IN THE SUPREME COURT OF FLORIDA

RAYMOND EDWARD BARNES, :

Petitioner, :

VS. : CASE NO. SC02-1413

STATE OF FLORIDA, :

Respondent. :

_____:

INITIAL BRIEF OF PETITIONER ON THE MERITS

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I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal. Barnes v. State, 815 So.2d 745 (Fla. 1st DCA 2002). The court per curiam affirmed, citing State v. Medlin, and Reed v. State, infra. At the time of the opinion, Reed was pending review in this court, but the court recently decided the case.

Petitioner, Raymond E. Barnes, was convicted at jury trial of possession of Lortab, a controlled substance. All proceed-ings were held in Santa Rosa County. Pretrial proceedings including jury selection were heard by Circuit Judge Paul Ras-mussen; Circuit Judge Ronald V. Swanson heard the trial and subsequent proceedings.

The one-volume record on appeal will be referred to as "R," the supplement as “Supp,” and the one-volume trial transcript as “T.”

II STATEMENT OF THE CASE

Petitioner, Raymond Edward Barnes, was charged by informa-tion filed June 2, 1999, in Santa Rosa County, with possession of Lortab and resisting an officer without violence, the date alleged, April 30, 1999 (R 5). The state handwrote "/hydroco-done" without objection (T 8-9).

October 23, counsel filed a motion to suppress (R 8-10). Judge Rasmussen held a hearing November 2. The state stipu-lated to the facts in the motion; no other evidence was pre-sented (Supp 143-44). The court took the motion under advise-ment, then denied it in writing (R 12).

Barnes failed to make a court appearance, and the court issued a capias November 4 (R 11). He was arrested in Georgia around March, 2000 (R 14).

August 14, 2000, Barnes filed a copy of a letter sent to his attorney and the Florida Bar complaining about the quality of representation he had received (R 17-21). After a hearing, (R 99-110), the court allowed the Public Defender to withdraw and other counsel, William Wade, was appointed, with whom Barnes said he had had conflicts in the past (R 22-26).

At trial November 30, before Judge Swanson, at the close of the state's case, Barnes renewed his motion to suppress, which was denied (T 86-92) and moved to dismiss both charges on the ground the state had failed to make a

prima facie case, which was also denied (T 93-98).

During deliberations, the jury asked the following questions:

> 1) The definition of citizen contact.
>
> 2) What does a law enforcement officer have to say or do to indicate to a person that he is being detained?
>
> 3) Three criteria elements that need to be proved to each verdict.
>
> 4) At what point is it unlawful to walk away or flee from an officer?

(T 140-42). Without objection, as to question 1, the court instructed that the evidence was presented, and no additional evidence or instruction would be given; as to 2 and 4, it was a "factual determination for your determination." As to 3, he reinstructed the jury (T 142 et seq.). The court later gave an instruction when the jury reported they were deadlocked on one count (T 148 et seq.).

The jury found Barnes guilty as charged of Count 1 (R 53). The jury deadlocked on the resisting charge, which the state then dismissed (T 159,162, R 59).

The same day, November 30, Barnes was sentenced to 3 years, 4 months in prison, with credit for time served of 276 days (R 59-64). The credit for time served was later corrected (R 88-89). His lowest permissible sentence under the Criminal Punishment Code was 21.3 months (R 54-55).

Notice of appeal was timely filed December 27, 2000 (R

70). The First District Court of Appeal affirmed per curiam with cites to Reed and Medlin.

III STATEMENT OF THE FACTS

Santa Rosa Deputy Woody Seevers testified that he was in charge of a "stepped up" narcotics operation on April 30, 1999. Officers worked in pairs on Byrom Street. Seevers was teamed with Randy Counts in an unmarked car, his 1996 Crown Victoria (T 32-33). Seevers wore plainclothes, but also wore a vest which said "sheriff" on the front and back (T 33-34). Counts was in uniform (T 34).

Around 10:30 p.m., Seevers saw two black males walking on Byrom Street. They were almost directly under the street light (T 34). Seevers testified he saw Petitioner, Raymond Barnes, "holding up a plastic bag with the aid of the light, showing the individual the contents of the bag." Could he tell what the contents of the bag were? "No, sir, not offhand. I had speculation as to what it could possibly be" (T 35).

Seevers pulled the car up next to the men. Barnes lowered the bag to his side out of Seevers's view. Seevers pulled up and asked Barnes to talk to him. Both men continued to walk northward on Byrom (T 36). Seevers turned the dome light on inside the car "to make sure that he knew that I was a law enforcement officer." He pulled a little

ahead of the two men. He again said, “Stop and talk to me,” and “what are you all doing.” How did Barnes respond? Barnes turned and walked southbound. Seevers put the car in reverse and followed him, the whole time telling him, “Stop and talk to me.” Counts got out of the car (T 37).

By the time Counts got to the rear of the car, Barnes took off running; Counts chased him. Seevers parked and told the other man to remain there, then he too started chasing Barnes. Counts had Barnes down on the ground and was attempting to handcuff him (T 38). Major Murray and Detective Carrier arrived. Seevers returned to his car; the other man was not there (T 39).

