

IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-1453

GEORGE BAPTISTE,

Petitioner,

-vs.-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, George Baptiste, was the appellant in the district court of appeal and the defendant in the circuit court. Petitioner, State of Florida, was the appellee in the district court of appeal, and the prosecution in the circuit court. In this brief, the symbol “R” will be used to designate the record on appeal, the symbol “T” will be used to designate the transcripts of hearing on the motion to suppress.

STATEMENT OF THE CASE AND FACTS

George Baptiste was charged with possession of a firearm by a convicted felon. (R.7-9). Prior to trial, the defense filed a motion to suppress the gun on the basis that the stop of Mr. Baptiste was unlawful because police lacked reasonable suspicion. (R.10-11). The stop of Mr. Baptiste was based solely on an accusation from an anonymous 911 caller. (R.10-11,T.19). There was no police corroboration with regard to suspicious circumstances or predictive movements. (T.11-12).

The evidence presented at the suppression hearing established the following facts. During the early morning on December 30, 2004, an anonymous person called 911 and stated that a man wearing jean shorts and a white t-shirt was waving a gun in front of the M and M Supermarket. (T.7-8,10). Miami-Dade Police Officer Terrika Williams responded and stopped Mr. Baptiste at gunpoint as he walked across a street because his physical appearance matched the description provided by the anonymous tipster. (T.8,11). Officer Williams did not see a gun in Mr. Baptiste's possession. (T.11-12). When Officer Penny Ellison arrived moments later, Mr. Baptiste was already being held at gunpoint. (T.8). Ellison too drew her gun and pointed it at Mr. Baptiste. (T.8). The officers ordered Mr. Baptiste to get on the ground. (T.8).

After Mr. Baptiste had been stopped at gunpoint and ordered to get on the ground, an unidentified man approached Ellison. (T.8-9,12). He said he was the anonymous caller and, remaining anonymous, claimed that the man being held at gunpoint had waved a gun around. (T.8-9). As Mr. Baptiste was lying on the ground, officers conducted a pat-down search, during which Mr. Baptiste said that he had a gun. (T.9,12). Officer Ellison reached in Mr. Baptiste's front pocket and recovered a gun. (T.9).

The defense maintained that the stop was unlawful because the anonymous tip lacked the requisite legal corroboration. (T.19). Police only corroborated identification information including the clothing and location of Mr. Baptiste. (T.8,11,19). They did not observe any suspicious circumstances. (T.10-11). When Mr. Baptiste was stopped by police, he was walking across a street and was not waving a gun. (T.10-12). Moreover, the tip lacked predictive information which could be verified by police. (T.21-22).

The trial court denied the defendant's motion to suppress the gun, ruling that the police could lawfully initiate the stop because Mr. Baptiste's physical description matched the information provided by the anonymous tipster and Mr. Baptiste was the only person in the area. (T.23-24).

Relying on *Florida v. J.L.*, 529 U.S. 266 (2000), Mr. Baptiste appealed the trial court's ruling, contending that the anonymous tip was insufficient to provide reasonable suspicion for the stop. *Baptiste v. State*, 959 So. 2d 815 (Fla. 3d DCA 2007). The Third District Court of Appeal rejected this argument, distinguishing *J.L.* on the basis that the anonymous tipster in that case alleged that a man was carrying a concealed firearm and the anonymous caller in this case alleged that a man was openly displaying a firearm. *Baptiste*, 959 So. 2d at 816. The court also found that, unlike in *J.L.*, the anonymous caller in this case was "transmogrified" into a citizen informant when he approached police officers after the stop of Mr. Baptiste and identified himself as the anonymous caller. *Id.* at 817. The district court upheld the denial of the motion to suppress. *Id.*

Notice invoking this Court's discretionary jurisdiction was filed on July 26, 2007. On November 7, 2007, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Third District Court of Appeal attempted to distinguish the decision of the United States Supreme Court in *J.L.* from this case based on the fact that the anonymous tip in this case mentioned the open display of a firearm. While the mention of the open display of a firearm in the anonymous tip in this case is a factor not present in *J.L.*, that factor only gains significance in the determination of reliability if the police verify that suspicious behavior. In this case, the police did not in any way verify the suspicious behavior mentioned in the tip. When Officer Williams arrived, Mr. Baptiste was simply walking across the street from the store. Officers did not see him waving a gun. Nor did they observe a gun, a bulge or anything suspicious. As the officers did not verify the suspicious details of the anonymous tip, the fact that the tip contained those suspicious details did not serve to establish the reliability of the tip.

