IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ANTHONY L. HANKERSON,

Respondent.

Case No. SC10-1074
4th DCA Case No. 4D08-3055

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PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONS

STATEMENT OF THE CASE

On March 19, 2008, Respondent was charged by information with one count of Possession of Cocaine With Intent to Sell Within 1,000 Feet of a School (R 9). On July 8, 2008, a jury found Respondent guilty of the lesser included offense of Possession of Cocaine With Intent to Sell (R 40). The trial court adjudicated Respondent guilty and sentenced Respondent to ten years in prison (R 58, 60).

Respondent pursued a direct appeal, challenging the trial court's denial of a motion to suppress evidence (R 43; Respondent's Initial Brief to the Fourth District). On March 31, 2010, the Fourth District Court of Appeal issued an opinion reversing Respondent's conviction. Hankerson v. State, 32 So. 3d 175 (Fla. 4th DCA 2010). The State of Florida sought review by this Court on the basis of conflict with a decision of this Court and conflict with two decisions of other district courts of appeal. On July 9, 2010, this Court accepted jurisdiction and dispensed with oral argument.

STATEMENT OF THE FACTS

Before trial, Respondent moved to suppress cocaine that was seized from his person (R 19-22). The trial court conducted a hearing on Respondent's motion to suppress (T1 90-119). The State presented testimony from two police officers with the

Delray Beach Police Department who were the only witnesses at the hearing (T1 90-119).

Officer Mark Lucas possessed extensive narcotics training and experience, including more than 10,000 narcotics investigations (T1 91-93). On February 28, 2008, Officer Lucas conducted surveillance on a residence at 234 Northwest Seventh Avenue in Delray Beach (T1 93). Officer Lucas explained why he conducted surveillance at that residence: "Over a period of six months, I have attended homeowners meetings, and through different C.I.'s I have interviewed, that was our main problem area in the community, that there were people selling and using drugs on the property" (T1 94). Officer Lucas conducted the surveillance from an unmarked vehicle approximately thirty yards from the residence (T1 94).

At approximately 5:00 p.m., Respondent arrived at the residence in a vehicle (T1 94). Respondent exited the car and walked up to a group of individuals standing on the front porch (T1 95). Respondent engaged in three hand-to-hand transactions:

> Q. [prosecutor] What happened then?
>
> A. [Officer Lucas] Very brief contact with three of the subjects.
>
> Q. How brief?
>
> A. Seconds. Mr. Hankerson had his hand open. He was looking up and down the

> street. Each individual took an item from the hand and then quickly handed him a paper currency.
>
> Q. How did you know it was paper currency?
>
> A. I could clearly see it. I was using binoculars and my vision was not obscured in any way.
>
> Q. Did you happen to see what he handed to the subjects or suspects?
>
> A. I couldn't identify it. It was very small in nature. They quickly secured it and he left quickly.
>
> Q. At any time did you see where he placed the money or paper currency?
>
> A. Yes, as he finished the third transaction, he put the money in his right pocket and went to his vehicle and started driving away.

(T1 95-96). Officer Lucas explained why he believed Respondent was dealing drugs:

> Q. [prosecutor] Why did you believe that the Defendant was actually dealing drugs?
>
> A. [Officer Lucas] In my experience, the brief of a contact [sic], the limited eye contact, the way he was looking up and down the street, and the exchange of paper currency for these items with three different subjects, it was consistent certainly with the hundreds of transactions I've witnessed.

(T1 96-97).

As Respondent drove away from the residence, Officer Lucas

reported his observations to assisting Officer James Schmidt, who was driving a marked police vehicle (T1 96, 104). Officer Schmidt followed Respondent's vehicle for approximately three blocks before he conducted a traffic stop (T1 105-06). When Officer Schmidt pulled Respondent over, Officer Schmidt became concerned when he saw Respondent "reaching into the center console and then down towards the floor" (T1 106). Officer Schmidt was concerned because "there was just a narcotics transaction done, and as well as often times those things are associated with weapons" (T1 107). Officer Schmidt's suspicions were "definitely heightened" (T1 107).

