IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-1102

G.M., a juvenile,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY 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

In this reply brief of petitioner on the merits, as in the initial brief of petitioner on the merits, the symbol "R" designates the record on appeal in Case No. 3D06-3032; “R1” designates the record on appeal in Case No. 3D06-3033; and “T” designates the transcript of proceedings on September 12, 2006.

ARGUMENT

THE POLICE OFFICERS' ACTIVATION OF THEIR EMERGENCY POLICE LIGHTS AS THEY DROVE THEIR POLICE VEHICLE TO WITHIN THREE FEET DIRECTLY BEHIND THE PARKED CAR IN WHICH THE JUVENILE WAS SEATED CONSTITUTED A FOURTH AMENDMENT SEIZURE.

A.

The trial judge did not make a factual finding that G.M. was unaware that the police officers had activated their police lights, and nothing in the record supports such a finding, therefore this Court should reject the State's argument that the activation of the police lights did not constitute a Fourth Amendment seizure because G.M. was unaware that the police lights had been activated.

The State first argues that the activation of the police lights did not constitute a Fourth Amendment seizure because G.M. was unaware that the police lights had been activated, and a Fourth Amendment seizure cannot occur if a person is unaware that the police have pulled up behind him and activated their police lights. (Brief of Respondent on the Merits at 12-19). This argument should be rejected because even if a seizure cannot occur if a person is unaware of the presence of the police, the trial judge in this case did not make a factual finding that G.M. was unaware that the police officers had activated their police lights and pulled to within three feet behind the car in which he was seated, and furthermore nothing in the record supports such a finding.

The Trial Judge's Denial of the Motion to Suppress Was Not Based on a Finding of Fact that G.M. Was Unaware of the Police Lights

The fact that G.M. was aware that the police officers had activated their police lights was not disputed in the trial court. Defense counsel argued that G.M. had been subjected to a Fourth Amendment seizure when the officers pulled in behind him and activated the police lights, and that the seizure was not based on a reasonable suspicion of criminal activity (T. 44-50, 54-59). In response, the State argued that the actions of the police officers prior to the discovery of the contraband constituted nothing more than a consensual encounter (T. 50-54). The State never argued that the motion to suppress should be denied because G.M. was not aware that the police lights had been activated when the police officers pulled behind the car in which he was seated (T. 50-54).

As the issue of G.M.'s awareness that the police officers had activated their police lights was never an issue in the trial court, the trial judge made no findings of fact on that issue. The judge made oral findings of fact and law at the conclusion of the hearing and never once mentioned any issue concerning G.M.'s lack of awareness of the police lights (T. 59-60). The judge denied the motion to suppress based on his finding that the actions of the police officers constituted nothing more than a consensual encounter prior to the time the officers discovered that G.M. was in possession of marijuana. In making this finding, the judge specifically focused on the fact that G.M. was seated in a car and made no attempt

to get out of the car (T. 60). Under these circumstances, the State's claim that the trial judge made an implicit finding of fact that G.M. was unaware of the police lights should be rejected.

The Record Does Not Support a Finding that G.M. Was Unaware of the Police Lights

No evidence was presented at the hearing on the motion to suppress which demonstrated in any way that G.M. was unaware of the police lights activated by the police officers when they pulled to within three feet behind the car in which he was seated. Neither of the two police officers who testified at the hearing gave any testimony concerning G.M.'s awareness of the police lights. When Officer Smith was asked if G.M. ever looked up at him as he approached the car in which G.M. was seated, the officer testified that G.M. "had his head down when I first saw him because he didn't see me coming from the back. He had his head down." (T. 17). Assuming that Officer Smith was properly allowed to speculate as to what G.M. had seen,[1] the officer's testimony that G.M. did not see him approaching the car does not in any way establish that G.M. did not previously see the police lights when they were activated as the officers pulled to within three feet behind the car in which he was seated.

[1] Counsel for respondent objected to this testimony on the grounds that it was speculation by the officer, but the objection was overruled (T. 17).

Similarly, G.M.'s testimony at the hearing on the motion to suppress did not demonstrate in any way that he was unaware of the police lights when they were activated by the police officers as they pulled to within three feet behind the car. When the prosecutor asked G.M. on cross-examination how he knew that the police officers were outside the car, he responded, "Someone told me." (T. 43). G.M.'s testimony that someone told him that police officers were outside the car in which he was seated does not in any way establish that G.M. did not previously see the police lights when they were activated as the officers first pulled behind the car.

Thus, to the limited extent that the testimony at the hearing on the motion to suppress did address the issue of G.M.'s knowledge of the presence of the police officers, that testimony only concerned G.M.'s awareness of the officers approaching the car on foot, not the officers' previous actions in activating the police lights and pulling to within three feet behind the car. Accordingly, the record in this case does not in any way support a finding that G.M. was unaware of the police lights when they were activated. Indeed, as noted in the previously filed initial brief on the merits, because it was 5:00 in the evening and it had been raining at the time the officers activated their emergency police lights, and because the officers drove up so close behind the car in which G.M. was seated, it is reasonable to assume that G.M. was aware of the police lights when they were

activated. As the trial judge in this case did not make a factual finding that G.M. was unaware that the police officers had activated their police lights, and as nothing in the record supports such a finding, this Court should reject the State's argument that the activation of the police lights did not constitute a Fourth Amendment seizure because G.M. was unaware that the police lights had been activated.

B.

