IN THE

SUPREME COURT OF THE STATE OF FLORIDA

TERRTRIC DOCTOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,433
DCA No. 88-3358

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida. Respondent was the Appellee and the Prosecution, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" = Record on Appeal

"SR" = Supplemental Record

STATEMENT OF THE CASE AND FACTS

Terrtric Doctor, Petitioner, was charged by information filed in the Nineteenth Judicial Circuit with trafficking in cocaine, a first-degree felony, and possession of cocaine, a third-degree felony (R 113).

Petitioner filed a motion to suppress physical evidence (R 126-127) which was heard by the trial court on November 14, 1988 (R 1-112).

On July 14, 1988, at approximately 2:20 a.m. (R 8), Petitioner was a passenger in his own vehicle (R 4) travelling north on Interstate 95 (hereinafter I-95) (R 74). Petitioner testified that his vehicle was travelling in the far left lane at 55 miles per hour (R 75) as it approached the southern boundary of St. Lucie County. Petitioner testified that at that time, a large automobile with dark tinted windows pulled onto I-95. As Petitioner's vehicle passed the automobile, it pulled directly behind Petitioner's vehicle. Petitioner testified that because of the way the automobile pulled behind him he believed the driver wanted to pass. However, the automobile pulled into the lane immediately to the right of Petitioner's vehicle, pulled up next to his vehicle and stayed there for approximately two minutes before it sped up and disappeared (R 74). Petitioner testified that approximately five miles later his vehicle passed a Florida Highway Patrol vehicle (hereinafter patrol vehicle), which was parked on the right side of the road. The patrol vehicle pulled onto I-95. The emergency lights for the patrol vehicle were activated and the driver of

Petitioner's vehicle pulled off to the side of I-95 and stopped (R 75).

Trooper Burroughs said he saw Petitioner's vehicle travelling northbound on I-95 at a slow rate of speed. He said he pulled Petitioner's vehicle over because of a broken left rear taillight (R 8). He stated that as his patrol vehicle approached Petitioner's vehicle from behind, he could tell the taillight was broken because white light was emitting from the broken section (R 9). Trooper Burroughs said he did not receive any instructions to stop Petitioner's vehicle (R 64). He then summoned the driver out of the vehicle and told the driver to summon the passenger out as well. Trooper Burroughs said that was normal procedure when the windows of a vehicle are darkly tinted (R 10-11). Although Trooper Burroughs said he did not believe the occupants of Petitioner's vehicle were armed (R 33), Petitioner was not informed that he did not have to exit the vehicle (R 35). While he was asking the driver for his license and registration he noticed Petitioner exiting the vehicle. Trooper Burroughs said Petitioner was walking sideways toward the rear of the vehicle as Deputy Aprea approached him. Trooper Burroughs noticed a bulge in Petitioner's groin area measuring approximately eight (8) inches long by four (4) inches wide. He took one or two steps back from the driver and yelled at Deputy Aprea, who simultaneously noticed the bulge. Deputy Aprea placed Petitioner up against the rear of Petitioner's vehicle and began a pat-down (R 39).

Trooper Burroughs testified he and Deputy Aprea were

"operating a drug interdiction program on I-95 ... the combined efforts of the Florida Highway Patrol and the St. Lucie County Sheriff's Department" (R 9). Trooper Burroughs testified that his major purpose for being out there that evening was to interdict drugs. He further testified he was relieved of most of his duties and that his primary mode of operation was to find traffic violators, including minor traffic violators, and stop them (R 14). Trooper Burroughs said another unit was working with them. The other vehicle was unmarked, indistinguishable from a civilian vehicle, and was operated by two plain-clothes deputies (R 15).

