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OIA 3/27/98

IN THE SUPREME COURT OF FLORIDA

JEREMIAH D. JOHNSON,

Petitioner,

v. Case No. 91,328

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
FIFTH DISTRICT

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State rejects Johnson's Statement of the Case and Facts on the grounds that it is argumentative and contains legal analysis. The following is offered in its place:

On April 10, 1995 in the Orange County Circuit Court, Petitioner Jeremiah Johnson was charged by information with possession of lysergic acid diethylamide[1], also known as "LSD." (R.29). The offense was alleged to have occurred on February 12, 1995. (R.29). Through his attorney, Johnson filed a motion to suppress, claiming that he and his car were illegally searched. (R.34-35). On July 25, 1995, a suppression hearing was held before the Honorable Theotis Bronson. (R.1-25).

The evidence adduced at the suppression hearing consisted entirely of the testimony of two State witnesses, Orlando Police Officers Christopher Berry and Hobart Henson. (R.3-16). The two officers were on bicycle patrol in a downtown Orlando parking garage at 3:30 A.M. (R.3). Noticing a parked car with people inside, the officers rode their bicycles in that direction. (R.3-4). As they neared, the occupants exited the car. (R.4). One of the occupants was Johnson, who had been sitting in the driver's seat. (R.4).

Officer Berry directed his attention to Ryan, one of the passengers, (R.4):

> A. . . . He exited the vehicle and I asked if he would mind if I talked with him. He stated sure and at that time he walked

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[1]§§ 893.13(6)(a) & 893.03(1)(c)(16), Fla. Stat. (1993).

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.

Q. What was your reasons for asking him to do this?[2]

A. 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.

Q. Is this a procedure you follow as a law enforcement officer?

A. Always.

Q. Did you explain this to him?

A. Yes, I did.

Q. What happened next?

A. In response to this request he said sure, I'll empty the contents of my pocket. At that time I said if you want. And at that time he proceeded to empty his entire contents of his pocket being also a bag of cannabis.

(R.4-5)(footnote added).

After testing the contraband and determining it to be cannabis, Officer Berry placed Ryan under arrest. (R.5). Johnson was not yet under arrest. (R.8, 15). Pursuant to Ryan's

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[2]Ryan did not ask Officer Berry why he made this request, as Johnson erroneously states in his merits brief. (MB 1). Johnson has apparently misread the opinion below, which reads in relevant part, "When asked why he made this request, Officer Berry responded . . ." State v. Johnson, 696 So. 2d 880 (Fla. 5th DCA 1997). It is apparent from the transcript that the person who asked Officer Berry why he made the request was not Ryan at the scene, but rather the prosecutor at the suppression hearing. (R.5).

arrest, Officer Henson searched the vehicle. (R.6,11). In the glove compartment he found what he suspected to be LSD and "rufenol." (R.11-12). In the pocket behind the passenger seat were a couple of "drug pipes", which contained residue and smelled like burnt cannabis. (R.12).

Having learned that Johnson was the owner of the car, Officer Henson arrested Johnson and searched his person. (R.12-14). In Johnson's pocket the police found small pieces of perforated paper, which they suspected to be LSD. (R.14).

On cross-examination, defense counsel elicited from both officers that they had observed nothing illegal or suspicious until Ryan produced the bag of cannabis. (R.7,15-16). Johnson did not consent to the car search. (R.8,15). The occupants of the car shut the doors when they got out. (R.9,15).

At the conclusion of the evidence, the defense argued that the police had no right to search Johnson's car based on Ryan's arrest. (R.16-19). The State argued that pursuant to New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981), the lawful arrest of a vehicle's occupant permits the police to search that vehicle. (R.19-21). In response, the defense argued that Belton did not apply because Ryan had exited the vehicle when the police arrived. (R.21-22). The issue of whether Ryan was illegally seized when Officer Berry asked him to remove his hands from his pockets was not raised. (R.1-25,34-35).

Judge Bronson granted the motion to suppress. (R.22-24,39). He found that the interaction between Ryan and Officer Berry was

a consensual encounter, during which Ryan "consented to stop and consented to talk to the officer and pretty much handed over cannabis." (R.23). However, he ruled that the arrest of Ryan outside of the car did not permit the officers to search the interior of the car, distinguishing the case from Belton. (R.23-24).

The State timely filed notice of appeal to the Fifth District Court of Appeal. (R.36). The State urged the court to reverse; the defense urged the court to affirm. (IB 4-6; AB 3-7). The only legal issue raised in the briefs was the Belton issue. (IB 4-6; AB 3-7). As in the trial court, the issue of whether Ryan was illegally seized was not raised in the party briefs. (IB 4-6; AB 3-7). On the contrary, the defense characterized the encounter as a consensual one. (AB 4,5).

On August 23, 1996, the Fifth District issued its first opinion in the case. State v. Johnson, 21 Fla. L. Weekly D1909 (Fla. 5th DCA Aug. 23, 1996). Judge Harris wrote the majority opinion in which Judge Goshorn concurred. Id. Judge Thompson dissented with an opinion. Id. As would be noted in the third opinion, all three members of the panel agreed that under Belton, the trial court's rationale for granting the motion to suppress was erroneous. State v. Johnson, 696 So. 2d 880, 881 (Fla. 5th DCA 1997).