No reasonable person in G.M.'s position would perceive that the officers had activated the police lights for the purpose of inquiring whether something was wrong or for traffic safety purposes, therefore the activation of the police lights constituted a Fourth Amendment seizure because the activation of the lights would lead a reasonable person to conclude that he or she was not free to end the encounter and leave the scene.

In support of its contention that G.M. was not subjected to a Fourth Amendment seizure when the police officers activated their police lights on a rainy evening and pulled to within three feet behind the lawfully parked car in which G.M. was seated, the State relies on several decisions from other jurisdictions holding that under the particular facts of the case the police activation of emergency lights did not constitute a Fourth Amendment seizure. Examination of those decisions reveals that each case falls within the limited class of cases where the activation of police lights would not convey to a reasonable person that he or she was not free to simply leave the scene. Accordingly, those decisions have no application to the facts of this case, where the actions of the police officers in

activating their police lights on a rainy evening and pulling to within three feet behind the car in which G.M. was seated would clearly convey to any reasonable person in G.M.'s position that he or she was not free to simply get out of the car and walk away.

In *Martin v. State*, 104 S.W.3d 298 (Tex.App.-El Paso 2003), the defendant's car was stopped in a traffic lane near an intersection with a green light. *Id*. at 299. A police officer pulled up behind the car and turned on his overhead lights to make the driver aware of his presence and "to let traffic know that was approaching not to come up and run into him, because he was sitting in the middle of traffic." *Id*. The court held that no Fourth Amendment seizure had taken place because a reasonable person in the defendant's position would realize that the officer had activated his police lights for reasons of highway safety and therefore he would be free to drive away. *Id*. at 301.

Similarly, in *State v. Dubois*, 75 Or.App. 394, 706 P.2d 588 (1985), a police officer driving his patrol car at 2:34 a.m. observed a motorcycle pull off the road, its headlights go out, and the operator begin to push it. 706 P.2d at 589. The officer was concerned there was a problem with the motorcycle and decided to inquire and offer assistance. *Id*. He pulled behind the motorcycle and turned on his overhead lights as a safety precaution required by Washington police policy when an officer stops on a road. *Id*. At the area where the officer pulled off the

road, the road had a three-foot shoulder and the officer's car was partially on the road. *Id*. The court held that the officer had not conducted a Fourth Amendment stop of the defendant because the police lights were activated in conjunction with the officer's attempt to render assistance, and not in conjunction with the officer's subsequent encounter with the defendant. *Id*. at 398.

State v. Blair, 171 Or.App. 162, 14 P.3d 660 (2000) is another example of a case where police officers activated police lights for traffic safety purposes and to render assistance to a defendant's vehicle. There, two officers were on patrol late at night when they noticed a van on the side of a two-lane highway. 14 P.3d at 662. Traffic was heavy at the time and a steady flow of vehicles was passing by the van. *Id*. The van was straddling a white line, its hazard lights were flashing, and it was either parked on the side of the road or slowly rolling forward. *Id*. There was no lighting in the area. *Id*. The officers pulled up behind the van and activated the overhead flashing lights to make sure that passing traffic could see them. *Id*. The court held that no seizure had taken place, as any reasonable person would know that the lights had been activated for traffic safety purposes and in conjunction with the officers' attempts to render assistance.

> [D]efendants' use of the van's hazard lights essentially announced to all other motorists or passersby that their vehicle was disabled or was in a hazardous situation.
>
> Given that announcement, any reasonable motorist in defendants' place would perceive the officers to be stopping behind them for the

> purpose of inquiring whether something was wrong and perhaps warning them of the safety problem they posed.

Id. at 665.

Finally, in *State v. Johnston*, 85 Ohio App.3d 475, 620 N.E.2d 128 (1993), a police officer on routine patrol at 2:40 a.m. pulled into a parking lot to turn around. 620 N.E.2d at 128-29. As the officer was in the parking lot, the defendant's vehicle pulled into the parking lot next to the patrol car. *Id* at 129. The officer activated his overhead lights and stepped out of his police vehicle to see if the driver needed some type of assistance. *Id*. The court held that the defendant was not subjected to a Fourth Amendment seizure by the activation of the police lights because it was the defendant who pulled up next to the officer, and the officer was merely trying to find out if the driver needed any assistance. *Id*. at 130.

The common thread running through all these cases is that the activation of police lights will not constitute a Fourth Amendment seizure where any reasonable motorist would perceive that the officer had activated the lights for the purpose of inquiring whether something was wrong or for traffic safety purposes. This common thread is noticeably absent from the facts of this case. There would be no reason for police officers to activate their police lights and approach a car parked in a parking lot of a public park at 5:00 in the evening to check to see if the driver needed help. There would be no reason for police officers to activate their police lights and approach a car parked in a parking lot of a public park at 5:00 in the

evening for traffic safety reasons. Thus, no reasonable person in G.M.'s position would perceive that the officer had activated the lights for the purpose of inquiring whether something was wrong or for traffic safety purposes, therefore the officers' activation of their emergency police lights as they pulled up behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure because the activation of the emergency lights would lead a reasonable person to conclude that he or she was not free to end the encounter and leave the scene.

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, and remand this case with instructions that the juvenile's motion to suppress be granted.

Respectfully submitted,

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BY:_____
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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 30th day of January, 2009.

_____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF FONT

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

_____
HOWARD K. BLUMBERG
Assistant Public Defender