IN THE SUPREME COURT OF FLORIDA

ERIC CHRISTOPHER CALDWELL,

Petitioner,

v.

FSC No.: SC08-1519
L.T. No.: 2D07-565

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
(CONFLICT CERTIFIED)

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioner will rely on the Statement of the Case and Facts set forth in his Initial Brief.

The Petitioner would emphasize the following facts for this Court. First, Judge Morris ruled that the Petitioner was told he was free to leave and that he did not have to speak with law enforcement. (R. 102). This is contrary to the officer's testimony. Officer Crisco never told the Petitioner he was free to leave. (V. I-II, R. 84-85, 87, 225-227). Second, the Respondent, in footnote 2 of the Answer Brief, "takes exception" that Officer Crisco made false representations to the Petitioner. Officer Crisco testified to the following:

> Q. Okay. And your telling him (Mr. Caldwell) the video depicts him?
>
> A. Yes.
>
> Q. At the time you made that statement, you didn't know that it was depicting him, did you?
>
> A. No.
>
> Q. Okay. So that wasn't true?
>
> A. No. (R. 227).

SUMMARY OF THE ARGUMENT

In addition to the argument set forth in his Initial Brief, the Petitioner responds to three (3) points raised in the Respondent's Amended Answer Brief. First, the Petitioner did not waive any Terry arguments. Second, the Respondent improperly relies on the factors contained in Ramirez v. State, 739 So. 2d 568 (Fla. 1999). Third, as the Respondent notes in footnote 5 of its Amended Answer Brief, the record is devoid of the Petitioner consenting to a frisk.

ARGUMENT

ISSUE I

THE PETITIONER DID NOT WAIVE ANY TERRY ARGUMENTS

The Petitioner has consistently maintained that the contact between Officer Crisco was an illegal investigatory stop in violation of the Fourth Amendment. An argument is cognizable on appeal, when it is the specific contention asserted as legal ground for the objection, exception, or motion below. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). The Petitioner raised this issue in the proceedings below at the Motion to Suppress hearing, in the Initial Brief, the Reply Brief, and in the Motion for Rehearing. The Petitioner cited Popple v. State, 626 So. 2d 185 (Fla. 1993), which discussed Terry v. Ohio 392 U.S. 1 (1968), throughout these proceedings. Furthermore, the Initial Brief below referred to Florida Statutes § 901.151 (Stop and Frisk Law) and United States v. Mendenhall, 446 U.S. 544 (1980).

ISSUE II

RAMIREZ v. STATE, 739 So. 2d 568 (Fla. 1999) IS INAPPLICABLE TO THE INSTANT CASE

The Respondent primarily relies on Ramirez v. State, 739 So. 2d 568 (Fla. 1999). Ramirez dealt with custody for Miranda purposes under the Fifth Amendment.

> A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of actions was curtailed *to a degree associated with actual arrest*. Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992), (emphasis added).

The issue in this case is whether contact between the Petitioner and Officer Crisco was an investigatory stop requiring reasonable suspicion under the Fourth Amendment.

> A person is seized (for Fourth Amendment purposes), if under the circumstances, a reasonable person would conclude that *he or she is not free to end the encounter and depart.* Popple v. State, 626 So. 2d 185, 187-188 (Fla. 1993),(emphasis added).

These are two different standards. For example, a person is seized within the meaning of the Fourth Amendment if an officer asks him to exit his vehicle. However, Miranda rights are not required because the person in not in "custody" for the Fifth Amendment protections to apply. See State v. Dykes, 816 So. 2d 179, 180 (Fla. 1st DCA 2002).

ISSUE III

THERE IS NO EVIDENCE THAT THE PETITIONER CONSENTED TO A FRISK

A frisk or pat down is a search. Consent to search is an exception to the warrant requirement under the Fourth Amendment. V.H. v. State, 903 So. 2d 321, 322 (Fla. 2d DCA 2005). The State must prove that consent to search was unequivocally given, "not merely deference to the apparent authority of the police." Id. If there is *any* question or doubt concerning whether a defendant's consent was given, is must be resolved in favor of the defendant. Id., (emphasis added).

As the Respondent concedes, "A review of the record does not indicate how Petitioner gave consent to the patdown." There is no evidence or any testimony that the Petitioner consented to this search. Any doubt must be resolved in his favor.

CONCLUSION

This Court should find that Mr. Caldwell was illegally detained and reverse the decision of the Second District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US Mail this the _____ day of _____, 2009 to the OFFICE OF THE STATE ATTORNEY, P.O. Box 5028, Clearwater, FL 33758 and the OFFICE OF THE ATTORNEY GENERAL, Concourse Center, #4, 3507 Frontage Road, Ste. 200, Tampa, FL 33607.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the forgoing brief has been typed in 12 point Courier New Font with one-inch margins.

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