IN THE SUPREME COURT OF FLORIDA

JEREMIAH D. JOHNSON.

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 91,328

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114

(904)252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT

POINT I. THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***STATE V. JOHNSON***, 22 Fla. L. Weekly D1392 (Fla. 5th DCA June 6, 1997), INCORRECTLY REVERSED THE TRIAL COURT'S ORDER OF SUPPRESSION OF EVIDENCE DISCOVERED DURING AN UNLAWFUL SEARCH AND SEIZURE, CONTRARY TO DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL WHERE THE RELINQUISHMENT OF THE CONTRABAND WAS THE RESULT OF A SHOW OF AUTHORITY. 6

POINT II. THE ARREST OF A FORMER PASSENGER OF AN AUTOMOBILE UNDER CIRCUMSTANCES WHICH HAVE NOTHING TO DO WITH THE CAR DOES NOT JUSTIFY THE SEARCH OF THE VEHICLE; EVIDENCE DISCOVERED DURING THE UNLAWFUL SEARCH MUST BE SUPPRESSED UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS. 11

CONCLUSION 15

CERTIFICATE OF SERVICE 15

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

Canion v. State
550 So.2d 562 (Fla. 4th DCA 1989) 9

Dees v. State
564 So.2d 1166 (Fla. 1st DCA 1990) 9

Doney v. State
648 So.2d 799 (Fla. 4th DCA 1994) 8

Evans v. State
546 So.2d 1125 (Fla. 3d DCA 1989) 9

Florida v. Bostick
501 U.S. 429 (1991) 2

Gipson v. State
667 So.2d 418 (Fla. 5th DCA 1996) 9

Harrison v. State
627 So.2d 583 (Fla. 5th DCA 1993) 9

Johnson v. State
610 So.2d 581 (Fla. 1st DCA 1993) 9

Mayhue v. State
659 So.2d 417 (Fla. 2d DCA 1995) 9

New York v. Belton
453 U.S. 454 (1981) 11-14

Palmer v. State
625 So.2d 1303 (Fla. 1st DCA 1993) 8

Popple v. State
626 So.2d 185 (Fla. 1993) 3, 5-9

TABLE OF CITATIONS (continued)

State v. Johnson
21 Fla. L. Weekly D1909 (Fla. 5th DCA August 23, 1996) 2, 7, 16

State v. Johnson
21 Fla. L. Weekly D2589 (Fla. 5th DCA December 6, 1996) 2

State v. Johnson
22 Fla. L. Weekly D1392 (Fla. 5th DCA June 6, 1997) 1-3, 6-8, 9, 10, 11, 16

Zelinski v. State
695 So.2d 834 (Fla. 2d DCA 1997) 9

IN THE SUPREME COURT OF FLORIDA

JEREMIAH D. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 91,328
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

The petitioner, JEREMIAH D. JOHNSON, moved to suppress drugs found in his car and on his person. ***State v. Johnson***, 22 Fla. L. Weekly D1392 (Fla. 5th DCA June 6, 1997) (on second motion for rehearing). The facts presented at a hearing on the motion to suppress revealed that police officers, riding bicycles approached a parked vehicle in a parking garage, in which Johnson was the driver and Ryan was a passenger. ***Id.*** As the officers rode toward the vehicle, Johnson, Ryan, and another passenger exited the vehicle. Officer Berry approached Ryan and asked if he could speak to him, to which Ryan agreed. As Ryan walked toward the policeman, he placed his hands in his pockets. ***Id.*** Berry "asked" Ryan to remove his hands from his pockets while he was talking to him. ***Id.*** After inquiring why, and being told that it was for safety reasons, Ryan stated, "Sure, I'll empty the contents of my pockets," and pulled a package of marijuana from his pocket, which he handed to Officer Berry. ***Id.***

The officer arrested Ryan, and, while the other occupants of the vehicle, including

Johnson, waited near the rear of the vehicle, police searched the car. They discovered additional drugs in the glove compartment, and, after determining that the car belonged to the petitioner, arrested him. A further search of Johnson's person uncovered more drugs in his pocket. ***Id.*** Based on these facts, the trial court ordered the drugs suppressed, ruling that the arrest of the former passenger did not support a search of the vacated automobile. ***Id.*** The state appealed the ruling to the District Court of Appeal, Fifth District.

The District Court of Appeal, having trouble making up its mind on the suppression, issued three different opinions, two reversing the trial court's order of suppression by finding that the seizure was consensual; ***State v. Johnson***, 21 Fla. L. Weekly D1909 (Fla. 5th DCA August 23, 1996)(hereinafter ***Johnson I***); ***State v. Johnson***, 22 Fla. L. Weekly D1392 (Fla. 5th DCA June 6, 1997)(***Johnson III***); and the middle opinion, affirming the suppression, finding that Ryan was submitting to the officer's show of authority, and hence the seizure was not consensual and was unconstitutionally obtained. ***State v. Johnson***, 21 Fla. L. Weekly D2589 (Fla. 5th DCA December 6, 1996)(***Johnson II***).

The third opinion's majority relied solely on general language in ***Florida v. Bostick***, 501 U.S. 429 (1991), for the proposition that, even though a police officer has no basis for suspecting an individual, he may not only request that the individual talk to him but may also request such person to submit to a search so long as the officer does not convey a message that compliance with the request is required. ***Johnson III***, 22 Fla. L. Weekly at D1393. ***See also Johnson I***, 21 Fla. L. Weekly at D1909 ("This merely requires an analysis under ***Florida v. Bostick***."). The dissent in ***Johnson III***, ***supra***, refused to take this approach of looking only at the general language from ***Bostick***, ***supra***; rather, the dissent looks at the question of whether

the individual is seized (*i.e.*, not free to end the encounter and depart), and whether the "direction" of the officer to comply with his request constituted a show of authority "which a reasonable person under the circumstances would believe that he should comply." ***Popple v. State***, 626 So.2d 185, 187 (Fla. 1993).

Regardless, the majority opinion in the instant case rules, the determining factor of whether the seizure was voluntary depends solely on how the officer's direction is characterized: whether it is merely a question (in which case the relinquishment of the evidence is then necessarily voluntary) or whether the officer phrased his discussion with the citizen as an order (in which case the discovery is a nonconsensual seizure). ***Johnson III***, 22 Fla. L. Weekly at D1392-1393. The dissent, citing to authority from other district courts contrary to the majority holding, notes, however, that ***Popple*** clearly holds that it does not matter how the officer's direction is classified, whether it is a question, order, direction, or request; rather the test is one of a reasonable person believing he should comply with an apparent show of ***authority***. ***State v. Johnson III***, 22 Fla. L. Weekly at D1393.

The dissent, relying on the language of ***Popple***, and a multitude of other cases to determine that, while the initial encounter may have been consensual, it did not remain so once the officer directed Ryan to remove his hands from his pockets since, once submitting to the authority of the officer, he was then unlawfully seized. ***Johnson III***, 22 Fla. L. Weekly at D1393 (Thompson, J., dissenting).

The petitioner's motion for rehearing and rehearing *en banc* from this third opinion was denied on July 11, 1997. The defendant filed his Notice to Invoke the Discretionary Jurisdiction of this Court on August 18, 1997. This Court accepted jurisdiction on November

17, 1997. This initial brief on the merits follows.

SUMMARY OF ARGUMENT

The decision of the district court directly and expressly conflicts with decisions of this Court and other district courts of appeal on the same issue of law. The appellate court, in reversing the trial court's order of suppression, ruled contrary to this Court's ruling in ***Popple v. State***, 626 So.2d 185 (Fla. 1993), that, for an analysis of whether the defendant voluntarily consented to the search and seizure, it does not matter whether the police characterize their discussion with the defendant as a "request" or an "order;" rather the test is whether "the direction . . . constituted a show of authority which . . . a reasonable person under the circumstances would believe that he should comply." ***Id.*** at 187-188. Additionally, as pointed out in the dissenting opinion, the majority decision in the instant case is contrary to numerous decisions of other district courts of appeal. The relinquishment by Ryan of the contents of his pocket was a direct result of the officer's show of authority and hence was involuntary. The unlawful seizure of the marijuana cannot then provide authority for the search of Johnson's automobile, in which Ryan was no longer a passenger.

ARGUMENT

POINT I.

THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***STATE V. JOHNSON***, 22 Fla. L. Weekly D1392 (Fla. 5th DCA June 6, 1997), INCORRECTLY REVERSED THE TRIAL COURT'S ORDER OF SUPPRESSION OF EVIDENCE DISCOVERED DURING AN UNLAWFUL SEARCH AND SEIZURE, CONTRARY TO DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL WHERE THE RELINQUISHMENT OF THE CONTRABAND WAS THE RESULT OF A SHOW OF AUTHORITY.

The opinion of the Fifth District in the instant case reversed the order of suppression of the trial court on the grounds that since the police officer characterized his discussion with Ryan as a mere request rather than an order, the seizure was voluntary and consensual. This holding expressly and directly conflicts with cases from this Court and other district courts which specifically rule that it does not matter how it is characterized by the police, but rather must be looked at from the standpoint of whether the direction constituted a show of authority which a reasonable person under the circumstances would believe that he should comply.

The district court's refusal to consider the effect which the direction had on a reasonable person allows the police to characterize their encounter any way they desire in order to acquire a favorable ruling, to the certain detriment of the citizen, and flies in the face of established precedent. This Court has the opportunity to affirm the protections afforded citizens by the Florida and federal constitutions as stated in ***Popple v. State***, 626 So.2d 185 (Fla. 1993), and protect citizens against those overzealous police officers, who show apparent

authority in order to dupe defendants into "consenting" to a search or seizure. Additionally, the petitioner submits that (in part because the case has had three differing opinions) submits that if the three-judge panel of the district court could not make up its mind (it issued three differing opinions in the single appeal) and come to a consensus as to the issue of acquiescence to an apparent show of authority versus a voluntary relinquishment of the contraband, how can a private citizen ascertain the difference when confronted with a police officer's "request?" As a result, this is a matter which should be rectified by this Honorable Court.

