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

APPEAL NO.: 1D06-3043

STATE OF FLORIDA
Appellant-Petitioner,

v.

MANUEL GOMEZ
Appellee-Respondent.

A DIRECT APPEAL OF AN ORDER GRANTING
A MOTION SUPPRESSING EVIDENCE
FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT,
DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND OF THE FACTS 1

STANDARDS OF REVIEW 2

SUMMARY OF ARGUMENTS 4

ARGUMENTS 9

I. THE STATE MAY NOT TAKE THIS APPEAL BECAUSE THE STATE FAILED TO PROPERLY PRESERVE THE ISSUE FOR APPEAL BECAUSE THE LEGAL ARGUMENT PRESENTED TO THE TRIAL COURT WAS NOT SUFFICIENTLY PRECISE TO APPRISE THE TRIAL COURT OF THE ARGUMENT NOW BEING MADE ON APPEAL 9

II. THE THIRTY MINUTE DELAY BETWEEN ARREST AND SEARCH, CONDUCTED AFTER CALLAWAY, THE PASSENGER WAS HANDCUFFED AND IN THE BACK OF THE PATROL CAR, TOOK THIS SEARCH OUTSIDE THE SAFE HARBOR OF *NEW YORK v. BELTON,* BECAUSE THE SEARCH WAS NOT DONE CONTEMPORANEOUSLY WITH THE ARREST, AS REQUIRED BY *BELTON* 11

III. *COOLIDGE v. NEW HAMPSHIRE*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), AND *STATE v. BENNETT*, 516 So.2d 964 (Fla. 5th DCA 1987), PRECLUDE THE SEARCH OF AN AUTOMOBILE RECENTLY OCCUPIED BY AN ARRESTED PERSON WHERE THE EXIGENCY FOR THE SEARCH IS CREATED BY THE STATE 19

IV. *BELTON* MUST BE HARMONIZED WITH *TERRY v. OHIO* AND ITS FLORIDA PROGENY, WHICH INVALIDATE SUBSEQUENT POLICE CONDUCT TAINTED BY AN ILLEGAL OR ILLEGALLY PROLONGED DETENTION, AND SUCH HARMONIZATION WOULD HOLD THE CONTINUED ILLEGAL DETENTION OF GOMEZ AND HIS AUTOMOBILE RENDERED THE DELAYED SEARCH INCIDENT TO CALLAWAY'S ARREST UNREASONABLE FOR BELTON'S CONTEMPORANEITY REQUIREMENT 25

CONCLUSION 28

CERTIFICATE OF TYPE SIZE AND STYLE 29

CERTIFICATE OF SERVICE 29

TABLE OF CITATIONS

Cases - Merits Issues

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) 21

New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981) 12, 21, 24, 26, 27

State v. Bennett, 516 So.2d 964 (Fla. 5th DCA 1987) 20-24

State v. Deferance, 807 So.2d 806 (Fla. 4th DCA 2002) 11, 15

State v. Howard, 538 So.2d 1279 (Fla. 5th DCA 1989) 22-24

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) 25, 27

Thomas v. State, 761 So.2d 1010, 1010-1011 (Fla. 1999) 23, 24

United States v. Seals, 987 F.2d 1102, 1106 (5th Cir. 1993) 17

United States v. Vasey, 834 F.2d 782, 787-788 (9th Cir. 1987) 16

United States v. Wells, 347 F.3d 280 (8th Cir. 2004) 17

Cases - Standard of Review Related

Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 644-45 (Fla. 1999) 3, 22

Harford v. State, 816 So.2d 789, 791 (Fla. 1st DCA 2002) 2, 15

Ingram v. State, 928 So.2d 423, 428 (Fla. 1st DCA 2006) 2

Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001) 3, 22

Robertson v. State, 829 So.2d 901, 906-07 (Fla. 2002) 3, 22

Schoenwetter v. State, 931 So.2d 857 (Fla. 2006) 2

State v. Pitts, 936 So.2d 1111, 1133 (Fla. 2nd DCA 2006) 3, 22

Statutes

Florida Statutes, § 924.051 . . . . . 4, 9

Other Authorities

Fourth Amendment to the United States Constitution 18, 22, 26, 27

STATEMENT OF THE CASE AND OF THE FACTS

Appellee Gomez accepts the State's statement of the case and facts. Record references for any additional facts required for the arguments herein are appropriately cited in the arguments, *infra*.

STANDARDS OF REVIEW

Evidence and Evidentiary Inferences Must Be Viewed in the Light Most Favorable to Affirm the Trial Court's Ruling

In reviewing the denial of a motion to suppress, we view the evidence and its reasonable inferences in a light most favorable to affirming the trial court's ruling. *See Harford v. State,* 816 So.2d 789, 791 (Fla. 1st DCA 2002), cited in *Ingram v. State,* 928 So.2d 423, 428 (Fla. 1st DCA 2006). Although the motion under review in this appeal was granted, the same evidentiary inferences apply, that is, the evidence and inferences from the evidence are to be viewed in the light most favorable to affirming the trial court's ruling.

