IN THE SUPREME COURT OF FLORIDA

GREGORY PRESLEY,

Petitioner,

v. **CASE NO. SC16-2089**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this Brief, Mr. Presley will be referred to by his proper name. He is the defendant in the criminal proceeding in the trial court and the Appellant in the lower tribunal. The State of Florida was the prosecution below and will be referred to as "the State."

All references to the record on appeal will be referred to as "R," followed by the volume number and page number, all in parentheses (e.g., R3-155).

STATEMENT OF THE CASE AND FACTS

(1) Nature of the case. This Court accepted jurisdiction based on an express and direct conflict. See Art. V, § 3(b)(3), Fla. Const.

(2) Course of proceedings. Mr. Presley was on probation in two circuit cases, numbers 13-1212 and 13-1213. (R1-89). His probation in each case was violated for: the new law offenses of possession of controlled substance, possession or use of drug paraphernalia, and resisting arrest without violence; the use of intoxicants to excess or possessing any drugs or narcotics not prescribed by a physician; and failure to abstain from the use of alcohol and/or illegal drugs. (R1-65).

(3) Disposition in the lower tribunal. After an evidentiary hearing, the trial judge entered an order denying the defense motion to suppress. (R2-270-274). The trial court ruled that Mr. Presley violated probation as alleged. (R2-274-275). His probation was revoked and he was sentenced to concurrent terms of 15 years in Prison for Count 1 in each case and five years in prison for Count 2 in each case with credit for time served. (R1-74-93, 169-188; R2-283-284). Mr. Presley filed a timely notice of appeal. (R1-95, 190). On November 9, 2016, the First District Court affirmed the denial of the motion to suppress and certified conflict with Wilson v. State, 734 So. 2d 1107 (Fla. 4th DCA

1999), cert. denied, 529 U.S. 1124 (200), and its progeny. On January 24, 2017 this Court accepted jurisdiction of the instant case based on express and direct conflict with Wilson. This brief on the merits follows.

STATEMENT OF THE FACTS

The facts are derived from the First District Court's opinion in this case. On January 29, 2015, several officers conducted a traffic stop in a high-crime area in Gainesville, Florida. The vehicle, stopped for running a stop sign and having faulty tail lights, was occupied by three men: the driver, and two passengers (R2-237-240). When Officer Pandak of the Gainesville Police Department arrived to render backup support, the driver and Mr. Presley, who was a passenger, were standing outside of the vehicle. The other passenger, who was also outside the vehicle, was acting belligerently and was detained in handcuffs. Officer Pandak was suspicious that there was criminal activity associated with the vehicle, but did not have an individual particularized suspicion with regard to Mr. Presley.

Officer Pandak told Mr. Presley not to leave the scene, and then asked him a series of questions including questions about his identity and events before the traffic stop. In response to the officer's questioning, Mr. Presley said that the group of men had come from Mr. Presley's aunt's house, and that he had been

drinking alcohol. After identifying Mr. Presley, Officer Pandak received information from dispatch that Mr. Presley was on probation and was not supposed to be drinking alcohol. Officer Pandak arrested him. Mr. Presley resisted arrest. Pursuant to a search incident to arrest, cocaine was discovered in Mr. Presley's pocket.

SUMMARY OF THE ARGUMENT

The First District Court erred in affirming the trial court's denial of Mr. Presley's motion to suppress. There was no articulable suspicion allowing the police officer to detain Mr. Presley, a passenger from a car in a traffic stop. The officer told Mr. Presley he was not free to leave, though lacking sufficient cause to detain him. The illegal detention means that any evidence resulting from the detention should have been suppressed.

The decision of the lower tribunal eliminates the reasonableness test courts have utilized under the United States Constitution in favor of unfettered police authority to detain passengers "as a matter of course." This court should reject the First District's Court's holding in the instant case and the Fifth District's holding in Aguiar, *infra*, and align itself with the Fourth District Court's decision in Wilson, *infra*.

ARGUMENT

THIS COURT SHOULD OVERRULE THE DECISION OF THE LOWER TRIBUNAL AND APPROVE THE DECISION OF THE FOURTH DISTRICT COURT IN WILSON v. STATE, 734 So. 2d 1107 (Fla. 4th DCA 1999), FLORIDA v.WILSON, CERT. DENIED, 529 U.S. 1124 (2000).