The holding of the fifth district is essentially that it is a consensual search and seizure if the police say it is. ***State v. Johnson***, 22 Fla. L. Weekly D1392 (Fla. 5th DCA June 6, 1997). ***See also State v. Johnson***, 21 Fla. L. Weekly D1909 (Fla. 5th DCA August 23, 1996). This holding directly and expressly conflicts with ***Popple v. State***, 626 So.2d 185, 187 (Fla. 1993), that the question here is whether the individual is seized (*i.e.*, not free to end the encounter and depart), and whether the "direction" of the officer to comply with his request constituted a show of authority "which a reasonable person under the circumstances would believe that he should comply."

The majority opinion attempts to distinguish ***Popple***, while the dissent relies on it and other cases which deal with precisely the issue present here. The majority faults the ***Popple*** decision claiming that "because of the limited facts given in ***Popple***, we cannot tell whether the officer 'asked,' 'directed,' 'ordered,' or 'requested' Popple to exit the vehicle." ***State v. Johnson***, 22 Fla. L. Weekly at D1392. However, the majority had just quoted from ***Popple*** and had even added emphasis to language (which it then proceeded to somehow overlook) which clearly holds that it does not matter how the officer's direction is classified, whether it is

a question, order, direction, or request:

> **Whether characterized as a request or an order**, we conclude that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show of authority which . . . a reasonable person under the circumstances would believe that he should comply.

Popple v. State, ***supra*** at 187-188 (emphasis added), ***quoted in State v. Johnson***, 22 Fla. L. Weekly at D1392. Thus, the majority's concern is not at all relevant to this discussion. It does not matter whether the facts in ***Popple*** revealed a request or an order, this Court has said so; the focus must be on whether a reasonable citizen would believe he must comply, not how the officer characterized his direction.

The dissent, on the other hand, refuses to follow the simplistic approach and instead correctly analyzes the situation and the language of ***Popple*** and a multitude of other cases to determine that, while the initial encounter may have been consensual, it did not remain so once the officer directed Ryan to remove his hands from his pockets since, once submitting to the authority of the officer, he was then unlawfully seized. The dissent correctly points out what the majority overlooked, misconstrued, or ignored: this Court and others have determined, based upon the totality of the circumstances, that a seizure occurs when an officer directs a person to remove his hands from his pockets and that person reasonably believes he must submit to that authority, rather than simply on how the "request" was characterized. ***Doney v. State***, 648 So.2d 799, 801 (Fla. 4th DCA 1994) (holding that compliance with officer's request that defendant spit out contents of his mouth was acquiescence to authority, rather than consent); ***Palmer v. State***, 625 So.2d 1303 (Fla. 1st DCA 1993) (holding that abandonment of a razor blade was product of illegal stop and thus involuntary because seizure occurred when

officer told defendant to take his hands out of his pockets); ***Johnson v. State***, 610 So.2d 581 (Fla. 1st DCA 1993) (holding that seizure occurred when officer told Johnson to remove his hands from his pockets and turn around so that officer could get good look at him); ***Dees v. State***, 564 So.2d 1166 (Fla. 1st DCA 1990) (seizure occurred when officer directed defendant to exit vehicle and remove hand from pocket); ***Evans v. State***, 546 So.2d 1125 (Fla. 3d DCA 1989) (when an officer asks a defendant to remove his hands from his pocket for the officer's safety, a reasonable person in the defendant's position would not believe he was free to go). ***See also Mayhue v. State***, 659 So.2d 417, 418 (Fla. 2d DCA 1995) ("When the officer ordered Mayhue to open his hand, however, the consensual encounter became an investigatory stop."); ***Canion v. State***, 550 So.2d 562 (Fla. 4th DCA 1989) (Where deputy sheriff demanded, without founded suspicion, that defendant remove his hand from his pocket, "mere encounter" between deputy sheriff and defendant escalated to temporary unlawful detention and evidence seized as result of such detention was inadmissible); ***Harrison v. State***, 627 So.2d 583 (Fla. 5th DCA 1993) (consensual encounter evolved into a seizure when police officer ordered defendant to remove his hand from his pocket; compliance was a submission to the show of authority); ***Gipson v. State***, 667 So.2d 418, 420 (Fla. 5th DCA 1996); ***Zelinski v. State***, 695 So.2d 834 (Fla. 2d DCA 1997) (a consensual encounter becomes an investigatory stop once an officer **asked** the defendant to step out of a vehicle).

While many of these cases characterized the officer's actions as an order, as the dissent correctly notes, ***Popple v. State***, ***supra*** at 188, directs that this is **not** a determining factor; a request may constitute a seizure if the act of directing the person to remove his hands "constituted a show of authority which restrained [appellant's] freedom of movement because a

reasonable person under the circumstances would believe that he should comply."

The required "totality of the circumstances" test can cause only one conclusion here: Ryan, and a reasonable person, would conclude that he was not free to end the encounter, the "request" to remove his hands from his pocket constituted an unlawful show of authority causing the reasonable person to believe he should comply.

> Whether the officer's directive is characterized as a request or an order, the result is the same; Ryan submitted to the authority of the officer. Ryan was given a Hobson's choice: obey the officer and remove his hands, or disobey the officer and possibly suffer dire consequences. Since the officer testified that his request was predicated upon his concern for his safety, Ryan was left with no alternative. We can only speculate what might have occurred if Ryan had not complied. Ryan's response to the officer, "Sure, I'll empty the contents of my pockets," makes it obvious he did not feel that he could refuse. Perhaps he misunderstood the officer or was nervous. Regardless, he complied because of the officer's communication. I am mindful that officers need to be careful of citizens who may be armed, but an officer's concern for his safety is not a basis to violate a citizen's Fourth Amendment rights. Based upon the prior rulings of this court and Ryan's response, I would affirm the order suppressing the evidence because it was obtained as a result of a seizure made in violation of Ryan's Fourth Amendment rights.

State v. Johnson, 22 Fla. L. Weekly at D1393-1394 (Thompson, J., dissenting).

The direction of the deputy for Ryan to remove his hands from his pocket constituted a show of authority and a violation of Forth Amendment rights. The resulting searches of Johnson's automobile and his person were fruits of the unlawful seizure; the evidence must be suppressed, as the trial court correctly ruled. The decision of the Fifth District Court of Appeal must be reversed.

POINT II.

THE ARREST OF A FORMER PASSENGER OF AN AUTOMOBILE UNDER CIRCUMSTANCES WHICH HAVE NOTHING TO DO WITH THE CAR DOES NOT JUSTIFY THE SEARCH OF THE VEHICLE; EVIDENCE DISCOVERED DURING THE UNLAWFUL SEARCH MUST BE SUPPRESSED UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS.

In addition to the argument favoring suppression in Point I, petitioner also submits that the trial court correctly suppressed the evidence since the arrest of Ryan, who at all times during the police encounter was outside of Johnson's vehicle, could not constitutionally provide a basis to search the contents of Johnson's vehicle.

The district court relied on the case of ***New York v. Belton***, 453 U.S. 454 (1981), as authority for the proposition that a search incident to arrest may include the vehicle in which the arrestee was a recent occupant, even though the arrestee was not the owner of the vehicle, nor was the car in any way involved in the offense. ***State v. Johnson III***, 22 Fla. L. Weekly at D1392. The trial court was correct in ruling that ***Belton*** does not apply to the facts of the instant case.

In ***Belton***, the police stopped a car for speeding, and smelled burnt marijuana emanating from it. The officer established that none of the occupants owned the car, or were related to the owner. He also saw a suspicious envelope on the floor of the car which he associated with marijuana. Based on this, the officer ordered the occupants from the car and arrested them for possession of marijuana. Then he searched the car. The Supreme Court held that, with Belton under arrest for possession of marijuana, the police had authority to

search Belton's jacket, which was still on the back seat of the car.

Those facts are noticeably different from those of the instant case. Here, the co-defendant had already left the vehicle and was standing in the parking lot for some time before the police rode up on their bicycles and acquired the marijuana from the co-defendant's person. (Tr 4, 5) The automobile was not in any way involved in this arrest of Ryan. (Tr 7) There was no odor of marijuana (Tr 7), no envelope or other visible signs of contraband in the car, and no traffic infraction or anything else to justify police suspicion of either the car or its owner, the defendant. The police freely admitted in their testimony at the suppression hearing that they had no reason to suspect that the defendant himself had committed a crime until they searched the car. (Tr 7, 15) There were no illegal objects in plain sight (Tr 7, 15), no odors of marijuana (Tr 7, 16), no statements that the car contained contraband (Tr 8, 16), and no implications that the car might be stolen or otherwise intrinsically illegal. Further, the defendant himself did not have any objective signs of illegality about his person. He was not arrested prior to the search of his car, and did not consent to a search of his vehicle. (Tr 8, 15) It is also clear from the record that there was no warrant, and that no exigent circumstances existed. All the police knew prior to the search of the defendant's car was that the co-defendant had handed them a baggie of marijuana from his pants pocket.

Under these facts, the trial court properly distinguished the instant case from ***Belton***, ***supra***. In ***Belton***, the grounds for arrest developed while the defendant was an occupant of the car, and as a result of things the officer observed about the car and its contents (the smell of burnt marijuana coming from the car and the suspicious envelope on the floor). Conversely, in the instant case the arrest situation developed after the drug-carrying person had already left

the car. The arrest was the result of a separate series of events which did not involve the car in any way.

Put another way, since the arrest was based totally on events which developed **after** the arrestee had left someone else's car, the presence of the car in the vicinity was entirely optional to the question of arrest. If the car had not even been there, the arrest of the co-defendant would have proceeded exactly as it did. The holding of ***Belton*** was worded as follows:

> [w]e hold that when a policeman has made a lawful custodial arrest of the **occupant of an automobile**, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

New York v. Belton, 453 U.S. at 459-460.

