IN THE SUPREME COURT OF FLORIDA

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WILLIE JAMES BROWN,

Petitioner,

vs. CASE NO. 93,942

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court. He will be referred to as Petitioner in this brief.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. The transcript is numbered independently of the record on appeal. All references to the transcripts will be by the symbol "T" followed by the appropriate page number in parenthesis.

All emphasis has been added by Petitioner unless otherwise noted.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE

Petitioner was charged by information filed in the Nineteenth Judicial Circuit with resisting an officer without violence, possession of less than 20 grams of cannabis and possession of cocaine (R-2). Petitioner *pro se* filed a written motion to suppress which was adopted by trial counsel (R-12-13, T-2). After a pretrial evidentiary hearing, the motion was denied (T-8-52).

Petitioner proceeded to jury trial (R-28). At the close of the state's case, Petitioner renewed his motion to suppress and moved for judgment of acquittal. Both were denied by the circuit court (T-129-132).

The jury returned a verdict finding Petitioner guilty of each count as charged in the information (R-32, T-185-186). Petitioner was adjudicated guilty accordingly (R-50-51, T-199). As to counts I and II, Petitioner was sentenced to serve 9 months in the county jail (R-52-53,54-55). As to count III, Petitioner was sentenced to serve 1 year and one day in prison (R-56-58). Said sentences were concurrent with one another (T-199, R-53,55).

Petitioner *pro se* filed a notice of appeal upon conviction but prior to sentencing (R-45). On November 20, 1996, upon counsel's motion, the Fourth District Court of Appeal abated the proceedings pending sentencing.

On August 5, 1998, the Fourth District Court of Appeal affirmed appellant's convictions and sentence. In a written decision, the appellate court concluded that Petitioner's right to

be free from unreasonable search and seizure was not violated where a police officer directed appellant to remove his hands from his pockets at a time when the officer did not have a founded suspicion to believe appellant was engaged in criminal activity. Brown v. State, 714 So. 2d 1191 (Fla. 4th DCA 1998).

On September 3, 1998, Petitioner served his notice of invocation of discretionary jurisdiction in this Court. After receiving jurisdictional briefs, on November 16, 1998, this Court issued an order accepting jurisdiction. This brief follows.

STATEMENT OF THE FACTS

At the evidentiary hearing on Petitioner's motion to suppress, the prosecution presented the testimony of Fort Pierce police officer Hall and Petitioner testified in his defense.

Hall stated that he was on routine patrol accompanied by a female civilian observer when he saw Petitioner approach a vehicle stopped at a traffic signal (T-9-10,24). According to Hall, Petitioner banged on the window of the stopped vehicle and yelled something (T-10). The vehicle sped away (T-10).

Hall drove toward Petitioner (T-10). Petitioner was very excited and approached the patrol car (T-10). Petitioner told Hall that he was trying to get his ride (T-18). Petitioner was not hostile toward Hall and Hall did not observe anything to indicate that Petitioner had a weapon on his person (T-31).

After moving Petitioner away from the door, Hall left his vehicle (T-10-11). Hall knew Petitioner, knew his name and knew that he had been previously arrested for battery on a police officer (T-12). One year earlier, Hall saw Petitioner at the police station (T-20). A couple of weeks after that meeting, Hall questioned Petitioner about drug sales (T-20-21). Hall testified that he questioned Petitioner several times and has searched Petitioner before although he did not feel threatened (T-21,28). Nonetheless, Hall asked Petitioner for his name (T-11). Petitioner replied "Willie James Nilly." (T-13).

Hall observed Petitioner's hands in his pockets (T-13,30).

Hall asked Petitioner to remove his hands from his pockets (T-13). Petitioner complied (T-13). Hall did not see any objects in Petitioner's hands or notice any bulges in his pockets (T-24).

Petitioner turned away from Hall bending slightly at the waist and placed his hands underneath the front waistband of his pants (T-13,23). Hall testified that he was afraid that Petitioner "might be going for some type of weapon." (T-13). Hall testified that when he is off duty he has carried "plenty of guns down in his pants" and it does not show (T-32).

