IN THE SUPREME COURT OF FLORIDA

ORIGINAL

WILLIE JAMES BROWN,

Petitioner,

vs. CASE NO. 93,942

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY 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 relies upon the statement of the case as set forth in his initial brief on the merits.

STATEMENT OF THE FACTS

Petitioner relies upon the statement of the facts as set forth in his initial brief on the merits.

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.

Respondent asks this Court to reject Petitioner's argument that a seizure occurred when the officer asked Petitioner to remove his hands from his pocket because the officer "asked" petitioner rather than "directed" him to do so. Respondent relies upon Sanders v. State, 595 So. 2d 1099 (Fla. 2d DCA 1099) and Lang v. State, 671 So. 2d 292 (Fla. 5th DCA 1996), to support this assertion. Lang cites Sanders. 671 So. 2d at 294. Sanders, however, does not cite any authority for the broad assertion that, "it was not improper for [the officer] to ask [the citizen] to remove his hands from his pockets." 595 So. 2d at 1100.

This Court has previously declined to adopt such a semantical approach to the determination of whether a seizure has occurred. Rather, in accordance with traditional Fourth Amendment analysis, focus is upon whether there has been any action by the officer which hinders or restricts a citizen's freedom of movement. As this Court held in Popple v. State, 626 So. 2d 185 (Fla. 1993):

> 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 re-**

> **quest or an order,** we concluded that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show of authority which restrained Popple's freedom of movement because a reasonable person would believe that he should comply. (Footnote omitted). *See Dees v. State,* 564 So.2d 1166 (Fla. 1st DCA 1990). (Emphasis added).

Thus, an officer's "request" as well as an "order" may turn an encounter into a detention if a reasonable person would conclude that he is not free to terminate the contact.

Another confusion in the application of Fourth Amendment law is illustrated by State v. Woodard, 681 So. 2d 733 (Fla. 2d DCA 1996), cited by Respondent at pages 8 and 9 of its brief. In Woodard, the Fifth District held that a citizen was not detained when an officer asked him to remove his hands from his pockets. The appellate court reasoned:

> The second circumstance arises from the request that Woodard remove his hands from his pockets. **This court has previously held that such a request, when made to insure an officer's safety, does not elevate a consensual encounter to a detention.** *Sander v. State,* 595 So. 2d 1099 (Fla. 2d DCA 1992); *see also Lang v. State,* 671 So. 2d 292 (Fla. 5th DCA 1996). *Contra Harrison v. State,* 627 So. 2d 583 (Fla. 5th DCA 1993); *Canion v. State,* 550 So. 2d 562 (Fla. 4th DCA 1989); *Evans v. State,* 546 So. 2d 1125 (Fla. 3d DCA 1989). (Footnote omitted).[1]

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[1]In its brief at pages 8-9, Respondent writes, "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." Unlike Respondent, the Second District in Woodard acknowledged that a split of authority exists on this question as evidenced by its

681 So. 2d at 735. The appellate court combined two separate Fourth Amendment concepts to draw this conclusion. The first question which must be addressed is whether there is an encounter vs. a detention. This finding is independent of the officer's state of mind i.e., his fear for his safety, unless the officer conveys his state of mind to the defendant. United States v. Mendenhall, 446 U.S. 544, 554 n.6, 100 S. Ct. 1870, 1877 n.6, 64 L. Ed 2d 497, 509 n. 6 (1980). Once the court determines that a defendant has been detained, the court must next consider whether the detention is supported by a well-founded suspicion of criminal activity and if the officer fears for his safety, he may frisk a defendant for weapons. Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). The officer's fear for his safety is relevant to this distinct issue of whether a reasonable basis to frisk exists. The Woodard court inappropriately spliced these two separate issues together to reach the conclusion that an officer's fear for his safety allows him to request a citizen to remove his hands from his pockets during a citizen encounter.

A similar approach was taken by the Fourth District Court of Appeal in its decision in Popple v. State, 609 So. 2d 619 (Fla. 4th DCA 1992). The Fourth District had concluded that the defendant was not detained despite the officer's request that he leave his car because "[t]he potential threat perceived by the officer under

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citation to Harrison, Canion and Evans as contra authority.

these circumstances clearly outweighed any *de minimus* inconvenience imposed upon the defendant by the officers request that he step out of his car." 609 So. 2d at 620. Although this Court quoted this language from the Fourth District's decision in its Popple opinion, this Court declined to apply this reasoning to affirm the conviction and sentence. 626 So. 2d at 186-187. Rather, applying traditional Fourth Amendment analysis, this Court reversed Popple's conviction because a reasonable person under the circumstances would not feel free to disregard the officer's request. 626 So. 2d at 188. See also, J.L. v. State, 23 Fla. L. Weekly S626 (Fla. Dec. 17, 1998), wherein this Court declined to recognize a firearm or weapons exception to the reasonable suspicion test required by the Fourth Amendment to the United States Constitution.

At bar, as in Popple, a reasonable person would not have felt free to leave his hands in his pockets once the officer made a request that he remove them. Petitioner's compliance with the officer's show of authority resulted in a seizure. Hollinger v. State, 620 So. 2d 1242 (Fla. 1993). As the officer did not have a founded suspicion that Petitioner was engaged in criminal activity at the time the seizure occurred, Petitioner's detention was unlawful.[2] Thus, the circuit court was remiss to deny the motion

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[2]As an aside, as Petitioner was not lawfully detained, he was not required to give the officer his correct name. See, Steele v. State, 537 So.2d 711 (Fla. 5th DCA 1989). Advising the officer that he was Willie James Nilly instead of Willy James Brown, particularly since the officer knew Petitioner, is thus, of no consequence.

to suppress and this Court should reverse the decision of the Fourth District Court of Appeal which affirmed that order.

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 relies upon his argument as set forth in his initial brief.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail, to DOUGLAS J. GLAID, Assistant Attorney General, Dept. Of Legal Affairs, Republic Tower, 10th Floor, 110 SE 6th Street, Ft. Lauderdale, Florida 33301, this 1st day of FEBRUARY, 1999.

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