IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC07-2158

RANDY DEWAYNE GIBSON,

Respondent.
______________________________/

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S SECOND AMENDED REPLY BRIEF ON THE MERITS

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

SUSAN M. SHANAHAN
Assistant Attorney General
Florida Bar No. 976059
Concourse Center 4
3507 Frontage Rd., Suite 200
Tampa, Florida 33607 (813)287-7900
Fax (813)251-5500

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES.. ii

STATEMENT OF THE CASE AND FACTS................................ 1

SUMMARY OF THE ARGUMENT.. 6

ARGUMENT... 7

ISSUE I.. 7

THE DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN STATE V. LAVERONI, 910 SO. 2D 333 (FLA. 4TH DCA 2005), AND THE FIFTH DISTRICT STATE V. COLEMAN, 911 SO. 2D 259 (FLA. 5TH DCA 2005). (Restated by Petitioner).

ISSUE II... 7

WHETHER THE STATE CAN MAKE A PRIMA FACIE SHOWING OF PROBABLE CAUSE FOR A SEARCH BASED ON A NARCOTICS DETECTION DOG'S ALERT BY DEMONSTRATING THAT THE DOG HAS BEEN PROPERLY TRAINED AND CERTIFIED.

ISSUE III... 122

WHETHER THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS BASED ON THE ASSERTION THERE WAS AN UNREASONABLE DELAY. (Restated by Petitioner).

CONCLUSION.. 15

CERTIFICATE OF SERVICE.. 15

CERTIFICATE OF FONT COMPLIANCE................................ 15

TABLE OF AUTHORITIES

Cases

Bain v. State,
839 So. 2d 739 (Fla. 4th DCA 2003) ... 11

Bernie v. State,
524 So. 2d 988, 990-91 (Fla. 1988) ... 11

Cardwell v. State,
482 So. 2d 512 (Fla. 1st DCA 1986) ... 11

Connor v. State,
803 So. 2d 598, 608 (Fla. 2001) ... 12

Denton v. State,
524 So. 2d 495 (Fla. 2d DCA),
review denied, 534 So. 2d 398 (Fla. 1988) ... 9

Gibson v. State,
968 So. 2d 631 (Fla. 2d DCA 2007) ... passim

Illinois v. Caballes,
543 U.S. 405, 125 S.Ct. 834,
160 L.Ed.2d 842 (2005) ... 11

Matheson v. State,
870 So. 2d 8 (Fla. 2d DCA 2003) ... passim

Nulph v. State,
838 So. 2d 1244 (Fla. 2d DCA 2003) ... 14

Sanchez v. State,
847 So. 2d 1043 (Fla. 4th DCA 2003) ... 14

Sands v. State,
753 So. 2d 630 (Fla. 5th DCA 2000) ... 14

State v. Anderson,
479 So. 2d 816 (Fla. 4th DCA 1985) ... 14

State v. Coleman,
911 So. 2d 259 (Fla. 5th DCA) ... passim

State v. Laveroni,
910 So. 2d 333 (Fla. 4th DCA 2005) ... passim

State v. Smith,
850 So. 2d 565 (Fla. 2d DCA 2003) ... 12

United States v. Place,
462 U.S. 696 (1983) ... 11

United States v. Sharpe,
470 U.S. 675 (1985) 14

Other Authorities

Art. I, § 12, Fla. Const 11

STATEMENT OF THE CASE AND FACTS

On July 26, 2005, Respondent was charged with carrying a concealed firearm, possession of cocaine and drug paraphernalia. (R5-7). At the suppression hearing, Sgt. Jernigan, with the Sarasota Sheriff's Office, testified that on July 14, 2005, he was involved in the Interstate Crime Enforcement Unit which was designed to work the interstate corridor looking for criminal activity. (R75-76). Respondent passed Sgt. Jernigan at around 6:15 p.m. and the officer testified it was obvious to him that Respondent's vehicle had tinted windows that were in violation of state law. (R76-77). Sgt. Jernigan stopped Respondent's car at about 6:17 p.m. and could see, by the silhouettes inside, suspicious movement by the driver which appeared as if the Respondent was either removing contraband or a weapon from the waist area and relocating it between the seats. (R77-78, 88).