Seevers did not question Barnes on the way to the jail, but Barnes made comments like, “you know me, man. Don’t take me to jail” (T 40).

On cross, asked if he knew Barnes before, Seevers said, “I know who Mr. Barnes is through my years of experience and being with the Sheriff’s office. I have seen him on several occa-sions, yes, sir.” Seevers had gone to school with one of Barnes’s brothers (T 41).

Seevers saw a “bag being held up, which contained some-thing; and based on my training at first I suspected it as being crack cocaine” (T 42). He was not 100% sure as to what was in the bag, but it was similar to the way that narcotics is packaged. He could not identify the exact

substance in the bag (T 42). His suspicion was “based on my experience as a law enforcement officer,” and “the area of where I was at.” So you would suspect people to be conducting drug transactions in that area? “It’s an area known for increased activity.” Q: I mean, everybody out there is not involved in illegal activity, are they or are they? A: No, sir. I wouldn’t say that. So, when you first approached Barnes, you didn’t know whether he had anything that was illegal or not? “I was not 100% sure, but I had a reasonable suspicion” (T 43). But he was mistaken (T 43). Did you have a reasonable suspicion that he had crack cocaine? “I had reasonable suspicion that he possibly had some type of illegal narcotics” (T 43-44). “Based on my training and experience I had reason to believe that a possible drug transaction was about to take place” (T 44).

Did you feel you had a legal basis to detain Barnes? “I did not detain Mr. Barnes.” “I felt like I had legal justifi-cation to make contact with him and initiate an officer con-tact.” You don’t have to have anything to do that? No. “I simply pulled my vehicle alongside of him and asked him to talk to me” (T 45).

> A: We were up there not only to step up enforcement, but also to improve the relations between law enforcement and the citizenry in that area.
>
> Q: Well did you succeed?
>
> A: I think we’ve made some successes in that area,

yes, sir, over the years.

Q: So you improved the relationships by chasing some-one through the neighborhood because you see them holding a piece of cellophane?

A: I'm not directly talking about this particular case, Mr. Wade. I'm talking about the citizenry as a whole.

(T 47-48).

On redirect, Seevers said the substance in the bag was white. Crack cocaine could be anything from white to yellow (T 49).

Deputy Randy Counts testified that, from "maybe three car lengths, two, three car lengths," the bag appeared to contain pill-shaped drugs (T 56,66). Counts intended to detain Barnes because he "wanted to ascertain exactly what he had in the plastic bag." Barnes started to run and Counts chased him. Counts yelled at him to stop and identified himself as law enforcement (T 58). When Counts caught Barnes, he handed him over to Carrier, and backtracked to see if he had discarded the bag (T 59). Carrier found the bag in Barnes's pocket, and identified the substance as Lortab (T 60). At the jail, Barnes said the pills came from his mother (T 64).

On cross, asked why they did not jump out of the car immediately and arrest Barnes, Counts said:

Because we wanted. . .to give him an opportunity to dispel any concerns that we had.

(T 66). Counts felt he had

> enough information to stop [Barnes], talk to him, try to ascertain exactly what he had in the bag to see if whether or not he had a legal right to have it or not; but up until that point it's unfair for me to just jump out and arrest somebody on something that I don't know if he has. . .permission or if he's able to have that type of stuff.

(T 67). He suspected it was illegal but couldn't prove it (T 67).

Deputy Brent Carrier testified that he searched Barnes and seized the Lortab (T 72). Lortab is hydrocodone, a synthetic morphine, a pain medication (T 73).

Donald Walker, of FDLE, identified the substance as hydro-codone (T 85).

After the state rested, James Walker testified for the defense. Walker is Barnes's stepfather; he is married to Barnes's mother. Barnes was at his house one night in April. Barnes's arms were hurting real bad because he has [bone] spurs in his arms. He needed some pain medication, so Walker gave him some hydrocodone, for which Walker had a prescription (T 109). Walker did not tell him what it was, "because I wasn't even thinking about that at the time" (T 108). Barnes was arrested some time after this, but Walker did not know the exact date on which he gave Barnes the pills (T 109-10).

Barnes acknowledged on the record that he was not going to testify (T 111).

IV SUMMARY OF ARGUMENT

Issue I. Barnes's only defense which the jury considered was his stepfather's testimony that he gave Barnes the Lortab for pain without telling him what it was, so Barnes did not know it was a controlled substance. The trial court committed fundamental error in failing to instruct the jury that he must know of the illicit nature of the substance.

Issue II. The first question is whether seeing someone holding a plastic bag on the street with an undetermined some-thing in it gives officers a founded suspicion for a Terry stop. It does not. Although a plastic bag may look suspicious to officers on stepped-up narcotics patrol, that suspicion is a hunch, that is, what they observed was too non-specific to be the well-founded suspicion necessary for a Terry stop, and detaining Barnes was illegal, as was the search.

Second, absent a founded suspicion, the person has the right to walk away from the officers. Yet, the officers twice thwarted Barnes's attempt to walk away, and only then did he run. Running under these circumstances did not convert an invalid stop into a valid stop, and Illinois v. Wardlow, infra, did not address this issue.

V ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAIL-ING TO INSTRUCT THE JURY THAT ONE OF THE ELEMENTS OF POSSESSION OF A CONTROLLED SUBSTANCE WAS THAT THE DEFENDANT MUST KNOW IT IS AN ILLICIT SUBSTANCE; BARNES'S DEFENSE WAS THAT HE DID NOT KNOW IT WAS A CONTROLLED SUBSTANCE.

Whether the failure to give a jury instruction is funda-mental error depends on whether the instruction pertains to a disputed element. If it does, the failure to instruct is fun-damental error; if the element is not disputed, then the fail-ure to instruct will **not** be fundamental error. See Reed v. State, ____ So.2d ____, 27 Fla. L. Weekly S1045 (Fla. Dec. 19, 2002). The trial court below failed to instruct the jury that it had to find that Petitioner, Raymond Barnes, had knowledge of the illicit nature of the substance. Because the issue was disputed, omitting the instruction was fundamental error.

The First District Court of Appeal per curiam affirmed (PCA'd) Barnes's conviction of possession of a controlled substance, citing State v. Medlin, 273 So.2d 394 (Fla. 1973), and Reed v. State, 783 So.2d 1192 (Fla. 1st DCA 2001). At that time, Reed was pending review in this court, and this court granted review under Jollie v. State, 405 So.2d 418 (Fla. 1981)(supreme court has jurisdiction to review "PCA cite," if cited case is pending review in supreme court). This court decided Reed December 19, 2002, supra,

reversing the decision of the First District.

Barnes argued that the officers did not have a reasonable suspicion on which to stop him. While this argument was made in some form to the jury, as well as to the judge on a motion to suppress, the jury's questions make clear that the instruc-tions are wholly inadequate to apprise the jury of the stan-dards by which to judge the legal validity of the stop. There-fore, Barnes's only defense which the jury considered was his stepfather's testimony that he gave Barnes the Lortab for pain without telling him what it was, so Barnes did not know it was a controlled substance (T 108-10). His stepfather gave him the medication sometime in April; he did not remember the exact date, but Barnes was arrested sometime after (T 109-10). The jury was instructed twice on the elements of the crimes, except the jury not instructed ever that Barnes had to know the sub-stance was illicit, and the trial court's omission of this instruction was fundamental error.[1]

In Chicone, this Court held that knowledge of the illicit nature of the contraband is an element of drug offenses, and the jury should be so instructed. Chicone v. State, 684 So.2d 736 (Fla. 1996); see also State v.

[1]The jury instructions on the resisting arrest charge were also error, see Starks v. State, 627 So.2d 1194 (Fla. 3d DCA 1993), review denied, 634 So.2d 627 (Fla. 1994), but the jury hung on this count, and the state dismissed the charge.

Dominguez, 509 So.2d 917 (Fla. 1987); Medlin, supra. No such instruction was given in the instant case, despite the fact that this claim was the heart of Barnes's defense.

In Chicone, this Court clarified existing case law and engaged in a comprehensive discussion of the illicit knowledge element of a drug crime. The court held that, while it is not an express element of any drug crime, knowledge is an implicit element of all of such crimes; the information was sufficient even though it failed to allege this element, but the standard jury instruction was deficient for failing to define it for the jury. 684 So.2d at 738 et seq.

The court said:

> We are also influenced by the fact that "[t]he exis-tence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Id. at 743, quoting Dennis v. United States, 341 U.S. 494, 500, 71 S.Ct. 857, 862, 95 L.Ed. 1137 (1951).

The court called Judge Cowart's opinion in State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982), "perhaps the most comprehen-sive discussion of the issue." Chicone, 684 So.2d at 740. The issue in Oxx was whether a statute prohibiting possession of contraband in a detention facility was unconstitutional due to the lack of a scienter element. The Fifth District held the constitutional issue was mooted because guilty knowledge was an element of the statute, as

it was in other criminal possession statutes. Id. The court said in Oxx:

> In its order, the trial court held that the failure of the statute to expressly require mens rea or sci-enter made unknowing possession a criminal offense. This is not correct. Knowledge of possession is gen-erally considered a part of the definition of posses-sion as used in criminal statutes making possession a crime. Section 893.13, Florida Statutes (1981), prohibiting the actual or constructive possession of a controlled substance, and its predecessors, have never specifically required "knowing" possession, yet possession has always been defined to include know-ledge of the same. A similar construction has been placed on other criminal possession statutes. Al-though the legislature may punish an act without regard to any particular (specific) intent, the State must still prove general intent, that is, that the defendant intended to do the act prohibited.

Chicone, 684 So.2d at 741, quoting Oxx, 417 So.2d at 290 (foot-notes omitted). This court added:

> We concur in what we perceive to be the essential thrust of the Oxx opinion, that "guilty knowledge" must be established in a simple drug possession case.

Chicone, 684 So.2d at 741.

The jury here was instructed as to possession:

> One, that the Defendant possessed a certain sub-stance; two, the substance was Lortab or hydrocodone; and three, that the defendant had knowledge of the presence of the substance.

(T 127). The jury was given the same instruction a second time (T 145).

