ORIGINAL

IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES BROWN,

Petitioner,

vs.

CASE NO. 93,942
(4th DCA #96-3638)

STATE OF FLORIDA,

Appellee.
_____/

PETITIONER'S BRIEF ON JURISDICTION

On appeal from the Circuit Court of the Nineteenth Judicial Circuit In and For St. Lucie County, Florida [Criminal Division]

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

MARCY K. ALLEN
Assistant Public Defender
Attorney for Willie James Brown
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 332161

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial, In and For St. Lucie County, Florida.

The following symbol will be used:

A = Appendix

STATEMENT OF THE CASE AND FACTS

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. Pretrial, Petitioner moved to suppress evidence seized during an unlawful detention. The facts were set forth in the opinion of the District Court as follows:

> Officer Hall of the Fort Pierce Police Department was patrolling a "high crime, high drug" area when he saw appellant, Brown on foot, approach a vehicle stopped at a traffic signal. Brown yelled into the vehicle, but it sped away. Hall drove toward Brown, who ran up to the patrol car in a "very excited" state and asserted that he was trying to get a ride home. Feeling vulnerable in his patrol car, Hall exited to speak with Brown.
>
> Hall knew Brown from prior contacts and knew of some other officers' arrests of Brown. One of those arrests was for battery on a law enforcement officer and resisting arrest with violence. When he asked Brown his name, however, Brown gave him a fictitious one. Hall noticed that Brown's hands were in his pocket. Knowing that one of the most basic elements of officer safety is never to talk with a potential suspect who has his hands in his pockets, Hall asked Brown if he would take his hands out of his pockets. Brown complied but then reached into the front of his pants underneath his waistband and turned away from Hall. At that point Hall was in fear that Brown was going for some weapon. Hall then reached around to grab Brown's hands. Hall and Brown fell to the ground as the officer yelled for Brown to take his hands out of his pants. Eventually, Hall gained control of Brown and placed him under arrest for resisting arrest. A subsequent search of Brown revealed drugs.

Brown v. State, 23 Fla. L. Weekly D 1829a (Fla. 4th DCA Aug. 5, 1998). The trial court denied the motion. Petitioner proceeded to jury trial, where his renewed motion was denied. He was found guilty as charged, convicted and sentenced.

On direct appeal to the Fourth District Court of Appeal, the order of suppression was affirmed. Notice of invocation of discretionary jurisdiction was filed on September 3, 1998.

SUMMARY OF ARGUMENT

The instant decision of the Fourth District Court of Appeal holding that an officer may order a defendant to remove his hands from his pockets without having a founded suspicion of criminal activity directly and expressly conflicts with the decision of the Third District Court of Appeal in Evans v. State, 546 So. 2d 1125 (Fla. 3d DCA 1989), and the decision of the First District Court of Appeal in Johnson v. State, 610 So. 2d 581 (Fla. 1st DCA 1992), on the same question of law. As authorized by Article V, Section 3(b)(3) of the Florida Constitution, this Court should exercise its discretion to accept review of the opinion of the Fourth District Court of Appeal in Brown v. State, 23 Fla. L. Weekly 1829a (Fla. 4th DCA Aug 5, 1998).

ARGUMENT

THIS COURT HAS JURISDICTION OVER THE INSTANT DECISION OF THE FOURTH DISTRICT ON THE BASIS OF DIRECT AND EXPRESS CONFLICT WITH TWO DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

Article V, Section 3(b)(3) of the Constitution of Florida empowers this Court to review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal. The Florida Star v. B.J.F., 530 So. 2d 286,288 (Fla. 1988). Here, the decision of the Fourth District Court of Appeal conflicts with the decision of the Third District Court of Appeal in Evans v. State, 546 So. 2d 1125 (Fla. 3d DCA 1989), and the decision of the First District Court of Appeal in Johnson v. State, 610 So. 2d 581 (Fla. 1st DCA 1992), on the same question of law.

In the instant case, the Fourth District Court of Appeal held that a police officer need not have a founded suspicion that a citizen is engaged in criminal activity prior to directing the citizen to remove his hands from his pockets. Despite the directive, the officer and citizen remain engaged in a citizen encounter. Judge Warner, writing for the court explained,

> In the instant case the initial contact between the officer and Brown constituted a consensual encounter. The officer asked Brown his name and asked him to take his hands out of his pocket. Under Popple[1], Brown was free to comply or ignore the officer's requests. Brown actually complied with both requests. However, after having complied, Brown placed his hands into his pants and turned around. At that time, the officer testified that Brown was no longer free to leave, and the trial court determined that the officer had reasonable suspicion to believe that Brown was going for a weapon and endangering the safety of the officer.

Brown v. State, 23 Fla. L. Weekly at 1830.

---

[1]Popple v. State, 626 So. 2d 185 (Fla. 1993).