Hall reached around Petitioner and grabbed Petitioner's hands (T-13). Hall felt something hard in Petitioner's pants which he subsequently determined was a beeper (T-15,26).

Hall yelled at Petitioner to remove his hands from his pants (T-15). They tumbled to the ground (T-15). Eventually Petitioner placed his hands behind his head (T-15-16).

After a while, back up arrived (T-16). Petitioner was arrested for resisting an officer (T-16). A search of Petitioner's person yielded a baggie of marijuana from his hip pocket. Cocaine rocks were shaken from the crotch area of his pants (T-16).

Petitioner testified that as he was walking home, Hall pulled up to him (T-33-34). Hall asked Petitioner what he was doing (T-34). Petitioner said he was going home (T-34). Petitioner turned around and continued walking (T-34). Hall pushed Petitioner toward the car (T-34). Petitioner leaned against the car and stated that he had not done anything (T-34). Hall pushed Petitioner and

Petitioner went to the ground (T-34). Hall placed Petitioner hands on his head (T-35). Petitioner lay on the wet ground while Hall called for backup (T-35). Hall pounded Petitioner's back as they waited a long time for the other officers to arrive (T-35).

Petitioner was handcuffed and placed in the car (T-35). Another officer searched Petitioner (T-36). Petitioner did not have marijuana or cocaine rocks on his person (T-36). Petitioner asked the officers to pick up his beeper from the ground (T-36).

The prosecutor limited his cross-examination to Petitioner's prior record (T-37). Petitioner agreed that he had been convicted of at least 3 felonies and probably had 5 felony convictions (T-37-38).

At Petitioner's jury trial, Hall reiterated his testimony as presented at the suppression hearing (R-73-84). He added that it was approximately 1:00 a.m. (T-73). He claimed it was his legal duty to find out why Petitioner was yelling at the car (T-75-76). He added that Petitioner smelled of alcohol (T-76).

Hall testified that he yelled at Petitioner to put his hands in plain view several times before Hall grabbed Petitioner (T-79-80). On cross-examination, Hall stated that Petitioner resisted by placing his hands in his pants and refusing to take them out (T-106).

Hall acknowledged that at the suppression hearing he testified that he felt a hard object in the crotch area of Petitioner's pants while at a preliminary hearing he testified that he felt a hard

object in the waistband of Petitioner's pants (T-108-109).

At trial, the civilian passenger, Rebecca Strickland, testified when she saw Petitioner standing on the street after the car left "[h]e was acting like he was, you know, not doing anything wrong or whatever." (T-112). Petitioner went over to the police car after it stopped next to him (T-119). Petitioner did not run toward the patrol car (T-119).

Hall left the patrol car while Ms. Strickland remained inside (T-112). Hall took Petitioner to the back of the vehicle (T-113). Petitioner was apprehensive about things (T-113). Ms. Strickland thought Hall was trying to get Petitioner to put his hands on the car and Petitioner would not comply (T-113). A tussle ensued. Ms. Strickland got out of the patrol car until back up arrived (T-114). She saw the officer placing marijuana and cocaine on the trunk (T-114-115).

SUMMARY OF ARGUMENT

Point I: Petitioner's motion to suppress cocaine and marijuana was wrongfully denied. First, the trial court incorrectly concluded that the officer was engaged in a consensual encounter when he directed Petitioner to remove his hands from his pockets. Second, the trial court incorrectly concluded that the officer was justified in grabbing Petitioner's hands after Petitioner complied with the officer's directive to remove his hands from his pockets, turned and placed his hands inside the waistband of his pants. At the time Petitioner approached the officer, the circumstances did not suggest that Petitioner was engaged in illegal activity or possessed a weapon. Petitioner's furtive movements did not change this legal conclusion. Therefore, this Court should vacate the opinion of the District Court of Appeal as it is contrary to well-settled principles of Fourth Amendment jurisprudence.

