IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-510

STATE OF FLORIDA,

Petitioner

vs.

DONALD MONINGER,

Respondent

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE ON APPEAL

WHETHER THE SECOND DISTRICT COURT OF APPEAL OPINION IN *STATE OF FLORIDA v. MONINGER,* 957 So.2d 2 (Fla. 2nd DCA 2007) CONFLICTS WITH THE FOURTH DISTRICT COURT OF APPEAL OPINION IN *TREADWAY v. STATE OF FLORIDA,* 534 So.2d 825 (Fla. 4th DCA 1988), WHERE THE SECOND DISTRICT AFFIRMED THE TRIAL COURT'S FINDING THAT THE CHILD VICTIM ACTED AS AN AGENT OF THE POLICE WHEN SHE REMOVED USED CONDOMS FROM THE BEDROOM TRASH CAN IN HER FATHER'S BEDROOM.

STATEMENT OF THE CASE

A. Appellate Statement of the Case:

In the Second District Court of Appeal, the State appealed the order (R58-61) of the trial court suppressing evidence in the prosecution of Respondent for the offenses of lewd or lascivious molestation, capital sexual battery, and two counts of lewd or lascivious battery. (R44-45)

The Petitioner sought review of the Second District Court of Appeal opinion in this court based on a conflict of the districts, and the Supreme Court of Florida accepted jurisdiction of this cause.

In the proceeding at bar, the Petitioner asserts that the Second District Court of Appeal misapplied the Fourth District Court of Appeal opinion in *Treadway v. State of Florida,* 534 So.2d 825 (Fla. 4th DCA 1988), and therefore the ruling of the

Second District Court of Appeal was in conflict with the ruling of the Fourth District Court of Appeal in *Treadway, supra.*

The Respondent takes exception to the Petitioner's position and respectfully asserts that the decision of the Second District Court of Appeal was correct under Florida law and the record before said court.

SUMMARY OF ARGUMENT

Based on the record before it, the Second District Court of Appeal correctly applied the holdings of the Fourth District Court of Appeal in *Treadway v. State of Florida,* 534 So.2d 825 (Fla. 4th DCA 1988), and therefore the opinion of the Second District Court of Appeal was not in conflict with the ruling of the Fourth District Court of Appeal in *Treadway, supra.*

The child-victim was essentially drafted by the detective to search for and seize evidence that he could not search for and seize himself without a warrant or consent. This child became an agent of the State in this regard, and the suppression of the condoms was correct.

In the case at bar, the Petitioner cannot avoid the suppression of the evidence by utilizing the "inevitable discovery" exception to the exclusionary rule, because it cannot show that officers were actively pursuing lawful means to conduct a search at the time of the illegal conduct.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL OPINION IN *STATE OF FLORIDA v. MONINGER,* 957 So.2d 2 (Fla. 2nd DCA 2007) DOES NOT CONFLICT WITH THE FOURTH DISTRICT COURT OF APPEAL OPINION IN *TREADWAY v. STATE OF FLORIDA,* 534 So.2d 825 (Fla. 4th DCA 1988), WHERE THE SECOND DISTRICT AFFIRMED THE TRIAL COURT'S FINDING THAT THE CHILD VICTIM ACTED AS AN AGENT OF THE POLICE WHEN SHE REMOVED USED CONDOMS FROM THE BEDROOM TRASH CAN IN HER FATHER'S BEDROOM.

When reviewing a motion to suppress, the trial court's factual findings must be affirmed if supported by competent, substantial evidence, *Caso v. State,* 524 So.2d 422 (Fla. 1988), while the trial court's application of the law to those facts is reviewed *de novo*, *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Also: *State v. Flores,* 932 So.2d 341 (Fla. 2nd DCA 2006). However, it is well-established that the review conducted by an appellate court must be based on the record made in the lower court.

Essentially, the record that the Second District Court of Appeal had before it comprised of the Motion to Suppress (R22-23) and the Memoranda (R46-51, 55-57) supplied to the court by the parties, the Stipulation of Facts (R46-47), and the proffer of the State/stipulation at the suppression hearing (R77-79).

As the Second District noted, "[a]lthough witnesses were available to testify at the hearing, the parties stipulated to the facts and did not present any testimony

or other evidence." Therefore, the lower court record became factually-limited to the proffers and stipulations of the parties.

