IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D14-1240

GABRIEL BRIAN NOCK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA CRIMINAL DIVISION

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ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred as the State or prosecution.

In this brief "Vol" will be used to denote the volume of the record on appeal followed by the actual page number within that volume.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the additions, corrections, clarifications and or modifications contained below and in the body of this brief.

In the Statement of the Facts at pages 8 and 9 appellant incorrectly states that the BSO used a tracking device such as "Triggerfish" to locate appellant in Miami Beach. The facts of the case show that no such tracking device was used. Deputy Thomas testified that even if such a tracking devise did exist, it was not used in this case. (Vol 4, pg. 32) This was the specific finding of the trial judge in the order denying the motion to suppress where he found:

> **Preliminarily, while Defendant argues that the Broward Sheriff's Office used an unknown tracking device, which allegedly tracks to a specific cell phone using signal strength in order to 'track' Defendant. However, there is no basis in the evidence to reach such a conclusion. The deputy who testified in this matter asserted that no such device, other than CSLI, was used in this case to find Defendant. Moreover, when asked to proffer what evidence Defendant would be able to present which forms the basis for reaching such a conclusion, defense counsel offered nothing other than a statement that he believes that law enforcement was lying. This court finds that no such device was used in this case. (SR V1, pages 4-5, order of June 12, 2012)**

Appellant took the stand at the 6-1-2012 motion to suppress

hearing and explained that his cell phone had been turned off over the weekend as he was arrested on Friday by South Beach police, and the cell phone remained in police custody until he retrieved it the following Monday. (Vol 4, pg. 12)

There was no testimony at the June 1, 2012 hearing or the January 21, 2014 hearings on the motions to suppress that the Broward Detectives used tracking equipment or that the Detectives first located appellant's cell phone inside a Starbucks or a Starbucks restroom. (Vol 4 or Vol 5) This was only a defense theory presented at the hearing without evidentiary support. (Vol 4)

The record shows a handwritten order dated August 26, 2011 stating in relevant part: "...the State, through Assistant State Attorney Gregg Rossman, that the device used to locate Gabriel Nock on March 16, 2009, may be referred to or considered a tracking device." (Vol 3, pg. 232) Prosecutor Rossman clarified what was meant by the term tracking device at the June 1, 2012 hearing where he noted: "Mr. Williams wanted a stipulation that the cell phone could be called a tracking device, I said I'll stipulate." (Vol 4, pg. 54) Later Mr. Rossman stated: "I'm offering a stipulation, if you want to call the phone a tracking device, I offer the stipulation." (Vol 4, pg. 56) However, the true meaning of any stipulation is unclear and very ambiguous. This issue was fully

reviewed at the hearing below and the trial judge concluded that no tracking device was used. This was based on police testimony at the hearing. (Vol 4, pg. 32)

SUMMARY OF THE ARGUMENT

The trial court judge correctly denied the motion to suppress. Contrary to the argument appellant asserts, there was no evidence that the police used a real time cellular strength tracking device to locate appellant. This was the finding made by the trial judge. Appellant was located walking down a public sidewalk in Miami Beach by Broward Sheriff's Detectives who were using information from the phone company pursuant to a valid warrant and a photograph from a surveillance camera to help them locate appellant.

The Broward Sheriff's Office Detectives, brought appellant back to their office when appellant volunteered to come with the detectives. Alternatively, appellant was legally arrested in Miami Beach by Broward detectives after appellant had been detained by Miami Beach police officers. It was a valid citizen's arrest based on probable cause.

The trial judge did not abuse his discretion in denying appellant's motion seeking to require the State to admit appellant's redacted video recorded police statement. The State presented what appellant told the police through the testimony of the detective who conducted the interview of appellant. Appellant was free to admit the video recorded statement but chose not to. It is not the role of the trial judge to tell the State what evidence they have to admit at trial.

