SUPREME COURT
OF FLORIDA

Filed
AUG 5 1988
Clerk Supreme Court

WILLIE MAE ROBINSON,)
)
Petitioner,)
)
v.) CASE NO. 72,583
)
STATE OF FLORIDA,)
)
Respondent.)
)
)

ANSWER BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

ALFONSO M. SALDANA
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Respondent

TABLE OF CITATIONS

CASE	PAGE
Colorado v. Bertine, 479 U.S. _______, 107 S.Ct. 738, 93 L.Ed 739 (1987)	7,9,10
Miller v. State, 403 So.2d 1307 (Fla. 1981)	8,9,10
State v. Bernie, 472 So.2d 1243 (Fla. 2d DCA 1985)	7,10
State v. Williams, 516 So.2d 1081 (Fla. 2d DCA 1987)	10,11

FLORIDA RULES

Art. 1 Section 112, Fla. Constitution	6

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	i
PRELIMINARY STATEMENT	2
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
THE 1983 AMENDMENT TO ARTICLE I SECTION 12 OF THE FLORIDA CONSTITUTION, COUPLED WITH THE COLORADO v. BERTINE, DECISION, EFFECTIVELY OVERRULES MILLER v.STATE, PROVIDING THE POLICE ARE NOT ACTING IN BAD FAITH. (Restated).	
CONCLUSION	12
CERTIFICATE OF SERVICE	12

PRELIMINARY STATEMENT

Petitioner was the Appellant in the District Court of Appeal and the defendant in the Criminal Division of the Seventeenth Judicial Circuit in and for Broward County. Respondent was the Appellee and the prosecution in these respective Courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

Appellee, the State of Florida, will accept Appellant's Statement of The Case And Facts except as follows:

State witness Trooper West, a highway patrolman for thirteen years, stated that on June 23, 1986 at approximately 2:30 P.M., he came into contact with the vehicle in which Appellant was a passenger (R.8-9). That vehicle was tailgating a truck or van at a very unsafe distance (R.10). The driver, Joseph McClendon, produced a rental contract of the vehicle which involved neither McClendon nor Appellant. The vehicle was also six days late in being returned (R.11). McClendon did not have a driver's license and a computer check revealed that McClendon's license had been suspended (R.12).

McClendon stated that the lessee, one Mrs. Reilly, was his wife (R.15). Officer West then inquired of Appellant as to whether she had a valid driver's license. She replied that she did not . (R.16). Officer West then notified Mr. McClendon that since neither person had a driver's license, since the car was not leased to either person and also since it was overdue, he was impounding the vehicle. (R.17).

Officer West then told Appellant that the car was being impounded and asked her if anything in the car belonged to her (R17-18). Appellant stated that nothing in the car belonged to her (R.18).

At this point, a wrecker was summoned. Upon initially inventorying the vehicle, the officer found three partially smoked marijuana cigarettes, two in the ashtray and one apparently on the floorboard in the driver's side (Id., 27), A brown bag was found

while inventorying the trunk of the vehicle. Prior to searching the bag, the officer asked both individuals if the bag belonged to them. Neither person had knowledge of this bag (R.19). A search of the bag revealed a plastic bag containing approximately a pound of marijuana and another plastic bag containing about twenty nine grams of cocaine (Id.). At this point, Appellant and McClendon were arrested (R.19-20).

A black case was also found in the trunk. This case contained a scale which had cocaine residue on it (R.20). Appellant was read her Miranda rights and afterwards, Appellant admitted that the contraband found in the trunk belonged to her. No contact was made with the lessee of the car (Id.). Appellant did not make any reference to this lessee (R.21). Neither the driver nor Appellant was ever given an alternative to towing and impounding the car (R.23). The car was not reported as being stolen (R.25). Consent for conducting an inventory search of the car was not obtained (R.26). However, there was apparently no objection to the car being towed (R.29) and apparently, no request was made to try to reach the true lessee prior to the car being searched. (R.30).

SUMMARY OF THE ARGUMENT

In the 1987 case of Colorado v. Bertine, the requirement of a reasonable alternative to impoundment was effectively eliminated by the U.S. Supreme Court. Since Miller was decided in 1981 it is no longer good law in light of Bertine and in light of the 1982 amendment to Art. I, §12 of the Florida Constitution.

ARGUMENT

> THE 1983 AMENDMENT TO ARTICLE I SECTION 12 OF THE FLORIDA CONSTITUTION, COUPLED WITH THE COLORADO v. BERTINE, DECISION, EFFECTIVELY OVERRULES MILLER v. STATE, PROVIDING THE POLICE ARE NOT ACTING IN BAD FAITH (Restated).

At bar, the certified question from the Fourth District Court of Appeal is as follows:

> DOES THE 983 AMENDMENT TO ARTICLE I SECTION 12 OF THE FLORIDA CONSTITUTION, COUPLED WITH THE COLORADO v. BERTINE DECISION, OVERRULE MILLER v. STATE, PROVIDING THE POLICE ARE NOT ACTING IN BAD FAITH?

Present caselaw and plain logic will dictate that this question be answered in the affirmative.

