IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1173

STATE OF FLORIDA,

Petitioner,

-vs-

ROBERT BAEZ,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Respondent, ROBERT BAEZ, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol “T.” designates the transcript of the trial court proceedings. The symbol “A.” designates the Appendix to this brief.

STATEMENT OF THE CASE

Respondent was charged in an information with possession of cocaine (R. 3). At trial, the court denied Respondent's motion to suppress based on an unlawful stop (T. 126). Appellant was adjudicated guilty of the charge and sentenced to five and a half months in the Broward County Jail with credit for time served (T. 25-32).

On appeal, the Fourth District reversed this denial finding that a reasonable person in Respondent's position would not have felt free to leave while the officer was running a check on his license, so that a detention occurred at this point, requiring reasonable suspicion to keep Respondent (A. 1-3). This court accepted conflict jurisdiction in this case and issued a briefing schedule.

STATEMENT OF THE FACTS

Deputy Schneider testified that on August 8, 2000 at around 8:30, while working road patrol, he was dispatched to a warehouse area in the City of Weston (T. 82). He said that he was asked to assist the Broward County EMS "with a suspicious incident where a subject may be passed out behind the wheel of a vehicle" (T. 82). He stated that the area where he was dispatched was unoccupied at the time and that there was limited lighting (T. 82).

Upon his arrival, Deputy Schneider observed a white van in the parking lot, meeting the description given over dispatch, with a white male slumped over the wheel (T. 82-83). The deputy said that it appeared that the male, who he identified as Respondent, was either asleep or that something was wrong (T. 83). He explained, "I'm concerned for his safety, first of all. . . Incapacitated or something was wrong and he needed either medical attention or some kind of attention." (T. 83). He said that he knocked on the window of the van and Respondent sat upright (T. 83).

Deputy Schneider testified that he identified himself as an officer and asked if he was okay (T. 84). He stated that Respondent did not appear to hear him through the window, so he stepped out of the vehicle to talk to him (T. 84). He said that

he again asked Respondent if he was okay, to which Respondent replied that he was sleeping (T. 84).

Deputy Schneider testified that at this point, he asked Respondent for identification, which he described as routine procedure under the circumstances (T. 84, 91-92). He checked the information on his computer and found that there was a possible warrant from out of state (T. 113).

The deputy placed Respondent in the back of his patrol car at the scene (T. 84-85). After Respondent was subsequently placed in another deputy's vehicle, Deputy Schneider found two pink, small plastic baggies with a white powdery-substance in this vehicle, later determined to be cocaine (T. 85-86, 142).

Respondent testified, outside the presence of the jury, that he had parked in the open parking lot in front of a building to eat the food that he just picked up before going to pick up his kids (T. 118-119). He said that he fell asleep and was awoken when he heard tapping on the glass of his window (T. 119-120). He said that an officer was standing by his vehicle (T. 120). He lowered his window because the officer could not hear him (T. 120). He testified that he told the officer that he was fine and proceeded to drive away when the officer ordered him to give him his license (T. 120).

Deputy Hubcheck testified that he arrived on the scene as backup (T. 127). His first contact with Respondent was when he took him out of Deputy Schneider's vehicle and directed him to his own vehicle (T. 128). He said that Deputy Schneider then searched his vehicle (T. 130). Deputy Hubcheck transported Respondent to the jail (T. 131).

SUMMARY OF ARGUMENT

The district court erred in finding that Respondent was seized when the deputy ran a computer check on his license. The court failed to consider the totality of the circumstances surrounding the encounter. The fact that the deputy briefly retained the license should not have been dispositive on the issue of whether Respondent was seized. Rather, had all of the circumstances been reviewed, the court would have had to find that Respondent voluntarily continued the encounter, because the deputy did not act in any way to make a reasonable person feel as if he could not end the situation.

ARGUMENT

THE DISTRICT COURT ERRED IN DETERMINING THAT RESPONDENT WAS SEIZED WHEN THE DEPUTY RAN A COMPUTER CHECK ON HIS LICENSE.

On appeal, the Fourth District reversed the trial court's denial of the motion to suppress, finding that a reasonable person in Respondent's position would not have felt free to leave while the officer was running a check on his license, so that a detention occurred at this point, requiring reasonable suspicion to keep Respondent (A. 2-3). The court reasoned that this case is distinguishable from this court's opinion in Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) because the officer herein did not act on a tip of suspicious activity and was not concerned about the welfare of Respondent (A. 2-3).