In Evans v. State, 546 So. 2d 1125 (Fla. 3d DCA 1989), the defendant was seated on a bench at 4:00 a.m. with his hands in this pockets. The officer "asked" the defendant to remove his hands from his pocket 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 police-man'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 Third District concluded that the cocaine was recovered as a result of a "constitutionally unjustified police order."

In Johnson v. State, 610 So. 2d 581 (Fla. 1st DCA 1992), 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. The First District 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 officer's directive to remove his hands from his pockets and turn around, he was seized. 610 So. 2d at 582.

Thus, the Third and First District Courts of Appeal have concluded that a seizure occurs where an officer asks a citizen to remove his hands from his pocket because a reasonable citizen has no choice but to comply. The Fourth District Court of Appeal, on the other hand, has held that no seizure occurs because a citizen may simply disregard the officer's "request" and walk away with impunity. In light of these conflicting conclusions, it is important that this Honorable Court accept

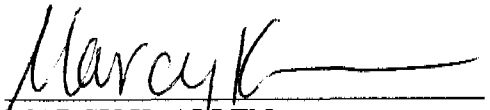
jurisdiction over the instant cause to correct the misapplication of Fourth Amendment law by the District Court of Appeal.

CONCLUSION

Based upon the argument and authorities cited above, Petitioner requests that this Court exercise its jurisdiction pursuant to Article V, Section 3(B)(3) of the Florida Constitution to review the opinion of the Fourth District Court of Appeal in the instant cause.

Respectfully Submitted,

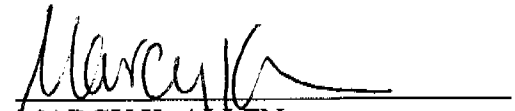
RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit



MARCY K. ALLEN
Assistant Public Defender
Attorney for Willie Brown
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 332161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to DOUGLAS J. GLAID, Assistant Attorney General, 110 SE 6th Street, 9th Floor, Ft. Lauderdale, Florida 33301, this 14 day of SEPTEMBER, 1998.



MARCY K. ALLEN
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES BROWN,

Petitioner,

vs.

CASE NO.
(4th DCA #96-3638)

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO

PETITIONER'S BRIEF ON JURISDICTION

INDEX TO APPENDIX

arguably undermines *Zuckerman*'s assertion that an inter vivos trust is not a testamentary will substitute. Nevertheless, we agree with the trial court. Section 689.075(1) indicates that an inter vivos trust should not be deemed the functional equivalent of a will, even though its testamentary aspects must be executed like one. *See* § 689.075(1), Fla. Stat. (1997); *see also Zuckerman*, 615 So. 2d at 663 ("If by the terms of the trust an interest passes to the beneficiary during the life of the settlor, although that interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not testamentary.")

Finally, Shirley makes an analogy to cases which hold that a court may not reform transfers by deed after the death of the grantor based on a unilateral mistake. She cites *Harrod v. Simmons*, 143 So. 2d 717 (Fla. 2d DCA 1962), and *Triesback v. Tyler*, 62 Fla. 580, 56 So. 947 (Fla. 1911). In *Harrod*, the court refused to reform a deed after the death of the grantor where the deed omitted a piece of property that the grantor allegedly intended to convey. 143 So. 2d at 718. The *Harrod* court relied on *Triesback*, which did not allow reformation after the death of the grantor where the deed incorrectly described a parcel of land. 62 Fla. at 581, 56 So. at 948.

A closer examination reveals that the courts in *Harrod* and *Triesback* refused to reform the deeds due to a lack of consideration. They found that love and affection amounted to inadequate consideration to support a grantee's acquisition, by way of reformation, of property which would otherwise belong to the estate and pass to other heirs through inheritance. *Harrod*, 143 So. 2d at 719; *Triesback*, 62 Fla. at 581, 56 So. at 948. *Triesback* stated that, in the absence of valuable consideration, "the grantee has no equity to reform the deed to the disinherison of the other heirs of the grantor equally entitled to her bounty." 62 Fla. at 581-82; 56 So. at 948. These cases stand for the proposition that reformation of a deed is not available, even for a mistake, where the grantee seeks to increase the size of the grant against the interests of the grantor-donor or its estate.

Unlike those cases, the parties here are not proceeding against the grantor or his estate, but instead, against each other. Cases from other jurisdictions indicate that reformation of a trust based on mistake is permissible where the action is between competing beneficiaries. *See Reinberg v. Heiby*, 88 N.E.2d 848 (Ill. 1949); *Berman v. Sandler*, 399 N.E.2d 17 (Mass. 1980); *Roos v. Roos*, 203 A.2d 140 (Del. Ch. 1964). The court in *Reinberg* wrote:

> The facts and circumstances recounted impel the conclusion that it is not merely the right but the undoubted duty of the court of equity to reform the instrument to conform with the intention of the grantor. The power and authority of a court of equity to correct the mistakes of a scrivener incorporated into a contract, deed, or other instrument is so well known as to require no citation of authorities. *While it is equally true that equity will not interfere in favor of a volunteer against his grantor and those claiming under him because to do so would enlarge the bounty of a recipient at the expense of and against the interest of the donor grantor, this exception can have no application to the present factual situation. Here, the grantor's interest in the property itself is not involved. The contest is not one between a volunteer and a grantor or the grantor's successors in interests. The present litigants are co-beneficiaries of a voluntary trust agreement. Their claims arise out of the same instrument and are not founded in any way on their additional status as heirs of the grantor.*