Both the majority and dissenting opinions were largely devoted to the unbriefed issue of whether the consensual encounter between Ryan and Officer Berry became a seizure when

Officer Berry asked Ryan to remove his hands from his pockets. The majority held that a request to remove one's hands from one's pockets does not necessarily constitute a seizure, just as a police officer may request to search a suspect without transforming the encounter into a seizure. 22 Fla. L. Weekly D1909. Accordingly, the Fifth reversed the trial court's order of suppression.

Judge Thompson wrote that Officer Berry's request to Ryan, whether characterized as a request or an order, constituted a show of authority to which Ryan acquiesced. 22 Fla. L. Weekly D1909-1910. Since the officers had acknowledged that they did not have any grounds supporting a reasonable suspicion, Judge Thompson would have affirmed the case. Id.

Following Johnson's motion for rehearing, the district court issued a second opinion. State v. Johnson, 21 Fla. L. Weekly D2589 (Fla. 5th DCA Dec. 6, 1996). Judge Harris and Judge Thompson adhered to their respective positions, but this time Judge Goshorn concurred in Judge Thompson's opinion, thus making it the majority. 21 Fla. L. Weekly at D2589-2590. The Court held that under the "tipsy coachman rule," the trial court should be affirmed despite having reasoned incorrectly, because Officer Berry unlawfully seized Ryan by asking him to take his hands out of his pockets. 21 Fla. L. Weekly at D2590. Judge Harris dissented, noting that the Florida Supreme Court had upheld a far more intrusive request in Bostick v. State, 593 So. 2d 494 (Fla. 1992). 22 Fla. L. Weekly at D2590-2591.

The State moved for rehearing, prompting the district court to issue its third and final opinion. 696 So. 2d 880. Judge Goshorn went back to Judge Harris' side, making that the majority opinion, with Judge Thompson dissenting. 696 So. 2d at 883. Accordingly, the district court's final decision was to reverse the trial court's suppression order and remand for further proceedings.

Johnson moved for rehearing, which the district court denied on July 17, 1997. Mandate issued August 4, 1997. On Monday, August 18, 1997, Johnson filed a notice to invoke this Court's discretionary review. This Court accepted jurisdiction on November 17, 1997.

SUMMARY OF ARGUMENT

POINT I: Officer Berry's request for Ryan to remove his hands from his pockets did not transform the consensual encounter into a seizure because an innocent, reasonable person would have felt free to decline the request and walk away. The encounter occurred in a public place in downtown Orlando, the officer used non-compulsory language, and the request in no way interfered with Ryan's ability to leave the scene. The officer did not use physical force or make a show of authority and there is no indication that Ryan was not free to leave.

In the alternative, even if there was an intrusion on Ryan's personal liberty, it was minimal and more than justified by the concern for officer safety.

In the alternative, Johnson lacks standing to seek suppression on the ground that Ryan's Fourth Amendment rights were violated. Such rights are personal and cannot be asserted vicariously. Mere ownership of the property searched or seized does not confer standing.

POINT II: This Court should decline to consider Point II, since it is beyond the scope of the express and direct conflict upon which this Court's discretionary review was invoked. In the alternative, if this Court chooses to consider this issue, it should hold that the occupant of a vehicle cannot escape the consequences of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981), by simply stepping out of the car when the police approach. Case law demonstrates that Belton applies to recent

occupants of vehicles. The considerations justifying a Belton search remain in effect regardless of whether the occupant spontaneously exits the vehicle or whether he or she is directed out by the officer. Accepting Johnson's arguments would defeat the goal of the Belton opinion, which was to create a bright-line rule for searching automobiles incident to a lawful arrest.

ARGUMENT

POINT I

OFFICER BERRY DID NOT TRANSFORM THE CONSENSUAL ENCOUNTER INTO A SEIZURE WHEN HE ASKED RYAN TO REMOVE HIS HANDS FROM HIS POCKETS, BECAUSE AN INNOCENT, REASONABLE PERSON WOULD HAVE FELT FREE TO DECLINE THE REQUEST AND TERMINATE THE ENCOUNTER. EVEN IF THERE WAS AN INTRUSION UPON RYAN'S LIBERTY, IT WAS MINIMAL AND JUSTIFIED BY THE OFFICER SAFETY DOCTRINE. PETITIONER JOHNSON LACKED STANDING TO SEEK SUPPRESSION ON THE GROUND THAT THERE WAS AN ILLEGAL SEIZURE OF RYAN, BECAUSE FOURTH AMENDMENT RIGHTS ARE PERSONAL AND CANNOT BE ASSERTED VICARIOUSLY.

Petitioner Jeremiah Johnson asks this Court to overturn the opinion of the district court, which reversed the trial court's order granting Johnson's motion to suppress. State v. Johnson, 696 So. 2d 880 (Fla. 5th DCA 1997). Johnson contends that the consensual encounter between Officer Berry and passenger Ryan was transformed into an unlawful seizure without reasonable suspicion when Officer Berry asked Ryan if he would mind removing his hands from his pockets.

