IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2254

ALVIN SHAWN TRACEY,
Petitioner,

- versus -

STATE OF FLORIDA,
Respondent.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4D09-3565

RESPONDENT'S BRIEF ON JURISDICTION

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Preliminary Statement

Petitioner was the Defendant in the trial court and the Appellant in the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" and "Tracey." Respondent, the State of Florida, was the Appellee in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State."

Reference to Petitioner's brief shall be (PB), followed by the appropriate page number.

A copy of the opinion issued by the Fourth District Court of Appeal on September 7, 2011 is attached as an Appendix.

Statement Of The Case and Facts

When determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion. Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1998). Petitioner seeks review of the September 7, 2011 opinion affirming his convictions. Respondent accepts Petitioner's statement of facts to the extent it is not argumentative and appears within the four corners of the opinion at issue subject to the following additions:

The Fourth District Court of Appeal recognized,

> on search and seizure issues, we are bound to follow United States Supreme Court precedent interpreting the Fourth Amendment. Art. I, § 12, Fla. Const. Under the current state of the law expressed in Knotts[1] and Karo,[2] a person's location on a public road is not subject to Fourth Amendment protection.

Tracey v. State, 69 So.3d 992, 997 (Fla. 4th DCA 2011). The district court's holding revolved around the provisions of §§ 943.23 and 934.28, Fla. Stat. Id., at 1000. Ultimately the district court held the trial court correctly denied the motion to suppress as pursuant to both State and Federal statutes; the exclusionary rule is not an available remedy. Id., at 1000.

Petitioner seeks review of this decision, alleging the Fourth District Court of

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1 United States v. Knotts, 460 U.S. 276 (1983).

2 United States v. Karo, 468 U.S. 705 (1984).

Appeal's opinion at bar expressly and directly construes the Fourth Amendment of the United States Constitution. (PB 3).

Summary of the Argument

This Court does not have jurisdiction to review the instant case. The decision of the Fourth District Court of Appeal in the instant case does not "expressly construe a provision of the state or federal constitution." Art. 5 § 3(b), Fla. Const. Therefore, this Court may not review the case at bar and should dismiss this matter.

Argument

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONSTRUE THE FOURTH AMENDMENT RATHER THE COURT APPLIED THE EXISTING FLORIDA STATUTORY LAW WHICH MIRRORS THE PROVISIONS OF THE FEDERAL LAW. (Restated).

Petitioner argues the Fourth District Court of Appeal's decision below "expressly construes a provision of the . . . federal constitution," and thus this Court possesses jurisdiction pursuant to Fla. Const. Art. 5 § 3(b). (PB 3). The district court's holding revolved around the provisions of §§ 943.23 and 943.28,

Fla. Stat. Id., at 1000. Ultimately the district court held the trial court correctly denied the motion to suppress because both State and Federal statutes provide the exclusionary rule is not an available remedy. Id., at 1000.

As the district court observed, "Federal electronic surveillance law preempts the field under Congress' power to regulate interstate communications" Id., at 997. This Court previously explained,

> The federal wiretap statute preempts the field of wiretapping and electronic surveillance and limits a state's authority to legislate in this area. State v. Rivers, 660 So.2d 1360, 1362 (Fla.1995). It allows states to adopt similar procedures authorizing state law enforcement personnel to intercept communications in a criminal investigation. 18 U.S.C. § 2516(2) (2000). Although states are free to adopt more restrictive statutes, they cannot adopt less restrictive ones. Rivers, 660 So.2d at 1362.

State v. Otte, 887 So.2d 1186, 1187-1188 (Fla. 2004). At bar, the Florida provisions regarding both electronic surveillance and available remedies for failure to comply with the statutory requirements mimic the Federal provisions. See §§ 934.21; 934.23; 934.27 and 934.28, Fla. Stat. compare with 18 U.S.C § 2701; 18 U.S.C. § 2703; 18 U.S.C. § 2707 and 18 U.S.C. § 2708. Accordingly, the district court held,

> The criminal penalties of section 934.21 and the civil remedy provided in section 934.27 are the only remedies authorized for a violation of section 934.23. Application

> of the exclusionary rule is not an option authorized by the statute.