The Fourth District also distinguished this case from other district court cases by pointing out that the courts in the other Florida cases cited by Petitioner rested their decisions on whether the defendants consented to searches, and not on the validity of the stops. Petitioner submits that the Fourth District's opinion is in direct conflict with not only this court's opinion in Lightbourne, but also with other district court cases, as well as is inconsistent with case law from other jurisdictions. Moreover, the State suggests that the court's

reasoning that a reasonable person in Respondent's position would not have felt free to leave is flawed; the court failed to consider the totality of the circumstances.

Not all personal intercourse between law enforcement and citizens is a seizure. Terry v. Ohio, 392 U.S. 1, 20 (1968). An officer does not violate the Fourth Amendment by approaching a person on the street and asking questions and for identification. Id. at 31-33. This is because the person approached does not have to listen or comply. Id. Hence, the court in U.S. v. Mendenhall, 446 U.S. 544 (1980) held that the defendant was not seized when the officers, based on a profile, encountered the defendant on a concourse, asked to look at her license and ticket, and upon returning these items, asked the defendant to accompany them to an office upstairs in the airport where they asked for permission to search her person.[1]

The court in Mendenhall stated that a person is seized only when physical force or a show of authority restricts his freedom of movement. The court listed circumstances that might indicate a seizure: threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person

[1] By reason of the 1982 amendment to article I, section 12 of the Florida Constitution, this court is bound to follow United States Supreme Court precedent on the Fourth Amendment. Bernie v. State, 524 So. 2d 988 (Fla. 1988).

of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. 446 U.S. at 554. The court explained, "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." Id.

Later, the court in Florida v. Royer, 460 U.S. 491, 501 (1983) decided that it was permissible for the officer to examine the defendant's airline ticket and driver's license upon approaching him in the airport. It further determined in I.N.S. v. Delgado, 466 U.S. 210, 217-218 (1984) that I.N.S. agents could individually approach workers in a factory and ask about, and for proof of, residency and citizenship without implicating the Fourth Amendment, even though agents stood next to the doors of the factory while the survey was being conducted.

Even where a person's movements are "confined" to an extent, an encounter is not necessarily rendered a seizure. See Michigan v. Chesternut, 486 U.S. 567 (1988)(police drove alongside pedestrian to find out where he was going). For instance, in Florida v. Bostick, 501 U.S. 429, 436 (1991), the defendant was a passenger on a bus about to depart when he was approached. The court held, therefore, that the inquiry was not whether a reasonable person would feel free to leave in this situation,

but whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. Id. After all, the refusal to cooperate does not furnish any objective justification for detention. Id. at 437.

Appropriately, then, this court in Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) upheld the checking of the defendant's license as not in violation of the Fourth Amendment, even though it was not contended that the officer had reasonable suspicion to believe an offense had been committed. In Lightbourne, the officer approached the defendant as he sat in his vehicle after having responded to the scene pursuant to a general call of suspicious activity. This court did not find that the officer's computer check of the defendant's license constituted an illegal seizure. This court explained:

> Officer McGowan simply approached the parked car, asked defendant a few simple questions as the reason for his presence there, his current address, and then ran a routine check on defendant's car and identification. **Surely the average, reasonable person, under similar circumstances, would not find the officer's actions unduly harsh.** There is nothing in the record that would indicate that prior to defendant **voluntarily relinquishing his driver's license** to Officer McGowan he was not free to express an alternative wish to go on his way.

438 So. 2d at 387-388.(emphasis supplied).

Acknowledging that this court in Lightbourne deemed the

encounter between the defendant and the officer as a consensual one wherein the defendant voluntarily handed to the officer his identification, which was then checked, the Fourth District nonetheless distinguished the instant case from Lightbourne based on two reasons: the responding officer was not acting on a tip of suspicious activity and the officer was not concerned about the safety of the defendant upon looking at his identification (A. 3). However, in so doing, the Fourth District apparently overlooked testimony in the record and facts relied on by this court in Lightbourne.