The essential point which must not be lost sight of here, and which the trial judge was careful to point out (Tr 22-24), is that ***Belton*** allows a warrantless search only if a current occupant of the car is arrested. It does not hold, as the fifth district ruled, that the police may search a car in which the offender was a **recent** occupant.

The fifth district court made a pretty big jump in the law from the situation in ***New York v. Belton***, ***supra***, wherein the arrestees were inside the automobile, to the instant situation where the defendants were already outside of the vehicle upon the officers' approach. To affirm this holding would give police *carte blanche* to search every car in the vicinity of a person's arrest despite the fact that these cars did not belong to the suspect. Additionally, it is submitted that the discovery of cannabis on **Ryan** (who was no longer a passenger in the car) does not provide probable cause or exigent circumstances to excuse a warrantless search of **Johnson's** car. This holding would require all law-abiding owners of automobiles (including

cab drivers) to first search any prospective passengers for contraband in order to protect their own Fourth Amendment right to be free of warrantless searches of their cars.

Let us consider the following hypothetical scenario: Suppose a judge of this Court were to offer his daughter's boyfriend a ride home, only to find that, upon arriving at the boyfriend's house, the police were awaiting the boyfriend to arrest him. Since the police observed the boyfriend exit from the judge's car, would that somehow nullify the judge's Fourth Amendment rights in his own private automobile? Would that allow the police to seize the judge's car and conduct a warrantless search, merely because the boyfriend had previously been a passenger in the car? Under the DCA's holding in this case, it would! This is a situation that cannot be constitutionally countenanced.

Belton does not apply to the facts of this case; the trial court correctly distinguished it. There was no other proposed justification for the search of the vehicle other than the arrest of Ryan outside the vehicle, and the ruling of the trial court suppressing the fruits of the search was correct. The opinion of the Fifth District Court of Appeal must be reversed and the case remanded to reinstate the trial court's order of suppression.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, and remand with instructions to reinstate the trial court's order suppressing the evidence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue - Suite A
Daytona Beach, Florida 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Jeremiah D. Johnson, 501 South Street, Fern Park, FL 32730, this 11th day of December, 1997.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

reverse this award of attorney's fees made after final judgment.

HAINES v. STATE. 4th District. #96-1949. June 4, 1997. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. AFFIRMED. *See State v. Brigham*, No. 96-01837 (Fla. 2d DCA May 7, 1997) [22 Fla. L. Weekly D1174a].

* * *

Criminal law—Search and seizure—Vehicle—Where officer made lawful custodial arrest of former passenger of vehicle, he was permitted to search passenger compartment of vehicle as contemporaneous incident of that arrest—Fact that passenger had stepped out of vehicle as officer approached does not invalidate search of vehicle—Consensual encounter between officer and former passenger not converted to seizure by officer's asking if passenger would mind removing his hands from his pockets while officer was talking to him—Error to grant motion to suppress illegal drugs found in vehicle in search conducted after passenger was arrested for possession of cannabis which was discovered when passenger voluntarily emptied contents of his pockets—Error to grant motion to suppress drugs found on person of defendant/vehicle owner in search conducted after drugs were found in glove compartment of vehicle

STATE OF FLORIDA, Appellant, v. JEREMIAH JOHNSON, Appellee. 5th District. Case No. 95-1943. Opinion filed June 6, 1997. Appeal from the Circuit Court for Orange County, Theotis Bronson, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Barbara Arlene Fink, and David H. Foxman, Assistant Attorney Generals, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and James R. Wulchak and S.C. Van Voorhees, Assistant Public Defenders, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

[Original Opinion at 21 Fla. L. Weekly D1909a; On Motion for Rehearing at 21 Fla. L. Weekly D2589a]

[Editor's note: Substituted opinion contains substantial changes; ruling not changed.]

HARRIS, J.) We again grant rehearing and substitute the following opinion.

Jeremiah Johnson moved to suppress the illegal drugs found on himself and in his vehicle on the basis that the discovery of cannabis on a "former" passenger does not justify the warrantless search of a vehicle owned by another. The trial court suppressed the evidence and we reverse.

It is apparent that the court suppressed the evidence in this case not because the officer improperly commanded the codefendant to remove his hands from his pockets, thus revealing the cannabis (the argument now being made) but rather because the court believed that it should, under the circumstances of this case, grant Johnson's motion based on the argument that the search of the passenger compartment of the vehicle was unauthorized since the occupants were outside the vehicle at the time of the arrest.

We all agree that this was an incorrect basis for the ruling. In *New York v. Belton*, 453 U.S. 454, 459-460, 101 S.Ct. 2860, 2863-2864, 69 L.Ed 2d 768, 774-775 (1981), the United States Supreme Court addressed "the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants" and held "that when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." We do not believe that "the occupants" can avoid the consequence of *Belton* by merely stepping outside the automobile as the officers approach.

Even so, the dissent argues that under the "tipsy coachman rule," the trial court should be upheld because its ruling was right for another reason. This argument suggests that the officer's request that one of the occupants who had just vacated the vehicle remove his hands from his pockets while they engaged in conversation agreed to by that occupant was so coercive that it converted what had been a consensual encounter into a seizure justifying the suppression of all the after-discovered drugs. We simply disagree.

The facts are not disputed. Jeremiah Johnson, appellant herein, was the driver and owner of a vehicle parked in a garage located on the top of the Alba Business Building. As officers on bicycles approached, the occupants exited the vehicle. One of these occupants was Ryan. Officer Berry approached Ryan and asked if he could speak to him. Officer Berry testified, "he stated sure and at that time he walked toward me and placed his hands in his pocket and I asked him if he would mind while I was talking to him if he would take his hands out of his pocket." When asked why he made this request, Officer Berry responded, "because as I went on to explain I did not know him and for safety reasons I—if I don't know him and I didn't know what he had in his pockets I would feel more comfortable if he takes his hands out of his pockets."

In response to this request, Ryan said, "Sure, I'll empty the contents of my pockets." He then proceeded to empty his pockets revealing the cannabis. Ryan was placed under arrest and since the officer had just observed him sitting in the passenger seat of the automobile, he proceeded to search the passenger compartment of the vehicle. In the glove compartment, additional drugs were found. Because Johnson was the owner/driver of the vehicle, he was placed under arrest and a search of his person revealed even more drugs.

The dissent suggests that when the officer asked Ryan if he would mind removing his hands from his pockets, the consensual encounter was converted into a seizure. We disagree.

In arguing for reversal, the dissent relies on *Popple v. State*, 626 So. 2d 185 (Fla. 1993). We believe such reliance is misplaced. In *Popple*, an officer approached a vehicle legally parked in a desolate area and "asked" Popple to exit the vehicle. It is somewhat difficult from the opinion to determine exactly what the officer said to Popple. Although the court uses the term "asked" in one sentence, it also stated that, "[T]o insure his safety, [Officer] Wilmoth *directed* Popple to exit the vehicle." *Id.* at 186. The court also stated that "[t]he State seeks to justify the deputy's decision to *order* Popple out of the vehicle . . ." *Id.* at 187. Finally, the court stated:

> Although there is no litmus-paper test for distinguishing a consensual encounter from a seizure, a significant identifying characteristic of a consensual encounter is that the officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer inquiries, and the person may not be detained without a well-founded and articulable suspicion of criminal activity. [Citation omitted.] This court has consistently held that a person is seized if, under the circumstances, a reasonable person would conclude that he or she is not free to end the encounter and depart. [Citation omitted.] *Whether characterized as a request or an order, we conclude that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show of authority which . . . a reasonable person under the circumstances would believe that he should comply.* [Emphasis added.] [Citation omitted.]

Id. at 187-188.

Because of the limited facts given in *Popple*, we cannot tell whether the officer "asked," "directed," "ordered," or "requested" Popple to exit the vehicle. Nor can we tell from the opinion, although we might be able to tell from the *Popple* record, the tone of voice used in making the request/order/direction. Whatever the deputy said, and however he said it, even if characterized as a request, clearly didn't pass muster. However, in our case, it is undisputed the officer merely said, "Would you mind removing your hands from your pockets while we talk?" It is difficult to imagine how such inquiry could intimidate Ryan into emptying his pockets. More importantly, however, while a request to exit a vehicle might cause a reasonable person to conclude that he is not free to leave (since he is abandoning his means of transportation), the same simply cannot be said of a request to remove one's hands from his pockets during a conversation in which he had agreed to participate. The fact that Ryan was not

intimidated in this case is perhaps most evident because he did not claim that he was nor did the trial court find any intimidation. Here, there was no indication that there was anything to prevent Ryan from terminating the conversation or to prevent the occupants from getting back into the automobile and driving away.

We believe the case that controls this search and seizure issue is *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L. Ed. 2d 389 (1991). In *Bostick,* the United States Supreme Court held that a police officer, even though he has no basis for suspecting an individual, may not only request that the individual talk to him but may also request such person to submit to a search so long as the officer does not convey a message that compliance with the request is required. There is nothing in this record, and the trial court made no such finding, that the request that Ryan remove his hands from his pockets while he and the officer talked conveyed a message that compliance was mandated.

Under *Bostick,* it would even have been appropriate for the officer to request that Ryan submit to a search. In this event, had Ryan said "Sure, I'll empty the contents of my pockets" (his actual response in this case), the search would have been legal under *Bostick.* But Officer Berry did not request a search in this case. His request was much less intrusive: "Would you mind removing your hands from your pockets while we talk?" This request, most reasonable under the circumstances, does not justify suppressing the drugs found as a result of Ryan's voluntary compliance with the request. In *Bostick v. State,* 593 So. 2d 494 (Fla. 1992), the Florida Supreme Court, on remand, upheld a request far more intrusive on its face than the request made herein.