The reliability of the anonymous tip in this case was not established in any of the ways discussed in *J.L.* As the suspicious details of the anonymous tip were not verified by police, all that remained were innocent details including appearance and location. Verification of a suspect's visible attributes does not establish the reliability of the anonymous tip. Further, the anonymous tip contained no predictive information that gave the caller credibility and made the tip reliable. Nor was the reliability of the anonymous tip established through independent

police investigation. As the reliability of the anonymous tip was not established in any of these ways, it was not sufficient to support a stop of Mr. Baptiste.

The United States Supreme Court in *J.L.* clearly established that the mere mention of a firearm in an anonymous tip is an inadequate substitute for the reliability requirement. The Court rejected the creation of a firearm exception reasoning that it would enable people to harass another and subject that person to police searches simply by placing an anonymous call to police alleging that the person had a gun. The fact that the tip alleges that a firearm is being displayed, as it did in this case, rather than concealed does not reduce the risk of fabrication when police do not observe anything suspicious. All that one seeking to harass another would have to do would be to place an anonymous call claiming that an individual is waving a gun rather than carrying a gun and police would then be allowed to conduct a search. Therefore, the fact that the anonymous caller alleged that a gun was being waved does not serve as a substitute for reliability.

While declining to create a firearm exception to the requirement that the reliability of an anonymous tip be established prior to a stop, the Court did recognize that the danger alleged in some anonymous tips may be so great that officers may conduct a stop without establishing the reliability of the tip. Although in *J.L.*, the Court declined to speculate about specific circumstances, it provided the example of a person carrying a bomb. The Court also found that in locations

such as airports or schools, where Fourth Amendment privacy is diminished, police may conduct a stop on the basis of information that would not be sufficient to provide reasonable suspicion for a stop elsewhere. However, the tip in this case did not allege a bomb, but rather a gun, like the tip in *J.L.* Additionally, the tip in this case did not involve a location where Fourth Amendment protections are diminished but instead, involved a public street, just as the tip in *J.L.* had.

Additionally, the information obtained by police after Mr. Baptiste had already been stopped cannot provide the reasonable suspicion needed for that stop. The Third District found that the anonymous caller in this case was “transmogrified” into a citizen informant when he approached police officers after the stop of Mr. Baptiste and remaining anonymous, told them he was the anonymous caller. The fact that the caller accused Mr. Baptiste after he was already being held by officers does not provide reasonable suspicion for the initial stop. District Courts of Appeal have uniformly held that events that happen after a stop cannot be used to establish reasonable suspicion for the stop.

Because the initial stop of Mr. Baptiste was unlawful, the subsequent search was unlawful as well. Admission of Mr. Baptiste’s statement to police during the unlawful stop was also in error. (T2.13). It too should have been excluded because the police lacked reasonable suspicion for the initial stop.

Police lacked reasonable suspicion to stop Mr. Baptiste at gunpoint as he walked down a street because the reliability of the anonymous tip was not established prior to the stop. Additionally, the tip did not allege a bomb or something so dangerous that a stop was required without a showing of reliability. Therefore, the trial court erred in denying the motion to suppress the gun.

ARGUMENT

I.

AN ANONYMOUS TIP STATING THAT A BLACK MAN WEARING JEAN SHORTS AND A WHITE SHIRT STANDING AT A PARTICULAR LOCATION AND WAVING A GUN LACKS THE REQUISITE INDICIA OF RELIABILITY TO ESTABLISH REASONABLE SUSPICION TO CONDUCT A STOP OF A SUSPECT MATCHING THAT DESCRIPTION, WHERE POLICE OBSERVE NOTHING TO CORROBORATE THE CLAIM THAT A GUN WAS BEING WAVED.

