IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NO.: 1D01-4625

REYNELDON DAVIS

Appellant-Petitioner,

v.

STATE OF FLORIDA

Appellee-Respondent.

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT
(ORIGINAL)

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Reply to State's Answer to Appellant's Argument I. - An Initial *Terry* Stop Immediately Ripened into a Full-scale Search Without Any Intervening Probable Cause, and Such Conduct by the Police, Given That a Canine Unit Had Been Prearranged to Be on Stand-by and Was Available Within Five Minutes of Being Requested but Was Not Called until after Twenty Minutes of Illegal Search, Exceeded the Permissible Bounds of a *Terry* Investigative Detention.

A. State Implicitly Concedes Defendant-Appellant's *Terry* Stop Argument is Correct.

The State never challenges the correctness of the Defendant-Appellant's argument that the initial *Terry* stop ripened into a full-scale search without any intervening probable cause, and if so, that the permissible scope of the *Terry* stop was exceeded. The State has, therefore, implicitly conceded that the trial court erred in ruling to the contrary, and implicitly conceded that the state erred below, in arguing to the contrary to the trial court.

B. State Misapplies the Tipsy Coachman Rule.

The State devotes its entire merits argument to an argument that was never made below - that the officers had probable cause for the initial stop, thereby attempting to bypass the unconstitutionality of the search that followed.

At the trial court level the State made one off-hand reference to probable cause, cited in footnote 2 of the State's answer brief. This was *not* the State's position below, and the State cannot with the candor required under the Rules of Professional Resposnsibility now be heard to suggest that it was fairly presented as an alternative ground to the trial court. The State never presented

to the trial court any argument in support of probable cause, either in testimony from its witnesses, in any written filing, or otherwise. Instead, the State's sole argument below was based on a *Terry* stop rationale. When the trial court *adopted the State's position* that the stop was a *Terry* stop, the State did not object, and did not argue probable cause as an alternative basis for upholding the search.[1] The State only cited *Terry* stop cases to the trial court and relied exclusively on *Terry* for its right to proceed with the search.

Now for the first time on appeal the State has decided to change horses and raise an argument that was not considered by the trial court and which was not tested in an adversarial manner before the trier of fact. There may be occasions where a party can properly assert an alternative ground for upholding a trial court's erroneous ruling, but those are cases in which the appellee raised the argument below giving the appellant the opportunity to make a record to rebut the theory. It makes a mockery of the adversarial system to allow a party to argue apples at the trial court then oranges on appeal.

We would agree that under the Tipsy Coachman doctrine, an

[1] Oddly the State cites as the appropriate standard of review the truism that "[a] trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness . . ." and "a trial court's ruling on a motion to suppress is presumptively correct . . ." Then the State proceeds to argue that the trial court's ruling is wrong. With that much we are in agreement with the State.

appellee can *in proper circumstances* argue an alternative basis for upholding a trial court order, but such circumstances are not found in a case where the State made no effort to apprize the Defendant of the theory of the search and seizure and allow the Defendant an opportunity to make an evidentiary record to rebut the argument.

The State cites *Dade County School Bd. v. Radio Station WQBA,* 731 So.2d 638 (Fla. 1999) for the Tipsy Coachman rule. However, this is what *Dade County* stated:

> Generally, if a claim is not raised in the trial court, it will not be considered on appeal. *See Arky, Freed,* 537 So.2d at 563 (denying recovery on a claim not pled with sufficient particularity for a defense to be prepared); *see also Dober v. Worrell,* 401 So.2d at 1324. In *Dober,* this Court quashed a district court's decision to allow a party to prevail on issues not framed by the pleadings. In *Dober,* Justice Overton adamantly professed this Court's displeasure with the idea that a claim could be successfully raised at the appellate level:
>
> > It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure. *Id.* at 1324.
> > *Dade County School Bd. v. Radio Station WQBA,* 731 So.2d 638, 644 (Fla. 1999)

