IN THE SUPREME COURT OF FLORIDA

JOHN CALVIN TAYLOR, II,

Appellant,

v. Case No. **SC96,959**

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant files this reply brief in response to the arguments presented by the state as to Points 1, 2, 4, and 6. Appellant will rely on the arguments presented in his Amended Initial Brief as to Points 3, 5, 7, 8, and 9.

ARGUMENT

Point I

THE TRIAL COURT ERRED IN DENYING TAYLOR'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED FROM HIS HOUSE AND VEHICLE, HIS STATEMENTS MADE WHILE DETAINED IN THE BACK OF THE PATROL CAR AND AT THE POLICE STATION, AND THE CLOTHING SEIZED AFTER HIS ARREST, WHERE THE EVIDENCE AND STATEMENTS WERE THE POISONED FRUIT OF ILLEGAL POLICE ACTION.

Preliminarly, the state has mischaracterized appellant's argument in stating "Taylor argues that he was arrested at four times"--when the officer followed him into the bathroom

to watch him dress; when the officers directed him into the kitchen, handcuffed, and frisked him; when he was removed from his home in handcuffs and placed in the back of the patrol car; and when he was transported to the sheriff's office. See State's Answer Brief at 6 and 11. Appellant has not argued he was "arrested" four times. The officers never technically arrested appellant. Some courts characterize a detention that exceeds the limits of Terry a de facto arrest, and appellant has used that term to describe his removal from his home in handcuffs as well as his transportation to the police station. Appellant has argued the initial encounter became an unlawful seizure when he was followed to the bathroom because the officers did not have a founded suspicion of criminal activity. Appellant has argued the stop and frisk inside his home was unlawful because the police had no probable cause to believe he was armed and dangerous. Second, at page 13 n.2 of the State's Answer Brief, the state has asserted that only the suppression hearing held on January 19 is in the record on appeal. Both suppression hearings are in the record, see Volumes III, VII, and were referenced extensively in Appellant's Amended Initial Brief at pages 1-6.

1. The Initial Intrusion Was an Unlawful Seizure.

At page 22, the state relies on United States v. Dickerson, 975 F.2d 1245 (7th Cir. 1992), to support its position that the encounter inside Taylor's trailer was consensual until Taylor was ordered to walk into the kitchen. Dickerson is not analogous to the present case, however, because critical to the court's decision in that case was its finding that Dickerson's nakedness was "a ruse to bolster his alibi that he had been in bed all morning with his fiance." In other words, Dickerson answered the door naked and continued with his ruse by letting the officers inside in a deliberate attempt to create an alibi. Furthermore, the police had tracked the vehicle involved in the robbery to Dickerson's house and had reasonable suspicion to detain him for questioning. Third, Dickerson said "no" to police once they entered his home twice, making it unlikely that his initial consent to enter had been coerced. Moreover, Dickerson involved whether the entry was consensual; appellant does not dispute that the entry here was consensual. The question here is whether once inside the trailer, the officers exerted a show of official authority such that a reasonable person would not have felt free to decline the officers' requests or terminate the encounter. Taylor never said "no" to police; indeed, he was never "asked" anything. He was told

what to do. And, he did it. A reasonable person under the circumstances would not have felt he had any choice but to accede to the officers' requests.

On page 22, the state also that the heightened protections for a private home are not implicated when the door is voluntarily opened by the occupants, citing United States v. Gori, 230 F.3d 44 (2d Cir. 2000). Gori is inapposite as well because in Gori, the issue was whether a police order to evacuate an apartment after the occupants had opened the door to a pizza delivery person violated Payton, which prohibits a warrantless entry to make a felony arrest. Furthermore, the police in Gori were reacting to "swiftly developing situation," and had reasonable suspicion to believe a the occupants of the apartment were involved in narcotics trafficking. Here, there was no swiftly developing situation as the victim had been missing for 24 hours. Furthermore, the officers in Gori, unlike the officers here, did not enter other rooms of the apartment without the occupants' consent or watch them dress.

