IN THE SUPREME COURT OF FLORIDA

RAYMOND EDWARD BARNES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-1413

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Raymond Edward Barnes, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of three volumes, a record on appeal [R], trial transcript [T], and supplement containing the motion to suppress hearing. [S], which will be referenced accordingly. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner’s statement of the case and facts. However, Petitioner’s brief is silent as to the essential relevant facts pertaining to both the jury instruction issue and the suppression issue. Therefore, the State will supply these facts for the court.

1. During the charge conference, defense counsel agreed that it was a case of actual personal possession and not constructive possession. [T 99-100].

2. Concerning the knowledge instructions, the following discussion took place:

Court: All right. Now, there is a knowledge issue as to the nature of the particular drug. And I note from the instructions, the standard jury instructions, there's a note to the judge: "If Defense seeks to show a lack of knowledge as to the nature of the particular drug, [an] additional instruction may be required. See. State versus Medlin, 273 Southern Second 394." Is that something the State is requesting?

Mr. Mochan [State]: The State would not be, Judge.

Court: Do you see where I'm talking about , Mr. Wade? The bottom of page 301.

Mr. Wade [defense]: There was a ...

Court: See –

Mr. Wade: – - I'm assuming tht it's the option of what is given here on number three.

Court: Yes.

Mr. Wade: I would be requesting that [number three].

Court: And I'm going to give three –

Mr. Wade: But further than that there's nothing I'm requesting.

[T 100-101].

3. At the conclusion of the charge conference, the court asked defense counsel: "Is that it, Mr. Wade"? Defense counsel replied, "Yes, Sir" [T 105].

4. The judge read the jury instructions [T 126-139], including the following instructions on the knowledge element:

> Before you can find the Defendant guilty of the crime charged the State must prove the following elements beyond a reasonable doubt: One, that the Defendant possessed a certain substance; two, the

> substance was Lortab or Hydrocodone; and three, that the Defendant had knowledge of the presence of the substance.
>
> To possess means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed. Possession may be actual or constructive. Actual possession means the thing is in the hand of, or on the person, or the thing is in the container in the hand of or on the person, or the thing is so close as to be within ready reach an is under control of the person.
>
> Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in the place over which the person has control. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

[T 127-128].

5. When the trial judge finished reading the jury instruction, the judge asked:

> Do either Counsel have any objections to the instructions as given or requests for additional instructions?

[T 139]. Defense counsel responded:

> Not from the Defense, your Honor.

[T 140].

6. The only ground raised in Petitioner's motion to suppress was that the officers had lacked "founded suspicion to justify the detention." [R 9-10].

7. Commander Seevers, in plain clothes, was wearing a Sheriff's tactical vest with "SHERIFF" written across the front and back of the vest. [T 33] Officer Counts was in uniform. [T 34]. When the officers pulled up to Petitioner, they turned on the inside light so that Petitioner could see they were law enforcement officers. [T 37, 57].

SUMMARY OF ARGUMENT

ISSUE ONE:

Petitioner not only failed to request a special instruction, but also affirmatively waived an additional or alternative knowledge instruction. Therefore, absent a request for the instruction, there was no error. Furthermore, because Petitioner is not entitled to reversal, his unpreserved issue is not entitled to review. Furthermore, given the recent enactment of § 893.101, it would be a useless act to remand for a new trial because Petitioner would not be entitled to receive the knowledge instruction at issue.

Accordingly, this court should affirm Petitioner's conviction.

ISSUE II:

This issue was not addressed by the district court and does not furnish an independent basis for jurisdiction. This Court should decline to address the issue.

The record shows that the stop was valid and the trial court properly denied Petitioner's motion. Both officers in this case were experienced law enforcement officers and were working a narcotics assignment. While patrolling a high-drug area, they observed Petitioner holding up a plastic bag containing "pills" or a substance that appeared to be crack cocaine, showing it to another person. Both officers recognized this activity as being consistent with a drug transaction. As the

officers approached Petitioner, he attempted to conceal the baggie from sight and as they attempted to stop Petitioner, he refused to cooperate. These facts were only bolstered when Petitioner fled on foot.

