OA 6-293

IN THE SUPREME COURT OF FLORIDA

TEDD J. POPPLE,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

Case No. 80,696

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA CONSTITUTION

UNITED STATES CONSTITUTION

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida, and the appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the appellant below.

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

A = Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner Tedd J. Popple was charged by two-count information with possession of drug paraphernalia in violation of section 893.1447, Fla. Stat. (1991) and with possession of cocaine in violation of section 893.13(1)(f) (R 42-43). He sought suppression of physical evidence (cocaine and a pipe) and statements, on the basis that the stop was not supported by a founded suspicion of unlawful conduct.

Testimony at the motion hearing established that Popple was seated in a legally parked car in a residential area in the middle of the day and was doing nothing suggestive of unlawful conduct when Indian River County Deputy Sheriff Timothy Wilmoth approached from behind[1] (R 11, 16-17). Wilmoth was in full deputy sheriff uniform. He carried a gun as well as handcuffs and affirmed that Popple could readily recognize that he was a law enforcement officer (R 18). Wilmoth admitted that he apparently startled Popple:

> Q: Please describe to the Court the actions that you took when you approached the defendant?
>
> A: O.K., when I pulled up behind him, I guess I surprised him pretty bad....

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[1] The stop occurred at 12:55 p.m. June 4, 1991 in the vicinity of 12th Street Southwest and 12th Avenue Southwest in Vero Beach (R 4, 15). Wilmoth was investigating a stolen vehicle which had been abandoned approximately four blocks away, a matter unrelated to Petitioner's case (R 5, 15, 40).

(R 9). Wilmoth further conceded on direct examination that when he approached Popple, he had no intention of stopping him or arresting him for any reason (R 11):

> Q: He was legally parked on the side of the road, correct?
>
> A: Correct.
>
> Q: There was nothing illegal about him parking on the shoulder of the road?
>
> A: Correct.
>
> Q: And prior to you approaching his vehicle and directing him to step out, did you observe him commit any type of illegal activity?
>
> A: Illegal, no.
>
> Q: You directed him to step out of his vehicle?
>
> A: Yes, I did.

(R 17).

* * *

> Q: So if you approached his car, he would observe and readily recognize that you are a law enforcement officer?
>
> A: Correct.
>
> Q: You directed him to step out of his vehicle, correct?
>
> A: Uh-huh.
>
> Q: And what was the reason for that?
>
> A: All of the furtive movements that he was making prior to me getting out of my vehicle.
>
> Q: Okay, was he doing anything illegal stopped there?
>
> A: No.
>
> Q: And so the reason that you detained him further was that he was making some furtive movements?

A: Correct.

Q: You didn't see exactly what those were?

A: Correct.

(R 18). The trial judge questioned Wilmoth further as to the reason for the stop:

> THE COURT: What were you thinking, what did you think?
>
> THE WITNESS: I didn't know whether he was broke down, or might have known something about this [the unrelated abandoned vehicle]. I'm sure he didn't know anything because he wasn't there when I got there unless he was coming back. I didn't know, I just felt it might be worth looking into.

(R 23) (emphasis added). Wilmoth saw a cocaine pipe on the floor board as Popple got out of the car (R 10-12, 23). In the search incident to the arrest, Wilmoth seized eight cocaine rocks[2] (R 12).

The lower court denied Popple's motion to suppress and Popple entered a plea of nolo contendere to each charge, reserving his right to appeal the denial of the suppression motion.

On appeal by Petitioner, the Fourth District Court of Appeal affirmed this disposition by written opinion, holding that there was not a stop here but a "consensual encounter" and that directing Popple to exit his vehicle did not turn the "consensual encounter" into a stop (Appendix at 2). The majority recognized that this ruling conflicted with Brown v. State, 577 So. 2d 708 (Fla. 2d DCA 1991) and with Jackson v. State, 579 So. 2d 871 (Fla. 5th DCA 1991) (appendix 2-3). The Second District in Brown, supra, and the Fifth

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[2] The cocaine rocks and pipe,along with Popple's post-arrest statement denying the charges were the subject of the suppression motion (R 75-76).

District in Jackson, supra, held under similar facts that ordering an accused out of a vehicle was a detention which requires a founded suspicion. Judge Anstead dissented, stating that the stop was not supported by a founded suspicion and thus unlawful (Appendix at 5-6). Judge Anstead relied upon Brown, supra and Jackson, supra, as well as the more recent Second District case Gano v. State, 599 So. 2d 759 (Fla. 2d DCA 1992) as bases for reversing (Appendix at 5-6, 8).