Trooper Burroughs said he stopped Petitioner's vehicle because it was in violation of Florida Statute 316.610, "the improper and safe equipment statute." Additionally, Trooper Burroughs said he believed the statute "read in fact that all equipment that has to be on the vehicle, because of state laws, must be in proper working order" (R 18). He said a taillight lens on the rear of Petitioner's vehicle was not in proper working order (R 20). He also said Petitioner violated Florida Statute 316.221 which is set aside for tail lamps. Although he later recanted, saying Petitioner only violated Florida Statute 316.610 (R 19-20), he went on to say that there was a light emitting from a bulb behind the broken lens (R 27, 31). However, later he said he did not know where the source of light was (R 41). Trooper Burroughs said there were two taillights shining on the left side and two shining on the right side. He went on to note that the back-up lights were located at the inner-side of the taillights, and that the next lens in from

the back-up light was the one which was cracked (R 29-30). Trooper Burroughs answered defense counsel's question in the negative when asked, referring to the two taillights on the left side, "So is that a violation of any statute just having two bulbs burning on the left side?" (R 29). Trooper Burroughs said that if the lens which was cracked was a reflector, that it was still part of the "taillight assembly." He agreed with defense counsel that if there was no bulb, and thus no light emitting from the cracked lens, he would not have had any reason to stop Petitioner's vehicle (R 31).

Deputy Aprea said Petitioner's vehicle was stopped because of a broken taillight (R 45). He said the unmarked unit was acting as a scout vehicle (R 60) and that the deputies in the unmarked unit radioed to Deputy Aprea and Trooper Burroughs that Petitioner's vehicle was coming their way. They also provided a description of Petitioner's vehicle, including the tinted windows and the tag number (R 58-59). Deputy Aprea said he and Trooper Burroughs were informed by the deputies in the unmarked unit of the defect on Petitioner's vehicle and that they knew what to look for when the vehicle passed (R 60). Deputy Aprea said Trooper Burroughs would have heard the radio transmission as well because the radio was between them (R 61).

Deputy Aprea said that upon stopping Petitioner's vehicle, he had no reason to believe Petitioner was committing a crime. He also said he had no reason to believe Petitioner was committing a crime when he was "pulled from the vehicle" (R 51-52). Deputy Aprea said he noticed the bulge in Petitioner's "belt line" in his pants, and

that it was about five (5) to six (6) inches square. He said his initial reaction was that it was a weapon, so he placed Petitioner against the trunk of the car. Deputy Aprea requested that Petitioner "remove whatever was in his pants" (R 48). Deputy Aprea performed a pat-down on Petitioner subsequent to Petitioner's failure to comply with his request. During the pat-down, Deputy Aprea said he felt what he believed was a package of cocaine and not a weapon. Deputy Aprea said he based his belief upon feeling the texture of what appeared to be a plastic bag and the "peanut brittle type feeling in it," which he equated with the texture of rock cocaine (R 48). Deputy Aprea said he had seen or felt rock cocaine approximately 800 times (R 45). He also said he had come across people storing cocaine in their belt or groin area in about 70 of the 130 search warrants he had participated in executing (R 49).

Petitioner testified his vehicle is equipped with two sets of rear lights consisting of a signal light on the outside of the light bank, then a brake light, then a reverse light, then a lens which never lights up (R 68). Petitioner further testified that: a bulb goes behind the outside lens which is the signal light; a bulb goes behind the next lens in, which is the brake light; a bulb goes behind the next lens, which is the reverse light; and no bulb goes behind the innermost lens, which is the lens which was cracked (R 71-72).

The trial court denied the motion to suppress finding that "what the officer determined in his own mind on that evening ...

that the left rear taillight was out ..." (R 108-110). Subsequently, Petitioner entered a plea of nolo contendere to Count I, trafficking in cocaine (R 130, SR), indicating his intent to appeal the trial court's denial of his motion to suppress (R 109-111). Count II was nolle prossed by the state (SR). Petitioner was adjudicated guilty of Count I and sentenced to seven (7) years incarceration in the Department of Corrections with credit for time served (R 132).