The Florida Supreme Court cited with approval *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So.2d 561 (Fla. 1988)*. Arky* had held:

> Arky, Freed contends that the Court's holding in *Dober v. Worrell,* 401 So.2d 1322 (Fla.1981), and its progeny

required that the trial court on remand direct a verdict in the firm's favor. In *Dober,* the Court considered a decision where the Fourth District concluded that the defendant was entitled to prevail on the issues framed by the pleadings, yet remanded the case to allow the plaintiff to amend. This Court quashed the decision of the district court in the interests of judicial economy and finality:

> It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings *to assert matters not previously raised* renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure.
> *Id.* at 1324 (emphasis added).

This policy is reiterated throughout this state's precedent. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So.2d 561, 562 (Fla. 1988)

Dober, which was cited with approval by the Florida Supreme Court had held:

> In other areas of the law we have previously held it inappropriate to raise an issue for the first time on appeal. For example, an appellate court will not consider issues not presented to the trial judge either on appeal from an order of dismissal, *Lipe v. City of Miami*, 141 So.2d 738 (Fla.1962), or on appeal from final judgment on the merits, *Cowart v. City of West Palm Beach*, 255 So.2d 673 (Fla.1971); *Mariani v. Schleman*, 94 So.2d 829 (Fla.1957); *Jones v. Neibergall*, 47 So.2d 605 (Fla.1950). We now add to this list and hold it inappropriate for a party to raise an issue for the first time on appeal from summary judgment. *Dober v. Worrell,* 401 So.2d 1322, 1323 -1324 (Fla. 1981)

An example of circumstances in which it *may* be appropriate to apply the Tipsy Coachman doctrine is found in *Simmons v. State,* 790

So.2d 1177, 1178 (Fla. 3rd DCA 2001). In *Simmons* at the trial court the State had argued that certain evidence was admissible under the *Williams* rule exception to show intent. The trial court, however, disagreed with the State's argument, and admitted the testimony on the basis that it was inextricably intertwined. When the defendant appealed, the State reasserted its *Williams* rule rationale on appeal. The Third District Court of Appeal upheld the admission of the disputed testimony on *Williams* rule grounds, citing the Tipsy Coachman doctrine.

In the *Simmons* case the Defendant was not prejudiced by application on appeal of an argument that was raised below, because the defendant had been allowed an opportunity to make an appropriate evidentiary record, if it could do so, to rebut the theory.

C. The Criminal Appeal Reform Act Prohibits Application of the Tipsy Coachman Doctrine in Criminal Appeals.

The Criminal Appeal Reform Act, Florida Statutes § 924.051 *et seq.* provides in pertinent part as follows:

> (8) It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

This provision pertains equally to the State as well as the Defense, and to hold otherwise would be a denial of Equal

Protection under the United States Constitution. In any event, the plain language of the statute directs Florida Courts that all procedural bar rules be *fully enforced.* The Statute does not limit the application of subsection eight's mandate that procedural bar rules be strictly enforced only against criminal defendants. The same policy rationale that is set forth in the statute of saving judicial resources and having finality of judgments applies with equal force to both parties to an appeal. The State cannot choose to have one set of rules for criminal defendants and another for itself. Fundamental fairness, Due Process and Equal Protection would prohibit a "heads I win, tails you lose" appellate rule scheme. In any event, that is not what the legislation purports to do. The legislation applies to the State with equal force as against the criminal defendant.

Florida Courts, including this Court, have routinely prevented either party to an appeal from raising an issue for the first time at the appellate level. For example, in *Randi v. State*, 182 So.2d 632 (Fla. 1st DCA 1966), this Court said:

> The issue respecting the constitutionality of the statute in question was neither raised in the trial court, nor was it passed upon by the trial judge in this proceeding. Such issue may not be raised for the first time by the brief on appeal and is therefore not properly before this court for consideration. (Cited in *Sanford v. Rubin,* 237 So.2d 134, 137 (Fla. 1970))

It would be a denial of Due Process as well as Equal Protection to allow the State to proceed in such a dilatory and

deceptive manner.