In *Florida v. J.L.*, 529 U.S. 266 (2000), the United States Supreme Court affirmed the decision of this Court in *J.L. v. State*, 727 So. 2d 204 (Fla. 1998) and held that an anonymous tip stating that a person standing at a particular location wearing a plaid shirt was carrying a gun lacked sufficient indicia of reliability to establish reasonable suspicion to make an investigatory stop of a suspect matching that description. The issue in this case is whether the fact that the anonymous tip states that the person is waving a gun rather than carrying a gun supplies the lacking indicia of reliability to establish reasonable suspicion for an investigatory stop, where the police observe nothing to corroborate that claim.

In this case, the Third District held that the mere mention of a person displaying a gun as opposed to just carrying a gun supplies the lacking indicia of reliability to establish the requisite reasonable suspicion. In *Rivera v. State*, 771 So. 2d 1246 (Fla. 2d DCA 2000), the Second District held that the mere mention of

a person displaying a gun is not enough to supply the lacking indicia of reliability where the police observe nothing to corroborate that claim. An examination of the decisions of this Court and the United States Supreme Court in *J.L.* establishes that an anonymous tip stating that a black man wearing jean shorts and a white shirt standing at a particular location and waving a gun lacks the requisite indicia of reliability to establish reasonable suspicion to conduct a stop of a suspect matching that description where police observe nothing to corroborate the claim that a gun was being waved. Accordingly, this Court should quash the decision of the Third District in this case and approve the decision of the Second District in *Rivera*.¹

In *J.L.*, police received an anonymous call that a black male wearing a plaid shirt standing at a particular bus stop was carrying a gun. *Florida v. J.L.*, 529 U.S. at 268. Police responded and found J.L. wearing a plaid shirt. *Id.* They did not see a firearm, nor did they see J.L. make threatening or unusual movements. *Id.* Officers frisked him and found a gun in his pocket. *Id.*

The United States Supreme Court unanimously held that the stop of J.L. was not based on reasonable suspicion because the anonymous tip lacked the requisite indicia of reliability. *Id.* at 274. “The anonymous call concerning J.L. provided no

¹ A trial court’s ruling on a motion to suppress is entitled to a presumption of correctness regarding its determination of historical facts. However, the appellate courts must review independently mixed questions of law and fact that are determinative of constitutional issues arising under the Fourth Amendment to the United States Constitution and Art. I § 9 of the Florida Constitution. *See Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001).

predictive information and therefore left the police without a means to test the informant's knowledge or credibility." *Id.* at 271. Nor did the anonymous caller explain how he knew about the gun or why the information was believable. *Id.* The Court rejected the State's argument that the anonymous tip was reliable because "its description of the suspect's visible attributes proved accurate," finding that the tip must also be accurate in its assertion of illegality. *Id.* at 271-72. The Court also rejected the State's suggestion of a "firearm exception" to the Fourth Amendment, reasoning that "[s]uch an exception would enable a person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." *Id.* at 272.

In this case, police received an anonymous tip that a black man wearing blue jean shorts and a white shirt standing in front of the M and M Supermarket was waving a gun. (T.7,10). The anonymous caller did not explain how he knew this or how he obtained this information. (T.7). When police responded to the location mentioned in the tip, they found Mr. Baptiste who matched the physical description in the tip. (T.8,10-11). When he was observed by the police, Mr. Baptiste was simply walking down the street. (T.11). Officers did not see him waving a gun. (T.11-12). Nor did they observe a gun, a bulge or anything suspicious. (T.11-12). Upon observing Mr. Baptiste, a police officer immediately

stopped him at gunpoint. (T.8). A second police officer arrived moments later and the second officer also drew her gun and pointed it at Mr. Baptiste. (T.8). The two officers then ordered Mr. Baptiste to the ground at gunpoint. (T.8). The Third District held that the anonymous tip was sufficient to support the stop because the tip mentioned a person displaying a gun, as opposed to just carrying a gun. *Baptiste*, 959 So. 2d at 816.