1. Standard of Review

Review of a motion to suppress is a mixed question of fact and law. See State v. Leonard, 764 So.2d 663 (Fla. 1st DCA). A trial court's factual findings must be supported by competent, substantial evidence, and the court's application of the law to the facts is reviewed *de novo*. See Williams v. State, 721 So.2d 1192 (Fla. 1st DCA 1998). Florida courts are to follow the opinions of the United States Supreme Court on claims of an illegal arrest or search whether such claims are predicated upon the provisions of the Florida or United States Constitutions. See Art. I, §12, Fla. Const.; State v. Butler, 655 So.2d 1123 (Fla. 1995).

2. Issue

The issue presented in the instant case and the conflict cases is whether it is reasonable under the Fourth Amendment for a police officer to detain a passenger, for whom there is no independent reasonable suspicion, in a lawfully stopped vehicle.

A) Conflict cases

Four of five District Courts of Appeal have decided the issue before this Court. The Second and Fourth Districts have answered the question presented in the negative: that is, it is *not* reasonable under the Fourth Amendment to detain a passenger following a traffic stop absent a reasonable suspicion that the passenger has committed a crime. See Wilson v. State, 734 So.2d 1107 (Fla. 4th DCA 1999)(holding that a police officer may not order a passenger to return to a vehicle without reasonable suspicion of criminal activity or a reasonable concern for officer safety.); Faulkner v. State, 834 So.2d 400 (Fla. 2d DCA 2003)(holding that it is illegal to order a passenger to remain in a vehicle following a traffic stop absent a reasonable suspicion that the passenger has committed a crime or is a threat.)

The Fifth and First Districts have reached the opposite conclusion, holding that it is reasonable under the Fourth Amendment to detain a passenger as a matter of course during a lawful traffic stop. See Aguiar v. State, 199 So.3d 920 (Fla. 5th DCA)(en banc), rev. denied 2016 WL 3459769 (Fla. June 24, 2016). In the instant case, the First District Court concurred with the reasoning of the Fifth District Court in Aguiar. Presley v. State, 204 So. 3d 84 (Fla. 1st DCA 2016).

B) This court should overturn Aquiar and approve Wilson

This court should resolve the conflict in favor of overturning the decisions of the First District Court in Presley and the Fifth District Court in Aguiar and approving the decisions of the Fourth District Court in Wilson and the Second District Court in Faulkner. In Wilson, 734 So. 2d 1107, the Fourth District held that there may be situations requiring an officer to detain a passenger from a vehicle stopped during a traffic stop, but the Fourth Amendment requires the officer to be able to identify objective circumstances that support the reasonableness of the detention. Wilson, *supra*, at 1113. Conversely, the Fifth District in Aguiar and the First District in Presley proclaimed that the reasoning in Wilson and Faulkner failed to balance the "minor infringement on the passenger's liberty" with the "great importance of officer safety." Presley, supra, at 87. For the reasons set forth below, the decisions in Aguiar and Presley overlook basic principles of the rights afforded to citizens under the Fourth Amendment and are at odds with United States Supreme Court jurisprudence.

3. THE MERITS

Reasonableness

The reasonableness standard is paramount to Fourth Amendment analysis. See Pennsylvania v. Mimms, 434 U.S. 106 (1977)("the

touchstone of... analysis under the Fourth Amendment is always the reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security."); Florida v. Jimeno, 500 U.S. 248, 250 (1991)("the touchstone of the Fourth Amendment is reasonableness"). The definition of a seizure rests on whether a reasonable person in the position of the defendant would have felt free to leave a terminate the encounter with officers. United States v. Mendenhall, 446 U.S. 544 (1980). Likewise, a person's expectation of privacy is analyzed under the reasonableness standard. Katz v. United States, 389 U.S. 347 (1967). Officers can conduct a Terry stop and frisk of a person for whom they have reasonable suspicion is armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). Reasonableness is said to depend "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

Correspondingly, the Fourth Amendment prohibits unreasonable, warrantless searches and seizures. A.L.T. v. State, 63 So.3d 855 (Fla. 4th DCA 2011); Florida v. Jimeno, 500 U.S. 248, 250 (1991). Police-citizen encounters come in three forms: consensual, investigatory stop, and arrest. Popple v. State, 626 So. 2d 185 (Fla. 1993). The first, a completely

voluntary and consensual encounter, can be terminated at will by the citizen, or never even started. Id. An officer is not required to have any suspicion to merely enter into conversation with a citizen; but at the same time, a citizen is under no obligation to engage with the officer or respond in any way. Id.