Of an instruction virtually identical to the one above, this Court said in Chicone, 684 So.2d at 745-46:

> While the existing jury instructions are adequate in requiring "knowledge of the presence of the sub-stance," we agree that, if specifically requested by a defendant, the trial court should expressly indi-cate to jurors that guilty knowledge means the defen-dant 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. (footnote omitted)

The knowledge instruction was requested in Chicone, but was not requested here. However, the law is well-settled that failure to instruct the jury accurately on a disputed element is fundamental error. This is the **standard of review** for fun-damental error in jury instructions. Fundamental error can be raised for the first time on direct appeal, even where trial counsel did not request the instruction. See Mercer v. State, 656 So.2d 555 (Fla. 1st DCA 1995); Cordier v. State, 652 So.2d 505 (Fla. 4th DCA 1995)(leaving scene of accident involving serious injury or death; fundamental error to fail to instruct jury that know-ledge that injury or death occurred was essential element); Johnson v. State, 650 So.2d 89 (Fla. 4th DCA), review denied, 659 So.2d 273 (Fla. 1995) (fundamental error to fail to instruct on knowledge element in cocaine possession, where knowledge disputed); Mancuso v. State, 636 So.2d 753 (Fla. 4th DCA 1995), app'd, 652 So.2d 370 (Fla. 1995) (knowledge element of leaving scene of accident with injury or death); Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981), cert. denied, 459 U.S. 1149, 103 S.Ct. 793, 74

L.Ed.2d 998 (1983)(gives many examples of disputed and undisputed elements).

In Mercer, the defendant was charged with obtaining a controlled substance with a forged prescription. The state proved the prescription was forged. Mercer testified that, while she did obtain the medication, she had no knowledge the prescrip-tion was forged. The trial court instructed the jury in accor-dance with the standard jury instructions, which omitted the element that Mercer must have knowledge of the forgery, and the jury convicted.

The First District found the omission to be fundamental error and reiterated the principle that the standard instruc-tions are only a guide and "cannot relieve the trial court of its responsibility to charge the jury correctly." 656 So.2d at 556, n.1. The court said:

> The failure. . .to charge the jury that the state had to prove intent and knowledge on the part of [Mercer] relieved the state of its burden of proving the essential elements of the charged offense, deprived [Mercer] of her sole theory of defense, and may have resulted in an impermissible conviction for a non-existent crime.

656 So.2d at 556.

Since knowledge is an element of the offense here, all that the court said in Mercer is true here also - the jury instruction was fundamentally flawed; it relieved the state of its burden of proving one of the essential elements of the crime; and it deprived Barnes of his chief theory of

defense. Compare Evans v. State, 625 So.2d 915 (Fla. 1st DCA 1993), in which the First District held that failure to instruct on the knowledge element was not fundamental error, because knowledge was not disputed, citing State v. Delva, 575 So.2d 643, 645 (Fla. 1991). The corollary applies here - because knowledge was a disputed issue, the failure to properly instruct was fundamental error. See Hubbard v. State, 751 So. 2d 771 (Fla. 5th DCA 2000).

By definition, fundamental error in Florida is a due pro-cess violation:

> For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process. State v. Smith, 240 So.2d 807 (Fla. 1970).

Castor v. State, 365 So.2d 701, 704 n.7 (Fla. 1978).

During the charge conference, the trial judge asked about the knowledge element. The court said:

> Now, there is a knowledge issue as to the nature of the particular drug. And I note from the. . .stan-dard instructions, there's a note to the judge: "If Defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruc-tion may be required. See State v. Medlin, [supra]. Is that something the state is requesting?

(T 100). The prosecutor did not request it. Defense counsel said:

> I'm assuming that it's the option of what is given here on [element] number three. . .I would be requesting that. . .But further than that, there's nothing I'm requesting.

(T 101). In reality, the reference to Medlin goes to a fourth element, which is a second knowledge element (illicit nature, in addition to presence). While this would be clear had the court or the parties read Medlin, the literal language of the comment to the instruction does not make clear that it pertains to knowledge of illicit nature, as opposed to knowledge that the substance is present.

In Reed, this court reiterated its holding in Delva that:

> . . .the failure to use the correct definition is fundamental error in cases in which the essential element. . .was disputed at trial. This conclusion is required by and follows our decision in State v. Delva, [infra]. **In Delva, we held that it was funda-mental error to give a standard jury instruction which contained an erroneous statement as to the knowledge element of the charged crime.** We expressly recognized a distinction regarding fundamental error between a disputed element of a crime and an element of a crime about which there is no dispute in the case. We answered affirmatively as to a disputed element and then said: "Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error...." Id. at 645. (emphasis added)

Id. The court continued:

> We rephrased the certified question because whether the evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruc-tion a feature of the prosecution's argument are not germane to whether the error is fundamental. It is fundamental error if the inaccurately defined. . . element is disputed. . .and the inaccurate definition "is pertinent or material to what the jury must consider in order to convict." Stewart v. State, 420 So.2d 862, 863 (Fla.1982). Otherwise, the error is not fundamental error. Because the

> inaccurate defi-nition of malice reduced the State's burden of proof, the inaccurate definition is material to what the jury had to consider to convict [Reed]. Therefore, fundamental error occurred in the present case if the inaccurately defined term "maliciously" was a dis-puted element in the trial of this case. (cites omitted)

Id. Further, fundamental error is not subject to harmless error review.

