OA 6-2-93



IN THE SUPREME COURT OF FLORIDA

TEDD J. POPPLE,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

Case No. 80,696

# PETITIONER'S REPLY BRIEF ON THE MERITS

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## 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

RB = Respondent's Brief on the Merits

## STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon his Brief on the Merits filed herein for the Statement of the Case and Facts, with the following clarifications.

1. Popple was seated in a legally parked vehicle on a public road in a residential area at 12:55 p.m. June 4, 1991, the middle of the day, in the vicinity of 12th Street Southwest and 12th Avenue Southwest in Vero Beach (R 4, 15-17). Deputy Sheriff Wilmoth was investigating a stolen vehicle which had been abandoned approximately four blacks away, a matter unrelated to Petitioner's case (R 5, 15, 40).

2. Wilmoth stated Popple was doing nothing even suggestive of illegal conduct when he approached from the rear (R 9, 11, 17-18). WIlmoth, in full deputy sheriff uniform, carried a gun and handcuffs. He approached Popple from behind, startling Popple ["...I guess I surprised him pretty bad..."] (R 9).

3. While Wilmoth claimed that he stopped the vehicle, ostensibly to check on Popple's welfare, he offered no reason he thought this, given the fact that Popple was lawfully parked. Nor did he provide any testimony that he made any inquiry of Popple in this regard. Wilmoth also claimed that he thought Popple may have known something about the abandoned car four blocks away. Then, contradicting himself, he stated he was sure Popple didn't know anything about the abandoned car. The trial judge questioned Popple further as to the basis of 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 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).

4. Wilmoth never stated that he asked about weapons, looked for or discovered weapons nor did he state Popple threatened him in any way. Appellee cites to no testimony that Wilmoth ever even referred to a "weapon". Rather, there was just an allusion to a concern for safety. Nor was Wilmoth able to discern just what kind of movements Popple was making and concluded Popple did nothing illegal (R 18). Moreover, Wilmoth noted that one of the items in the car included a receipt of sale of the car to Popple (R 9-11, 18).

## 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 1992) 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 that the fourth amendment protection was not implicated. Petitioner contends that the dissent correctly recognized that 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 continues to maintain that the present stop was unlawful and unsupported by a founded suspicion. Brown v. State, 577 So. 2d 708 (Fla. 2d DCA 1991), Jackson v. State, 579 So. 2d 871 (Fla. 5th DCA 1991) (Appendix at 9-12). Specifically, the fact that Wilmoth had Popple get out of the vehicle, elevated the police-citizen encounter into a full-blown stop, requiring a founded suspicion. Neither Popple, or any other reasonable person would believe he or she was free to leave in these circumstances. Petitioner further contends that the present case is governed factually and analytically by Brown, Jackson, Gano v. State, 599 So. 2d 759 (Fla. 2d DCA 199), and Currens v. State, 363 So. 2d 1116 (Fla. 4th DCA 1978). Respondent's attempt to factually distinguish those cases from the instant cause is unconvincing.

Here, as in Brown and Jackson, the encounter became a stop when the officer directed Popple to get out of the car. Popple's freedom to leave or refuse the directive was clearly a restriction on his liberty. Although Respondent claims that here the officer had some sort of "...concern for his safety..." whereas the officers in Brown and Currens did not, Respondent fails to cite to anything more specific than this generalized "concern". Moreover, Respondent fails to distinguish or even discuss Gano v. State, supra, relied upon by Petitioner, which is particularly pertinent to the instant case. Despite the officer's reference to Gano's

"furtive movements," as well as weapons, the Gano court rejected this claim because the officer never asked about weapons, looked for or discovered weapons. Gano, supra, 599 So. 2d at 760. Indeed the present facts are even more compelling because unlike the officer in Gano, Wilmoth failed to even mention weapons. In the same vein, Currens, supra, involved a similar hand movement as the present cause. The Fourth District nonetheless held there was no legitimate basis for the officer to believe the officer's safety was endangered. Currens, supra, 363 So. 2d at 1117.

Respondent also attempts to distinguish the present cause from Jackson, Brown and Currens on the basis that the officer "asked" Popple to exit his vehicle (RB 12-13). It bears mention, first that Wilmoth's own testimony supports the conclusion that Wilmoth directed Popple to get out of the vehicle:

> Q: You directed him to step out of his vehicle?
>
> A: Yes I did.

(R 17) (emphasis added).

* * *

> Q: You directed him to step out of his vehicle, correct?
>
> A: Uh-huh.

(R 18) (emphasis added). See also Appendix at 5-6 (Anstead, J., dissenting) (characterizing Wilmoth's direction to Popple as an "order").