Art. I, §12, Fla. Const. states as follows:

> SECTION 12. Searches and seizures.- The right of the people to be secure in their persons, house, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Consti-

> tution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution. (New language underlined. State v. Bernie, 472 So.2d 1243 (Fla. 2d DCA 1985).

In the present case, neither the driver nor Appellant had a driver's license (the driver's license had been suspended) (R. 12,16) and additionally, the rental contract for the car which was six days overdue did not mention either the driver or Appellant (R.11). In light of these facts, the officer stated that he was impounding the car (R.17). Neither the driver nor Appellant were given an alternative to having the car impounded (R.23). Appellant denied that anything in the car belonged to her (R.18) and after calling a wrecker, the officer began an inventory search which revealed the presence of partially smoked marijuana cigarettes (R. 18,27).

A brown bag was found in the trunk. Prior to searching this bag, the officer asked both the driver and Appellant if the bag belonged to either one (R.19). Neither person admitted having knowledge of this bag and a search thereof revealed marijuana and cocaine (Id.) . Both the driver and Appellant were arrested (R. 19-20).

In Colorado v. Bertine, 479 U.S. ______, 107 S. Ct. 738, 93 L.Ed.2d 739 (1987), the defendant was arrested for driving while

under the influence of alcohol. The car was inventoried pursuant to local police procedures and upon completion of the inventory, the car was impounded. Id, at 93 L.Ed.2d 744.

The Supreme Court of Colorado expressed the view that the search was unreasonable because , among other things, Bertine himself could have been offered the opportunity to make other arrangements for the safekeeping of his property. The U.S. Supreme Court stated that while giving Bertine an opportunity to make alternate arrangements would have been possible,

> "[t]he real question is not what could have been achieved,' but whether the Fourth Amendment requires such steps...The resonableness of any (emphasis added) particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive" means." Lafayett 462 US, at 647, 77 L.Ed. 2d 65, 103 S.Ct. 2605.
>
> . . .
>
> We conclude that here, as in Lafayette, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.

Id, at 747.

This is the opposite of this Honorable Court's conclusion in Miller v. State, 403 So.2d 1307 (Fla. 1981) where this Court stated as follows:

> In our opinion, if the primary purpose of impoundment and an inventory search is for security and protection of the vehicle's contents, it necessarily follows that the owner or possessor who is reasonably available must be consulted concerning the impoundment.
>
> . . .
>
> We base our conclusion on section 12 of Article I of the Florida Constitution and the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court in Opperman. Our reading of Opperman leads us to a firm conclusion that a majority of the United States Supreme Court would not have approved that inventory search on federal grounds if the driver or owner of the vehicle had been present or reasonably available.

Id, at 1313 .

In Miller, this Court relied in part on South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) and its language stating that the owner of the car was not present to make other arrangements for the safekeeping of his belongings. Id, at 428 U.S. 375. This language leads to the conclusion that in Opperman, the U.S. Supreme Court did fashion the reasonable alternative requirement relied upon by this Court in Miller.

However, in Colorado v. Bertine, the U.S. Supreme Court effectively overruled this requirement in the language previously mentioned. See supra. Hence, as of 1987, the U.S. Supreme Court no longer required a reasonable alternative requirement to im-

poundment. Since Miller was decided in 1981 and relied on Opperman, it is no longer good law in light of Colorado v. Bertine since Bertine is fully applicable to Florida courts.

Furthermore, Miller expressly relied on Art. I, §12, Fla. Const. as it existed in 1981. In November 1982, this section was amended to add the requirements that the right under the Florida Constitution to be secure against unreasonable searches and seizures shall be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court. State v. Bernie, supra, State v. Williams, 516 So.2d 1081 (Fla. 2d DCA 1987).

Since Miller dealt with impoundments coupled with inventory searches (Id, at 1313) and relied on constitutional and caselaw authorities that have since been modified, it logically follows that Miller must be modified to come in harmony with these provisions.

Colorado v. Bertine dealt with an impoundment where the owner was not offered an opportunity to make alternate arrangements. The U.S. Supreme Court stated that such alternatives are not necessary. This opinion, explicitly dealing with a Fourth Amendment issue (Id, at 93 L.Ed.2d 739), is fully applicable to us via the 1982 amendment to Article I, Section 12 dealing with Fourth Amendment issues.

Therefore, it is logical and clear that Miller's requirement of an alternative to impoundment no longer exists as so found in State v. Williams, supra.

Petitioner draws a distinction between impoundments and the subsequent inventory search stating that these are separate procedures and that the impoundment is not a Fourth Amendment issue (Petitioner's Brief, pgs. 12,16). This fine line distinction overlooks the fact that impoundment cases fall under the umbrella of Fourth Amendment caselaw as so treated in Opperman, Miller, and Colorado v. Bertine. Therefore, since the Fourth Amendment is implicated, pursuant to Article I, Section 12, Bertine must be followed and the ruling of the trial court must be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Respondent respectfully requests that this Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

ALFONSO M. SALDANA
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent, has been furnished by courier to LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401 this 3rd day of August 1988.

Of Counsel