ARGUMENT

POINT 1

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE MOTION TO SUPPRESS; THERE WAS A FACTUAL FINDING BELOW THAT THE STATE DID NOT USE A SIGNAL STRENGTH TRACKING DEVICE TO FIND APPELLANT'S PHONE

Appellant argues that the trial judge abused his discretion in denying the motion to suppress that sought to exclude evidence derived after police located and arrested appellant in Miami Beach. Appellant argues that the police should not have used a signal strength tracking device to help locate the cell phone. However, the trial judge made a factual finding that no such device was used. The police apparently did use real time cellular site location information (CSLI), authorized by a warrant, to help locate appellant. The State contends the trial judge correctly denied the motion to suppress.

On March 10, 2009 at 8:20 p.m., the victim was found dead in his home in Wilton Manors. His wallet and car and other personal property were missing. The medical examiner concluded it was a homicide. On March 13th, Citibank, the issuer of the victim's credit card, notified the Broward Sheriff's Office that the victim's credit card had been used on March 10th at 8:40 p.m. at an

Athlete's Foot store at a Broward County shopping mall. Police went to the mall, reviewed surveillance videos at that store, and captured a picture of the man using the victim's stolen credit card at the Athlete's Foot store. Based on other video from mall security, the police located a woman (Sophia Jabron) who the man using the victim's credit card had approached and asked on a date while she worked at a kiosk in the mall. The man also gave Ms. Jabron his cell phone number of 954-547-8019 and asked her to call him. Based on this cell phone number the State applied for and received a warrant to utilize real time cell site location information from the cell phone carrier (Verizon) to locate the cell phone of the person who used the stolen credit card of the victim of the homicide. Copies of the warrant application and warrant are in the record on appeal. (Vol 2, pgs. 281-285) Appellant below did not suggest there was anything improper with the issuance of the warrant.

The standard of review for a motion to suppress is summarized in State v. Gandy, 766 So. 2d 1234, 1235-36 (Fla. 1st DCA 2000).

> **A trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness, and we must interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining that ruling. Johnson v. State, 608 So. 2d 4, 9 (Fla. 1992), cert. denied, 508 U.S. 919, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993). In this case, the facts are undisputed and supported by competent substantial evidence. See Caso v. State, 524 So. 2d 422 (Fla.), cert. denied, 488 U.S. 870,**

> **109 S.Ct. 178, 102 L.Ed.2d 147 (1988). Accordingly, our review of the trial court's application of the law to the facts is de novo. See United States v. Harris, 928 F. 2d 1113, 1115-16 (11th Cir.1991). In addition, we are constitutionally required to interpret search and seizure issues in conformity with the Fourth Amendment of the United States as interpreted by the United States Supreme Court. See Fla. Const. art. I, § 12; Perez v. State, 620 So. 2d 1256 (Fla.1993); Bernie v. State, 524 So. 2d 988 (Fla.1988)**

It appears that appellant makes two arguments in the initial brief. First, appellant suggests the motion to suppress should have been granted because appellant asserts the State used some type of unauthorized cellular telephone signal strength tracking device to locate appellant. In support of his argument appellant cites solely to allegations in a defense discovery motion. (Vol 2, pgs. 220-227) However, the facts of the case show that no such tracking device was used. This was the specific finding of the trial judge in the order denying the motion to suppress where he found:

> **Preliminarily, while Defendant argues that the Broward Sheriff's Office used an unknown tracking device, which allegedly tracks to a specific cell phone using signal strength in order to 'track' Defendant. However, there is no basis in the evidence to reach such a conclusion. The deputy who testified in this matter asserted that no such device, other than CSLI, was used in this case to find Defendant. Moreover, when asked to proffer what evidence Defendant would be able to present which forms the basis for reaching such a conclusion, defense counsel offered nothing other than a statement that he believes that law enforcement was lying. This court finds that no such device was used in this case. (SR Vol 1, pages 4-5, order of June 12, 2012)**