The State respectfully disagrees and urges affirmance on the following alternative grounds: 1) Ryan was not seized by Officer Berry's request because an innocent, reasonable person would have felt free to decline the request and terminate the encounter; 2) even if the officer's request intruded upon Ryan's liberty, the intrusion was minimal and justified by the officer safety doctrine; and 3) Johnson lacks standing to assert an alleged violation of Ryan's Fourth Amendment rights, because such rights are personal and cannot be asserted vicariously.

At 3:30 A.M., Orlando Police Officers Christopher Berry and Hobart Henson were on bicycle patrol in a parking garage atop the Alba Business Building. (R.3). The Alba Business Building is located in downtown Orlando. Johnson, 696 So. 2d at 883 (Thompson, J., dissenting). Noticing a parked car with occupants, the officers rode their bicycles in that direction. (R.3-4). As the officers neared, the occupants exited the car. (R.4). One of the occupants was Petitioner Johnson, who had been sitting in the driver's seat. (R.4).

Officer Berry directed his attention to Ryan, one of the passengers. (R.4). He asked if Ryan would mind talking with him, to which Ryan replied, "Sure." (R.4). As he walked toward Officer Berry, Ryan placed his hands in his pockets. (R.4). Officer Berry asked if Ryan would mind taking his hands out of his pockets while the two were talking. (R.4). He explained to Ryan that he did not know him and did not know what Ryan had in his pockets and so, for safety reasons, would feel more comfortable if Ryan had his hands out of his pockets. (R.5). Officer Berry explained to Ryan that, as a law enforcement officer, he always followed this procedure. (R.5). At no time was Ryan told that he had to comply or that he could not leave.

In response to Officer Berry's request, Ryan said, "Sure, I'll empty the contents of my pockets." (R.5). The officer said, "If you want." (R.5). Ryan produced a bag of cannabis from his pockets. (R.5). The contents were tested and determined to be cannabis. (R.5). Ryan was placed under arrest,

(R.5), although Johnson was not yet under arrest. (R.8,15). Pursuant to Ryan's arrest, Officer Henson searched the car that Ryan had just exited. (R.6,11). More drugs were found in the car. (R.11-12).

After determining that Johnson was the owner of the car, Officer Henson arrested Johnson and searched his person. (R.12-14). The officer found small pieces of perforated paper, which they suspected to be LSD. (R.14).

The trial court granted Johnson's motion to suppress on the ground that the arrest of Ryan did not give the officer's the right to search the car that Ryan had just exited. (R.23-24). The State appealed to the Fifth District Court of Appeal. (R.36). The district court issued three opinions in the case, twice changing its position on rehearing. State v. Johnson, 21 Fla. L. Weekly D1909 (Fla. 5th DCA Aug. 23, 1996); State v. Johnson, 21 Fla. L. Weekly D2589 (Fla. 5th DCA Dec. 6, 1996); State v. Johnson, 696 So. 2d 880 (Fla. 5th DCA 1997). Ultimately, a split panel determined to reverse the trial court's suppression order. 696 So. 2d at 883.

The three-judge panel unanimously agreed that the trial court's reasoning was erroneous and did not justify suppression. 696 So. 2d at 881. However, the panel split on whether the trial court's order should be affirmed under the "tipsy coachman rule," which permits a reviewing court to affirm the court below even though the lower court reasoned incorrectly, so long as there is any basis in the record for affirmance. Caso v. State, 524 So.

2d 422 (Fla.), cert. denied, 488 U.S. 870, 109 S.Ct. 178 (1988); Carraway v. Armour & Co., 156 So. 2d 494, 497 (Fla. 1963).

The issue the panel found controlling -- whether Officer Berry's request that Ryan remove his hands from his pockets constituted a seizure -- had not been raised in the trial court or in the appellate briefs. The majority of the panel determined that this was not a seizure and reversed the trial court's order. 696 So. 2d at 880-883. However, the dissenting judge would have affirmed the suppression order on the grounds that Officer Berry's request did constitute a seizure. 696 So. 2d 883-884.

Citizens have the right to be free from unreasonable seizures of their persons. U.S. Const., Amend. IV. As this Court has explained, there are three levels of police-citizen encounters:

> The first level is considered a consensual encounter and involves only minimal police contact. During a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).
>
> The second level of police-citizen encounters involves an investigatory stop as enunciated in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. Sec. 901.151, Fla. Stat. (1991). In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere

> suspicion is not enough to support a stop. Carter v. State, 454 So. 2d 739 (Fla. 2d DCA 1984).
>
> While not involved in the instant case, the third level of police-citizen encounters involves an arrest which must be supported by probable cause that a crime has been or is being committed. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); Sec. 901.15, Fla. Stat. (1991).

Popple v. State, 626 So. 2d 185, 186 (Fla. 1993). As in Popple, the third category is not involved in this case. The issue here is whether the contact between Officer Berry and Ryan was transformed from a consensual encounter into a seizure when the officer asked Ryan if he would mind removing his hands from his pockets.

The test for whether a police officer's request transforms a consensual encounter into a seizure is whether a reasonable person would feel free to disregard the request and go about his or her business. Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386 (1991). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a `seizure' has occurred." Id., quoting Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16 (1968). In deciding this issue, a court must consider all of the circumstances surrounding the encounter. Id., 501 U.S. at 439, 111 S.Ct. at 2389.

