

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DONALD MONINGER,

Respondent.

FSC No. SC07-510

DCA No. 2D05-4568

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

INITIAL BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On August 16, 2005, the State Attorney for the Sixth Judicial Circuit in and for Pasco County filed an Amended Felony Information charging Respondent as follows: Count one, lewd or lascivious molestation; count two, capital sexual battery; count three, lewd or lascivious battery; and, count four, lewd or lascivious battery (R44-45). It was alleged Respondent had engaged in multiple acts of sexual activity with his daughter, a child less than twelve years of age and less than sixteen years of age. (R44-45). The episodes were alleged to have occurred during a period beginning June 1, 1996 and ending July 8, 2004. (R44-45).

On June 6, 2005, Respondent filed a motion to suppress arguing two condoms alleged to have been used during one episode of sexual battery against the victim were obtained in violation of his Fourth Amendment right against unreasonable search and search. (R46). The following stipulated facts were accepted in lieu of testimony:

On July 8, 2004, Deputy White made contact with the victim and defendant at their home located in Pasco County, Florida in response to a call by a third party regarding [a] possible child molestation. After a brief interview with the victim, then fifteen years of age, Deputy White called for a major Crimes [d]etective to respond. Detective Ewald responded to the scene shortly thereafter and met with Deputy White and CPI Morgan. Deputy White stood by the defendant while Detective Ewald briefly spoke with the victim.

All conversations with the victim and the defendant occurred outside of the residence. Law enforcement never made entry into the residence. Defendant was NOT in custody. After a short conversation with the victim it was discovered that there were condoms that were used during the sexual episodes between the defendant and the victim. CPI Morgan then instructed the victim to go inside and start packing some of her belongings as she was being sheltered and removed from the residence. Detective Ewald told the victim that while inside she could get the condoms if she chose to obtain them. At no time did Detective Ewald direct the victim to get the condoms. At no time had the defendant denied permission to the Law Enforcement personnel on scene to enter his home. Victim did enter the residence by herself. While inside she packed her belongings and prior to leaving did obtain the condoms from the waste basket inside the master bedroom where the sexual activity took place.

(R47). On August 12, 2005, a suppression hearing was held before the Honorable Circuit Court Judge Stanley Mills. (R711-103). On August 23, 2005, Judge Mills entered an order granting Respondent's motion to suppress. (R58-61). The trial court found the stipulated facts included statements that the investigating officers told the victim to go into Respondent's residence to get her belongings but also that "she could remove two condoms that the defendant had allegedly used." (R58). The officer were also found to have provided the child with a bag in which to place the condoms. (R58). In granting the motion, the trial court ultimately concluded the officers encouraged the child to obtain evidence it they could not have validly obtained without permission or a proper search warrant. (R58).

On January 5, 2007, the Second District Court of Appeal issued its written opinion in Moninger v. State, 32 Fla. L. Weekly D 174 (Fla. January 5, 2007) affirming the trial court's granting of the motion. In reaching its decision, the majority found the victim acted as a state agent in retrieving the evidence from a wastebasket in her father's bedroom. The majority's opinion relied upon Treadway v. State, 534 So.2d 825 (Fla. 4th DCA 1988). On January 18, 2007, Petitioner filed a Motion for Rehearing and Motion for Rehearing En Banc which was subsequently denied. This instant appeal followed.

PRELIMINARY STATEMENT

Citations to the record on appeal will be referred to by the symbol (R) followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

This Court may exercise its discretionary jurisdiction to review the instant case as the Second District Court of Appeal is in express and direct conflict with the Fourth District Court of Appeal on the same question of law. In Moninger v. State, 32 Fla. L. Weekly D 174 (Fla. January 5, 2007), the Second District equated the status of a victim and a state agent as one. This holding is in conflict with the Fourth District Court of Appeal's decision in Treadway v. State, 534 So.2d 825 (Fla. 4th DCA 1988) wherein it was held de minimus or incidental contacts between a citizen and law enforcement agents prior to or during

the course of a search or seizure will not subject the search to Fourth Amendment scrutiny. Accordingly, Petitioner respectfully requests this Court review the instant case.

ARGUMENT

ISSUE

WHETHER THIS COURT SHOULD ACCEPT
DISCRETIONARY REVIEW OF THE DECISION FROM
THE SECOND DISTRICT COURT OF APPEAL?

As this Court explained in the Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept, discretionary jurisdiction, is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. Florida Star v. B.J.F., 530 So. 2d at 288.

Discretionary jurisdiction may be invoked to review any decision of a district court of appeal that is in express and direct conflict with a decision of another district court of appeal on the same question of law. Fla. Const. Art. V, § 3(b)(4). This Court has held the "concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law." Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). The Second District Court of

Appeal opinion in the instant case is in express and direct conflict with the Fourth District Court of Appeal.