REVERSED and REMANDED for further action consistent with this opinion. (GOSHORN, J., concurs. THOMPSON, J., dissents, with opinion.)

(THOMPSON, J., dissenting.) This case turns upon whether a "request" instead of an "order" to remove Ryan's hands from his pockets, "to assure the officers' safety," constituted a seizure. Whether the officer's statement is characterized as a "request" instead of as an "order" is not determinative. In my opinion, the fact that Ryan was directed to take his hand from his pocket caused the consensual encounter to evolve into a seizure. Therefore, all the drugs and drug paraphernalia retrieved at the scene should have been suppressed. *Wong Sun v. United States,* 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *Woodson v. State,* 579 So. 2d 381 (Fla. 5th DCA 1991).

Two uniformed and armed officers on bicycle patrol approached Johnson's car at 3:30 a.m. Johnson's car, a Honda Civic, was legally parked in a parking garage in downtown Orlando. The officers testified that as they approached the vehicle they did not see any unusual movement or furtive gestures; they did not smell any burning marijuana, or see any contraband. The police saw Johnson and Ryan get out of the car along with Ryan's girlfriend. The officers testified that they did not observe any behavior that established a well-founded suspicion that either Ryan or Johnson had committed, was committing, or was about to commit a crime. Therefore, this was not a *Terry* stop. *See* § 901.151, Fla. Stat. (1993); *Terry v. Ohio,* 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The officers also testified they had no arrest warrants. Therefore, the police had no basis to justify a seizure of Ryan or Johnson, and at most could engage in a consensual encounter. *Florida v. Royer,* 460 U. S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *Lightbourne v. State,* 438 So. 2d 380, 387 (Fla. 1983), *cert. denied,* 465 U. S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1984).

I agree with the majority that under *Florida v. Bostick,* 501 U. S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991), the police officer was allowed to ask Ryan to speak with them and to present identification, as long as Ryan felt that he could leave at any time and that he was not required to submit to the apparent authority of the officer. I also agree that the initial encounter was consensual, but I do not agree that it remained so. At the time the polic cer directed Ryan to take his hands from his pockets, h seized because he submitted to the authority of the officer.

The test to apply to determine if Ryan was seized is wh reasonable person would have believed he was free to go. *fornia v. Hodari D.*, 499 U. S. 621, 111 S. Ct. 1547, 113 2d 690 (1991); *United States v. Mendenhall*, 446 U. S. 544 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980) (holding person has been 'seized' within the meaning of the Amendment only if, in view of all the circumstances surrou the incident, a reasonable person would have believed that not free to leave.") This court has held that once an officer a person to remove his or her hand from a pocket, the cons encounter becomes a seizure. *Harrison v. State*, 627 So. 2 (Fla. 5th DCA 1993); *accord*, *Gipson v. State*, 667 So. 2 420 (Fla. 5th DCA 1996). In *Harrison*, the appellant was st on the street by the police, who ordered him to remove his from his pocket. This court ruled that the consensual enc evolved into a seizure when the officer issued the order. Wh complied with the order, he was submitting to the show of a ity. *Id.* at 585.

Other district courts have reached the same conclusion *Doney v. State*, 648 So. 2d 799, 801 (Fla. 4th DCA 1994) ing that compliance with officer's request that appellant sp contents of his mouth was acquiescence to authority, rathe consent); *Palmer v. State*, 625 So. 2d 1303 (Fla. 1st DCA (holding that abandonment of a razor blade was product of stop and thus involuntary because seizure occurred when told defendant to take his hands out of his pockets); *John State*, 610 So. 2d 581 (Fla. 1st DCA 1992) (holding that s occurred when officer told defendant to remove hands pockets and to turn around so that officer could get good l him), *rev. denied*, 623 So. 2d 495 (Fla. 1993); *Dees v. Stat* So. 2d 1166 (Fla. 1st DCA 1990) (holding that seizure occ when officer directed defendant to exit vehicle and remove from pocket); *Evans v. State*, 546 So. 2d 1125 (Fla. 3d 1989) (holding that cocaine was not voluntarily abandoned defendant, who was sitting on park bench at 4:00 a.m., dr cocaine after complying with constitutionally unjustified order to remove hands from pocket for officer's safety). *C Sander v. State*, 595 So. 2d 1099 (Fla. 2d DCA 1992) (n proper for officer to ask defendant to remove hands fro pockets). It is clear that an order to remove a hand from a p is a seizure. The question, then, is whether a request is a se I think it is.

The Florida Supreme Court in *Popple v. State*, 626 S 185, 188 (Fla. 1993), wrote that "[w]hether characterize request or an order" the act of directing a person to exit his cle "constituted a show of authority which restrained [lant's] freedom of movement because a reasonable person the circumstances would believe that he should comply. though the instant case does not involve the officer orde driver or passenger from the car, the reasoning still ap Whether the officer's directive is characterized as a request order, the result is the same; Ryan submitted to the autho the officer. Ryan was given a Hobson's choice: obey the and remove his hands, or disobey the officer and possibly dire consequences. Since the officer testified that his reque predicated upon his concern for his safety, Ryan was left w alternative. We can only speculate what might have occu Ryan had not complied. Ryan's response to the officer, ' I'll empty the contents of my pockets," makes it obvious not feel that he could refuse. Perhaps he misunderstood th cer or was nervous. Regardless, he complied because officer's communication. I am mindful that officers need careful of citizens who may be armed, but an officer's c for his safety is not a basis to violate a citizen's Fourth A ment rights. Based upon the prior rulings of this court and F response, I would affirm the order suppressing the evi

because it was obtained as a result of a seizure made in violation of Ryan's Fourth Amendment rights.

* * *

Insurance—Personal injury protection—Insurer who failed to pay claim within thirty days was exposed to statutory penalties attendant to an "overdue" claim where insurer did not have reasonable proof to establish that it was not responsible for payment—Reasonable proof to "question" relationship of insured's knee surgery to automobile accident does not meet statutory test—Insurer's failure to pay claim within thirty days did not relieve insured from obligation to submit to independent medical examination—Insured's failure to appear at scheduled IME did not necessarily relieve insurer of any further duty to pay—Insurance contract on which insurer relied for its argument that insured breached contractual duty was not in record—Factual issue exists as to whether IME should have been scheduled to occur in city in which insured resided rather than in neighboring municipality—Error to enter summary judgment in favor of insurer

KEITH EDWARD JONES, Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee. 5th District. Case No. 96-480. Opinion filed June 6, 1997. Appeal from the Circuit Court for Volusia County, Patrick G. Kennedy, Judge. Counsel: Rick Kolodinsky and Jason O. Brown, of Kolodinsky, Berg, Seitz & Tresher, New Smyrna Beach, for Appellant. Lester A. Lewis, Daytona Beach, for Appellee.

(GRIFFIN, J.) This is an appeal of a summary final judgment entered in favor of State Farm Mutual Automobile Insurance Company ["State Farm"] on a claim for PIP coverage and underinsured motorist benefits.

On April 1, 1995, Keith Edward Jones ["Jones"] was injured in an automobile accident in New Smyrna Beach, Florida. Jones submitted an initial application for PIP benefits to his insurer on April 6, 1995. He received PIP and medical payments coverage benefits through June 29, 1995, in the amount of $3,412.75. He was ultimately scheduled for knee surgery on September 28, 1995, for injuries that his orthopaedic surgeon related to the accident. Bills for this surgery were received by State Farm on October 13, 1995. Rather than pay the bill within the thirty-day period provided for in section 627.737, Florida Statutes (1993), because of her concern that the surgery might not be related to the accident, State Farm's adjuster scheduled Jones for a physical examination on November 30, 1995, in Daytona Beach, Florida. Jones responded by filing a four-count complaint against the tortfeasor and State Farm on November 20, 1995. The complaint sought PIP benefits and alleged that State Farm had violated section 627.737 because of the failure to make payment on the claim within the thirty-day period provided for in the statute. Jones also sought underinsured motorists benefits.

Jones did not attend the physical examination scheduled for November 30, 1995. State Farm thereupon filed several motions seeking summary judgment, asserting that State Farm had been relieved of its obligations to Jones because of his failure to attend the November examination.

Jones opposed the motion by filing a copy of a report from Jones' physician which had been received by State Farm on June 5, 1995. The report stated in relevant part that:

> IMPRESSION: I am quiet [sic] certain, with [sic] a reasonable degree of medical probability that this patient tore his left knee anterior cruciate ligament in his accident of 4/1/95.

Jones also filed a copy of the adjuster's deposition, in which she stated that she had made the decision to require further examination of Jones based on what she thought were indications that his condition was degenerative in nature and not related to the accident. The court entered final summary judgment in favor of State Farm on all of Jones' claims.

Although we cannot credit Jones' contention that State Farm's failure to pay Jones' surgical bills within thirty days relieved him of any further obligation under the policy and requires that judgment be entered in his favor, we do agree with Jones that the summary judgment in favor of State Farm must be reversed. First of all, it is apparent that State Farm did not have reasonable proof that it was not responsible for payment of Jones' surgical bills. Despite State Farm's heroic effort on appeal to catalogue any fact or circumstance that might engender a suspicion that the knee surgery was not causally related to the accident, the best that even State Farm can say is that "State Farm had 'reasonable proof' to *question* the relationship of Jones' left knee surgery . . . ." This does not meet the statutory test of "reasonable proof to establish that the insurer is not responsible for the payment . . . ." Thus, State Farm is exposed to the statutory penalties attendant to an "overdue" claim. State Farm does not, however, lose its right to contest the claim. For this reason, State Farm's failure to pay the claim in thirty days does not relieve Jones from the obligation to submit to an independent medical examination.