Officer Schmidt explained what transpired next:

> Q. [prosecutor] Did you come into contact with the driver of the vehicle?
>
> A. [Officer Schmidt] Yes.
>
> Q. Was there anyone else in the vehicle at the time?
>
> A. No.
>
> Q. When you came into contact with the driver of the vehicle, what did you do?
>
> A. I asked him to exit the vehicle.
>
> Q. Did he comply?
>
> A. Yes.
>
> Q. What did you proceed to do then?

A. I asked him if he had anything on him, any drugs or weapons.

Q. How did he respond?

A. He said no, and he turned and lifted his shirt up to show, I guess, that he didn't have anything in his --

Q. Did he say anything else?

A I -- I -- yes, I believe he said, you know, do you have any -- I asked him did he have anything on him, he said no, I've been out of the game.

Q. What did you proceed to do then?

A. I conducted a search of him.

Q. And why did you conduct a search?

A. From my observations and Officer Lucas' observations.

Q. What did you suspect the Defendant to have on him or his person?

A. Drugs.

Q. How did you search the Defendant?

A. I patted him down and I asked him if he had anything in his shoes, and he said no. And he started taking off -- he took off his shoe. He took off his left shoe --

Q. Did you ask him to take off his shoes?

A. I don't believe I did. It was inferred. I would have asked him to take off his shoes, but I believe my exact thing was [sic] do you have anything in your shoe, and he was like no. And he started taking off his shoes.

> Q. What then?
>
> A. He took off his left shoe. I could see that he was a little bit hesitant. He actually looked like he was going to take off his right shoe and then took off his left shoe. As he took off his right shoe, he took something -- he took a bag of what I suspected was cocaine and kind of put it in his hand at which point I grabbed his hand and --
>
> Q. What do you mean by he kind of put it in his hand? I don't understand.
>
> A. No, I'm sorry, he was trying to conceal it is what I was trying to say.
>
> Q. Okay.
>
> A. He bent down and grabbed it, had it in his hand. I saw it and placed him under arrest.

(T1 107-09).

After hearing argument from the parties, the trial court ruled as follows:

> THE COURT: Thank you, Ms. Jones. This is before the Court on the Defendant's Motion to Suppress. The facts as the Court finds them from the evidence is that the officers were detailed to surveil a specific house because of the on-going narcotics trafficking in the area from that house. The evidence is is [sic] that home was the central -- or how did the officer put it, he didn't say central, but was the problem home in the area and that all of the narcotics being sold emanated from that home, and the homeowners association and homeowners in the area continued to complain and to ask for police assistance to stop the traffic -- the

> narcotic trafficking from that residence. And that based upon these complaints and on-going narcotic difficulties, Officer Lucas was dispatched to surveil the house at 234 Seventh Avenue. He was in a vehicle approximately thirty yards from the home and saw the Defendant drive up into the parking lot. The Defendant got out and spoke to three individual people. Now, the record does not reflect how Officer Lucas demonstrated as to how the purported narcotics were distributed, but what he did was he held out -- he said the Defendant held out an open hand, palm up, and that the individual -- the three individuals selected the substances from Mr. Hankerson's hand by using the thumb and forefinger and that's what he, I mean, that was his demonstration. As I said, no one -- strike that, that was his demonstration, that it was a thumb and forefinger from an open palm. And that thereafter, the Defendant received cash in exchange -- from each of the three individuals for the substances. The Court finds that based upon the evidence -- strike that. And then the officer further testified that his training and experience and what he has seen, done and in the course of his official capacity seeing these -- that this is how narcotics are, in fact, exchanged. So with all of the circumstances involved, the Court finds that the officer had, in fact, probable cause to believe that he saw a narcotic transaction, even though he could not identify the substance, all of the other facts and circumstances give cause for the subsequent search of Mr. Hankerson. And accordingly, the motion is denied.