Independent Review of Mixed Questions of Law and Fact

"Appellate courts should accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues." *Schoenwetter v. State,* 931 So.2d 857 (Fla. 2006).

Tipsy Coachman Rule

Even if the State shows that the trial court's reasoning in suppressing the evidence was erroneous or that the appellee did not specifically articulate the specific

basis for proper affirmance of the ruling on the motion to suppress, under the tipsy coachman doctrine, the trial court's suppression must be affirmed if the record before the court of appeals establishes a proper basis for the trial court's ruling, *see Robertson v. State,* 829 So.2d 901, 906-07 (Fla. 2002); *Dade County School Board v. Radio Station WQBA,* 731 So.2d 638, 644-45 (Fla. 1999), and *Jaworski v. State,* 804 So.2d 415, 419 (Fla. 4th DCA 2001), cited in *State v. Pitts,* 936 So.2d 1111, 1133 (Fla. 2nd DCA 2006).

SUMMARY OF ARGUMENTS

I. THE STATE MAY NOT TAKE THIS APPEAL BECAUSE THE STATE FAILED TO PROPERLY PRESERVE THE ISSUE FOR APPEAL BECAUSE THE LEGAL ARGUMENT PRESENTED TO THE TRIAL COURT WAS NOT SUFFICIENTLY PRECISE TO APPRISE THE TRIAL COURT OF THE ARGUMENT NOW BEING MADE ON APPEAL.

The State rests its entire argument on *New York v. Belton*. The State did not sufficiently preserve the *Belton* issue for appeal. Under Florida Statutes, § 924.051, a criminal appeal may not be taken unless an error has been properly preserved or is fundamental. "Preserved" means that the legal argument presented to the trial court was "sufficiently precise" to fairly apprise the trial court of the argument being made on appeal. § 924.051(1)(b). At the trial court the State never cited *Belton* or any of its progeny nor did it make a plain, express and sufficiently precise *Belton* argument, therefore the *Belton* issue was not properly preserved, and the State may not take this appeal.

II. THE THIRTY MINUTE DELAY BETWEEN ARREST AND SEARCH, CONDUCTED AFTER CALLAWAY, THE PASSENGER WAS HANDCUFFED AND IN THE BACK OF THE PATROL CAR, TOOK THIS SEARCH OUTSIDE THE SAFE HARBOR OF *NEW YORK v. BELTON,* BECAUSE THE SEARCH WAS NOT DONE CONTEMPORANEOUSLY WITH THE ARREST, AS REQUIRED BY *BELTON*.

The State's argument is that the search was authorized under *New York v.*

Belton as a search incident to the arrest of a passenger of Gomez's car.[1] This argument fails because the search was delayed to the point that it no longer satisfied the express contemporaneity requirement of *Belton*. The record indicates that the search was conducted approximately thirty minutes after the arrest of the passenger. Courts have held delayed searches of as little as 30-45 minutes exceed the permissible scope of *Belton*.

III. *COOLIDGE v. NEW HAMPSHIRE*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), AND *STATE v. BENNETT*, 516 So.2d 964 (Fla. 5th DCA 1987), PRECLUDE THE SEARCH OF AN AUTOMOBILE RECENTLY OCCUPIED BY AN ARRESTED PERSON WHERE THE EXIGENCY FOR THE SEARCH IS CREATED BY THE STATE.

Belton is an exception to the Fourth Amendment dictated by exigent circumstances, to wit, an arrest of a passenger or driver of an automobile and the need for an officer to act quickly under the volatile circumstances of such an arrest to protect himself and preserve evidence.

But the arresting officer cannot himself create the exigency which is the justification for the exception to the Fourth Amendment warrant requirement. If he does, he does not obtain the benefit of the safe harbor exception of *Belton*.

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[1] We suggest that this Court decline to address the State's merits argument because the argument was not preserved for appellate review by a sufficient objection at the trial court level. Our authority for this argument is set forth in the Standard of Review section of this brief, *supra*.

In this case, the arresting officers were members of a joint task force fugitive apprehension team, who were in possession of an arrest warrant for the suspect, Callaway. The fugitive apprehension team were told where Callaway could be found - - a residence in Jacksonville. The team set up surveillance around the residence and observed Callaway go into the residence. They kept the residence under continuous surveillance until Callaway later exited the residence. The officers did not arrest Callaway as he entered the residence, while he was in the residence, or when he left the residence.

Instead, the officers waited for Callaway to enter Gomez's vehicle, followed the vehicle, and subsequently arrested Callaway at another location while in the vehicle. On these facts the officers created the situation which resulted in the arrest while Callaway was in the automobile - the officers created the exigent circumstances by choosing to wait until Callaway got in a car and drove away to make their arrest. Courts have refused to apply *Belton* under similar or analogous circumstances.