88 N.E.2d at 852 (emphasis added); *see also*, 66 Am. Jur. 2d *Reformation of Instruments* § 43 (2d ed. 1973) ("The rule against reformation of voluntary conveyances has its own limitation and exceptions. In a proper case, relief may be had as between parties claiming under the same instrument, the interests of the grantor not being at stake."). *Reinberg*, *Berman*, and *Roos* all reformed trusts after the death of the settlor where clear and convincing proof of a drafting error existed. The court in *Reinberg* described the policy behind allowing a trust reformation as follows:

> The decretal order of the circuit court reforming the trust agreement to correct the admitted error of the scrivener is not adverse to the interest of the grantor. On the contrary, the decree is in harmony with his interest, since it effectuates his manifest intention to divide the property in question equally between his two daughters. Indeed, this is a compelling reason for holding that a plaintiff beneficiary in a voluntary trust agreement has the right to have the agreement reformed as against the defendant, the other beneficiary, claiming under the same instrument. Although defendant specifically admits that the trust indenture, as uncorrected, fails to carry out the actual intention of the grantor, she suggests, nevertheless, that a court of equity would not reform the agreement, thereby permitting the manifest error of the scrivener to be perpetuated, upon the ground that plaintiff, having paid nothing has lost nothing. By the same token, defendant has paid nothing and seeks to become greatly enriched at the plaintiff's expense and contrary to the intention of the grantor.

88 N.E.2d at 852; *see also* 89 C.J.S. *Trusts* § 86 (1955) ("A voluntary deed of trust which, through mistake, failed to express the intention of the settlor, may be reformed even after the settlor's death, even though reformation benefits one beneficiary and harms another . . . . [I]n an action by one or more beneficiaries under a trust agreement against the others, the agreement may be reformed in equity after the death of the donor, where the mistake in the agreement is conclusively established."); Restatement (Second) of Trusts § 333 (1959) Scott, Trusts § 333.4 (4th ed. 1989).

Like *Reinberg*, *Berman*, and *Roos*, we hold that a trust with testamentary aspects may be reformed after the death of the settlor for a unilateral drafting mistake so long as the reformation is not contrary to the interest of the settlor. We affirm as to all other issues raised based on law of the case or as being without merit. (KLEIN and GROSS, JJ., concur.)

---

[1]We recognize that since *Forsythe*, Florida courts have held that neither a mistake in the inducement nor a mistake in the contents is sufficient to invalidate a will. *See Azcunce v. Estate of Azcunce*, 586 So. 2d 1216 (Fla. 3d DCA 1991); *In re Mullin's Estate*, 128 So. 2d 617 (Fla. 2d DCA 1961).

* * *

Criminal law—Search and seizure—Detention—Founded suspicion—Where officer knew that defendant who approached officer's patrol car had prior arrest for battery on law enforcement officer, officer exited his car and asked defendant to remove his hands from his pockets, defendant removed his hands from his pockets, but reached into the front of his pants underneath his waistband and turned away from officer, officer had reasonable suspicion to believe that defendant was going for weapon—After officer reached around to grab defendant's hands, and officer and defendant fell to the ground as officer yelled at defendant to take his hands out of his pants, officer had probable cause to arrest defendant for resisting an officer and to conduct search incident to arrest

WILLIE JAMES BROWN, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 96-3638. Opinion filed August 5, 1998. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Larry Schack, Judge; L.T. Case No. 96-2249 CF. Counsel: Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Douglas J. Glaid, Assistant Attorney General, West Palm Beach, for appellee.

(WARNER, J.) In this appeal, appellant claims that the trial court erred in failing to suppress evidence where there was no founded suspicion that appellant was engaged in criminal conduct at the time of the detention and search. We hold that the officer had reasonable suspicion that appellant was concealing a weapon which could have been turned on the officer and thus affirm.

Officer Hall of the Fort Pierce Police Department was patrolling a "high crime, high drug" area when he saw appellant, Brown, on foot, approach a vehicle stopped at a traffic signal. Brown yelled into the vehicle, but it sped away. Hall drove towards Brown, who ran up to the patrol car in a "very excited" state and asserted that he was trying to get a ride home. Feeling vulnerable in his patrol car, Hall exited to speak with Brown.

Hall knew Brown from prior contacts and knew of some other officers' arrests of Brown. One of those arrests was for battery on a law enforcement officer and resisting arrest with violence. When he

asked Brown his name, however, Brown gave him a fictitious one. Hall noticed that Brown's hands were in his pocket. Knowing that one of the most basic elements of officer safety is never to talk with a potential suspect who has his hands in his pockets, Hall asked Brown if he would take his hands out of his pockets. Brown complied but then reached into the front of his pants, underneath his waistband and turned away from Hall. At that point, Hall was in fear that Brown was going for some weapon. Hall then reached around to grab Brown's hands. Hall and Brown fell to the ground as the officer yelled for Brown to take his hands out of his pants. Eventually, Hall gained control of Brown and placed him under arrest for resisting arrest. A subsequent search of Brown revealed drugs.

