IN THE SUPREME COURT OF FLORIDA

CASE NO: SC09-2163

Lower Tribunal Case Number(s): 3D08-1094; 07-16793

ALFREDO MORENO-GONZALEZ,

Petitioner/Appellant

-vs-

THE STATE OF FLORIDA,

Respondent/Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Appellant, Alfredo Moreno Gonzalez, was the Appellee before the District Court of Appeal and was the Defendant in the Trial Court. The State of Florida was the prosecution in the Trial Court and the Appellant before the District Court of Appeal. The Symbol "R" refers to the record on appeal.

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal of the Third District Court of Appeal's reversal of the Trial Court's order granting Defendant's motion to suppress. On June 15, 2007, the State of Florida filed an information charging Defendant with being in actual or constructive possession of in excess of 25 pounds, but less than 2000 pounds, of cannabis. (R. 6-8). The cannabis was found after a search of the Defendant's home. Defendant filed a pre-trial motion to suppress physical evidence. (R. 14-27). In his motion, the Defendant argued that the evidence should be suppressed since the home was first searched without a warrant. (R. 15-16). Secondly, the warrant that was later issued was insufficient on its face since it was not supported by lawfully acquired probable cause. (R. 15-16). Third, the Defendant argued that the affidavit in support of the warrant was not subscribed to by the affiant as required by Fla. Stat. § 933.06. (R. 15-16).

In its written response, the State argued that the affidavit in support of the search warrant was valid as Detective Lourdes Hernandez both swore to the affidavit in support of the warrant and placed her initials on the bottom of each page. (R. 32). The State argued that the initial entry into the Defendant's home was consensual, thus the probable cause facts recited in the unsigned affidavit were lawfully acquired.

On March 3, 2008, the Trial Court conducted an evidentiary hearing on the motion to suppress. (R. 84-174). The Court heard testimony from the two officers involved in the search of Defendant's home, i.e., Detective Hernandez of the Miami-Dade Police Department, Special Agent Yates of the U.S. Drug Enforcement Administration (hereafter DEA), and took judicial notice of the deposition of Detective Silva.

Detective Hernandez testified that she was part of a DEA / Miami-Dade group that was following up on DEA generated tips on grow houses. (R. 91). She said that she and Agent Yates first went to the Defendant's residence at 22590 SW 252 Street to "canvas" the neighborhood regarding information about 22600 SW 252 Street. (R. 91). According to the detective other officers had previously been to the target 22600 address but could not gain entry. (R. 136-137). They arrived around 9:00 or 10:00 in the morning. (R. 114).

They went to the front door of 22590, the Defendant's residence, and the detective knocked. The housekeeper came to the door which could not be opened due to it being under construction. (R 93-94). The housekeeper told them to go to the door at the rear of the house to speak with her. (R. 94).

Detective Hernandez testified that she and Agent Yates then went to the side of the house and walked to the rear door. According to Detective Hernandez on the way to the rear door "she smelled a very strong order of live marijuana plants

coming from a detached garage that was just west of the primary residence." (R. 94-95).

Agent Yates testified that he had twelve years of law enforcement experience (R. 144) and had worked numerous marijuana grow house cases. (R. 144-145). He testified that he and Det. Hernandez headed out for 22600 SW 252 Street, based on a tip his agency generated that there was a grow house at that location. He put the address into his GPS "and it took us to 22590." (R. 145). He and Hernandez wound up at the Defendant's residence by mistake through reliance on his GPS device intending to go to 22600 SW 252 Street, the house due west of the Defendant's, based on the tip. (R 153-154). He and Detective Hernandez never went to the Defendant's house for the purpose of doing a canvas. They thought they were at the target house. (R. 154-156).

Yates and Hernandez walked up to the front door at about 7:30 a.m., according to Yates written report. (R. 152). After they knocked a female opened the door and spoke in Spanish to Detective Hernandez. (R. 147). After the female closed the door they walked "around the left-hand side towards the rear of the residence." (R. 147). Agent Yates did not recall the front door being unable to open due to construction. (R. 147).

Agent Yates said he never smelled marijuana when they walked to the rear of the house past the detached garage (R. 158), and he's familiar with the smell.

(R. 159). Furthermore, Detective Hernandez never told Yates she smelled marijuana when they walked to the rear.

Agent Yates went into the house with Detective Hernandez. He had not yet seen or smelled marijuana anywhere. (R. 160-162). After the Defendant refused consent to search, Detective Hernandez, Agent Yates and the Defendant went to the Defendant's back porch. (R. 165). Yates stayed with the Defendant on the porch and Hernandez walked outside to the detached garage. She returned to the porch and then told Yates that she smelled marijuana in the detached garage. (R. 165).

The Court took judicial notice of page 5 of the deposition of Detective Silva who stated, contrary to Detective Hernandez's testimony, that law enforcement went to the Defendant Moreno's property first, not to the 22600 property due west of the Defendant's home.