First, in this case, Deputy Schneider, expressly testified, "I received a call to assist Broward County EMS with a **suspicious incident** where a subject may be passed out behind the wheel of a vehicle" (T. 82).(emphasis supplied). He explained that Respondent's van was parked in a warehouse parking lot in an industrial area in Weston that is "normally unoccupied" at around 8:30 to 9:00 in the evening in "very limited" lighting (T. 82-83). Hence, the responding officer did go to the scene pursuant to a tip of suspicious circumstances.[2]

Second, the record clearly shows that Deputy Schneider, who

[2] The nature of the tip likely was not elaborated upon because the testimony was before the jury at trial, and not during a separate motion to suppress hearing.

arrived at the scene around the time EMS did, was concerned about Appellant's safety in the same way that the officer in Lightbourne might have been concerned about the safety of the defendant. Deputy Schneider said that Appellant was "slumped" over the wheel of his van (T. 83). He thought that Appellant might be unconscious (T. 82). He testified:

> **I'm concerned for his safety, first of all**. Maybe there was some reason he was here... Incapacitated or something was wrong and he needed either medical attention or some kind of attention.

(T. 83).(emphasis supplied).

As in this case, there was no indication in the Lightbourne opinion that the officer was worried about the defendant's safety after talking to him and looking at his identification. This court in Lightbourne suggested that the officer had asked the defendant questions about why he was in the parking lot. 438 So. 2d at 387-388. Notably, the Lightbourne opinion does not set out any facts suggesting that the defendant gave any response to the officer's questions that might have suggested that he was in danger.

Moreover, this court emphasized that while the responding officer was "motivated" by a concern that the defendant might be in need of assistance, as was Deputy Schneider in this case, upon arriving on the scene, the officer then acted prudently for

the safety of the community. 438 So. 2d at 388. In this case, the deputy said that when Appellant stepped out of his vehicle, he asked for identification as standard procedure because he wanted to know with whom he was talking (T. 84, 91-92).

Citing to Lightbourne, the court in State v. Chang, 668 So. 2d 207, 208 (Fla. 1st DCA 1996), a case wherein the officers saw a group of males standing in front of a vacant house known for drug trafficking and asked the group what they were doing there, held in regard to the check on the defendant's license:

> We hold that the trial court erred in holding that Chang was illegally detained. There was no constitutional violation in Officer Schwab approaching Chang, asking for identification, receiving Chang's driver's license, and running a check for warrants. (citations omitted). The contact between Officer Schwab and Chang was nothing more than a consensual encounter between a police officer and citizen. (citations omitted).

668 So. 2d at 208.

Because the encounter was deemed consensual, the court stated that it only had to determine whether the subsequent consent to search was voluntary.

Similarly, in State v. Robinson, 740 So. 2d 9, 11-12 (Fla. 1st DCA 1999), the court described the contact between the defendant and officer, who was on patrol and noticed that dogs were barking in the area around the defendant, as "minimal." It said that the contact was consensual at the point where the

officer asked for identification and ran a check on it upon the defendant producing it for him.

On the same line of reasoning, the court in State v. Arnold, 475 So. 2d 301 (Fla. 2d DCA 1985) reversed the order granting the motion to suppress based on an unfounded stop. It determined that the officer, who went to the scene because of a call about a suspicious boat in the area, acted reasonably in requesting identification from the defendant and running a check on it. It said, relying on Lightbourne, that the encounter did not rise to the level of a stop or seizure. 475 So. 2d at 307.

The Second District again relied on Lightbourne in State v. Mitchell, 638 So. 2d 1015 (Fla. 2d DCA 1994),wherein the court held that the initial encounter between the defendant and the officer was consensual. The officer in Mitchell approached the defendant's vehicle, which was parked in the lot of a closed gas station early in the morning, asked about the defendant's business there and identity, and ran a computer check on the identification.

Likewise, the court in McClane v. Rose, 537 So. 2d 652 (Fla. 2d DCA 1989) determined that the trial court improperly denied forfeiture on the basis that the cocaine found on the defendant was unlawfully seized. It rejected the contention that the officers needed reasonable suspicion to approach the defendant

and check his identification, deciding that the encounter was consensual.

In McLane, the officers approached the defendant and asked for his driver's license. Upon receiving the license, the officer requested computer information on the defendant. While waiting for this information, the officer observed the passenger in the defendant's car appear to try to hide something, so he ordered the passenger to exit, at which time the officer discovered a bag of cocaine between the console and the seat. The Second District in McLane found that the defendant was not detained until after the officers found the cocaine. 537 So. 2d at 654.