Appellant does assert that there was a stipulation between the prosecutor and the defense counsel that a tracking device was used. The record shows a handwritten order dated August 26, 2011 stating in relevant part: "...the State, through Assistant State Attorney Gregg Rossman, that the device used to locate Gabriel Nock on March 16, 2009, may be referred to or considered a tracking device." (Vol 3, pg. 232) Prosecutor Rossman clarified what was meant by the term tracking device at the June 1, 2012 hearing where he noted: "Mr. Williams wanted a stipulation that the cell phone could be called a tracking device, I said I'll stipulate." (Vol 4, pg. 54) Later Mr. Rossman stated: "I'm offering a stipulation, if you want to call the phone a tracking device, I offer the stipulation." (Vol 4, pg. 56) However, the true meaning of any stipulation is unclear and very ambiguous. This issue was fully reviewed at the hearing below and the trial judge concluded, as noted above, that no tracking device was used. This was based on police testimony at the hearing. (Vol 4, pg. 32)

As a secondary argument, <u>which was not presented in the trial court</u>, appellant contends "there was no probable cause to support the BSO tracking of Appellant's cell phone and no basis for a warrant..." (Initial brief at page 34) Appellant also suggests the the Stated cited the wrong statutory subsection in their application. The State contends that these issues were not

preserved for appellate review as the specific legal arguments were not made below. In order to be preserved for appellate review, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of the presentation if it is to be considered preserved. See Tillman v. State, 471 So. 2d 32,35 (Fla. 1985)("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of the presentation if it is to be considered preserved."); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below."); § 924.051(3) Fla. Stat.(2014). The State contends that this court cannot address the merits of appellant's argument because the issue is not properly before this court.

Appellant also makes the unpreserved argument that the fellow officer rule cannot be used to authorize the initial detention by Miami Beach officers because these officers received information from Detectives from Broward County. This is not the law. See Smith v. State, 719 So. 2d 1018, 1022 (Fla. 3d DCA 1996)("The 'fellow officer' rule is applicable whether the communication is from a superior, a fellow officer with the same police department,

between different agencies or agencies at different levels within a state, between officials in different states, and between federal and state or local authorities.")

Appellant's argument here ignores the fact that the State, through the affidavit of Detective Torres, titled "Application for An Order To Release Location Information by 'Real Time Cellular Site Information'" applied for a warrant to receive CSLI information from the cellular phone carrier Verizon. (Vol 2, pg. 281) The application was very specific citing to cell phone number 954-547-8019. This was the phone number that appellant gave Ms. Jabron at the mall. Appellant had just used the stolen credit card of the victim to purchase an item at a store in the mall. This purchase occurred within one hour of the time the victim's body was discovered. The Circuit Court Judge issued the warrant titled: "Order To Release Location Information by Real Time Cellular Site Information." (Vol 2, pg. 285) The warrant was specific and limited to cell number 954-547-8019. There was probable cause to issue the warrant. Appellant was seen on video using the credit card of the victim shortly after the victim was discovered dead in his home. His wallet and car were missing. It was a homicide. The picture from the mall matched the description of the person last seen with the victim. The trial judge correctly issued the warrant based on this information.

Point 2

THE TRIAL JUDGE CORRECTLY DENIED THE MOTION TO SUPPRESS; THERE WAS NOTHING IMPROPER LOCATING APPELLANT ON A SIDEWALK IN MIAMI BEACH

Appellant argues the trial judge erred in denying the motion to suppress[1]. This issue involves the defense motion to suppress due to an alleged illegal arrest made outside of law enforcement's territorial jurisdiction filed on December 9, 2013. (R 407-413) In that motion appellant contends that his arrest in Miami Beach was unlawful. Argument was heard during a January 14, 2014 hearing. (vol 5) The trial judge orally denied the motion to suppress at the conclusion of the hearing stating:

> **For the various points raised, I read the case law a little different than counsel for the defense. I find that based on Phoenix and the various issues that are raised and argued by the State, your motion to suppress**

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[1]**Appellate courts should 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 should independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the State Constitution and Fourth and Fifth Amendments to the Federal Constitution. Blue v. State, 837 So. 2d 541 (Fla. 4th DCA 2003).Review of a motion to suppress presents a mixed question of law and fact. See State v. Leonard, 764 So. 2d 663, 664 (Fla. 1st DCA 2000). The Court must examine the trial court's factual findings to ensure they are supported by competent substantial evidence and examine its application of the law to the facts de novo. See Williams v. State, 721 So. 2d 1192, 1193 (Fla. 1st DCA 1998).**

is denied.(vol 5, pg. 138)

No written order denying the motion is in this record on appeal. The State strongly asserts the trial judge correctly denied the motion to suppress.