IV. *BELTON* MUST BE HARMONIZED WITH *TERRY v. OHIO* AND ITS FLORIDA PROGENY, WHICH INVALIDATE SUBSEQUENT POLICE CONDUCT TAINTED BY AN ILLEGAL OR ILLEGALLY PROLONGED DETENTION, AND SUCH HARMONIZATION WOULD HOLD THE CONTINUED ILLEGAL DETENTION OF GOMEZ AND HIS AUTOMOBILE RENDERED THE DELAYED SEARCH INCIDENT TO CALLAWAY'S ARREST UNREASONABLE FOR BELTON'S CONTEMPORANEITY REQUIREMENT.

Gomez was the innocent driver of the automobile in which Callaway was the passenger. The police had an arrest warrant for Callaway, his passenger, but had no prior knowledge of Gomez and no basis for any detention of Gomez. Despite the lack of any legal basis to detain Gomez, simultaneously with the arrest of Callaway, the fugitive apprehension team handcuffed and detained Gomez as well. His unlawful detention continued for approximately one half hour until his car was searched. Under *Terry v. Ohio* and the Fourth Amendment, the detention of Gomez was unlawful.

However, we recognize that implicit in *Belton* was the authority to temporarily detain Gomez's *vehicle*, but only so long as was necessary to perform a contemporaneous search incident to Callaway's arrest.

The outer boundary of that contemporaneity requirement of *Belton* must be measured against Gomez's right to be free to go about his business as soon as possible upon completion of the *Belton* authorized search. Therefore, to harmonize

Belton with *Terry*, one must interpret the contemporaneous search requirement consistent with *Terry's* demand. That is, persons or things detained without a warrant or probable cause must be released as soon as the determination can be made that would dispel the basis for the temporary detention. Any unnecessary delay runs afoul of *Terry* and *Belton's* contemporaneity requirement.

The illegal detention of Gomez coupled with the unnecessary thirty minute delay in conducting the search of his car, violated the *Belton* contemporaneity requirement as harmonized with *Terry's* restriction on unnecessarily prolonged detentions, therefore the search was illegal.

ARGUMENTS

I. THE STATE MAY NOT TAKE THIS APPEAL BECAUSE THE STATE FAILED TO PROPERLY PRESERVE THE ISSUE FOR APPEAL BECAUSE THE LEGAL ARGUMENT PRESENTED TO THE TRIAL COURT WAS NOT SUFFICIENTLY PRECISE TO APPRISE THE TRIAL COURT OF THE ARGUMENT NOW BEING MADE ON APPEAL.

The State rests its entire argument on *New York v. Belton*. The State did not sufficiently preserve the *Belton* issue for appeal. Under Florida Statutes, § 924.051, a criminal appeal may not be taken unless an error has been properly preserved or is fundamental. "Preserved" means that the legal argument presented to the trial court was "sufficiently precise" to fairly apprise the trial court of the argument being made on appeal. § 924.051(1)(b). At the trial court the State never cited *Belton* or any of its progeny nor did it make a plain, express and sufficiently precise *Belton* argument, therefore the *Belton* issue was not properly preserved and the State may not take this appeal.

The State filed no written response to the motion to suppress - either before, during or after the evidentiary hearing. After the lower court granted the motion to suppress the State declined to file a motion for rehearing citing any legal authority for its position taken on this appeal.

At the brief oral argument at the conclusion of the evidentiary hearing, the State's argument was not clearly presented, and in the entire argument, only one

sentence is spoken, in the middle of other argumentation, stating that the search was lawful as incident to an arrest, and that one sentence was not a clear or correct formulation of the *Belton* rule and, in context of what the State argued, not sufficiently precise to preserve the error for appeal. The State's argument below was as follows:

> Upon Mr. Gomez exiting the vehicle, it sounds like these officers moved in because they were uncertain of whether or not - - what sort of actions were going t o be taking. They had a lawful warrant for Mr . Callaway's arrest. They had a -- every reason to detain Mr. Gomez as the driver of this vehicle and, in doing so, found these drugs. Now, I think it's perfectly logical for the officers t o pursue whether or not Mr. Gomez was rightfully behind the wheel of this car. I think it's perfectly reasonable for them to check his driver's license status, which takes a certain amount of time. I think it's perfectly legal for them to search the car because they had a lawful arrest of Mr. Callaway. And so I think in the middle of all those things being done, they come across these drugs. There is an identical T-shirt to the one Mr. Gomez is wearing at that point. And in time they make the decision that he is the person who was in possession of these drugs and arrest him for that reason. So I think the actions of the officers were certainly reasonable. They did not detain him any longer than necessary to the put the situation together, realize who all these individuals were, and make a decision to arrest.

