OA 5-10-99 067

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,942

WILLIE JAMES BROWN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Willie James Brown, was the defendant in the trial court and respondent, the State of Florida, was the prosecution. Petitioner, in this brief, will be referred to as he stood before the trial court and respondent will be identified as the State or prosecution. The symbol "R" will be used to refer to the record on appeal and the symbol "T" will be used to refer to the transcript of the trial proceedings. The symbol "PB" refers to the Petitioner's initial brief on the merits and the symbol "A" refers to the Appendix attached to Petitioner's initial brief. Unless otherwise stated, all emphasis has been supplied by respondent.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Statement of the Facts appearing on pages 2 through 5 of his initial brief on the merits to the extent that it is accurate and nonargumentative, but sets forth the following additional facts for purposes of clarification:

At the pretrial suppression hearing, Officer William Hall testified that he had been continuously employed as a police officer with Ft. Pierce Police Department for over two years, since August of 1994, and that he had patrolled this high crime/drug area since that time. (T 9, 21). Officer Hall stated that he grew up in this area. (T 21). The officer testified that he had previously dealt with Defendant in "high crime -- high drug areas" and knew that Defendant had been previously arrested by other officers. (T 12). At the intersection of 10th Street and Delaware Avenue, Defendant ran up to Officer Hall's vehicle in an excited state, which the officer considered to be a "threatening movement." (T 10, 19). Although the officer knew Defendant's name from a previous experience with him, he asked Defendant what his name was. (T 11). Defendant lied to the officer and told him that his name was Willie James Nilly. (T 13). Noticing that Defendant had his hands in his pockets, Officer Hall for safety reasons "asked"

Defendant if he would take his hands out of his pockets for him. (T 13). Although Defendant removed his hands from his pockets, he turned around from the officer and then reached into the inside of his pants underneath the front waistband of his pants. (T 13, 22-23). Officer Hall testified that, at this point, "I was in fear that the Defendant might be going for some type of weapon." (T 13, 31). The officer said he was "scared that I was going to get hurt again in a confrontation with somebody. And I was yelling at the Defendant to go ahead and remove his hands from his pants, put his hands out in front of me." (T 15, 24). When Defendant failed to comply, the officer reached around in front of Defendant and tried to hold his hands so that he couldn't retrieve a weapon. (T 13). At this time, the officer felt something hard in Defendant's pants, which he thought was a weapon. (T 15, 26).

On cross-examination, Officer Hall testified that he had previously been hurt in confrontations with two different people. (T 24-25).

Any additional facts which Respondent seeks to bring to the attention of the Court are contained in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

POINT I

The trial court properly denied Defendant's motion to suppress physical evidence since Officer Hall had a well-founded suspicion to detain Defendant based on his reasonable belief that defendant was reaching for a weapon. The mere fact that Officer Hall "asked" Defendant if he would remove his hands from his pockets did not elevate the officer's encounter with Defendant to a *Terry*-type detention. (T 13). Furthermore, Officer Hall's act of grabbing the Defendant's hands, which act was based on the officer's concern for his safety in light of his experience (which significantly included prior confrontations in which the officer was injured), was reasonable under the totality of the circumstances confronting the officer. Indeed, it is clear that Defendant's right to personal security free from arbitrary interference was outweighed by the public interest in officer safety. Additionally, the State alternatively maintains that, as the trial court ruled, since Defendant failed to comply with the officer's lawful request for Defendant to remove his hands from his front waistband, the officer had probable cause to arrest Defendant for resisting arrest without violence, and that the subsequent search of Defendant was incident to that arrest.

POINT II

There was sufficient evidence to support Defendant's conviction for resisting an officer without violence since it was established that the officer was engaged in the lawful execution of a legal duty.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SINCE OFFICER HALL HAD A WELL-FOUNDED SUSPICION TO DETAIN DEFENDANT BASED ON HIS REASONABLE BELIEF THAT DEFENDANT WAS REACHING FOR A WEAPON. (Restated).

As this Court has ruled, the ruling of a trial court on a motion to suppress comes to this court clothed with a presumption of correctness, *McNamara v. State*, 357 So. 2d 410, 412 (Fla. 1978), and a trial court's factual findings can be disturbed on appeal *only* if shown to be without basis in the evidence or predicated upon an incorrect application of the law. *See Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992). With these principles in mind, it is clear that the District Court's decision affirming the trial court's ruling *sub judice* was correct and should therefore be approved.

