IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER L. CARPENTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case Number: SC15-2125

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

References to Petitioner's Initial Brief on the Merits will be made as "IB." followed by any appropriate page number(s). This case also involves references to the decisions of Smallwood v. State, 61 So. 3d 448 (Fla. 1st DCA 2011), and Smallwood v. State, 113 So. 3d 724 (Fla. 2013), which will be referred to as "Smallwood I" and "Smallwood II" respectively.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as generally supported by the record, subject to the following restatement quoted from the decision below:

> Carpenter was charged with traveling to meet a minor, solicitation of a minor, and transmission of harmful material to a minor. At the time of his arrest, law enforcement officers searched Carpenter and removed a cell phone from his person.
>
> Without a warrant, law enforcement officers retrieved from the cell phone images and data, including text messages with sexual content and explicit photos sent by Carpenter to an undercover officer posing as a 14-year-old.
>
> Carpenter filed a motion to suppress, arguing that pursuant to the Florida Supreme Court's opinion in Smallwood II, the warrantless search of Carpenter's cell phone violated the Fourth Amendment. The state argued in response that when Carpenter was arrested, the binding legal precedent in this jurisdiction was this Court's decision in Smallwood I, and the law enforcement officer acted in good faith and under binding appellate precedent when he searched Carpenter's cell phone.
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> . . .

In Smallwood I, this court held, "[T]he search of appellant's cell phone incident to his arrest was not a violation of the Fourth Amendment." In June 2012, the time of the search in this case, Smallwood I was binding appellate precedent on the issue of cell phone searches. Following the search, however, the Florida Supreme Court quashed Smallwood I, and held in Smallwood II that law enforcement officers are required to obtain a search warrant before searching the contents of a cell phone that has been seized incident to a lawful arrest.

Although Carpenter correctly challenges the legality of the warrantless search of his cell phone based upon Smallwood II, determining the legality of the search does not address the question of whether he is entitled to the remedy of exclusion of evidence obtained from the search. In Davis v. United States, --- U.S. ----, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), the United States Supreme Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Id. at 2423–24. Under Davis, where a good-faith exception to the exclusionary rule applies, a defendant is not entitled to the remedy of exclusion of evidence simply because of retroactive applicability of a new law. In Davis, the Court emphasized that the exclusionary rule is not a personal constitutional right, but is instead a "judicially created sanction" to "deter future Fourth Amendment violations." Davis, 131 S.Ct. at 2433–34 (quoting Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). The Court stated, "[W]hen binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." Id. Accordingly, the question presented in this case is not whether the evidence obtained from the warrantless search of Carpenter's cell phone should have been suppressed under the exclusionary rule, but whether the evidence was admissible based on the application of the good-faith exception to the exclusionary rule.

> At the time of Carpenter's arrest, Smallwood I was the only Florida district court decision addressing the legality of warrantless cell phone searches incident to arrest. In Pardo v. State, 596 So. 2d 665 (Fla. 1992), the Florida Supreme Court held that decisions of a district court of appeal constitute binding appellate precedent and "represent the law of Florida unless and until they are overruled by this Court." Id. at 666. Accordingly, under Pardo, this Court's decision in Smallwood I was binding on all Florida trial courts until it was later reversed in Smallwood II. In conducting the search of Carpenter's phone, the officers acted pursuant to the authority set forth in this Court's decision in Smallwood I. Thus, under Pardo and Davis, it was objectively reasonable for the officers to rely on the binding appellate precedent of Smallwood I when conducting the warrantless search of Carpenter's cell phone
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> . . .
>
> The search of Carpenter's cell phone falls within the good-faith exception to the exclusionary rule, and thus, the trial court erred in granting the motion to suppress.

State v. Carpenter, 158 So. 3d 693 (Fla. 1st DCA 2015).

SUMMARY OF ARGUMENT

The decision below properly found that the good-faith exception to the exclusionary rule applied in Petitioner's case. At the time law enforcement searched Petitioner's phone they were authorized to do so under binding appellate precedent. The purpose of the exclusionary rule is to deter police misconduct. This purpose is not furthered by excluding evidence which was seized in objectively reasonable reliance on binding appellate precedent. Even though this precedent would later be quashed, at the time the search was executed law enforcement was engaged in conscientious and informed police work. The remedy of exclusion is not a personal constitutional right, and its purpose would not be furthered by penalizing law enforcement for a search authorized by then binding appellate precedent.