The observations of the experienced law enforcement officers suggested that there was criminal activity afoot and their investigation, as allowed by Terry v. Ohio, infra, shows that their suspicions were correct. The trial judge correctly found that the stop was justified and properly denied Petitioner's motion to suppress. That ruling, as well as Petitioner's conviction, should be affirmed.

ARGUMENT

ISSUE I

DID PETITIONER, BY FAILING TO REQUEST A SPECIAL KNOWLEDGE INSTRUCTION AND BY AFFIRMATIVELY WAIVING AN ADDITIONAL OR ALTERNATIVE KNOWLEDGE INSTRUCTION, PRESERVE THIS ISSUE FOR DIRECT APPEAL AND, IF SO, UNDER THESE CIRCUMSTANCES WAS IT FUNDAMENTAL ERROR FOR THE COURT NOT TO SUA SPONTE INCLUDE A SPECIAL KNOWLEDGE INSTRUCTION? (Restated)

Standard of Review

Petitioner argues that the standard of review is fundamental error. The state does not agree that there is fundamental error and maintains that the claimed error was not cognizable on appeal.

"'Fundamental error,'" which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). "Fundamental error is defined as the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999)(citations omitted).

Burden of Persuasion

Petitioner bears the burden of demonstrating prejudicial error preserved in the trial court. Section 924.051(7), Fla. Stat. (2000), provides:

> In a direct appeal ..., the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the Petitioner to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999).

Preservation

This issue is not preserved because it was not raised in the trial court. Petitioner failed to request a special knowledge instruction. [T 100-101]. Petitioner affirmatively waived any additional or alternative instruction [T 100-101], and he did not object to the instructions as proposed or as given. [I 99-105, 126-139]. For the foregoing reasons, there was no error[1], let alone fundamental error. Therefore, because Petitioner

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[1] The seminal cases,[Chicone, Scott, McMillon Washington and Williamson, infra,] all found that the trial court erred in denying the "requested" instruction.

failed to properly preserve the issue, it is not cognizable on direct review.

Additionally, in view of Petitioner's affirmative waiver and the evidence that Petitioner fled from the officers, the State submits that it is absurd for Petitioner to assert for the first time on appeal that he was sua sponte entitled to a special knowledge instruction.

MERITS

AFFIRMATIVE WAIVER

It is firmly rooted Florida law that even where it would be fundamental error not to read an instruction, an exception exists when defense counsel requests or affirmatively agrees to the omission or alteration of a jury instruction. Armstrong v. State, 579 So.2d 734 (Fla.1991); State v. Lucas, 645 So.2d 425 (Fla. 1994); Singletary v. State, 829 So.2d 978 (Fla. 1st DCA 2002); Hanks v. State, 786 So.2d 634, 635 (Fla. 1st DCA 2001), review denied 805 So.2d 807 (Fla.2001) (finding that even constitutional error may be waived by a tactical decision on the part of defense counsel); Firsher v. State, No. 3D02-30 (Fla. 3rd DCA Jan. 15, 2003); Summers v. State, 672 So.2d 617 (Fla. 5th DCA 1996).

Although the trial court was under no duty to, sua sponte[2], give an unrequested jury instruction, the court offered to give

[2] See argument, infra, the Florida Supreme Court has only held that it is fundamental error to deny a special knowledge instruction where one has been requested.

a special knowledge instruction, which the defense **affirmatively waived**:

Court: All right. Now, there is a knowledge issue as to the nature of the particular drug. And I note from the instructions, the standard jury instructions, there's a note to the judge: "If Defense seeks to show a lack of knowledge as to the nature of the particular drug, [an] additional instruction may be required. See. State versus Medlin, 273 Southern Second 394." Is that something the State is requesting?

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Mr. Wade: I would be requesting that [number three] .

Court: An I'm going to give three –

Mr. Wade: **But further than that there's nothing I'm requesting**.

[T 100-101. Emphasis added.]

At the conclusion of the charge conference, the court asked defense counsel: "Is that it, Mr. Wade"? Defense counsel replied, "Yes, Sir" [T 105].