By the same token, we also cannot agree with State Farm that Jones' failure to appear at the earlier IME scheduled relieved it of any further duty to pay. The burden of establishing an absence of any issue of fact or law that would support a summary judgment was on State Farm. To begin with, the insurance contract on which State Farm relies for its argument that Jones breached a contractual duty is not in the record. Even if we could assume the terms of the State Farm policy, Jones' refusal to appear for the November 30 IME was not so "unreasonable" as to void coverage. First, Jones argues that he was entitled to refuse to appear for the physical examination requested by State Farm because the examination was scheduled to occur in Daytona Beach, even though the statute provides that "[s]uch examination shall be conducted within the municipality of residence of the insured or in the municipality where the insured is seeking treatment." § 627.736(7)(a), Fla. Stat. (1993). Jones is a resident of New Smyrna Beach and asserts that there are orthopaedic physicians in New Smyrna Beach who could have performed the examination. State Farm complains this issue was not raised below until the day of the hearing on the motion for summary judgment, and further contends that it was entitled to schedule the examination in Daytona Beach because the statute also provides:

> If the examination is to be conducted within the municipality of residence of the insured and there is no qualified physician to conduct the examination within such municipality, then such examination shall be conducted in an area of the closest proximity to the insured's residence.

Id. Obviously, the question whether the examination had to be held in New Smyrna Beach, or whether State Farm could require Jones to travel to Daytona Beach, involves issues of fact which were not addressed in the parties' motions or by affidavit. *Frielingsdorf v. Allstate Ins. Co.*, 497 So. 2d 289 (Fla. 3d DCA 1986), *review denied*, 506 So. 2d 1040 (Fla. 1987). The burden of showing an absence of a material issue of fact is on the movant. Thus, this was not an appropriate basis on which to enter the summary judgment for State Farm.[1]

The summary final judgment is reversed and the cause remanded for further proceedings.

REVERSED and REMANDED. (PETERSON, C.J., and HARRIS, J., concur.)

---

[1]Jones further questions the value of such a post-operative examination on the issue of whether Jones' knee injury was related to the accident. Even if Jones' refusal to submit to an examination were considered unreasonable, State Farm is not relieved from all liability for PIP payments; rather, the statute provides that "[i]f a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for *subsequent* personal injury protection benefits." § 736.736(70)(b), Fla. Stat. (1993) (emphasis added). Under this statute, State Farm would appear to remain liable for PIP benefits incurred before the request for an examination was made. *See Tindall v. Allstate Ins. Co.*, 472 So. 2d 1291, 1293 (Fla. 2d DCA 1985), *review denied*, 484 So. 2d 10 (Fla. 1986).

* * *

BIELAWSKI v. UNEMPLOYMENT APPEALS COMMISSION. 5th District. #96-2974. June 6, 1997. Administrative Appeal from the Unemployment Ap-

grandmother, and when the grandmother was being questioned by the father's attorney concerning whether she would force the children to see relatives that they did not want to see, the following took place:

> THE COURT: I am not predisposed to do anything. If there is some reason that I think that is sufficient why they shouldn't see a certain person, then I have no reservations in so ordering it.
>
> [FATHER'S ATTORNEY]: Okay. Your Honor, at this point, I would just—I want to make his legal position clear. His legal position is that he doesn't have to have a reason to say that his children don't have contact with anyone. He is the parent. You are a parent. You have a right, Judge, to tell anybody my child—I don't want him to have contact with so and so. And no one, including the State of Florida, has the right to tell you, Your Honor, as a parent, that you have to have a reason to not want your children to be with someone.
>
> [GRANDMOTHER'S ATTORNEY]: Your Honor—
>
> THE COURT: Yeah, you do, because grandparents are entitled to visitation rights.

The court thus made its position clear that the father must justify the denial of visitation with the grandmother. This was incorrect. This statute does not provide that a grandparent is entitled to visitation based solely upon his or her status as a grandparent. Although the courts of this state have opined that Florida's legislature has adopted a policy that visitation between grandparents and grandchildren is potentially beneficial, *see, e.g.*, *Griss v. Griss*, 526 So. 2d 697, 699-701 (Fla. 3d DCA) (Pearson, J., concurring), *review dismissed*, 531 So. 2d 1353 (Fla. 1988); *Dixon v. Melton*, 565 So. 2d 1378, 1381 (Fla. 1st DCA 1990), the legislative policy is given effect through the adoption of the statute itself, with the result that grandparents[4] uniquely, not aunts, uncles, siblings, friends, next friends, or "psychological parents," qualify for visitation rights with a child not their own. As have other states that have construed similar statutes, we hold that there is no presumption that grandparents are entitled to visitation. *See Weybright*, 635 N.E. 2d at 121 ("The overriding concern of the court in any custody or visitation decision is the best interest of the child. A grandparent whose child has died and who seeks visitation under this section must show that it is in the best interest of the grandchild that the visitation request be granted. We reject petitioner's argument that there is somehow a presumption that visitation is proper and the custodial parent must show visitation should be restricted."); *Santaniello*, 850 P.2d at 271 ("In presuming the grandparents were entitled to visitation, the district court placed the burden of proof upon the mother to show that visitation was not in the children's best interests. The burden of proof is on the grandparents to show that it is in the children's best interests."); *Ridenour v. Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App.) ("[T]here is no presumed beneficial relationship between grandparents and children; rather, visitation is appropriate only after grandparents have met one of the threshold factors . . . and presented evidence to show, among other factors, that visitation is in the child's best interests."), *cert. denied*, 898 P.2d 120 (N.M. 1995).[5] After reviewing this record, we can find no substantial competent evidence that the ordered visitation is in these children's best interests. In light of this conclusion, it is unnecessary for us to reach the father's constitutional challenges to the statute.[6]

REVERSED and REMANDED. (DAUKSCH and COBB, JJ., concur.)

---

[1]§ 752.01(1), Florida Statutes (1993).

[2]The Florida Supreme Court has recently decided *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), and has declared unconstitutional § 752.01(1)(c), which concerns grandparent visitation in the context of an intact parental marriage. The First District Court of Appeal had upheld the constitutionality of the statute relying substantially on its earlier decision in *Sketo v. Brown*, 559 So. 2d 381 (Fla. 1st DCA 1990), which found that a grandparent visitation order did not violate a widowed mother's constitutional right to privacy. As does this case, *Sketo* involved § 752.01(1)(a) and the situation where one of the child's parents is deceased. From the standpoint of a parent's fundamental right to raise his or her children, *Beagle*, at S341, the distinction between an intact marriage where one parent objects to visitation and a case where one parent has died and the surviving parent objects to visitation is hard to discern. The First District Court argued in *Beagle* that they should be treated the same. Judge Webster, who concurred in *Beagle*, evidently saw no distinction either, concluding that th *Beagle* panel was bound by the court's earlier decision in *Sketo*. Judge Webst argued, however, that *Sketo* itself had been incorrectly decided and that 752.01 unconstitutionally intrudes upon a parent's fundamental right to raise h or her child without governmental interference.

[3]It is not clear whether her husband was the children's natural grandfather.

[4]"Grandparent" is defined under the statute to include a great-grandparen § 752.001, Fla. Stat. (1993).

[5]*Cf. Steward v. Steward*, 890 P.2d 777, 782 (Nev. 1995) (construin grandparent visitation statute nearly identical to Florida's to embody a presump tion *against* grandparent visitation when divorced parents with full legal righ to the children agree that it is not in the child's best interest to see its grandpar ents).

[6]Even though by 1993, every state in the nation had adopted a statute pro viding for grandparent visitation over the objection of a parent or parents, Cyn thia L. Greene, *Grandparents' Visitation Rights: Is the Tide Turning?*, 12 J Am. Acad. Matrim. L. 51, 52 & n.3 (1994), constitutional challenges to thes statutes have apparently just begun. In the context of the federal right to privac and its protection of the fundamental right to raise a child without governmenta interference, most courts that have addressed the issue have analyzed the visita tion statutes with what appears to be only a rational basis scrutiny and hav concluded that the statutes pass the constitutional challenge. *Bailey v. Menzi* 542 N.E. 2d 1015 (Ind. Ct. App. 1989); *Spradling v. Harris*, 778 P.2d 36 (Kan. Ct. App. 1989); *King v. King*, 828 S.W. 2d 630 (Ky.), *cert. denied*, 50 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992); *R.T. v. J.E.*, 650 A.2d 1 (N.J. Super. Ct. Ch. Div. 1994); *People ex rel. Sibley v. Sheppard*, 429 N.E 2d 1049 (N.Y. 1981); *Dolman v. Dolman*, 586 S.W. 2d 606, 609 (Tex. Ct App. 1979); *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995). On court applied an intermediate form of scrutiny in the fashion of the pluralit opinion of Justices O'Connor, Kennedy and Souter in *Planned Parenthood v Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), and, uphold ing the law, held that a statute does not impermissibly interfere with parents constitutional rights unless the state substantially infringes upon the family relationship. *Herndon v. Tuhey*, 857 S.W. 2d 203 (Mo. 1993). Other court have applied a strict scrutiny test and found visitation statutes to be narrowly drawn to effect the states' compelling interests in promoting grandparent-grand child relationships. *Sketo v. Brown*, 559 So. 2d 381 (Fla. 1st DCA 1990); *Ride nour*; *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995). Also applying a strict scrutiny analysis, however, the Supreme Court of Georgia recently held Geor gia's grandparent visitation statute to be unlawful under both the United State and the Georgia constitutions, finding insufficient evidence to sustain the notion that grandparental visitation always supported a child's health or welfare, an that, even assuming such benefits, the state cannot force visitation over the parents' objections without a showing that failing to do so would be harmful to the child. *Brooks v. Parkerson*, 454 S.E. 2d 769 (Ga.), *cert. denied*, 116 S. Ct 377, 133 L. Ed. 2d 301 (1995). Similarly, after applying largely federal princi ples to the state constitution, the Tennessee Supreme Court, in *Hawk v. Hawk* 855 S.W. 2d 573 (Tenn. 1993), held that Tennessee's grandparent visitation statute violated parents' constitutionally guaranteed right to raise their children without unwarranted state intervention because the state lacked a compelling interest in grandparent-grandchild visitation absent a showing that a substantia harm would otherwise threaten a child's health or welfare. More recently, the Tennessee court extended its analysis to terminate grandparent visitation after a child's mother and new adoptive father objected. *Simmons v. Simmons*, 90 S.W. 2d 682 (Tenn. 1995).

