IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. SC01-2779
JOHNNY DIAZ,	:	
Respondent.	:	
______________________________	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

ISSUE

WHETHER THE DISTRICT COURT CORRECTLY DECIDED THAT WHEN GROUNDS FOR A TRAFFIC STOP DO NOT EXIST OR CEASE TO EXIST, THE POLICE CANNOT CONTINUE THE TRAFFIC STOP? 5

CONCLUSION 19

CERTIFICATE OF SERVICE 19

TABLE OF CITATIONS

CASES	PAGE NO.
Azadi v. Spears, 2001 WL 418748, 26 Fla. L. Weekly D1077 (Fla. 3d DCA, filed April 25, 2001)	17
Connor v. State, 2001 WL 1013245 (Fla., filed Sept. 6, 2001)	7, 10
Diaz v. State, 26 Fla. L. Weekly D2679b (Fla. 2d DCA, filed Nov. 14, 2001)	2, 4, 7, 8, 10
Hayes v. Florida, 470 U.S. 811 (1985)	16, 18
Hilgeman v. State, 790 So.2d 485 (Fla. 5th DCA 2001)	10
Hudson v. State, 711 So.2d 244 (Fla. 1st DCA 1998)	12
McKendry v. State, 641 So.2d 45 (Fla. 1994)	12
Palmer v. State, 753 So.2d 679 (Fla. 2d DCA 2000)	8, 10, 17
Sands v. State, 753 So.2d 630 (Fla. 5th DCA 2000)	12
State v. Bass, 609 So.2d 151 (Fla. 5th DCA 1992)	4, 5, 7-9, 18
State v. Garcia, 696 So.2d 1352 (Fla. 5th DCA 1997)	14
State v. Iacovone, 660 So.2d 1371 (Fla. 1995)	14
State v. St. Jean, 697 So.2d 956 (Fla. 5th DCA 1997)	13

TABLE OF CITATIONS (continued)

State v. Wikso,
738 So.2d 390 (Fla. 4th DCA 1999) 4-9, 18

Tillman v. State,
471 So.2d 32 (Fla. 1985) 16, 18

Williams v. State,
492 So.2d 1051 (Fla. 1986) 14

OTHER AUTHORITIES

Art I, § 9, Fla. Const. 13
Art. I, §12, Fla. Const. 13, 16
U.S. Const. Amend. IV 13, 16
U.S. Const. Amend. V 13
U.S. Const. Amend. XIV. 13, 16
§ 316.605(1), Fla. Stat. (2000) 11, 12
§ 320.131(1), Fla. Stat. (2000) 11, 12
§ 320.131(4), Fla. Stat. (2000) 8, 11, 12, 14, 15
§ 320.27(6), Fla. Stat. (2000) 11

STATEMENT OF THE CASE AND FACTS

Respondent Johnny Diaz adds the following facts and corrections to petitioner's statement of the case and facts:

The trial court entered a general order denying the motion to suppress and did not make any factual findings on the record or in its written order. (R32, T15). In denying the motion to suppress, the trial court stated, "I just disagree with your position concerning the stop in this case and I'm going to deny the motion." (T15).

The following testimony was given by Officer Crumpler on direct examination concerning the reason the officer thought the temporary tag violated the law:

> Q. [by the prosecution]: What drew your attention about that temporary tag in the window?
>
> A. It was -- it was unreadable; the date, the expiration date was unreadable at the time so I did a U-turn, I was behind him, did a U-turn, initiated a traffic stop and came in contact with Mr. Diaz.
>
> . . . .
>
> Q. [by the prosecution]: Okay. What was obstructing your ability to see the tag?
>
> A. I think the writing on it was not clear, and the actual expiration date was with a pen, it was not dark enough to read.

(T5-6).

Concerning the placement of the tag for visibility, the officer testified as follows on cross examination:

> Q. [by the defense]: And the tag was hung on the inside of the automobile?
>
> A. I believe so, at the top part of the back window.
>
> Q. It was actually in the upper rear window, correct?
>
> A. Yes, ma'am.
>
> Q. And that is an appropriate place for a temporary tag to be located?
>
> A. At the time I believe it was.