Still yet, in the recent case of Watts v. State, 788 So. 2d 1040 (Fla. 2d DCA 2001)(en banc), the court described the encounter between the defendant and officer, in which the officer walked up to the defendant, who was in a "high drug area," asked questions and for identification, and ran a warrant check on the identification, as consensual. It stated, "Watts was still free to go at this point and the encounter remained consensual." 788 So. 2d at 1041.

Even more recently, after the decision in this case, the Second District indicated in Parsons v. State, 27 Fla. L. Weekly D988 (Fla. 2d DCA May 3, 2002) that the encounter remained

consensual at the point where the officer asked for identification and ran a records check on it. It said that the encounter became an investigatory stop, though, when the officer then ordered the defendant, who was asleep in the car parked in a public lot, out of his automobile.

In Florida v.Bostick, 501 U.S. 429, 439 (1991), the court refused to accept the state court's finding that one factor, the cramped confines of the bus, was enough to be a dispositive factor in every case; it directed that it was a single point that had to be taken into consideration with other factors. Thus, it remanded the case for the court to consider all of the circumstances surrounding the encounter to determine whether the police conduct communicated to a reasonable person that he was not free to decline the officer's requests and terminate the encounter. 501 U.S. at 439.

Accordingly, at least one federal circuit has refused to find that the single factor of an officer retaining a license for the purpose of running a computer check on it constitutes a seizure. In U.S. v. Weaver, 282 F. 3d 302, 310 (4th Cir. 2002), the Fourth Circuit refused to adopt a bright-line rule that when an officer retains a person's identification to check for outstanding warrants, the person is effectively seized. See also U.S. v. Analla, 975 F.2d 119 (4th Cir. 1992)(officer stood near

car door and held license as checked information by way of walkie-talkie). It stressed that time and time again the United States Supreme Court has pointed out that the inquiry as to whether a police-citizen encounter is a seizure depends on the totality of the circumstances and not on one dispositive factor. 282 F. 3d at 310.

Citing to INS v. Delgado, 466 U.S. 210 (1984), the court in Weaver noted that the fact that most people respond to police requests and are not told that they do not have to do so does make an encounter a seizure. Hence, it determined that even though it might have made the defendant feel awkward, the defendant in Weaver could have nonetheless walked away from the encounter. 282 F. 3d at 311-312. It reasoned that the defendant chose to remain and acquiesce to the officer's requests. Id. at 312.

In Weaver, the officer made contact with the defendant because he generally matched the description of a person given in a dispatch about a robbery. The officer obtained the defendant's license and ran a check on it. When no warrants were indicated, the officer asked the defendant if he would accompany him to a nearby bank to face the teller who had been robbed. The defendant went with the officer, who continued to hold his identification.

The court in Weaver did note that the defendant was a pedestrian so that he was unaffected by the officer's retention of the license. 282 F. 3d at 312. However, it first stressed that it was the defendant's having acquiesced to the officer's requests that was key. Here, Respondent did not have to comply with the request for the license or could have requested it back, letting the officer know he wanted to leave. He could have even driven away with no criminal consequence, for the officer knew that he was licensed.[3]

Indeed, it was Respondent who exited his vehicle on his own volition. In U.S. v. De La Rosa, 922 F. 2d 675 (11th Cir. 1991), the court distinguished its earlier case, U.S. v. Thompson, 712 F. 2d 1356 (11th Cir. 1983), on which the Fourth District relied, because it noted that the defendant in De La Rosa had already exited his vehicle and could have walked away. 922 F. 2d at 678 n. 2. In De La Rosa, the officer approached the defendant after he parked in his apartment complex lot and asked to talk with him. The officer requested the defendant's license, and before returning it to him, asked and received permission to search his vehicle. While Respondent may not have had a nearby apartment to go to like the defendant in De La Rosa, he did have the

[3] The failure of a driver to have his license in possession while driving is a noncriminal, nonmoving violation. See Section 322.15 (4), Florida Statutes.

ability to act as a pedestrian.

Regardless, the fact that Respondent was approached in a vehicle does not dictate a finding of a seizure. In U.S. v. Dunigan, 884 F. 2d 1010 (7th Cir. 1989), the police made contact with the defendants as they sat in their van, which was stopped at a street corner. The officers asked the defendants questions about where they were going and asked to see their licenses. One officer took the licenses to do a status check, while the other officer used a flashlight to look into the interior of the van. The court ruled that the officers did nothing that could have objectively led the defendants to believe that they were not free to leave up to the point it was discovered that the driver's license was suspended. 884 F. 2d at 1015.

