

IN THE SUPREME COURT OF FLORIDA

JEREMIAH D. JOHNSON,

Petitioner,

v.

Case No. 91,328

STATE OF FLORIDA,

Respondent.

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**FILED**

SID J. WHITE

OCT 16 1997

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

ON NOTICE TO INVOKE DISCRETIONARY REVIEW  
OF A DECISION OF THE  
FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

The cases which supposedly conflict with the Fifth District's opinion in this case are distinguishable and therefore do not provide conflict jurisdiction. Accordingly, this Court should decline to exercise its discretionary review.

ARGUMENT

THIS HONORABLE COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY REVIEW IN THIS CASE BECAUSE THE ALLEGED CONFLICT CASES ARE READILY DISTINGUISHABLE FROM THE OPINION BELOW.

Petitioner Jeremiah D. Johnson urges this Court to exercise its discretionary review over this case, arguing that the majority opinion of the Fifth District Court of Appeal expressly and directly conflicts with Popple v. State, 626 So. 2d 185 (Fla. 1993), and with opinions from other district courts of appeal. Art. V, § 3(b)(3), Fla. Const. Because the alleged conflict cases are readily distinguishable from this case, conflict jurisdiction does not exist and this Court should decline to exercise its discretionary review.

First, Johnson asserts conflict with Popple. The majority opinion of the Fifth District properly distinguished this case from Popple. State v. Johnson, 22 Fla. L. Weekly D1392, D1392-3 (Fla. 5th DCA June 6, 1997). In Popple, the deputy approached Popple, who was seated in a lawfully parked car in a "desolate area." 626 So. 2d at 186. Popple made some furtive movements when he saw the deputy approach, prompting the deputy to direct Popple to exit his vehicle. Id.

In this case, the encounter occurred in an Orlando parking

garage. 22 Fla. L. Weekly D1392. Johnson and passenger Ryan had already exited their vehicle on their own when the police approached. Id. Officer Berry asked if he could speak with Ryan and Ryan replied, "Sure." Id. As he approached Officer Berry, Ryan placed his hands in his pockets. Id. Officer Berry asked Ryan if "he would mind" taking his hands out of his pockets while they spoke. Id. Officer Berry explained to Ryan that the request was made for safety reasons; because he did not know Ryan, he would feel more comfortable if Ryan did not have his hands in his pockets. Id.

The test for whether a consensual encounter was transformed into a seizure is whether a reasonable person would have felt free to decline the officer's request and terminate the encounter. Florida v. Bostick, 501 U.S. 429 (1991); Popple, 626 So. 2d at 188. As the Fifth District found, the request in Popple was more likely to convey a message that Popple had to comply with the officer's request and was not free to leave, because Popple was in a desolate area and was being asked to exit his means of transportation. Id. In this case, there was no such message conveyed and no indication that Johnson and Ryan were not free to get back in their car and drive away. Id. at D1392-1393. Because the two cases are distinguishable, there is

no conflict between the majority opinion of the Fifth District and Popple.

This case is also distinguishable from Popple, in that it raises a prickly standing issue. In Popple, the defendant himself was seized. 626 So. 2d at 186. Here the person allegedly seized was not Petitioner Johnson, but rather passenger Ryan, who is not a party to this litigation. 22 Fla. L. Weekly D1392.

In addition to Popple, Johnson reels off a laundry list of DCA cases allegedly in conflict with the decision below. Like Popple, all of these cases are easily distinguishable because the police conduct was more coercive than the conduct in this case. The defendant in Doney v. State, 648 So. 2d 799 (Fla. 4th DCA 1994), was asked to spit out the contents of his mouth, a far more intrusive request than the one in this case. In Palmer v. State, 625 So. 2d 1303 (Fla. 1st DCA 1993), the police told Palmer to take his hands out of his pockets as the officers attempted to block Palmer's path.

In Johnson v. State, 610 So. 2d 581, 583 (Fla. 1st DCA 1992), the officer ordered Johnson to remove his hands from his pockets and turn around so the officer could see him. In Dees v. State, 564 So. 2d 1166, 1167 (Fla. 1st DCA 1990), the officers

determined to stop Dees and her companion, asked Dees to get out of her car, and repeatedly asked Dees to remove her hands from her pockets. Both Mayhue v. State, 659 So. 2d 417 (Fla. 2d DCA 1995)<sup>1</sup>, and Canion v. State, 550 So. 2d 562 (Fla. 4th DCA 1989), involved orders or demands by the police.

In Evans v. State, 546 So. 2d 1125 (Fla. 3d DCA 1989), the police officer "confronted" Evans and asked him to remove his hands from his pockets. The court characterized this as a "constitutionally unjustified police order[,]" which would have communicated to a reasonable person that he or she was not free to disregard the order. Id. Unlike the officer in Evans, Officer Berry did not confront Ryan, but rather asked if he could speak with Ryan. 22 Fla. L. Weekly D1392. The request in this case appears to have been more gently phrased than the request in Evans, with Officer Berry politely asking if Ryan "would mind" taking his hands out of his pockets and explaining his reasons for so asking. 22 Fla. L. Weekly D1392.

Because the alleged conflict cases are distinguishable from

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<sup>1</sup>The opinion below is in concert with the position taken by the Second District, which has held that a request to remove one's hands from one's pockets, where motivated by a concern for officer safety, does not transform a consensual encounter into a seizure. State v. Woodard, 681 So. 2d 733, 735 (Fla. 2d DCA 1996); Sander v. State, 595 So. 2d 1099, 1100 (Fla. 2d DCA 1992).



the Fifth District's opinion, this Court should decline to exercise its discretionary review. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983).

CONCLUSION

BASED ON THE foregoing argument and authority, the State respectfully requests that this Honorable Court decline to exercise its discretionary review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Jurisdictional Brief of Respondent and the attached Index to Appendix have been furnished by hand-delivery to ASSISTANT PUBLIC DEFENDER JAMES R. WULCHAK, ESQ., 112 Orange Ave., Ste. A, Daytona Beach, FL 32114, via the Public Defender's basket at the Fifth District Court of Appeal, this 16<sup>th</sup> day of October, 1997.



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