(T7).

The only record evidence of what happened after the stop when Deputy Crumpler came face to face with Mr. Diaz is as follows, taken from the transcript of the hearing on the motion to suppress: Q.[by the prosecutor]: Okay. What did you do after you approached the car and saw that you couldn't see the tag?

> A. I just came in contact with the driver.
>
> Q. And what happened at the point?
>
> A. He handed me -- Mr. Diaz handed me a Florida I.D. card.
>
> Q. What happened when he handed you the Florida I.D. card?
>
> MS. MUSGRAVE [defense counsel]: I'm going to object, Judge, this is beyond the basis or beyond the scope of the motion.
>
> THE COURT: I'll sustain the objection.

(T6). The district court's opinion states the following concerning the events that occurred after the stop: "He [the police officer]

walked up to the driver's side of the car and obtained information from Diaz, the driver, which ultimately led to the charge against Diaz of felony driving with a suspended license." Diaz v. State, 26 Fla. L. Weekly D2679b (Fla. 2d DCA, filed Nov. 14, 2001).

The hearing on the motion to suppress contains no evidence of any statement by Mr. Diaz to Deputy Crumpler. (T6). Petitioner's brief refers to a defense statement and cites to the arrest affidavit as support of that statement, Petitioner's Brief on the Merits at 2, 3, 6, but no defense statement was presented as evidence at the hearing on the motion to suppress.

Concerning the sentence imposed, the trial court suspended the twenty-four month prison sentence and placed Mr. Diaz on twenty-four months probation. (R33, 36, 39).

SUMMARY OF THE ARGUMENT

No conflict exists between Diaz v. State, 26 Fla. L. Weekly D2679b (Fla. 2d DCA, filed Nov. 14, 2001) and State v. Wikso, 738 So.2d 390 (Fla. 4th DCA 1999) and State v. Bass, 609 So.2d 151 (Fla. 5th DCA 1992).

The Second District correctly ruled that once grounds for the traffic stop did not exist or ceased to exist, the police could not continue to stop and inquire of the detained individual. The decision of the district court should be affirmed.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT CORRECTLY DECIDED THAT WHEN GROUNDS FOR A TRAFFIC STOP DO NOT EXIST OR CEASE TO EXIST, THE POLICE CANNOT CONTINUE THE TRAFFIC STOP?

There is no conflict in the law on which to base this court's jurisdiction. Both Wikso v. State, 738 So.2d 390 (Fla. 4th DCA 1999) and State v. Bass, 609 So.2d 151, 152 (Fla. 5th DCA 1992), were based on different facts which the respective district courts determined justified the traffic stops made. Additionally, neither case held that an officer can continue to detain a person once the legal grounds justifying the detention no longer exist.

In Wikso v. State, 738 So.2d 390 (Fla. 4th DCA 1999), the Fourth District Court of Appeal found that the factual record, consisting of merely a probable cause affidavit, contained sufficient evidence that the police stop for displaying an improper license tag was legal. In Wikso, the state presented no testimony on the suppression motion, and the trial court ultimately granted the motion to suppress based on the facts set forth in the probable cause affidavit. The facts of the probable cause affidavit showed that the officer stopped Mr. Wikso for displaying an improper license tag. The kind of tag is not disclosed in the opinion, so it is unknown

whether it was a temporary tag or a permanent license plate. The facts of the case do not specify what exactly was improper about the license tag. While the officer was telling the defendant why he had stopped him, the defendant started making movements by reaching behind his back with his right hand. The officer then asked the defendant to get out of the car for the officer's safety. While the defendant was getting out of the car, the police officer saw what he suspected was cocaine in the driver's side door.

The defense in Wikso conceded "that the facts disclose that the officer was initially unable to read the tag." Id. at 391. The facts did not further disclose what caused the tag to be unreadable. The defense maintained on appeal that the record evidence showed the officer was able to read the tag as he approached the vehicle. Since the evidence of the probable cause affidavit did not support this defense factual assertion, the district court did not consider it in ruling. Id. at 390-391. The district court found the stop legal because "the only 'evidence,' considered by the trial court supported the stop." Id. at 391.