> Furthermore, we take this occasion to clarify that fundamental error is not subject to harmless error review. By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being funda-mental. Again, we refer to what we said in Delva, 575 So.2d at 644-45:
>
> > Instructions ... are subject to the contemporane-ous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. Castor v. State, [supra]; Brown v. State, 124 So.2d 481 (Fla. 1960). To justify not imposing the contemporaneous objection rule, "the error must reach 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." Brown, 124 So.2d at 484. In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Stewart v. State, 420 So.2d 862, 863 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983).
>
> Thus, for error to meet this standard, it must follow that the error prejudiced the defendant. Therefore, all fundamental error is harmful error.

Id. While the court cautioned that not all harmful error is fundamental,

> [t]he record in the present case demonstrates that **the malice element was disputed at trial**. Therefore, fundamental error occurred when the trial court instructed the jury using the erroneous definition for "maliciously."

Id. Likewise, knowledge of the illicit nature of the substance was disputed at Barnes's trial. Therefore, fundamental error occurred when the trial court failed to instruct the jury that such knowledge was an element of the crime.

Finally, Reed expressly held that it "shall be retroactively applied to cases pending on direct review or not yet final." Id.

Because the jury was not instructed on a disputed element, Barnes is entitled to new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER BARNES'S MOTION TO SUPPRESS; THE DEPUTIES' VIEW OF AN UNKNOWN SUBSTANCE IN A PLASTIC BAG DID NOT GIVE THEM A FOUNDED SUSPICION NECESSARY TO JUSTIFY A TERRY STOP; WITHOUT A FOUNDED SUSPICION, BARNES HAD THE RIGHT TO WALK AWAY; WHEN THE OFFICERS WOULD NOT LET HIM WALK AWAY, HE RAN, BUT THAT FACT DOES NOT TRANSFORM AN INVALID STOP INTO A VALID ONE; WARDLOW IS NOT ON POINT.

While this court did not grant jurisdiction on this issue, it may consider it because, once this court acquires jurisdic-tion over a case, its jurisdiction extends to all issues. Feller v. State, 637 So.2d 911, 914 (Fla. 1994); Trushin v. State, 425 So.2d 1126 (Fla. 1982). Petitioner contends this court should reach this issue because the district court allowed the decision in Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), to

convert an invalid stop into a valid one.

The first question is whether seeing someone holding a plastic bag on the street with an undetermined something in it gives officers a founded suspicion for a Terry stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It does not. Even though a plastic bag may look suspicious to officers on stepped-up narcotics patrol, that suspicion is a hunch, that is, what they observed was too non-specific to be the well-founded suspicion necessary to justify a Terry stop under the Fourth Amendment, and the officers' detaining peti-tioner, Raymond Barnes, was illegal, as was his arrest and the subsequent search.

Second, absent a founded suspicion, the officers do not have the right to stop a person, and the person has the right to walk away. Yet, the state's evidence proves that the offi-cers twice thwarted Barnes's attempt to walk away from them, and only then did he run. His running under these circumstan-ces did not convert an invalid stop into a valid stop, and Wardlow, did not address this issue.

The relevant facts were that Deputy Seevers testified he saw Barnes hold up a plastic bag, containing "something" which was white, which he could not further identify, but believed to be crack cocaine (T 35,42,49). Deputy Counts testified that, from "maybe three car lengths, two, three car lengths," the bag appeared to contain pill-shaped drugs

(T 56,66).[2] Counts intended to detain Barnes because he "wanted to ascertain exactly what he had in the plastic bag" (T 58).

Seevers pulled up in the car and asked Barnes to talk to him; Barnes and the other man continued to walk northward on Byrom (T 36). Seevers turned on the dome light inside the car "to make sure that he knew that I was a law enforcement offi-cer." Seevers pulled a little ahead of the two men. He again said, "Stop and talk to me," and "what are you all doing." Barnes turned and walked southbound. Seevers put the car in reverse and followed him, telling him, "Stop and talk to me." Seevers stopped; Counts got out of the car (T 37).

By the time Counts got to the rear of the car, Barnes took off running. Counts chased him down to the ground, handcuffed him and searched him (T 38). The state made no

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[2]Deputy Counts did not testify as to how long he thought a car length was. Undersigned counsel perused Ford's website; Ford's shortest cars listed were about 14.5 feet long, the longest, a Crown Victoria, was 17+ feet. Assuming Deputy Counts were judging by the car he was in, Deputy Seevers's 1996 Crown Victoria (T 33), a car length would be about 17 feet, so two to three car lengths would be 34 to 51 feet.

While this court will of course not review credibility on appeal, this court must determine the reasonableness of the offi-cers' actions. Undersigned counsel conducted an experiment by putting a half dozen white pills into a plastic bag; viewed from about 25 feet inside a well-lit house, the contents could not be identified except as to color. This incident occurred at 10:30 p.m. (T 34).

attempt to justify the search as something less, such as a patdown.