Defendant first contends that the trial court erred by finding that Defendant and Officer Hall were engaged in a consensual encounter until Defendant turned away from the officer and the officer asked him to remove his hands from the waistband of his pants. Defendant claims that Defendant was "seized" at the time the officer initially asked him to remove his hands from his

pockets, which seizure necessarily would require the existence of a founded suspicion of criminal activity. However, the State submits that the mere fact that Officer Hall "asked" Defendant if he would remove his hands from his pockets did not elevate the officer's encounter with Defendant to a *Terry*-type detention. (R 13). Indeed, there is nothing in the officer's testimony indicating that he used words of compulsion requiring Defendant to remove his hands from his pockets. Rather, the officer plainly testified on direct examination that, "I *asked* the Defendant if he would take his hands out of his pockets for me," and that Defendant then removed his hands from his pockets but then "reached into the inside of his pants underneath his waistband at the front of his pants." (R 13). On cross-examination, the officer again reiterated the fact that he had *asked* Defendant to take his hands out, as opposed to *directing* Defendant to do so. (R 28-29). The mere fact that Officer Hall propounded this question to Defendant was perfectly reasonable given the fact that Defendant had run up to the officer's vehicle in an excited state (R 10), and certainly would not lead a reasonable person in Defendant's shoes to conclude that he was not free to leave if he so chose. *See Popple v. State*, 626 So. 2d 185, 188 (Fla. 1993). As such, the officer's simple

request of Defendant did not turn the consensual encounter between the two into a detention or seizure requiring a founded suspicion of criminal activity. *See Sander v. State*, 595 So. 2d 1099, 1100 (Fla. 2d DCA 1992) (it was not improper for officer to ask the defendant to remove his hands from his pockets during encounter); *accord, State v. Woodard*, 681 So. 2d 733, 735 (Fla. 2d DCA 1996); *Lang v. State*, 671 So. 2d 292, 294 (Fla. 5th DCA 1996); *King v. State*, 696 So. 2d 860, 862-863, n.1 (Fla. 2d 1997); *see also State v. Boone*, 613 So. 2d 560 (Fla. 2d DCA 1993) (officer asking defendant what he had in his hand behind his back did not transform encounter into seizure); *Peek v. State*, 575 So. 2d 1380 (Fla. 5th DCA 1991) (officer's request that defendant come over to patrol car during street encounter did not constitute stop); *State v. Crumpton*, 676 So. 2d 987, 989-990 (Fla. 2d DCA 1996) (order to disperse given by police officer to group of persons of which defendant as a member was not the functional equivalent of a seizure of defendant's person, where officer did not restrict freedom of members of the group to leave the area or the direction of their travel).

In light of the above-cited case law, the State strongly disagrees with Defendant's assertion that there exists a "line of

cases" holding that a "seizure" occurs due to the sole fact that a citizen complies with an officer's request to remove his/her hands from his/her pockets. (PB 13). Rather, the State submits that case law holds that it is not improper for an officer to ask a person to remove his hands from his pockets during a citizen encounter. *See Lang v. State*, 671 So. 2d 292, 294 (Fla. 5th DCA 1996), citing *Sander v. State*, 595 So. 2d 1099, 1100 (Fla. 2d DCA 1992); *State v. Woodard*, 681 So. 2d at 735; *King v. State*, 696 So. 2d at 863, n. 1.

In this regard, the case of *Dees v. State*, 564 So. 2d 1166 (Fla. 1st DCA 1990), cited for support by Defendant, is readily distinguishable from the facts of this case. To be sure, contrary to Defendant's assumption, the First District in *Dees* did *not* hold that the deputy's direction for the defendant to remove her hand from her pocket constituted a seizure for Fourth Amendment purposes. Rather, a careful reading of *Dees* shows that the district court held that the deputy's direction to defendant Dees to exit the van in which she was seated ***together with*** the deputy's direction for Dees to remove her hand from her pocket constituted a show of authority that restrained Dees' freedom of movement. 564 So. 2d at 1168. However, despite the deputy's direction for Dees

to remove her hand from her pocket, the deputy's direction to exit the vehicle *alone* constituted a detention or seizure under this Court's holding in *Popple v. State*, 626 So. 2d 185, 188 (Fla. 1993). Thus, the officer's direction for Dees to remove her hand from her pocket clearly was not the dispositive factor that caused the First District to hold that a seizure had occurred.

