

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2036
DCA CASE NO. 3D06-2532

WILLIAM LENNON

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

**ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, William Lennon, was the defendant at the trial court and Appellee in the District Court of Appeal, Third District. Respondent, the State of Florida, was the prosecution in the trial court and the Appellant in the district court.

The State appealed the lower court's order granting Petitioner's motion to suppress, arguing that there was reasonable suspicion to detain him and conduct an investigatory stop based on the totality of the circumstances. The State also argued that Petitioner lacked standing to challenge the seizure of the stolen items, and that such argument could be made for the first time on appeal. Petitioner solely seeks jurisdictional review as to the issue of whether the State could raise the standing argument for the first time on appeal. The district court reversed the trial court's ruling in a written opinion. *State v. Lennon*, 963 So. 2d 765 (Fla. 3d DCA 2007). Petitioner's Appendix A. A motion for rehearing and rehearing en banc was denied on September 26, 2007.

The facts contained in the Third District's opinion, *State v. Lennon*, 963 So.2d 765 (Fla. 3d DCA 2007) were, verbatim:

At the hearing on Lennon's motion to suppress, Officer Castaneda testified on behalf of the State. Castaneda testified that at 9:05 p.m. on August 16, 2005, 911 received information that two men were selling a jet ski and a trailer on the side of the road at southwest 181st street and 97th avenue for a "very good price." Castaneda testified this activity was illegal pursuant to a Miami-Dade County ordinance

prohibiting any vehicles from being parked and displayed for sale on public streets.

Officer Castaneda responded in a marked police vehicle to the exact location provided by the tip and saw a van, jet ski, and trailer parked on the side of the public road. Lennon was standing next to the van holding a bicycle when Officer Castaneda parked his vehicle next to the van. As Castaneda approached, Lennon rode five to seven feet away from the scene on his bicycle. At that point, Officer Castaneda told Lennon “stop, I need to talk to you.” Lennon stopped, and Officer Castaneda asked for his driver's license. After Lennon told Officer Castaneda that the van, jet ski and trailer belonged to him, Castaneda asked Lennon whether he had documentation of ownership, and Lennon responded that he did not have any to give him. Lennon told Castaneda that he owned the jet ski and trailer for a period of six months and then consented to an inspection of the jet ski and trailer. During this time frame, Lennon's co-defendant approached Officer Castaneda and Lennon and admitted that they were selling the jet ski and trailer.

Officer Castaneda checked the VIN for the jet ski FN1 and after running the VIN number discovered that both the jet ski and trailer had been stolen six days earlier. After determining that the jet ski was stolen, Castaneda approached another officer at the scene to make contact with the registered owner who lived nearby and *768 obtain a description of the jet ski and trailer. When the second officer confirmed that the registered owner's description matched that of the jet ski and trailer offered for sale by Lennon, he was placed under arrest.

Following the hearing on the motion to suppress, the trial court entered a written order finding that Officer Castaneda “did not make any independent observations that were indicative of criminal activity and had no other facts upon which he could articulate a well-founded basis for suspicion of criminal activity.” Based upon these findings, the trial court concluded that Officer Castaneda “did not have reasonable suspicion to detain Lennon” and granted the motion to suppress “all of the evidence, including the jet ski, trailer, statements made by Lennon, and the officer's identification” of Lennon.

Lennon, at 767-768.

The Third District's opinion contained the following relevant holdings of law:

Here, under the totality of the circumstances, we find that Officer Castaneda had reasonable suspicion to lawfully detain Lennon. Once Officer Castaneda received the information from the dispatcher that two men were attempting to sell a jet ski and trailer on a public road, he proceeded immediately to the detailed location. Upon arriving at the specific location, Castaneda observed Lennon standing next to a van, jet ski, and trailer, all of which were parked on the side of a public road, at night, in a location not near the vicinity of water. This observation, along with the tip, indicated to Castaneda a possible violation of a Miami-Dade County ordinance prohibiting the display of any vehicles for sale on a public street. Additionally, when Lennon saw Officer Castaneda park his car, he fled on a bicycle. In light of the already suspicious circumstances in this case—the possible violation of an ordinance, the time of day plus the anonymous tip, the attempt by Lennon to flee may be considered in deciding whether there existed reasonable suspicion. Indeed, taken as a whole, these factors were sufficient to lead Officer Castaneda to have a reasonable suspicion that a crime may have been, was, or was about to be committed so as to justify further investigation. ...

Although not presented below by the State, the issue of standing may be properly addressed for the first time on appeal. See *McCauley v. State*, 842 So.2d 897, 900 (Fla. 2d DCA 2003) (“the concept of standing has been subsumed into Fourth Amendment issues *770 and can be raised for the first time on appeal.”). On appeal, the State argues that Lennon did not have a reasonable expectation of privacy in either the jet ski or trailer as he did not lawfully possess them. We agree. A defendant challenging a search must show a proprietary or possessory interest in the area of search or that there are other factors which create an expectation of privacy

which society is willing to recognize as reasonable. *Singleton*, 595 So.2d at 45 (Fla.1992).