At the conclusion of the state's case, Barnes renewed his suppression motion. Defense counsel argued that both officers described the initial encounter as a citizen encounter, which means there was no legal basis to detain Barnes (T 86-87). The officers said they had a suspicion, but they did not have a reasonable suspicion based upon their observations, therefor, a citizen's contact was initiated (T 87). Barnes acted within his rights by not talking to them and not participating in their desired contact. After a number of attempts by them to initiate contact, Barnes left the area. At that point, nothing justified them in detaining him, yet they gave chase and took him into custody (T 87-88). The evidence was not admissible and should be suppressed (T 88-89).

The prosecutor argued that Deputy Counts testified he saw Barnes in a particular area, holding up these tablets to the light at 10:30 at night. They attempted to talk to him con-cerning this. "It has the appearance of a white substance, of white type of tablets, in. . .a cellophane plastic-type bag - - baggie consistent with drug trafficking." They went and attempted to stop him to talk to him about it. They then believed they had justification based upon their observations and training and experience to

detain him. They had a reason-able suspicion of a particular crime taking place. They attempted to do so, Barnes fled, and flight justifies a stop (T 89-90).

The court asked the prosecutor, in the context of citizen contact, if the citizen chooses to walk away or run away, what is the state's position as to whether they can arrest and detain based on that (T 90).

The prosecutor answered that this was not a citizen contact type case:

> When the officers observed this individual holding up this type of article. . .in this situation in the circumstances that they did, I believe at that time there's a reasonable suspicion of criminal activity.

(T 91). If all they had was a citizen contact situation, then he could run away and walk away, and there would be nothing that could be done, but he believed the officers were allowed to detain Barnes (T 91). The court overruled the objection (T 92).

In moving to dismiss the charges at the close of the state's case,[3] defense counsel argued:

> It defies reality to believe that [the officers] believed under those circumstances – not that their belief really makes any difference. I think it's clear that they didn't believe that they had enough to detain him. If they had thought that, they would have detained him immediately instead of playing cat and mouse backing up and down the street talking to him.

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[3]Actually a motion for judgment of acquittal, but the state did not object to the labeling.

> I think the whole situation boils down to is that they knew they didn't have enough to detain him, and whenever he wouldn't cooperate with them, which he didn't have to do and left, then they clearly over-stepped their bounds and chased him down and searched him.
>
> . . .this isn't a situation where they happened to be just driving down the road and they see somebody. They knew what they were looking for, and I suggest. . .that they were primed and they were ready to react. And they had a preconceived notion as to what they were looking for. Whenever they saw something that got even close to that, then they decided that that's what it was; but then they stepped back from it and said, "Now wait a minute. You know, in real-ity from what we've seen, we don't have probable cause. We don't have a justifiable reasonable sus-picion, so let's talk to him."
>
> The next question, if he had stood there. . .would have been, "Have you got anything in your pocket that's going to get you in trouble?" . . . That's the reality of what it was. Whenever he wouldn't stop and remain there when he didn't have to, they chased him down and they searched him. And him running from them was perfectly within his rights. Absolutely nothing had happened up to that point in time that they were exercising any legal and mandated duty. And the resisting should be dismissed.

(T 95-97).

The prosecutor responded that the totality of circumstances allowed the officers to detain him. "And while maybe initially there wasn't enough when you take into account the flight when asked about that certainly generated [sic] into a resisting" (T 97-98). The judge said that was his recollection of the testimony, he thought it was jury question, and denied the motion as to both counts (T 98).

Under the law of Terry stops, the officers' suspicion

here was a hunch, not a founded suspicion. “A mere ‘hunch’ that criminal activity may be occurring is not sufficient” to jus-tify a Terry stop. Ippolito v. State, 789 So.2d 423, 425 (Fla. 4th DCA 2001), citing McCloud v. State, 491 So.2d 1164, 1167 (Fla. 2d DCA 1986). “Mere suspicion is not enough to support a stop.” Popple v. State, 626 So.2d 185, 186 (Fla. 1993).

Something in a plastic bag could have been any number of small white things - peppermints, candy, aspirin, Vitamin C, any number of legal substances, and in their failure to observe anything else that evening, the officers failed to establish a founded suspicion. In Caplan v. State, 531 So.2d 88 (Fla. 1988), cert. denied 489 U.S. 1099, 109 S.Ct. 1577, 103 L.Ed.2d 942 (1989), this court held that seeing small, handrolled burnt cigarette wrappings on the floor of a car did not provide pro-bable cause to believe it was marijuana. In Dunn v. State, 382 So.2d 727 (Fla. 2d DCA 1980), app’d in Doctor v. State, 596 So.2d 442 (Fla. 1992), the officer felt a cylinder in the defendant’s shirt pocket during weapon patdown. He suspected it was marijuana, but had no apprehension it was a weapon. The court held the officer did not have probable cause to seize it.