On page 24, the state says the other officers--Noble and Lee--did not need consent to enter the trailer because the door was open, and that Heaton's presence and the open door lessened the intrusiveness, citing Miranda. First of all,

Taylor did not leave the door open; the officers did. The officers exerted control immediately and did so by a show of authority that would have communicated to a reasonable person they had no choice but to obey the officers' directives. Furthermore, the issue here is not whether the situation was custodial such that Miranda warnings were required; the issue here is whether a reasonable person in Taylor's situation would have felt free to refuse the officer's requests or to terminate the encounter. The encourter must be viewed from Taylor's perspective, not that of the officers. Taylor walked into his living room to find two officers inside the room and another person at the threshold of the door. There is no evidence Taylor knew Heaton was a civilian. From Taylor's viewpoint, Heaton could have been another plainclothes officer stationed at the door to make sure the trailer's occupants did not leave.

On page 25, the state asserts that if guns and uniforms are sufficient to turn encounters into arrests or to invalidate consent, then all encounters will be arrests and no consent given to a uniformed officer will be valid. Obviously, guns and uniforms don't turn every encounter into a seizure. Guns and weapons are a relevant factor, however. Florida v. Royer, 460 U.S. 491 (1983); United States v.

Mendenhall, 446 U.S. 544 (1980). Critical here is that the encounter took place inside a private home, where guns and weapons are especially relevant to whether a person would feel free to terminate the encounter. When uniformed officers approach citizens in a public place, to investigate a possible crime in progress, the uniform and weapon do not convey the same message as when a citizen is confronted by officers in his own living room. In addition, the intrusion here involved more than guns and uniforms. The officers also communicated a show of authority by following Taylor to the bathroom to watch him dress.

At page 25, the state contends with regard to following Taylor to the bathroom that "any intrusion was justified for the stated purpose of preventing Taylor from obtaining a weapon." In essense, the state is conceding this was an intrusion. The police cannot lawfully intrude upon a person's privacy, however, without consent or probable cause to believe the person is armed and dangerous. When police question someone inside his own home, they are not at liberty to follow that person around the home or enter other areas of the home without consent. See Gonzalez v. State, 578 So. 2d 729 (Fla. 3d DCA 1991). The state has cited no authority for the proposition that such an intrusion is countenanced by the

Fourth Amendment. Officer Strickland's action in following Taylor to the bathroom to watch him dress was tantamount to a protective sweep or frisk without probable cause. Compare Maryland v. Buie, 494 U.S. 325 (1990)(police may conduct protective sweep in conjunction with in-home arrest where officer has reasonable belief area harbors dangerous individual).

Last, on page 25, the state says Deputy Noble [sic] was only "generally watching" and thus could not "see where Taylor got the underwear." This statement misrepresents the facts. Deputy Strickland said he stood in the doorway of the bathroom while Taylor got dressed. He was only a few feet from Taylor and "kept Taylor in his view the whole time." Strickland did not say he did not see where Taylor got the underwear. He said he did not see Taylor put on underwear.

2. The Search Under the Chair Cushion was Illegal Because Taylor's Consent was the Product of Coercion and the Deputies Did Not have Probable Cause to Believe Taylor was Armed and Dangerous.

On page 25, the state contends that Taylor's furtive movement gave the deputies reasonable suspicion to support a Terry stop, citing Illinois v. Wardlow, 528 U.S. 119 (2000), which held flight from police in an area of heavy narcotics

trafficking justified a stop. The state asserts that Taylor's action in removing something from his pocket and placing it under the chair cushion was the equivalent of flight from an officer because

> Taylor did not have the option of running for it like Wardlow did. There were several officers present and inside his house. The only option he had to leaving the cash in his pocket was to hide it while the officers were not looking.