On March 16th Broward County Sheriff Deputies went to Miami Beach in an attempt to locate appellant. They did not know his full name but had his March 9th picture from a surveillance camera photo (Vol 5, pg. 44) showing him making a purchase with the stolen credit card of the homicide victim shortly after the victim's body was discovered. They knew he was in possession and had used the credit card of the victim to make purchases at several locations both before and after the victim was discovered. (Vol 3, pgs. 11-14, 23-25, 62, 67[2]) They knew that appellant was in possession of a cell phone[3] and pursuant to a warrant police knew the cell phone was in the small area of Miami Beach to which they responded. (Vol 5, pg. 25) Police also knew that the last person the victim had been seen with was a Latin male named Gabriel who was from the Delaware area. (Vol 5, pg. 26) While cruising the streets in Miami

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[2]**The victim's credit card was used at 5:46 p.m. at a Los Olas Blvd. 7-11. It was also used at at a Target Store in Hollywood. This was around 3 hours before the victim's body was discovered. (Vol. 3, pgs. 67-69)**

[3]**Appellant had given his cell phone number to a clerk at the shopping mall when he made a purchase and asked her on a date. (Vol 5, pg. 46)**

Beach, Broward Sheriff's Office Detective Belanger, observed appellant on a corner and had two on duty uniformed Miami Beach police officers approach him. Broward Detective Luis Rivera, who was in plain clothes and also in the area looking for appellant, responded and observed appellant standing between the two Miami Beach uniformed officers. He was not restrained in any way. Guns were not drawn.(Vol 5, pgs 15-16) Rivera approached appellant and told him he was from the Broward Sheriff's Office. Rivera observed appellant in possession of a tote bag with the initials "LWE" on the front--the same initials as the homicide victim. (Vol 5, pgs. 17, 86, 95) The bag was open and Detective Rivera saw inside a lap top computer, credit cards, keys to a vehicle and the victim's business cards. (Vol 5, pgs. 95-96) Appellant appeared to have a bad sun burn. This matched the description given of the person last seen with the victim. (Vol 5, pgs. 97-98) When Rivera introduced himself to appellant he responded this must be about the car and appellant also voluntarily mentioned there was a warrant out for him from Delaware. Appellant gave the Detective his name--Gabriel Nock. (Vol 5, pgs. 18-19) Nock told the Detective he was willing to co-operate in the investigation and volunteered to go back to Broward County. (Vol 5, pgs. 20, 96, 100) Nock was placed in handcuffs, pursuant to policy, and placed in the backseat of an unmarked vehicle and transported to Broward County. Nock

volunteered to show the police where he had parked the victim's car. (Vol 5, pgs. 30, 90) It was established during redirect that with Rivera was Detective Nicholson who had been deputized by the United States Marshall Service giving him nationwide arrest jurisdiction. (Vol 5, pgs. 98-100) Detective Rivera verified that appellant had a warrant out of the State of Delaware. (Vol 5, pg. 101) Rivera, when he first approached appellant verified that appellant matched the picture he had. (Vol 5, pg. 102)

The trial judge orally denied the motion to suppress. (Vol 5, pg. 138) This was the proper ruling.

The State acknowledges, that as a general principle, public officers of a county or municipality have no official power to arrest an offender outside the boundaries of their county or municipality. State v. Phoenix, 428 So. 2d 262, 265 (Fla. 4th DCA 1982), citing State v. Shipman, 370 So. 2d 1195, 1196 (Fla. 4th DCA 1979). However, in addition to their official power to arrest, police officers also have a common law right as citizens to make so-called citizen's arrests. Phoenix v. State, 455 So. 2d 1024 (Fla. 1984).