The decisions of this Court and the United States Supreme Court in *J.L.* establish that an anonymous tip is not sufficient to support a stop just because the tip mentions a person displaying a gun when the police arrive on the scene and do not observe anything to indicate that a gun was being displayed. Anonymous tips are “generally less reliable than tips from known informants” and “must be closely scrutinized.” *J.L. v. State*, 727 So. 2d at 206. “Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, *see Adams v. Williams*, 407 U.S. 143, 146-147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), ‘an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,’ *Alabama v. White*, 496 U.S., at 329, 110 S.Ct. 2412.” *Florida v. J.L.*, 529 U.S. at 270.

Therefore, before an anonymous tip may provide a basis for reasonable suspicion, the reliability of the tip must be established. *J.L. v. State*, 727 So. 2d at 206. Reliability can be established in several ways. *Id.* One way to establish the

reliability of an anonymous tip is if the tip contains suspicious details and those suspicious details are verified by the police. *Id.* at 206, 208-09. The fact that the anonymous tipster in this case alleged that a man was waving a gun rather than carrying a concealed firearm raised the possibility that the reliability of the tip could be established by verification of that suspicious behavior. However, when officers arrived on the scene, they did not in any way verify the suspicious behavior mentioned in the tip. When Officer Williams arrived, Mr. Baptiste was simply walking across the street from the store. (T.8,11). Officers did not see him waving a gun. (T.11-12). Nor did they observe a gun, a bulge or anything suspicious. (T.11-12). As the officers did not in any way verify the suspicious details of the anonymous tip, the fact that the tip contained those suspicious details did not serve to establish the reliability of the tip.

In *Rivera v. State*, 771 So. 2d 1246 (Fla. 2d DCA 2000), the Second District found that the fact that an anonymous tip contained suspicious details did not establish the reliability of the tip when the police did not corroborate those suspicious details. In *Rivera*, an anonymous motorist called the police and reported that two cars were exchanging gunfire on a specific road. *Id.* at 1247. The caller provided a description of the vehicles and a tag number. *Id.* Officers dispatched to that location stopped a car matching the description and license tag number as it drove down the street. *Id.* Officers did not see an exchange of

gunfire or see a firearm. *Id.* at 1248. Nor did the police observe any suspicious behavior such as tailgating or an attempt to communicate. *Id.* The Second District found that the anonymous tip was not sufficient to establish reasonable suspicion to stop the car because police observed nothing to corroborate the claim of the anonymous caller that two cars were exchanging gunfire or any other suspicious behavior. *Id.*

Thus, the Second District correctly recognized that under the decisions in *J.L.*, the fact that a tip contains suspicious details only establishes the reliability of the tip if those suspicious details are verified. As the suspicious details of the anonymous tip in *Rivera* were not verified when the police arrived on the scene, the Second District correctly held that the suspicious details in the anonymous tip did not provide the reasonable suspicion for the stop. *See also Commonwealth v. Jackson*, 594 S.E. 2d 595 (Va. 2004), (anonymous tip that three black males in a white Honda were acting disorderly and that one of them had brandished a firearm did not provide reasonable suspicion to conduct a stop where police spotted a car matching the description but did not observe the occupants engaged in any suspicious behavior), *U.S. v Torres*, Criminal Action No. 06-630 (E.D. Pa. 2007) (2007 WL 419214) (anonymous tip that a Hispanic male in a silver BMW with a specific license tag number driving east on a specific road had just flashed a gun at “a bum” did not establish reasonable suspicion to stop a driver matching that

description as he drove down the same road, where police did not observe the defendant commit a motor vehicle violation or exhibit any criminal or suspicious behavior); and *People v. Moore*, 847 N.E. 2d 1141 (N.Y. 2006) (anonymous tip that an 18 year old black male wearing a gray jacket and red hat was involved in a dispute with a gun was insufficient to support a stop where the responding officers arrived and observed no dispute taking place but only a man matching the description provided by the caller). As the present case also involves an anonymous tip which contained suspicious details which were not verified by police officers when they arrived on the scene, the Third District incorrectly held that the suspicious details in the anonymous tip provided the reasonable suspicion for the stop.²