Petitioner moved for rehearing based upon the argument contained in the dissent and moved for rehearing en banc based upon intradistrict conflict with Currens v. State, 363 So. 2d 116 (Fla. 4th DCA 1978) (Appendix at 14-17). The Fourth District denied Petitioner's motion for rehearing on October 21, 1992 (Appendix at 18-20).

Petitioner noticed his intent to invoke his Court's discretionary jurisdiction to review this case on October 21, 1992. On February 15, 1993, this Court accepted jurisdiction to review the conflict thus created with the decision of another district court of appeal. Art. V, § 3(b)(3), Fla. Const. This brief on the merits follows.

SUMMARY OF ARGUMENT

Petitioner's judgment of conviction and sentence must be reversed because his motion to suppress was erroneously denied. The stop and detention was unsupported by a founded suspicion or probable cause of unlawful conduct. In declining to follow the decisions of the Second District in Brown v. State, 577 So. 2d 708 (Fla. 2d DCA 1991) and the Fifth District in Jackson v. State, 579 So. 2d 871 (Fla. 5th DCA 1991) the Fourth District erroneously characterized the stop as consensual. As such, the majority ruled fourth amendment protection was not implicated. Petitioner maintains the dissent correctly recognized the decisions of the Second and Fifth Districts should be followed and properly concluded Petitioner's fourth amendment rights were violated.

ARGUMENT

PETITIONER'S JUDGMENT OF CONVICTION AND SENTENCE MUST BE REVERSED WHERE THE TRIAL COURT ERRONEOUSLY DENIED HIS MOTION TO SUPPRESS BECAUSE THE STOP AND DETENTION WAS UNSUPPORTED BY A FOUNDED SUSPICION OR PROBABLE CAUSE.

Petitioner Tedd J. Popple contends that the trial court erred in denying his motion to suppress physical evidence and statements where the stop and detention was unsupported by a founded suspicion or probable cause of unlawful conduct. Amendments IV and XIV, United States Constitution; Article I, § 12, Florida Constitution. Testimony adduced at the motion hearing below established that Popple was seated in his lawfully parked vehicle in a residential area in the middle of the afternoon (R 11, 16-17). Deputy Sheriff Wilmoth, the sole witness at the hearing stated that Popple was doing nothing even suggestive of criminal conduct when he [Wilmoth] approached from the rear (R 9, 11, 17-18).

Wilmoth was in full uniform and carried a gun as well as handcuffs which Popple could see (R 18). Wilmoth, who had been four blocks away, waiting for the arrival of a tow truck for an abandoned, stolen vehicle in an unrelated case, said he approached Petitioner ostensibly to see if he had broken down. In rather contradictory testimony, Wilmoth said he thought Popple might know something about the abandoned vehicle, yet added: "I'm sure he didn't know anything because he wasn't there when I got there unless he was coming back" (R 23).

When he approached, he saw Popple make some furtive movements although he could not see exactly what those movements were (R 18). Wilmoth then had Popple get out of his vehicle (R 18). There was

no testimony that Wilmoth asked Popple for identification, inquired about his welfare, or questioned him about the abandoned car four blocks away. There was simply no testimony whatsoever that Wilmoth said anything to Popple other than to direct Popple to exit.

In affirming the suppression denial, the Fourth District Court of Appeal rejected Petitioner's argument that the stop was unlawful and unsupported by a founded suspicion. The majority instead characterized this case as a consensual encounter (Appendix at 2). In doing so, the majority declined to follow Brown v. State, 577 So. 2d 708 (Fla. 2d DCA 1991) and Jackson v. State, 579 So. 2d 871 (Fla. 5th DCA 1991) (Appendix at 2-3). Judge Anstead dissented, stating that no unlawful conduct was observed. Rather, Petitioner was legally parked in a residential area in the middle of the day (Appendix at 7). Consequently, the stop was not supported by a founded suspicion. Judge Anstead also stated that ordering a driver out of a vehicle constitutes a detention absent any founded suspicion or probable cause. (Appendix at 5-6). Judge Anstead also cited Gano v. State, 599 So. 2d 759 (Fla. 2d DCA 1992) and, on rehearing, Currens v. State, 363 So. 2d 1116 (Fla. 4th DCA 1978) (Anstead, J., dissenting) (Appendix at 19-20) which are significantly similar to the present facts, as further bases for rehearing.