The decision in Wikso was based on the facts before the appellate court which set forth a valid stop made for some kind of improper license tag. The facts in the record of Wikso did not set forth a stop based on a properly displayed and visible temporary license tag which the officer could not initially read, but which he

could later read close up. The language in Wikso about the readability of the license tag concerns facts the defense argued to the appeals court, but which facts were not in the record of the probable cause affidavit on which the trial court court's ruling was based. In this case, however, there was an evidentiary hearing and the state used only the testimony of Deputy Crumpler to try to meet its burden of proof. The facts in this case showed the stop here was not for displaying an improper license tag, but that the stop was made because Deputy Crumpler could not read the properly displayed temporary tag. Diaz v. State, 26 Fla. L. Weekly at D2679b; (T5). Thus the facts of this case are distinguishable from the facts in Wikso and the two cases are not in conflict with one another.

The district court in Wikso relied on dicta in State v. Bass, 609 So.2d 151, 152 (Fla. 5th DCA 1992) to support its ruling. The Wikso court stated, "Similarly, in State v. Bass, 609 So.2d 151 (Fla. 5th DCA 1992), under similar circumstances, the court held that "'once the vehicle was properly stopped, the officer could ask to see the driver's license and registration.' 609 So.2d at 152." State v. Wikso, 738 So.2d at 391. Although the Fourth District described the Bass language as a holding, the Bass decision itself describes the quoted language as a finding. 609 So.2d at 152 ("We find that once the vehicle was properly stopped, the officer could ask to see the driver's license and registration.") A holding denotes a ruling of

law, while a finding concerns a factual finding. Rulings on a motion to suppress are based on historical factual questions, legal questions and mixed questions of fact and law. Connor v. State, 2001 WL 1013245 (Fla., filed Sept. 6, 2001). The language the Wikso court relied upon from Bass was not a pure legal conclusion, but a mixed question of law and fact which relied on the particular facts of the Bass case concerning the proper stop, i.e., the temporary tag's lack of the statutorily required visibility. Wikso did not hold that a visible and properly displayed temporary tag containing an expiration date which a particular officer might find unreadable from a distance, would provide lawful grounds for a traffic stop. Wikso did not hold that when the initial grounds for stopping a citizen no longer exist, the police can continue detaining a person in a traffic stop if the grounds for the initial stop are valid. Thus the holding of Wikso does not conflict with the district court's decision below or with Palmer v. State, 753 So.2d 679 (Fla. 2d DCA 2000).

In State v. Bass, 609 So.2d 151, 152 (Fla. 5th DCA 1992), the district court upheld a stop made because a temporary tag "was not sufficiently visible for the officer to determine whether it had expired." Id. The statute regarding temporary tags requires the tag to be "clearly visible from the rear of the vehicle." §320.131(4), Fla. Stat. (2000). Visibility of the temporary tag was not the factual basis for the stop of Mr. Diaz. In the case before this

court, the stop was made "[b]ecause he [the officer] could not read the tag," which was visible and properly displayed. Diaz v. State, 26 Fla. L. Weekly at D2679b; (T5-7).[1]

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[1] The following testimony was given by Officer Crumpler on direct examination concerning the reason the officer thought the temporary tag violated the law:

> Q. [by the prosecution]: What drew your attention about that temporary tag in the window?
>
> A. It was -- it was unreadable; the date, the expiration date was unreadable at the time so I did a U-turn, I was behind him, did a U-turn, initiated a traffic stop and came in contact with Mr. Diaz.
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> . . . .
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> Q. [by the prosecution]: Okay. What was obstructing your ability to see the tag?
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> A. I think the writing on it was not clear, and the actual expiration date was with a pen, it was not dark enough to read.

(T5-6).

Concerning the placement of the tag for visibility, the officer testified as follows on cross examination:

> Q. [by the defense]: And the tag was hung on the inside of the automobile?
>
> A. I believe so, at the top part of the back window.
>
> Q. It was actually in the upper rear window, correct?
>
> A. Yes, ma'am.