The judge read the jury instructions [T 126-139], including the following instructions on the knowledge element:

> Before you can find the Defendant guilty of the crime charged the State must prove the following elements beyond a reasonable doubt: One, that the Defendant possessed a certain substance; two, the substance was Lortab or Hydrocodone; and three, that

> the Defendant had knowledge of the presence of the substance.
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> Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in the place over which the person has control. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

[T 127-128]. When the trial judge finished reading the jury instruction, the judge asked:

> Do either Counsel have any objections to the instructions as given or requests for additional instructions?

[T 139]. Defense counsel responded:

> Not from the Defense, your Honor.

[T 140].

Thus, it is clear from the facts that Petitioner was happy with the instructions as given. Petitioner had ample opportunity to offer his own input at the charge conference. The trial court was not only open to giving alternative or additional knowledge instructions, but actually offered to do so. Petitioner affirmatively waived by rejecting the court's offer to give an additional knowledge instruction. Likewise, the court gave Petitioner another opportunity to ask for an additional instruction when he finished reading the approved instructions to the jury. Again, Petitioner had no objection

to the given instructions and declined the court's second offer seeking requests for additional instructions. [T 139].

So, even assuming arguendo, that it had been fundamental error in November of 2000, for the court not to have sua sponte, sans any request, read the knowledge of the illicit nature instruction, the affirmative waiver exception clearly applied in this case.

FUNDAMENTAL ERROR

Petitioner claims that the court committed fundamental error when it did not **sua sponte** instruct the jury that the State had to prove that the defendant knew the illicit nature of the substance he possessed, even though Petitioner did not request a special knowledge instruction, and affirmatively refused the court's offer to give one. Petitioner was charged with violating section 893.13(6)(a), Florida Statutes (1997), which provided:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter.

Both parties agreed that it was an actual personal possession case. [T 100].

The First District Court per curium affirmed, citing State v. Medlin, 273 So.2d 394 (Fla. 1973); and Reed v. State, 783 So.2d 1192 (Fla. 1st DCA 2001), reversed Reed v. State, 27

Fla. L. Weekly S1045 (Fla. December 19, 2002). Barnes v. State, 815 So.2d 745 (2002). This Court's very specific holding in Reed –- that fundamental error occurred because the jury was given the erroneous definition of "maliciously" and because the malice element was disputed at trial–- is not controlling in this case because there was no request for a special knowledge instruction and the trial court's offer to give one was explicitly declined.

This Court has only held that it is fundamental error to refuse a special knowledge instruction where a special knowledge instruction is actually requested.

Background

When this case went to trial on November 30, 2000, State v. Medlin, 273 So.2d 394 (Fla. 1973); and Chicone v. State, 684 So.2d 736 (Fla. 1996), were the leading decisions in cases dealing with knowledge of possession of an illegal drug.

In Medlin, this Court held that in an **actual** possession case, the "State was not required to prove intent to violate the Statute **or defendant's specific knowledge of the contents of the capsule."** The instant case involves actual possession by the defendant of an illegal drug as noted by both the trial and district courts in citing to Medlin. Moreover, as the facts indisputably show, the defendant fled when approached by the police which is entirely inconsistent with any suggestion for the first time on appeal that knowledge of the nature of the illegal drug was in issue.

By contrast to Medlin and the instant case, Chicone was a case where the defense specifically requested a special jury instruction directing that the Defendant had to know the illicit nature of the substance he possessed. The Chicone court held

> While the existing jury instructions are adequate in requiring "knowledge of the presence of the substance," we agree that, if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed. We hold that the defendant was entitled to a more specific instruction as requested here.

Id. at 745-746. Moreover, the last line of footnote fourteen reads:

> Further, consistent with Medlin, the present instructions also note the inference of knowledge that may appropriately be drawn in cases of actual possession.

Id. at 746, fn 14.

The state suggests the obvious. Chicone does not require that a trial court sua sponte instruct the jury on knowledge of the nature of the drug when there is no request for such instruction. Nearly two years after the trial in this case, this Court decided Scott v. State, 808 So.2d 166 (Fla. 2002)and its progeny: McMillon v. State, 813 So.2d 56 (Fla. 2002); Washington v. State, 813 So.2d 59 (Fla. 2002); and State v. Williamson, 813 So.2d 61 (Fla. 2002).