D. Florida Statutes § 933.13 Does Not Permit Application of the Tipsy Coachman Doctrine to Fourth Amendment Issues.

Recall also that under the Fourth Amendment the burden is on the State to establish probable cause for a warrantless search and seizure. We submit that this burden must be met before the neutral fact finder - not for the first time before a court of appeal on a cold record, when the fact finder and adversary below were misled as to the basis for the Fourth Amendment warrant exception.

Florida Statute § 933.13 provides:

> (1) The provisions of the opinion rendered by the Supreme Court of the United States on March 2, 1925, in that certain cause wherein George Carroll and John Kiro were plaintiffs in error and the United States was defendant in error, reported in 267 United States Reports, beginning at page 132, relative to searches and seizures of vehicles carrying contraband or illegal intoxicating liquors or merchandise, and construing the Fourth Amendment to the Constitution of the United States, are adopted as the statute law of the state applicable to searches and seizures under s. 12, Art. I of the State Constitution, when searches and seizures shall be made by any duly authorized and constituted bonded officer of this state exercising police authority in the enforcement of any law of the state relative to the unlawful transportation or hauling of intoxicating liquors or other contraband or illegal drugs or merchandise prohibited or made unlawful or contraband by the laws of the state.
>
> (2) The same rules as to admissibility of evidence and liability of officers for illegal or unreasonable searches and seizures as were laid down in said case by the Supreme Court of the United States shall apply to and govern the rights, duties and liabilities of officers and citizens in the state under the like provisions of the Florida Constitution relating to searches and seizures.
>
> (3) All points of law decided in the aforesaid case

> relating to the construction or interpretation of the provisions of the Constitution of the United States relative to searches and seizures of vehicles carrying contraband or illegal intoxicating liquors or merchandise shall be taken to be the law of the state enacted by the Legislature to govern and control such subject.

There is no Tipsy Coachman doctrine in United States Supreme Court Fourth Amendment jurisprudence, and under Florida Statutes § 933.13, the Florida Courts cannot unilaterally engraft such a doctrine on the Fourth Amendment.

E. Even if The Tipsy Coachman Rule Applied, The State Still Fails Because the Evidence Does Not Support a Finding that The Officer Who Ordered the Stop Had Probable Cause Under the Fourth Amendment.

Because the trial court did not make a finding that there was probable cause for the initial stop and search of appellant's automobile, the State does not come to this Court with a fact finding clothed in any presumption of correctness. Indeed just the opposite is true. The trial court implicitly found that there was no probable cause for the initial stop, and that implicit finding is instead clothed with a presumption of correctness, and the burden is on the State to show that the trial court's fact finding was clearly erroneous. That it has not attempted and cannot do.

Even were the burden not on the State to overcome the trial court's contrary fact finding, and even if the burden under the Fourth Amendment and § 933.13 were not on the State to establish an exception to the Fourth Amendment warrant requirement, the search in this case was not reasonable and there was no probable cause to support it.

There was no probable cause for the search of this automobile. This is a classic case of bare suspicion, of a hunch, and frankly of a hunch that the lead detective felt to be so weak that he had to bolster it at trial by lies about the cell site data.[2]

Reply to State's Answer to Appellant's Argument II. - The Trial Court Erred in Denying Davis' Motion for Mistrial Based on the State's Intentional and Prejudicial Discovery Violation of Not Disclosing to the Defense the Pertinent Cell Site Location Records, Which Were Not Disclosed until the Trial Was in Process, and the Belated Disclosure of Which Prevented the Defense from Effectively Cross-examining the State's Key Witness.

Appellant rests on his initial brief.

Reply to State's Answer to Appellant's Argument III. - Sentencing Issues.