Detective Hernandez acknowledged that she forgot to sign the signature line of the affidavit in support of search warrant. (R. 130). The Detective omitted from the affidavit any facts about being on Defendant's premises between the house and the garage (where she allegedly smelled marijuana) based upon the housekeeper's consent since she didn't consider that necessary to tell the Judge (R. 140), even though that "consent" is what allowed the detective to acquire probable cause. (R. 127).

The Court granted the motion to suppress at the conclusion of the hearing and entered a written order dated April 16, 2008. (R. 78-80). The Trial Court ruled that the failure of the Detective to sign the affidavit violated F. S. § 933.06 and rendered the warrant defective.

The State did not advance any other theory to validate the search beyond arguing that the warrant was valid. (R. 78). "Good Faith" was never argued. These words are never found in this record and this theory was never advanced at the trial level. The Trial Court granted the motion to suppress by written order due to noncompliance with Fla. Stat. § 933.06 and declined to address the other arguments advanced by the Defendant to invalidate the warrant made under the Florida and United States Constitutions.

The State appealed to the Third District Court of Appeals contending that the affidavit in support of the search warrant was properly subscribed and argued good faith in the alternative. The Third District ruled that the 1982 Amendment to Article I, Section 12 of the Florida Constitution, known as the Conformity Clause, prohibited exclusion in this case.

The District Court reasoned that the case of United States v. Ventresca, 380 U.S. 109 (1965) prohibited application of the exclusionary rule to remedy the violation of Fla. Stat. § 933.06's requirement that an application for a search warrant be sworn to and subscribed.

Appellant Alfredo Moreno Gonzalez then petitioned this Court to accept jurisdiction. Jurisdiction was granted on May 21, 2010.

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in finding that the 1982 Amendment to Article I, Section 12 of the Florida Constitution prohibited the Trial Court from applying the exclusionary rule to remedy a violation of Fla. Stat. § 933.06. The statute requires that there be a signed and sworn application before a Judge prior to issuance of a warrant. No United States Supreme Court case prohibits application of the exclusionary rule under these facts.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEALS ERRED IN RULING THAT THE 1982 AMENDMENT TO ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION PROHIBITS A COURT FROM EXCLUDING EVIDENCE OBTAINED BY A WARRANT ISSUED UPON AN APPLICATION THAT WAS NOT SIGNED BY THE APPLICANT AS REQUIRED BY FLORIDA STATUTE SECTION 933.06.

The majority 2-1 decision of the Third District points out that with the adoption of the 1982 Amendment to Article I, Section 12 of the Florida Constitution "Florida Courts became bound to follow the interpretations of the

United States Supreme Court with relation to the Fourth Amendment…" at page 4, decision of the District Court of Appeals.

The decision of the District Court majority advances the position that the United States Supreme Court, in United States v. Ventresca, 380 US 109 (1965) provides precedent and controlling authority requiring reversal of the Trial Court. The District Court sets forth the ruling in Ventresca as follows:

> [T]he Fourth Amendment's Commands, like all constitutional requirements, are practical and not abstract. **If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in the area.** (emphasis in original)

Ventresca, 380 U.S. at 108 (emphasis added).

Decision of the District Court, p. 7. Ventresca should have no bearing on this case unless an affiant's signature to an affidavit is deemed by this Court to be a "technical requirement of elaborate specificity…" Ventresca at 108.

In this instance the problem the Trial Court found with the warrant application isn't how it was drafted. The Court did not address any problem with the application as to its content or lack of specificity. The problem cited by the

Trial Court is simply that the application was not subscribed to contrary to the clear language of Fla. Stat. § 933.06.

As pointed out in the Third District's dissenting opinion at page 16, the failure to sign the application/affidavit is substantive, not technical. Article I, Section 12 of the Florida Constitution States that a search warrant cannot be issued except upon probable cause "supported by affidavit[.]" Pursuant to Fla. Stat. § 933.06 (2007) the affidavit must be "subscribed," i.e., signed. Fla. Stat. § 933.18 also requires sworn proof by affidavit prior to a search of a dwelling.

Fla. Stat. § 933.06 was amended by the legislature in 1997 and in 2004, each time leaving in the requirement that an application for search warrant be signed. These amendments of the statute are after the 1982 amendment to Article I, Section 12 of the Florida Constitution.

Florida follows the rule that warrant requirements "must conform strictly to the constitutional and statutory provisions authorizing their issue." Jackson vs. Sate, 99 So. 548, 542 (Fla. 1924); cf. State v. Vargas, 667 So.2d 175, 176-177 (Fla. 1995).

No remedy, other than the exclusionary rule in Article I, Section 12, exists as a part of Florida criminal procedure to address or remedy unlawful searches and seizures. The 1982 amendment to Article I, Section 12, referred to as the "Conformity Clause" never should come into play in this case since there is no

United States Supreme Court case factually and legally on point. The Supreme Court cases referenced in the majority decision are not factually similar to this case. The Ventresca decision did not involve a factual situation where an officer failed to sign an affidavit in support of a search warrant.