The Defendant's motion to suppress asserted that on July 8, 2004, a Deputy White, a Detective Ewald, and Child Protective Investigator Morgan responded to a sexual battery complaint at Defendant's residence. The alleged victim was the Defendant's fifteen-year-old daughter. Further, the motion stated that the daughter spoke with Detective Ewald and told him that "condoms were used in the bedroom" of the residence, and that the daughter, upon Detective Ewald's prompting, went into the residence and returned with two condoms. The motion contended that the Defendant "did not consent to the unlawful entrance and removal of the condoms," and that the daughter "was acting as an instrument of the police and, as such, Detective Ewald searched the Defendant's residence without permission of the Defendant." (R22-23)

The stipulation of facts contained within the State's Memorandum (R46-47) expanded on the allegations of Defendant's motion (R22-23), therein providing that Deputy White and Detective Ewald responded to the Defendant's residence, where his daughter also lived, to investigate an allegation of child molestation. Child Protective Investigator Morgan was present and was going to remove the daughter from the residence to shelter care. While outside the residence, Detective Ewald conducted a brief interview with the daughter and asked her if there was any

evidence to substantiate her claim. She responded that she believed there were "a couple of condoms in the house." Detective Ewald and Child Protective Investigator Morgan "told the victim to go inside and start packing" her belongings because she was going to be removed from the home. They also told her that if she wanted to, she could "grab the condom. And, she did grab the condoms on her way out after she had packed her belongings."

The proffer/stipulation further provided, that the daughter retrieved two condoms from the trash can in the Defendant's room inside the residence and gave them to the detectives, and that the daughter had "access" to Defendant's room, and that the room had never been locked. Additionally, it was stipulated that, although "[t]he detectives had never been told not to enter the premises prior to the obtaining of the condoms" and consent was never "denied to Detective Ewald prior to the detective telling the victim to go inside and start packing," the stipulation confirmed that "consent was never requested from the Defendant."

In the State's memorandum (R46-47) in opposition to the motion to suppress, the State acknowledged as undisputed facts that Detective Ewald spoke with the daughter while Deputy White stood by with the Defendant *and that Detective Ewald gave the daughter "a bag in which to place the condoms if she chose to obtain them."* Emphasis supplied.

This was the record that the Second District Court of Appeal had before it at the time this cause was before them for their consideration.

The legal issue presented to the lower court was whether the daughter was acting as an instrument or agent of the State when she retrieved the used condoms from the trash can in the Defendant's bedroom and gave them to the detectives.

As the Second District Court of Appeal found, as the trial court before it, "the facts of record establish that the daughter's action in retrieving the condoms was precipitated by Detective Ewald's suggestions and encouragement, and that the interest being fulfilled was the law enforcement interest in obtaining evidence to support a criminal prosecution."

Based on these findings which were based on the record before it, the Second District Court of Appeal correctly applied the holdings of the Fourth District Court of Appeal in *Treadway v. State of Florida,* 534 So.2d 825 (Fla. 4th DCA 1988), and therefore the opinion of the Second District Court of Appeal was not in conflict with the ruling of the Fourth District Court of Appeal in *Treadway, supra.,* as discussed below.

In *Treadway v. State of Florida,* 534 So.2d 825 (Fla. 4th DCA 1988) the court recognized that "while a wrongful search and seizure by a private party does not violate the fourth amendment, when a private party acts as an 'instrument or agent' of the state in effecting a search and seizure, fourth amendment interests are

implicated." That court explained that "[t]he government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state." (quoting *United States v. Walther,* 652 F.2d 788, 791 (9th Cir. 1981))

In *State v. Iaccarino,* 767 So.2d 470, 475 (Fla. 2d DCA 2000), the Second District stated as follows: "The test for determining whether private individuals are agents of the government is whether, in consideration of the circumstances, the individuals acted as instruments of the state. To determine whether a private individual acts as an instrument of the state, courts look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual intended to assist the police or further his own ends."

Again, as the Second District found, "[h]ere, the facts of record establish that the daughter's action in retrieving the condoms was precipitated by Detective Ewald's suggestions and encouragement and that the interest being fulfilled was the law enforcement interest in obtaining evidence to support a criminal prosecution. The daughter was being removed from the home based on what the officers already knew, and nothing suggests that the daughter, of her own motivation, considered taking the condoms to substantiate that she had been molested or for any private purpose." As noted by the *Iaccarino* court, *supra.,* the intent of the individual is a

necessary consideration. Here, the stipulated facts reflect that the daughter's intent was to obtain evidence for Detective Ewald.

The *Treadway* court, *supra.,* recognized that the Fourth Amendment is implicated if the sole purpose of a private search is to further a government interest. 534 So.2d at 827.