² Citing *United States v. Perkins*, 363 F. 3d 317 (4th Cir. 2004), the Third District distinguished anonymous tips that allege concealed firearms from those that allege openly-displayed firearms, even when police do not observe a gun being displayed or any other illegal conduct, reasoning that when the tip alleges that a firearm is being displayed, it has sufficient indicia of reliability. In *Perkins*, police stopped a car after an anonymous caller said she saw two cars pointing rifles in front of a duplex. *Id.* at 320. The court found that police had reasonable suspicion to stop the car due to eleven circumstances including that it was a high crime neighborhood, the officer had been involved in prior drug investigations on the same street, the duplex was a known drug house, the officer had personally arrested residents of the duplex in the past, the officer believed that he knew the identity of the tipster and that she had provided reliable information in the past, the passenger in the car was a well known drug purchaser and the car drove away when officers arrived. *Id.* “In view of these circumstances,” the court found that there was reasonable suspicion for the stop. *Id.* *Perkins* does not hold that an anonymous tip alleging a displayed firearm is more reliable than a tip alleging a concealed firearm. *Id.* at 321.

As the only details in the anonymous tip in this case which were verified by the officers upon their arrival at the scene were visible attributes, the tip did not supply officers with reasonable suspicion to make a stop. An anonymous tip must be reliable in its assertion of illegal or suspicious activity. *Florida v. J.L.*, 529 U.S. at 272. The reliability of an anonymous tip is not established because “its description of the suspect’s visible attributes proved accurate.” *Id.* at 271-72.

“An accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue required that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”

Id. at 272.

The fact that the officers found Mr. Baptiste at the location mentioned in the tip and wearing the clothes mentioned in the tip did not establish the reliability of the information in the anonymous tip which the officers needed to conduct a stop. *See also Felton v. State*, 753 So. 2d 640, 643 (Fla. 4th DCA 2000) (verification of innocent details of an anonymous tip such as location, physical appearance and clothing is insufficient to raise reasonable suspicion unless additional suspicious circumstances are observed through independent police investigation); *Young v. State*, 841 So. 2d 689, 689-90 (Fla. 2d DCA 2003) (no reasonable suspicion arose from an anonymous tip that an armed white male wearing jean shorts and a black

tank-top and carrying a white t-shirt, was involved in a disturbance at a nearby mobile home park where the responding officer stopped the defendant as he walked down a road near the mobile home park solely because his physical description and location matched the tip but the officer did not observe him with a gun, nor did he observe him acting suspiciously); *State v. Kelly*, 790 So. 2d 563, 564-65 (Fla. 3d DCA 2001) (no reasonable suspicion based on anonymous tip that three armed black men would be getting into a gray Acura with tinted windows at a specific address and were planning a home invasion robbery even though police confirmed the make of the car, the specific house and the physical description); and *Butts v. State*, 644 So. 2d 605, 606 (Fla. 4th DCA 1994) (“tip from an anonymous informant that a black male with a gray beard, wearing a black cap, gray pants, and black jacket was riding a bicycle” armed with a gun at a specific intersection did not create reasonable suspicion because the officers did not observe the defendant engaged in any suspicious activity).

An anonymous tip that contains only innocent details may exhibit sufficient indicia of reliability if it also contains predictive information. *J.L. v. State*, 727 So. 2d at 207. If the tip correctly predicts a subject’s future actions, it demonstrates that the tipster has a familiarity with the subject’s affairs beyond that which a regular person would possess. *Id.* In this case, however, the tip did not contain any predictive information but only described presently occurring details. The

caller said that a man was waving a gun in front of a supermarket. (T.7-8,10). Thus, the anonymous tip did not provide police with any predictive information that established the reliability of the information in the anonymous tip.

The reliability of the information in an anonymous tip can also be established by independent police investigation. *J.L. v. State*, 727 So. 2d at 207 (“Reasonable suspicion can be established by verification of a presently-occurring innocent detail tip coupled with an independent police investigation. *See generally United States v. Bold*, 19 F.3d 99, 103 (2d Cir. 1994). But for these types of tips (presently-occurring innocent detail tips), the independent police investigation would have to uncover something more than just a verification of the innocent details. The police must observe *additional* suspicious circumstances as a result of the independent investigation.”). In this case, however, there was no independent police investigation which established suspicious behavior. Officer Ellison testified that she did not see a gun or observe a bulge in Mr. Baptiste’s pocket nor did she observe any other indications that Mr. Baptiste was carrying a gun. (T.12). Although officers confirmed the innocent details of the tip and concluded that Mr. Baptiste matched the general physical description provided by the caller, they did not observe any suspicious circumstances or illegal activity before stopping him at gunpoint.