A police officer may approach a person on the street and ask questions of that person without implicating Fourth Amendment rights. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983)

(plurality opinion); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330 (1984). The U.S. Supreme Court has "explained that `law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.'" Bostick, 501 U.S. at 434, 111 S.Ct. at 2386, quoting Royer, 460 U.S. at 497, 103 S.Ct. at 1324.

Ryan was not seized by Officer Berry's mildly-worded request because a reasonable person would have felt free to disregard the request and walk away. The encounter indisputably began as a consensual encounter when Officer Berry asked if Ryan would mind speaking with him and Ryan agreed and walked over to the officer. The events occurred in a public place in the downtown area of Orlando. The officer did not use physical force or make a show of authority, and there is no indication that Ryan was in any way restricted from simply walking away. Officer Berry used non-compulsory language and phrased the request in terms of a question, asking if Ryan minded taking his hands out of his pockets and politely explaining that he did not know Ryan and it was simply a matter of personal policy that he always followed for safety reasons.

By asking if Ryan minded, the officer implied that if Ryan did mind, he could decline. For instance, in State v. Crumpton,

676 So. 2d 987, 989 (Fla. 2d DCA 1996), the officer greeted Crumpton by asking "how things were going" and if Crumpton "minded" coming over to the patrol car and telling the police what he had just put in his pocket. Crumpton replied that it was rock cocaine. Id. The Second District determined that the encounter was consensual because the officer did not use "words of compulsion", did not use physical force, make a show of authority, or otherwise interfere with Crumpton's ability to simply walk away. Id. at 989-990; see also, State v. Baldwin, 686 So. 2d 682 (Fla. 1st DCA 1996)(finding no seizure where police "politely" asked defendants' names and whether they had anything on them that could get them into trouble).

The dissent below suggests that Ryan would have faced unspecified "dire consequences" if he had declined to take his hands out of his pockets. 696 So. 2d at 884 (Thompson, J., dissenting). This vaguely ominous conclusion is wholly unsupported by the record. Because there is no evidence of physical force or a show of authority, the dissent is forced to acknowledge that it "can only speculate what might have occurred if Ryan had not complied." Id.

The dissent's reliance on Ryan's response to Officer Berry's request is equally unavailing. The dissent writes:

> Ryan's response to the officer, "Sure I'll empty the contents of my pockets," makes it obvious he did not feel he could refuse. Perhaps he misunderstood the officer or was nervous. Regardless, he complied because of the officer's communication.

Id. Because Ryan did not testify, there is no evidence of how he

actually perceived the encounter or why he spontaneously handed over the contraband. Whether Ryan subjectively misunderstood the officer is irrelevant, since the test is an objective one. Bostick. As for whether Ryan was nervous, the State imagines that anyone with a bag of pot in their pocket would be nervous about talking to a police officer. However, the reasonable person test contemplates an *innocent* reasonable person, Bostick, 501 U.S. at 438, 111 S.Ct. at 3288, so the fact that Ryan may have been nervous is irrelevant.

Perhaps the best evidence that there was no seizure is the fact that Johnson never claimed there was. He did not raise this issue in the trial court or in his appellate brief in the district court. On the contrary, in his answer brief below he characterized the contact between Officer Berry and Ryan as a consensual encounter. (AB 4,5). He stated that Ryan "gratuitously handed [the police] the bag of cannabis from his pocket during a consensual encounter in the parking lot." (AB 4).

The trial court reached the same conclusion as Johnson, expressly finding the encounter to be consensual. (R.23). The trial court found that Ryan "consented to stop and he consented to talk to the officer and pretty much handed over [the] cannabis." (R.23). The trial court's determination of whether an encounter was consensual should not be disturbed on appeal unless clearly erroneous. Jones v. State, 658 So. 2d 178 (Fla. 1st DCA 1995). Considering that there is *no* evidence of physical

force or show of authority, and no indication that Ryan was in any way restricted from simply walking away, the trial court's determination that the encounter was consensual cannot be deemed clearly erroneous.

Both Johnson's argument and the dissent below are founded upon an incorrect interpretation of a passage from this Court's opinion in Popple: "*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." 626 So. 2d at 188 (emphasis supplied).

Both Johnson and the dissent below appear to interpret this language to mean that it does not matter what language Officer Berry used in making his request to Ryan -- simply by making the request he was seizing Ryan. But since the relevant inquiry requires a consideration of how a reasonable person would interpret the Officer's words and actions, Bostick, 501 U.S. at 434-435, 111 S.Ct. at 2386, the manner in which the request is phrased is a crucial factor.

The State would respectfully suggest that the subject language in Popple simply means that under the totality of the circumstances in that case, the word the officer used to characterize the request was not determinative. Popple was lawfully parked in a "desolate" area, when he was approached by Deputy Wilmoth and directed to exit his vehicle. 626 So. 2d at

186. Because Popple was being asked to abandon his only means of leaving, a reasonable person might naturally feel that he or she was not free to terminate the encounter and leave. That fact was not changed by the semantic label Deputy Wilmoth subsequently used to characterize his direction.

This case is easily distinguishable. First, the encounter occurred in downtown Orlando, hardly a "desolate" area. Unlike the request in Popple, the request here did not in any way interfere with Ryan's ability to leave the scene. Moreover, this is not a case where the officer summarily described the request by saying, "I requested him to . . ." or "I asked him to . . ." Rather, Officer Berry provided a detailed description of the language he used in asking Ryan if he would mind taking his hands out of his pockets and in explaining to Ryan his reasons for so asking. (R.4-5).