Furthermore, the justification for the officer's request in *Evans v. State*, 546 So. 2d 1125 (Fla. 3d DCA 1989), to have the defendant take his hands out of his pocket was the mere fact that the defendant was seen sitting on a park bench at 4 o'clock in the morning. Here, in stark contrast however, the facts reveal that the officer's request for Defendant to remove his hands from his pockets *was* justified. As the Fourth District set forth in its opinion, Officer Hall knew Defendant from prior contacts and knew of some other officers' arrests of Defendant, one of which, not insignificantly, was for ***battery on a law enforcement officer*** and resisting arrest ***with violence***. (A 1). Moreover, during his encounter with Defendant, Defendant gave the officer a fictitious name. (A 2). Hence, considering these circumstances as well as the officer's experience in this high crime area, unlike the officer in *Evans* Officer Hall was more than justified in asking Defendant to

take his hands out of his pockets. In short, given the realities of the situation facing Officer Hall in the instant case, the officer's noncompulsory request here simply cannot be properly construed as a "constitutionally unjustified police order," as was found by the Third District in *Evans*. *Id.*, 546 So. 2d at 1125.

Similarly, the case of *Johnson v. State*, 610 so. 2d 581 (Fla. 1st DCA 1992) is factually distinguishable from the instant case. In contrast to the present case, the defendant in *Johnson* was instructed to remove his hands from his pockets ***and*** to face the officer so that the officer could get a good look at the defendant. *Id.*, 610 So. 2d at 583. The only justification for this instruction was the fact that the officer had seen the defendant quickly place his hand in his pocket as if to conceal something. *Id.*, 610 So. 2d at 583. Unlike the case *sub judice*, there is nothing in *Johnson* suggesting that the officer had prior knowledge about any prior violent contacts the defendant had with the police and, hence, the defendant's potential for posing a threat to the officer.

Similarly, in *Gipson v. State*, 667 So. 2d 418 (Fla. 5th DCA 1996), another case cited for support by Defendant, there is absolutely nothing to indicate that the officer who commanded the

defendant to take his hand from his pocket had any prior knowledge about any prior violent contacts with the defendant and police, as is the situation here. Moreover, in stark contrast to the facts involved here, the facts of *Gipson* reveal that the defendant posed *no threat* to the officers. Indeed, the officer who stood behind Gipson at the time when Gipson was ordered to take his hand out of his pocket was "certain" that Gipson was not holding a weapon. 667 So. 2d at 419. As such, the State submits that *Gipson* is not factually on all fours with the facts of the instant case so as to be persuasive.

In sum, the State maintains that the fact-specific holdings of the cases cited by Defendant lend no real support for Defendant's position vis-a-vis the unique facts presented in the instant case. As a result, the trial court did not err in concluding that a consensual encounter existed between Defendant and the officer until Defendant turned away from the officer and the officer asked him to remove his hands from the waistband of his pants.

Defendant alternatively claims that, even if the trial court properly concluded that a consensual encounter existed between the officer and Defendant until Defendant put his hands in his front waistband, the trial court erred by ruling that Defendant was

legally entitled to seize Defendant by grabbing his hands. Since, based on the totality of the circumstances confronting the officer, including the officer's experience (which significantly included prior confrontations in which the officer was injured), the officer clearly had a reasonable belief that Defendant might be armed, the State strongly disagrees with Defendant's argument.

The sole case relied upon by Defendant for support in this regard, *Williams v. State*, 694 So. 2d 878 (Fla. 2d DCA 1997), is clearly distinguishable from the unique facts involved at bar. First, in *Williams*, the "officer asked Williams to pull his waistband forward so that he could look down into his pants." 694 So. 2d at 879. The State submits that this officer's action constituted a far greater intrusion on Williams' personal freedom than Officer Hall's simple request here for Defendant to remove his hands from his pockets. Furthermore, nothing in *Williams* suggests that the arresting officer had any prior knowledge of any violent criminal propensities on Williams' part, as was present in this case. Moreover, in significant contrast to the facts here, the defendant in *Williams* did not turn away from the officer and make a sudden hand movement to his front waistband as if he were reaching for a weapon. To be sure, in *Williams*, unlike Officer

Hall here who testified that he feared that Defendant was "going for some type of weapon" (T 13), the arresting officer testified that he had no reason to believe that Williams was armed. *Id.*, 694 So. 2d at 880. Additionally, unlike *Williams*, where the *officer* approached the defendant, *Defendant* here initially engaged Officer Hall in a voluntary encounter by approaching the officer. (T 10). Indeed, as the Fourth District noted in its opinion, the factual situation involved *sub judice* is much more akin to the facts presented in *Wilson v. State*, 569 So. 2d 516 (Fla. 4th DCA 1990), as well as the fairly recent decision in *King v. State*, 696 So. 2d 860 (Fla. 2d DCA 1997).