ARGUMENT

ISSUE: WHETHER THE DECISION BELOW PROPERLY DETERMINED THAT SMALLWOOD I WAS BINDING APPELLATE PRECEDENT SUFFICIENT TO JUSTIFY THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE. (RESTATED)

Standard of Review

This issue is reviewed *de novo*. See Daniels v. State, 121 So. 3d 409 (Fla. 2013) ("The conflict issue in this case presents a pure question of law and this Court's review is therefore *de novo*.").

Merits

The decision below properly found that Smallwood I was binding appellate precedent at the time law enforcement searched Petitioner's cell phone, therefore it fell within the good-faith exception to the exclusionary rule. Petitioner avers the decision below erred because Smallwood I was a "pipeline" case involving an area of quickly developing Fourth Amendment jurisprudence, requiring reconsideration of what constitutes "binding appellate precedent." (IB. 7). However, the decision below properly determined that exclusion was not proper, because Smallwood I was binding appellate precedent at the time of the search. Contrastingly, Second District Court of Appeal addressed a similar situation in Willis v. State, 148 So. 3d 480, 481 (Fla. 2d DCA 2014), holding the opposite was true of Smallwood I, giving rise to the conflict at issue. This Court should affirm the decision of the First District Court of Appeal.

The United States Supreme Court case of Davis v. United States, 564 U.S. 229 (2011), provides substantial guidance on this issue. The Fourth Amendment protects the right of the people to be free from unreasonable searches and seizures. Davis, 564 U.S. at 236. The exclusionary rule provides enforcement of this right by barring the prosecution from introducing evidence obtained in violation of the Fourth Amendment. Id. Therefore, use of the exclusionary rule compels respect for this constitutional guarantee. Id. (citations omitted). However, exclusion is not reflexive, but rather is a separate issue subject to exceptions, and only applies where its purpose is effectively advanced. Id. at 244. That purpose is deterrence. Id. at 238. Accordingly, where exclusion would fail to yield an appreciable deterrent for unlawful police conduct, exclusion is "clearly . . . unwarranted." Id. (quoting United States v. Janis, 428 U.S. 433, 454 (1976)).

"Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one[,]" because "[e]xclusion exacts a heavy toll on both the judicial system and society at large." Id. at 237 (quoting Hudson v. Michigan, 547 U.S. 586, 596 (2006)). Exclusion "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." Id. Accordingly, for suppression to be the appropriate remedy, the deterrence benefits of exclusion must outweigh the cost of--in many cases--setting the criminal loose without punishment. Id.

The deterrent value of exclusion is strong when the police exhibit deliberate, reckless, or grossly negligent behavior. Id. at 238. However,

this rationale loses much of its force when police act with an "objectively reasonable good-faith belief" that their conduct is lawful. Id. Accordingly, the Davis Court recognized that "good-faith" can justify an exception to the exclusionary rule's application. Id. The court noted that this exception had previously applied to searches pursuant to a warrant or statute which was later invalidated, because judicial officers and legislators are not the focus of the rule. Id. at 239. The question in Davis was whether to apply the exclusionary rule when police conduct a search in objectively reasonable reliance on binding judicial precedent. Id. Ultimately, the court found the good-faith exception would apply to such scenarios.

At the time of Davis' arrest, New York v. Belton, 453 U.S. 454 (1981), was binding appellate precedent outlining when the search of a vehicle's passenger compartment may be conducted incident to a recent occupant's arrest. Id. However, those rules would later be deemed unconstitutional under the standard set forth by Arizona v. Gant, 556 U.S. 332 (2009), which was decided while Davis' case was on appeal. Id. at 239-40. The court explained, the police in Davis' case acted in strict compliance with the then binding precedent of Belton. Id. at 240. Accordingly, their actions were nonculpable, innocent police conduct. Id. The court further explained, that exclusion would not have been applicable if the officers had reasonably relied on a warrant, erroneous government database, or statute authorizing such conduct, because it could not logically contribute to future deterrence. Id. at 240-41. The court found that the same should be true of "Davis's attempt here to

penalize the officer for the appellate judges' error." Id. at 241 (internal quotations omitted).

The Davis court commented that "[r]esponsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." Id. (quoting Hudson, 547 U.S. at 599). The court also explained, "when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." Id. (emphasis as provided). The court realized that "all that exclusion would deter in this case is conscientious police work[,]" because exclusion in such a case can only discourage an officer from doing his duty. Id. In the case at bar, the same is true of law enforcement's reliance on binding appellate precedent in executing the search of Petitioner's cell phone.