Point II: As Petitioner was illegally detained, he was lawfully entitled to obstruct the officer without violence. Consequently, his conviction for resisting an officer without violence must be reversed and his discharge ordered.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION TO SUPPRESS WHERE THE OFFICER DID NOT HAVE A FOUNDED SUSPICION THAT PETITIONER WAS ENGAGED IN CRIMINAL CONDUCT AT THE TIME OF THE DETENTION AND SEARCH.

At Petitioner's pretrial suppression hearing[1], the circuit court made the following pertinent factual findings and conclusion of law:

> I find that the police officer did see the defendant banging on and yelling into some motor vehicle. Within a couple of minutes, the officer circled around and the Defendant ran up to the officer's car in an excited state. The officer was vulnerable sitting in the car and got out. The officer knew who he was and knew that he had been arrested before for battery on a law enforcement officer. There is no evidence before the Court on the disposition of that case. The officer asked the defendant his name and the defendant gave a fictitious name. The defendant had his hands in his pockets and the officer asked him to remove them. The Defendant did so and immediately turned, bent over at the waist and with his back to the officer, put his hands into the waistband area. The defendant was not attempting to walk away at the time. Officer Hall fearing for his safety asked the Defendant to remove his hands. The Defendant did not do so and Officer Hall grabbed the Defen-

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[1]After receiving testimony, the court directed defense counsel to present her argument prior to that of the prosecutor. The court reasoned that this was a defense motion. Implicit in this statement is the misconception that the defense had the burden of proof at the hearing. However, as Petitioner was challenging a warrantless search, the burden of proof was upon the prosecution to establish that Petitioner's detention and search was reasonable. State v. Setzler, 667 So. 2d 343, 345 (Fla. 1st DCA 1995)

> dant's hands to get control of the situation. In the course of that encounter, the officer felt a hard object in the waistband area of the defendant's clothing and could not tell what it was. The defendant and officer Hall fell to the ground. The defendant was handcuffed, arrested and searched. Drugs were found during the search of the defendant.
>
> Now key in Fourth Amendment jurisprudence, as you know, is the concept of reasonableness. It's a balancing of interest. The situation here started as a consensual encounter initiated by the defendant. The defendant's behavior was certainly odd. The defendant made a move that clearly would cause a reasonable police officer to be concerned for his or her safety. The officer would have been foolish indeed if he ignored the move and didn't respond. The officer did respond and asked the defendant to remove his hands. The defendant did not. The officer then had probable cause to arrest the defendant for resisting an officer without violence. The search was incident to that arrest. On the question of reasonableness, one question that can be asked really puts this matter in perspective, even if the officer had wanted to just leave when the defendant turned, bent at the waist and reached into his pants, how could he possible (sic) do so? He could not have simply and safely disengaged, turned his back, gotten into his car and driven off without being at great risk. The officer did have reasonable suspicion to believe that the defendant was going for a weapon and the defendant's actions escalated this consensual encounter into what it has become. The motion to suppress is denied.

(T-50-52).

The Fourth District Court of Appeal affirmed the order denying the motion to suppress. Brown v. State, 714 So. 2d 1191 (Fla. 4th DCA 1998). The appellate court determined that the officer was engaged in a consensual encounter despite his asking Petitioner to

remove his hands from his pockets. The encounter did not escalate to a detention until the officer grabbed Petitioner's arm when Petitioner turned away from the officer and placed his hands inside the waistband of his pants. At the time of the detention, Petitioner's behavior coupled with the officer's knowledge of Petitioner's past arrest provided the officer with a basis to fear for his safety. Petitioner takes issue with these legal conclusions.[2]

First, the trial court erred by finding that Petitioner and the officer were engaged in a consensual encounter until the officer directed him to remove his hands from the waistband of his pants. Rather, the correct application of Fourth Amendment principles requires the conclusion that Petitioner was detained at the time the officer directed him to remove his hands from his pockets. Prior to issuing that command, the officer was obliged to have a founded suspicion that Petitioner was involved in some criminal activity. Absent a founded suspicion, the officer was not lawfully entitled to detain Petitioner by asking him to remove his hands from his pants pockets.