The Fourth Amendment requires a level of objective justification for making a stop. Hilton v. State, 961 So.2d 284, 294 (Fla. 2007); quoting Illinois v. Wardlow, 528 U.S. 119, 123 (2000). If an officer has a "reasonable suspicion that a person has committed, is committing, or is about to commit a crime," the officer may temporarily detain a citizen to confirm or refute his or her suspicions. June v. State, 131 So. 3d 2, 5 (Fla. 1st DCA 2013). The courts look at the totality of the circumstances when considering if an officer had a reasonable suspicion and whether that officer had a particularized and objective basis for the suspicion. Hilton at 294; United States v. Arvizu, 534 U.S. 266, 273 (2002).

In the context of a seizure, reasonableness depends on the existence of specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. Terry v. Ohio, 392 U.S. 1, 21 (1968). This requirement governs all seizures of the person, including those that involve only a brief detention. U.S. v. Mendenhall, 446

U.S. 544, 551 (1980). More than a bare suspicion of criminal activity is required to justify a stop. Coladonato v. State, 348 So.2d 326 (Fla. 1976).

The Fourth/Second DCA: Wilson

The Fourth DCA in Wilson held that a police officer conducting a lawful traffic stop may not order a passenger who has left the stopped vehicle to return to the vehicle absent reasonable suspicion pertaining to the passenger individually. Wilson v. State, 734 So. 2d 1107 (Fla. 4th DCA 1999). The Fourth DCA recognized that police interaction with a citizen in a vehicle must fit within the framework set forth in Popple, *supra*, with regard to the levels of police-citizen encounters.

Not ignoring the inherent challenges facing officers during a traffic stop, in its analysis, the Fourth District weighed the individual liberty interests of an innocent passenger--that is, someone who is not suspected of any violation of the law--with the generalized safety concerns of police officers during a traffic stop. While officer safety is a legitimate concern when conducting traffic stops, to detain a passenger, "the officer should be able to identify objective circumstances that support the reasonableness" of the detention of a passenger and "not rely solely on standard routine or police protocol." Wilson v. State, 734 So. 2d 1107, 1113. A generalized safety concern without any

facts attributable to the passenger's behavior is not a reasonable basis to justify his detention. Id. The Wilson court properly treated the contact with a passenger who has exited the vehicle in a traffic stop similar to a Terry stop, which requires articulable suspicion that the individual is engaged in unlawful activity.

In so holding and analyzing, the Fourth DCA maintains the balance that the reasonableness standard serves. Officers can detain passengers, but they must do so reasonably. It may be that there are circumstances which warrant a passenger's detention, but that detention must be based on facts related to that passenger, not to the conduct of the driver or a non-specific threat to officer safety. This basic requirement does not unduly or unsafely limit the control an officer has during a traffic stop, just like it does not inordinately restrict an officer from performing his duties when he conducts a Terry stop on the street. If two individuals are walking down the street and the officer has reasonable suspicion with regard to the conduct of one of them, the other person is not stopped for associating with him, absent separate suspicion. Protection from the Fourth Amendment does not terminate once those same two people step inside a motor vehicle.