Brown moved to suppress the drugs as the result of an unlawful search. The trial court denied the motion, reasoning that the situation started as a consensual encounter. When Brown made a move that "clearly would cause a reasonable police officer to be concerned for his or her safety," the officer had reasonable suspicion to believe that Brown was going for a weapon. Hall was thus entitled to require Brown to remove his hands from his pants. When he failed to do so, the officer then had probable cause to arrest Brown for resisting an officer, and the search was incident to that arrest.

In *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993), the supreme court explained the 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. § 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).
>
> ....
>
> [T]he 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); § 901.15 Fla. Stat. (1991).

In the instant case, the initial contact between the officer and Brown constituted a consensual encounter. The officer asked Brown his name and asked him to take his hands out of his pocket. Under *Popple*, Brown was free to comply or ignore the officer's requests. Brown actually complied with both requests. However, after having complied, Brown placed his hands into his pants and turned around. At that time, the officer testified that Brown was no longer free to leave, and the trial court determined that the officer had reasonable suspicion to believe that Brown was going for a weapon and endangering the safety of the officer.

Reasonable suspicion requires articulable facts on which to base the officer's investigative stop. In the present case, the officer had prior personal contacts with Brown and knew that Brown had been arrested for battery on a law enforcement officer. When Brown first ran up to the car, the officer considered his movements threatening. More threatening was his sudden movement putting his hands into his pants and turning away from the officer. Based upon the officer's general experience and specific knowledge of this particular individual, the trial court did not err in concluding that the officer had reasonable suspicion to seize Brown. *See King v. State*, 696 So. 2d 860, 862 (Fla. 2d DCA), *dismissed*, 705 So. 2d 9 (Fla. 1997).

Appellant cites *Alexander v. State*, 693 So. 2d 670 (Fla. 4th DCA 1997), for support. However, in *Alexander* the officer only saw the defendant moving his hands in his waistband while looking at the officer. *See id.* at 671. Unlike the instant case, there was no furtive movement or concealing action from the officers, and the officers had no independent knowledge of the suspect. More on point is *Wilson v. State*, 569 So. 2d 516 (Fla. 4th DCA 1990), in which this court approved a stop and frisk where the defendant made a sudden furtive movement to the front area of his pants as if reaching for a gun. This fact, viewed through the officer's fourteen years experience, was sufficient to provide reasonable suspicion for a brief investigatory stop and frisk. *See id.* at 516 (citations omitted).

Our affirmance should not imply that any consensual encounter may escalate to an investigative stop simply because the officer generally has safety concerns. The mere fact that a citizen refuses to comply with an officer's request in a consensual encounter cannot be sufficient to provide the officer with reasonable suspicion that the commission of a crime is imminent. If the citizen is not free to ignore the officer's requests in such an encounter, then it is clearly not consensual. *See Popple*, 626 So. 2d at 187-88.

Finding that the detention of appellant was lawful, we also affirm the remaining issue raised by the appellant.

Affirmed. (FARMER, J., and OWEN, WILLIAM C., JR., Senior Judge, concur.)

* * *

Criminal law—Coram nobis—Involuntariness of plea—Claim that plea was involuntary because defendant was not informed that adjudication would have an adverse effect on her status as a resident alien states an error of fact rather than an error of law—Coram nobis is available to correct alleged error—Conflict certified—Claim barred by laches where claim is made more than ten years after entry of plea, and there is no transcript available of plea colloquy

ERA GREGERSEN, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 97-1373. Opinion filed August 5, 1998. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; John L. Phillips, Judge; L.T. Case Nos. 86-748CF, 85-5499CF, 84-8220CF, 84-3620CF A02. Counsel: Neal Randolph Lewis, Miami, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

(KLEIN, J.) In January 1986 appellant, a German national with permanent resident alien status in the United States, entered a plea after being charged with grand theft and writing worthless checks. She received probation which was terminated in 1987. In 1996 she filed this petition for writ of coram nobis alleging that she was not informed that her adjudication would have an adverse effect on her status as a resident alien. The state responded alleging, among other things, that her claim was barred by laches. The trial court denied the petition without having an evidentiary hearing, and appellant appeals. We affirm.

The third district has recently concluded that a trial court's failure to inform a defendant of the deportation consequences of a plea is not a basis for coram nobis relief. In *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA 1998), the third district noted that the function of coram nobis is to correct errors of fact, not errors of law, and concluded that the court's failure to inform a defendant about deportation consequences is an error of law, explaining:

> In these cases, the defendants do *not* seek coram nobis relief asserting errors of fact or newly discovered evidence, but rather on the basis of an error of law, to wit, an irregularity in their plea colloquy rendering their pleas involuntary.