Notice of Appeal was timely filed (R 139). On January 16, 1991, the Fourth District Court of Appeal affirmed the trial court's denial of Petitioner's motion to suppress. In so doing, the Fourth District Court certified that its opinion was in conflict with the Second District Court of Appeal's decision in Dunn v. State, 382 So.2d 727 (Fla. 2d DCA 1980).

On February 15, 1991, Petitioner timely filed a Notice to Invoke the Discretionary Jurisdiction of this Court. On February 22, 1991, this Court issued an Order setting a briefing schedule for this cause which was modified by this Court's Order of March 19, 1991.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Petitioner's motion to suppress physical evidence where the stop was not a valid traffic stop because no traffic violation occurred and/or it was a purely pretextual stop and no founded suspicion existed to otherwise justify the stop. In addition, the resulting seizure was illegal because Deputy Aprea exceeded the limited scope of a weapons search when he removed the cocaine from Petitioner's pants when he believed the item to be cocaine and not a weapon.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AS THE STOP WAS INVALID AND THE DEPUTY EXCEEDED THE LIMITED PERMISSIBLE SCOPE OF A WEAPONS SEARCH.

Petitioner filed a motion to suppress physical evidence (crack cocaine) obtained by police without a warrant as a result of an illegal stop and subsequent search and seizure in violation of Section 901.151, Florida Statutes (1987), the Florida Stop and Frisk Law (R 126-127). The trial court denied Petitioner's motion (R 108-109). The Fourth District Court of Appeal affirmed the trial court's denial of the motion, but certified direct conflict with Dunn v. State, 382 So.2d 727 (Fla. 2d DCA 1980).

Petitioner will first address the issues upon which the decision of the Fourth District in the instant case conflicts with Dunn v. State as well as other decisions of district courts of appeal. Next, Petitioner will address the illegality of the stop in this case as the district court also erred in finding the stop to be valid before reaching the issues upon which conflict is predicated. In so finding, the Fourth District's opinion is also in conflict with decisions of other district courts and this Court.

Petitioner contends as follows: 1) the stop was not a valid traffic stop because no traffic violation occurred and/or it was a purely pretextual stop and no founded suspicion existed to otherwise justify the stop; and 2) the resulting seizure was illegal because Deputy Aprea exceeded the limited scope of a weapons search when he removed the cocaine from Petitioner's pants when he had determined the object was not a weapon.

At bar, the evidence was obtained by Deputy Aprea in the following manner: On July 14, 1988, at approximately 2:20 a.m. (R 8) Petitioner was a passenger in his own vehicle (R 4) travelling north on I-95 (R 74). An unmarked unit occupied by two plain-clothes deputies, who were part of a drug interdiction program on I-95 (R 15), pulled up directly behind Petitioner's vehicle, then pulled into the lane immediately to the right of Petitioner's vehicle. The unmarked unit pulled up next to Petitioner's vehicle and stayed there for approximately two minutes before speeding off (R 74). Approximately five miles later, Petitioner passed a patrol vehicle parked on the right side of the road. The patrol vehicle subsequently pulled onto the highway and stopped Petitioner's vehicle (R 75). The patrol vehicle was occupied by Trooper Burroughs and Deputy Aprea, who were involved in the drug interdiction program along with the two deputies in the unmarked unit (R 15).

Trooper Burroughs said he stopped Petitioner's vehicle because of a broken left taillight (R 8). He stated that as his patrol vehicle approached Petitioner's vehicle from behind he could tell the taillight was broken because white light was emitting from the broken section (R 9). Although at first he said there was light coming from a bulb behind the broken lens (R 27, 31), later he said he did not know the source of the light (R 41). Trooper Burroughs said Petitioner's vehicle was in violation of Florida Statute 316.610, "the improper and safe equipment statute" (R 18). However, he also said Petitioner's vehicle had two (2) taillights shining

on each side of the rear of the vehicle, and that the cracked lens was the innermost lens on the left side (R 29-30). He agreed with defense counsel that if there was no bulb, and thus no light coming from the cracked lens, he would not have had any reason to stop Petitioner's vehicle (R 31). Trooper Burroughs acknowledged that the lens which was cracked was the innermost lens which was a reflector, but said he believed it to be part of the taillight assembly (R 31).[1]