[R54-55]

In context, the argument was not sufficiently precise to fairly apprise the trial court of the argument the State is now presenting on this appeal. On this record we would ask this Court to decline to reach the merits of the State's argument on appeal on the basis of the failure to adequately apprise the lower court of the grounds for

denial of the motion and insufficient preservation of the issue for appeal.

It is not the burden of an overworked trial judge to deduce from an argument such as the foregoing that the officers were authorized under *Belton v. New York* to conduct the search of Mr. Gomez's vehicle as a search contemporaneously incident to Mr. Callaway's arrest as a recent passenger of the Gomez automobile.[2]

II. THE THIRTY MINUTE DELAY BETWEEN ARREST AND SEARCH, CONDUCTED AFTER CALLAWAY, THE PASSENGER WAS HANDCUFFED AND IN THE BACK OF THE PATROL CAR, TOOK THIS SEARCH OUTSIDE THE SAFE HARBOR OF *NEW YORK v. BELTON,* BECAUSE THE SEARCH WAS NOT DONE CONTEMPORANEOUSLY WITH THE ARREST, AS REQUIRED BY *BELTON*.

The State rests its argument on *New York v. Belton*, which held:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, *as a contemporaneous incident of that arrest*, search the passenger compartment of that automobile [and] may also

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[2] The State's argument also failed to fairly apprise the *defense* of the State's position, and thereby deprived the defense of an opportunity to make as complete a record as possible to rebut this legal position. From this point of view it denies Gomez due process as guaranteed by the Due Process clause of the Fifth Amendment to the United States Constitution to allow the State to hide the thrust of their legal argument at the evidentiary hearing at the trial court, then sandbag the defense (and trial judge) on appeal. That is, the defendant-appellant was not fairly put on notice of the State's legal theory justifying the exception to the search warrant, resulting in an evidentiary record and record of legal argument that frankly fails to address the facts and law as fully as might be desired. At a minimum if this Court is not inclined to affirm the trial Court for any reason, the case should be remanded to allow the defense an opportunity to more fully develop the record on the issues now being argued on appeal by the State. *See State v. Deferance*, 807 So.2d 806 (Fla. 4th DCA 2002).

> examine the contents of any containers found within the passenger compartment . . .

New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981) (emphasis supplied).[3]

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[3] The continuing vitality of *Belton* has been placed in doubt by *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127 (2004). In *Thornton*, Justice Scalia wrote, in dissent:

> When petitioner's car was searched in this case, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer's squad car. The risk that he would nevertheless "grab a weapon or evidentiary ite[m]" from his car was remote in the extreme. The Court's effort to apply our current doctrine to this search stretches it beyond its breaking point, and for that reason I cannot join the Court's opinion.

Thornton, 541 U.S. at 2133, 124 S.Ct. at 625.

Although *five justices agreed with this proposition*, it was not adopted as the holding in the case only because Justice O'Connor, while agreeing with the proposition, declined to adopt it in this case solely on the jurisprudential ground that certiorari had not been granted on that question. Justice O'Connor wrote:

> I write separately to express my dissatisfaction with the state of the law in this area. As Justice SCALIA forcefully argues, *post,* Pp. 2133-36 (opinion concurring in judgment), lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). That erosion is a direct consequence of *Belton's* shaky foundation. While the approach Justice SCALIA proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak

What the State's argument neglects to discuss is that the search in Gomez's case was not a *contemporaneous* incident of Callaway's arrest as required by *Belton*.[4] The search in Gomez's case falls outside the *Belton* safe harbor, because it was not conducted contemporaneously with the arrest.

In *Belton*, the Supreme Court was mindful of the fact that officers should not be forced to make difficult legal decisions in the split-seconds during the often-volatile circumstances of an arrest. It was upon this consideration that several courts have held that a search of an automobile may be conducted as a search incident to arrest even when the arrestee has been taken from a vehicle and handcuffed. *United States v. McCrady,* 774 F.2d 868, 871-72 (8th Cir.1985); *United States v. Cotton,* 751 F.2d 1146, 1149 (10th Cir.1985); *United States v. Abel,* 707 F.2d 1013, 1015, n. 3 (9th Cir.1983), *rev'd on other grounds,* 469 U.S. 45, 105 S.Ct. 465, 83

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to its merit." *Thornton*, 124 S.Ct. at pp. 624-625.

Gomez agrees with Justice Scalia in this instance, and argues that to the extent *Belton* has been held to permit a search contemporaneously incident to arrest after the suspect is handcuffed and in the back of the patrol car, it was wrongly decided or wrongly applied, and on that ground alone, the State's reliance on *Belton* should not be accepted.

[4] In the argument presented as Issue II below, we argue that the search was also not *incident* to the arrest, as is explicated by *State v. Howard*, *Thomas v. State* and *State v. Bennett*, cited therein.

