

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA
(Criminal Division - Dubitsky)

NO. 75-10539

STATE OF FLORIDA,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	<u>EXCERPT TRANSCRIPT</u>
	:	
RAMON DONESTEVEZ,	:	
	:	
Defendant.	:	
	:	
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The above-entitled cause came on for hearing before the Honorable Ira L. Dubitsky, Judge of the above-styled court, at the Metropolitan Justice Building, Miami, Florida, on March 11, 1976, commencing at approximately 1:00 p.m.

APPEARANCES:

JAMES H. WOODARD,
Assistant State Attorney,
State Attorney's Office,
on behalf of the State of Florida.

STEPHEN J. MECHANIC and
STEPHEN J. GOLDSTEIN, ESQS.,
on behalf of the Defendant.

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THE COURT: Okay. That being the situation, at least now I know what the two alternative theories are; I can make some factual findings. All right?

First of all, factually, I don't question anything up until the point of going inside.

I perceive that in order to sustain the burden on the Motion to Suppress, the State must, by clear and convincing evidence, show that if, indeed, it was a consent search, that it was done freely and voluntarily.

In view of the testimony about, first of all, the language problem -- which I think clearly existed -- and, number two, the officer's disparity in recollection between that night, when he wrote his report indicating that the individual reluctantly let him into the office, and today, that he volunteered it, I find it difficult to see how one can reluctantly volunteer to lead one inside; but I am inclined to go with his recollection the same night more than I am from today, and I would simply find that the State has fallen short of its burden to show, by clear and convincing evidence, that if there were consent, it was freely, voluntarily, knowingly and intelligently given.

Insofar as probable cause goes, the officer indicated that the only basis for going inside was that it was a large area and there might be somebody lurking inside with another weapon.

I don't think that anybody would contend -- maybe I'm incorrect -- but I don't think anybody would contend that there was probable cause, per se, to go inside and search for weapons in the cabinet; and the question is, then, whether, pursuant to this arrest, if you can call it an arrest by means of detaining him momentarily, he was entitled to search the immediate area for weapons or had any basis for believing there was anybody else present.

I don't find that merely the fact that it was a large area gave him probable cause to believe there might be somebody else lurking inside, and although I'm inclined to go a long way towards letting a police officer protect his own life and protect his person, I don't think he was reasonable in doing it in these circumstances.

MR. WOODARD: Judge, may I respond to one area that I think the Court may be confused on?

THE COURT: You go right ahead and tell me where you think, factually, I'm incorrect insofar as recalling the testimony goes.

MR. WOODARD: I am not suggesting the Court is incorrectly recalling the testimony.

THE COURT: To the extent that it's other than the testimony, you are questioning, then, the implication arising from it, I will let you respond briefly.

MR. WOODARD: No, no.

All right. The Court has indicated, at least initially, to me, that the Court is inclined to deny the Motion to Suppress as to the one weapon that was observed outside of the building. Am I correct at this stage?

THE COURT: Right.

MR. WOODARD: I also perceive that, at least initially, at this point, the Court is inclined to suppress the remaining three weapons.

THE COURT: I think it would follow from the findings of fact that I preliminarily indicated, and I am affording an opportunity to persuade me differently on the others.

MR. WOODARD: Let me say this to the Court, and here is where I think the problem may be. The Court has -- and perhaps, by stipulation between counsel for the defense and counsel for the State, we have precluded the Court from hearing the entire

factual circumstances surrounding the initial seizure. We are not talking about the suppression of the four weapons as of the 12th, or whatever date it was that the officer went in and made the observations. We are talking about the ultimate Wong-Sun-type theory extending to the seizure of the weapons, ultimately, by the police officers who responded to Officer Vetterick's report; correct?

THE COURT: Right.

MR. WOODARD: All right. Now, if the Court --

THE COURT: If you take the position, as I do, that if the first officer didn't have the right to go in and see them, then all the other observations flowed from that, then, to that extent, I think it would follow that on the subsequent date, the seizure, the actual seizure, would then also have to fall. At least, I will make that as a separate finding of fact.