After Petitioner was ordered out of the vehicle, both Trooper Burroughs and Deputy Aprea said they noticed a bulge in the groin/belt line area of Petitioner's pants which they believed to be a weapon (R 11-14, 48). Deputy Aprea patted Petitioner down and determined the bulge was not a weapon, but what he believed to be a bag of rock cocaine. Deputy Aprea said he based this belief upon feeling the texture of what appeared to be a plastic bag and the "peanut brittle type feeling in it," which he equated with the texture of rock cocaine (R 48). He then removed the package, which turned out to be crack cocaine.

A. <u>The seizure of the cocaine was illegal because Deputy Aprea exceeded the limited permissible scope of a weapons search</u>.

Even <u>if</u> the stop was valid and the weapons search was justified, the evidence must be suppressed as Deputy Aprea exceeded the limited permissible scope of a weapons search when he removed what he knew was not a weapon from Petitioner's pants.

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[1] This may be seen visually by referring to defense exhibits (photographs) in the Supplemental Record, which reflects that the portion of the broken taillight assembly was a reflector.

An officer may not lawfully seize an item he does not believe to be a weapon pursuant to a weapons pat-down. § 901.151(5); Dunn v. State, 382 So.2d 727 (Fla. 2d DCA 1980) (unlawful stop and frisk, but no right to seize marijuana where officer had no belief the object might be a weapon); Meeks v. State, 356 So.2d 45 (Fla. 2d DCA 1978) (denial of motion to suppress reversed where officer did not believe marijuana seized pursuant to a pat-down was a weapon); Walker v. State, 514 So.2d 1149 (Fla. 2d DCA 1987) (officer conducted a weapons pat-down of defendant and seized a smoking pipe which the officer knew was not a weapon at the time it was seized; denial of the motion to suppress reversed); Jordan v. State, 544 So.2d 1073 (Fla. 2d DCA 1989) (denial of motion to suppress reversed where officer exceeded permissible scope of weapons search when he removed four cocaine rocks from defendant's small inner front jeans pocket, where officer could not have reasonably believed object was a weapon); Baldwin v. State, 418 So.2d 1219 (Fla. 2d DCA 1982) (seizure of wallet in defendant's pocket subsequent to a weapons pat-down invalid where officer did not believe wallet was a weapon); Raleigh v. State, 404 So.2d 1163 (Fla. 2d DCA 1981) (permissible scope of pat-down exceeded where officer removed plastic bag from waistband of defendant and officer knew it was not a weapon); Ingram v. State, 364 So.2d 821 (Fla. 4th DCA 1978); Warren v. State, 547 So.2d 324 (Fla. 5th DCA 1989) (conviction and revocation of probation reversed where officer exceeded the permissible scope of a weapons search when two pieces of crack cocaine were seized); Harris v. State, 16 F.L.W. D439

(Fla. 1st DCA Jan. 31, 1991) (even when a basis for a protective frisk does exist, the intrusion must be limited to an external pat-down; officer's additional directive for defendant to empty pocket when there was no indication of a weapon contained therein exceeded the scope of a protective pat-down).

In Dunn v. State, 382 So.2d 727, the Second District considered circumstances where during a weapons pat-down an officer felt and then removed a cylindrical object in the defendant's front shirt pocket which he knew was not a weapon but he believed to be marijuana. The appellate court determined that no probable cause justified the seizure and that the officer had exceeded the limited permissible scope of a weapons frisk permitted by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In so doing, the court interpreted Florida's stop and frisk statute to mean

> [O]nly that if in the course of a legal stop and frisk, a law enforcement officer removes from a suspect's possession an object which he believes might be a weapon, but finds instead of it being a weapon it is 'evidence of a criminal offense,' he may still seize it. The seizure of contraband or other evidence of a crime during a legal stop and frisk is permissible so long as the officer reasonably believes the object which he is acquiring might be a weapon.