In this regard, the Second District correctly found that "[t]he stipulated facts do not suggest that the daughter retrieved the condoms for any purpose other than the officers' desire to acquire evidence without the necessity of a search warrant or requesting and obtaining consent. Indeed, nothing in the record suggests that the daughter would even have thought to retrieve the condoms without the detective's suggestion that she take that specific course of action."

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," and therefore would not implicate the Fourth Amendment protections.

However, as the Second District found in the case at bar, "Nothing in the record here suggests that the daughter retrieved the condoms to further her own purposes." The Second District also found in the case at bar that, "it does not seem logical to find that the private interests of the victim in obtaining corroboration of

the alleged offense is any different than the State's interest in obtaining evidence of the crimes the State has charged."

The Petitioner argues that, "the victim's assistance to law enforcement retained its private character because she was furthering her own ends which created a dual purpose for the search." The Petitioner further argues that "[t]he mere fact that she was a victim of a crime presented a built-in dual purpose for the search, and she could, therefore, not be considered an agent of the state when retrieving evidence of that crime."

In its efforts to substantiate this "dual purpose" argument, and as a result of the deficiencies of the record, the Petitioner uses words in its brief such as: "It appears her purpose was…" (Petitioner's Brief – P. 28, L. 17); "…it is *reasonable to conclude…*" (Petitioner's Brief – P. 29, L. 6); "…then *possibly* out of concern…" (Petitioner's Brief – P. 30, L. 11); "…which she *probably* was not ready for at that time." (Petitioner's Brief – P. 30, L. 12); *…it appears* the victim did not wish…" (Petitioner's Brief – P. 30, L. 15); "*It appears* her actions were motivated…" (Petitioner's Brief – P. 30, L. 16), and "…was *possibly* the driving force…" (Petitioner's Brief – P. 31, L. 4). (Emphasis supplied.)

With regard to the Second District's holding in the case at bar being in conflict with the *Treadway* case opinion, it should be noted that the *Treadway* case is wholly distinguishable from the facts of the case at bar.

In *Treadway,* an insurance agent worked for Treadway, and he accessed his own investment file, although the office rules prohibited him from reviewing those files. The documents assisted in a prosecution of Treadway for organized fraud and grand theft, but the facts established that the insurance agent had his own reasons to look into the files, including concern over his investments and to determine whether the investment program was being handled properly.

Additionally, it should be noted, that law enforcement, the Florida Comptroller's Office in this instance, *never asked the insurance agent to look in the files*, and it should be noted that *the insurance agent never gave law enforcement the actual documents*, but only told them essentially what was in them.

In the case at bar, the child-victim's acts were wholly precipitated by Detective Ewald's suggestions and encouragement, so that the detective's interest in obtaining evidence to support a criminal prosecution would be fulfilled.

Also, in the case at bar, the physical evidence (the condoms and whatever DNA may be upon them) was actually given to the detective.

It is respectfully submitted, that when Detective Ewald gave the child-victim a bag in which to place the condoms "if she chose to obtain them," this act spoke volumes to this minor child coming from an adult-authority figure. Respondent submits, that the act of giving the child the bag essentially said, "go put the condoms in the bag and bring them back to me."

There is no doubt that the officers would need a search warrant or an exception to the warrant requirement, such as consent, to validly enter the Defendant's residence to search for evidence. *V.H. v. State,* 903 So.2d 321, 322 (Fla. 2d DCA 2005)

In the case at bar, the officers could have sought a search warrant or could have asked for the Defendant's consent to search, however they chose neither.

Additionally, in the case at bar, there is no evidence that the daughter consented, or had authority to consent, to a search of the home, the bedroom, or the trash can in the bedroom.

The dissent in the Second District opinion in the case at bar relies substantially upon *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and it is submitted, attempts to over-simplify the issue in this case as follows: "Two things are thus clear from the undisputed facts in this case. If Mr. Moninger's daughter had retrieved the condoms from the home "wholly on her own initiative," without any suggestion from law enforcement that she do so, the condoms would have been admissible in evidence. *See, e.g., Coolidge,* 403 U.S. at 487, 91 S.Ct. 2022. *Conversely, if the law enforcement officers had entered the home without a warrant and without the consent of one or perhaps both of the occupants and seized the condoms, the seizure would have violated the Fourth Amendment.* (Emphasis supplied.) *See, e.g., Kirk v. Louisiana,* 536 U.S. 635, 122

S.Ct. 2458, 153 L.Ed.2d 599 (2002). The question presented here, though, is whether the combination of the officer's suggestion and the daughter's voluntary actions combined in such a manner to require a court to conclude that the government performed an unlawful seizure of the condoms."