MR. WOODARD: If the Court please, I think the Court is confused in this area.

Assuming arguendo that the officer had the right to observe the one firearm, the one rifle that was outside, and assuming that his report had indicated only the presence of this one weapon, and

assuming that the members of the Organized Crime Bureau would have followed up this report as a result of the report of one of these weapons, notwithstanding that there were three additional inside, we have not addressed, and counsel has not chosen to raise the issue of the ultimate propriety of the entry to search and the seizure of the weapons inside of the building approximately a week to ten days later. So assuming that the officers had the right to investigate and entered the premises properly, subsequently, whether they were looking for one rifle or whether they were looking for four, is immaterial, because the officer did not seize one, two or three or four of these rifles in the initial stages. It's merely his observations, his propriety of observations and the propriety of the activities that flowed from his observations that the Court is concerned with, and I think at that stage, that it would be improper for the Court to suppress three of the four weapons on the basis of the fact that the officer observed four weapons in the initial stages of his investigation, when the four weapons, in fact, were together when they were seized by the officers later.

THE COURT: You are not suggesting that they went back looking for only one of the weapons?

MR. WOODARD: I think it's immaterial as to how many they were looking for, because when they found the one weapon, they found the four. They were all stacked simultaneously together.

THE COURT: Before you tell me what is material, just tell me, factually, whether you agree or disagree with my observation.

MR. WOODARD: I am sorry.

THE COURT: I said, before you tell me, by way of avoidance of an answer to a question I raised, just answer the question.

MR. WOODARD: I am not avoiding a question, your Honor.

THE COURT: You are not suggesting that they went there looking just for the one weapon?

MR. WOODARD: We are talking, Judge --

THE COURT: That calls simply for a yes or no; then you can go and explain, tell me what your theory is.

MR. WOODARD: I am not suggesting they went looking for a weapon, because they didn't. They went looking for four weapons that had been seen previously.

But, factually, we are determining a Motion to Suppress three of four weapons that were

previously observed.

When the officers responded looking for weapons or a weapon, regardless of whether or not it was singular or plural, all four were recovered simultaneously from the same location. So the question as to whether or not they had the right as a result of the flow of the knowledge from Officer **Vetterick**, to be there and to investigate, the ultimate seizure resulted from the seizure of all of the -- of the seizure of all of the weapons, which were simultaneously impounded, and I think we are creating an artificial --

THE COURT: What you are saying, in effect, is **regardless** of whether or not the officer had followed the guard on inside the house --

MR. WOODARD: Yes.

THE COURT: (Continuing) -- those weapons were kept in the same place, there was no effort to change their place, they would have been there with the one he had in his possession, regardless of whether or not that initial observation had taken place?

MR. WOODARD: That is correct.

THE COURT: And ultimately, inevitably, inexorably, would have been found at the same time

they went back for the others.

MR. WOODARD: That is my argument, and the only reason we have ~~not~~ addressed ourselves to that is because it was not raised.

THE COURT: How do you respond to that?

MR. MECHANIC: Respond to that, basically, I don't think you have the benefit of Officer Vetterick's report --

THE COURT: I am not really concerned about the basis of his report. I just want to know whether you agree or disagree, factually, first of all, with that.

MR. MECHANIC: No. I disagree, factually, with Mr. Woodard's proposition. Is that what the Court is asking me?

THE COURT: Yes.

MR. MECHANIC: Yes. Factually, I disagree. If the report would have been based on what he observed Mr. Bobillo doing outside on the premises as a security guard and that report would have been limited to that, the otherwise legal part of this action, probably -- well, of course, there is no position to know that -- but my belief is that probably there was nothing even remotely, even, nothing illegal in Mr. Bobillo's activities, not at all. As a

matter of fact, he was doing a very valid job. OCB --

THE COURT: Question isn't whether or not there is anything illegal in his activities, but simply whether the officer has any probable cause to go in there and at least investigate, and everybody has conceded that that was a valid police action on his part and I thought we were long past that.