The Fifth/First DCA: Aguiar

On the other hand, the courts in Aguiar and Presley reject reasonableness in favor of a general concern for officer safety and a bright line rule. The Fifth District discussed the "heightened dangers" that could arise from allowing passengers to leave the scene of a traffic stop, and held that "the legitimate and weighty concern" of routine officer safety "outweighs the minimal intrusion on those few passengers who might prefer to leave the scene." Aguiar v. State, 199 So. 3d 920, 926 (Fla. 5th DCA 2016). The Fifth District concluded that Wilson v. State was incorrectly decided because "officer safety can only be addressed 'if the officers routinely exercise unquestioned command of the situation.'" Id. citing Maryland v. Wilson, 519 U.S. 408, 414 (1997). The Fifth District relied on language from the Supreme Court in Brendlin v. California, 551 U.S. 249 (2007), and Arizona v. Johnson,555 U.S. 323 (2009), writing that "the import of Brendlin and Johnson is clear. The United States Supreme Court has held that all occupants of a stopped vehicle are reasonably seized for the duration of a traffic stop. This necessarily means that the passenger is "not free to terminate the encounter." Id. at 930. Accordingly, the Fifth District's rule allows the police, as a matter of course, to detain a passenger

who attempts to leave the scene of a lawful traffic stop without violating the passenger's Fourth Amendment rights.

The United States Supreme Court

The United States Supreme Court has rejected Fourth Amendment rules that apply in every case, regardless of the facts. See Florida v. Harris, 568 U.S. __, 133 S. Ct. 1050 (2013)("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.") The determination that an officer may detain a passenger for the duration of a traffic stop without requiring an articulable suspicion of criminal activity contravenes the "touchstone" of the Fourth Amendment.

That court has recognized the challenges facing officers during traffic stops in a series of cases which allow officers routinely to order the driver and passengers in a stopped vehicle to exit the vehicle. Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997). In Mimms, the United States Supreme Court balanced the interest of officer safety against the additional intrusion of requiring an already-stopped driver to exist the vehicle. The Court concluded that this was a "de minimis" intrusion and "at most a mere inconvenience." Later, the supreme court in Maryland v. Wilson concluded that a passenger is already stopped by virtue of the vehicle stop, and

"the only change in their circumstances...is that they will be outside of, rather than inside of, the stopped car." Id. at 414. Notably, no passenger in Maryland v. Wilson attempted to leave the vehicle, and the Supreme Court did not decide the question of whether a passenger may be forcibly detained for the entirety of the stop. Ten years later, the supreme court determined that a passenger has standing to challenge a traffic stop because the passenger likely would not feel free to leave during a traffic stop. Brendlin v. California, 551 U.S. 249 (2007).

Most important to the issue in the instant case, in Arizona v. Johnson, 555 U.S. 323 (2009), the supreme court addressed the authority of police to stop and frisk a passenger in a lawfully stopped vehicle. Citing Terry, the Court wrote that stop and frisks are constitutionally permissible provided that the investigatory stop is lawful *and* the police have a reasonable suspicion that the person stopped is armed and dangerous. Johnson, supra, at 326. In considering the first requirement--that there be a lawful stop--and citing Brendlin, the Court wrote that during the stop of a vehicle on suspicion that the driver has violated traffic laws or is otherwise engaged in criminal conduct, the police seize everybody in the vehicle and need not have additional suspicion to believe an occupant of the vehicle is engaged in criminal activity. Id. at 327. But the Court did

not dispense with the reasonableness requirement as pertaining to each individual's rights with respect to their interaction with the police, writing that "to justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonable suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." Id.

Wilson Conforms to United States Supreme Court Precedent

The holdings in Wilson can be easily reconciled with the precedent from the Supreme Court. Although the passenger's "planned mode of travel has already been lawfully interrupted" and "the passenger has already been stopped due to the driver's lawful detention" by virtue of the traffic stop, Aguiar, *supra*, quoting Maryland v. Wilson at 414, police conduct must yield to reasonableness in their interaction with vehicle occupants. As made clear in Justice Ginsburg's opinion in Johnson, the Fourth Amendment protect the rights of the occupants of the vehicle as individuals, and the reasonableness of the officer's suspicion with regard to each occupant controls. The courts in Aguiar and Presley dispose of the individualized reasonable suspicion requirement, attempting instead to transfer the driver's suspicion to the passenger simply because of the supreme court's pronouncement that the occupants are seized for purposes of

standing. The courts in Aguiar and Presley conflate standing to challenge the stop with reasonable suspicion to detain, holding essentially that because passengers may challenge the constitutionality of the stop because they are seized (standing issue) pursuant to Brendlin, then the driver and the passengers are treated equally across the board for Fourth Amendment purposes. This is a misapplication of Arizona v. Johnson, and an abandonment of Terry v. Ohio.