It is respectfully submitted, that the dissent seems to overlook the fact that law enforcement officers *did* constructively enter the home without a warrant and without the consent of one or perhaps both of the occupants and seized the condoms through the use of their agent (the alleged child-victim), and therefore the seizure does in-fact violate the Fourth Amendment.

The dissent acknowledges that the United States Supreme Court has recognized that in some circumstances, the actions of a private citizen may be deemed to be the actions of the government. *Coolidge,* 403 U.S. at 487, 91 S.Ct. 2022. "The test," the Supreme Court held, "is whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings."

In the Second District case, the dissent states that, "[t]he only perceivable differences between the facts presented in *Coolidge*, *supra.,* and the facts presented here, are the age and relationship of the daughter to Mr. Moninger and the fact that the daughter did not herself originate the idea of retrieving the condoms, but

simply agreed to do so when the officer explained that it might assist the investigation or prosecution."

The dissent concludes that there was nothing "suspect" or "sinister" in the detective informing the daughter that if she had access to this "important evidence" and could retrieve it, it would assist in a prosecution.

It is respectfully submitted, that the "suspect" or "sinister" test is not the law of Florida. As noted above, the *Treadway* court, *supra.,* recognized, when a private party acts as an 'instrument or agent' of the state in effecting a search and seizure, fourth amendment interests are implicated," and that "[t]he government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state." (quoting *United States v. Walther,* 652 F.2d 788, 791 (9th Cir. 1981))

It is submitted, that telling the child that she could retrieve the condoms is direct participation and encouragement by the detective, and therefore she became an instrument of the state.

Additionally, the dissenting opinion in the Second District case relies upon *People v. Heflin,* 71 Ill.2d 525, 17 Ill.Dec. 786, 376 N.E.2d 1367 (1978). It is most respectfully submitted, that the facts of that case as set forth in said dissenting opinion are completely distinguishable from the facts of the case at bar.

Essentially, the Illinois court found "no evidence of unreasonable police conduct or coercive influence over the private individual who turned the defendant's possessions over to the police." Again, *Treadway* merely requires that law enforcement be directly involved as a participant or indirectly as an encourager of the private citizen's actions. There is no mention of unreasonable police conduct or coercive influence over the private person. The fact that law enforcement in this instance is directly involved as a participant or indirectly as an encourager, is unreasonable police conduct, and a violation of the Fourth Amendment search and seizure protections.

The Petitioner argues in their brief, that inasmuch as the child-victim could have given consent to search the "bedroom" of the residence, although was never asked for consent by the detective, then she could lawfully retrieve the condoms herself. This argument is based upon the notion that the father had no expectation of privacy in the interior of his bedroom.

Petitioner's conclusion that the child-victim had authority to grant consent to search the interior of her father's bedroom is again based upon supposition and the assumption of facts not reflected in the record.

Specifically, Petitioner quotes the motion to suppress, where it is stated, "The daughter had told Detective Ewald that the condoms were used in *the bedroom* of the father's residence before she went into the residence to retrieve

them." (Emphasis supplied.) (R23), and they quote the trial judge at the suppression hearing, "Detective Ewald hav[ing] been told that those particular items were used in *the bedroom* of the father's residence." (Emphasis supplied.) (R76).

To demonstrate that the child-victim had authority to grant consent to search her father's bedroom, if such request for consent would have been made, the Petitioner states at page 36 of their brief as follows:

> "Here, if the words the condoms are in "the bedroom" are taken literally, it follows logically there existed only one bedroom in the home. Given that the victim resided in the home with her father, it leads to a conclusion the victim shared the only bedroom in the home with her father which, in turn, gave her common authority over the premises where the condoms were retrieved."

Again, the Petitioner is creating "facts" that are simply not in the record. How do we know there was not a sleeper-couch in the living room, or in a den area, that the child-victim would sleep on? These non-record conclusions are just as valid as the Petitioner's conclusions.

This court may find it regrettable that the record is not more fully developed and that a full evidentiary suppression hearing was not held in the trial court, however it is respectfully submitted, that such a situation does not permit counsel on either side, nor the court, to read facts into the record that are not there.

In *Altchiler v. State, Dept. of Professional Regulation*, 442 So.2d 349 (Fla. 1st DCA 1983), the court stated that, "It is fundamental that an appellate court reviews determinations of lower tribunals based on the records established in the lower tribunals." Further, the court in *Hillsborough County Board of County Commissioners v. PERC,* 424 So.2d 132 (Fla. 1st DCA 1982) stated that, "An appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it. *Tyson v. Aikman,* 159 Fla. 273, 31 So.2d 272 (Fla. 1947); *Seashole v. F & H of Jacksonville, Inc.,* 258 So.2d 316 (Fla. 1st DCA 1972).