MR. MECHANIC: I am saying that was valid, but if OCB nine days later, based on a report stating just that fact, they would ~~never~~ have come out to secure the premises or do any subsequent search, because all the report would have shown is, here is a security guard employed by this company, outside the premises with a weapon, which turned out to be a lawfully-owned, registered and legal weapon. That's all the report would have indicated.

It's based upon what Mr. Woodard is forgetting, the other part of the report, once he gained access, which caused OCB, nine days later, without a warrant, to then come down and further investigate. So you can't cut them off, because the report is what's in issue, and Mr. Woodard, I believe his argument is asking your Honor to take the report and modify it such that the first action was legal -- and we agree with that, there was nothing wrong. Stop

and frisk would justify the officer seeing a man out with a gun to protect himself and do everything that Officer Vetterick did.

The report didn't end there and it's based on everything else that OCB took their action. There is no doubt as to that from the depositions that we have --

THE COURT: I am inclined to agree and I am going to grant the Motion to Suppress insofar as the other weapons go.

MR. MECHANIC: On our motion, if I could just ask your Honor, we are then also holding that based on that report, the subsequent October 21st seizure, was invalid based upon this October 12th situation.

THE COURT: Of all but the one weapon.

MR. MECHANIC: Right. Oh, fine.

All right.

On the Motion to Dismiss, I imagine your Honor will set now a trial date?

THE COURT: Pardon me?

MR. MECHANIC: Your Honor will set a trial date now, I imagine.

THE COURT: If that's what your pleasure is.

Do you want me to set a trial date now or do you want a report date, say, next week to determine whether there is going to be an appeal or what?

MR. WOODARD: We would request a written Order, and since the Court has indicated *its* findings, I can either have the record prepared and prepare an Order accordingly or --

THE COURT: I think that would probably be the best procedure and I will ask you to prepare from the point where I made my preliminary findings of fact.

MR. WOODARD: We would also -- we would ask for a record of the entire proceedings so they can be reviewed by our Appellate Bureau.

THE COURT: All right. And then when you have submitted the Order to me, I will sign it or correct or whatever is necessary.

When do you want a report date?

Is there a speedy trial problem in this case or anything?

MR. MECHANIC: I don't believe there is. I think it's been waived.

Mr. Woodard, what is your recollection?

MR. WOODARD: Judge, I don't believe it's been waived. There has been a defense

continuance which --

MR. MECHANIC: Well, all right. That defense continuance, we would deem it as a waiver.

MR. GOODSTEIN: In fact, I think that was the Court's request at the time I moved for a continuance; we waived.

THE COURT: I think I specifically did indicate that.

MR. GOODSTEIN: And I believe the record would indicate that it would be waived.

MR. MECHANIC: If they were not, speedies are not in issue. They are being waived.

THE COURT: All right. That being the situation, what I will do is, I will set a report date 3-25 at 9:00.

We will recess for five minutes and then we will pick a jury on the other case. Get me a panel down here.

(Thereupon the hearing

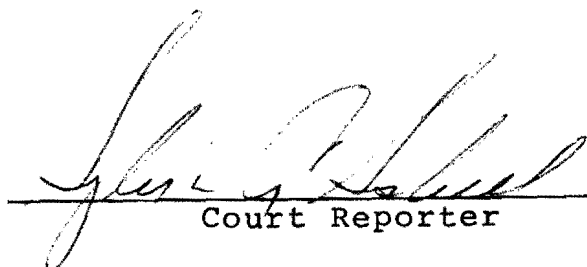
was concluded.)

CERTIFICATE

STATE OF FLORIDA)
 : SS.
COUNTY OF DADE)

I, SYLVIA A. ISBELL, do hereby certify that the foregoing excerpt transcript, pages 1 through 13, is a true and correct excerpt transcript of the proceedings had in the above cause of STATE OF FLORIDA, Plaintiff, versus RAMON DONESTEEVEZ, Defendant, Case Number 75-10539, heard before the Honorable Ira L. Dubitsky, Judge of the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, on the 11th day of March, 1976.

DATED at Miami, Dade County, Florida, this 18th day of March, 1976.



Court Reporter