Judge Anstead aptly noted that:

> [The majority is] breaking new ground today in holding that the police may control the movements of a motorist without any requirement whatsoever of "probable cause" or "founded suspicion" of unlawful conduct. In my view, this constitutes a clear violation of the Fourth Amendment to the United States Constitution.

(Appendix at 5).

Petitioner contends that the decision was erroneous on the bases that (1) the present case is governed factually and analytically by Brown, Jackson and Gano, (2) the case involves a stop and detention rather than a consensual encounter; and, (3) the stop and detention, unsupported by a founded suspicion, was unlawful. These arguments will be addressed sequentially.

Both Brown and Jackson, like the present facts, involve stops because neither Brown or Jackson felt free to leave. In Brown, supra, Brown was seated in a parked car at 6:20 p.m. Police officers, investigating narcotics sales in the area approached because Brown was illegally parked on the wrong side of the road facing the wrong direction. The officer asked Brown to identify himself; when Brown did not do so, he was directed to exit the vehicle. As Brown opened the door, the officer saw marijuana in the vehicle. The Second District noted that while a police officer did not need a founded suspicion to approach and talk, when he directed Brown to exit the car, the encounter became a stop which was unsupported by a founded suspicion. The Fifth District, in Jackson, found that when an officer ordered Jackson to exit the vehicle in which he was sitting, the encounter became a stop requiring a founded suspicion.[3] Similarly, when Wilmoth directed Popple to get out of his parked car, neither Popple or any reasonable person would believe he or she was free to leave.

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[3] While the facts are not set forth, the Fifth District noted that the record did not support the requisite founded suspicion. Jackson, supra, 579 So. 2d at 872, fn 1.

Otherwise stated, Popple's freedom to leave or refuse the directive was clearly hindered and/or restricted.

A similar case discussed by the dissent, but not addressed by the majority, also involves a factually similar order to exit from a parked vehicle. Gano v. State, supra. Gano was sitting in a car parked in front of a lounge at 1:00 a.m. The officer pulled in and said when Gano and the passenger saw him, the passenger reached over and seemed to be shoving something under the seat. The officer said he feared a weapons violation or drug activity occurred, detained the pair and, upon arrival of back up, ordered the pair out of the car. The Second District concluded that this was a stop absent sufficient facts to comprise a founded suspicion. Gano, supra, 599 So. 2d at 760. Moreover Gano is particularly similar to the instant case; here, as in Gano, furtive movements were involved.[4] The Gano court also rejected the officer's mention of weapons noting the office never asked about weapons, looked for weapons, or discovered weapons. Gano, supra, 599 So. 2d at 760. Wilmoth's allusion to concern for his safety was even more oblique; like the officer in Gano, Wilmoth never stated he asked about weapons, looked for or discovered weapons, nor did he state that Popple threatened him in any way.

Currens v. State, supra, also involved an officer who ordered a citizen out of a parked vehicle. The officer, like Wilmoth, commanded Currens to exit a lawfully parked vehicle. Currens, like Popple, made a quick motion with his hands when the office

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[4] In this regard, the present facts are just as compelling if not more so. Unlike the officers in Gano, Wilmoth was unable to discern exactly what these movements were. Wilmoth also admitted Popple was not doing anything illegal (R 18).

approached. The Fourth District stated a stop and detention was involved when the officer ordered Currens out of the vehicle. Because the detention was unsupported by a reasonable suspicion, the court concluded it was illegal stating:

> The officer could investigate appellant's presence in a legally parked vehicle only if he had a "founded" or reasonable suspicion which requires further investigation to determine whether the car's occupants have committed or are about to commit a crime.

Currens, supra, 363 So. 2d at 1117 (citations omitted). Notably, the Fourth District concluded notwithstanding Currens' quick hand movement, there was

> ...no indication that appellant was involved in any criminal activity, nor was there any reason to believe the safety of the officer or the public was endangered.

Currens, supra, 363 So. 2d at 1117. The present case is factually and analytically similar to the Second District cases of Brown, supra and Gano, the Fifth District case of Jackson and the Fourth District in Currens, supra. Petitioner accordingly maintains that the majority erred in failing to follow these cases.