In an unpublished opinion, the Tenth Circuit determined in U.S. v. Himes, 25 Fed. Appx. 727, 2001 WL 1241136 (10th Cir. 2001)(unpublished) that the request for a license and the retention of the license while a dispatcher did a check on it was sufficiently brief so as not to trigger Fourth Amendment scrutiny. The court described the encounter, in which the officer parked near the defendant's vehicle, which was parked along the shoulder of a highway, as a "motorist assist." The court explained that unlike cases dealing with traffic stops that the State later attempts to describe as consensual

encounters after information has been verified, "because a motorist assist begins as a consensual encounter, a police officer can retain a driver's license for a short period of time without changing the consensual nature of the encounter." 25 Fed. Appx. at 730. The State submits that although the instant situation did not occur on the side of a public road, as in Himes, the officer in this case was similarly concerned about the welfare of the driver.

In its opinion, the Fourth District cited to two other federal cases besides Thompson, U.S. v. Jordan, 958 F. 2d 1085 (D.C. Cir. 1992) and U.S. v. Jefferson, 906 F. 2d 346 (8th Cir. 1990).[4] First, Petitioner emphasizes that unlike in this case, in Jordan and Jefferson, the officers continued to question the defendants while they retained their identification. In Jordan, the officer, who identified himself as a narcotics officer running a drug interdiction mission, asked the defendant if he had any drugs and whether he could search his tote bag while he held the defendant's license. In Jefferson, the officer

[4] The Fourth District also cited U.S. v. Battista, 876 F. 2d 201 (D.C. Cir. 1989) (A. 2). However, while the court in Battista determined that a seizure occurred, in part due to the assumption that the police never returned the defendant's identification to him when they asked to hand search his roomette on the train, the court recognized that the police where conducting an investigatory stop, as opposed to a consensual encounter, and found that they had reasonable suspicion to warrant the investigation.

likewise took the defendants' identification prior to asking them questions. He also asked them to come sit in his patrol car after he obtained the licenses, where he interviewed the defendants. Thus, under a totality of the circumstances analysis, the situations in Jordan and Jefferson might be deemed as more intrusive than in this case.

Second, the two circuits which decided Jordan and Jefferson have made rulings in other cases consistent with the State's position. The D.C. Circuit in U.S. v. Tavolacci, 895 F.2d 1423 (D.C. Cir. 1990) suggested that the retention of papers constitutes a seizure when it is prolonged or accompanied by some interview. Thus, it determined that no seizure occurred where the officer stood in the open doorway of the defendant's roomette on a train and asked to see the defendant's ticket, and then still retaining the ticket, asked to see some photo identification, while continuing to talk to the defendant as he looked for it.

In U.S. v. McManus, 70 F. 3d 990 (8th Cir. 1995), the Eighth Circuit upheld the validity of the encounter in which the officer conducted a computer check on the defendant's identification as consensual. In McManus, the defendant went to the police headquarters to verify the VIN number of his vehicle. The officer verified that the VIN number on the defendant's

registration form matched the number of his vehicle. The officer then asked the defendant for his driver's license and proceeded to run three computer checks on it. Considering the totality of the circumstances, the court in McManus noted, "McManus, by his own free will, handed over his license. Roberts did not threaten MCManus or use coercive tactics. He did not display a weapon or physically detain Roberts." 70 F. 3d at 992.

Similarly applying the the totality of the circumstances test in inquiring whether the retention of a license constitutes a seizure, state courts outside of Florida have found that it does not. In McCain v. Commonwealth, 545 S.E. 2d 541 (Va. 2001), the Virginia Supreme Court held that the officer did not effect a seizure of the defendant when he approached the defendant in his vehicle, which was parked on the side of the road, asked for identification, and conducted a check for warrants. It explained that the officer did not make a show of force or authority that would have led a reasonable person to believe that he was not free to leave. 545 S. E. 2d at 545-546.

In a similar vein, the Colorado Supreme Court in People v. Paynter, 955 P. 2d 68, 73 (Colo. 1998) determined that the officer's request for identification from occupants of a vehicle, legally parked on a public street in front of a private

residence, was not so intimidating as to require a response because it was not done in a threatening manner. The court found the encounter, during which the officer took the identification to his patrol car to run a check, to be consensual.