Because Johnson is unable to point to any evidence of physical force or show of authority, he must be arguing for a *per se* rule that any time a police officer requests that a citizen remove his hands from his pockets, the citizen is thereby seized. However, in Bostick, the U.S. Supreme Court rejected Bostick's argument that it should create a *per se* rule that a certain type of encounter automatically constitutes a seizure and emphasized that the correct standard is the fact-specific reasonable person standard.[3]

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[3]Bostick involved an encounter on a bus.

Moreover, the hands-from-pockets request cannot be a *per se* seizure, since far more intrusive requests do not transform consensual encounters into seizures. In the course of a consensual encounter, the police may request to search the citizen or the citizen's belongings without converting the encounter into a seizure. Bostick v. State, 593 So. 2d 494 (Fla. 1992); State v. Gainey, 688 So. 2d 997 (Fla. 2d DCA 1997). As the majority of the district court panel noted, a request to search is far more intrusive than the request in this case. 696 So. 2d at 883. Thus, if a request to search does not automatically constitute a seizure, then the request in this case does not automatically constitute a seizure either.

Officer Berry testified that he made the instant request out of concern for his safety. (R.5). Opinions from the U.S. Supreme Court make it clear that concern for officer safety is an important consideration in evaluating the reasonableness of police conduct. See e.g. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977); Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983). Officer Berry's request was a reasonable, non-intrusive step toward assuring a safe encounter. To hold otherwise would needlessly place police officers in danger.

In summary, a reasonable person would have felt free to decline Officer Berry's request and walk away because the encounter occurred in a public place in downtown Orlando, the officer first obtained Ryan's voluntary agreement to talk, the

subject request was politely phrased as a question, the officer did not use physical force or words of compulsion, did not make a show of authority, and the request did not curtail Ryan's ability to walk away. Accordingly, Ryan was not seized.

Johnson reels off a laundry list of DCA cases in his merits brief. (MB 8-9). These cases are easily distinguishable and thus provide little or no help. Some of Johnson's cases involve police requests different the instant request. Doney v. State, 648 So. 2d 799 (Fla. 4th DCA 1994)(police asked defendant to spit out contents of his mouth); Mayhue v. State, 659 So. 2d 417 (Fla. 2d DCA 1995)(Officer ordered Mayhue to open his clenched fist)[4]; Zelinski v. State, 695 So. 2d 834 (Fla. 2d DCA 1997)(officer asked defendant to step out of vehicle). Others involve police conduct which was more coercive than the conduct in this case or which tended to restrict the defendants' movements. Palmer v. State, 625 So. 2d 1303 (Fla. 1st DCA 1993)(police told defendant to take hands out of pockets as they blocked his path); Johnson v. State, 610 So. 2d 581 (Fla. 1st DCA 1992)(Police told defendant to remove hands from pockets and turn around so police 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)(police determined to stop defendant, asked defendant to get out of car, and repeatedly asked defendant to remove her hands from her pockets); Evans v. State, 546 So. 2d 1125 (Fla. 3d DCA

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[4]The Second District has distinguished Mayhue from the type of request made in this case. State v. Woodard, 681 So. 2d 733, 735 n.1 (Fla. 2d DCA 1996).

1989)(police "confronted" defendant and made a "constitutionally unjustified police order" for defendant to remove hands from pockets); Mayhue,(Officer ordered Mayhue to open his clenched fist); Canion v. State, 550 So. 2d 562 (Fla. 4th DCA 1989) (officer demanded defendant remove hands from pockets); Harrison v. State, 627 So. 2d 583 (Fla. 5th DCA 1993)(police ordered defendant to remove hands from pockets); Gipson v. State, 667 So. 2d 418 (Fla. 5th DCA 1996)(police commanded defendant to take his hand out of his pocket).

The Second District is in accord with the Fifth in holding that a request such as the one in this case does not constitute a seizure. State v. Woodard, 681 So. 2d 733 (Fla. 2d DCA 1996); Sander v. State, 595 So. 2d 1099 (Fla. 2d DCA 1992). In fact, a few months prior to the first opinion in this case, the Fifth District held that it was not improper "for an officer to ask a person to remove his hands from his pockets during a citizen encounter." Lang v. State, 671 So. 2d 292, 294 (Fla. 5th DCA 1996). This Court should affirm the majority opinion of the district court.

In the alternative, even if there was some intrusion upon Ryan's liberty -- and the State does not concede that there was -- it was minimal and justified by Officer Berry's concern for his safety. Officer Berry testified that he asked Ryan to remove his hands from his pockets because of a concern for his safety. (R.5).

Florida courts are required to follow the U.S. Supreme

Court's interpretation of the Fourth Amendment. Art. I, § 12, Fla. Const. As noted above, the decisions of that Court indicate that the officer safety doctrine is to be given considerable weight in evaluating police conduct. See e.g. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977); Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983).

In Mimms, the Court stated, "We think it too plain for argument that the State's proffered justification -- the safety of the officer -- is both legitimate and weighty." 434 U.S. at 110, 98 S.Ct. at 333. Concern for officer safety can justify minimal intrusions on personal liberty. Maryland v. Wilson, ___ U.S. ___, 117 S.Ct. 882 (1997).