L.Ed.2d 450 (1984).

These cases and the *Belton* cases cited by the State in its initial brief are distinguishable, however, because the searches in these cases followed closely on the heels of the arrest.

But the search of Gomez's vehicle in this appeal took place approximately thirty minutes after Callaway had been arrested, handcuffed, and placed in the rear of the police vehicle, although the officers had accomplished their purpose in identifying and arresting Callaway within a minute or two of the confrontation. [R44; R46;] During this entire time Gomez was handcuffed and illegally detained. [R48][5]

During the thirty minutes that elapsed between the arrest and the warrantless search [R46], the *Belton* Court's fear of forcing officers to make split second legal decisions during the course of an arrest evaporated and took with it the right of the officers to enter the vehicle under the guise of a search incident to arrest. Simply because the officers had the right to enter the vehicle during or immediately after the arrest, a continuing right was not established to enter the vehicle without a warrant. This search, on these facts, simply was not contemporaneous with Callaway's arrest

[5] The officers conducted the search while Callaway was handcuffed in the rear of the police vehicle. They exhibited no fear nor testified to any fear that Callaway would try to get out of the police vehicle to grab a weapon or evidence. In fact, the officer justified the search as "standard operating procedure." [R49]

as is required by the express terms of *Belton*.

The circumstances of each arrest dictate whether the search was proper and conducted contemporaneously with the arrest or not and in this case, the circumstances establish that the time was long past when a *Belton* search was authorized.[6]

Counsel has been unable to find a Florida case directly on point,[7] but the

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[6] In its initial brief, p. 20, n. 4, the State questions the half hour figure argued by Gomez below as being the time between satisfying the purpose of the stop and the search. This objection was not made to the trial court below, and the State itself at n. 4, p. 20 of its brief waives any objection to the argument that the delay in conducting the search could take the search outside *Belton*, instead taking the position that the "bright line" of *Belton* is of infinite duration.

Under the applicable standard of review, this Court must assess the evidence in the light most favorable to affirming the lower court. *Harford v. State,* 816 So.2d 789, 791 (Fla. 1st DCA 2002).

However, if this Court were to determine that the State's concession was not controlling, and to find that the record is insufficient to determine the delay involved in the search, and otherwise be unwilling to affirm the ruling below on the alternative grounds urged in this brief, then Gomez would respectfully request the Court remand the case for fact finding to determine the missing facts. This was done in *State v. Deferance*, 807 So.2d 806 (Fla. 4th DCA 2002).

[7] *State v. Grant*, 732 So.2d 513 (Fla. 4th DCA 1999), may support Gomez's position, but the opinion does not set forth the operative facts:

> We affirm the trial court's suppression of evidence. The facts believed by the trial court show that defendant had not been a recent occupant of the automobile searched without a warrant, at least not recently enough within the holding in *New York v. Belton* . . .

federal courts have agreed that delay in conducting a search incident to an arrest can take the search outside the safe harbor of *Belton*. A case with remarkably similar facts to Gomez is *United States v. Vasey*, 834 F.2d 782, 787-788 (9th Cir. 1987). In *Vasey* the delay between the arrest and search of the automobile incident to the arrest was thirty to forty-five minutes after the suspect had been arrested.

The Ninth Circuit held that the 30-45 minute delay in *Vasey* exceeded the *Belton* court's explicit directive that a search incident to arrest must be *contemporaneous* with the arrest, not following the arrest at a point when the need for split-second decision making no longer pertained. The Court explained:

> The *Belton* Court did not completely abandon Fourth Amendment privacy rights at the expense of establishing a bright line test for law enforcement personnel. This is shown by the Court's adherence to the narrow scope of the search incident to arrest exception espoused in *Chimel* and by the Court's explicit directive that a search be conducted contemporaneously with the arrest. The *Belton* holding does have limits and those limits were exceeded here. The warrantless search in this case violated the *Chimel* principle and was not conducted contemporaneously with the arrest. . . . The search also falls outside the *Belton* prophylactic rule because it was not conducted contemporaneously with the arrest. . . . The *Belton* Court explicitly admonished that the search had to be conducted contemporaneously with the arrest. The government, in effect, asks us to transform the

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In *State v. Vanderhorst*, 419 So.2d 762 (Fla. 1st DCA 1982), this Court held that, where the defendant had not been in his car for approximately two-and-one-half hours before he was taken into custody, even though taken in custody at his car, he was not a "recent occupant" of the vehicle searched for *Belton* purposes, therefore the motion to suppress was properly granted.

search incident to arrest exception into a search *following* arrest exception. This we decline to do.