Sgt. Jernigan's suspicion began to rise, and his concern for his safety increased to such a level that he did not want to go up to Respondent's vehicle. Based on his observations, the tinted windows and safety concerns, the officer motioned for Respondent to make contact with him by exiting his vehicle and walking back to the officer. (R78). Respondent complied and Sgt. Jernigan explained the reason for the stop and inquired about his movements inside the vehicle. (R79). The officer noticed Respondent's very nervous behavior over a general traffic stop and, after inquiry,

Respondent was unable to provide his driver's license but did have the vehicle's registration. (R79).

Sgt. Jernigan had to write down all of Respondent's personal information and he then went to the passenger and retrieved the vehicle registration. (R80). He asked if Respondent had any firearms or narcotics in his possession and Respondent became even more nervous so his body was shaking, he avoided eye contact, and asked the officer to repeat himself which the officer recognized as a stalling tactic. (R81, 86). The officer made a general inquiry as to what brought Respondent into the area since he lived in Bradenton, and Respondent said he was looking for a house to rent. When asked if Respondent needed directions and if he knew where he was going Respondent replied, "Well, I'm not going anyplace particular. I'm just going to look wherever." (R81). The officer also asked the passenger about their destination while she was retrieving the registration and she said they were going to Wal-Mart or Target down in the southern Sarasota County area to return an item. (R81-82).

The time elapsed at this point had been about five to six minutes. (R82). As soon as he had the registration and information from Respondent, the officer went to his vehicle and conducted a manual registration check. Respondent initially consented to a search of his vehicle but then declined. After the computer check, the sergeant checked to see if there was a K-9 unit

in the area. He determined that his agency did not have one available, but the Venice Police Department indicated they had a K-9 unit in service which arrived within a few minutes of the request. (R83).

Sgt. Jernigan began writing the warning and citation before the K-9 officer arrived, but he had not completed the writing of the citation before the K-9 unit arrived on scene. (R83-84, 90). Respondent was issued a written warning for the window tint violation and a citation for failure to carry and exhibit a driver's license on demand. (R83).

Officer Freeman testified he had been a K-9 handler since May 2003. (R92). His K-9, Sirus, is a German Shepherd and the two of them completed a 2 ½ month-long 400-hour training school held by the Sarasota County Sheriff's Department. At the end of the course they were assessed by three evaluators and passed a practical examination in which the paperwork was sent to Florida Department of Law Enforcement. The team is allowed to work together for one year and is then recertified every year thereafter. (R93).

After being dispatched at 6:31 p.m., Officer Freeman testified that he arrived on scene within five minutes. (R94, 98). After walking Sirus around Respondent's car the first time, the K-9 immediately alerted to the trunk area. (R95-96). On the second walk around Sirus alerted on the vehicle again. (R96). A search of Respondent's vehicle revealed a handgun and a metal container

with cocaine residue in it and a razor blade inside of it. (R103).

On cross-examination of Officer Freeman, defense counsel asserted Sirus was not 100 percent accurate and implied the officer did not really know the dog's alert rate. The prosecutor made the following objection, "I'm going to object to this line of questioning unless you're planning to introduce records or --." (R104). Defense counsel responded, "I'm just asking him what his personal knowledge is." (R104). When asked if Sirus was 100 percent accurate, Officer Freeman stated he was unable to answer that question. (R104). Officer Freeman stated that every time Sirus alerted drugs were not always found by the officers. (R105). The officer explained that Sirus detects the odor of drugs not the presence of drugs themselves. Sirus has been trained to detect the odor of cannabis, cocaine, heroin and methamphetamine. (R106). Defense counsel argued the stop was not reasonable as Respondent was improperly detained by the officer while waiting for the K-9 unit. (R116-122). At the very end of his argument defense counsel asserted there was no evidence regarding the training of the K-9 and its accuracy and reliability, "so that burden has not been met." (R122). Defense counsel did not argue any case law on this issue or present performance records of the dog to challenge its reliability. (R122).