"Under the common law as it exists in Florida, private persons can arrest for a felony in two situations. Private persons can arrest (1) for a felony committed in their presence and (2) for a felony that they know was committed if they have probable cause to

believe and do believe that the person arrested perpetrated the felony." State v. Phoenix, 428 So. 2d 262, 265 (Fla. 4th DCA 1982). The State contends that (2) directly applies to this case. Below, it was strongly argued that the any arrest of appellant in Miami Dade County was a valid citizen's arrest because the Broward County Sheriff's Deputies had probable cause to believe appellant was directly involved in the homicide of the victim in Wilton Manors as well as the theft of his wallet, fraudulently using the victim's credit cards and taking the victim's vehicle and other belongings. (Vol 5, pgs. 108-09)

This court has also stated: "At common law, a private citizen may arrest a person who in the citizen's presence commits a felony or breach of the peace, or a felony having occurred, the citizen believes this person committed it." Edwards v. State, 462 So. 2d 581 (Fla. 4th DCA 1985), citing State v. Schuyler, 390 So. 2d 458, 460 (Fla. 3rd DCA 1980) and Schachter v. State, 338 So. 2d 269, 270 (Fla. 3rd DCA 1976). The Supreme Court of this state noted: "A private citizen does have the common law right to arrest a person who commits a felony in his presence, or to arrest a person where a felony has been committed, and where the arresting citizen has probable cause to believe, and does believe, the person arrested to be guilty. Even though there was time to obtain a warrant, a private citizen may make such an arrest and justify his failure to

obtain a warrant by proving the person arrested was actually guilty of a felony." Phoenix v. State, 455 So. 2d 1024, 1025 (Fla. 1982), quoting, Collins v. State, 143 So. 2d 700, 703 (Fla. 2nd DCA 1962).

At bar, based on the facts outlined above, there was never a dispute that Broward County Deputy Sheriffs had probable cause to arrest appellant as he stood on a public sidewalk in Miami Beach. The probable cause was established long before the Broward officers went to Miami-Dade County. The probable cause was based on the homicide investigation that occurred totally within Broward County. The police had appellant's picture taken at the time he illegally used a credit card of a homicide victim in Broward County a few days earlier when appellant was spotted on the sidewalk. They went to Miami-Dade solely to locate appellant.

The main argument presented below was that Broward County Deputy Sheriffs could not act in Miami Dade County based on evidence they validly previously collected in Broward County, because that evidence was collected based on investigative techniques not available to the general public. (Vol 5, pgs. 118-129) Appellant argues that this made any Broward Sheriffs Office citizen's arrest of appellant in Miami-Dade County illegal because is was violative of the "under color of their office" doctrine. Appellant clearly misreads State v. Phoenix, 428 So. 2d 262 (Fla. 4th DCA 1982), approved, Phoenix v. State, 455 So. 2d 1024 (Fla.

1984).

There is nothing in State v. Phoenix that prohibits police from utilizing previously validly collected evidence from within their jurisdiction to establish probable cause and then use that probable cause as the basis for a later citizen's arrest in another jurisdiction. It is important to stress that once appellant was seen on the sidewalk, Miami Beach police officers approached appellant and apparently detained appellant. The initial interaction was not done by Broward County Deputy Sheriffs[4]. At no time did Broward Officers utilize the color of their office to collect evidence or ferret out criminal activity in Miami-Dade County

The portion of Phoenix utilized by appellant is dicta, is very ambiguous and at best is limited to situations where police officers acting outside of their jurisdiction utilize the power of their office to gather or observe evidence or ferret out criminal activity outside of their jurisdiction that is not generally observable or obtainable without the assertion of official

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[4]After this valid detention appellant volunteered many things including the fact there was warrant for his arrest issued by Delaware, and the fact he had driven the victim's car and parked it in a nearby parking garage. Appellant acknowledged had had been with the victim when he died. This volunteered information greatly enhanced the degree of probable cause the officers had to perform a citizens arrest.

authority. This apparently means that the police must assert their official authority outside of their jurisdiction. See State v. Phoenix, 428 So. 2d 262, 266 (Fla. 4th DCA 1982)("The evidence upon which the arrests were based was obtained before confronting any persons in St. Lucie County and without any unlawful assertion of official authority vis-a-vis the occupants or a third party.") However, under Phoenix, 428 So. 2d at 266 n.2, there is nothing improper with police outside of their jurisdiction gathering evidence "through the use of their own senses and through the voluntary cooperation of citizens..." This is exactly what happened here. At bar, Broward County Sheriffs never asserted their official authority in Miami-Dade County. Appellant volunteered information and volunteered to return to Broward County.