In Bass a brief majority opinion, stated, "We find that once the vehicle was properly stopped, the officer could ask to see the driver's license and registration." In Bass one judge dissented from the result, but did not write an opinion. Id. Bass, like Wikso involved a stop legally made because of an improper tag or improper tag visibility. The facts set forth in both cases did not establish that the grounds for the stop were the same grounds that occurred here where the police stopped Mr. Diaz because the officer could not read the ink written on a properly displayed temporary tag. (T5-8). Since Bass and Wikso involve different facts and different bases for a stop, those cases cannot be said to conflict with Diaz and Palmer.

This Court has recently stated the following concerning the standard of review of a lower court ruling on a motion to suppress: "appellate courts should continue to 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 arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section

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> Q. And that is an appropriate place for a temporary tag to be located?
>
> A. At the time I believe it was.

(T7).

9 of the Florida Constitution." Connor v. State, 2001 WL 1013245, 7 (Fla., filed Sept. 6, 2001).

The district court properly ruled the stop at bar illegal, because the officer had a mistaken belief that a violation of the traffic laws had occurred, when in fact it had not. Deputy Crumpler mistakenly believed the tag he saw was not readable. Once he approached Mr. Diaz' car, the tag became readable to him. (T5). A mistaken belief in a law violation cannot justify a traffic stop. Hilgeman v. State, 790 So.2d 485 (Fla. 5th DCA 2001)(mistaken belief that accused had violated open container ordinance did not provide probable cause for arrest for violating that law). The officer's mistaken belief that the temporary tag was improper or not readable cannot justify the traffic stop in this case. Id.

Moreover, it is not unlawful for a person to drive a vehicle carrying a properly displayed and visible temporary tag which happens to contain an expiration date written with a pen which was not dark enough for a particular officer to read from a distance of two or three car lengths. (T5-7). This is so because the law concerning temporary tags provides that the driver does not issue himself a temporary tag, but that the state designs and the state or its agent issues the temporary tag to the vehicle owner. §§ 320.131(1) and (2), 320.27(6), Fla. Stat. (2000). It logically follows then that the vehicle owner does not choose the pen or ink or the handwriting for

filling in the expiration date. Since the car owner has no control over the kind of ink or pen used or the handwriting of the person the state of Florida requires to issue the temporary tag, it would be absurd to then make the car driver legally liable for that ink or pen or handwriting. Such a result would subject vehicle drivers to police stops and to traffic citations for temporary tags only because the state or its designated agents issued a tag which did not meets the state's own requirements. Certainly the legislature did not contemplate such an absurd result; nor should the temporary tag laws be construed to lead to such an absurd result.

The state argues that the stop in this case was justified because the temporary tag was not visible within 100 feet, pursuant to §316.605(1), Fla. Stat. (2000). Petitioner's Initial Brief at 4-5. This position ignores the language of the applicable statute for temporary tags, §320.131(4), Fla. Stat. (2000), as well as the rules of statutory construction.

That the tag could not be read from 100 feet did not provide reasonable suspicion for the detention. The specific law concerning temporary tags requires "Temporary tags shall be conspicuously displayed in the rear license plate bracket or attached to the inside of the rear window in an upright position so as to be clearly visible from the rear of the vehicle." §320.131(4), Fla. Stat. (2000). The general statutory provision concerning licensing of vehicles states

that Florida license plates must be displayed "so that they will be plainly visible and legible at all times 100 feet from the rear or front." §316.605(1), Fla. Stat. (2000).

It is a well settled rule of statutory construction that specific statutory provisions will control over general ones. McKendry v. State, 641 So.2d 45, 46 (Fla. 1994); Hudson v. State, 711 So.2d 244, 247 (Fla. 1st DCA 1998). Applying this principle to the licensing statutes, the temporary tag statute controls and the license plate statute is inapplicable to temporary tags, to the extent a conflict in the two provisions exists. Sands v. State, 753 So.2d 630 (Fla. 5th DCA 2000)(specific statutory provision of §320.131(4), Fla. Stat., regarding temporary tags applies to temporary tag placement and visibility and not statute concerning permanent license plates found in §316.605(1), Fla. Stat.). The temporary tag statute does not require visibility of the temporary tag from 100 feet.