The Passenger and Standing

There is no question that a passenger in a vehicle during a traffic stop is "stopped" for the purpose of standing. See Brendlin,551 U.S. 249 (2007). "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer 'by means of physical force or show of authority' terminates or restrains his freedom of movement." Florida v. Bostick, 501 U.S. 429 (1991). The finding of a seizure is necessary to establish standing, and the result of Brendlin is that a passenger may bring a Fourth Amendment challenge to the legality of the traffic stop. Id. at 259. The issue here is different: how does the Fourth Amendment treat the passenger after he is stopped. The First and Fifth Districts adopted a bright line standard, ruling that police may in all circumstances and without reason treat every individual who

occupies a vehicle the same because they are all seized. The result is an inappropriate transfer of suspicion from the driver to the passenger. In addition to deserting the reasonableness requirement, this bright-line rule regards the place, not the people. The Fourth Amendment protects people, not places. Katz v. United States, *supra*, at 351.

Application to the Facts

The facts of the instant case make clear the need to reject the Fifth and First District's rule. Here, a vehicle is stopped for running a stop sign and bad brake lights. Contraband is not found in the car, so the passengers do not raise the issue of standing to challenge the lawfulness of the vehicle stop. The occupants of the vehicle are removed pursuant to Mimms (removal of driver) and Maryland v. Wilson (removal of passenger). When the backup units arrive, one of the passengers who is acting belligerently is detained in handcuffs while Mr. Presley, who is acting calmly and not suspiciously, is not in handcuffs. The driver, who ran the stop sign and is driving a car with broken tail lights, is the object of police suspicion. Mr. Presley would have had standing to challenge the stop if contraband had been found in the car. But it is ludicrous to say that Mr. Presley somehow has responsibility for a broken tail light or for

the driver's failure to stop at a stop sign so as to justify reasonably his continued detention.

This is not to say that police cannot develop suspicion as the stop unfolds. Police may develop suspicion, but it needs to be with regard to each person. When Mr. Presley is told to stay, the officer did not have suspicion at that moment to tell him to stay. As such, he should have been let go. If he had gotten ten feet away, or if he had chosen to stay of his own free will when the officer received the information from dispatch that Mr. Presley was on probation, the police could have then developed reasonable suspicion to stop him. Suspicion is not static. Police are always learning new information and the presence of suspicion is fluid based on the knowledge known to the police at the time. A passenger in Mr. Presley's position is "someone who, at the time of the law enforcement encounter, is not suspected of any violation of the law, and who does not pose an articulable suspicion of danger to officer safety." Wilson v. State, 734 So. 2d at 1113(Schack, J., concurring specially).

Here, since the officers had no reasonable suspicion to believe Mr. Presley was engaged in criminal conduct or presented a threat, he should have been permitted by Officer Pandak to leave. Although he was seized by the police as a passenger in the car in the sense that his travel was interrupted by the

lawful stop of the driver, once backup officers arrived and could not articulate a reason to continue to hold him, and he was outside the vehicle and inclined to leave, he should have been released. Accordingly, his continued detention was illegal and the evidence obtained from him should have been suppressed.

Mr. Presley urges this Court to reject the bright line rule--which is an unsupported extension of a necessary finding to establish a passenger's standing to challenge the legality of a traffic stop--and hold fast to reasonableness. The First District Court erred in affirming the trial court's denial of Mr. Presley's motion to suppress, agreeing with Aguiar and receding from Wilson and the touchstone of the Fourth Amendment, reasonableness. This Court should reverse.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner requests that this Court reverse the First District's holding and approve the decision of the Fourth District Court in Wilson.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by e-mail to Samuel Steinberg, Assistant Attorney General, at crimapptlh@myfloridalegal.com, and by U.S. mail to Mr. Gregory Presley, DC# 816734, Santa Rosa CI, 5850 E. Milton Road, Milton, FL 32583, on this 13th day of February, 2017.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,

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