The Fourth Amendment to the United States Constitution and Article I, Section 12 guarantee all Floridians the right to be free

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[2] "A ruling on a motion to suppress is a mixed question of law and fact, each subject to a different standard of review." United States v. Harris, 928 So. 2d 1113, 1115-1116 (11th Cir. 1991). While factual findings are clothed with the presumption of correctness, legal conclusions are subject to de novo review. 928 F.2d at 1115-1116.

from unreasonable search and seizure. "The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 544, 96 S. Ct. 3074, 3081, 49 L. Ed. 2d 1116, 1126 (1976).

There are three levels of police citizen contact: a consensual encounter, an investigatory detention and an arrest. Popple v. State, 626 So. 2d 185, 186 (Fla. 1993). A consensual encounter by its very nature does not implicate the Fourth Amendment for the citizen is free to terminate contact at any time. By contrast, an investigatory stop is an involuntary detention of the citizen. Thus, the Fourth Amendment requires that an officer must have a founded suspicion that the citizen is engaged in criminal activity before the detention occurs. 626 So. 2d at 186; Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); § 901.151, Fla. Stat. (1996).

In determining whether there has been a consensual encounter, a court must consider all of the circumstances surrounding the encounter to determine whether the conduct of the police officer ". . . would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429, 439, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). An encounter escalates to a detention where the citizen submits to the officer's show of

authority and remains in place. Hollinger v. State, 620 So. 2d 1242 (Fla. 1993). As this Court explained in Popple:

> 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. *State v. Simmons*, 549 So.2d 785 (Fla. 2d DCA 1989). 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. *Jacobson v. State*, 476 So.2d 1282 (Fla. 1985). Whether characterized as a request or an order, we conclude that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show or authority which restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply. *See Dees v. State*, 564 So.2d 1166 (Fla. 1st DCA 1990). (Footnote omitted).

Popple v. State, 626 So. 2d at 187-188. Simply stated, a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." Terry v. Ohio, 392 U.S. at 16, 88 S. Ct. at 1877.

Dees v. State, 564 So. 2d 1166 (Fla. 1st DCA 1990), cited in Popple, typifies the line of cases holding that seizure occurs where a citizen complies with an officer's request remove her hands from her pockets. Accord, Harrison v. State, 627 So. 2d 583, 584 (Fla. 5th DCA 1993); Evans v. State, 546 So. 2d 1125 (Fla. 3d DCA 1989); James Johnson v. State, 610 So. 2d 581 (Fla. 1st DCA 1992).

The Fifth District summarized the holdings of these cases:

> Our courts have recognized that examples of such submission to authority include situations were an officer orders a person to take his hands out of his pockets or orders a person to hand over something in his hands, explaining that a reasonable person in such circumstances would not conclude that he or she was free to disregard such a show of authority. *See Harrison v. State*, 627 So.2d 583 (Fla. 5th DCA 1993); *Dees v. State*, 564 So.2d 1166 (Fla. 1st DCA 1990).

Gipson v. State, 667 So. 2d 418, 420 (Fla. 5th DCA 1996).

In Gipson, two uniformed police officers seated in a patrol car observed the defendant walking along the sidewalk. One of the officer's recognized the defendant having spoken to him numerous times in the past. Upon sight of the officers, the defendant immediately placed his hand behind his back. The one officer exited the patrol car, approached the defendant and asked to speak to him. After the defendant agreed to speak to the officer, the officer told the defendant to take his hand out of his pocket. The officer knew that the defendant did not have a weapon because by this point the second officer was standing behind the defendant. The defendant handed the officer several bags of contraband. After recognizing that the officer engaged the defendant in a consensual encounter when he asked to speak with him, the Fifth District held that the encounter escalated to a seizure when the officer asked the defendant to remove his hand from his pocket. 667 So. 2d at 420.