In this case, any intrusion was minimal, since the request did not interfere with Ryan's ability to leave the scene. Compare Popple.

Alternatively, Petitioner Johnson lacks standing to assert a violation of Ryan's Fourth Amendment rights. Such rights are personal and cannot be asserted vicariously. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978). In U.S. v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980), the U.S. Supreme Court abolished the automatic standing doctrine. The Court held that mere ownership of the property searched or seized does not confer standing -- the defendant cannot claim the benefits of the exclusionary rule unless there has been a violation of the *defendant's* Fourth Amendment rights. Salvucci. Even assuming Johnson is correct

that Ryan was unlawfully seized, there is no indication that *Johnson's* Fourth Amendment rights were violated.

POINT II

THIS COURT SHOULD DECLINE TO CONSIDER JOHNSON'S ARGUMENT IN POINT II, SINCE IT LIES BEYOND THE SCOPE OF THE CONFLICT UPON WHICH JOHNSON INVOKED THIS COURT'S DISCRETIONARY REVIEW. ON THE MERITS, THE OCCUPANTS OF AN AN AUTOMOBILE CANNOT ESCAPE THE CONSEQUENCES OF NEW YORK v. BELTON, 453 U.S. 454, 101 S.Ct. 2860 (1981), BY MERELY STEPPING OUT OF THE VEHICLE WHEN THEY SEE THE POLICE APPROACH.

Johnson contends that the arrest of Ryan does not justify the subsequent search of Johnson's car, even though the officers saw Ryan get out of the car as they approached, because Ryan was outside of the car when he was arrested and "the circumstances have nothing to do with the car". (MB 11). The State respectfully disagrees and urges affirmance on the following alternative grounds: 1) This Court should decline to consider this issue since it is beyond the scope of the conflict upon which this Court's discretionary review was invoked; and 2) on the merits, a vehicle's occupants cannot escape the consequences of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981), by merely stepping outside of the vehicle when they see police officers approaching.

At 3:30 A.M. Orlando Police Officers Christopher Berry and Hobart Henson were on bicycle patrol in a parking garage located atop the Alba Business Building in downtown Orlando. (R.3). Noticing a parked car with people inside, the officers rode their bicycles in that direction. (R.3-4). As they neared, the occupants exited the car. (R.4). One of those occupants was Petitioner Jeremiah Johnson, who had been sitting in the driver's

seat. (R.4).

Officer Berry directed his attention to passenger Ryan, asking if Ryan would mind speaking with him. (R.4). Ryan agreed and a brief encounter followed, during which Ryan produced a bag of cannabis from his pocket. (R.4-5). Ryan was placed under arrest and, pursuant to his arrest, Officer Henson searched the car that Ryan had just exited. (R.6,11). In the glove box and in the pocket behind the passenger seat, he found what he suspected to be drugs and two "drug pipes", which contained residue and smelled like burnt cannabis. (R.11-12).

Having determined that Johnson owned the car, Officer Henson placed Johnson under arrest and searched his person. (R.12-14). In his pocket, the police found small pieces of perforated paper, which they suspected to be LSD. (R.14).

Johnson moved to suppress, arguing that the police could not lawfully search his vehicle pursuant to Ryan's arrest because Ryan had gotten out of the vehicle when the police approached and because it was Johnson's car, not Ryan's. (R.16-19,21-22,34-35). After holding an evidentiary hearing at which the above facts were adduced, (R.1-25), the trial court granted the motion to suppress. (R.22-24, 39). The court found that the arrest of Ryan was lawful, but the police were not permitted to search the car pursuant to Ryan's arrest. (R.23-24). The court distinguished this case from Belton, which permits the police to search a vehicle incident to the lawful arrest of one of the vehicle's occupants:

> In the [Belton] case it was one of which the car was stopped for some traffic violation. There was reason why the car was being stopped. And once the car was stopped the officer detected the odor of burning cannabis in the car and based upon that arrest and search the car was conducted. Those facts are different from the case that we have before us.
>
> I'll grant the motion.

(R.24).

The State appealed to the Fifth District Court of Appeal. (R.36). Although the three-judge panel split over the issue in Point I, all three judges agreed that the trial court's analysis of the Belton issue was incorrect and that Belton did not justify suppression. State v. Johnson, 696 So. 2d 880, 881 (Fla. 5th DCA 1997). The Court held, "We do not believe that `the occupants' can avoid the consequence of Belton by merely stepping outside the automobile as the officers approach." Id.

First, the State would urge this Court to decline to consider this issue. Johnson invoked this Court's discretionary review on the issue raised in Point I -- whether Officer Berry's request for Ryan to remove his hands from his pockets constituted a seizure -- arguing that the district court's ruling on that point expressly and directly conflicted with other Florida cases. (Pp. 5-9, Petitioner's Brief on Jurisdiction). The issue in Point II was not argued as a basis for discretionary review. Id. Accordingly, this Court should decline to exercise its discretionary review over Point II. See, Stephens v. State, 572 So. 2d 1387 (Fla. 1991)(Court declined to reach issue that was beyond the scope of the certified question).