In *Wilson*, an officer was walking through a bar which had a reputation for violent crimes when he encountered the defendant walking down the hallway. The officer observed the defendant take quick, evasive action after he spotted the officer, and quickly turn and walk back towards the restroom. Similar to Defendant here, as the defendant was turning, he made a sudden, furtive hand movement to the front area of his pants as if he was reaching for a gun. The experienced officer, who was concerned for his safety, thereupon stopped and frisked the defendant. The Fourth District upheld the legality of the officer's search, holding that the

defendant's sudden movements, coupled with the officer's experience, was sufficient to find reasonable suspicion. *Id.*, 569 So. 2d at 516.

Additionally, in the strikingly similar case of *King v. State*, 696 So. 2d 860 (Fla. 2d DCA 1997), the Second District Court of Appeal concluded that a police officer had the required founded suspicion to grab a defendant he feared was about to shoot him. Although the officer had not seen a weapon or been warned that the defendant was armed, he had come upon the defendant, who was dazed and confused, standing in the middle of the street. The defendant was unresponsive and, like Defendant in our case, was acting oddly. He appeared transfixed by the retreating figure of another man. When the officer was finally able to get the defendant's attention, defendant began slowly backing away, putting his hands in his pockets. When asked not to do that, the defendant tried to reach behind his back despite the officer's repeated requests that he remove his hands from his pockets and refrain from putting his hands behind him. At this point, the officer grabbed the defendant by the arm and placed him up against his patrol car. Similar to the instant case, at the time that the police officer grabbed the defendant, the officer feared that the defendant was about to shoot

him, and thus commit a crime. The Second District concluded that the officer's belief was reasonable under the circumstances in light of the officer's knowledge at the time, and therefore upheld the seizure. In its opinion, the Second District aptly opined as follows:

> A law enforcement officer faced with circumstances, not of the officer's creation, which cause the officer to have a reasonable suspicion or fear that a person encountered may be armed with a weapon that could jeopardize the officer's safety is entitled to take such minimum action as will allay the officer's safety concerns. **Those permissible actions would include asking the person encountered to take whatever reasonable action might be necessary to ensure that no weapon is involved. Similarly, the officer also would be entitled to physically take whatever reasonable action was necessary to thwart any threatening actions by the person encountered so as to dispel any reasonable fear of harm.**

Id., 696 So. 2d at 862. The Fifth District, in the case of *State v. Burns*, 698 So. 2d 1282, 1284 (Fla. 5th DCA 1997), recently expressly agreed with the Second District's opinion in *King* regarding the ability of a law enforcement officer to take action to allay his/her safety concerns when placed in such a precarious situation.

Based upon the foregoing analogous case law, the State submits that Officer Hall's act of grabbing the Defendant's hands, which

act was based *solely* on the officer's concern for his safety in light of his experience, was reasonable under the totality of the circumstances confronting the officer. Indeed, as in *King*, it is clear that Defendant's right to personal security free from arbitrary interference was outweighed by the public interest in officer safety. Thus, the evidence seized from Defendant was not the fruit of an illegal detention and, as such, the trial court properly denied Defendant's motion to suppress evidence. Additionally, the State maintains that, as the trial court ruled, since Defendant failed to comply with the officer's lawful request for Defendant to remove his hands from his front waistband, the officer had probable cause to arrest Defendant for resisting arrest without violence, and that the subsequent search of Defendant was incident to that arrest. (T 50-52).

POINT II

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION FOR RESISTING AN OFFICER WITHOUT VIOLENCE SINCE IT WAS ESTABLISHED THAT THE OFFICER WAS ENGAGED IN THE LAWFUL EXECUTION OF A LEGAL DUTY.

Since Defendant's detention by Officer Hall was lawful for the reasons explained in point I, *supra*, it is clear that there existed sufficient evidence to support Defendant's conviction for resisting an officer without violence. As such, Defendant's reliance on *Mayhue v. State*, 659 So. 2d 417 (Fla. 2d DCA 1995), a case involving an illegal detention, is inapposite. The jury's verdict as to the resisting arrest charge should not be disturbed.

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the Fourth District Court of Appeal affirming the judgment of conviction and the sentence should be approved.

Respectfully submitted,

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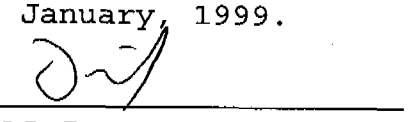
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits was furnished by U.S. mail to Marcy K. Allen, Asst. Public Defender, 421 3rd Street, West Palm Beach, FL 33401, on this 8th day of January, 1999.



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