A. Court Lacked Authority to Impose Habitual Offender Sentence for Drug Trafficking Offenses.

The State's only authority for its position that the drug trafficking statute does not trump the habitual offender statute is a citation to *Woods v. State*, 807 So.2d 727 (Fla. 1st DCA 2002). *Woods* does make the statement that a drug trafficking offense may be habitualized, but the statement is clearly *dicta*, was not the issue in the case, was not the matter briefed or argued, and has no precedential value. As far as counsel for appellant Davis is aware, there is no precedential authority for the state's position and the issue presented in this case is one of first impression.

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[2] In an odd twist, the State attempts to use the cell site data to support its probable cause argument as to Issue One, and then in Issue two, argues that the cell site testimony was not important.

In a nutshell our argument is as follows: the drug trafficking statute *mandates* certain sentences for persons convicted as drug traffickers, using the familiar “shall” mandatory language. The HO statute, on the other hand, sets forth a discretionary sentencing scheme, using the familiar “may” statutory language. When sentencing schemes are in conflict, the mandatory trumps the discretionary. This principal of statutory construction is fundamental hornbook law, and there is no reason that it should not apply in this particular instance.

B. *Apprendi* Issue.

This issue is raised merely to preserve it for further review.

C. Inadequate Fact Findings for HO Sentence.

Our argument is that even after the amendment to the habitual offender statute, the sentencing court still must make fact findings that a habitual offender sentence is necessary for the protection of the public before imposing such a sentence. We submit that all the amendment to the HO statute changed is that the trial court does not need to make such findings *in writing*, an oral finding on the record is sufficient.

The state cites *dicta* from a case that *reversed* a habitual offender sentence for the proposition that such fact findings are no longer required. However that *dicta* from *Pankhurst v. State*, 646 So.2d 727 (Fla. 1994), is based on a citation to *King v. State*, 681 So.2d 1136 (Fla. 1996).

However, *King* clearly states just the opposite of the proposition for which it is cited. *King* states - and even that is *dicta* - that fact findings are not required *when the court elects to not sentence the defendant as a habitual offender*.

There simply is no authority for the proposition that record fact findings are no longer required before a habitual offender sentence may be imposed, and the plain language of the statute itself provides otherwise.

D. Separate Proceeding for HO.

The State cites no authority for its argument that Davis is not entitled to the separate habitual offender sentencing proceeding *mandated by the legislature* - an argument that is flatly contradicted by the plain language of the statute itself.

E. Did *Taylor's* Declaration that the 1999 Amendment of the Trafficking Statute was Unconstitutional Somehow Cause the Previous Version of the Statute to Spring Back Into Existence and Save Davis's Conviction.

This is a fascinating constitutional law question that deserves fuller briefing than the page limitations of the original brief or this reply brief permit. When a Florida Court decides that a Florida statute is unconstitutional, as amended by the legislature, does the prior version of the statute before the unconstitutional amendment somehow spring back to life? If so, by what authority? This is not a estates and trusts question and the

principle of testamentary revival does not apply.[3]

F. One Last But Important Argument - The State Cannot Have it Both Ways - If Davis is to be Sentenced as an Habitual Offender Because the HO Sentencing Scheme Can Trump the Drug Trafficking Sentencing Mandate, then Davis Cannot Simultaneously Be Sentenced as a Drug Trafficker for Purposes of the Drug Trafficking Fine of $250,000.

The State wants to have its cake and eat it too. When it comes to the term of imprisonment, the State argues that the HO scheme can trump the drug trafficking sentencing scheme, and it was legal to sentence Davis to a HO sentence. But then when we point out that the Court imposed a drug trafficking fine under the drug trafficking statute as part of the same sentence on the same count, the State argues that is okay, because he is being sentenced as a drug trafficker. We submit it is one or the other but not both.

[3] In the law of estates and trusts if a later will is declared invalid, the prior will springs back into existence.

CONCLUSION

Appellant Davis respectfully requests this Honorable Court reverse his conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Davis certifies that the size and style of type used in this brief is 12 point Courier or Courier New.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Assistant Attorney General Robert Wheeler, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, by hand delivery, this August 16, 2002.

____
William Mallory Kent