Whether to reach Point II is a matter within the Court's discretion. Savoie v. State, 422 So. 2d 308 (Fla. 1982). However, the district court did not seem to find the issue remarkable or difficult. Although they split over the issue in Point I and twice granted rehearing to change their position on that point, the three-judge panel unanimously rejected the trial court's ruling on the issue in Point II. 696 So. 2d at 881. The majority devoted only two paragraphs to this issue, Id., and the dissent did not address it at all, 696 So. 2d at 883-884. Accordingly, this Court should exercise its discretion not to consider Point II.

In the alternative, this Court should affirm the Fifth District's treatment of this issue, because the district court was correct in holding that the occupants of a vehicle cannot escape the consequences of New York v. Belton simply by getting out of the vehicle when they see the police approaching. In Belton, the U.S. Supreme Court 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 459-460, 101 S.Ct. at 2863-2864. In so doing, the Court hoped to create a bright-line rule that would be easy for officers understand and follow. 453 U.S. at 458-460, 101 S.Ct. at 2863-2864.

Almost inevitably, by the time the police take a vehicle's occupant into custody, the occupant has *already* been removed from the vehicle. See e.g., Belton, 453 U.S. at 456, 101 S.Ct. at

2862 (officer directed occupants out of car, placed them under arrest, and then searched the car); Padron v. State, 449 So. 2d 811 (Fla. 1984)(upon being stopped, Padron got out of his car and stood beside it; Court upheld Belton search of car after Padron's arrest for driving without a license). Thus the fact that the occupant is not inside the car at the moment of arrest is not determinative.

The fact that the occupant steps out of the vehicle as the police approach, as opposed to being directed out, is a distinction without a difference. The purpose of the Belton rule is to prevent the arrestee from reaching into the car to retrieve a weapon, attempt to escape, or destroy evidence. Id., 453 U.S. at 457-460, 101 S.Ct. at 2862-2864. These considerations remain in effect regardless of whether the individual has spontaneously exited the vehicle upon the officer's approach or has been requested to exit by the officer.

In State v. McClendon, 490 So. 2d 1308 (Fla. 1st DCA 1986), the First District rejected the defendant's argument that it should distinguish between arrests of persons in the car and persons recently vacating the car. Lieutenant Presley saw McClendon, a homicide suspect, drive up to a gas station and go inside. Id. Lt. Presley arrested McClendon inside the station, 20-30 feet away from McClendon's truck and about three minutes after McClendon had exited the truck. Id. at 1309. In rejecting McClendon's contention that a Belton search was inappropriate because he was arrested, not inside his truck, but 20-30 feet

away, the court held:

> The importance of the Belton decision is that the Supreme Court supplied police officers with a workable definition of the "area within the immediate control of the arrestee," eliminating the need for case-by-case determinations as to whether the interior of an automobile is within the scope of a search incident to a lawful arrest. To distinguish between arrests of persons in the car from arrests of persons recently vacating the car serves to severely diminish the purpose of the Belton decision. Once again, case-by-case determinations would be required, this time with regard to whether an arrestee was a recent occupant. We decline to define the time parameters for a "recent occupant" for the purpose of rendering the "search-incident-to-arrest" exception applicable or inapplicable. We do find, however, under the circumstances presented -- where mere minutes lapsed between the driver's exit from his vehicle and his arrest, affording no opportunity for intervention or tampering with the evidence -- that the warrantless search was pursuant to a lawful arrest based on probable cause that the arrestee committed a murder in Florida and the scope of the search was permissible, in that evidence of the crime was sought from an automobile.

Id. at 1309-1310 (footnotes omitted).

In State v. Saufley, 574 So. 2d 1207, 1209 (Fla. 5th DCA 1991), the officer observed Saufley driving erratically and turned on his lights and siren to stop Saufley. However, Saufley continued for two miles, not stopping until he reached his front yard. Id. When he got out of his car, he appeared intoxicated and the officer arrested him for driving under the influence. Id. After putting Saufley in the patrol car, the officer was "accosted" by Saufley's girlfriend, so that it was two to three minutes before the officer could search Saufley's car. Id.

Saufley claimed that because the search occurred after he had gotten out of his car, it could not be incident to his arrest. Id. The Fifth District rejected this argument and held that the search was lawful pursuant to Belton. Id.

In this case, there is no estimate of the amount of time that elapsed between Ryan exiting the car and his arrest, or how far away he was from the car. However, since Officer Berry initiated the encounter as Ryan got out of the car and since Ryan produced the cannabis after only the second question asked by the officer, (R.4-5), it is reasonable to conclude that Ryan was arrested within moments of exiting Johnson's car, and in close proximity to the car.

There is no merit to Johnson's contention that Belton does not permit search of the car where the arrestee is not the driver or owner of the car, but rather a mere passenger. The Belton rule applies when police arrest an "occupant of an automobile", which includes passengers, not just the driver or owner. Belton, 453 U.S. at 460, 101 S.Ct. at 2864; State v. Smith, 662 So. 2d 725 (Fla. 2d DCA 1995).

Nor can Belton be read to require a nexus between the automobile and the crime for which the occupant is arrested, as Johnson seems to suggest. As with all of Johnson's other arguments Point II, acceptance of Johnson's position would require police officers to make complex, on-the-spot evaluations of whether they can search the vehicle incident to a lawful arrest. This is precisely the sort of situation the U.S. Supreme

Court sought to avoid in formulating the bright-line Belton rule. McClendon; Smith.