The Florida Supreme Court has held that for the Conformity Clause to be applicable, there must be a United States "Supreme Court pronouncement factually and legally on point…" State v. Daniel, 665 So. 2d 1040, 1047 n.10. (Fla. 1995), receded from on other grounds, Holland v. State, 696 So. 2d 757, 760 (Fla. 1997). The Court has explained:

> [I]n the absence of a controlling U.S. Supreme Court decision, Florida courts are still "free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution."
>
> With the conformity clause amendment, we are bound to follow the interpretations of the United States Supreme Court with respect to the Fourth Amendment and provide to Florida citizens no greater protection than those interpretations. Bernie v. State, 524 So.2d 988, 990-91 (Fla. 1988). **However, when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us for review, we will look to our own precedent for guidance.**

Soca v. State, 673 So. 2d 24, 26-27 (Fla. 1996) (citations omitted) (emphasis added).[1]

In *State v. Tolmie*, 421 So. 2d 1087 (Fla. 4th DCA 1982) the Court ruled that a warrant issued upon an unsubscribed affidavit was invalid. The affiant in *Tolmie*

[1] The Soca decision has been superseded on other grounds. Bamberg v. State. 953 So. 2d 649, 654 (Fla. 2d DCA 2007).

swore to the affidavit but omitted to sign, i.e. subscribe to the affidavit. *Id*. The Court held that "the failure of an affiant to subscribe to an affidavit for search warrant as required by statute invalidates a warrant based thereon." *Id*.

A similar case is *Collins v. State*, 465 So. 2d 1266, 1267 (Fla. 2d DCA 1985) where the affiant signed but did not swear to the affidavit in support of a search warrant. Citing *Tolmie*, the Second District also strictly construed the "duly sworn and subscribed clause" of § 933.06, Fla. Stat. and invalidated the warrant based on the un-sworn affidavit. *Collins*, 465 So. 2d at 1268.

"Statutes and rules authorizing searches and seizure of homes must be strictly construed, and affidavits and warrants issued pursuant to such authority must meticulously conform to statutory and constitutional provisions." *Bonilla v. State*, 579 So. 2d 802, 805 (Fla. 5th DCA 1991); *See Gildrie v. State*, 113 So. 704, 705-706 (Fla. 1927); *State ex rel. Wilson v. Quigg*, 17 So. 2d 697, 701 (Fla. 1944); *Levison v. State*, 138 So. 2d 361 (Fla. 3d DCA 1962); *Hesselrode v. State*, 369 So. 2d 348, 350 (Fla. 2d DCA 1979); *State v. Lopez*, 590 So. 2d 1045, 1047 (Fla. 2d DCA 1991) (*Gersten, J., dissenting*).

In *Mylock v. State*, 750 So. 2d 144 (Fla. 1st DCA 2000), a judge issued a search warrant on the basis of oral statements by deputy sheriffs. No affidavit was submitted. The State argued that under the Conformity Clause and the United

States Supreme Court decisions Whiteley, McGrain, and Burford[2], it was unnecessary to file an affidavit. The First District said that while there are federal court of appeals decisions holding that the Fourth Amendment does not require a written affidavit, there was no United States Supreme Court decision on the point. "The United States Supreme Court…has never squarely reached the issue." Mylock, 750 So. 2d at 147.

The Mylock court concluded that "in the absence of a United States Supreme Court decision controlling the issue before us, the validity of the warrant is controlled by Florida constitutional and statutory provisions requiring that a search warrant must be supported by an affidavit." *Id*.

The Mylock analysis is applicable here. There is no United States "Supreme Court pronouncement factually and legally on point with the present case…" Daniel, 665 So. 2d at 1047 n.10. Florida's Conformity Clause is therefore not applicable.

This is not a situation where a Trial Court has ruled in contravention of United States Supreme Court precedent. The Trial Court's decision was consistent with the Florida constitutional and statutory requirements that an affidavit in support of a warrant be signed. The United States Supreme Court has never considered this issue and Florida law requires strict construction of warrant

[2] Whitely v. Warden, 401 U.S. 560 (1971); McGrain v. Daugherty, 273 U.S. 135 (1927); Ex Parte Burford, 7 U.S. 448 (1806).

requirements. It follows that Florida law controls and the Trial Court's order granting suppression was a correct application of the law.

CONCLUSION

WHEREFORE, the Defendant respectfully requests the Florida Supreme Court to reverse the decision of the Third District Court of Appeal and to uphold the Trial Court's granting of the motion to suppress.

Respectfully submitted,

By: _____
MARTIN L. ROTH, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief of Petitioner complies with the font requirements set forth in Fla. R. App. P. 9.210(2) as well as Administrative Order No. AOSC04-84, Mandatory Submission of Electronic Copies of Documents, dated July 7th, 2010.

By: *Martin L. Roth, Esq.*
MARTIN L. ROTH, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served *via* U.S. Mail: Office of the Attorney General: Nikole Hiciano, Esq., 444 Brickell Ave., Suite 650, Miami, FL 33131 on this 7th day of July 2010.

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