Id. at 1062.

In one of the earliest cases allowing a writ of coram nobis in Florida, *Nickels v. State*, 98 So. 502 (Fla. 1923), the defendant in a rape case was attempting to set aside a plea of guilty which he knew would result in his being hanged. He alleged that he had entered his plea because he was afraid of being killed through mob violence. After acknowledging that coram nobis is available only for errors of fact and not errors of law, the Florida Supreme Court held that a plea of guilty entered through fear or coercion is an error of fact which may be challenged by coram nobis.

The plea in *Nickels* was, of course, an involuntary plea. So was

Edwin Anthony EVANS, Appellant,

v.

The STATE of Florida, Appellee.

No. 89–204.

District Court of Appeal of Florida, Third District.

July 18, 1989.

Appeal was taken from order of the Dade County Circuit Court, Arthur I. Snyder, J., refusing to suppress evidence that had fallen from defendant's pocket when he was confronted by police officer. The District Court of Appeal, Schwartz, C.J., held that evidence was revealed as result of constitutionally unjustified police order.

Reversed.

Drugs and Narcotics ⇐185.10

Packet of cocaine that dropped from person's pocket after police officer "asked" person to take his hands out of his pockets for officer's "own safety" was not voluntarily abandoned, but revealed because of constitutionally unjustified police order; request was made after officer, without probable cause or reasonable suspicion, confronted person, who was sitting on park bench in early morning.

Bennett H. Brummer, Public Defender and N. Joseph Durant, Jr., Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen. and Joni B. Braunstein, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, C.J., and BASKIN and FERGUSON, JJ.

SCHWARTZ, Chief Judge.

Without probable cause or reasonable suspicion, Officer Picallo confronted Evans sitting on a park bench at 4 o'clock in the morning. After he "asked" the defendant to take his hands out of his pockets, for, as Picallo stated, "[the officer's] own safety," Evans did so and a small packet of cocaine dropped to the ground.[1] The cocaine was not but should have been suppressed below. 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). Hence, the contraband was not, as the trial judge held, voluntarily abandoned, but was rather revealed only because of a constitutionally unjustified police order. See *Wallace v. State*, 540 So.2d 254 (Fla. 4th DCA 1989); *Jenkins v. State*, 524 So.2d 1108 (Fla.3d DCA 1988).

Reversed.

1. The officer described what happened after he inquired after Evans's well-being:

Q. Did he respond to you when you asked him how he was doing?
A. No.
Q. What did he do?
A. He just started walking towards me basically.
Q. At what time—what did you ask him?
A. Remove his hands from his pockets.
Q. Did you ask him or order him?
A. I asked him.
Q. Was he free to leave?
A. Yes, he was.
Q. What, if anything, did the defendant do?
A. He removed his hands from his pockets.
Q. What, if anything, did you observe?
A. When he removed I believe it was his right hand, a small packet fell out which after I observed it contained powder cocaine.
Q. It was in a clear plastic bag?
A. Yes, it was.

if the killing was either justifiable or excusable homicide, as I previously explained those terms."

[2, 3] In *Hedges v. State*, 172 So.2d 824 (Fla.1965), the Supreme Court held in a unanimous opinion that in order to supply a complete definition of manslaughter as a degree of unlawful homicide, it is necessary to include a definition of its exclusions. Justifiable homicide and excusable homicide are exclusions to unlawful homicide. *Kelsey v. State*, 410 So.2d 988 (Fla. 1st DCA 1982). The Supreme Court has since stated that manslaughter is a "residual offense, defined by reference to what it is not." *Stockton v. State*, 544 So.2d 1006, 1008 (Fla.1989). In order to define manslaughter completely, the definitions of justifiable and excusable homicide and murder must be included. *Id.*

[4] The state argues that these rules of law notwithstanding, we should affirm, since the trial court cross-referenced justifiable and excusable homicide during the reinstruction on manslaughter. In our view, such cross-referencing does not meet the requirements of *Stockton*. We may assume that the jurors could not adequately remember the definitions of manslaughter and second-degree murder, since they requested reinstruction. The state would, in essence, ask us nonetheless to find that the same jurors, while uncertain of the definitions of the crimes, could nonetheless clearly recall the definitions of justifiable and excusable homicide, and that the mere mention of these words must have served to trigger this memory with enough clarity in their collective minds to rectify any technical shortcoming in the instruction. We defer to the case law which requires a complete instruction upon request. A complete instruction requires a definition of not only what manslaughter is, but what it is not.

REVERSED and REMANDED for a new trial on the charge of manslaughter.

MINER and ALLEN, JJ., concur.

James JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

No. 91-2922.

District Court of Appeal of Florida, First District.

Dec. 10, 1992.

Rehearing Denied Feb. 1, 1993.