Scott, like Chicone is a possession case, where the special instruction had been requested by the defense. The majority in Scott held:

> Knowledge of the illicit nature of the contraband is an element of the crime of possession of a controlled substance, a defendant is entitled to an instruction on that element, and it is error to fail to instruct on that element. [footnote omitted] It is error to fail to give an instruction even if the defendant did not explicitly say he did not have knowledge of the illicit nature of the substance. Additionally, the Medlin presumption or inference is applicable to those cases where the defendant has actual, personal possession of the substance. . . .The defendant in this case requested a Chicone instruction. The trial court denied that request; the denial was reversible error.

Id. at 172[3].

The state again points out that there was no request for a special knowledge instruction in the instant case.

Justice Wells, issued a strong dissent in Scott, stating that the court in both Chicone and Scott, had usurped the legislature's role by writing the element of knowledge into the offense. Justice Wells urged the legislature to quickly amend the statute to say that possession of contraband gives rise to a presumption of knowledge.

On February 28, 2002, this Court decided State v. Williamson, 813 So.2d 61 (Fla. 2002); McMillon v. State, 813 So.2d 56 (Fla. 2002); and Washington v. State, 813 So.2d 59

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[3] "Medlin stands for the proposition that evidence of actual, personal possession is enough to sustain a conviction. In other words, knowledge can be inferred from the fact of personal possession. 684 So.2d at 739."
Scott v. State, 808 So.2d 166, 171 (Fla. 2002)

(Fla. 2002). Again, in all these cases the special knowledge instruction had been requested and denied. Williamson and McMillon were actual person possession cases, while Washington dealt with constructive possession.

The Williamson court held:

> [w]e approve the decision of the Second District finding the trial court should have given the Chicone jury instruction as requested and finding, based on Williamson's defense of lack of knowledge of the illicit nature of the pills, that the error was not harmless.

Id. at 65. Likewise, the McMillon court held:

> [w]e find the trial court's failure to grant McMillon's request for the specific jury instruction harmful error.

Id. at 58. The Washington court held almost verbatim:

> We find that the trial court's failure to grant Washington's request for the specific jury instruction was harmful error.

Id. at 60.

Justice Wells, dissented in all three cases but reiterated in McMillon:

> Writing of elements into crimes is for the Legislature--not this Court.

Id. at 59.

The Florida legislature immediately reacted by adding § 893.101 entitled, **"Legislative findings and intent"** to Chapter 893 Fla. Stats., effective May 13, 2002:

> (1) The Legislature finds that the cases of Scott v. State, Slip Opinion No. SC94701 (Fla. 2002) and Chicone v. State, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance

found in his or her actual or constructive possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.

(3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

First, it should be noted that unlike the case at bar, Chicone, Scott, McMillon Washington and Williamson all involved a requested instruction, and each decision found that it was error to deny the requested instruction.

Therefore, the trial court here, absent a request from the defense, was under no obligation to give a special knowledge instruction. Furthermore, it was not fundamental error because this Court has only found fundamental error **where the special instruction was requested and denied.**

Further, in the instant case, we not only have a failure by the defendant to request the special instruction, we have an explicit rejection of the suggestion of the trial court that such instruction could be given. .

USELESS ACT

In State v. Strasser, 445 So.2d 322 (Fla. 1983), this Court emphasized: "We are not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief." Id. at 323. This court further reasoned that where nothing could be gained from granting a new trial:

> The only effect would be to increase the pressures on the already overburdened judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its forms.

Id. at 323.

In this instant case, it would be useless to remand for a new trial because in accordance with § 893.101 (2002), Petitioner would not be entitled to a jury instruction on knowledge of the illicit nature of the substance because the Florida Legislature has expressly decided that knowledge is not an element of the crime. If anything, the jury instructions in a new trial would be more beneficial to the prosecution than those given in the 2000 trial.

Therefore, because Petitioner not only failed to request a special instruction, but also affirmatively waived an additional or alternative knowledge instruction, he is not entitled to review or reversal. Furthermore, given the recent enactment of
§ 893.101, it would be a useless act to remand for a new trial because Petitioner would not receive the knowledge instruction at issue in this case.

Accordingly, this Court should affirm.