The Utah Supreme Court held in State v. Higgins, 884 P.2d 1242 (Utah 1994) that the officer permissibly ran a computer check on the defendant, a passenger in a stopped vehicle who offered to drive away the car to avoid impoundment. The court stated that the passenger was not seized at the time the warrant check was run. 884 P. 2d at 1246. While the check was on the defendant's name, for she did not have a license with her, the officer conditioned the defendant's leaving with the car on his running a check. The court pointed out that the defendant made the choice to drive and not just leave the scene.

In Maryland, an appeals court held in State v. Ott, 584 A. 2d 1266 (Md. App. 1990), quashed on other grounds, 600 A. 2d 111 (Md. 1992) that the officer did not seize the passenger of an automobile that was parked in a deserted lot to a shopping mall in the early morning hours when he requested identification and ran a check on it. In a similar ruling, the court in Warrensville Heights v. Mollick, 607 N.E.2d 861 (Ohio App. 8th Dist. 1992) upheld the validity of an encounter in which the

officer on patrol asked the defendant, who was standing outside of his vehicle in an area known for drugs, for identification on which he ran a computer check. See also State v. Glen, 2002 WL 31719351 (Ohio App. 9th Dist. 2002)(unpublished)(checked pedestrian's identification for warrants); State v. Morgan, 2002 WL 63196 (Ohio App. 2nd Dist. 2002)(unpublished)(computer check on vehicle passenger's license).

A couple of districts in Illinois have also held that consensual encounters were not rendered seizures because identification was held during checks. In People v. Smith, 640 N.E. 2d 647 (Ill. App. 4th Dist. 1994), the court upheld the officer's encounter with the passenger of a vehicle that was stopped for a minor traffic violation in which the officer obtained the passenger's license and ran a check on it in his squad car. But see People v. Gonzalez, 753 N.E. 2d 1209 (Ill. App. 2d Dist 2001).

In a situation not involving an initial traffic stop, the court in People v. Cole, 627 N.E. 2d 1187 (Ill. App. 2d Dist. 1987) upheld the trial court's determination that the defendant was not seized up to the point of his arrest. The officers approached the defendant, who was sitting in his parked vehicle near an apartment building. They asked to see his license, but the defendant produced an identification card. The officers

asked to see the license, too, as one officer continued to hold the identification card. To this, the defendant stated that his license was suspended, and the police arrested him for driving with a suspended license since the officers observed the defendant drive into the lot. The court noted that there was no evidence that the police would not have returned the identification card to the defendant or that they would not have given it to him if he had only indicated that he wanted it back right then. 627 N.E. 2d at 1191.

In California, although in unpublished opinions, the trend of the district courts appears to be finding that a consensual encounter is not rendered a seizure by virtue of an officer holding a license as he performs a computer search on it. See, e.g., People v. Purdy, 2002 WL 31689735 (Cal. App. 5th Dist. 2002)(unpublished); People v. Millsaps, 2002 WL 1733245 (Cal. App. 1st Dist. 2002)(unpublished); People v. Williams, 2002 WL 1050442 (Cal. App. Cal. App. 1st Dist. 2002)(unpublished); People v. Garcia, 2002 WL 89006 (Cal. App. 5th Dist. 2002)(unpublished); People v. Robinson, 2002 WL 27127 (Cal. App. 4th Dist. 2002)(unpublished); People v, Lampkin, 2002 WL 15668 (Cal. App. 5th Dist. 2002)(unpublished). In the one published opinion on this situation, People v. Terrell, 69 Cal. App. 4th 1246 (Cal. App. 2nd Dist. 1999), the court found that counsel was not

ineffective for failing to pursue a motion to dismiss on the premise that the defendant was unlawfully seized when the police ran a check on his identification. In Terrell, the defendant was seated on a park bench when the officer approached him and asked if he had any identification. When the defendant produced a license, the officer took it and ran a "wants and warrants" check. In finding that the encounter was consensual, the court stated:

> The totality of the circumstances surrounding appellant's arrest reveals that appellant's initial encounter with the police was consensual, including appellant's spontaneous and voluntary action in handing Officer Trevino his driver's license. At no time did he ask the officer for his driver's license back. During the entire encounter, which lasted about three minutes, neither Officer Trevino nor his partner, by words or conduct, indicated that appellant was not free to leave. No reasonable inference therefore could be drawn that the encounter was a detention rather than a consensual encounter.