Defendant was convicted in the Circuit Court, Duval County, David Wiggins, J., of possession of cocaine, and he appealed. The District Court of Appeal, Shivers, J., held that officer lacked founded suspicion of criminal activity to justify investigative stop of defendant, and thus evidence discovered in subsequent search should have been suppressed.

Reversed.

Booth, J., dissented and filed opinion.

1. Arrest ⇐68(4)

For purposes of Fourth Amendment, "seizure" occurs when one's freedom of movement has been restrained, either by physical force or showing of authority, so that surrounding circumstances demonstrate reasonable person would not have felt free to leave. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arrest ⇐68(4)

Drug suspect was "seized" by approaching officer; officer's order for suspect to take his hands out of his pockets and to turn around was directive that suspect was not free to disregard. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

3. Arrest ⇐63.5(5)

Officer lacked founded suspicion of criminal activity such as would justify stop of drug suspect; suspect, though in high crime area, was only seen talking to another person with what appeared to be cash in his hand, with no weapon seen and no exchange between individuals observed. U.S.C.A. Const.Amends. 4, 14; West's F.S.A. § 901.151.

4. Arrest ⇐63.5(4)

Flight of bicyclist from approaching officer, even in high crime area, does not of itself give rise to founded suspicion of criminal activity and does not justify stop and frisk, especially where person is detained as result of companion's flight. U.S.C.A. Const.Amends. 4, 14; West's F.S.A. § 901.151.

5. Arrest ⇐63.4(5)

Drug suspect's quick movement as if to conceal something was legally insufficient to justify investigatory stop, even though neighborhood was known to have high crime rate. U.S.C.A. Const.Amends. 4, 14; West's F.S.A. § 901.151.

6. Arrest ⇐63.5(4)

Officer's knowledge that drug suspect had prior drug problem did not give rise to founded suspicion, absent more, warranting investigative stop. U.S.C.A. Const. Amends. 4, 14; West's F.S.A. § 901.151.

7. Arrest ⇐63.5(5)

Fact that drug suspect had cash in hand did not create founded suspicion of criminal activity sufficient to warrant detention where officer observed no exchange of drugs, money or anything else. U.S.C.A. Const.Amends. 4, 14; West's F.S.A. § 901.151.

8. Arrest ⇐63.5(5)

Initial stop of drug suspect could not be justified by officer's observation, after illegal detention, of bulge in suspect's rear pants pocket. U.S.C.A. Const.Amends. 4, 14; West's F.S.A. § 901.151.

Nancy A. Daniels, Public Defender, Nada M. Carey, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Amelia L. Beisner, Asst. Atty. Gen., Tallahassee, for appellee.

SHIVERS, Judge.

Appellant pled nolo contendere to possession of cocaine and possession of a concealed weapon by a convicted felon, specifically reserving the right to take this appeal from the denial of his motion to suppress. The facts of this case compel us to reverse the order denying the motion to suppress, because the police officer lacked a founded suspicion of criminal activity or probable cause to believe Appellant was armed. The subsequent patdown and warrantless search were invalid as a result of the illegal detention, and the evidence obtained should have been suppressed. *Baggett v. State*, 531 So.2d 1028 (Fla. 1st DCA 1988).

On July 3, 1991, Officer Bates was patrolling an inner-city section of Jacksonville known as a high drug area. He had been told to go out and look for drug activity. About 7:30 P.M., the officer observed Appellant standing in front of a house at an intersection where the police had made numerous prior drug arrests. However, the Sheriff's Department had received no complaints on that day about drug-related activities there. Officer Bates saw Appellant talking to another man, who was on a bicycle. The officer did not see either individual hand anything to the other. As soon as he saw the approaching patrol car, the man on the bicycle hurriedly rode away.

The officer was about 30 feet away and saw what appeared to be cash wadded in Appellant's hand and an object in the other. Bates testified that Appellant quickly stuck "a small round object" in his right pants pocket as the officer approached, but Bates could not see what the object was and did not know whether it was a weapon. Based on his police experience, Officer Bates concluded that a drug transaction had occurred. At the suppression hearing, he said drugs, knives and guns are "very common," and in a situation where a drug deal

is suspected, for safety reasons he approaches a suspect as if the person is armed.

Bates could not recall the exact details of what followed, and he relied on his prior deposition testimony indicating he had told Appellant to remove his hands from his pockets and to turn around so the officer could get a good look at him. Prior to instructing Appellant to turn around, the officer had seen no bulges or anything else that looked like a weapon. However, when Appellant turned around, Bates saw a long, narrow closed object, about six inches long, that created a diagonal bulge in the rear pants pocket and appeared to be a pocket knife. The officer removed "a razor type knife" from Appellant's pocket and performed a patdown. Appellant was arrested for carrying a concealed weapon and then was searched, revealing a small plastic container with three pieces of crack cocaine in the right front pants pocket.