Tracey, at 1000. The district court did not in any way expand, limit or otherwise alter the law. Rather, the district court merely applied Florida statutory law which mirrors the federal provisions.

This Court's jurisdiction extends only to the narrow class of cases specifically enumerated in Article V, Section 3(b) of the Florida Constitution. Gandy v. State, 846 So.2d 1141, 1143 (Fla. 2003). For jurisdiction to vest with this Court, the district court's opinion must expressly construe a provision of the Federal Constitution. Fla. Const. Art. 5 § 3(b). This Court has explained that, "Applying is not synonymous with Construing; the former is NOT a basis for our jurisdiction, while the Express construction of a constitutional provision is." Rojas v. State, 288 So.2d 234, 236 (Fla. 1973). This Court further explained,

> we may not accept a direct appeal based upon an Inherent construction of a Constitutional provision; it is insufficient to invoke our direct appeals jurisdiction that there was an Inherent construction of a Constitutional provision in the judgment appealed from, but rather **there must be an express ruling by the trial court which explains, defines, or overtly states a view which eliminates some existing doubt as to a constitutional provision** in order to support a direct appeal. Our direct appeals jurisdiction is not properly invoked merely because the trial court may Apply a constitutional provision to the facts before it, but rather is properly invoked as to construction of a constitutional provision

> only where the trial court has Expressly construed the constitutional provision involved.

Dykman v. State, 294 So.2d 633, 634-635 (Fla. 1973). (e.s.) (internal citations omitted). See also Ogle v. Pepin, 273 So.2d 391, 392 (Fla. 1973), adopting the definition provided at Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla. 1958).

An examination of the opinion below reveals that the district court did not explain, define or otherwise eliminate existing doubts arising from the language or terms of any constitutional provision. (Appendix). In fact, the district court specifically found the Fourth Amendment protections did not apply to a person's location on a public roadway. Tracey, at 997. Further, nowhere does the opinion of the Fourth District "expressly construe" the Fourth Amendment of the United States Constitution. *Compare*, Laborers' Int'l Union of N. America, Local 478 v. Burroughs, 541 So.2d 1160 (Fla. 1989)(Finding jurisdiction based on express construction of Art. V, § 1, Fla. Const.); City of Casselberry v. Orange County Police Benevolent Assoc., 482 So.2d 336 (Fla. 1986)(Finding jurisdiction based on express construction of Art. I, §6 and Art. III, § 14, Fla. Const.); Key Haven Associated Enterprises, Inc, v. Bd.. of Trustees of Internal Improvement Trust Fund, 427 So.2d. 153 (Fla. 1982)(Finding jurisdiction based on express

construction of Art. X, §6, Fla. Const.). The State submits that this Court does not have jurisdiction to review the Fourth District's decision in this case based upon the argument presented.

Similarly, Petitioner's argument that the opinion implicates Article I, section 23, of the Florida Constitution must fail. (PB 6). The Fourth District Court of Appeal never discussed or even cited this provision of the Florida Constitution. Therefore, the district court cannot possibly be found to have "construed," a provision in the Florida Constitution. Rojas.

Petitioner's argument for this Court to accept jurisdiction pursuant to Article V, section 3(b)(3), Florida Constitution, must fail because he has not demonstrated that the Fourth District Court of Appeals construed a provision of the federal constitution. Rather, the opinion at issue merely applied existing and controlling law. Such application does not confer jurisdiction to this Court. Rojas. Therefore, this Court must deny the petition as it is without jurisdiction to review this matter.

Conclusion

Consequently, this Court should DISMISS the in this cause as it does not have jurisdiction to review decisions which merely apply existing state statutory law.

Respectfully submitted,
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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **TATJANA OSTAPOFF, ESQUIRE**, Office of the Public Defender, Criminal Justice Building, 6th Floor, 421 Thirds Street, West Palm Beach, Florida 33401 on this ___ day of December, 2011 and electronically transmitted to appeals@pd15.state.fl.us and TOstapof@pd15.state.fl.us

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SUE-ELLEN KENNY
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Certificate of Font Compliance

I HEREBY CERTIFY that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with Times New Roman 14-point font.

_/s/_____
SUE-ELLEN KENNY
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