State's Answer Brief at 26. This was exactly appellant's point in subsection (1) above: Taylor was surrounded by officers and any reasonable person in his position would have felt he had no choice but to comply with the officers' requests. Furthermore, flight from police on the street in a high crime area is a far cry from removing something from one's pocket while in the privacy of one's own home. Taylor was not fleeing; he was cooperating. Unlike Wardlow, Taylor was available to answer questions. Unless the officers had probable cause to believe Taylor had a weapon, they had no justification for detaining him or searching the cushion. See Wardlow, 528 U.S. at 122 n. 2 ("we express no opinion as to the lawfulness of the frisk independently of the stop").

On page 28, the state asserts "the act of concealing gives the police probable cause to believe that the item is contraband," and the cases cited by appellant are contrary to

Wardlow and Lightbourne v. State, 438 So. 2d 380 91983). See State's Answer Brief at 27 n.3. That is not the law, and neither Wardlow nor Lightbourne so hold. As discussed above, Wardlow concerns flight in a high crime area, not concealing an object while in one's own home. The police may not stop a person who appears to be concealing something unless the officers have reasonable suspicion the object is contraband or a weapon. See, e.g., Ruddack v. State, 537 So. 2d 701 (Fla. 4th DCA 1989)(a high crime area plus defendant placing his hand behind his back upon the approach of the officer insuffienct for Terry stop); Jenkins v. State, 524 So. 2d 1108 (Fla. 3d DCA 1988)(same). Furthermore, although the Court in Lightbourne held the defendant's removal from his car to conduct a pat-down search was justified by the defendant's "furtive movements and nervous appearance," the opinion does not specify what movements the officer observed. Lightbourne does not mean an officer lawfully may stop a citizen or conduct a pat-down simply because the citizen makes a furtive movement or looks nervous.

On pages 28-29, the state asserts there is a fourth level of lawful intrusion between a consensual encounter and a Terry stop called a "de miminus" intrusion, citing Pennsylvania v. Mimms, 434 U.S. 106 (1977). According to the state, "[p]olice

officers may order citizens to do such things as exiting a car or removing their hands from their pockets and the encounter remains consensual." Thus, says the state, directing Taylor to get out of his chair and walk to the kitchen was a di minimus intrusion not requiring any level of suspicion. This argument is based on a misreading of the caselaw. In Mimms, a lawful Terry stop was already in progress when the driver was asked to exit the vehicle. The Court held simply that asking the driver to exit the vehicle did not exceed the permissible limits of the lawful traffic stop. Here, there was no lawful stop in progress when Officer Lindsay ordered Taylor to get up and walk into the kitchen. Mimms is inapplicable.

On page 29, the state argues the officers were justified in ordering Taylor into the kitchen and looking under the cushion as part of a Terry stop, for purposes of officer safety. According to the state, the officers were entitled to frisk Taylor because they "were investigating a missing person who disappeared with a large sum of cash." The state relies on Terry and Reynolds. Both Terry and Reynolds involved situations where the officers were on the street, directing observing crimes in progress. As discussed in his initial brief, Reynolds involved drug trafficking and specific testimony by the officers that such crimes were likely to

involve weapons. In Terry, the officer observed Terry and his companion casing a store, and hypothesized that they were contemplating a daytime robbery, which likely would involve the use of a weapon. Here, in contrast, there was no crime in progress. The officers did not even know if a crime had been committed. All they had was a missing person, who had disappeared 24 hours earlier with some money. There was no testimony that investigations of missing persons often erupt in violence. The state also has cited United States v. Campa, 234 F.3d 733 (1st Cir. 2000), and United States v. Maher, 145 F.3d 907 (7th Cir. 1998). Neither of those cases is applicable however, as the officers in those cases had reasonable suspicion or probable cause to detain. Furthermore, like Terry and Reynolds, both Campa and Maher involved a different rubric of police conduct from that here--"necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." See Terry, 392 U.S. at 20. These were entirely different situations from the present one. Here, Taylor was cooperating with police and going about his lawful business, and the officers had no reasonable suspicion to detain him or to believe he was armed or dangerous.