In State v. Shipman, 370 So. 2d 1195, 1196-97 (Fla. 4th DCA 1979) this court described the under color of office doctrine as follows: "'Under color of office' refers to a law enforcement officer actually holding himself out as a police officer, by either wearing his uniform or in some other manner openly asserting his official position, in order to observe the unlawful activity involved or the contraband seized.") This did not happen here.

McAnnis v. State, 386 So. 2d 1230 (Fla. 3d DCA 1980) supports the State's position. In that case, a Broward County police officer completed the purchase of drugs in a home in Dade County, while

Dade County police officers waited outside. The Broward County officer pulled his weapon to detain the drug dealer and prevent him from escaping. Ultimately, the Dade County officers entered the home and arrested the drug dealer. Clearly, the Broward County officer in McAnnis had probable cause and believed that a person committed a felony. Thus, the detention in McAnnis constituted a proper citizen's arrest.

In San-Martin v. State, 562 So. 2d 776 (Fla. 2nd DCA 1990) the court wrote:

> **Also, Phoenix approves the district court of appeal's determination in that case that officers who made an arrest in an area outside of their geographical jurisdiction based upon evidence they did not obtain there were not acting improperly under the color of their office. 455 So. 2d at 1026. Accordingly, the mere fact that an officer acts like a police officer in making an arrest outside of his geographical jurisdiction does not mean that he is improperly acting under the color of his office.**

See also State v. Price, 74 So. 3d 528 (Fla. 1st DCA 2011).

It is clear that the detectives from Broward County were not acting under color of office when they went to Miami-Dade County looking for appellant.

The State made other arguments at the hearing below. After appellant was initially approached by the two Miami Beach Officers[5]

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[5]**The two officers from Miami Beach did not testify at the hearing below.**

(Vol 5, pgs. 81-85) at the request of Broward Detective Belanger, he was co-operative and voluntarily agreed to return to Broward County with the Broward County Detectives,[6] to answer questions about the incident in Wilton Manors. (Vol 5, pgs. 20-23, 106) The detective testified that appellant volunteered to go back to Broward County. (Vol 5, pg. 20) As noted earlier, under Phoenix, 428 So. 2d at 266 n.2, there is nothing improper with police outside of their jurisdiction gathering evidence "through the use of their own senses and through the voluntary cooperation of citizens...". This is what happened in this case. There was no indication that the detectives placed appellant under arrest in Miami Beach or communicated to him that he was under arrest. (Vol 5, pg. 28) Everything appears to be totally voluntary on appellant's behalf. Appellant, without any police questioning, also volunteered to show the officers where he had parked the victim's car and he directed officers to a local parking garage.(Vol 5, pgs. 28-30) Appellant voluntarily told police there was a Delaware warrant issued for his arrest. Pursuant to policy applicable to all persons detained or under arrest, appellant was placed in handcuffs. (Vol 5, pg. 22) The co-operative and voluntary nature of appellant's actions clearly acted as a waiver,

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[6]**The detectives were in plain clothes and did not display any weapons.**

or clears any taint from an assertion of an invalid stop or detention. Additionally, appellant was fully Mirandized before giving his formal statement to police in Broward County. (Vol 5, pg. 104) This fact also acted to clear any taint of any earlier improper police activity.

It is clear that appellant voluntarily told police, while he was on the sidewalk, that he had an active open warrant from the State of Delaware. (vol 5, pg. 19) He also directed the police to a stolen vehicle of the homicide victim and was in possession of items stolen from the victim. The prosecutor argued as follows below:

> **And finally, Mr. Nock had a warrant out of Delaware. No matter what happened that morning, once he brings it up and says, is this about the warrant out of Delaware. I asked the detective, did you conform that? He said, yes. Once that happens, Mr. Nock is in custody, no matter where they take him. Broward County or Dade County, he's going to be in custody, lawfully. (vol 5, pg. 114)**