In the instant case, it is the officers’ naked conclusion about the contents without a reasonable factual predicate which must not be allowed to stand. Otherwise,

there would be scarcely any limitation on what constitutes a founded suspicion for a Terry stop, and the officers' bare conclusions would not be reviewed by appellate courts. Although it arises in the context of Wardlow, which will be discussed below, a comment by Judge Farmer of the Fourth District is apropos here as well:

> Case by case--or (should I say?) nail by nail--the courts are closing the lid on the coffin of the idea that in this age of the war on drugs there is any such thing as a truly consensual encounter between officer and citizen when drugs are suspected (or, for that matter, merely imagined). In fact Wardlow may have already entombed it. If two people seeing each other across a crowded street is really a "consensual encounter," then the speed with which one of them disappears from the other's view should not matter. Nevertheless the Supreme Court has held otherwise and we must follow it--if only for search and seizure– but not for the meaning of the Florida obstructing statute.

Slydell v. State, 792 So.2d 667 (Fla. 4th DCA 2001) (Farmer, J., concur-ring). As will be explained below, both the Slydell majority and Judge Farmer go too far in treating Wardlow as having created a bright-line rule, for it did not.

Even if it were true that drug dealers often carry their stashes in plastic bags, it does not follow that seeing a plastic bag constitutes a founded suspicion to stop the person holding it. That would be a step no court has taken, nor should take, because a plastic bag could contain anything. This case is indistinguishable from Caplan and

Dunn. A plastic bag is not more probative of possession of contraband than the small, handrolled, burnt cigarette wrappings that failed to provide probable cause in Caplan or the cylinder in Dunn.

One of the elements missing from this scenario, which deprives the officers' suspicion of reasonableness is that they witnessed no "transaction," which might have made their hunch reasonable. In Johnson v. State, 610 So.2d 581, 584 (Fla. 1st DCA 1992), review denied, 623 So.2d 495 (Fla. 1993), the First District ruled that "under these circumstances that fact did not raise a mere hunch to the level of founded suspicion." The most the officers witnessed here was "something" white or white pill-like things in a plastic bag, that could have been many kinds of non-contraband. But the officers never claimed to have seen a transaction. For example, in State v. Anderson, 591 So.2d 611 (Fla. 1992), undercover officers saw a series of hand transactions distributing something among pedestrians and drivers, and the defendant threw an object into a nearby plan-ter and engaged in other furtive, suspicious acts upon seeing police. This was sufficient to detain Anderson, but the offi-cers witnessed nothing similar here.

Likewise, in D.A.H. v. State 718 So.2d 195 (Fla. 2d DCA 1998), the officer witnessed the juvenile make several hand-to- hand transactions with people in vehicles. He saw

an exchange of money for small packages. This constituted probable cause for a Terry stop, but there was no comparable fact here.

The next question is whether Barnes's running away after the officers at least twice thwarted his attempt to walk away makes valid a stop which was otherwise invalid. Petitioner contends it does not. Wardlow has been misinterpreted as creating a bright-line rule that flight alone constitutes a reasonable suspicion for a Terry stop, but Wardlow did not create a bright-line rule. Moreover, Wardlow simply did not address the issue here - a person's right to walk away where the police attempt to detain him, although they do not have a founded suspicion under Terry.

In Wardlow, a caravan of several cars were carrying police to a location where they expected to find a large amount of drug activity. Wardlow looked in their direction and then fled from police who were driving by in cars, but had not even stopped yet. Slydell said:

> In Wardlow, the defendant fled immediately upon see-ing a caravan of police vehicles arrive in an area known for heavy narcotics trafficking. The police officers had observed [Wardlow] holding an opaque bag. After chasing [Wardlow], the officers stopped him and searched him for weapons. They arrested [him] after discovering a handgun in the bag. The Supreme Court held that [Wardlow's] unprovoked flight upon noticing the police in an area known for heavy narcotics trafficking provided reasonable suspicion that [he] was involved in criminal activity.

792 So.2d at 673. On its face, Wardlow did not address the

issue of whether where the police had already initiated a stop, which was invalid under Terry, flight transformed the invalid stop into a valid one.

Part of the holding of Wardlow is explained better in Jus-tice Stevens' concurring and dissenting opinion than the major- ity, and that is, despite requests by both parties, Wardlow did **not** establish a bright-line rule on whether flight from the police in a "high-crime area" justifies a Terry stop. Justice Stevens wrote that Illinois had asked for a per se rule that flight **always** justified a Terry stop, while the defendant had asked for a per se rule that flight **never** justified a Terry stop. Justice Stevens wrote:

> The Court today wisely endorses neither per se rule. Instead, it rejects the proposition that "flight is ... necessarily indicative of ongoing criminal acti-vity," adhering to the view that "[t]he concept of reasonable suspicion ... is not readily, or even use-fully, reduced to a neat set of legal rules," but must be determined by looking to "the totality of the circumstances--the whole picture." (internal cites omitted).

Wardlow, 120 S.Ct. at 677 (Stevens, J., concurring in part, dissenting in part). The court was unanimous on the point that flight from the police in a high-crime area was part of the totality of the circumstances, but the court split 5-4 on whether the stop of Wardlow was justified, with the majority holding it was.

Because Wardlow does not address the right of the defen-dant to walk away from a stop, which is not valid

under Terry, his case is distinguishable from Wardlow. It is hard to say what the state would have argued had Barnes continued only to walk away and refuse to stop and talk to the officers. The state argues, however, that his running away created a valid basis for the stop, but Barnes ran only after the officers at least twice thwarted his attempt to walk away, which he had a right to do.