Petitioner further maintains that the majority's characterization of the present circumstances as a consensual encounter is incorrect. The Fourth and Fourteenth Amendments to the United States Constitution and corresponding protections of the state constitution are triggered in a stop and detention. The significant identifying characteristic is whether a reasonable person would believe he or she is free to leave. U.S. v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980); State v. Simons, 549 So. 2d 785, 787 (Fla. 2d DCA 1989); . That is, where a police officer restricts or hinders a

reasonable person's freedom to leave or freedom to refuse to answer inquiries, Fourth Amendment protections apply. J.C.W. v. State, 545 So. 2d 306 (Fla. 1st DCA 1989); State v. Simons, supra. Under such circumstances, an investigative stop and detention must be supported by a founded suspicion. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Brown v. State, supra; Jackson v. State, supra. In factually similar circumstances, the First, Second, Fifth and Fourth Districts, have concluded that the governmental intrusion into a citizen's intrusion trigger Fourth Amendment protections. See e.g. Terry v. Ohio, supra; Brown, supra; Jackson, supra; Currens, supra; J.C.W. v. State, supra; McCreary v. State, 538 So. 2d 1377 (Fla. 1st DCA 1989).

By way of contrast, J.C.W. v. State, supra cited by the majority in Popple, supra, illustrates a police-citizen encounter which does not amount to a constitutionally protected seizure. J.C.W. accompanying a narcotics suspect who was the subject of a BOLO, walked away from the suspect pretending not to know him, when the officer approached. J.C.W. was on a public street when the officer later stopped her, asked for identification and several questions, then asked to search for narcotics, to which she consented. J.C.W. then reached for what appeared to be a napkin containing cocaine which the officer took. There, the First District concluded that because the officer merely approached the accused to check identification or ask questions, the encounter was not a seizure for Fourth Amendment purposes. J.C.W., supra, 545 So. 2d at 307. The First District looked to the facts that J.C.W. was not physically detained, ordered to stop or held in any manner, noting J.C.W. was initially able to walk away from the suspect and

the officer. Moreover, she apparently answered the officer's questions and consented to a search.

Another case cited by the majority points up the distinction between a consensual encounter and a stop requiring a founded suspicion. State v. Simons, supra. There, the police officer received a dispatch involving a black man in a red outfit selling narcotics at a supermarket. The officer spotted Simons, a black man in a red outfit, seated on the sidewalk by the supermarket. The deputy approached, referred to the dispatch, and asked him to empty his pockets. Simons opened his shirt to reveal a gun. Because Simons voluntarily and without any request from the deputy displayed his revolver, the Second District concluded that this was a consensual encounter and not a stop and seizure.

On the other hand, the greater intrusion at bar does involve fourth amendment ramifications. The intrusion here went beyond a mere approach on the sidewalk or asking Popple if he is willing to answer questions, or by questioning Popple if he was willing, or referring to a criminal investigation. Unlike J.C.W. and Simons, who voluntarily answered the officer's queries and consented to searches, Wilmoth controlled Popple's movements when he had Popple out of his car. There is no evidence that Wilmoth said anything other than directing Popple out of his car. Any reasonable person would feel restricted and/or hindered and surely not free to leave under such circumstances.

The distinction between a lawful detention and the unlawful detention here is cogently addressed by the dissent. Citing Pennsylvania v. Mims, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977), Judge Anstead contrasted that scenario from the present

case. (Appendix at 6-7). There, the police officers stopped a vehicle to issue a traffic summons for an expired tag. One officer asked the driver to step out of the car with his license and registration; as he did, the officers saw a bulge which resulted in a weapons search and seizure. In upholding the search, the Court stated:

> In this case, unlike Terry v. Ohio, there is no question about the propriety of the initial restrictions in respondent's freedom of movement. Respondent was driving an automobile with expired license tags in violation of Pennsylvania Motor Vehicle Code...[w]e...presently deal only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and permissible under the Fourth Amendment. This inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle...but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.

Id., 434 U.S. at 107 (emphasis added). The court held that a driver who had already been lawfully stopped and detained may be ordered out of the vehicle "...since the additional intrusion on a person already detained is not a serious intrusion." (Appendix at 6). As Judge Anstead noted, the Mims majority was not approving the present scenario:

> Contrary to the suggestion in the dissent of our Brother STEVENS, post at 339, we do not hold today that "whenever an officer has an occasion to speak with a driver of a vehicle, he may also order the driver out of the car." We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

Id., at 17, n. 6. Judge Anstead further points out that the Court did not dispute that ordering Mims out of the car was a seizure.[5] (Appendix at 6-7). Similarly, the Florida courts have held that where officers approach and ask a citizen to get out of a vehicle absent observation of illegal activity a stop and detention implicating the fourth amendment has occurred. Dees v. State, 564 So. 2d 1166, 1168 (Fla. 1st DCA 1990) (holding the direction to exit the vehicle and to remove her hand from her pocket constituted a show of authority which restrained her freedom of movement; a reasonable person would conclude that she was required to comply with the officer's directives). McCreary v. State, 538 So. 2d 1377 (Fla. 1st DCA 1989) (finding the order to get out of the car and to ask identity was an investigatory stop); Brown, supra; Sites v. State, 582 So. 2d 813, 814 (Fla. 4th DCA 1991) (reversing denial of suppression where Sites sleeping in his legally parked car was not doing anything to suggest unlawful activity and ruling "[l]egally parked cars do not give police officers a basis for detaining or searching persons therein"); Currens, supra; Jackson, supra.

In the case at bar, Wilmoth did not engage Popple in a consensual encounter. Here, the invasion of Popple's freedom of

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[5] Justice Stevens wrote

> The Court does not dispute nor do I, that ordering Mims out of his car was a seizure. A seizure occurs whenever an "officer, by means of physical force or show of authority...in someway restrain[s] the liberty of a citizen..."

Id., 434 U.S. at 115, n. 2 (citations omitted).

movement was not the benign inconvenience or de minimis intrusion the majority suggests. Rather, in the absence of a founded suspicion or probable cause of unlawful conduct, this stop and detention was a violation of the fourth amendment guarantees.

Petitioner further contends that the stop and detention is not supported by the requisite founded suspicion. Gano, supra; Currens, supra. Wilmoth's testimony alluded mostly to Popple's "furtive movements" as a basis for the stop(R 17-18). Wilmoth also mentioned maybe Popple could be broken down. However, he did not suggest or even mention any reason he thought this, given Popple's lawfully parked car. He also said he though Popple may have known something about the abandoned car, but then contradicted himself and said he was sure Popple didn't know anything (R 23). He readily admitted that Popple had nothing to do with the stolen vehicle abandoned four blocks away.

Furtive movements, with no facts to support the suspicion of a weapon, or a threat to an officer's safety, fail to support a founded suspicion. Indeed, in numerous cases, the courts have so held. Gano v. State (passenger who pushes something beneath seat absent more presents no reasonable threat to officer's safety); Currens, supra (quick movement of hands between legs when officers approach car does not comprise a founded suspicion); Johnson v. State, 17 Fla. L. Weekly D2808, 2809 (Fla. 1st DCA Opinion filed December 10, 1992) (quick movement as if to conceal something, even if in a high crime area, does not supply founded suspicion); Dees v. State, supra (officer's testimony vehicle occupant took something from the dash, put it under the front seat but was unsure whether the object was a weapon insufficient basis for a stop and

search); L.W. v. State, 538 So. 2d 523 (Fla. 3d DCA 1989) (nervous passenger appearing to hide something under rear seat does not support investigatory stop); G.J.P. v. State, 469 So. 2d 826 (Fla. 2d DCA 1985) (bare suspicion was not elevated to founded suspicion by virtue of accused making quick movement when officers approach vehicle); see also Smith v. State, 592 So. 2d 1206 (Fla. 2d DCA 1992) (suspect's quick movement as if to conceal something behind back does not support founded suspicion; even in a high crime area).

Wilmoth's testimony at the motion to suppress hearing is indicative of, at most, a "hunch": "I didn't know, I just felt it might be worth looking into" (R 23). He did not observe Popple commit any illegal act; he admitted Popple's vehicle was legally parked (R 8, 11, 15-18).

The fourth amendment requires suppression of the evidence obtained pursuant to an illegal search and seizure. Article I, § 12, Fla. Const. The decision of the Fourth District must be reversed. This is so because the majority opinion incorrectly held that the encounter here was consensual. On the contrary, the facts establish in directing Popple to get out of his car, the command was sufficiently intrusive to trigger fourth amendment protections. These protections require a founded suspicion to justify the stop and detention here. The officer's testimony involved at most, a mere hunch. Neither the furtive movement nor the nebulous reference to safety and welfare concerns, supply the necessary basis for a lawful stop.

To conclude, the decision of the majority which permits the restriction and control of a motorist's movements in the absence

of a founded suspicion or probable cause, is a departure from established legal precedent and constitutes an unmistakable violation of fourth amendment protections. Accordingly, the majority decision of the Fourth District must be reversed.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court reverse the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Douglas J. Glaid, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 1st day of March, 1993.

Ellen Morris

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