These facts made it inevitable that all of what was discovered from finding appellant in Miami Beach would have been inevitably discovered. The inevitable discovery doctrine is applicable here. See generally Maulden v. State, 617 So. 2d 298, 301 (Fla. 1993)(Under the inevitable discovery doctrine, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been

discovered by legal means.") Alternatively, if appellant had not been so co-operative with the Broward Detectives, Detective Rivera would have had Detective Nicholson, who had nationwide arrest powers, arrest Nock before he was brought back to Broward County. (Vol 5, pgs. 98-101)

Point 3

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN RULING AS HE DID, THE RULE OF COMPLETENESS AS FOUND IN § 90.108(1) IS NOT APPLICABLE AS THE STATE NEVER INTRODUCED THE ACTUAL VIDEO RECORDED STATEMENT TO POLICE

Appellant was taken to the Broward Sheriff's Office where he gave a Mirandized statement to Detective Rivera. During this statement he admitted his involvement in the death of the victim. The statement was video recorded. This video recording was not offered into evidence at trial by either party. Detective Rivera did testify at trial and was asked questions regarding what appellant said to him during the statement. Defense counsel below made many arguments suggesting that the trial judge should require the State to introduce the video recorded statement into evidence. This was apparently done as part of a defense strategy to place the exculpatory comments appellant made during the statement before the jury without exposing appellant to impeachment with his prior felony convictions[7]. The trial judge rejected appellant's arguments and did not compel the State to present the actual video recorded statement to the jury. During cross examination of Detective

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[7]**Appellant argues in the initial brief: "... Appellant should not have been burdened with the admission of his prior felony convictions." (initial brief, page 41)**

Rivera, the appellant's exculpatory statements were presented. These statements formed the basis of his defense of accidental death.

There were three pretrial motions filed regarding this video recorded statement. The first was filed by the State and that motion sought to redact certain portions of the statement which the State believed were inadmissable as they referenced prior crimes or prior arrests. (Vol 3, pgs. 422-425) The second motion was filed by the defense and it sought to require the State to admit the entire video recording into evidence and not just the testimony of Detective Rivera. In that motion the defense clearly admits it is aware that the State was considering not introducing the actual video recording at trial. (Vol 3, pgs. 427-429) The third motion was a memorandum of law in support of the defense position. (Vol 3, pgs. 430-434) The trial judge denied the defense motion to require the State to introduce the actual video recorded statement. (Vol 14, pgs. 1003-1010) It is apparently from this ruling that the present issue arises.

During the State's direct examination of Detective Rivera defense counsel made several objections and requested the State be required to present the redacted video recording of the appellant's police statement citing best evidence and citing section 108 and stating the "rule of completeness." (Vol 18. pgs. 1387-88, 1399,

1412, 1431, 1434) The prosecutor responded that the defense was free to introduce the video in their portion of the case. (Vol 18, pg. 1400)

The admission of evidence is within the sound discretion of the trial court and will not be overturned absent a showing of an abuse of discretion. Taylor v. State, 640 So. 2d 1127, 1133 (Fla. 1st DCA 1994); Jent v. State, 408 So. 2d 1024 (Fla. 1981); Traina v. State, 657 So. 2d 1227 (Fla. 4th DCA 1995). "Overall, broad discretion rests with the trial court in matters relating to the admissibility of relevant evidence, and that ruling will not be overturned absent a clear abuse of discretion." Grau v. Branham, 761 So. 2d 375, 378 (Fla. 4th DCA 2000). "A trial judge is afforded significant discretion in determining whether the prejudicial nature of evidence outweighs any relevance the evidence may have at trial." Rodriguez v. State, 753 So. 2d 29, 42 (Fla. 2000). "Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion." Johnson v. State, 40 So. 3d 883, 886 (Fla. 4th DCA 2010).