ISSUE II

DID THE TRIAL COURT ERROR IN DENYING PETITIONER'S MOTION TO SUPPRESS CLAIMING THAT THE OFFICERS LACKED FOUNDED SUSPICION TO JUSTIFY THE DETENTION? (Restated)

SCOPE OF REVIEW:

It is well established practice for this Court to decline to address issues which are not within the scope of the certified conflict or certified question for which it has granted review. McMullen v. State, 714 So.2d 368 (Fla. 1998); Allstate Ins. Co. v. Reliance Ins. Co., 692 So.2d 891 (Fla. 1997); Ratliff v. State, 682 So.2d 556 (Fla. 1996). In the present case, the First District Court per curiam affirmed citing State v. Medlin, 273 So.2d 394 (Fla. 1973) and Reed v. State, 783 So.2d 1192 (Fla. 1st DCA 2001), rev. granted (Fla. October 16, 2001)[4]. Both Medlin and Reed pertain to the jury instruction issue and not the suppression issue. Therefore, because this suppression issue is not within the scope of the conflict nor even remotely related, this Court should decline addressing the issue.

The trial court properly denied Petitioner's motion to suppress. There being no error below, Petitioner's conviction should be affirmed.

STANDARD OF REVIEW:

This Court recently reiterated:

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[4] Reed v. State, 27 Fla. L. Weekly S1045 (Fla. December 19, 2002), reversed.

> An appellate court should accord a presumption of correctness to a trial court's ruling on a motion to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution. See Connor v. State, 803 So.2d 598 (Fla.2001).

Smithers v. State, 27 Fla. L. Weekly S477, (Fla. May 16, 2002).

> In Terry v. State, 668 So.2d 954, 958 (Fla.1996), we stated:
>
> A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling.

Doorbal v. State, 27 Fla. L. Weekly S839,(Fla. 2002)

PRESERVATION

Petitioner raised the sole issue that the police lacked founded suspicion for the detention in a pretrial motion ro suppress and renewed the motion before the evidence was admitted at trial. [R. 8-10/T. 86-92] Thus, this issue was presented to the trial court and is properly preserved for appellate review. See e.g. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

***MERITS*:**

REASONABLE SUSPICION/ TERRY STOP

Petitioner’s basis for the motion to suppress is that the police officers did not have justification for the stop under

Terry v. Ohio, 392 U.S. 1 (1968). The record shows that the stop was valid and trial court properly denied Petitioner's motion.

Captain Seevers of the Santa Rosa County Sheriff's Office testified that on April 30, 1999, he was the supervisor over investigations and narcotics for that agency. [T. 31-32] At that time officers of that agency were working "stepped-up" narcotics enforcement. [T. 32] Captain Seevers and Officer Counts were teamed up together for this operation. [T. 33] Captain Seevers was in plain clothes, with a vest with "sheriff" written on it and Officer Counts was in a regular uniform. [T. 34, 54] The officers were driving a unmarked vehicle. [T. 33]

On that date, Captain Seevers and Officer Counts observed Petitioner and second subject standing under a street light in an area known for increased drug activity. [T. 34-35, 43, 56] Petitioner was observed by both officers holding up a plastic bag and showing its contents to the other subject. [T. 34-35, 56] Based on Captain Seevers nineteen and a half years as a law enforcement officer, and the packaging, he believed that the bag contained crack cocaine, however, he was not 100% sure what was in the bag. [T. 42] According to Captain Seevers, most people carry prescription drugs in their bottle. [T. 49] Officer Counts also believed the substance in the bag to be "pill-shaped" drugs and that potentially a crime had been committed. [T. 56, 58] Officer Counts suspected that

Petitioner was possessing illegal drugs, but was not positive what the substance was and wanted to investigate further before making an arrest. [T. 67] Based on his experience and observations, Captain Seevers believed that a drug transaction was about to take place. [T. 44]

As Captain Seevers and Officer Counts approached Petitioner, he lowered the bag to his side, out of the sight of the officers. [T. 36] They attempted to stop Petitioner, however, as the uniformed officer got out of the patrol car, Petitioner fled on foot. [T. 37-38, 58] Petitioner was apprehended after he fled into the woods. [T. 58-59] In a search conducted after Petitioner's arrest, he was found to be in possession of a plastic bag containing Lortab. [T. 60, 72]