The crux of the matter is that Petitioner was stopped by Wilmoth and no reasonable person in Popple's position would believe he or she is free to leave when approached and directed to exit the car. See, e.g Dees v. State, 564 So. 2d 1166, 1168 (Fla. 1st

DCA 1990) (finding the deputy's direction to exit the vehicle constituted comprised a show of authority that restrained the defendant's freedom of movement because a reasonable person would conclude she was required to comply. "Merely stating that the officer "asked" Dees to get out of the van and "asked" her to take her hand from her pocket does not change the fact that the statements were directives from a law enforcement officer, rather that simple requests that Dees was free to disregard"). See also Evans v. State, 546 So. 2d 1125 (Fla. 3d DCA 1989) (reasonable person would not have been free to disobey officer who "asked" defendant to take his hand out of his pockets); Currens v. State, supra (investigatory stop occurred when officer ordered defendant out of car).

As Judge Anstead in his cogent dissent recognized:

> I would submit that in its simplest form liberty is not having a police officer approach and order you out of your car. We are 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).

Respondent's claims notwithstanding, the intrusion at bar was not a consensual encounter, but one which implicates the fourth amendment. The intrusion here went beyond the mere street encounter characterizing Peek v. State, 575 So. 2d 1380 (Fla. 5th DCA 1991), cited by Respondent. No reasonable person in Popple's position would believe he or she was free to leave. U.S. v. Mendenhall, 446 U. S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497

(1980); State v. Simons, 549 So. 2d 785 (Fla. 2d DCA 1989).

Respondent's reliance upon Pennsylvania v. Mims, 434 U. S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) is misplaced. Mims involves a car stop where the driver had already been lawfully stopped and detained for an expired tag a violation under Pennsylvania law. In such a scenario, the Mims majority held that an already lawfully stopped and detained driver could be ordered out of the vehicle because this additional intrusion was not a serious intrusion. Petitioner emphasizes that the Mims majority does not approve the present intrusion:

> ...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 only hold 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...

Respondent concedes, as it must, that no such traffic or criminal infraction occurred here (RB 8). Petitioner vehemently disagrees with Respondent's assertion that Wilmoth's order to exit was a benign "inconvenience" or "de minimus intrusion" that did not implicate the fourth amendment. Certainly Mims does not stand for that proposition. Nor do any of the cases Respondent relies upon so hold. For example, Doctor v. State, 573 So. 2d 157, 159 (Fla. 4th DCA 1991) involves a vehicle already lawfully stopped for a broken taillight. State v. Louis, 571 So. 2d 1358 (Fla.4th DCA 1990) also involved a stop for a taillight violation. Louis is further distinguishable from the present facts because the officer there had a fear for his safety which he specifically articulated: the defendant suddenly bailed out of the vehicle; the officer had

to repeatedly tell the defendant to stop; prior to stopping, the defendant put his hands inside his jacket and then threw down an envelope. Not so here. Moreover, unlike the officer in Louis, Wilmoth never stated he thought Popple had a weapon. Respondent seeks to validate the present intrusion based upon nothing more than a generalized "concern for safety" and absent supporting facts Wilmoth's mere reference to "furtive movements" fails to suffice. E.g. Gano v. State, supra; Currens v. State, supra; Dees v. State, supra. See also Johnson v. State, 17 Fla. L. Weekly D2808, 2809 (Fla. 1st DCA Opinion filed December 10, 1992), and Smith v. State, 592 So. 2d 1206 (Fla. 2d DCA 1992).

State v. Williams, 371 So. 2d 1074 (Fla. 3d DCA 1979) a case upon which Respondent heavily relies is readily distinguishable from the case at bar. There, the officer was responding to a disturbance call, a situation more likely to be potentially violent than the present circumstances. Here, Wilmoth responded to a call for an abandoned vehicle four blocks away from Popple's location. Also, the officer in Williams was approached by a man who thought there may have been a gun in a car located at the scene by three or four occupants. Here, not only was the car was located at least four blocks away from the dispatch Wilmoth responded to, it was occupied only by Petitioner and there was no reference whatsoever to the existence of a gun or dangerous weapon. State v. Williams supra, 371 So. 2d at 1516. Wilmoth's testimony indicates, at most, a "hunch," ["I didn't know, I just felt it might be worth looking into"] (R 23). Neither the furtive movement or vague reference to safety and welfare concern, justify the stop and intrusion here. Finally, the majority decision sub judice is a departure from

established legal precedent and constitutes a violation of fourth amendment protections. Accordingly, Petitioner urges this Honorable Court to reverse the majority decision of the Fourth District.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to 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, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 1ST day of April, 1993.

Ellen Morris

ELLEN MORRIS
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