* * *

Criminal law—Search and seizure—Evidence seized from defendant's vehicle and person following arrest of defendant's passenger, who had responded to officer's request that he remove his hands from his pockets by emptying contents of his pockets and thereby revealing bag of cannabis—Order granting motion to suppress is affirmed—Arrest of defendant's passenger, which led to search of vehicle and of defendant, was unlawful—Consensual encounter between officer and passenger outside the vehicle was transformed into an illegal stop when officer asked passenger to remove his hands from his pockets without justification

STATE OF FLORIDA, Appellant, v. JEREMIAH JOHNSON, Appellee. 5t District. Case No. 95-1943. Opinion filed December 6, 1996. Appeal from th Circuit Court for Orange County, Theotis Bronson, Judge. Counsel: Robert A Butterworth, Attorney General, Tallahassee, and Barbara Arlene Fink, Assis tant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Publi Defender, and S.C. Van Voorhees, Assistant Public Defender, Daytona Beach for Appellee.

ON APPELLEE'S MOTION FOR REHEARING
[Original Opinion at 21 Fla. L. Weekly D1909b]

(THOMPSON, J.) We grant the Appellee's motion for rehear ing, withdraw the opinion filed 23 August 1996, and substitut therefor the following opinion:

The State of Florida appeals the trial court's order grantin Jeremiah Johnson's motion to suppress. Johnson alleged in hi

motion that the evidence was seized during an illegal search of his vehicle. He argued to the trial court that the arrest of his passenger, William Ryan, did not provide probable cause to search his vehicle since the state did not show that the search was consistent with exceptions to the "warrant rule" of the Fourth Amendment. The state argued that *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), allowed the police to search the passenger compartment of a vehicle incident to the arrest of a recent occupant. The trial court granted the motion on the ground that, although Ryan was lawfully arrested, *Belton* did not justify the search of Johnson's vehicle. We affirm because we find that the arrest of Ryan was unlawful.

Two uniformed and armed bicycle patrol officers approached Johnson's car at 3:30 a.m. The car, a Honda Civic, was legally parked in a parking garage in downtown Orlando. The officers testified that as they approached the vehicle they did not see any unusual movement or furtive gestures; they did not smell any burning marijuana, or see any drugs or contraband. Johnson and Ryan got out of the car along with Ryan's girlfriend. The officers testified that they did not observe any behavior that established a well-founded suspicion that either Ryan or Johnson had committed, was committing, or was about to commit a crime. *See* § 901.151, Fla. Stat. (1993); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

One of the officers walked up to Ryan and asked if he would be willing to talk to the officer. Ryan said he would, but upon doing so, placed his hands in his pockets. The officer asked Ryan if he would mind removing his hands from his pockets, Ryan answered: "Sure, I'll empty the contents of my pocket." He did so and revealed a bag of cannabis. After determining that the substance was indeed cannabis, the officers placed Ryan under arrest and proceeded to search Johnson's vehicle. In the glove compartment, the officers found LSD and what they thought to be another illegal drug, Rufenol. The officers determined that Johnson was the owner of the vehicle and placed him under arrest. During the search of Johnson's person, the officers found additional LSD.

Because the officer had neither a warrant nor grounds to detain Ryan, he could only conduct a consensual encounter. Under *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991), the police officer was allowed to ask Ryan to speak with him and to present identification, as long as Ryan felt that he could leave at any time and that he was not required to submit to the apparent authority of the officer. *State v. Mitchell*, 638 So. 2d 1015 (Fla. 2d DCA 1994). Here, the initial encounter was consensual, but it did not remain so. This court has held that once an officer orders a person to remove his or her hand from a pocket, the consensual encounter becomes a seizure. *Harrison v. State*, 627 So. 2d 583 (Fla. 5th DCA 1993); *accord Gipson v. State*, 667 So. 2d 418, 420 (Fla. 5th DCA 1996). In *Harrison*, the appellant was stopped on the street by the police, who ordered him to remove his hands from his pocket. This court ruled that the consensual encounter evolved into a seizure when the officer ordered him to remove his hand from his pocket. When he complied with the order, he submitted to the officer's show of authority. 627 So. 2d at 585.

Other district courts have reached the same conclusion. *See Palmer v. State*, 625 So. 2d 1303 (Fla. 1st DCA 1993) (holding that abandonment of a razor blade was product of illegal stop and was involuntary because seizure occurred when officer told defendant to take his hands out of his pockets); *Johnson v. State*, 610 So. 2d 581 (Fla. 1st DCA 1992) (holding that seizure occurred when officer told defendant to remove his hands from his pockets and to turn around so that officer could get a good look at him), *rev. denied*, 623 So. 2d 495 (Fla. 1993); *Dees v. State*, 564 So. 2d 1166 (Fla. 1st DCA 1990) (holding that seizure occurred when officer directed defendant to exit vehicle and remove hand from pocket). The question, then, is whether a "request" is also a seizure. We think it is.

The Florida Supreme Court in *Popple v. State*, 626 So. 2d 185, 188 (Fla. 1993), wrote that "[w]hether characterized as a request or an order" the act of directing a person to exit his vehicle" constituted a show of authority which restrained [appellant's] freedom of movement because *a reasonable person under the circumstances would believe that he should comply*." (Emphasis added). In *Evans v. State*, 546 So. 2d 1125 (Fla. 3d DCA 1989), the appellate court was faced with facts similar to this case. An officer confronted Evans who was sitting on park bench at 4:00 a.m. *Id.* The officer "asked" Evans to take his hands out of his pocket for the officer's safety. When Evans complied, a packet of cocaine dropped to the ground. The court reversed the trial court's order which denied a motion to suppress evidence. The court wrote:

> "Given the realities of the situation and notwithstanding the policeman's contrary statement, it is clear that a reasonable person [in the defendant's situation] would have believed *he was not free to [disobey the officer]*." (Emphasis added).

Id.

This case turns upon whether compliance with a "request" to remove Ryan's hands from his pockets "to assure the officers' safety" constituted a seizure. We think it was reasonable under the circumstances for Ryan to believe he had to comply. Whether the officer's statement was characterized as a "request" or an "order" is not determinative. Because Ryan's freedom and movement were restricted without justification, the consensual encounter evolved into an illegal stop. Therefore, all the drugs and drug paraphernalia retrieved at the scene should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *Woodson v. State*, 579 So. 2d 381 (Fla. 5th DCA 1991). The trial court was right, but for the wrong reason. *Carraway v. Armour & Co.*, 156 So. 2d 494, 497 (Fla. 1963).

AFFIRMED. (GOSHORN, J., concurs. HARRIS, J., dissents, with opinion.)

(HARRIS, J., dissenting.) I respectfully dissent.

The court suppressed the evidence in this case not because the officer commanded the codefendant to remove his hands from his pockets thus revealing the cannabis but rather because the court believed that it was improper, under the circumstances of this case, for the officers to search the passenger compartment of the automobile since the occupants were outside the vehicle at the time of the arrest. We all agree that this was an incorrect ruling. In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed 2d 768 (1981), the United States Supreme Court addressed, "the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants" and held, "that when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460, 101 S. Ct. at 2683-2684. We do not believe that "the occupants" can avoid the consequence of *Belton* by merely stepping outside the automobile as the officers approach.

Even so, the majority holds that under the "tipsy coachman rule," the trial court should be upheld because its ruling was right for another reason. The majority holds that the officer's request that one of the occupants remove his hands from his pockets while they engaged in a conversation agreed to by that occupant was so coercive that it converted what had been a consensual encounter into a seizure justifying the suppression of all the after-discovered drugs. It is on this point that I dissent.

The facts are not disputed. Jeremiah Johnson, appellant herein, was the driver and owner of a vehicle parked in a garage located on the top of the Alba Business Building. As officers on bicycles approached, the occupants exited the vehicle. One of these occupants was Ryan. Officer Berry approached Ryan and asked if he could speak to him. Officer Berry testified, "he stated sure

and at that time he walked toward me and placed his hands in his pocket and I asked him if he would mind while I was talking to him if he would take his hands out of his pocket." When asked why he made this request, Officer Berry responded, "because as I went on to explain I did not know him and for safety reasons I—if I don't know him and I didn't know what he had in his pockets I would feel more comfortable if he takes his hands out of his pockets."

In response to this request, Ryan said, "sure, I'll empty the contents of my pockets." He then proceeded to empty his pockets revealing the cannabis. Ryan was placed under arrest and since the officer had just observed him sitting in the passenger seat of the automobile, he proceeded to search the passenger compartment of the vehicle. In the glove compartment, additional drugs were found. Because Johnson was the owner/driver of the vehicle, he was placed under arrest and a search of his person revealed even more drugs.

The majority takes the position that when the officer asked Ryan if he would mind removing his hands from his pockets, the consensual encounter was converted into a seizure. I disagree. The majority's reliance on *Popple v. State,* 626 So. 2d 185 (Fla. 1993), in my view, is misplaced. In *Popple,* an officer approached a vehicle legally parked in a desolate area and "asked" Popple to exit the vehicle. Requiring Popple to exit his vehicle is far more intrusive than merely asking him to remove his hands from his pockets and may well have hindered or restricted his freedom to leave or freedom to refuse to answer inquiries. In our case, there was nothing to prevent Ryan from terminating the conversation or to prevent the occupants from getting back into the automobile and driving away.