The trial court made oral findings that the stop was valid and the only issue after all the testimony heard was whether the time

of the stop until the alert by the dog was reasonable within the time required to issue the citation. The court further indicated it would have a written order the following day. Defense counsel made no response to the trial court's oral findings. (R131-132).

On March 29, 2006, the trial court entered a written order finding the time period between the stop of the vehicle and the K-9 search was not unreasonably long, and that only 19 minutes had elapsed. (R40). The court found the citation was still being written when the K-9 officer arrived and there was no evidence that Sgt. Jernigan intentionally delayed issuing the citation to allow time for the canine officer to arrive. (R41).

On March 30, 2006, defense counsel filed a Motion to Clarify the Order Denying Motion to Suppress claiming the State did not present any evidence of the reliability of the K-9, that Officer Freeman testified the dog was not 100 percent accurate and has alerted on vehicles where illegal substances were not found, but he did not know how many times that had occurred. (R38). There is nothing in the record to indicate the motion to clarify was considered or ruled upon by the trial court.

On April 10, 2006, Respondent pled no contest and the trial court withheld adjudication and sentenced Respondent to time served and to 12 months probation. (R48-52; Supp:T1, 20-34).

SUMMARY OF THE ARGUMENT

The State can make a prima facie showing of probable cause for a warrantless search based on a narcotic dog's alert by establishing that the dog has been properly trained and certified. The dog's reliability can then be challenged by the defendant through performance records of the dog, or other evidence, such as expert testimony.

Because an alert by a trained and certified narcotics detection dog, standing alone, provides an officer with probable cause to search, this Court should reverse the decision in Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), and approve the holdings in State v. Coleman, 911 So. 2d 259, 261 (Fla. 5th DCA), and State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005).

Furthermore, the length of detention was not unreasonable as the citation was still being written when the canine officer arrived, and there was no evidence that the officer intentionally delayed issuing Respondent the citation to allow time for the K-9 officer to arrive.

ARGUMENT

ISSUE I

THE DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN STATE V. LAVERONI, 910 SO. 2D 333 (FLA. 4TH DCA 2005), AND THE FIFTH DISTRICT IN STATE V. COLEMAN, 911 SO. 2D 259 (FLA. 5TH DCA 2005). (Restated by Petitioner).

The Second District has certified conflict with the holdings in Laveroni and Coleman. Petitioner will rely on its argument that this Honorable Court should exercise its discretionary jurisdiction as stated in Petitioner's Jurisdictional Brief.

ISSUE II

WHETHER THE STATE CAN MAKE A PRIMA FACIE SHOWING OF PROBABLE CAUSE FOR A SEARCH BASED ON A NARCOTICS DETECTION DOG'S ALERT BY DEMONSTRATING THAT THE DOG HAS BEEN PROPERLY TRAINED AND CERTIFIED.

Petitioner submits the State can make a prima facie showing of probable cause for a warrantless search based on a narcotic dog's alert by establishing that the dog has been properly trained and certified. The dog's reliability can then be challenged by the defendant through performance records of the dog, or other evidence, such as expert testimony.

In Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), the Second District Court of Appeal (hereinafter "the Second District") relying on its opinion in Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), has erroneous held that the fact that a dog has been

trained and certified to detect narcotics, standing alone, does not justify an officer's reliance on the dog's alert to establish probable cause. The court in Gibson certified conflict with the Fifth District in State v. Coleman, 911 So. 2d 259, 261 (Fla. 5th DCA 2005), as well as the Fourth District in State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005), as these courts rejected the holding in Matheson.

Respondent asserts that in this case the handler did not know the dog's track record, so there was no evidence of his reliability. Respondent further claims the training and certification process were not described by the handler and no standards for completing the process were described. (Respondent's Answer Brief, p.22). However, the record shows the reliability of the dog was not contested in the written motion to suppress nor was it raised during the motion to suppress hearing. Respondent did not litigate the issue of the dog's reliability but merely made the claim at the end of the hearing that because there was no evidence regarding the training of the dog and its reliability, "that burden has not been met." (R122).