3. The Police Exceeded the Permissible Scope of Terry Resulting in a De Facto Arrest Without Probable Cause when they removed Taylor from his Home in Handcuffs and Placed Him in the Backseat of a Patrol Car.

On page 31, the state seems to be arguing the police were justified in removing Taylor from his home because it "could have contained firearms." This is pure speculation. Furthermore, Officer Noble candidly admitted he didn't know why he took Taylor outside.

On page 32, the state cites United States v. Gil, 204 F.3d 1347 (11th Cir. 2000), to support its position that removing Taylor from his home and placing him the back of the patrol car was permissible. Gil actually supports appellant's position. Like most of the other cases the state has cited, Gil involved a crime in progress. Mrs. Gil's husband had been meeting with a confidential informant for months, and on the day in question, Mr. Gil had obtained five kilograms of cocaine from the informant, which he took back to the house he shared with his wife to be tested. About 15 minutes after Mr. Gil entered the house, the federal agents saw Mrs. Gil leave carrying two large plastic bags, which were large enough to contain either the cocaine or money. The agents pulled Mrs. Gil over, told her they were conducting a narcotics investigation, and asked to search her car. She agreed, and

the agents found $12,500 in one of the bags. The agents handcuffed Mrs. Gil and placed her in the patrol car. After the residence was secured and searched, at which time the agents had probable cause to arrest, Mrs. Gil was arrested. In upholding the seventy-five minute detention in the police car, the court noted that it was necessary for the agents to detain Mrs. Gil to prevent her from jeopardizing their investigation, and that she was detained for only as long as necessary to complete their investigation of the residence. The court further noted that although handcuffing her and placing her in the back of the patrol car was a severe form of intrusion, its necessity was supported by the circumstances. Mrs. Gil was not searched at the scene because there was no female officer to conduct the search, and the agents thus did not know if she was armed. Handcuffing and detaining her in the police vehicle thus was reasonable to maintain the safety of the officers and the ongoing investigation of the residence.

Here, in contrast, there was no ongoing investigation of the residence and no crime in progress. The officers in the present case detained Taylor to question him about a missing person, absent a founded suspicion to do so. They handcuffed and frisked him without any objective basis for believing he

was armed and dangerous. And, then, even after the frisk revealed no weapons, they removed him from his home and placed him in the back of the patrol car, to question him further, again, without reasonable suspicion or probable cause to do so. The state has cited no authority that justifies these actions.

4. The Evidence Seized From Taylor's Home and Car Was the Fruit of the Unlawful Arrest and Unlawful Search.

On pages 38-39, the state attempts to distinguish Gonzalez, arguing that Gonzalez is unlike the present case because in Gonzalez, the police obtained consent to enter the house, then proceeded to do another thing without consent, conduct a protective sweep of the house. The police in Gonzalez did more than conduct a protective sweep, however. After the brief room-to-room sweep, the police asked if they could search the house. Mrs. Gonzalez gave verbal consent, then signed a written consent form. The police then conducted a thorough search, finding cocaine. The court held the prior illegal sweep rendered involuntary the consent to search which was not dissipated by the printed advice of rights on the written consent because Gonzalez already had verbally consented to the search. This is very similar to what occurred here.

5. Taylor's Statements Were the Fruits of the Illegal Arrest.

On page 33, the state asserts the trial court found Taylor voluntarily accompanied the deputy to the sheriff's office and found that Taylor "was not treated as if he were under arrest," and these findings should not be overturned unless clearly erroneous. First, the issue is not whether Taylor was treated as if he were under arrest. The issue is whether the duration and scope of the detention exceeded that allowed under Terry.