In summary, this Court should decline to consider Point II. However, if the Court chooses to address this issue, it should affirm the Fifth District's holding that occupants of a vehicle cannot escape the consequences of New York v. Belton merely be stepping out of the car as the police approach.

CONCLUSION

WHEREFORE, based on the foregoing argument and authority, the State respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery to ASSISTANT PUBLIC DEFENDER JAMES R. WULCHAK, ESQUIRE, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, via his basket at the Fifth District Court of Appeal, this 31st day of December, 1997.

DAVID H. FOXMAN
ASSISTANT ATTORNEY GENERAL

First Union and, being persuaded by its reasoning, adopt it.

We therefore reverse and remand for the trial court to deduct the amount of real estate taxes owed as of the date of the foreclosure sale, from the fair market value, and enter a deficiency judgment for the difference between that amount and the amount found to be due in the final judgment of foreclosure.

WARNER and SHAHOOD, JJ., concur.

1

FEHLHABER CORPORATION, Appellant,

v.

VILLAGE OF TEQUESTA, a municipal corporation located in Palm Beach County, Florida, Appellee.

No. 96–2221.

District Court of Appeal of Florida, Fourth District.

June 4, 1997.

Rehearing and Clarification Denied July 23, 1997.

Appeal was taken from judgment of the Circuit Court, Fifteenth Judicial Circuit Court, Palm Beach County, Mary E. Lupo, J., in zoning controversy. The District Court of Appeal held that plaintiff had to first exhaust administrative remedies.

Affirmed in part and vacated in part.

Zoning and Planning ⇐562

Plaintiff failed to exhaust its administrative remedies, and thus merits of zoning controversy should not have been addressed by trial court, where plaintiff did not follow the procedures set forth in village code to challenge the building official's decision before filing its lawsuit.

Richard A. Gescheidt of Gescheidt and Foreman, Boca Raton, for appellant.

John C. Randolph of Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, for appellee.

PER CURIAM.

We affirm the trial court's finding that appellant (plaintiff) failed to exhaust its administrative remedies. Plaintiff did not follow the procedures, set forth in the Village of Tequesta's Code, to challenge the building official's decision before filing its lawsuit in the trial court.

After finding that plaintiff failed to exhaust administrative remedies, the trial court proceeded in its final judgment to address the merits of the underlying zoning controversy. Because plaintiff should have first exhausted the available administrative remedies, we vacate the portion of the final judgment that addressed and decided the merits of the controversy.

DELL, PARIENTE and GROSS, JJ., concur.

2

STATE of Florida, Appellant,

v.

Jeremiah JOHNSON, Appellee.

No. 95–1943.

District Court of Appeal of Florida, Fifth District.

June 6, 1997.

Rehearing Denied July 17, 1997.

State appealed from order of the Circuit Court, Orange County, Theotis Bronson, J.,

which granted motion to suppress drugs. The District Court of Appeal, Harris, J., held that: (1) fact that occupants were outside vehicle at time of arrest did not preclude search of passenger compartment of vehicle, and (2) officer's request that passenger remove his hands from his pockets while they engaged in conversation agreed to by passenger was not so coercive as to convert consensual encounter into a seizure justifying suppression of all after-discovered drugs.

Reversed and remanded.

Thompson, J., filed a dissenting opinion.

1. Arrest ⇐71.1(8)

Fact that occupants were outside the vehicle at time of arrest did not preclude search of passenger compartment of vehicle.

2. Arrest ⇐68(4)

Officer's request that passenger who had just vacated vehicle remove his hands from his pockets while they engaged in conversation agreed to by passenger was not so coercive as to convert what had been consensual encounter into a seizure justifying suppression of all after-discovered drugs, where officer asked passenger if he would mind taking his hands out of his pockets and passenger responded "Sure, I'll empty the contents of my pockets" and then proceeded to empty his pockets, revealing cannabis.

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

HARRIS, Judge.

We again grant rehearing and substitute 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.

[1] 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.

[2] 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 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. 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 occu-

pants 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, Judge, 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 police officer directed Ryan to take his hands from his pockets, he was seized because he submitted to the authority of the officer.

The test to apply to determine if Ryan was seized is whether a reasonable person would have believed he was free to go. *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (holding "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have be-

lieved that he was not free to leave.") 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 issued the order. 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 Doney v. State*, 648 So.2d 799, 801 (Fla. 4th DCA 1994) (holding that compliance with officer's request that appellant 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 1992) (holding that seizure occurred when officer told defendant to remove hands from pockets and to turn around so that officer could get 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); *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). *Contra, Sander v. State*, 595 So.2d 1099 (Fla. 2d DCA 1992) (not improper for officer to ask defendant to remove hands from his pockets). 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." Although the instant case does not involve the officer ordering a driver or passenger from the car, the reasoning still applies. 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.

WEST KEY NUMBER SYSTEM

BURGER KING CORPORATION, a Florida corporation, Appellant,

v.

Frieda Arkoulis KASTOGIANIS, as Administrator of the Estate of Gus Arkoulis, Appellee.

No. 96-0438.

District Court of Appeal of Florida, Fourth District.

June 11, 1997.

Rehearing and Clarification Denied July 10,1997.

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County,