulevard

and South Dale Mabry Highway in Tampa. 771 So. 2d at 1247. An officer observed two cars, matching the description given, as the cars got onto northbound I-275 from Dale Mabry Highway.[1] *Id*. The officer then stopped one of the cars, whose registration matched the information provided, in Ybor City.[2] *Id*.

The facts in *Baptiste* are factually distinct on several points. First, where the caller in *Rivera* simply called in information and disappeared, the caller in *Baptiste* "came to the scene and identified himself to the officers." (App. 3). Though his identity was not provided on the record, he did not know he could remain anonymous when he met the officers at the scene. Second, the caller in *Baptiste* reported a simple and direct observation of a readily apparent fact: a specific person waving a firearm, (App. 2), as opposed to the vague and conclusory allegation in *Rivera* that the occupants of two cars were involved in a gun battle. For these two reasons, the Third District determined that the caller was "transmogrified" from an "anonymous tipster" into a constitutionally reliable citizen informant. (App. 3).

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[1] Although this fact was not stated in the opinion, perusal of a street map establishes the distance between the scene of the alleged incident and the officer's sighting as being more than four miles.

[2] Again, though this fact is not stated in the opinion, the stop was made a distance of at least seven and a half miles from the scene of the alleged incident.

The *Rivera* court did not examine the source of the information it merely characterized as being "provided by an unidentified motorist." 771 So. 2d at 1248. Instead, in reaching its holding, the court cited *State v. Evans*, 692 So. 2d 216 (Fla. 4th DCA 1997), "for the proposition that, since an anonymous informant's basis of knowledge and veracity are typically unknown, such tips justify a stop only when they are sufficiently corroborated by police."[3] 771 So. 2d at 1247. Then the court compared its facts with those of two other cases that applied the same proposition to find a lack of reasonable suspicion to justify a stop.

Although it is not apparent from the face of the opinion, the court in *Rivera* must have delved deeper in its analysis than a superficial conclusion that, because the informant was anonymous and the police could not corroborate the allegations,

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[3] In *Evans*, "somebody from McDonald's" called 9-1-1 to report that a customer at the drive-through "was wasted," "incoherent," "fumbling to get the bag of food," and "his eyes were . . . really dilated." 692 So. 2d at 217. Although the informant gave her name, location and occupation, the responding officer did not know this and both parties at trial argued the motion to suppress on the assumption that the informant was "anonymous." *Id*. at 218. The informant and the officer did, however, acknowledge each other when the officer arrived at the scene, and the informant then pointed to the defendant's vehicle. *Id*. at 219. In reversing the trial court's suppression order, the Fourth District noted, *inter alia*, that even on the basis of the responding officer's knowledge alone, the informant's identity was "readily discoverable" and thus she was not "anonymous." *Id*. Indeed, not only was she not anonymous, she also qualified as a "citizen-informant," and thus her information was to be considered "at the high end of the tip-reliability scale." *Id*.

the information was therefore unreliable. Such a simple conclusion would have been contrary to well established law, for the United States Supreme Court has plainly stated that it is possible for an anonymous caller alone to provide the reasonable suspicion necessary to justify an investigatory stop. *Alabama v. White*, 496 U.S. 325, 329 (1990). Therefore, it is necessary to delve deeper into the cases cited by *Rivera* in order to determine if there is a conflict in the laws applied.

In the first case deemed to be analogous, *State v. Rewis*, 722 So. 2d 863 (Fla. 5th DCA 1998), a car was stopped for suspicion of drunk driving based solely upon the observations of a fellow motorist that had seen the car weaving on the road. *Id.* at 864. The motorist personally informed deputies of his observations, but left before the deputies could obtain his identity. *Id*. The court in *Rewis* applied a test to determine whether or not the motorist should be considered a citizen-informant, whose information would be considered at the high end of the reliability scale. *Id*. Instead, they held that "there was absolutely nothing to suggest that the driver of the [car] was impaired other than a conclusory tip. . . ." *Id*. at 865.

Both the *Evans* and *Rewis* courts placed the information provided at an appropriate place on a "reliability scale" by examining more than just whether the informant's identity had been established for the record. An important factor was "basis for knowledge," as evidenced by the *Rewis* court's characterization of the information as "conclusory." 722 So. 2d at 865 (citing *Evans*, 692 So. 2d at 218).

In other words, drawing a conclusion that the driver of the car was drunk from a motorist's mere observation that the car was weaving was not reasonable.[4]

These rules of law and their application present no conflict with the opinion in *Baptiste*. As the court in *Baptiste* points out, the location and basis of knowledge was facially apparent in the tip itself. (App. 2-3). Instead of the conclusory inference that a driver was drunk because he was weaving, as in *Rewis*, the caller in *Baptiste* simply reported observations, just as did the caller in *Evans* – observations that were interpreted by trained officers as indicative of criminal behavior giving rise to reasonable suspicion to conduct an investigatory stop.

Instead of providing the information and disappearing prior to the stop, as in *Rivera* and *Rewis*, the caller in *Baptiste* "came to the scene and identified himself to the officers," as in *Hunter* and *Evans.* (App. 3). This is why the Third District determined that the caller in *Baptiste* was "a constitutionally reliable citizen informant," as did the Fourth District in *Evans. Id*. Even the court in *Rewis* considered whether or not its motorist was a citizen informant before holding otherwise on the facts.

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[4] Presumably, the court might have considered it a reasonable conclusion if the observation had been made by one who was demonstrably experienced in the behavior of impaired drivers, such as a police officer.

The *Rivera* opinion also cited *Solino v. State*, 763 So. 2d 1249 (Fla. 4th DCA 2000), as analogous. 771 So. 2d at 1248. In *Solino*, the defendant's car was stopped based upon information provided by another driver who had observed the defendant throw a bottle out of the window of his car. 763 So. 2d at 1249. The informant flagged down police and notified them of the observation, then left before police ascertained anything further. *Id*. The court considered and rejected classifying the driver as a citizen informant more deserving of a presumption of reliability. *Id*. at 1250. Although this case involved a simple observation, as in *Evans*, the informant was not present at the scene of the stop, but rather left beforehand, as in *Rivera* and *Rewis*. Therefore, this case, too, is factually distinct from *Baptiste*, and nothing in its analysis conflicts with the decision in *Baptiste*.

As a final note, the opinion in *Rivera* cited the then recent decision in *Florida v. J.L.*, 529 U.S. 266 (2000), to dispose of an argument that the "danger alleged in the tip" was so great that it justified the stop even without a showing of reliability. 771 So. 2d at 1248. The court in *Rivera* noted the now well accepted principle that there is no "firearm exception" to the required showing of reliability. *Id*. The court in *Baptiste* explicitly acknowledged and explicitly distinguished *J.L.* on the facts. (App. 2). The *Baptiste* opinion rests upon the reliability of the information, not the "danger alleged in the tip," and as such, it neither conflicts with *J.L.*, nor with that portion of the *Rivera* opinion which cites *J.L.*

CONCLUSION

Based upon the arguments and authorities cited herein, this Court should decline to accept the instant case for review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 17th day of August, 2007 to Colleen Brady Ward, Esq., Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 NW 14th St., Miami, FL 33125.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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