Id. at 730. Justice Grimes, writing for the court in Dunn, set forth the valid policy reasons upon which the rule limiting searches and seizures to objects thought to be weapons is based: "[A]ny other rule would have the practical effect of allowing law enforcement officers to search for contraband with less than probable cause on the ostensible premise of looking for weapons."

Id. at 729.

However, at bar, the Fourth District disagreed with that well-established rule and the policy reasons therefore and reached a contrary result, holding that a citizen should "suffer the legal consequences when the drugs are discovered as an officer lawfully frisks him for a weapon." Doctor v. State, 573 So.2d 157, 159 (Fla. 4th DCA 1991). Thus, the holding would appear to authorize officers to seize any object discovered during a weapons frisk without probable cause, instead of just an object which an officer believes to be a weapon when it is seized but which turns out to be evidence of a criminal offense. This clearly erroneous and novel interpretation is obviously not shared by other appellate courts, most likely because it runs afoul of constitutional protections and would authorize police to engage in fishing expeditions without probable cause on the pretext that weapons are being sought.

At bar, Deputy Aprea testified that upon feeling the bulge, he determined it was not a weapon (R 48). Thus, because Deputy Aprea was certain that the bulge was not a weapon, the subsequent seizure exceeded the permissible scope of a weapons pat-down and the cocaine must be suppressed. § 901.151; Dunn v. State; Meeks v. State; Walker v. State; Jordan v. State; Baldwin v. State; Raleigh v. State; Ingram v. State; Warren v. State; Harris v. State.

In addition, after disagreeing with the basic proposition set forth in Dunn v. State (and a long line of cases), the Fourth District went on to determine that during the weapons pat-down Deputy Aprea developed probable cause to believe that Petitioner's

pants contained cocaine rocks. The district court erred in so finding as under the facts and circumstances sub judice probable cause did not exist to justify Petitioner's arrest for possession of cocaine.

In a case quite similar to Dunn v. State and the case at bar, Walker v. State, 514 So.2d 1149, the appellate court determined that even if founded suspicion existed to detain the defendant, the officer exceeded the permissible scope of a weapons pat-down as enunciated in 901.151 by pulling what he knew was not a weapon but a smoking pipe out of the defendant's pocket. Although the officer stated that the stem of the pipe was in plain view, the court found that the pipe alone did not constitute probable cause to arrest the defendant for possession of paraphernalia. Id. at 1151.

As set forth by this Court in Bostick v. State, 554 So.2d 1153, 1155 (Fla. 1989),

> "Probable cause" means that the circumstances are such as to cause a person of reasonable caution to believe that an offense has been or is being committed by the person to be arrested.

At bar, the deputy did not have probable cause to arrest Petitioner for possession of cocaine on the basis of the weapons frisk. Nothing that transpired during the "traffic stop" led to that conclusion. No item was observed that could have been used as narcotics paraphernalia. In fact, the deputy conducted a pat-down of Petitioner because he claimed to be concerned that Petitioner possessed a weapon because of the square bulge in Petitioner's pants. Before removing it the deputy had not observed all or any

portion of the item contained in Petitioner's pants that would have led the deputy to conclude that the bulge was drugs. The peanut brittle type texture that the deputy felt was perceived during the brief touch of a weapons frisk. Certainly the deputy did not testify that he felt Petitioner's groin area in greater detail than a frisk would normally entail. On the basis of this quick impression the deputy decided that the bulge in Petitioner's pants was caused by cocaine rocks and the district court concluded that the deputy had probable cause to arrest Petitioner for possession of cocaine. Petitioner submits that this brief touch did not rise to the level of probable cause such that would justify Petitioner's arrest for possession of cocaine. This was nothing more than a hunch on the deputy's part that cocaine was involved, most likely because that was uppermost in the deputy's mind as they were engaged in drug interdiction. The bulge could have been any number of things other than cocaine, perhaps even a money container. See Caplan v. State, 531 So.2d 88 (Fla. 1988) (several small rolled burnt cigarette wrappings on the floor of defendant's automobile which were observed by officer whereupon he concluded that they were marijuana-related did not provide probable cause for search); Dunn v. State, 382 So.2d 727 (probable cause not established by feel of cylindrical object in defendant's pocket which officer believed to be marijuana); Walker v. State, 514 So.2d 1149 (appellate court holds that although the stem of a pipe was observed by officer in plain view sticking out of defendant's back pocket during weapons frisk, observation of the pipe did not

