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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

GLADYS CAROL HUTCHINSON,
Respondent.

FILED

SID J. WHITE

MAY 18 1987

Case No. CLERK, SUPREME COURT

By _____
Deputy Clerk

70526

DISCRETIONARY REVIEW OF DECISION OF
THE SECOND DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE

Respondent plead nolo contendere to the possession of methamphetamine and possession of drug paraphenalia. (R 94) In doing so, the respondent reserved the suppression issue for appellate purposes. (R 94)

On appeal to the Second District Court of Appeal the respondent obtained a reversal of the judgment and sentence. The grounds for reversal was the denial of the motion to suppress by the trial court.

STATEMENT OF THE FACTS

The petitioner accepts the facts in the opinion of the District Court for the purposes of this petition. The facts of the case as stated in the opinion are as follows:

The chain of events culminating in the search began when the assistant manager of a supermarket, Jerry Geisler, observed the defendant shopping in the store using a shopping cart. Geisler testified that his suspicions were aroused by the fact that the defendant had an unusually large purse lying in the cart. He described it as like a small airline bag, two feet across and six or eight inches wide. Continuing to observe the defendant while she shopped, Geisler became convinced that the defendant was engaged in shoplifting and called the police. When Officer Jerbie Bryan arrived in response to Geisler's call, the defendant had not yet left the store. Bryan advised Geisler to go back inside the store and when the defendant exited, to follow her. Meanwhile, Bryan remained in the parking lot and waited. The defendant exited the store pushing a grocery cart containing her purchases, followed by Geisler. Geisler pursued the defendant to her car while Officer Bryan pulled his patrol car up to the defendant's car. Geisler indicated to Officer Bryan that the defendant was removing articles from her purse and hiding them underneath the seat of her car.

Bryan testified that he walked up to the defendant's car and advised her that she was suspected of shoplifting, which she vehemently denied. Officer Bryan said that "we" requested to look in her handbag and that she "just started taking stuff out." He further testified that there were little zip-up bags, cloth bags, in the large bag and that the defendant would open some of these small bags and others she would not, laying these aside. During this process, Sergeant Robert Walker drove up and started observing what was going on. When the defendant completed process of emptying her handbag and opening some, but not all, of the small bags, Officer Bryan said "now, let's go back and open all of them." He said the defendant picked up one particular small bag and unzipped it and zipped it back up real quick. Sergeant Walker's interest focused on

that bag and he asked the defendant what was in it. She would unzip it and zip it back up. Sergeant Walker asked her a couple more times "what's in the container in the bag?" The defendant said nothing; she just handed the bag to Sergeant Walker. When Walker opened up the bag he found that it contained a white substance. Officer Bryan was then reminded of seeing a jar in another bag and he went back and looked in that bag again. Upon further examination, Officer Bryan found a white substance in that bag also.

SUMMARY OF ARGUMENT

The decision of the Second District conflicts with the Third District's decision in Palmer v. State, 467 So.2d 1063 (Fla. 3d DCA 1985) Specifically, in Palmer, supra, the court held that consent to search a handbag includes the contents of the handbag. The instant decision of the Second District specifically hold to the contrary.

ISSUE I

THE DECISION OF THE SECOND DISTRICT
EXPRESSLY AND DIRECTLY CONFLICTS
WITH THE THIRD DISTRICT'S DECISION
IN PALMER V. STATE, 467 So.2d 1063
(Fla. 3rd DCA 1985).

Article V. Section 3(b)(3), of the Florida Constitution and Rule 9.030(A)(2)(a)(iv), Florida Rules of Appellate Procedure provides for discretionary jurisdiction in this court where the decision of a District Court of Appeal expressly and directly conflicts with a decision of another District Court on the same question of law. To be "expressly" in conflict there must be a conflict of decisions. Jenkins v. State, 385 So.2d 1356 at 1359 (Fla. 1980). Petitioner submits that this Court's holding in Jenkins requires that there be a conflict in the text of the opinions. The "direct" requirement excludes those cases which are distinguishable by operative facts. See Wilson v. Southern Bell Telephone and Telegraph Co., 327 So.2d 220 (Fla. 1976).

The holding of the Court below which is submitted as conflict is as follows:

With respect to the initial opening of her purse and revealing its contents, we think it is arguable that this gesture could be interpreted as consent in response to the request of the officers that they be permitted to see what was in the defendant's purse. But that consent did not automatically extend to the contents of the small unopened bags within the purse.

Slip opinion pages 4-5

From the above text it is clear that the opinion sought to be reviewed holds that consent to search a handbag does not

extend to the contents of the bag. This is expressly and directly in conflict with the Third District Court of Appeal's position as expressed in Palmer v. State, 467 So.2d 1063 (Fla. 3rd DCA 1985) when it stated:

Second, the initial consent to search the tote bag is properly regarded as extending to the packages themselves, particularly in the light of the fact that, unlike, for example, Goldberg v. State, 407 So.2d 352 (Fla. 4th DCA 1981) and Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980), pet. for review denied, 408 So.2d 1095 (Fla. 1981), Palmer did not restrict, withdraw or limit his consent in any way, even when directly questioned about the packages' contents.

Sub judice, the respondent did not withdraw or limit her consent. As such, the conflict cannot be distinguished by facts. Furthermore, the decisions leave law enforcement in doubt as to their duties and obligations in a commonly encounter setting for law enforcement. As such, petitioner submits that the implications of the conflict are of such magnitude to warrant this court to exercise its discretion and accept jurisdiction in this case.

CONCLUSION

There is expressed conflict on matters of law which cannot be distinguished by operative facts. The implications of the conflict have an impact on law enforcement to such a magnitude to warrant the exercise of discretionary jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

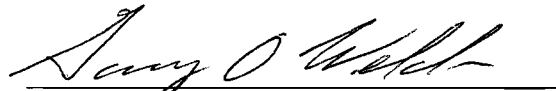


GARY O. WELCH
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U. S. Mail to Marshall G. Slaughter, Esquire, P. O. Box 226, Bartow, Florida 33830 this *15th* day of May, 1987.



OF COUNSEL FOR PETITIONER