(T1 117-19).

SUMMARY OF THE ARGUMENT

The police had probable cause to arrest Respondent on the basis that (1) Officer Lucas received information from various sources that illegal drug offenses were occurring at the residence under surveillance, (2) Officer Lucas saw Respondent arrive at the residence and conduct three hand-to-hand transactions with three individuals, (3) the transactions were brief, (4) Respondent did not maintain eye contact with the other individuals, (5) Respondent looked up and down the street during the transactions, (6) small items were exchanged for paper currency, and (7) the transactions were consistent with hundreds of narcotic transactions observed by Officer Lucas.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION TO SUPPRESS EVIDENCE.

A. Standard of Review

"[T]he United States Supreme Court has generally instructed that determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." Jenkins v. State, 978 So. 2d 116, 122 (Fla. 2008) (citing Ornelas v. United States, 517 U.S. 690, 699 (1996)). "However, the court should review findings of historical fact only for clear error and give due weight to inferences drawn from those facts by resident judges

and local law enforcement officers." Jenkins, 978 So. 2d at 122 (citing Ornelas, 517 U.S. at 699).

B. Law

The Fourth Amendment to the United States Constitution and section 12 of the Florida Constitution guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Art. I, § 12, Fla. Const. The Florida Constitution provides that the right "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const.

An arrest "is unreasonable unless it is supported by probable cause." Michigan v. Summers, 452 U.S. 692, 700 (1981). The concept of probable cause was explained in the following reasoning:

> The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. And this means less than evidence which would justify condemnation or conviction, [but] more than bare suspicion: Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Jenkins, 978 So. 2d at 121 (quoting Brinegar v. United States,

338 U.S. 160, 175-76 (1949)). The Supreme Court of the United States further explained:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same-and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. . . . [P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.

Illinois v. Gates, 462 U.S. 213, 231-32 (1983) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

Police officers are permitted to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting Cortez, 449 U.S. at 418). Furthermore, police officers may consider the crime rate of an area in determining the existence of probable cause. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently

suspicious to warrant further investigation"); Brinegar v. United States, 338 U.S. 160 (1949) (finding probable cause where a heavily loaded vehicle was observed traveling from place which was a common source of supply for those illegally importing liquor into the dry State of Oklahoma).

C. Discussion

The trial court correctly concluded that the police had probable cause to arrest and search Respondent. Officer Lucas received reports from multiple sources that the residence was a problem area in the community due to the use and sale of drugs (T1 94). When Officer Lucas watched the residence, he observed Respondent park in the driveway, approach individuals outside the house, and engage in three hand-to-hand transactions with three separate individuals (T1 94-97). Each individual took a small item from Respondent's hand and then quickly handed Respondent a paper currency (T1 95). Respondent looked up and down the street as he conducted the transactions (T1 95). Once he finished the last transaction, Respondent put the money in his pocket, walked back to his vehicle, and drove away (T1 96). The manner of the three transactions was consistent with hundreds of narcotics transactions witnessed by Officer Lucas (T1 97).

The facts and circumstances within Officer Lucas' knowledge

and of which he had reasonably trustworthy information were "sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense was committed. See Jenkins, 978 So. 2d at 121. The trial court properly evaluated the evidence "as understood by those versed in the field of law enforcement." See Gates, 462 U.S. at 232. The trial court also had the benefit of watching Officer Lucas' demonstration of how the three individuals each took a small item from the palm of Respondent's hand (T1 118).

The facts of the instant case are similar to D.A.H. v. State, 718 So. 2d 195 (Fla. 2d DCA 1998). In D.A.H., an officer with approximately 300 narcotics arrests observed the defendant engage in "several hand-to-hand transactions." Id. at 195. The officer saw the exchange of money for small packages between D.A.H. and people in vehicles. Id. The officer's "training, experience, and knowledge of the area told him he was watching drug transactions in progress." Id. The Second District Court of Appeal concluded that the officer's observations gave rise to probable cause for the stop and search of D.A.H. Id.