provide probable cause to arrest for possession of narcotic paraphernalia as pipes are not contraband per se). It was impossible for the deputy to know that it was cocaine such that presumably he would have had probable cause to arrest Petitioner at that time and conduct a lawful search incident to the arrest. Dunn v. State, 382 So.2d at 728, n. 1. Otherwise the intrusion was not justified in the context of an extremely limited protective search for weapons permitted pursuant to Terry v. Ohio.

B. **The initial stop was invalid on two bases: no traffic violation had occurred and it was a purely pretextual stop.**

Although Petitioner should prevail in this Court on the foregoing basis, he further asserts that the motion to suppress should have been granted in any event as the initial stop of Petitioner's vehicle was invalid because no traffic violation had occurred and/or the stop was a purely pretextual one.

No traffic violation had occurred as, taken in the light most favorable to the state, Petitioner's vehicle was equipped with four (4) taillights, of which only one was inoperable. Only two (2) taillights are required by law. § 316.221, Fla. Stat. (1987). Moreover, the record reflects that the alleged broken taillight was not a light, but a reflector, which is not even required equipment. § 316.610, Fla. Stat. (1987).

Thus, the Fourth District also erred in holding that there was a traffic violation, a broken taillight, that justified the stop of Petitioner's vehicle. Indeed, the Fourth District's opinion is in direct conflict with the Second District's decision in Wilhelm

v. State, 515 So.2d 1343 (Fla. 2d DCA 1987), on this point. In Wilhelm, the Second District reversed a denial of a motion to suppress where a traffic stop based on Section 316.221 was found to be invalid because the defendant's vehicle was equipped with four (4) taillights of which only one was inoperable. The court held this was not a traffic violation. The facts in the case sub judice are virtually identical. At bar, although the trooper claimed he stopped Petitioner's vehicle for a broken taillight, testimony at the hearing revealed Petitioner's vehicle was equipped with four (4) functioning taillights. However, even if one taillight lens had been broken as the trooper believed, Petitioner's vehicle would still have had three operable lights (R 29-30) and the facts would be identical to those in Wilhelm. Thus, Petitioner's vehicle was not in violation of Section 316.221, and a traffic stop on that basis was invalid. § 316.221; Wilhelm v. State.

Furthermore, even the trial court appeared to agree it was not a broken left rear taillight. As the trial court so carefully put it, it determined "what the officer determined in his own mind on that evening ... that the left rear taillight was out ..." (R 110). This finding is contrary to the evidence in the record. Petitioner's vehicle did not and could not have had a bulb positioned behind the broken lens (R 29-31, 72-73). Trooper Burroughs acknowledged that the lens which was cracked was the innermost lens which was a reflector, but he considered it to be part of the "taillight assembly" (R 31). What Trooper Burroughs

referred to as a cracked lens of a taillight was actually a cracked lens of a reflector.[2] Moreover, there was no bulb behind the cracked lens which could cause white light to be emitted. Trooper Burroughs testified he saw light emitting from the cracked lens, but did not know the source of the light (R 41). It is possible that the white light Trooper Burroughs claims he saw was merely the reflection of his headlights off the shiny surface behind the cracked reflector lens as he only saw the light when he pulled behind Petitioner's vehicle (R 9).