In *Popple,* the court observed, "[d]uring a consensual encounter a citizen may either voluntarily comply with a police officer's requests or chose to ignore them." *Popple,* 626 So. 2d at 186. The court did state:

> Whether characterized as a request or an order, we conclude that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show of authority which restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply.

Id. at 188.

But there is a distinction between "would you get out of your car?" which implies a command and "would you mind removing your hands from your pocket while we talk?" In the latter case, Ryan could merely have said that he no longer wished to talk to the officer and walked away.

This case is controlled by *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L. Ed. 2d 389 (1991). In *Bostick,* the United States Supreme Court held that a police officer, even though he has no basis for suspecting an individual, may not only request such individual talk to him but may also request such person to submit to a search so long as the officer does not convey a message that compliance with the request is required. There is nothing in this record, and the trial court made no such finding, that the request that Ryan remove his hands from his pockets while he and the officer talked conveyed a message that compliance was mandated.

Under *Bostick,* it would have been appropriate for the officer to even request Ryan submit to a search. Officer Berry did not request a search. His request was much less intrusive: "would you mind removing your hands from your pockets while we talk." I do not believe that this simple request, most reasonable under the circumstances, justifies suppressing the drugs found as a result of Ryan's voluntary compliance with the request. In *Bostick v. State,* 593 So. 2d 494 (Fla. 1992), the Florida Supreme Court, on remand, upheld a request far more intrusive on its face than the request made herein.

* * *

Torts—Dismissal—Plaintiff allegedly injured by attending facility that was advertised as upscale weight-loss clinic but was in reality a psychiatric facility—Error to dismiss action against psychiatric facility, physician and facility's marketing agent on ground of plaintiff's failure to comply with medical malpractice presuit requirements—Acts alleged in complaint for breach of contract, fraud, false imprisonment, intentional infliction of emotional distress, defamation, conspiracy to defraud, and loss of consortium did not arise out of the rendering of or failure to render medical care services

KAREN ROBBINS and ELDON MAX ROBBINS, Appellants, v. ORLANDO, H.M.A., INC., etc., et al., Appellees. 5th District. Case No. 95-154. Opinion filed December 6, 1996. Appeal from the Circuit Court for Orange County, Lawrence R. Kirkwood, Judge. Counsel: Francis R. Lakel, Tampa, for Appellants. Alan J. Landerman of Parker, Goodwin, McGuire, Burke, Landerman & Dabold, P.A., Orlando, for Appellee, Orlando H.M.A., Inc., d/b/a University Behavioral Center. Lawrence E. Brownstein of Law Offices of Lawrence E. Brownstein, and F. Laurens Brock and Craig A. Brand of Rumberger Kirk & Caldwell, Miami, for Appellee, Riaz Mazcuri, M.D.

(THOMPSON, J.) Karen Robbins ("Robbins") and her husband, Eldon Robbins, appeal the trial court's dismissal with prejudice of their seven count complaint against Orlando H.M.A., Inc. d/b/a University Behavioral Center ("UBC"), Riaz Mazcuri, M.D., and Steve Hamparian, for failure to comply with the presuit screening requirements of Chapter 766, Florida Statutes (1993). Robbins contends that the alleged acts of the defendants did not arise out of a medical malpractice claim but from independent intentional torts, and that she was therefore not required to comply with Chapter 766. We reverse because the complaint alleges intentional torts rather than medical malpractice.

Whether a plaintiff must give the requisite presuit notice outlined in Chapter 766 is fact-dependent. *Foshee v. Health Management Associates, Inc.*, 675 So. 2d 957 (Fla. 5th DCA 1996). The allegations of the complaint, which must be taken as true, determine the facts. *Id.* "It is up to the court to decide from the allegations in the complaint whether the claim arises 'out of the rendering of, or the failure to render, medical care or services.'" *Id.* (quoting § 766.106, Fla. Stat. (1989)).

Robbins filed a seven count complaint against the appellees, alleging breach of contract, fraud, false imprisonment, intentional infliction of emotional distress, defamation, conspiracy to defraud, and loss of consortium. The complaint alleges that Robbins, a resident of Michigan, was overweight when she saw a television commercial for an upscale weight loss clinic called New Image. The advertisement never mentioned that New Image was a psychiatric facility. UBC and Dr. Mazcuri developed, broadcasted, and authorized the use of the New Image advertisement. Robbins telephoned for information about the program and Hamparian, a marketing agent for UBC, returned her call. When she told him her medical insurance would not pay for a weight loss program or cosmetic surgery, he obtained all of her medical insurance information and secured payment for her stay at the clinic. Robbins later learned that in order to obtain the payments from the insurance company, Dr. Mazcuri and UBC misinformed the insurance company that Robbins suffered from "major depression, severe eating disorder, bulimia and dependent personality traits." Robbins was never asked to submit to a physical examination or to release her medical records to Dr. Mazcuri or UBC before they informed the insurance company of their diagnosis.

UBC provided Robbins with a round-trip ticket to Orlando, where a limousine provided by UBC picked her up. When she arrived at the facility, she did not see any signs for New Image but she did see a sign for "University Behavioral Center." The facility was a concrete block and brick building with a barbed wire fence. She entered the facility and was asked to sign papers, which she did, thinking they were insurance forms. Before clinic personnel examined her or took her medical history, she was given three shots and pills which caused nausea and vomiting. She was taken to dinner and then to the "unit" for the evening. When she stated that she was in the wrong place and that she wanted to leave, she was told by a nurse that everything would be

Parole Comm'n, 643 So. 2d 668, 671 (Fla. 1st DCA 1994).

HERNANDEZ v. STATE. 3rd District. #96-816. August 21, 1996. Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade County. Affirmed. *Zaetler v. State*, 627 So. 2d 1328 (Fla. 3d DCA 1993), *rev. denied*, 639 So.2d 984 (Fla. 1994).

* * *

Criminal law—Search and seizure—Vehicle—Officers who saw defendant and passenger exit from vehicle as they approached were authorized to search passenger compartment of vehicle upon arrest of defendant for possession of cannabis which he pulled out of his pocket in response to officer's request that he remove his hands from his pocket—Error to grant motion to suppress drugs found in vehicle on ground that defendant was standing outside vehicle at time of his arrest—Officer was permitted to walk up to defendant and ask if he would be willing to talk—Request that defendant remove hands from his pocket was reasonable in order to assure officer's safety—Nothing in record indicates that defendant was under the impression that he was required to consent to the removal of his hands from his pocket

STATE OF FLORIDA, Appellant, v. JEREMIAH JOHNSON, Appellee. 5th District. Case No. 95-1943. Opinion filed August 23, 1996. Appeal from the Circuit Court for Orange County, Theotis Bronson, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Barbara Arlene Fink, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and S.C. Van Voorhees, Assistant Public Defender, Daytona Beach, for Appellee.

(HARRIS, J.) Two police officers approached a parked vehicle in which appellant, Jeremiah Johnson, was sitting on the driver's side and William Ryan was sitting on the passenger's side. The occupants exited the vehicle upon the approach of the officers. One of the officers walked up to Ryan and asked if he would be willing to talk to him. Ryan responded in the affirmative but upon doing so, placed his hands in his pockets. The officer asked Ryan if he would mind removing his hands from his pockets. Ryan answered: "Sure, I'll empty the contents of my pockets." He did so and revealed a bag of cannabis. After determining that the substance was indeed cannabis, the officers placed Ryan under arrest and proceeded to search the vehicle. In the glove compartment, the officers found LSD and what they thought to be another illegal drug, Rohypnol. The officers determined that Johnson was the owner of the vehicle and placed him under arrest. During the search of Johnson's person, the officers found additional LSD. Johnson moved to suppress the drugs, and the trial court granted the motion, on the basis that Ryan was standing outside the vehicle at the time of his arrest and, therefore, a search of the vehicle was unjustified.

Although the passengers had exited the vehicle upon the officers' approach, the logic of *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and *State v. Smith*, 662 So. 2d 725 (Fla. 2d DCA 1995), authorize the search of the passenger compartment of a vehicle upon the arrest of an occupant of that vehicle when the officers see the occupants exit the vehicle as they approach.

It might be argued that when Ryan removed his hands from his pockets revealing the cannabis, he was responding to apparent police authority and thus what had been a consensual stop was converted into an illegal seizure. See generally *Gipson v. State*, 667 So. 2d 418 (Fla. 5th DCA 1996), and *Harrison v. State*, 627 So 2d 583 (Fla. 5th DCA 1993). We hold, however, that there can be a constitutional consent to the removal of hands from the pockets as well as a constitutional consent to answer questions or to submit to a search.

This merely requires an analysis under *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). In *Bostick*, the court held that a police officer, even though he has no basis for suspecting an individual, may nevertheless request that such person talk to him and may even request that such person submit to a search so long as the officer does not convey a message that compliance with the request is required. Here, unlike *Gipson* and *Harrison* in which the defendants were *told* to remove their hands from their pockets, the officer merely requested that Ryan remove his hands from his pockets. This request was certainly reasonable in order to assure the officers' safety since there was no authority to search for weapons during this admittedly consensual stop.

There is nothing in the record to indicate, nor did the trial court find, that Ryan was under the impression that he was required to consent to the removal of his hands from his pockets. Consistency requires that we recognize a distinction between a request and a command even when the removal of the hands from the pockets is the subject of inquiry.

REVERSED AND REMANDED for further action consistent with this opinion. (GOSHORN, J., concurs. THOMPSON, J., dissents, with opinion.)

(THOMPSON, J., dissenting.) I respectfully dissent. This case turns upon whether compliance with a "request" instead of an "order" to remove Ryan's hands from his pockets "to assure the officers' safety" constituted a seizure. Whether the officer's statement is characterized as a "request" instead of as an "order" is not determinative. The fact that Ryan's freedom and movement were restricted caused the consensual encounter to evolve into an illegal stop. Therefore, all the drugs and drug paraphernalia retrieved at the scene should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *Woodson v. State*, 579 So. 2d 381 (Fla. 5th DCA 1991).