On January 5, 2007, the Second District issued its written opinion affirming the trial court's granting of Respondent's motion to suppress condoms alleged to have been used during the commission of a sexual battery against his Fifteen year old daughter. In rendering its opinion, the majority found the victim acted as a state agent in retrieving the evidence from a wastebasket in her father's bedroom in reliance upon Treadway v. State, 534 So.2d 825 (Fla. 4th DCA 1988).

In Treadway, it was held the burden of proof to establish government involvement in a private search rests upon the party moving for suppression of evidence. Treadway v. State, 534 So. 2d 825, 827 (Fla. 4th DCA 1988). The Fourth district acknowledged as follow:

While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, de minimus or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before [the court may] deem the citizen to be an instrument of the state.

Treadway v. State, 534 So. 2d 825 at 827 citing United State v. Walther, 652 F.2d 788 (9th Cir. 1981). It was further held the requisite degree of governmental participation involves some

degree of knowledge and acquiescence in the search. Treadway v. State, 534 So. 2d 825 at 826. If the only purpose of a private search is to further a government interest, it is subject to Fourth Amendment strictures. Treadway v. State, 534 So. 2d 825 at 827.

When a dual purpose for a search exists such that the private person is also furthering his own ends, the search generally retains its private character. *Id.* In Treadway, the Fourth District ultimately held the victim had several good reasons for looking into Appellant's files pertaining the investment scheme and "even if there was some modicum of government involvement," the record supported the trial court's admission of evidence. Treadway v. State, 534 So. 2d 825, 827 (Fla. 4th DCA 1988).

Petitioner submits the majority's reliance upon Treadway was misplaced and, in fact, in direct conflict with the holding of Treadway. In the instant case, the majority found the victim's action in retrieving the condoms was precipitated by suggestions and encouragement by law enforcement officers done with the motive of fulfilling their interest in obtaining evidence in support of a criminal prosecution and, in doing so, the victim acted as an instrument or agent of the state.

If the officer's suggestion to retrieve the evidence had any affect on the victim, Petitioner submits it was minimal. A

necessary degree of governmental participation demonstrating the victim was transformed into an agent of the state either prior to or during the search was not shown in this case. The evidence did not show the victim's retrieval of the evidence was done, exclusively, with the purpose of furthering the government's interest. The officer did not direct, coerce, or threaten her in any way nor were any requirements placed upon her to act.

The victim cannot be deemed an instrument of the state because it was not shown the officer was directly involved as a participant in retrieving the evidence or indirectly as an encourager of the victim's action. Contact between the victim and law enforcement prior to the search was de minimus and does not subject the search to Fourth Amendment scrutiny.

Rather, the victim was a private citizen advancing her own interest. The record reveals the victim stated to the officers that her father used condoms during the commission of the crime. This information as to the existence and location of the evidence was voluntarily furnished by the victim. It appears her purpose in assisting law enforcement was motivated by a desire for termination of the abuse she had endured for several years wishing to ultimately be removed from the home.

The victim's purposes are in stark contrast to law enforcement's interest in securing evidence for criminal

prosecution. The victim's decision to obtain the evidence prior to removal from the home was motivated by factors which did not in any manner violate Respondent's Fourth Amendment rights. The victim's personal purposes were independent of that of law enforcement in that she acted in furtherance of her own ends which resulted in a search consisting of a dual purpose which retained its private character during the entire transaction. The search should retain its private character as the victim was a private person.

Petitioner further submits the majority overlooked the fact that Respondent engaged in sexual intercourse with the victim in the master bedroom for several years, specifically, giving her joint control over the bedroom where the evidence was retrieved. The bedroom was an area common to both she and Respondent wherein Respondent enjoyed no zone of privacy. The victim's assistance to law enforcement during the course of the search retained its private character, which does not make her a police agent. If the victim chose, she could have legally allowed the officer to obtain the evidence without violating Respondent's rights.

The Treadway court recognized that when "a dual purpose for the search exists such that the private person is also furthering his own ends, the search generally retains its private character." Treadway 534 So. 2d at 827. A victim of a

crime has a built-in dual purpose, and therefore cannot be considered an agent of the state when retrieving evidence of that crime.

The Fourth District's holding in Treadway is in conflict with the instant holding as it equates the status of a victim and a state agent as one. Here, the dissent, as well as the majority were confined by this Court's holding in Treadway which appears to have been misapplied in the instant case. This was a private search wherein the strictures of the Fourth Amendment should not be activated. Accordingly, this Court should accept review of the second district's opinion Treadway.

CONCLUSION

Because the Second District Court of Appeal opinion in the instant case is in direct and express conflict with Treadway, this Court should accept jurisdiction and review decision in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Mark A. Goettel, Esquire, Mark A. Goettel, P.A., 5623 U.S. Highway 19, Suite 107, New Port Richey, Florida 34652-3751, this 26th day of March 2007.

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,

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