In Evans v. State, 546 So. 2d at 1125, the defendant was

seated on a bench at 4:00 a.m. with his hands in his pockets. The officer "asked" the defendant to remove his hands from his pockets for officer safety. When the defendant complied, cocaine fell to the ground. In finding that the trial court erred by denying the motion to suppress, the appellate court wrote:

> Given the realties 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]." See *United States v. Mendenhall,* 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L. Ed.2d 497, 509 (1980); *Florida v. Royer,* 460 U. S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

Consequently, the appellate court concluded that the cocaine was recovered as a result of a "constitutionally unjustified police order." 546 So. 2d at 1125.

In James Johnson v. State, 610 So. 2d at 58, the appellate court found that the defendant was seized when he was approached by an officer, asked to remove his hands from his pockets and told to face the officer so the officer could get a good look at him. The appellate court explained, "[F]or purposes of the Fourth Amendment to the United States Constitution, a 'seizure' occurs when one's freedom of movement has been restrained, either by physical force or a showing of authority, so that the surrounding circumstances demonstrate a reasonable person would not have felt free to leave." Since the defendant was not free to disregard the officers directive to remove his hands from his pockets and turn around, he was seized. 610 So. 2d at 582. Compare State v. Jeremiah Johnson,

696 So. 2d 880 (Fla. 5th DCA 1997) rev. dism. 716 So. 2d 787 (Fla. 1998) (as the argument was not presented to the trial court, the appellate court declined to apply the tipsy coachman rule to uphold an order of suppression where officer asked defendant if he "would mind while I was talking to him if he would take his hands out of his pockets" determining that the request was not so intimidating as to convert a consensual encounter into a seizure).

At bar, a uniformed police officer was on routine patrol in his marked police car accompanied by a citizen observer when he saw Petitioner (T-9-10,24,72). The officer knew Petitioner, had spoken with him several times in the past and had searched Petitioner before (T-28). Petitioner approached the patrol car as the officer drove toward him (T-10). A consensual encounter began when Petitioner excitedly told the officer who was still seated in the police cruiser that he was trying to get a ride home in a car that had just left the area (T-10,18). The officer exited the patrol car in the interest of officer safety to continue the conversation (T-10). The officer asked Petitioner his name although he knew that it was Willie James Brown (T-11). Petitioner replied "Willie James Nilly." (T-13). The officer next "asked" Petitioner to take his hands out of his pocket (T-13,28-29). With that request, the encounter elevated to a seizure because a reasonable person would not have believed he was free to allow his hands to remain concealed in his pockets. Evans v. State, 546 So. 2d at 1125, Gipson v. State, 667 So.2d at 420; Harrison v. State,

627 So. 2d at 584. While Petitioner complied with the request and removed his hands from his pockets, his compliance was nothing more than a submission to the officer's show of authority. Hollinger v. State, 620 So. 2d at 1243; Gipson v. State, 667 So. 2d at 420. Thus, a seizure occurred.

The conclusion that a seizure occurred when the officer asked Petitioner to take his hands out of his pockets is underscored by both the officer's past interactions with Petitioner as well as the officer's subsequent action. In the past, the officer had searched the Petitioner although the officer did not feel threatened by him (T-28). Subsequent to Petitioner's acquiescence to the officer's directive to remove his hand from his pocket, Petitioner turned away from the officer and put his hands inside the waistband in the front of his pants (T-13,23). Had Petitioner been free to terminate the contact, he should have been able to turn away from the officer to do so. Instead of allowing Petitioner his freedom, the officer grabbed Petitioner's hands. The officer's response thus, demonstrates that Petitioner was detained when he was told to remove his hands from his pockets.

The officer may not conduct an investigatory stop of Petitioner unless the officer has a well-founded suspicion that Petitioner has committed, is committing, or is about to commit a criminal offense. Kearse v. State, 384 So. 2d 272 (Fla. 4th DCA 1980); Kimbrough v. State, 539 So. 2d 619 (Fla. 4th DCA 1989). Mere or bare hunches will not suffice. Sumlin v. State, 433 So. 2d

1303 (Fla. 2d DCA 1983). Rather the officer must be able to point to specific and articulable facts which taken together in light of the officer's knowledge, training and practical experience reasonably justify the stop. State v. Stevens, 354 So. 2d 1244 (Fla. 4th DCA 1978).