69 Cal. App. 4th at 1254.

Petitioner advances that the totality of the circumstances in the instant case also does not warrant a finding that Respondent was seized when Deputy Schneider ran a check on his license. Like in a motorist assist scenario, Deputy Schneider was acting in the role of a community caretaker when he responded to the dispatch about a "suspicious" situation (T. 82). He arrived on the scene to assist EMS because Respondent appeared to be "passed out behind the wheel of a vehicle" (T.

82). Deputy Schneider explained, “I’m concerned for his safety, first of all. . . Incapacitated or something was wrong and he needed either medical attention or some kind of attention.” (T. 83).

The deputy said that he knocked on the window of the van and Respondent sat upright (T. 83). He testified that he identified himself as an officer and asked Respondent if he was okay (T. 84). He stated that Respondent did not appear to hear him through the window, so he stepped out of the vehicle to talk to him (T. 84). He said that he again asked Respondent if he was okay, to which Respondent replied that he was sleeping (T. 84).

Deputy Schneider testified that at this point, he **asked** Respondent for identification, which he described as routine procedure under the circumstances (T. 84, 91-92)(emphasis supplied). He checked the information on his computer and found that there was a possible warrant from out of state (T. 113).

Considering the factors referred to by the United States Supreme Court in U.S. v. Mendenhall, 446 U.S. 544 (1980), it cannot be said that Respondent was seized by physical force or a show of authority. None of the circumstances listed by the court as indicative of a seizure are present in this case: threatening presence of several officers, the display of a

weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. 446 U.S. at 554 ("In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.").

Rather, the deputy in this case acted out of concern for Respondent, and then after establishing that he had just been sleeping, acted out of concern for the community. After all, Respondent was parked in front of a building in a deserted parking lot in an industrial area at night, and the officer had just received a dispatch to check it out. If nothing else, the deputy had an interest in determining the status of the license since Respondent was the purported driver of the vehicle.

In any event, Deputy Schneider did not act in any way to make a reasonable person believe that he could not end the encounter at any time. The deputy asked to see the license. He made no comments or suggestions that would invoke fear or demand compliance.

Instead, Respondent acted voluntarily when he responded to Deputy Schneider's questions and requests. He exited the vehicle on his own. He willingly agreed to hand over his

license. He did not ask where the deputy was going with it or if he could have it back. Moreover, he did not ask to end the discourse or otherwise indicate that he wished to leave immediately.

The Fourth District in the instant case, though, focused on the single factor of the officer retaining the license while he ran the computer check, and, as a matter of law, deemed this one factor as implicating the Fourth Amendment. In fact, it recognized that in O.A. v. State, 754 So. 2d 717 (Fla. 4th DCA 1998), it had held that it was permissible for an officer in a consensual encounter to remain in the presence of a juvenile and call in his name to be run through the computer (A. 2). The State suggests, though, that it would have been just as easy for a citizen to terminate the instant situation by asking for the license back as it would have been in O.A. by walking away.

Of course, as it stands, the Fourth District's opinion makes it seem that any retention of identification beyond a cursory look would render an otherwise consensual encounter a seizure. Thus, an officer would not even be able to make a meaningful observation of the person's name, residence, or driver's license number to independently check the information. Yet, in State v. Hansen, 994 P. 2d 855 (Wash. App. Div. 1 2000), the court held that no seizure occurred during the time that one officer handed

the license to another officer to write down information from it for a computer check.

The Fourth District erred in not taking all of the circumstances of the encounter into consideration and instead concentrating on only one factor. See Florida v. Bostick, 501 U.S. 429, 439 (1991)(one factor not enough to resolve issue of whether encounter amounted to a seizure). This factor, the brief retention of Respondent's license, did not render the otherwise consensual contact a seizure. Petitioner, therefore, asks that this court decline to adopt a per se rule for analyzing such encounters and apply the totality of the circumstances test in inquiring whether a reasonable person would feel free to end an encounter under the circumstances.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District, affirming the trial court's denial of the motion to suppress, and therefore, the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Margaret Good-Earnest, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on this ___ of December, 2002.

_____
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CERTIFICATE OF TYPEFACE

Petitioner certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
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