Another similar case is Knox v. State, 689 So. 2d 1224, 1225 (Fla. 5th DCA 1997), a case that involved an officer with several dozen narcotics arrests who observed multiple hand-to-hand transactions. The officer was conducting surveillance on

the area because the police received numerous complaints of narcotics dealing. Id. The officer observed "Knox approach vehicles that would pull up, lean into the vehicle and pass something to the occupants of the vehicle." Id. When the vehicles pulled off, Knox had cash in his hand. Id. The items exchanged for money were concealed and too small to be seen by the officer. Id. The Fifth District Court of Appeal found that the officer's observations "established sufficient probable cause for an experienced narcotics officer to believe that Knox was engaged in criminal conduct that justified a search for illegal drugs." Id.

The Fourth District Court of Appeal addressed a similar factual situation in League v. State, 778 So. 2d 1086 (Fla. 4th DCA 2001). In that case, after the police received an anonymous complaint that an individual was selling narcotics at a residence, a veteran police detective hid in the bushes and observed the location. Id. at 1086. The detective observed League drive to the house, knock on the door, speak with the person inside, and hand over money to the person in the residence. Id. In exchange for the money, something was dropped into League's left hand. Id. When an officer seized League and grabbed his left hand, pieces of cocaine fell out. Id. at 1087. The Fourth District Court of Appeal concluded that

"there was probable cause for appellant's seizure." Id.

Another decision from the Fourth District Court of Appeal addressing similar facts is Elliott v. State, 597 So. 2d 916 (Fla. 4th DCA 1992). In that case, an experienced detective observed what he knew to be a drug transaction, although he did not see the contents of a baggie that was exchanged. Id. at 916-17. The detective was passing a corner known for the sale of crack cocaine when he saw a black man, Elliott, leaning into a car occupied by a white male. Id. at 916. "The detective saw some movement, which the detective described as an exchange of hands, between the passenger and the appellant." Id. Elliott made a very quick motion with his hand to place a plastic baggie into his pocket. Id. The detective recognized Elliott as a suspect that he seized a quantity of cocaine from previously. Id. Based on the observations of the experienced detective, "there was probable cause to arrest and search." Id. at 918.

Despite the similar situations presented in D.A.H., Knox, League, and Elliott, the Fourth District Court of Appeal concluded that the trial court's ruling on Respondent's motion to suppress evidence required reversal on the authority of Coney v. State, 820 So. 2d 1012 (Fla. 2d DCA 2002). Hankerson, 32 So. 3d at 177. In Coney, two police officers observed a single hand-to-hand transaction "in an area where many drug arrests had

previously been made." Coney, 820 So. 2d at 1013. "The officers observed Coney approach on a bicycle and put his closed hand into a car." Id. "The officers could not see what was in Coney's hand, but as the car left they saw that Coney held money." Id. The Second District Court of Appeal concluded that the officers had reasonable suspicion to stop Coney, but not probable cause to conduct a search of Coney's mouth after the officers noticed something in his mouth. Id. at 1014.

The Second District Court of Appeal explained that it was significant that the police did not see Coney involved in more than one transaction:

> While we recognize that cases of this nature are often close, several factors are significant to our decision that the police officers did not have probable cause to search Coney: they did not see what was in Coney's hand when he reached into the car; they did not see what was in Coney's mouth before he spit out the object at the command of one of the officers; and they did not see Coney involved in more than one transaction.

Id. Despite the fact that a total of three transactions were observed in the instant case, the Fourth District Court found the Coney decision controlling. Hankerson, 32 So. 3d at 177.