The reliability of the anonymous tip in this case was not established in any of the ways discussed in *J.L.* As the suspicious details of the anonymous tip were not verified by police, all that remained were innocent details including appearance and location. Verification of a suspect's visible attributes does not establish the reliability of the anonymous tips. Further, the anonymous tip contained no predictive information that established the reliability of the information. Nor was the reliability of the anonymous tip established through independent police investigation. As the reliability of the anonymous tip was not established in any of these ways, it was not sufficient to support a stop of Mr. Baptiste.

The United States Supreme Court in *J.L.* clearly established that the mere mention of a firearm in an anonymous tip is an inadequate substitute for the reliability requirement. *Florida v. J.L.*, 529 U.S. at 272. The Court upheld this Court's decision which rejected the creation of a firearm exception to the Fourth Amendment. *Id.* at 272-74. "Such an exception would enable a person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." *Id.* at 272. In *Rivera*, the Second District explained that this same reasoning applies even when the anonymous tip alleges that a gun is being used, rather than being carried. *Id.* The fact that the tip alleges that a firearm is being displayed rather than concealed does not reduce the risk of

fabrication when police do not observe anything suspicious. *Id.* All that one seeking to harass another would have to do would be to place an anonymous call claiming that an individual is waving a gun rather than carrying a gun and police would then be allowed to conduct a search. This same reasoning applies in this case as well. The fact that the anonymous caller alleged that a gun was being waved does not serve as a substitute for reliability.

Although the Court declined to create a firearm exception to the requirement that the reliability of an anonymous tip be established prior to a stop, it did recognize that the danger alleged in some anonymous tips may be so great that officers may conduct a stop without establishing the reliability of the tip. This is not one of those tips. Although in *J.L.*, the Court declined to speculate about specific circumstances, it provided the example of a person carrying a bomb. *Id.* The tip in this case did not allege a bomb, but rather a gun, like the tip in *J.L.*

The Court also found that in locations such as airports or schools, where Fourth Amendment privacy is diminished, police may conduct a stop on the basis of information that would not be sufficient to provide reasonable suspicion for a stop elsewhere. *Id.* at 274. The tip in this case did it involve a location where Fourth Amendment protections are diminished but instead, involved a public street, just as the tip in *J.L.* had.

As the reliability of the anonymous tip was not established, the tip did not provide the requisite reasonable suspicion to support a stop. Therefore, police lacked reasonable suspicion to stop Mr. Baptiste at gunpoint and order him to get down on the ground as he walked down a street and the trial court erred in denying the motion to suppress.

II.

THE INFORMATION OBTAINED BY POLICE OFFICERS AFTER MR. BAPTISTE HAD ALREADY BEEN STOPPED AT GUNPOINT AND ORDERED TO THE GROUND BY TWO POLICE OFFICERS CANNOT PROVIDE THE REASONABLE SUSPICION NEEDED FOR THAT STOP.

Because the stop of Mr. Baptiste was unlawful, the trial court erred in denying the motion to suppress. The Third District found that the anonymous caller in this case was “transmogrified” into a citizen informant when he approached police officers after the stop of Mr. Baptiste and told them he was the anonymous caller. *Baptiste*, 959 So. 2d at 817. The anonymous caller approached Officer Ellison on the street and, remaining unidentified, accused Mr. Baptiste of waving a gun. (T.8-9,12). The fact that the caller accused Mr. Baptiste after he was already being held by officers does not provide reasonable suspicion for the initial stop. “The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.” *Florida v. J.L.*, 529 U.S. at 271. “It is axiomatic that hindsight may not be employed in determining whether a prior arrest or search was made upon probable cause...the information to be considered is the ‘totality of facts’ available to the officer at the time of the arrest or search.” Wayne R. LaFave, *Search and Seizure – A Treatise on the Fourth Amendment*, § 3.2(d), at 11 (4th ed. 2007). Indeed, the post stop

“transmogrification” of the informant could no more justify the stop than the discovery of the gun. District Courts of Appeal have uniformly applied this principle to the context of a *Terry* stop to hold that events that happen after a stop cannot be used to establish reasonable suspicion for the stop.