Although Section 316.234, Florida Statutes (1987), was not relied upon by the trooper as a basis for the stop or even raised in the trial court, the Fourth District has cited that statute along with Section 316.221 as justifying the stop. Section 316.234 specifies that rear lights shall emit a red or amber light when signalling. There was no testimony in the trial court that the white light which the trooper said emitted from the rear of the vehicle occurred while the signals were activated. Indeed, the trooper never testified that he was positive that the white light was from a bulb. In fact, the photographic evidence included in the record on appeal and much of the testimonial evidence reflects that it was a reflector (which had no bulb affixed behind it) that was partially broken. Thus, Petitioner's vehicle was not in violation of Section 316.234.

In addition, even assuming arguendo this Court agrees that a

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[2] See photographs of the taillight assembly which were utilized at the hearing and introduced in evidence and which are contained in the record on appeal (SR).

minor traffic violation had occurred, the stop was purely pretextual and thus still invalid.

To establish that a traffic stop was not invalid as a pretext stop, this Court has held that the state must show that under the facts and circumstances a reasonable officer would (not could) have stopped the vehicle absent an additional, invalid purpose. Kehoe v. State, 521 So.2d 1094 (Fla. 1988); accord Monroe v. State, 543 So.2d 298 (Fla. 5th DCA 1989); Porcher v. State, 538 So.2d 1278 (Fla. 5th DCA 1989); Arnold v. State, 544 So.2d 294 (Fla. 2d DCA 1989); Clemons v. State, 533 So.2d 321 (Fla. 5th DCA 1988).

In the present case, the record clearly reflects that Trooper Burroughs' and Deputy Aprea's purpose was to operate a drug interdiction program with two plain-clothes deputies who were in an unmarked scout vehicle (R 14-15, 60). Trooper Burroughs testified that their mode of operation was to stop even minor traffic violators in their attempt to interdict drugs (R 14). The scout vehicle would identify vehicles travelling northbound on I-95 which looked suspicious. The deputies in the unmarked vehicle were exclusively operating a drug interdiction program, and were informing Trooper Burroughs and Deputy Aprea, who were in a Florida Highway Patrol vehicle, of traffic violators. In this case, the unmarked unit pulled directly behind Petitioner's vehicle, then pulled up next to Petitioner's vehicle and stayed there for approximately two minutes before speeding off (R 74). The deputies in the unmarked vehicle radioed ahead to Trooper Burroughs and Deputy Aprea the description of Petitioner's vehicle, including the

tinted windows and tag number (R 58-59). The deputies also informed the officers in the patrol vehicle of the cracked lens, so they knew what to look for as Petitioner's vehicle passed (R 60). Petitioner's vehicle was subsequently pulled over. Thus, the traffic stop was initiated on the basis of what the deputies in the unmarked car told them.

Florida appellate courts have consistently held traffic stops invalid or pretextual under similar circumstances. Wilhelm v. State, 515 So.2d 1343; State v. Terzado, 513 So.2d 741 (Fla. 3d DCA 1987) (a broken taillight does not satisfy the Terry requirement for a stop); Arnold v. State, 544 So.2d 294; Monroe v. State, 543 So.2d 298 (officer on drug patrol made pretextual stop of vehicle defendant was a passenger in based on a bald tire; no founded suspicion justified the stop and the state failed to meet its burden of demonstrating that a reasonable officer would have made the stop); Porcher v. State, 538 So.2d 1278; Brooks v. State, 524 So.2d 1102 (Fla. 3d DCA 1988) (police observed defendant's car driving from suspected drug house in drug trafficking area; pretext stop where defendant was stopped for "improper start" when his car accelerated suddenly, causing gravel to fly and tires to screech).