The ruling of the trial judge was correct and was not an abuse if discretion. The precise issue was looked at in Hoffman v. State, 708 So. 2d 962 (Fla. 5th DCA 1998) where the court held:

> **Appellant incorrectly asserts that the "rule of completeness" recognized in section 90.108, Florida Statutes (1997) should have allowed him to enter exculpatory portions of the tape that the state did not introduce. In this case, however, no writing or recorded statement was introduced by the state. The state simply asked the deputy to tell the court and jury what appellant said. The rule of completeness is inapplicable when no portion of the taped statement is actually played for the jury. Larzelere v. State, 676 So. 2d 394 (Fla. 1996), cert. den., 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). Since appellant sought to exclude or otherwise preclude introduction of the tape, and did not attempt to introduce it himself, we find no abuse of discretion.**

This court followed and applied Hoffman in Cann v. State, 958 So. 2d 545, 546 (Fla. 4th DCA 2007). This is controlling of the issue here[8].

Clearly, as held in Hoffman, there can be no violation of §90.108 Fla. Stat. when the State does not introduce a writing or recorded statement into evidence. Obviously, the defense was free to ask the Detective anything they wanted about what appellant said during the police statement during cross examination. They did this during cross examination and the Detective gave answers during his police statement supportive of the accident defense which was asserted. (vol 18, pgs. 1416-18, 1440-41, 1516) Also, the defense could have introduced the video statement but chose not to.

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[8]**See Larzelere v. State, 676 So. 2d 394, 401 (Fla. 1996) (noting that section 90.108 is known as the "rule of completeness").**

However, since the exculpatory portions were elicited by the defense during cross examination this opened the door to the admissibility of prior convictions as impeachment[9]. See Kelly v. State, 857 So. 2d 949, 949-50 (Fla. 4th DCA 2003) (finding that pursuant to section 90.806(1), such generally inadmissible evidence of the defendant's prior convictions was admissible for impeachment purposes once the declarant introduced the exculpatory statements through cross-examination of the State's witness); Huggins v. State, 889 So. 2d 743, 756 (Fla. 2004) (A defendant who chooses not to testify but who succeeds in getting his or her own exculpatory statements into evidence is subject to having those statements impeached by felony convictions.); Gonzalez v. State, 948 So. 2d 877 (Fla. 4th DCA 2007); Freeman v. State, 74 So. 3d 123, 125 (Fla. 1st DCA 2011)("The State can use a defendant's prior convictions to impeach exculpatory hearsay statements of a defendant who does not testify but gets the statements into evidence through another witness.")

This doctrine is obviously the reason appellant continually

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[9]**The prosecutor noted "I have nine felonies. There are others, like I said, but I think nine is sufficient of prior felony convictions out of Delaware." (vol 18, pg. 1436) After cross examination of Detective Rivera where the defense counsel brought out many of appellant's exculpatory statements made during the video statement, the jury was advised, without objection, that "Mr. Nock has nine prior convictions of felonies or crimes involving dishonesty." (vol 20, pg. 1627)**

argued below that the State should be required to admit the entire video of his police statement. The trial judge did not agree. The State or defense did not admit any of the video statement at trial. On cross examination of the detective the defense brought out the exculpatory portions of the police statement including appellant telling police the death was an accident. (vol 18, pg. 1440) The ruling of the trial judge was not an abuse of discretion.

Appellant also argues that the trial judge should have required the State to ask Detective Rivera about portions of the video statement where appellant said things that could be viewed as exculpatory. This argument was never made below and is therefore not properly before this court. "In order to preserve the issue for appellate review, a party must have made the same argument to the trial court that it raises on appeal." Morrison v. State, 818 So. 2d 432, 446 (Fla. 2002); F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003)(confirming that for an argument to be cognizable on appeal it must be the specific contention asserted as a legal ground below) See Archer v. State, 613 So. 2d 446, 448 (Fla.1993) (stating the issue "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved").

Obviously it is not the role of a trial judge to direct the State regarding how to present their case and what witnesses to

call and what questions to ask of a witness.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests this court affirm the trial court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished to: Ian Seldin, Assistant Public Defender, 421 Third St, 6th floor, West Palm Beach, FL. 33401 at appeals@pd15.state.fl.us and a PDF copy has been sent to the Fourth District Court of Appeal at edca.4dca.org on April 6, 2016.

/s/ Don M. Rogers
OF COUNSEL

Certificate of Font Size

This brief is typed in Courier New 12 font.

/s/ Don M. Rogers
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