"The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (quoting Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980)). Thus, in the absence of interdistrict conflict, decisions of the District Courts of Appeal bind all Florida trial courts. However, the decision of one District Court of Appeal is merely persuasive on a sister District Court. Id. The purpose of this rule is to preserve stability and predictability in the law. Id. (quoting State v. Hayes, 333 So. 2d 51, 53 (Fla. 4th DCA 1976)). In the case at bar, Smallwood I was the only relevant

decision at the time of the search conducted in both Carpenter and Willis, accordingly it was binding appellate precedent on all Florida trial courts.

In Smallwood I, the First District Court of Appeal held that the search of a defendant's cell phone incident to his arrest was not a violation of the Fourth Amendment. State v. Carpenter, 158 So. 3d 693, 695 (Fla. 1st DCA 2015). At the time of the search in Carpenter, Smallwood I was binding appellate precedent on the issue of cell phone searches. Id. The same was true of the cell phone search conducted in Willis. Willis v. State, 148 So. 3d 480, 481 (Fla. 2d DCA 2014). While Petitioner's case was pending in the trial court, Smallwood I was undone by Smallwood II; accordingly, the search of Petitioner's phone was now considered illegal. Carpenter, 158 So. 3d at 695.[1] In each case, at the time law enforcement conducted their search Smallwood I authorized such a search. This was the only decision in Florida which touched on the relevant issue. Therefore, Smallwood I was binding appellate precedent on all trial courts in Florida.

For purposes of this Court's analysis, it is of no moment that Smallwood I was quashed by Smallwood II while Petitioner's case was pending. Although Smallwood II made the search conducted by law enforcement illegal, it did not mandate exclusion of the seized evidence. As was the case in Davis, the application of the exclusionary rule was not reflexive, but rather subject

[1] It is unclear procedurally from the Willis decision when Smallwood II was rendered, but suffice it to say the opinion was at least issued while Willis' case was pending appeal. See Willis, 148 So. 3d at 482.

to the good-faith exception for law enforcement's reliance on then binding appellate precedent. If the purpose of the exclusionary rule is to deter police misconduct, that purpose cannot be furthered by excluding evidence seized when law enforcement was objectively reasonable in relying on binding appellate precedent. As noted by Davis, penalizing the officer for the appellate judges' error cannot logically contribute to the deterrence of Fourth Amendment violations. What's more, in the instant case law enforcement testified that at the time they searched Petitioner's cell phone they were operating under the authority of Smallwood I. Carpenter, 158 So. 3d at 694-95. While this subjective consideration is not part of the proper objective analysis, it highlights the potential for conscientious police work lauded by the United States Supreme Court in Davis, which should not be discouraged by use of the exclusionary rule.

Under similar facts, the Second District Court of Appeal failed to apply the good-faith exception to the exclusionary rule in Willis. Willis, 148 So. 3d at 484. Rather, the court delineated the following:

> [W]e are not convinced that our supreme court intends for one recent decision from another Florida district court of appeal on such a controversial issue to create "binding precedent," at least in other districts, for purposes of the good-faith exception as announced in Davis.

Id. at 483. The decision below correctly noted the contrived nature of such a rule, explaining "the Willis majority is unsupported by any authority and is completely at odds with the rule established in Pardo." Carpenter, 158 So. 3d at 696. To this extent, the dissent in Willis correctly acknowledged

that although there is a split among other courts as to what constitutes "binding appellate precedent," Pardo clarifies that definition for Florida courts. Willis, 148 So. 3d at 485 (Morris, J. Dissenting). Accordingly, Pardo justifies the application of the good-faith exception for cases such as Carpenter and Willis.

The majority opinion in Willis erred by unfairly comparing what is binding appellate precedent between district courts, with what an officer can rely on in good-faith. First the majority correctly noted that the rule in Pardo "was created to establish consistency within Florida law in light of our unique system in which the intermediate appellate courts are intended to be the normal final courts of review." Id. However, the court then relied on the fact that "an opinion from a single district court is not binding on another district court in Florida[,]" to inexplicably conclude the following:

> We are not inclined to believe that the rule announced in Pardo should be used in the Fourth Amendment context to determine whether evidence from a warrantless search is admissible.

Id. Therefore, the court declined to find Smallwood I as binding appellate precedent on the officers, because at the time of the search there was no decision from the Florida Supreme Court or the United States Supreme Court, and "the issue of cell phone searches was clearly an open and unresolved legal issue." Id. While, this may have been true of review between sister District Courts, it was simply not true for review in a trial court located in these districts.