In fact, at the suppression hearing the trial court made specific oral findings that the only issue before the court was whether the 20 minutes from the time of the stop until the completion of the alert by the dog, was reasonable and whether that was within the time required to issue the citation. It was not

until after the suppression hearing that Respondent filed a motion to clarify the suppression order and cited to Matheson claiming the State failed to present evidence of the dog's reliability.

Additionally, the Second District's opinion in Matheson that it is the State's burden to prove a dog is reliable, and that an alert by a trained and certified narcotics detection dog does not provide probable cause to search but only provides mere suspicion, is not only contrary to every jurisdiction in Florida and this country but is internally inconsistent within the Second District itself. See Denton v. State, 524 So. 2d 495 (Fla. 2d DCA 1988), review denied, 534 So. 2d 398 (Fla. 1988).

The much more logical approach taken by Laveroni, Coleman, and several other jurisdictions in the country, is that once the state has proven the dog is trained and certified the defendant can then challenge or rebut that presumption through the performance records or other evidence of the dog. Here, the State did present testimony from the handler that the dog was trained and certified. Respondent presented no evidence to challenge this dog's qualifications.

Respondent asserts the State is requesting this Court to create a per se and bright line rule or exception to the totality of the circumstances test. To the contrary, Petitioner's argument merely reasserts well-established law that an alert by a trained and certified narcotics detection dog provides an officer with

probable cause to search. Petitioner further submits that the holding by the Second District, in Matheson and Gibson, that an alert by trained narcotics detection dog only provides the officer with mere suspicion, to be erroneous. Petitioner requests this Honorable Court to find that a trained drug dog's alert on a vehicle may constitute probable cause to conduct a warrantless search of the vehicle. This is a rebuttable presumption that can then be challenged by a defendant by producing evidence to contest the dog's reliability. Therefore, the training and certification are prima facie evidence that the dog is reliable and the burden shifts to the defendant to challenge the reliability of the canine.

Contrary to Respondent's assertion, such a presumption does not violate due process, as the presumption of reliability can be challenged. Respondent's additional claim that the police would not keep records of their dog because it would not be to their benefit does not take into account that law enforcement is not attempting to create probable cause where none exists, but is using the canine nose as a valuable tool in fighting the war on drugs, terrorism and in criminal apprehension. Therefore, it is to the benefit of the K-9 handlers to keep detailed performance records of their dogs. Such records may be required for recertification and training purposes. Furthermore, the records, or lack of them, would be an additional factor for the trial court to consider in determining reliability. The public has a compelling interest in

identifying by all lawful means those who traffic in illicit drugs for personal profit and it is undisputed that a properly trained canine is highly reliable as a detection tool for law enforcement. "Just as no police officer need close his eyes to contraband in plain view, no police officer armed with a sniff dog need ignore the olfactory essence of illegality." Bain v. State, 839 So. 2d 739 (Fla. 4th DCA 2003), quoting Cardwell v. State, 482 So. 2d 512 (Fla. 1st DCA 1986).

Moreover, the Second District's determination that an alert to a vehicle by a trained narcotics detection dog is insufficient to establish probable cause, is in conflict with the United States Supreme Court's decisions in United States v. Place, 462 U.S. 696 (1983), and Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). While the ultimate decision of reliability should rest with the discretion of the trial court, the courts in Florida are required to follow the United States Supreme Court's interpretation of the Fourth Amendment pursuant to Art. I, § 12, Fla. Const.; Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988).

Consequently, Petitioner respectfully submits that this Honorable Court reverse the decision in Gibson and approve the holdings in Coleman and Laveoni.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS BASED ON THE ASSERTION THERE WAS AN UNREASONABLE DELAY IN WRITING THE CITATION. (Restated by Petitioner).