The Eighth Circuit reached a similar conclusion in *United States v. Wells*, 347 F.3d 280 (8th Cir. 2004):

> The Grand Am was stopped; Wells was arrested. Once he was arrested, law enforcement was authorized to conduct a search incident to the arrest. *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (holding "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile"). *Such a search, however, must be contemporaneous to the arrest. The government's brief raises doubt about whether the search was contemporaneous*, for it quotes the arresting officer as saying:
>
> I went to the passenger door, opened the door from the outside. I asked Mr. Wells to step out. I believe I took control of one of his arms on the way out and handcuffed him. I drove the blue Pontiac four door that Mr. Wells was in to the northeast precinct to do an inventory search and to impound the vehicle .... It was going to be impounded and it's the standard procedure to search. Also, Mr. Wells was under arrest at the time for marijuana that was found on his person. Subsequent to his arrest the vehicle was searched. . . .
>
> *Because these facts can be read to imply the search did not follow hard upon the heels of the arrest, we are unwilling to sanction the search as one incident to a lawful arrest.*

[emphasis supplied]

The Fifth Circuit suggested a similar result, in *dicta*, in *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993):

> The magistrate stated that the original "sniff" conducted by the K-9 unit was permissible under the search incident to an arrest exception to the warrant cause. We express certain misgivings as to whether the "sniff" could be considered a search incident to an arrest in light of the fact that the defendant had already been arrested, handcuffed, and removed from the scene at least thirty minutes before the search took place.

The *Belton* Court explicitly admonished that the search had to be conducted *contemporaneously* with the arrest. The State, in effect, asks this Court to transform the search incident to arrest exception into a search *following* arrest exception. This can not be done consistent with *Belton* and the Fourth Amendment.

III. *COOLIDGE v. NEW HAMPSHIRE*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), AND *STATE v. BENNETT*, 516 So.2d 964 (Fla. 5th DCA 1987), PRECLUDE THE SEARCH OF AN AUTOMOBILE RECENTLY OCCUPIED BY AN ARRESTED PERSON WHERE THE EXIGENCY FOR THE SEARCH IS CREATED BY THE STATE.

Testimony from the State's own witness, Senior Deputy United States Marshall Dwayne Johnson, who was a member of a fugitive apprehension strike team, established that there was an outstanding arrest warrant for Michael Callaway. [R25-27] A member of the fugitive apprehension strike team received a tip that Callaway could be found at a residence in Jacksonville, Florida. The team set up surveillance on the residence. [R27] The team knew Callaway was in the residence - apparently they saw him go inside while it was under surveillance. [R38] Callaway was later observed coming out of the residence, which was surrounded by the fugitive apprehension strike team.

The fugitive apprehension team elected to not execute the arrest warrant as Callaway entered the residence, while he was at the residence, or when Callaway exited the residence. [R27-28]

Instead, the officers waited and allowed Callaway to get into Gomez's car and then after Callaway got into the car driven by Gomez, the team began to tail Gomez's car and waited to arrest Callaway until the car stopped at a post office some distance away. [R28-29] The fact that Callaway was in the car when the arrest was made was

then used as the pretext to search Gomez's car.[8] [R32-33]

Callaway could have been arrested at his residence or outside his residence, but instead, the fugitive apprehension team elected to allow him to get into an automobile, followed him in that automobile after he left the residence, and made an arrest on a public street while he was in the automobile.

In other words, the police created the necessity of searching the car by delaying the arrest until Callaway was in the car, which they thought then authorized them to search the car without obtaining a search warrant - - a search warrant they could not have obtained because they did not have probable cause to search the car in the first place.

On similar facts the Fifth District Court of Appeal in *State v. Bennett*, 516

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[8] We say pretext as a matter of objective fact, not necessarily the subjective intent of the officers. The record on the officers subjective thoughts was not developed. However, given the amount of time between Callaway entering the residence, the arrival of Gomez, the time Gomez was in the residence with Callaway before Callaway and Gomez exited the residence and then got in Gomez's car, it is apparent there was plenty of time for a trained fugitive apprehension team to analyze the situation, discuss alternatives, and make a reasoned decision whether to execute the warrant at the scene or to wait and make the arrest if and when Callaway got into the car. The decision clearly was made to wait until Callaway got into the car. This was not an unforeseen, sudden development but something that was easily anticipated and whether anticipated or not, which developed over sufficient period of time that a consultative decision could be made whether to use the situation to make an arrest outside or inside the car conscious of the consequences of each alternative.

So.2d 964 (Fla. 5th DCA 1987), upheld a lower court order granting a motion to suppress against a claim that the search was authorized under *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

The Fifth District Court of Appeal held that the operative case was *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), not *New York v. Belton.* According to *Bennett, Coolidge* precludes the search of an automobile recently occupied by an arrested person where the exigency (substitute for a search warrant) is created by the state.

In the instant case, the arresting officers planned Callaway's arrest. Deputy Marshall Johnson testified he intended in advance to arrest Callaway and had a warrant to do so - - but he did not have probable cause to search Callaway's or Gomez's car, therefore he had not applied for a search warrant to do so.