In *Butts v. State*, 644 So. 2d 605, 605 (Fla. 1st DCA 1994), police stopped the defendant after receiving an anonymous tip that a black man with a beard, wearing gray pants and a black cap and jacket and riding a bike at a specific intersection had a gun in his pocket and was possibly selling drugs. Police saw the defendant riding a bicycle stopped him. *Id.* After the stop, they saw a gun in his pocket and seized it. *Id.* The court found that the officers lacked reasonable suspicion to stop the defendant based on the anonymous tip alone because prior to the stop they had not observed the defendant doing anything illegal or suspicious. *Id.* at 606. The State maintained that the fact that the tip contained information that the gun could be found in the defendant’s pocket made the anonymous tip more reliable. *Id.* The First District rejected this because police did not corroborate that the defendant had a gun in his pocket until after he was already stopped. *Id.*

Similarly, in *McCarthy v. State*, 536 So. 2d 1196, 1197 (Fla. 4th DCA 1989), an officer, responding to an anonymous tip, stopped the defendant and ordered him to walk over. As the defendant was walking over, the officer observed him attempting to hide something with his hand and elbow. *Id.* at 1197.

The officer also saw the butt of a gun sticking out from the defendant's shirt. *Id.* The officer searched the defendant and found a gun. *Id.* The Fourth District Court of Appeal found that the officer lacked a founded suspicion for the stop and specifically stated that courts cannot consider things that occur after the stop when determining whether there was reasonable suspicion for the stop. *Id.*

After the officer hailed appellant over to where he was located, the officer may have had a founded suspicion based on his observations, i.e., the butt of the gun under appellant's shirt and his apparent attempt to hide something with his hand and elbow. However, the stop took place prior to these observations and relies for its validity solely upon the anonymous tip and what the officer observed before stopping appellant. The factual foundation therefore was inadequate and the motion to suppress should have been granted.

Id. See also *Slydell v. State*, 792 So. 2d 667 (Fla. 4th DCA 2001) (holding that where officers lacked reasonable suspicion to stop a defendant holding a beer can and a napkin in his hand, the fact that the napkin turned out to have cocaine in it was immaterial because only the facts known to the officer at the time of the stop are relevant to a determination of reasonable suspicion) and *Ward v. State*, 453 So. 2d 517 (Fla. 2d DCA 1984) (holding that nothing that transpires after the initial stop can be used to validate an unlawful stop).

Because the initial stop of Mr. Baptiste was unlawful, the subsequent search was unlawful as well. See *Pinkney v. State*, 666 So. 2d 590, 592 (Fla. 4th DCA 1996). The fact that the anonymous caller approached after Mr. Baptiste was stopped and the fact that a gun was subsequently recovered from Mr. Baptiste's

pocket does not make the initial stop lawful. *See Butts*, 644 So. 2d at 606 (holding that a tip is not rendered reliable when corroboration does not happen until after the stop) and *McCloud v. State*, 491 So. 2d 1164, 1166 (Fla. 2d DCA 1986) (holding that only the facts known to the officer at the time of the stop are considered when determining whether there was reasonable suspicion, and that cannabis and firearm should have been suppressed as they were fruits of the illegal stop).

Admission of Mr. Baptiste's statement to police during the unlawful stop was also in error. (T.9). It too should have been excluded because the police lacked reasonable suspicion for the initial stop. *See Dames v. State*, 566 So. 2d 51, 52 (Fla. 1st DCA 1990) (when an officer lacks reasonable suspicion for a stop, any statements the defendant makes should be suppressed) and *Wilson v. State*, 433 So. 2d 1301, 1302 (Fla. 2d DCA 1983) (same). As reasonable suspicion was not established prior to the stop, the trial court erred in denying the motion to suppress the gun.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal affirming the trial court's denial of the motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this ____day of December, 2007.

COLLEEN BRADY WARD
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

COLLEEN BRADY WARD
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