The temporary tag statute does place the responsibility for designing and issuing the temporary tags on the Department of Motor Vehicles. §320.131(1), Fla. Stat. (2000). These temporary tag and license plate provisions cannot constitutionally be construed to require that citizens obtain and use the state issued temporary tag and also be subject to police detention if a given officer cannot read the state issued tag from 100 feet. This is especially so where

the temporary tag and its handwriting are made by state agents or employees. Such a construction of the temporary tag law would violate the state and federal constitutional guarantees of due process and the prohibition of unreasonable searches and seizures. Art. I, §§ 9, 12, Fla. Const.; U.S. Const. Amends. IV, V, XIV.

The Fifth District Court of Appeal encountered a similar issue in State v. St. Jean, 697 So.2d 956 (Fla. 5th DCA 1997). In St. Jean, the district court construed the permanent license plate statute, § 316.605, Fla. Stat. (1995), as not requiring visibility and legibility from 100 feet for the county name on a state issued license plate. In so finding, the district court stated, "Plainly, any writing contained on a Florida tag produced and sold by the state that is not 'visible and legible' at 100 feet could not be an 'identification mark' as referred to in this statute. Otherwise, under the statutory scheme, every citizen who complies with the law by displaying the tag assigned to it by the State of Florida would be in violation of the law requiring legibility at 100 feet. This would yield an absurd result and cannot be what the legislature intended. We question whether the state could establish that the county name on the tags supplied by the State of Florida is visible and legible to a person with normal vision at 100 feet." Id. at 957.

Similarly, the legislature cannot have intended that state issued temporary tags be visible and readable from 100 feet when the

expiration date is handwritten on the tag and a separate statute specifically for temporary tags requires only that the temporary tag be "conspicuously displayed in the rear license plate bracket or attached to the inside of the rear window in an upright position so as to be clearly visible from the rear of the vehicle." §320.131(4), Fla. Stat. (2000). See also State v. Garcia, 696 So.2d 1352 (Fla. 5th DCA 1997)(affirming trial court granting suppression motion where officer stopped vehicle on dark and rainy night because he could not read expiration date on valid temporary tag displayed "high up" in rear window).

"Statutes, as a rule, 'will not be interpreted so as to yield an absurd result.' Williams v. State, 492 So.2d 1051, 1954 (Fla. 1986)." State v. Iacovone, 660 So.2d 1371, 1373 (Fla. 1995). It is indeed absurd to interpret these statutes as requiring a citizen to use a state issued tag which does not comply with the 100 feet visibility requirement and thus subjects every driver with a vehicle displaying a temporary tag to police detention. Instead the principles of common law statutory construction and constitutional due process require that the temporary tag provision be construed to control over the license plate provision. This means that the visibility requirement must be construed to mean "visibility" and not "readability." Additionally, the 100 feet visibility requirement must be interpreted as applying only to permanent license plates and

not read to apply to temporary tags. Therefore, under the applicable state laws, the deputy had no legal grounds to stop Mr. Diaz. If, however, the police can legally stop a car with a temporary tag containing an unreadable expiration date, the police cannot continue the detention once the officer can read a properly displayed and visible temporary tag.

The state also argues that the license tag in this case did not comply with the temporary tag statute requiring it to be clearly visible from the rear of the vehicle, because the tag could only be read from the rear bumper of the vehicle. Petitioner's Initial Brief at 5. Clearly rear bumper visibility, as occurred in this record (T5-8), does comply with the statute's requirement of visibility from the rear of the vehicle. § 320.131(4), Fla. Stat. (2000).

Readability and visibility are separate and distinct requirements. The statute for temporary tags requires "visibility," § 320.131(4), Fla. Stat. (2000), which is logical, because the driver decides where to place the temporary tag and can determine visibility. The statute does not require "readability," which is also logical, since it is not the driver who makes the tag readable, but the state agent who issues the tag.