At the time the seizure occurred, no circumstances existed to indicate that Petitioner was engaged in criminal activity or possessed a weapon. The officer was not engaged in an investigation nor had he observed any illegal activity before he drove toward Petitioner. Petitioner immediately told the officer that he was trying to get his ride which explained Petitioner's interaction with the vehicle that had just left the area. Moreover, the officer had not observed any bulges in Petitioner's clothing or other indication that Petitioner possessed a weapon. Neither, the officer's past contact with Petitioner nor his knowledge that Petitioner had previously been arrested by some other officer, alter this legal conclusion. Gipson v. State, 667 So. 2d at 419 (officer had spoken to defendant many times in the past); R. B. v. State, 429 So. 2d 815 (Fla. 2d DCA 1983) (officer knew that defendant's family members had committed violent crimes in past). Furthermore, the officer's generalized concern for his safety aroused by an individual whose hands are in his pockets does not provide founded suspicion of criminal activity sufficient to justify a temporary detention. Daniels v. State, 543 So. 2d 363, 365-366 (Fla. 1st DCA 1989) (officer's standard procedure not to

speak to persons who refused to remove hands from pocket does not create founded suspicion that individual is armed); Baggett v. State, 531 So. 2d 1028, 1030 (Fla. 1st DCA 1988) (placing of hands in pocket upon sight of officer does not give rise to a founded suspicion). See also, Jenkins v. State, 524 So. 2d 1108 (Fla. 3d DCA 1988) (where officer stopped defendant and conducted pat down during an "area check," solely because defendant placed his hand behind his back detention unlawful). Thus, the trial court at bar wrongfully denied Petitioner's motion to suppress. James Johnson v. State, 610 So. 2d at 581.

In James Johnson, at the time of the seizure, the officer had observed the defendant speaking with a man on a bicycle. The man on the bicycle left as the officer approached. The defendant had money wadded in one hand and an unknown object in the other. The defendant placed the object in his pocket as the officer neared. The officer did not see any bulges or indications that the defendant carried a weapon. The appellate court found that these facts did not support a founded suspicion of criminal activity to justify a stop. 610 So. 2d at 583.

The appellate court next considered the officer's testimony that he knew the defendant, had stopped him numerous times with other people in the drug industry and may have arrested the defendant on other drug related charges. However, because the officer admitted that he personally had never seen the defendant involved in drugs before nor had he personally had problems with

the defendant in the past, these circumstances did not supply a founded suspicion to detain the defendant. 610 So. 2d at 583. Last, the appellate court declined to find the seizure was justified by the officer's observation of a bulge after he directed the defendant to turn around. 610 So. 2d at 583-584. Thus, the appellate court in James Johnson reversed the order denying the motion to suppress.

James Johnson is factually on point with the instant cause. The officer's attention was drawn to Petitioner because he communicated with occupants of a car. The officer knew Petitioner, had questioned him and had searched him in the past. However, there was no testimony that the officer had ever personally observed Petitioner engaged in criminal activity. Moreover, while the officer testified that he knew Petitioner had a prior arrest for battery on a law enforcement officer, the trial court specifically found that there was no evidence of the disposition of that case. As in James Johnson, these circumstances combined with the Petitioner having his hand in his pocket do not give rise to a founded suspicion of criminal activity. Absent a founded suspicion, Petitioner's detention violates the Fourth Amendment.

Assuming arguendo, the trial court correctly concluded that there was a consensual encounter until Petitioner placed his hands in the waistband of his pants, the trial court erred by finding that the officer was legally entitled to seize Petitioner by grabbing his hands. The facts and circumstances known to the

officer did not create a well founded suspicion that Petitioner possessed a weapon or was otherwise engaged in illegal activity. Williams v. State, 694 So. 2d 878 (Fla. 2d DCA 1997).