[1, 2] Appellant contended the officer lacked a lawful reason to perform an investigatory stop and to detain him. We agree. For 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. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *J.C.W. v. State*, 545 So.2d 306, 307 (1st DCA), *rev. den.*, 553 So.2d 1165 (Fla.1989); *Evans v. State*, 546 So.2d 1125 (Fla. 3d DCA 1989) (cocaine should have been suppressed because of invalid seizure resulting from officer's asking defendant to remove hands from pockets). Appellant was seized, as Officer Bates' order for Appellant to take his hands out of his pockets and to turn around was a directive that Appellant was not free to disregard. *See Dees v. State*, 564 So.2d 1166, 1168 (Fla. 1st DCA 1990).

[3] To justify such a seizure, a law enforcement officer must have a founded suspicion of criminal activity. Section 901.151, Florida Statutes (1989); *Terry*. A founded suspicion requires a "factual basis in the circumstances observed by the officer." *Gipson v. State*, 537 So.2d 1080, 1081 (Fla. 1st DCA 1989). We must focus on the reasonableness of the stop. *Steele v. State*, 561 So.2d 638, 642 (Fla. 1st DCA 1990). Appellant was in his own neighborhood, albeit a high-crime area, talking to another person when the police arrived. Officer Bates saw no weapon and articulated no reason initially to believe Appellant was carrying a weapon. Although he saw what appeared to be cash in Appellant's hand, the officer observed no exchange of any kind between the two individuals. In *Curry v. State*, 532 So.2d 1316, 1317–18 (Fla. 1st DCA 1988), we stated that the officer's assessment of the circumstances in their totality "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." These facts are insufficient to provide the requisite founded suspicion for an investigatory stop and detention.

[4] First, the flight of the unidentified bicyclist from an approaching officer, even in a crime area, does not of itself give rise to a founded suspicion of criminal activity and does not justify a stop and frisk, *Daniels v. State*, 543 So.2d 363, 365 (Fla. 1st DCA 1989), especially where the person is detained as a result of a companion's flight. *Smith v. State*, 592 So.2d 1239, 1240 (Fla. 2d DCA 1992).

[5] Second, a quick movement as if to conceal something is a legally insufficient reason to justify an investigatory stop. *Gipson*, 537 So.2d at 1082; *Ruddack v. State*, 537 So.2d 701 (Fla. 4th DCA 1989); *Walker v. State*, 514 So.2d 1149, 1150 (Fla. 2d DCA 1987). Appellant's placing his hand in his pocket, without more, did not justify the stop, *Dees*, 564 So.2d at 1168, even though the neighborhood was known to have a high crime rate. *J.D. v. State*, 568 So.2d 99 (Fla. 3d DCA 1990); *Jenkins v. State*, 524 So.2d 1108 (Fla. 3d DCA 1988). *Cf. State v. Anderson*, 591 So.2d 611 (Fla.1992) (undercover officers saw series of hand transactions apparently distributing something among pedestrians and drivers, and defendant threw an object into

a nearby planter and engaged in other furtive, suspicious acts upon seeing police).

[6] Third, Officer Bates testified he knew Appellant and had stopped him on numerous occasions in the past associating with other people linked to drugs, and he believed he had arrested him on drug-related charges. On cross-examination, however, Bates acknowledged that without reviewing the arrest record he could not ascertain whether or not he had arrested Appellant before. He had observed Appellant exiting crack houses and abandoned buildings in areas known for drugs. Bates admitted that in a deposition he had said he had never seen Appellant involved in criminal activity and had never had any problems with him. Although Bates knew Appellant had a prior drug problem, under these circumstances that fact did not raise a mere hunch to the level of founded suspicion. *See Smith v. State*, 592 So.2d 1206, 1207–08 (Fla. 2d DCA 1992); *Shackelford v. State*, 579 So.2d 306 (Fla. 2d DCA 1991); *Mosley v. State*, 519 So.2d 58 (Fla. 2d DCA 1988) (reversing denial of suppression order where appellant clenched fists in nonthreatening manner and was accompanying purported drug dealer in high-crime area).

[7] Finally, simply having cash in his hand did not create a founded suspicion of criminal activity sufficient to warrant detention, as the officer observed no exchange of drugs, money, or anything else. *See Bush v. State*, 594 So.2d 793 (Fla. 3d DCA 1992); *Bolinger v. State*, 576 So.2d 875 (Fla. 2d DCA 1991); *Dames v. State*, 566 So.2d 51 (Fla. 1st DCA 1990); *Peabody v. State*, 556 So.2d 826 (Fla. 2d DCA 1990); *Gipson. Cf. Winters v. State*, 578 So.2d 5, 6 (2d DCA), *rev. den.*, 589 So.2d 292 (Fla. 1991) (temporary detention justified because officer saw defendant lean into vehicle and accept money from driver); *Blanding v. State*, 446 So.2d 1135 (Fla. 3d DCA 1984) (rapid succession of transactions involving exchange of cash and unseen item in plastic bag).