The United States Supreme Court[5] has held that "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible." Ornelas v. United States, 517 U.S. 690, 695 (1996). The Supreme Court further stated that they are commonsense, nontechnical conceptions that deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Ornelas, supra [citations omitted]. As such, the standards are "not readily, or even usefully, reduced

[5] In matters of search and seizure, Florida law is inextricably tied to the 4th Amendment to the U. S. Constitution and all interpretations of that amendment made by the United States Supreme Court. Art. I, § 12, Fla. Const.

to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983).

The U.S. Supreme Court has described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity. United States v. Cortez, 449 U.S. 411, 417-418 (1981). The rationale for permitting brief, warrantless seizures is that it is "impractical to demand strict compliance with the Fourth Amendment's ordinary probable-cause requirement in the face of ongoing or imminent criminal activity demanding 'swift action predicated upon the on-the-spot observations of the officer on the beat.'" Terry, 392 U.S. at 20. Moreover, in Adams v. Williams, another Terry -stop case, the Supreme Court said that

> [t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.

Adams v. Williams, 407 U.S. 143, 145 (1972). The officers in the instant case had reasonable suspicion of criminal activity and were justified in stopping Petitioner.

Both officers in this case were experienced law enforcement officers and were working a narcotics assignment. [T. 32-33, 35, 53-54] While patrolling a high-drug area, they observed Petitioner holding up a plastic bag containing "pills" or a substance that appeared to be crack cocaine, showing it to another person. [T. 42, 56, 58] Both officers recognized this activity as being consistent with a drug transaction. [T. 44,

56, 58] As the officers approached Petitioner, he attempted to conceal the baggie from sight and as they attempted to stop Petitioner, he fled. [T. 36-38, 57-58]

The combination of the high-drug location, the observations of the officers, based on their training and experience in such matters, Petitioner's attempt to conceal the item and his refusal to stop when asked[6], all support the officers' belief that Petitioner had committed, was committing, or was about to commit a violation of the criminal laws. See § 901.151, Fla. Stat. (2001). These facts were only bolstered when Petitioner fled on foot. [T. 37-38, 58] In Illinois v. Wardlow, 528 U.S. 119 (2000), the Supreme Court held that flight in a high-crime area could be used as a factor in determining reasonable suspicion.

Petitioner asserts that the then-unknown substance in the plastic baggie could have been a number of lawfully possessed items. The facts of this case go well beyond a plastic bag and an unknown white substance and when viewed under the complete facts, as noted above, even peppermints or aspirin in the bag could have provided justification for the *stop* in this case. Even in Terry, supra, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The

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[6] United States Supreme Court cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. See e.g. United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Florida v. Rodriguez, 469 U.S. 1 (1984) (*per curiam*); United States v. Sokolow, 490 U.S. 1 (1989).

officer in Terry observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. Terry, 392 U.S. at 5-6. While all of this conduct was by itself lawful, taken together it also suggested that the individuals were casing the store for a planned robbery and Terry recognized that the officers could detain the individuals to resolve the ambiguity. Id. at 30.

In allowing such detentions, Terry accepts the risk that officers may stop innocent people. Wardlow, 528 U.S. 127. The Supreme Court further that stated in Wardlow:

> Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

Id. The fact that, despite appearances and the officers' conclusions based on their training and experience, Petitioner could have been engaged in lawful activity, does not invalidate their reasonable suspicion or the fact that the stop of Petitioner was lawful under the circumstances. Had Petitioner merely been holding peppermints or aspirin, he likely would not have fled and he certainly would not have been arrested for possessing Lortab.

The simple facts are that the observations of the experienced law enforcement officers suggested that there was criminal activity afoot and their investigation, as allowed by

Terry, supra, shows that their suspicions were correct. The trial judge correctly found that the stop was justified and properly denied Petitioner's motion to suppress. That ruling, as well as Petitioner's conviction, should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits that This Court affirm the decision of the District Court of Appeal, reported at 815 So. 2d 745, should be approved, and the order to suppress entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on February _____, 2003.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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