Provided that Smallwood II had not been decided, a sister District Court of Appeal could have declined to follow the First District's decision, and conversely held that evidence seized pursuant to Smallwood I was subject to suppression. However, that truth did not taint an officer's actions for relying on Smallwood I as it relates to the good-faith exception. While lawyers may argue on appeal in a sister District Court about the validity of the rule from Smallwood I, law enforcement would be acting in good-faith by relying on Smallwood I, where that was the only case addressing the search at issue in the trial court. The Willis court tragically misapplied Davis in its seemingly contradictory holding that "*without faulting the officers involved*, we conclude that the State cannot rely upon the good-faith exception to prevent the exclusion of this evidence." Id. (emphasis added). In this way the Willis court truly found that the officers acted in good-faith, but decided to penalize the State anyways; this is exactly the type of unnecessarily penal application of the exclusionary rule that the Davis court sought to prevent when it espoused a good-faith exception to the rule.

Judge Morris' dissent in Willis provides further beneficial analysis on the majority's error. Specifically, Judge Morris highlights the following:

> [T]he majority nullifies the holding of Pardo in cases involving facts like the present case and ignores the extensive analysis in Davis as to both the purpose and reach of the good-faith exception.

Id. at 486. Judge Morris goes on to explain that the majority misses the issue in its attempt to circumvent Pardo. Id. at 487. In this regard Judge Morris states the following:

> The majority notes that an opinion from a single district court is not binding on another district court in Florida. But that is not the issue here. Here, the issue is whether the good-faith exception applies where law enforcement officers in Florida objectively reasonably relied on the single Florida district court case addressing a Fourth Amendment issue.

Id. Thus, the issue was not so much whether the precedent may be subject to further appellate review, but whether law enforcement may act in good-faith by relying on the only appellate precedent providing guidance. Finally, Judge Morris outlines the absurdity in this rule with the example that follows:

> [I]f a single Florida district court decided in the first instance that a particular action violated the Fourth Amendment, then law enforcement officers in that district would have to either refrain from engaging in such conduct or face the prospect of having evidence suppressed, whereas law enforcement officers in other districts could freely engage in that conduct without fear of having evidence suppressed.

Id. This example elucidates the problem in Willis, and runs counter to this Court's recognition in Pardo that its rule was necessary "to preserve stability and predictability in the law." Pardo, 596 So. 2d at 666.

Petitioner's argument--in its reliance on Willis--similarly focuses on the application of Smallwood II to law enforcement's actions, rather than whether those actions warrant exclusion. (IB. 7-10). The fact that the relevant search is now known to be a violation of the Fourth Amendment does not conclude the analysis. This Court must still weigh the deterrence benefits against the exclusionary rule's heavy costs. Therefore, Petitioner's argument that depriving him of the Smallwood II standard is inconsistent with the principles of the Fourth Amendment, is unpersuasive. (IB. 11). "Exclusion is

not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." Davis, 564 U.S. at 236 (citations and internal quotations omitted). Accordingly, Petitioner is not entitled to exclusion as a matter of right. Ultimately, the evidence should not be excluded where the deterrent purpose of the rule would not be furthered, as was properly noted by the decision below.

Finally, Petitioner's argument regarding retroactivity is unpersuasive. (IB. 11-15). Again, Davis provides guidance on this analysis. Retroactive application categorically allows a new rule to be "available on direct review as a *potential* ground for relief." Davis, 564 U.S. at 243 (emphasis as provided in original). "Retroactive application does not, however, determine what appropriate remedy (if any) the defendant should obtain." Id. (citation and internal quotation omitted). Therefore, retroactivity only raises the question of whether exclusion is necessary, it does not answer it. Id. at 243-44. The question here becomes one of remedy, and Petitioner seeks application of the exclusionary rule, "[b]ut exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred." Id. at 244 (citation omitted). The deterrence purpose of the exclusionary rule would not be served in the instant case; accordingly, retroactive application does not determine this issue and suppression of the evidence is unnecessary.

The decision below properly found the good-faith exception to the exclusionary rule applied to Petitioner's case. Law enforcement was acting on binding appellate precedent when it executed the search of his cell phone.

The subsequent change in the relevant appellate precedent does not mandate exclusion, because the purpose of the exclusionary rule would not be served by such a result. Excluding evidence in the case at bar would deter no police misconduct, rather it would levy a sizeable social cost.

CONCLUSION

Based on the foregoing discussions, Respondent respectfully requests this Honorable Court affirm the decision of the First District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by electronic mail to the following: Ross A. Keene, Counsel for Petitioner, at rkeene@rosskeenelaw.com, on August 22, 2016.

CERTIFICATE OF COMPLIANCE

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