While still in the car, Seevers asked to talk to him; Barnes continued to walk; Seevers again drove up to him and again asked to talk; Barnes changed direction and walked away; Seevers put the car in reverse, still telling Barnes he wanted to stop and talk to him, he stopped the car, and Counts got out of the car to go over to Barnes. Only then did he start to run, and of course, Counts chased him down to the ground. If a person's right under Terry not to stop unless the police have a founded suspicion means anything, it necessarily means that, where the police thwart the defendant's attempt to walk away, provoking him into running, it does not justify an otherwise unjustified stop. The salient aspect of Wardlow for this case is that "unprovoked" flight from the police may justify a stop, but that does not mean the officers can provoke flight by thwarting his right to walk away and thereby justify the stop. Wardlow does not hold that it intended to destroy or render impotent the right of the defendant to walk away

under Terry, and its silence does not decide this issue or this case.

The U.S. Supreme Court's decision in Michigan v. Chester-nut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988), is pertinent to the discussion here. Chesternut, who had been standing on a corner, turned and ran when he saw a police car. The car followed and drove alongside him for some distance, but did not stop him. As Chesternut ran, he discarded some pills, which upon examination, an officer believed to be codeine; then the police stopped and arrested him.

The Supreme Court rejected requests by both sides to create a bright-line rule. Michigan and other amici states argued that

> the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, [the government] would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coer-cive, as long as the police did not succeed in actu-ally apprehending the individual.

486 U.S. at 572, 108 S.Ct. at 1979. Chesternut "contends, in sharp contrast, that any and all police 'chases' are Fourth Amendment seizures":

> [Chesternut] would have us rule that the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity.

Id. The court expressly rejected any bright-line rule in

favor of a totality of the circumstances test.

The court noted that two other Michigan state-court cases were distinguishable as they involved foot chases with the apparent goal of stopping the defendant. The court did not rule on the correctness of those decisions. 486 U.S. at 575, 108 S.Ct. at 1980, n.8. In a prelude to Wardlow, Justice Kennedy wrote a concurring opinion, joined by Justice Scalia, that Chesternut's "unprovoked flight gave the police ample cause to stop him." 486 U.S. at 576, 108 S.Ct. at 1981.

According to the court, Wardlow engaged in "unprovoked flight," where the police had not even stopped their car. By comparison, in the instant case, the police essentially pro-voked flight by their aggressive tactics in not allowing Barnes to walk away. In Wardlow, where the police had not yet so much as stopped, or gotten out of, their cars, when the defendant fled, they had not yet done enough to provoke such a response, any more than the court was willing to accept that a police car which is following someone, but without stopping him, had nevertheless stopped or seized the person as soon as the "chase" began. Chesternut.

The instant case is different, however, because from the moment the officers thwarted Barnes's attempt to walk away and eventually gave chase on foot, they intended to stop him. Under Terry, therefore, they needed a reasonable

basis before they commenced the chase. Without deciding the issue, Chester-nut noted that, where the officers had gotten out of the car and were chasing the suspect on foot, the rule of law, or should one say, the totality of the circumstances, might weigh out differently.

Perhaps the reason the supreme court has not yet addressed such a fact pattern is because Chesternut is fairly typical of these cases in that it turns on abandonment, and where the defendant has abandoned contraband before stopping, that is, before submitting to the authority of the police, the court tends not to reach the propriety of the chase. Chesternut is unique, or almost unique, in addressing the validity of a chase, as opposed to a stop. But as Chesternut itself acknow-ledges, it is one thing to say a person would feel free to go about his business even though a police car is driving along-side him, but not stopping him; it is an altogether different question when the police are chasing you down on foot.

If this court were to hold that Barnes's running after the police would not allow him to walk away created a valid stop, it would destroy the defendant's right under Terry not to stop. As Wardlow gives no indication it intended to go so far, this court should not either.

The contraband was found after Barnes was chased down and searched. If the stop was illegal, then contraband

found following the stop must be suppressed as the fruit of a poison-ous tree. Wong Sun v. United States, 371 U.S. 471, 481-482, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Standard of review

A motion to suppress is a mixed question of law and fact, yoked to federal law. Art. I, § 12, Fla. Const.; Perez v. State, 620 So. 2d 1256 (Fla. 1993). The standard of review for the trial judge's factual findings is whether competent sub-stantial evidence supports the judge's ruling. Caso v. State, 524 So. 2d 422 (Fla. 1988). The standard of review for the trial judge's application of the law to its factual findings is de novo. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Butler v. State, 706 So. 2d 100 (Fla. 1st DCA 1998). This court reviews de novo the applica-tion of the law to the facts, which were little disputed.

V CONCLUSION

Based upon the foregoing analysis, arguments, and authori-ties, petitioner respectfully requests that this court find he entitled to new trial due to fundamental error in the jury instructions, or in the alternative, hold the trial court erred in denying the motion to suppress and remand for discharge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Robert L. Martin, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Raymond E. Barnes, 4281 Tomahawk Trail, Milton, FL 32583

this _____ day of January, 2003.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER