OA 6-2-93

047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,696

TEDD J. POPPLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

****

RESPONDENT'S 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 Indian River County, Florida. Respondent was the appellee and the prosecution, respectively, in the lower courts.

In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal, except that Respondent may also be referred to as the State or the prosecution.

The following symbols will be used:

"R"	Record on Appeal
"A"	Appendix attached to Petitioner's brief
"PB"	Petitioner's Brief on the Merits

Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts appearing on pages 2 through 5 of his Initial Brief to the extent that it is accurate and nonargumentative, but sets forth the additional facts for purposes of clarification:

Deputy Tim Wilmoth testified that the area in which the abandoned stolen car was found is "real close," i.e., one block away, to a high crime area and is secluded. Wilmoth did not have a backup officer nearby to assist him at this time. (R 5). As he waited for the wrecker to arrive, Wilmoth noticed Petitioner's vehicle parked on the side of the road on 12th Street. Petitioner's car was not parked there when Deputy Wilmoth first arrived on the scene. Petitioner was not parked near any establishments or businesses. Nor were there any residences on 12th Street. (R 21-23). Deputy Wilmoth stated that it was "unusual" to have parked vehicles in the area in which Petitioner was parked. (R 17).

As he pulled up behind Petitioner's vehicle, Deputy Wilmoth observed Petitioner acting "real nervous" and "flipping" in that he was reaching over and underneath the front seat. (R 9-11). At this point, Wilmoth exited his vehicle and **"asked"** Petitioner to step out of his vehicle. (R 11, 23). In response to questioning by the trial court, Deputy Wilmoth stated that he asked Petitioner to exit his car for his own safety, especially in light of Petitioner's furtive arm movements inside the car. Wilmoth testified that he did not know what, if anything,

Petitioner was grabbing for and knew that it would be a while before any backup officer could arrive to assist him if necessary. Wilmoth stated that he intended to ask Petitioner what he was doing parked there and to check on Petitioner's welfare, i.e., to see if his car had broken down or if he possibly knew something about the stolen vehicle. (R 23-24).

Incident to Petitioner's arrest, Deputy Wilmoth discovered two cocaine rocks under the driver's seat of the vehicle, three rocks on the floorboard, and a small bag containing three rocks between the driver's seat and the passenger seat. (R 12).

SUMMARY OF ARGUMENT

The District Court correctly held that, based upon the particular circumstances of this case, including most notably a legitimate concern of the deputy for his safety, Petitioner's encounter with the deputy did not evolve into a stop simply because the deputy requested Petitioner to step out of his car. Indeed, there were a number of articulable facts which supported Deputy Wilmoth's concern for his safety. First of all, Petitioner's vehicle was parked by itself in a relatively desolate, secluded area which was adjacent to a high crime area. (R 5). Deputy Wilmoth testified that it was "unusual" to find parked vehicles in that area. (R 17). Furthermore, Deputy Wilmoth was alone and knew that it would be a while before any backup officer could arrive to assist him if any trouble developed. (R 5, 23-24). Most importantly, Petitioner's furtive arm movements and nervous demeanor in and of themselves gave the deputy reason to be concerned for his safety and, hence, justified the deputy's request for Petitioner to exit his vehicle. On balance, the intrusion into Petitioner's personal liberty by Deputy Wilmoth's request was de minimis compared with the "legitimate and weighty" public interest in the deputy's safety. As such, the deputy's request, being most reasonable under the circumstances, did not violate Petitioner's Fourth Amendment rights.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT, BASED UPON THE PARTICULAR CIRCUMSTANCES OF THE INSTANT CASE, PETITIONER'S ENCOUNTER WITH THE DEPUTY DID NOT EVOLVE INTO A STOP SIMPLY BECAUSE THE DEPUTY REQUESTED PETITIONER TO STEP OUT OF HIS CAR.

The State submits that the scenario presented at bar should properly be categorized as a police-citizen encounter, not a "stop" or "detention" as Petitioner contends. As Senior Justice Alderman significantly reminded in the decision under review, there is no litmus-paper test for distinguishing a consensual encounter from a stop. (A-4). Indeed, this determination must be made on a case-by-case basis. Moreover, as reiterated by the Second District in State v. Wilson, 566 So.2d 585, 587 (Fla. 2d DCA 1990):

> **It is firmly established that an officer does not need any founded suspicion to approach and ask questions of an individual.** Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); McLane v. Rose, 537 So.2d 652 (Fla. 2d DCA 1989). **Such questionings usually constitute consensual encounters rather than stops unless an attempt is made to forcibly prevent citizens from exercising their right to walk away.**

Id. at 587. See also Peek v. State, 575 So.2d 1380 (Fla. 5th DCA 1991) (Officer's request that defendant come over to patrol car during street encounter did not constitute stop).

Because of the diversity of police-citizen contacts, it is apparent that not every such encounter is subject to Fourth Amendment restrictions. As Chief Justice Warren opined in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968):

> Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.

Id., 88 S.Ct. at 1875-1876.

In the instant case, when viewing the evidence adduced at the suppression hearing in the light most favorable to sustaining the trial court's ruling, it is clear that Deputy Wilmoth had a right, if not a duty, to approach Petitioner's parked vehicle. In other words, Deputy Wilmoth was in a place where he had a right to be. Certainly, it was not unreasonable for Deputy Wilmoth to approach the lone vehicle parked on the side of a road in a desolate area in order to check on the welfare of the driver (Petitioner) and the vehicle's operational ability. As the trial court perceptively observed (R 34), the only question that arises is whether Deputy Wilmoth acted reasonably in asking Petitioner to exit his vehicle based upon

the movements he observed inside the vehicle and other circumstances with which the deputy was faced. Considering the particular facts of this case, the State submits that the deputy was clearly justified in doing so.

In determining the issue before this Court, the following words of the United States Supreme Court in Pennsylvania v. Mimms, 434 U.S. 106, 109-111, 98 S.Ct. 330, 332-33, 54 L.Ed.2d 331, 336-37 (1977), are instructive:

> The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Id., 98 S.Ct. at 332. In Mimms, while specifically recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile," the high court held that once an officer has made a lawful traffic stop of an automobile, the officer may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures, notwithstanding the fact that an officer has no reason to suspect foul play from the driver at the time of the stop. In such a situation, the Court found that, on balance, the intrusion on the driver's personal liberty occasioned by an

officer's order to exit the car is de minimis. Id., 98 S.Ct. at 333.

Although no traffic violation, and hence no traffic stop, was involved sub judice, the State nonetheless asserts that since Deputy Wilmoth was in a place where he had a lawful right to be and had a reasonable concern for his safety, the deputy's request for Petitioner to exit his car was reasonable and permissible under the Fourth Amendment for the same reasons expressed in Mimms. See also Doctor v. State, 573 So.2d 157, 159 (Fla. 4th DCA 1991), citing Pennsylvania v. Mimms, supra, ("An officer's interest in protecting himself or a fellow officer against an unsuspected assault by a driver or passenger and against accidental injury from passing traffic is both legitimate and weighty and the intrusion into the driver's or passenger's personal liberty [by ordering the driver or passenger to get out of the car] is de minimis"). Indeed, in Mimms, the Supreme Court held that even a generalized concern for an officer's safety - without any evidence of danger involved in the particular case - was sufficient to justify the "minor inconvenience" of requiring every driver stopped for a traffic violation to get out of his/her car. A fortiori, the State asserts that the result should not be any different when, as here, there actually exists evidence of danger which has created a concern for safety in the officer's mind. Certainly, the mere fact that Petitioner was not stopped for a traffic violation did not in any way negate or diminish the risk of danger confronting an Deputy Wilmoth as he

approached Petitioner's car. In fact, considering the totality of the particular circumstances which confronted Deputy Wilmoth, the State submits that the risk of danger to the deputy was greater than that involved in a routine traffic stop.

Indeed, there were a number of articulable facts which supported Deputy Wilmoth's concern for his safety and, hence, his request for Petitioner to exit his vehicle. First, Petitioner's vehicle was parked by itself in a relatively desolate, secluded area which was adjacent to a high crime area. (R 5). Deputy Wilmoth testified that it was "unusual" to find parked vehicles in that area. (R 17). Furthermore, Deputy Wilmoth was alone and knew that it would be a while before any backup officer could arrive to assist him if any trouble developed. (R 5, 23-24). Most importantly, Petitioner's furtive arm movements and nervous demeanor in and of themselves gave the deputy reason to be concerned for his safety. As the Fourth District aptly held in State v. Louis, 571 So.2d 1358 (Fla. 4th DCA 1990), "A person's unusual body movements and demeanor during an encounter with an officer gives the officer reason to believe the person has a weapon." Id. at 1359. Thus, Deputy Wilmoth's simple request for Petitioner to step out of his car was clearly not unreasonable and, as a result, not violative of Petitioner's Fourth Amendment rights. Indeed, the risk of danger to the deputy far outweighed the slight inconvenience suffered by Petitioner in stepping from his vehicle.

Here, as in Louis, supra, Petitioner was asked to expose to the deputy's view very little more of his person than was already exposed. To be sure, it is evident that the Deputy Wilmoth merely desired to establish a face-to-face conversation with Petitioner so as to diminish the possibility that Petitioner could make additional furtive movements which could jeopardize the exposed deputy's safety. On balance, the intrusion into Petitioner's personal liberty by Deputy Wilmoth's reasonable request was de minimis compared with the "legitimate and weighty" public interest in the deputy's safety. "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." Mimms, 434 U.S. at 111, 98 S.Ct. at 333, 54 L.Ed.2d at 337.

It necessarily follows from the Supreme Court's holding in Mimms that approaching a parked car and requesting the occupants out is not a Terry stop, even in the absence of a traffic stop. This is clearly evident from the Third District's holding in State v. Williams, 371 So. 2d 1074 (Fla. 3d DCA 1979), wherein the court held that a "tip" to a police officer concerning the possible presence of a gun which did not contain sufficient "indicia of reliability" to support any greater restriction of a person's liberty, nonetheless did justify the "de minimus" intrusion involved in ordering a passenger out of a car that was already stopped for reasons unrelated to police activity. Noting that the Supreme Court in Mimms held that a generalized concern for an officer's safety - without any

evidence of danger involved in the particular case - was sufficient to justify the "minor inconvenience" of requiring every driver stopped for a traffic violation to get out of his car, the court went on to conclude that, **"There is all the more reason, it seems to us, for vindicating that concern when, as here, there is a legitimate reason for actually believing the risk to exist in a particular situation."** Id., 371 So. 2d at 1076.

In light of the totality of the circumstances discussed above, the contact between Petitioner and the deputy constituted nothing more than an encounter. As such, there was no need for a "founded suspicion of criminal activity" as Petitioner presupposes in his brief. As a result, the cases cited by Petitioner in this regard are inapposite.

Nevertheless, the cases upon which Petitioner heavily relies, Brown v. State, 577 So. 2d 708 (Fla. 2d DCA 1991), Jackson v. State, 579 So. 2d 871 (Fla. 5th DCA 1991), and Currens v. State, 363 So. 2d 1116 (Fla. 4th DCA 1978), are all significantly distinguishable from the case at bar. In Brown, there is nothing to suggest that the officer's direction for Brown to exit the car was prompted by the officer's concern for his safety. Rather, it appears that the officer directed Brown to exit the car simply due to the fact that Brown refused to identify himself. Id., 577 So. 2d at 709. Unlike the present case, it is clear that the circumstances in Brown were not such as to cause the officer to have a legitimate concern for his

safety. In Jackson, the Fifth District failed to explain in its one paragraph opinion the surrounding circumstances that led to the officer's "direction" to the defendant to exit his car. Thus, it is impossible to tell from the decision why the officer directed the defendant to step from the vehicle. Lastly, in Currens, in stark contrast to the present case, the appellate court expressly found that there was no reason to believe that the safety of the officer was endangered. Id., 363 So. 2d at 1117.

Additionally, the fact that Deputy Wilmoth simply "asked" Petitioner to exit his vehicle, as opposed to ordering him out, distinguishes this case from Brown, Jackson, and Currens. In both Brown and Jackson, it is evident that the officer "directed" the defendant out of his vehicle. Brown, 577 So. 2d at 709; Jackson, 579 So. at 871. In Currens, the officer "ordered" the defendant out of his vehicle. Id., 363 So. 2d at 1117. Here, in contrast, although Deputy Wilmoth agreed with defense counsel that he had directed Petitioner to step from his car, the deputy stated in his own words that he "asked" Petitioner to exit his car. (R 11). In particular, Deputy Wilmoth's testimony was as follows:

> Q. Okay, what did you do after he (Petitioner) made these nervous actions, reaching under the seat actions?
>
> A. I got out of my vehicle and asked him to step out of his vehicle. (R 11).

In this regard, the State notes that the Fourth District's decision correctly interpreted the evidence in a manner most favorable to sustaining the trial court's ruling by concluding that the deputy "asked" Petitioner to step out of his car. (A-2); See McNamara v. State, 357 So.2d 411 (Fla. 1978).

In sum, the State submits that, in light of the totality of the circumstances facing Deputy Wilmoth, his request to have Petitioner step out of his car was a most reasonable one and did not implicate Fourth Amendment restrictions, i.e., did not rise to the level of a stop or detention. Even if the Fourth Amendment did come into play, this amendment prohibits only unreasonable searches and seizures and should not require a police officer to unreasonably risk his life, especially where a reasonable alternative exists to reduce the risk of harm to the officer. Under the circumstances of the instant case, the deputy's simple request to have Petitioner step from his vehicle so that he could speak with him constituted such a reasonable alternative. As such, no Fourth Amendment violation occurred.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Court to approve the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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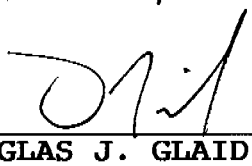

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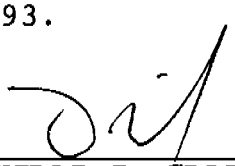
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail to: ELLEN MORRIS, Assistant Public Defender, Counsel for Petitioner, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, on this 25th day of March, 1993.



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