In Williams, the Second District Court of Appeal declined to find that officers had a lawful basis to detain a defendant who stuck his hands in the top of his pants as he was approached by a police officer behind a closed bar at 11: 00 a.m. The appellate court concluded that the officer did not have a valid basis to detain the defendant by asking him to pull his waistband forward. The facts did not provide a reason to believe that the defendant possessed a weapon or was otherwise engaged in criminal activity. Williams v. State, 694 So. 2d at 880.

At bar, as in Williams, Petitioner's act of turning away from the officer and placing his hands inside his waistband did not provide a reasonable basis to believe that Petitioner possessed a weapon. Petitioner was not engaged in illegal or suspicious activity at the time he approached the officer's vehicle and the officer did not observe anything such as a bulge to indicate that Petitioner possessed a weapon. As his furtive movement alone did not supply a lawful basis to seize and search, Petitioner's motion to suppress was wrongfully denied. This Court should reverse.

POINT II

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT PETITIONER'S CONVICTION FOR RESISTING AN OFFICER WITHOUT VIOLENCE WHERE THE STATE DID NOT ESTABLISH THAT THE OFFICER WAS ENGAGED IN THE LAWFUL EXECUTION OF A LEGAL DUTY.

Petitioner was charged by information with resisting an officer without violence. The state's theory was that Petitioner resisted, obstructed or opposed officer Hall by failing to remove his hands from the waistband of his pants at the officer's direction. Petitioner moved for judgment of acquittal contending that the state had not proved that Petitioner resisted a lawful order relying upon Mayhue v. State, 659 So. 2d 417 (Fla. 2d DCA 1995) (T-130). The trial court wrongfully denied the motion (T-132).

Section 843.02 Florida Statute defines the offense:

> Whoever shall resist, obstruct, or oppose any officer ...in the lawful execution of any legal duty without offering or doing violence to the person of the officer shall be guilty of a misdemeanor of the first degree...

An essential element of the offense is whether the officer is engaged in the lawful execution of a legal duty. Where the officer is not so engaged, a defendant may oppose the officer without violence. Lowery v. State, 356 So. 2d 1325 (Fla. 4th DCA 1978).

In Mayhue v. State, 659 So. 2d at 418, as in the instant case, the defendant was charged with possession of narcotics and obstruction of an officer without violence. He maintained that his

detention was unlawful. An officer saw the defendant pushing a shopping cart that contained a television set. Although he was not aware of any burglary or theft, the officer approached the defendant. When the officer asked the defendant his name, the defendant became verbally abusive, "turned his left side toward [the officer], while keeping his right hand close to his body, with his right hand clenched." 659 So. 2d at 417. The officer ordered the defendant to open his hand because he feared that he had a weapon. When the defendant complied, cocaine was discovered. The appellate court held that the consensual encounter became an investigatory stop when the officer ordered the defendant to open his hand. The defendant's possession of the television set combined with his "aggressive posture" however did not justify an investigatory stop. As the defendant was illegally detained, he was entitled to oppose the officer without violence. Thus, the appellate court reversed his obstruction conviction and directed his discharge on remand.

Mayhue is on point with the instant case. Officer Hall did not have a valid basis to conduct an investigatory stop of Petitioner. (See point I, supra.) As Petitioner's detention was unlawful, he was entitled to oppose officer Hall without violence. This Court should reverse his obstruction conviction and remand the cause with directions to order his discharge.

CONCLUSION

Based upon his argument and authorities cited in Point I, Petitioner requests that this Court reverse the order of District Court of Appeal which affirmed the trial court's denial of his motion to suppress cocaine and marijuana and remand the cause with appropriate directions. As to Point II, Petitioner requests that this Court set aside his conviction in count III for resisting without violence and order his discharge for that offense.

Respectfully Submitted,

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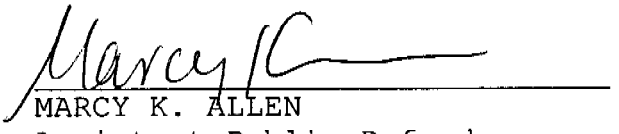

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to CELIA TERENZIO, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 11 day of DECEMBER, 1998.

MARCY K. ALLEN
Assistant Public Defender