Lastly, the Petitioner argues the "doctrine of inevitable discovery," as an exception to the fruit-of-the-poisonous-tree doctrine, citing the case of *Nix v. Williams,* 467 U.S. 431 (1984). They state that the inevitable discovery doctrine allows evidence obtained as a result of unconstitutional police procedure to be admitted if the evidence would ultimately have been discovered by legal means.

To attempt to make this doctrine fit into the facts, or lack-of-facts, in the case at bar, Petitioner states, "Given that the victim indicated to Detective Ewald that the condoms were in a trash bin in the bedroom, Petitioner submits there is a

reasonable probability the condoms would have been discovered by the police *during a search of the home after Respondent was taken into custody and the victim was removed from the home*." (Emphasis supplied.)

The Petitioner's own brief states that the inevitable discovery doctrine *requires the State to establish by a preponderance of the evidence* that the police ultimately would have discovered the evidence independently of the improper police conduct by "means of normal investigative measures that inevitably would have been set in motion as a matter of routine police procedure."

It is unfortunate that the Petitioner does not tell this court the whole story with regard to the "doctrine of inevitable discovery."

Specifically, in the recent case of *United States v. Virden,* 488 F.3d 1317 (11th Cir. 2007), the United States Court of Appeals for the Eleventh Circuit examined the "doctrine of inevitable discovery," as follows:

> "Under the inevitable discovery exception, if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been recovered by lawful means, the evidence will be admissible. *Nix,* 467 U.S. at 434, 104 S.Ct. at 2509. However, the mere assertion by law enforcement that the information would have been inevitably discovered is not enough. *United States v. Brookins,* 614 F.2d 1037, 1048 (5th Cir. 1980). This circuit also requires the prosecution to show that "the lawful means which made discovery inevitable were being *actively pursued prior to the occurrence of the illegal conduct*." *Jefferson v. Fountain,* 382 F.3d 1286 (11th Cir. 2004). This second requirement is especially important. Any other rule would effectively eviscerate the exclusionary rule, because in most illegal search situations the government could have obtained a valid

> search warrant had they waited or obtained the evidence through some lawful means had they taken another course of action. *United States v. Hernandez-Cano,* 808 F.2d 779, 784 (11th Cir. 1987)." (Emphasis supplied.)

That court also stated, "In *United States v. Satterfied,* 743 F.2d 827, 846 (11th Cir. 1984) we found it was error for a district court to admit evidence where police conducted an illegal search of a defendant's home prior to obtaining a search or arrest warrant. 743 F.2d 827, 846 (11th Cir. 1984). While police had sufficient probable cause to obtain a search warrant at the time of the search, and even later obtained a search warrant for the property, we held that *inevitable discovery did not apply because the police had not taken any steps to procure the warrant prior to conducting the illegal search. Id.* In the case at bar, the Petitioner cannot evade the suppression of the evidence by utilizing the "inevitable discovery" exception to the exclusionary rule, because it cannot show that officers were actively pursuing lawful means to conduct a search at the time of the illegal conduct.

Additionally, where is the evidentiary record that establishes anything *by a preponderance of the evidence*, let alone establishes that these police officers were actively pursuing lawful means to search at the time of the illegal conduct.

Certainly, the idea of requesting consent to search did not even occur to them at the time they were outside of the home with the child-victim and the Respondent.

It is respectfully submitted, that the child-victim was essentially drafted by the detective to search for and seize evidence that he could not search for and seize himself without a warrant or consent. This child became an agent of the State in this regard and the suppression of the condoms was correct.

Further, as mentioned above, the appellate court must conduct its review based on the record of the lower tribunal, regardless of the evidentiary/factual deficiencies that said record may reflect.

CONCLUSION

Based on the foregoing, it is respectfully submitted, that the opinion of the Second District Court of Appeal affirming the trial court's granting of Respondent's motion to suppress is not in conflict with the Fourth District Court of Appeal opinion in *Treadway, supra.,* and should be affirmed by this Honorable Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was mailed this ____ day of December, 2007, to: Chandra Waite Dasrat, Assistant Attorney General, Office of Bill McCollum, Florida Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, that this Respondent's Answer Brief on the Merits has been submitted in Times New Roman 14-point font in compliance with the Florida Rules of Appellate Procedure.

Respectfully submitted,

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