As the Court stated in *Bennett*, *Belton* and the related cases cited by the state are readily distinguishable. They all involved the unplanned, unanticipated arrest of an occupant, or recent occupant, of a motor vehicle - - thereby confronting the arresting officer with an exigent circumstance *which he had not created.*

That is not the case in this appeal. Here, the arresting officers created the exigency by not arresting Callaway before he entered the automobile.

Bennett and *Coolidge* are directly on point and support the trial court's order

of suppression. As a plurality of the Court stated in *Coolidge:* "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 461-62, 91 S.Ct. at 2035. The lower court was correct in granting the motion to suppress, because on the facts of Gomez's case, the arresting officers created the exigency that was used to justify the warrantless search of Gomez's automobile. That is not permitted under the Fourth Amendment.[9]

Bennett is not an anomaly. A variation of the *Bennett* facts was presented in *State v. Howard*, 538 So.2d 1279 (Fla. 5th DCA 1989):

> A police officer, knowing of an outstanding warrant for the arrest of appellee for a probation violation, commenced following appellee, who was driving a car. Appellee turned into a convenience store, got out of his car with a pouch in his hand, saw the officer, then put the pouch back into the car and locked it and put the key in his pocket. The police officer approached appellee and advised him of the warrant for his arrest, called and verified the outstanding warrant, and then arrested him. After appellee was arrested, appellee's brother arrived at the scene in another vehicle. Appellee told his brother to get appellee's keys from appellee's pocket and told his brother, "Don't let them search my car."

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[9] Even if the trial court's apparent reasoning in suppressing the evidence was erroneous or that Gomez did not specifically articulate the above basis for proper affirmance of the ruling on the motion to suppress, under the tipsy coachman doctrine, the trial court's suppression must be affirmed if the record before the court of appeals establishes a proper basis for the trial court's ruling, *see Robertson v. State,* 829 So.2d 901, 906-07 (Fla. 2002); *Dade County School Board v. Radio Station WQBA,* 731 So.2d 638, 644-45 (Fla. 1999), and *Jaworski v. State,* 804 So.2d 415, 419 (Fla. 4th DCA 2001), cited in *State v. Pitts,* 936 So.2d 1111, 1133 (Fla. 2nd DCA 2006). The record in this case is adequate to support the trial court's ruling.

> The brother tried to get the keys from appellee's pocket but the officer got there first and ordered the brother "to stand back." The officer took the keys from appellee and searched the vehicle, finding contraband. The trial court suppressed the contraband evidence and the State appeals. We affirm.
>
> We agree with the trial court that the search of appellee's vehicle was not a search incident to a valid arrest. Appellee had exited his vehicle and locked it, and was detained until the validity of the outstanding arrest warrant was verified and then arrested. Of course, the officer's suspicions were aroused when appellee put his pouch back in his car, locked it and tried to prevent his car from being searched. However, the officer did not have probable cause for a warrantless search of the car. There was no valid need or reason to search appellee's vehicle as an incident to his valid arrest. *See State v. Bennett,* 516 So.2d 964 (Fla. 5th DCA 1987), *rev. denied,* 528 So.2d 1183 (Fla.1988).

Howard was approved by the Florida Supreme Court in *Thomas v. State*, 761 So.2d 1010, 1010-1011 (Fla. 1999):

> The facts of *Thomas* are as follows. On the evening in question, Robert Thomas entered the driveway of a residential home in which police were already present making arrests for narcotics offenses. While the detectives were in the residence, Officer Maney waited outside the residence in his patrol car. Officer Maney observed Thomas drive up to the house, park his car in the driveway, and get out of the vehicle. Upon exiting, Thomas walked to the rear of his vehicle, where Officer Maney met him and asked him his name and whether he had a driver's license. A check of Thomas's driver's license revealed an outstanding warrant for a probation violation. Officer Maney arrested Thomas and took him inside the residence. Officer Maney originally was unaware that there were narcotics in Thomas's car. However, a subsequent search after Thomas's arrest resulted in the discovery of a plastic bag containing white residue on the bottom of the driver's side door and three small bags of a white substance in the glove box. All of the bags tested positive for methamphetamine. Five minutes elapsed between the time

> Thomas exited his car, was placed under arrest, and was brought into the residence and Officer Maney's subsequent search of the vehicle.

Thomas v. State, 761 So.2d 1010, 1010-1011 (Fla. 1999).

Thomas held:

> [T]hat *Belton's* bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant [when the defendant is in the automobile], and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile.

Thomas v. State, 761 So.2d 1010, 1014 (Fla. 1999).