[8] The initial stop cannot be justified by Officer Bates' observation, after the illegal detention, of a bulge in the rear pants pocket. *Daniels.* Section 901.151(5), Florida Statutes (1989), provides that if the officer has probable cause to believe the detainee is armed with a dangerous weapon, a search can be conducted to the extent necessary to disclose the presence of the weapon. *Johnson v. State*, 547 So.2d 699, 701 (Fla. 1st DCA 1989). The officer testified he conducted the patdown as a matter of routine police procedure, not because he could articulate any specific reason to believe Appellant was armed. As in *Daniels*, the officer would have had no reason to fear for his own safety had he not impermissibly stopped Appellant in the first place. *Id.*, 543 So.2d at 366. The timing of the officer's conclusions is significant here, and "the attempt to bootstrap the justification for the stop" based on Officer Bates' belated suspicion that Appellant was armed does not comport with stop and frisk law. *Daniels*, 543 So.2d at 366. *Cf. Williams v. State*, 492 So.2d 1051, 1054 (Fla.1986), in which the conviction was affirmed where officers, observing a bulge under the defendant's clothing as he was informing them he was on parole for armed robbery, formulated a reasonable suspicion to believe the suspect was armed. They discovered a loaded pistol during the subsequent lawful patdown.

Because the evidence against Appellant was obtained pursuant to an illegal search and seizure, the Fourth Amendment requires a reversal of the trial court's denial of the motion to suppress. Fla. Const. art. I, § 12.

REVERSED.

WEBSTER, J., concurs.

BOOTH, J., dissents with opinion.

BOOTH, Judge, dissenting.

Officer Bates testified he saw appellant place a small, round object in his pocket, as part of what, based on the officer's experience and knowledge, was the culmination of a drug transaction between appellant and a man on a bicycle. The trial court ruled that the officer had a founded suspicion that a crime had taken place. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d

889 (1968). The subsequent pat-down search, which revealed cocaine and a concealed weapon, was proper. We should uphold the trial court's decision on the motion to suppress and affirm the judgment of conviction.

1

Miriam EGAN, Appellant,

v.

FLORIDA ATLANTIC UNIVERSITY and Division of Risk Management, Appellees.

No. 91-4116.

District Court of Appeal of Florida, First District.

Dec. 10, 1992.

Rehearing Denied Jan. 20, 1993.

Appeal was taken from order of Judge of Compensation Claims, Lisa J. Campbell, J. The District Court of Appeal, Allen, J., held that the inclusion of the word "stress" in the statutory provision that mental or nervous injury due to stress, fright or excitement only shall be deemed not to be an injury by accident arising out of the employment was merely a codification and affirmation of existing case law; mental or nervous injuries occasioned solely by stress, without any contributing physical injury, are not compensable.

Affirmed.

Workers' Compensation ⇐546

The inclusion of the word "stress" in the statutory provision that mental or nervous injury due to stress, fright or excitement only shall be deemed not to be an injury by accident arising out of the employment was merely a codification and affirmation of existing case law; mental or nervous injuries occasioned solely by stress, without any contributing physical injury, are not compensable. West's F.S.A. § 440.02(1).

See publication Words and Phrases for other judicial constructions and definitions.

Peter S. Schwedock, P.A., Miami, for appellant.

Kent S. Pratt and Thomas M. Bates of Gaunt, Pratt & Radford, P.A., West Palm Beach, for appellees.

ALLEN, Judge.

In this workers' compensation appeal the parties dispute the effect of an amendment to section 440.02(1), Florida Statutes (1990), by which the word "stress" was included in the statutory provision that "mental or nervous injury due to stress, fright or excitement only ... shall be deemed not to be an injury by accident arising out of the employment." We conclude that this amendment was merely a codification and affirmation of the existing case law, as reflected in decisions such as *LaFave v. Bay Consolidated Distributors,* 546 So.2d 78 (Fla. 1st DCA 1989). Mental or nervous injuries occasioned solely by stress, without any contributing physical injury, are not compensable. *See City of Holmes Beach v. Grace,* 598 So.2d 71 (Fla.1992).

The appealed order is affirmed.

WOLF and WEBSTER, JJ., concur.

2

Thomas Joseph ARNOLD and Richard Keith Baylor, Appellants,

v.

STATE of Florida, Appellee.

Nos. 91-722, 91-877.

District Court of Appeal of Florida, First District.

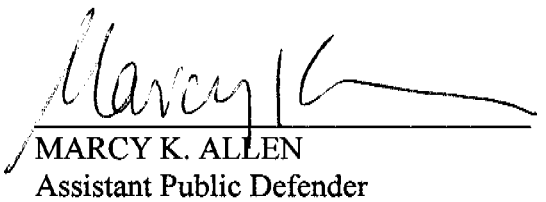
Dec. 10, 1992.

Rehearing Denied Jan. 15, 1993.

Defendants were convicted in Circuit Court, Leon County, F.E. Steinmeyer, J., of

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to DOUGLAS J. GLAID, Assistant Attorney General, 110 SE 6th Street, 9th Floor, Ft. Lauderdale, Florida 33301, 33401, this 14 day of SEPTEMBER, 1998.



MARCY K. ALLEN
Assistant Public Defender