Second, the trial court's finding is clearly erroneous because it is not supported by competent, substantial evidence. In order to show Taylor voluntarily agreed to go to the station, there would have to be evidence an officer asked Taylor if he would go down to the station, and evidence Taylor assented. Here, there was neither. Noble also conceded Taylor was not free to leave, stating he "was not under arrest, he was just being taken down to speak to Detective Lester as I explained to him." VII 144.

The state asserts Taylor's shrug after being told Detective Lester wanted to speak with him is sufficient evidence of consent. A shrug does not indicate actual consent, much less voluntary consent, especially when the shrug occurs in the back of a police vehicle. The cases cited

by the state aren't similar. In United States v. Wilson, 895 F.2d 168, 172 (4th Cir. 1990), for example, the court found consent when the defendant shrugged his shoulders and raised his arms in the air after a request to search his person. The state's reliance on Suggs v. State, 644 So. 2d 64 (Fla. 1994), also is unavailing because the opinion does not reveal what facts led the Court to conclude that Suggs went to the police station voluntarily. The opinion merely states, "Suggs voluntarily agreed to accompany the officer to the station, even going so far as to show another officer how to drive his vehicle." 644 So. 2d at 68. With regard to the trial court's finding that Taylor voluntarily agreed to go to the station, the trial court was in no better position to assess the legal import of Taylor's shrug than this Court. The trial court made no factual findings on this issue to which this Court must give deference.

On page 35, the state asserts the police had probable cause to arrest Taylor for theft once they saw the cash under the cushion. The state contends that because the deposit had not been made, "the officer knew that at least grand theft had been committed." The officers had no way of knowing whether a theft, robbery, or any other crime had been committed, however. Nor did the officers have probable cause to believe

that, if a crime had been committed, Taylor committed it. The missing woman could have been on her way to Arkansas with the money. The missing woman could have been robbed after she dropped Taylor off at his trailer. That Taylor had some cash he did not want the deputies to know about did not give the officers probable cause to believe the money was stolen. The state's reliance on Gil is misplaced, as the police in that case had extensive evidence that a crime had been committed. See supra at page 10-11.

Point 2

THE TRIAL COURT ERRED IN PERMITTING JOE DUNN, ARTHUR MISHOE, ALEX METCALF, AND CYNTHIA SCHMERMUND TO TESTIFY TO HEARSAY STATEMENTS MADE BY THE VICTIM ABOUT GIVING TAYLOR A RIDE TO GREEN COVE SPRINGS.

On page 44, the state asserts the standard of review is abuse of discretion. Appellant disagrees. The standard of review is de novo, since the trial court's ruling was based upon a misapplication of a strict rule of law. This Court explained this distinction in Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980):

> In order to properly review orders of the trial judge, appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion. Where a trial judge fails to apply the correct legal rule, . . . the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule

of law.

Judicial discretion, in contrast, is "[t]he power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." Id. The First District Court of Appeal expressed the principle as follows:

> Where the trial court's decision involves a pure question of law, the appellate court is not bound by the trial court's legal conclusions where those conclusions conflict with established principles of law. Moreover, where the trial court has misconceived the legal effect of the facts, the appellate court is required to reverse.

Florida Game and Freshwater Fish Commission v. Dockery, 671 So. 2d 471, 474 (Fla. 1st DCA 1996)(citations omitted). In the present case, the rule of law is that a hearsay statement admitted to show state of mind is only allowed to prove the state of mind of the declarant, not of the defendant. The correct standard of review is de novo. See Brooks v. State, SC 94,308 (Fla. April 5, 2001).

On page 45-46, the state relies on various cases from other jurisdictions, holding admissible statements made at the beginning of a trip to establish that the trip was made, as part of the res gestae. Those cases are not controlling, and res gestae is no longer a valid basis for the admissibility of

evidence in Florida. As the state itself has pointed out in its Answer Brief at page 46 n.5, only those aspects of the res gestae concept that have been codified retain any validity.