The merits of this issue was never addressed by the Second District. The Second District reversed only on the issue of the reliability of the narcotics detection dog. However, the merits of this issue was litigated at the trial level in which the court denied the motion to suppress and found there was no unreasonable delay in the writing of the traffic citation prior to the arrival of the K-9 officer. Respondent asserts the length of the traffic detention was unreasonable. Petitioner disagrees and submits there was no unreasonable delay in detaining Respondent or in writing the citation prior to the arrival of the K-9 unit, and the trial court did not err in denying the motion to suppress.

In Connor v. State, 803 So. 2d 598, 608 (Fla. 2001), this Court explained the review of orders on motions to suppress.

> [A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.

See also, State v. Smith, 850 So. 2d 565, 567 (Fla. 2d DCA 2003)(in

reviewing the trial court’s determination on a motion to suppress, this Court must consider the trial court's findings of fact pursuant to the competent, substantial evidence standard; however, the trial court’s legal conclusions are reviewed de novo).

Sgt. Jernigan effectuated a stop of Respondent’s car at about 6:17 p.m. Respondent did not have a driver’s license so the officer had to write down all of Respondent’s personal information. The officer then went to the passenger sitting in the car and retrieved the vehicle registration. After obtaining all of the necessary information and conducting a general inquiry regarding where Respondent was going, about five to six minutes had elapsed from the time of the stop. The sergeant then conducted a manual registration check and called for a K-9 unit which arrived within a few minutes of the request. Sgt. Jernigan began writing the warning and citation before the K-9 officer arrived, but had not completed the citation before the K-9 unit arrived on scene.

The trial court found that the lapse of time from stopping to writing the citation and arrival of the K-9 unit was reasonable. Specifically, the court found the time period between the stop of the vehicle and the canine search was not unreasonably long, as only 19 minutes had elapsed. The court further found the citation was still being written when the K-9 officer arrived, and there was no evidence that Sgt. Jernigan intentionally delayed issuing the citation to allow time for the K-9 officer to arrive. “Where the

police are still in the process of investigating and writing the ticket, the detention is not rendered unreasonable when other law enforcement personnel, including canine officers, converge on the scene." Sanchez v. State, 847 So. 2d 1043 (Fla. 4th DCA 2003); Sands v. State, 753 So. 2d 630, 632 (Fla. 5th DCA 2000)(detention was not unreasonable where fifteen minutes had passed between the initial stop and the arrival of the canine officer and the officer was still writing the ticket). See United States v. Sharpe, 470 U.S. 675 (1985)(20 minute detention of a suspect met the Fourth Amendment's standard of reasonableness). In State v. Anderson, 479 So. 2d 816 (Fla. 4th DCA 1985), the court held that a detention of one-half hour to issue speeding ticket was not unreasonable.

In the present case Respondent has failed to show that the detective engaged in delay tactics. Respondent relies on Nulph v. State, 838 So. 2d 1244 (Fla. 2d DCA 2003), in support of his argument. However, the facts in Nulph are distinguishable as the officer in Nulph made a conscious decision not to start writing the ticket because he wanted to wait for the K-9 officer. Id. In the case at bar, the sergeant conducted a manual registration check of the information Respondent provided and was in the process of writing the citation when the K-9 officer arrived. Unlike Nulph, Sgt. Jernigan did not wait for the arrival of the K-9 unit before writing the ticket. Thus, there was no unreasonable delay and the trial court did not err in denying Respondent's motion to suppress.

CONCLUSION

Petitioner respectfully requests that the opinion of the Second District Court of Appeal be reversed and Respondent's convictions and sentences be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Carol J.Y. Wilson, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, and Ted Daus, Esq., 2417 N.E. 22nd Terr., Ft. Lauderdale, FL 33305, this 17th day of April, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

____

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

____

SUSAN M. SHANAHAN
Assistant Attorney General
Florida Bar No. 976059
3507 E. Frontage Rd., Suite 200
Tampa, Florida 33607
(813) 287-7900 Fax (813)281-5500
COUNSEL FOR PETITIONER