Wilhelm v. State, 515 So.2d 1343, is also directly on point with the case at bar as to this issue. The Second District held a traffic stop for one broken taillight where three others were functioning was also invalid as it was pretexted upon finding evidence of violations of other laws. Thus, the evidence was suppressed. In the case at bar, Petitioner was stopped for an

alleged broken taillight under similar circumstances. Testimony at trial clearly revealed the officers were searching for drugs, and were stopping even minor traffic violators to effectuate their purpose. Thus, the stop was pretextual and the court erred in denying the motion to suppress.

In case similar to the one sub judice, Porcher v. State, 538 So.2d 1278, the Fifth District held the evidence should have been suppressed because the state failed to meet its burden of showing that absent a pretextual purpose, a reasonable officer would have stopped defendant's vehicle for following too closely. The arresting officer was called to stop defendant by another deputy in an unmarked vehicle who was exclusively involved in drug investigation at the time of the stop. Similarly in the case sub judice, Petitioner's vehicle was stopped for an alleged broken taillight by officers exclusively involved in a drug interdiction program. An unmarked vehicle used to scout vehicles which may be violating traffic laws radioed ahead to Trooper Burroughs and Deputy Aprea a description of Petitioner's vehicle as well as the alleged traffic violation. Thus, the stop in the present case should also be held invalid.

In another case, Arnold v. State, 544 So.2d 294, the Second District held a minor traffic violation was a pretext to stop defendant's vehicle where the state failed to show a reasonable officer would have made the stop absent an invalid purpose. The court held it is difficult to drive without occasional minor violations. In the case at bar, Petitioner's vehicle was likewise

stopped for a minor traffic violation where the state failed to meet its burden of showing that a reasonable officer would have, absent the invalid purpose of drug interdiction, stopped the vehicle.

Petitioner notes that the Fourth District's determination that the stop was not pretextual appears to have misapplied this Court's holding in Kehoe v. State. At bar, the Fourth District, relying instead on its opinion in State v. Kehoe, 498 So.2d 560 (Fla. 4th DCA 1986), held

> When an officer stops a car for a minor traffic violation of such a nature that any citizen committing it would be routinely stopped, the fact that the officer "possibly would not have stopped the car but for further suspicion" does not render the stop "an unlawful 'pretext' stop."

Doctor v. State, 573 So.2d at 159. However, this is not the standard this Court enunciated in Kehoe v. State:

> We decline to adopt the Ogburn "could arrest" approach ... Allowing the police to make unlimited stops based upon the faintest suspicion would open the door to serious constitutional violations. It is difficult to operate a vehicle without committing some trivial violation - especially one discovered after the detention ... This Court, however, will not allow officers to get around the fourth amendment's mandate by basing a detention upon a pure pretextual stop. The state must show that under the facts and circumstances a reasonable officer would have stopped the vehicle absent an additional invalid purpose. We approve the result reached by the district court, but disapprove its reliance on Ogburn.

Kehoe v. State, 521 So.2d at 1097.

At bar, at the suppression hearing the state failed to meet

its burden of showing that a reasonable officer would have stopped Petitioner's vehicle, absent the additional invalid purpose of interdicting drugs. Moreover, the trial court did not demonstrate on the record that it understood the state had the burden of showing it was not a pretextual stop. Kehoe v. State. The trial court erred in denying the motion to suppress under the circumstances presented sub judice.

To conclude, the stop was unlawful as there was no traffic violation and/or it was a pretextual stop. Even if the stop were valid, the evidence still should have been suppressed because the deputy exceeded the scope of a permissible weapons pat-down by removing the cocaine after he had determined the bulge was not a weapon. Since the evidence described in Petitioner's motion to suppress physical evidence was obtained pursuant to an unlawful detainment and/or seizure, the trial court erred in denying the motion to suppress the evidence. § 901.151, Fla. Stat.; Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Gipson v. State, 537 So.2d 1080 (Fla. 1st DCA 1989). Thus, the decision of the Fourth District affirming the trial court's order denying the motion to suppress physical evidence must be quashed and the cause reversed.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District and remand this cause with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sylvia Alonso, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 29th day of March, 1991.

Susan D. Cline

Of Counsel