On page 47, the state attempts to distinguish Brooks. Brooks, however, is right on point. There, the victim was found stabbed to death in her car in Crestview, Florida. The trial court admitted statements by the victim to her co-workers evidencing her intent to drive to Crestview with Davis, the co-defendant, on the night of the murders. This Court held the statements were not admissible to show Davis traveled to Crestview with Carlson on the night of the murders because "a declarant's statement of intent under section 90.803(3) is only admissible to infer the future act of the declarant, not the future act of another person." Brooks, op. cit. at 7 (citing Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982)).

Accordingly,

> [B]ecause the State used the statements to show Brooks' subsequent acts of driving to Crestview with Carlson, their admission was error. As noted earlier, under section 90.803(3), statements of intent can ordinarily be used to prove the subsequent acts of the declarant, not a defendant. See Bailey.

Id. at 9.

Here, too, the state sought to introduce the statements not to prove the victim's intent or subsequent act, but to prove the subsequent act of the defendant, i.e., that Taylor intended or did go with Shannon to Green Cove Springs.

The state also asserts, on page 48, the hearsay was admissible to rebut a defense raised by Taylor. However, the state sought and was permitted to introduce the statements in its case-in-chief, not as rebuttal evidence, and thus was not admissible in this context. See Brooks, op. cit. at 809; Bradford v. State, 658 So. 2d 572, 575 (Fla. 5th DCA 1995).

Last, on page 50, the state asserts the hearsay statements were admissible as admissions by a party opponent because Taylor was present when they were made and his conduct manifested a belief in the statement. This argument is meritless. Taylor was not present when the statements were made although he was nearby, and there is no evidence he even heard them.

Point 4

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO REHABILITATE DEPUTY NOBLE BY ADMITTING A PRIOR CONSISTENT STATEMENT WHERE THE PRIOR STATEMENT WAS MADE A YEAR AFTER ANY MOTIVE TO FABRICATE AROSE.

On page 61, the state asserts the standard of review is

abuse of discretion. The standard of review is de novo, as the trial court's ruling was based upon a misapplication of a strict rule of law. See Point 2, supra at page 15-16.

On the merits, the state seems to be arguing the prior consistent statement was admissible to rehabilitate Deputy Noble's trial testimoney under the common law doctrine that a prior statement is admissible to correct an inconsistency or misstatement. Inconsistency is not the issue here, however. Deputy Noble testified at trial that Taylor made the statement about the money and admitted he did not include the statement in his report. There was no inconsistency in his trial testimony that required correction. The only basis for admitting the prior statement would be to boster or corroborate Noble's trial testimony to rebut the inference that he fabricated the statement after he filed his report. The exception specified in section 90.801(2)(b), Florida Statutes (1997), is inapplicable, however, for the reasons discussed in appellant's initial brief. The trial court erred in admitting the hearsay statement.

Point 6

THE HUSBAND/WIFE PRIVILEGE WAS VIOLATED WHEN THE TRIAL COURT REQUIRED TAYLOR'S WIFE TO TESTIFY TAYLOR

TOLD HER MICHAEL MCJUNKIN NEEDED MONEY FOR A BUS TICKET TO ARKANSAS.

The state contends the conversation at issue was not covered by the marital privilege because it took place in a jail, citing Johnson v. State, 730 So. 2d 368 (Fla. 5th DCA 1999), and other cases. The cases cited by the state are not applicable because they involved an entirely different issue. Johnson involved a police taping of a husband/wife conversation in a jail interview room. The court held the taping did not violate the Fourth Amendment because the Johnsons had no reasonable expectation of privacy in that location. Here, no one taped or heard the conversation. Moreover, no facts were adduced below as to where or how the conversation between appellant and his wife took place. This argument therefore has not been preserved.

CONCLUSION

Appellant respectfully requests this Honorable Court to grant the relief requested in his Amended Initial Brief on the Merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis M. French, Assistant Attorney General, by delivery to The Capitol, PLO1, Tallahassee, FL 32399-1050, on this date, October _____, 2001.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 point.

_____
Nada M. Carey