Lennon, at 769-770. (emphasis added).

SUMMARY OF THE ARGUMENT

The decision below does not expressly and directly conflict with Petitioner's cited opinion. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

THE DISTRICT COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *STATE V. MAE*, 706 So.2d 350 (Fla. 2d DCA 1998).

Petitioner contends the district court's opinion in the instant case directly and expressly conflicts with *State v. Mae*, 706 So.2d 350 (Fla. 2d DCA 1998). Petitioner claims the district court opinion conflicts as to the following question: whether the issue of standing can be raised for the first time on appeal by the State in its appeal of an order granting a motion to suppress.

Petitioner's contention that the instant decision expressly conflicts with the *Mae* decision from the Second District Court of Appeal is misplaced. The two cases are factually distinguishable as the arguments presented by the State were

different. In *Mae*, the State argued for the first time on appeal that the defendant had no standing to seek suppression of the statements made by his codefendant as a result of his stop. In the instant case, the State argued that Petitioner had no standing to challenge the search or seizure of the stolen jet ski and trailer because he had no expectation of privacy in stolen property. Although the points on appeal in the two cases involve arguments as to standing, they do not involve the same issue. Unlike *Mae* where the issue involved standing to suppress a codefendant's statements, the issue in this case involved standing to suppress the search and seizure of stolen property implicating the Fourth Amendment standing requirement of a reasonable expectation of privacy. The two situations are significantly different. The question of standing as to a reasonable expectation of privacy is intertwined with the question of whether such a reasonable expectation exists. By contrast, the question of standing of a defendant to challenge a codefendant's statements is not intertwined with the alleged violation of the defendant's rights. Thus, there is no direct and express conflict between *Mae* and the instant case.

In *Mae*, the Second District Court of Appeal held that the State could not raise the standing issue because of the Criminal Appeal Reform Act, enacted in 1996. Section 924.051(3), Fla. Stat., explained that an appeal may not be taken from judgment or order when the prejudicial error is not properly preserved, unless it constituted fundamental error:

(3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

Subsequently, the Second District Court of Appeal decided *McCauley v. State*, 842 So. 2d 897 (Fla. 2nd DCA 2003). In *McCauley* like in the instant case, the State argued on appeal a lack of standing to challenge a search, i.e., that the defendant lacked a reasonable expectation of privacy in a home searched where he did not live. In *McCauley*, the Second District Court of Appeal reversed and remanded for a new suppression hearing, **expressly** holding: “[a]lthough this point was not argued by the State at the hearing on the motion, **the concept of standing has been subsumed into Fourth Amendment issues and can be raised for the first time on appeal,**” citing to *State v. Abeles*, 483 So. 2d 460, 461 (Fla. 4th DCA 1986) and *St. John v. State*, 400 So. 2d 779, 780 (Fla. 1st DCA 1981). *McCauley*, 842 So.2d at 900. (emphasis added). The decision in *McCauley* was issued **after Mae and after the enactment of the Criminal Appeal Reform Act of 1996.**

Petitioner’s argument that *McCauley* does not support the holding of the Third District Court of Appeal because in *McCauley*, the State was the appellee and “as such could argue for affirmance based on any issue apparent in the record

under the tipsy coachman doctrine,¹” is not accurate. In *McCauley*, the Second District Court of Appeal did not hold that it was reversing the suppression order based on the tipsy coachman doctrine. It specifically held that although the State had not raised the issue below, the concept of standing was subsumed into Fourth Amendment issues and could be raised for the first time on appeal. In fact, a case cited for such proposition by the court in *McCauley* was a State appeal just like the instant case. *See State v. Abeles*, 483 So.2d 460, 461 (Fla. 4th DCA 1986) (the court agreed that although the State had not raised the matter of standing in the trial court, it could challenge appellee's standing for the first time on appeal upon the authority of *Morales v. State*, 407 So.2d 321 (Fla. 3d DCA 1981)).

Clearly, the Second District Court of Appeal has taken a defined stance as to hearing the issue of standing for the first time on appeal. The decision in *Mae* was written in 1998 pursuant to the Criminal Appeal Reform Act. In 2003, however, the same court, ruled differently in *McCauley*.

Furthermore, even if there was a direct and express conflict between *Mae* and the instant case, this Court should exercise discretion **not** to review the instant decision. The point at issue involving standing is academic and irrelevant in this

¹ It permits an appellate court to affirm a trial court's decision that was correct in result, but based on the wrong reason, if there is record evidence of any theory or principle of law that would support the order. *Dade County Sch. Bd. V. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999).

case as the Third District Court of Appeal expressed an independent finding of reasonable suspicion based on the totality of the circumstances supporting the investigatory stop.

CONCLUSION

There is no express or direct conflict between these cases and the district court's opinion below given the factual differences between the cases. As no conflict exists between the face of the district court's opinion below and the case cited by Petitioner, discretionary review as to this matter should be denied.

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests this Court decline jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed to Howard K. Blumberg, Assistant public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, this ___ day of November, 2007.

OLGA VILLA
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief was written using 14-point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

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