When the two uniformed and armed officers approached Johnson's car at 3:30 a.m., they were on bicycle patrol. Johnson's car, a Honda Civic, was legally parked in a parking garage in downtown Orlando. The officers testified that as they approached the vehicle they did not see any unusual movement or furtive gestures; they did not smell any burning marijuana, or see any drugs or illegal contraband in clear view. Johnson and Ryan did get out of the car along with Ryan's girlfriend. The officers testified that they did not observe any behavior that established a well-founded suspicion that either Ryan or Johnson had committed, was committing, or was about to commit a crime. *See* § 901.151, Fla. Stat. (1993); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968). The officers also testified they had no arrest warrants. Therefore, the police had no basis to justify a seizure of Ryan or Johnson. The only thing the officers could do was to conduct a consensual encounter.

I agree that under *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991), the police officer was allowed to ask Ryan to speak with him and to present identification, as long as Ryan felt that he could leave at any time and that he was not required to submit to the apparent authority of the officer. *State v. Mitchell*, 638 So. 2d 1015 (Fla. 2d DCA 1994). Here, the initial encounter was consensual, but it did not remain so. This court has held that once an officer orders a person to remove his or her hand from a pocket, the consensual encounter becomes a seizure. *Harrison v. State*, 627 So. 2d 583 (Fla. 5th DCA 1993); *accord Gipson v. State*, 667 So. 2d 418, 420 (Fla. 5th DCA 1996). In *Harrison*, the appellant was stopped on the street by the police, who ordered him to remove his hands from his pocket. This court ruled that the consensual encounter evolved into a seizure when the officer ordered him to remove his hand from his pocket. When he complied with the order, he was submitting to the show of authority. *Id.* at 585. Other district courts have reached the same conclusion. *See Palmer v. State*, 625 So. 2d 1303 (Fla. 1st DCA 1993) (holding that abandonment of a razor blade was product of illegal stop and thus involuntary because seizure occurred when officer told defendant to take his hands out of his pockets); *Johnson v. State*, 610 So. 2d 581 (Fla. 1st DCA 1992) (holding that seizure occurred when officer told defendant to remove his hands from his pockets and to turn around so that officer could get a good look at him), *rev. denied*, 623 So. 2d 495 (Fla. 1993); *Dees v. State*, 564 So. 2d 1166 (Fla. 1st DCA 1990)

(holding that seizure occurred when officer directed defendant to exit vehicle and remove her hand from pocket); *Evans v. State*, 546 So. 2d 1125 (Fla. 3d DCA 1989) (holding that cocaine was not voluntarily abandoned where defendant, who was sitting on park bench at 4:00 a.m., dropped cocaine after complying with constitutionally unjustified police order to remove hands from pocket for officer's safety). It is clear that an order to remove a hand from a pocket is a seizure. The question, then, is whether a request is a seizure. I think it is.

The Florida Supreme Court in *Popple v. State*, 626 So. 2d 185, 188 (Fla. 1993), wrote that "[w]hether characterized as a request or an order" the act of directing a person to exit his vehicle "constituted a show of authority which restrained [appellant's] freedom of movement because a reasonable person under the circumstances would believe that he should comply." Whether characterized as a request or an order, the result is the same; Ryan submitted to the authority of the officer. I would affirm the order suppressing the evidence.

* * *

Civil procedure—Corporations—Default judgment against Japanese corporation quashed based on finding that service of process through an American corporation which acted as Japanese corporation's distributor was ineffective—Two corporations were not shown by affidavit or evidence to be other than separate and independent corporations—Neither American corporation nor employee served by plaintiffs had general authority to act for Japanese corporation—Unrefuted affidavit further established that Japanese corporation had no office or agent in United States and did not do business in state in which employee of American corporation was served

TAITO CORPORATION, Appellant, v. JOHN FERRIS and LYNN FERRIS, etc., et al., Appellees. 5th District. Case No. 96-197. Opinion filed August 23, 1996. Non-Final Appeal from the Circuit Court for Orange County, Jeffords D. Miller, Judge. Counsel: Anthony Deglomine, III and Nichole M. Mooney of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., Orlando, for Appellant. Robin M. Orosz of Maher, Gibson and Guiley, P.A., Orlando, for Appellees.

(SHARP, W., J.) Taito Corporation appeals from an order of the trial court which denied its motions to quash service of process and set aside a default judgment entered against it. This court has jurisdiction.[1] Because we find that the record completely fails to establish personal service of process over Taito.[2] We reverse.

After a default was entered against Taito, but before entry of the judgment, Taito moved to dismiss the default and a hearing was held. Originally, the judge granted Taito's motion, but the next day, appellees filed an objection and a second hearing was held. After this hearing, the trial court reversed itself, and Taito brought this appeal. At neither hearing was any testimony adduced, and the evidence in the record on appeal consists solely of affidavits and depositions.

The record on appeal establishes that Taito is a Japanese corporation. It has no office, officers nor agents in this country. Taito America was shown to be an Illinois based corporation which acts as a distributor for Taito. The two were not shown by affidavit or evidence to be other than separate and independent corporations. The record also established without dispute that Taito manufactured printed circuit boards in Japan. Taito America imported some circuit boards from Taito, to Illinois, and installed one of them in a game. Taito America sold the product to Cleveland Coin Company, its distributor. Cleveland then sold the game to the Marriott or to another party who then sold it to the Marriott. The game was eventually installed in an arcade ride in Florida. The plaintiff's minor son, John Ferris, was injured in an accident involving the arcade ride, which was the germination of this lawsuit.

The Ferrises tried to serve Taito through Taito America. They served Bianca Villareal, an employee of Taito America, in Illinois, pursuant to Section 48.194. On April 26, 1995 a default was entered against Taito. Taito was so informed, and on September 6, 1995, Taito America faxed a copy of the summons to Taito in Japan.

Taito filed a motion to set aside the default and to quash service of process on October 2, 1995. Ultimately the trial court denied the motions. It may have relied upon the fact that there was a considerable delay between the time Taito learned of the default and the time it moved to have it set aside. We think that is immaterial in this case.

The record on appeal affords no constitutional or statutory basis for concluding that Taito was properly served in Illinois. Service on an agent or employee for a different corporation in Illinois is insufficient service on Taito. *See Valdosta Milling Co. v. Garretson*, 54 So. 2d 196 (Fla. 1951); *Southeast Mail Transport, Inc. v. Amoco Oil Co.*, 402 So. 2d 522, 524 (Fla. 1st DCA 1981); *Dade Erection Service, Inc. v. Sims Crane Service, Inc.*, 379 So. 2d 423 (Fla. 2d DCA 1980). For purposes of validating service on a corporation, a business agent must have the general authority to act for the corporation. *Id.* Neither Taito America nor its employee meets these requirements. Affidavits offered for Taito established that Taito has no office in the United States, and it does not do business in Illinois. The Ferrises failed to controvert any of these facts by affidavit or depositions. Nor did they establish any basis to conclude that Taito and Taito of America are anything other than separate corporations. Mere status as a parent corporation is ineffective to establish long-arm jurisdiction. *Qualley v. International Air Serv. Co.*, 595 So. 2d 194, 196 (Fla. 3d DCA 1992).

We conclude that service of process in this case was not properly made on Taito, in Illinois. Thus, the default judgment must be vacated and service of process quashed. *See Huguenor v. Huguenor*, 420 So. 2d 344 (Fla. 5th DCA 1982); *Bache, Halsey, Stuart, Shields, Inc. v. Mendoza*, 400 So. 2d 558 (Fla. 3d DCA 1981); *Dade Erection Service*, at 426. We do not reach, nor should the trial court have reached, the issues of excusable neglect, due diligence and meritorious defenses, *vel non*. Taito was not properly served with process. Accordingly the default judgment cannot stand.

REVERSED. (GRIFFIN and THOMPSON, JJ., concur.)

---

[1]This court has jurisdiction under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv) and (a)(5) (set aside default). *See Khubani v. Mikulic*, 620 So. 2d 800, 801 (Fla. 2d DCA 1993); *Monte Campbell Crane Co., Inc. v. Hancock*, 510 So. 2d 1104, 1105 (Fla. 4th DCA 1987). *See also* Fla. R. App. P. 9.130(a)(3)(C)(i) (quash service of process); *Local No. 66 Concrete Products and Material Yard Workers v. Dennis*, 453 So. 2d 1138 (Fla. 4th DCA 1984).

[2]Incidentally, the basis for exercising personal jurisdiction over Taito in Florida is not clear either, but this point was not raised or argued by the parties. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1696-1697, 56 L.Ed. 2d 132 (1978); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945).

* * *

Injunctions—Dissolution of marriage—No abuse of discretion in finding that there was danger of dissipation of marital funds, or in entering injunction to preserve status quo, in view of wife's conduct in revoking trust that had controlled lottery proceeds for preceding six years, emptying parties' joint safe deposit box of all documents relating to lottery winnings and trust documents, denying husband access to documents, and denying that husband had claim to future proceeds

LINDA PIERCE LEONARD, Appellant, v. JOHN MARK LEONARD, Appellee. 5th District. Case No. 96-625. Opinion filed August 23, 1996. Non-Final Appeal from the Circuit Court for Flagler County, Kim C. Hammond, Judge. Counsel: Horace Smith, Jr., of Monaco, Smith, Hood, Perkins, Loucks & Stout, Daytona Beach, for Appellant. James L. Rose of Rice and Rose, P.A., Daytona Beach, for Appellee.

(THOMPSON, J.) We affirm the temporary injunction.

Injunctions in marital dissolution cases are provided for by section 61.11, Florida Statutes (1995), which provides:

When either party is about to remove himself or herself or his or