Whether a temporary tag is visible cannot depend, as the state argues, Petitioner's Initial Brief at 5-6, on a particular officer's ability to read the handwriting of the bureaucrat issuing the

temporary tag. If each officer's ability to read handwritten dates on temporary tags becomes the litmus test for determining if an officer has grounds to stop a car carrying a temporary tag, then every car with a temporary tag could be legally stopped, as long as the officer stated he could not read the handwritten expiration date on the tag except upon close examination. This court should not carve such a temporary tag exception to the state and federal constitutional provisions forbidding random seizures. Art. I, § 12, Fla. Const.; U.S. Const. Amend. IV, XIV. The state's argument should be rejected.

The state also argues that the Florida identification card was legally obtained, regardless of the legality of the stop itself. The state asserts that when Mr. Diaz saw Deputy Crumpler, Mr. Diaz handed over his Florida identification card and stated that his license was suspended. Petitioner's Initial Brief at 6. This argument was not presented below in either the trial court or the district court and was not the basis for the trial court's denial of the suppression motion. (T15; R32), Answer Brief of Appellee at 2-4.[2] A legal argument and the facts supporting it which were not presented in the lower courts should not be presented for the first time in this

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[2] Mr. Diaz's initial brief in the district court stated, "The state did not prove or argue below that the subsequently obtained identification was gotten through valid consent. (I:T6, 15)." Appellant's Initial Brief at 6. The state did not dispute this in its answer brief in the district court.

court. Hayes v. Florida, 470 U.S. 811, 814 n.1 (1985); Tillman v. State, 471 So.2d 32 (Fla. 1985).

This state argument most likely was not relied upon in the trial court because there are no historical facts to support it. The testimony of Deputy Crumpler shows that at some unspecified point after the officer "came in contact" with Mr. Diaz, Mr. Diaz gave the officer a Florida identification card. (T6). There is no evidence that Mr. Diaz gave the deputy the identification card spontaneously or voluntarily. (T6). The state had the burden of presenting evidence that the stop and seizure of the identification evidence were legal. Palmer v. State, 753 So.2d 679, 680 (Fla. 2d DCA 2000). If the state based the stop's legality on Mr. Diaz's behavior after meeting Deputy Crumpler, the state should have sought to make a record with evidence showing facts to support such behavior. Since the state presented no evidence to support legally acquiring the identification card through voluntary means, this argument must be rejected.

There is also no record evidence that Mr. Diaz said anything to Deputy Crumpler about his license being suspended. (T6). The state on appeal relies on facts in the probable cause affidavit as "proof" of a statement by Mr. Diaz. Petitioner's Brief at 2. A probable cause affidavit is not evidence. Azadi v. Spears, 2001 WL 418748, 26 Fla. L. Weekly D1077 (Fla. 3d DCA, filed April 25, 2001). The state

cannot now in this court cure a deficient record with unproved facts it would like the record to contain in order to support its new theory of the stop's validity.

The third basis for the state's argument is likewise without record support. The state concludes that "the delay between the deputy's determination that Respondent's temporary tag was a valid one and the deputy's making contact with Respondent and learning that Respondent's driver's license was suspended was very brief - a matter of a few moments." Petitioner's Initial Brief at 6. The state gives no record support for this factual assertion in the brief, and no record evidence exists to support this conclusion. There is no evidence in this record about how much time passed from the time the officer saw he could read the temporary tag and then obtained evidence of the suspended license. There are no facts to show what kind of delay occurred once the deputy could read the temporary tag. Since the state did not establish below through facts that the contact was de minimum, it cannot now ask this court to issue a ruling relying on those nonexisting facts. Again, this court should not decide this case based on arguments and facts not presented in the courts below. Hayes v. Florida, 470 U.S. 811, 814 n.1 (1985); Tillman v. State, 471 So.2d 32 (Fla. 1985).

There is no conflict between the district court's decision in this case and the decisions of Bass and Wikso; thus jurisdiction does

not lie in this court. The Second District decision rightly ruled that the trial court erred in denying the motion to suppress. The decision of the Second District should be affirmed.

CONCLUSION

Respondent Johnny Diaz respectfully requests that this Court decline to accept jurisdiction over this case or affirm the decision of the district court to reverse the judgment and sentence below and discharge Mr. Diaz.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss and Susan D. Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of August, 2002.

CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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