Unlike *Bennett*, neither *Thomas* nor *Howard* involved the arresting/searching officer using the arrest as a *pretext* to search the car, instead each holding was premised simply on the fact that the officer could have or did effect the arrest unrelated to the defendant's recent occupancy of the automobile. In *Thomas* the officer approached to make the arrest after the defendant had exited the vehicle; in *Howard*, the officer had the warrant for the arrest before the defendant entered the vehicle. Either way the result was the same, the search was illegal. In both circumstances the Courts distinguished *Belton*, finding that the searches were not properly incident to the arrest.

Belton requires that a search be *contemporaneous* and *incident* to the arrest. The search in Gomez's case was neither.

IV. *BELTON* MUST BE HARMONIZED WITH *TERRY v. OHIO* AND ITS FLORIDA PROGENY, WHICH INVALIDATE SUBSEQUENT POLICE CONDUCT TAINTED BY AN ILLEGAL OR ILLEGALLY PROLONGED DETENTION, AND SUCH HARMONIZATION WOULD HOLD THE CONTINUED ILLEGAL DETENTION OF GOMEZ AND HIS AUTOMOBILE RENDERED THE DELAYED SEARCH INCIDENT TO CALLAWAY'S ARREST UNREASONABLE FOR BELTON'S CONTEMPORANEITY REQUIREMENT.

It is certainly implicit in *Belton* that an innocent driver may be made to wait while his automobile is searched if a passenger in his automobile has been lawfully arrested. But it is equally true under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), that an investigatory detention can continue no longer than necessarily required to dispel the suspicion. Although the *Terry* progeny cases cited by Gomez to the lower court do not directly control the outcome of this appeal, because their holdings were directed toward excluding the fruit of the illegal detention in each case, neither can their holdings nor the Constitutional requirement that undergird them be ignored.

Rather, the *Terry* progeny should be harmonized with *Belton,* and we suggest that that harmonization is already implicit in *Belton's* limitation that the search incident to a *Belton* arrest must be *contemporaneous* with the arrest. That is, as read under the gloss of *Terry*, the arresting officer must proceed immediately and directly to search the innocent driver's automobile, and allow the innocent driver to proceed on his way as soon as that search has been completed. To unnecessarily prolong or

delay the search is to go beyond the limited exception to the Fourth Amendment permitted by *Belton* whose contemporaneity requirement honors the right of the innocent driver to go about his business as soon as is reasonably possible.

Alternatively, to delay the search, or to wrongfully detain the innocent driver, as was done in this case, is not only to violate the express contemporaneity requirement of *Belton*, but to violate as well the driver's independent Fourth Amendment right to be free of unreasonable seizure of his person or effects (his car). We submit that any search which unnecessarily intrudes on the innocent driver's independent Fourth Amendment right to be free to go about his own business - by unlawfully detaining him - or which unnecessarily delays his ability to go about his business, by unnecessarily delaying the search of his vehicle, by definition is an *unreasonable* search for Fourth Amendment purposes and must be held to be outside the safe harbor of *Belton.*

Gomez's proposed harmonization of *Terry* with *Belton* is simply a more complete articulation of what counsel for Gomez and the lower court perhaps unconsciously contemplated in the arguments and ruling below. *Belton* was meant to provide law enforcement with a bright line rule for authority to search automobiles incident to an arrest. It adds no burden to the officer to execute that authority consistent with *Terry* requirements, at least when an innocent third party is involved.

Every experienced law enforcement officer already understands the requirement that *Terry* encounters not be unnecessarily prolonged. *Terry* and *Belton* can be easily harmonized in the field by officers operating under field conditions. The Fourth Amendment requires that harmonization.

Because Gomez was illegally detained and his illegal detention unnecessarily prolonged due to the delay in executing what may have otherwise been an appropriate *Belton* search,[10] the lower court was correct in granting the motion to suppress on the authority of the *Terry* cases cited by counsel for Gomez, because that ruling implicitly harmonized the holding in *Belton,* which itself contains an express contemporaneity requirement, with the holding in *Terry*, that a person may be temporarily detained to dispel reasonable, articulable suspicion, but no longer.

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[10] Subject to our arguments in Issues II and III, above, however, that the search was not contemporaneous with the arrest and not properly incident to the arrest, because the arresting officer created the exigency for the arrest in the automobile, when the suspect could readily have been arrested before ever being allowed to enter the car and drive away.

CONCLUSION

Appellee Gomez respectfully requests this Honorable Court affirm the trial court's order granting Appellee Gomez's motion to suppress, because the State failed to sufficiently preserve the issue presented for appeal, or if the merits of the State's argument are addressed, to affirm the trial court's order on the grounds set for above, or failing either alternative, remand the case to the lower court for further fact finding.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellee Gomez certifies that the size and style of type used in this brief is 14 point Times New Roman proportional font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Assistant Attorney General Terry P. Roberts, Office of the Attorney General, The Capitol, Tallahassee, FL 32399, by United States Postal Service this October 20, 2006.

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William Mallory Kent