The Fourth District Court of Appeal overlooked the fact that Respondent engaged in three transactions and instead focused on the fact that Respondent was observed on only one

occasion: "They did not see him similarly involved in more than one occasion." See id. The Fourth District Court of Appeal also refused to see the circumstances as strongly indicative of criminal behavior. See id. ("These patterns on which they rely also occur in innocent public transactions and are not unique to narcotics violations. These patterns may be enough to inform a suspicion of further investigation . . . but they fall short of the requirements of probable cause").

However, it is clear that the evidence must be viewed "and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." See Illinois v. Gates, 462 U.S. 213, 232 (1983). The Second District Court of Appeal correctly viewed multiple hand-to-hand transactions as follows: "In the overall context of this case, the exchange of money is unlikely to be an exchange for any small object other than crack cocaine. The fact that the officers witnessed two prior exchanges on this same evening adds to the circumstances supporting probable cause." See Revels v. State, 666 So. 2d 213, 215 (Fla. 2d DCA 1995). Thus, to the observing officer, Respondent's activity was not a single event, but three separate exchanges, each bolstering the officer's belief that an offense had been committed.

An instructive discussion is found in the dissent from a

denial of a petition for writ of certiorari in Pennsylvania v. Dunlap, 129 S.Ct. 448 (2008). Chief Justice Roberts, joined by Justice Kennedy, wrote that he would grant certiorari and reverse the Pennsylvania Supreme Court's finding that probable cause was lacking where police observed a single exchange of cash for small objects in a high-crime neighborhood. Id. at 448. The Chief Justice explained, "[p]erhaps it is possible to imagine innocent explanations for this conduct, but I cannot come up with any remotely as likely as the drug transaction [Officer] Devlin believed he had witnessed. In any event, an officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to make an arrest." Id.

Chief Justice Roberts' opinion notes that state courts are divided on the issue. Id. at 449. However, in the instant case, the facts are much stronger than the facts of Dunlap because Officer Lucas observed three transactions, not just one (T1 95-96). Although the residence in the instant case was not described as a "high-crime neighborhood," police received information from various sources of illegal drug activity regularly occurring at that location (T1 94). Thus, there was credible information that the location was prone to criminal activity, just like a high-crime neighborhood. See Illinois v.

Wardlow, 528 U.S. 119, 124 (2000) ("officers are not required to ignore the relevant characteristics of a location"). Additional factors that support the finding of probable cause in the instant case include (1) the brevity of the transactions, (2) the lack of eye contact between Respondent and the other individuals, (3) the fact that Respondent looked up and down the street during the transactions and (4) the exchange of paper currency (T1 95-97).

Even in the absence of probable cause, the seizure of the drugs would be permissible on the basis of reasonable suspicion. See Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999) ("an appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to consideration of the reasons given by the trial court"). The Fourth District Court of Appeal refused to analyze whether the seizure was justified by reasonable suspicion because the State did not make this argument in the trial court. See Hankerson, 32 So. 3d at 176-77 ("The only argument made by the state at the suppression hearing to justify the seizure and search of defendant was that the police had probable cause"). However, "an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below." Dade County

School Board, 731 So. 2d at 645.

Based on Officer Lucas' observations, Officer Schmidt was certainly entitled to conduct an investigatory detention of Respondent. See Golphin v. State, 945 So. 2d 1174, 1180 (Fla. 2006) ("a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime"). Once he effectuated the traffic stop, Officer Schmidt was concerned by Respondent's reaching movements inside the car, especially since narcotics transactions are often "associated with weapons" (T1 106-07). At that point, Officer Schmidt was justified in conducting a pat-down of Respondent. See Terry v. Ohio, 392 U.S. 1, 27 (1868) (concluding that it is permissible to conduct "a reasonable search for weapons for the protection of the police officer"); Lightbourne v. State, 438 So. 2d 380, 388 (Fla. 1983) (finding a pat-down justified by "defendant's furtive movements and nervous appearance").

After the pat-down search was completed, Officer Schmidt asked Respondent if he had anything in his shoes (T1 108). Respondent answered "no" and proceeded to take off his shoes, revealing the cocaine (T1 108-09). Officer Schmidt did not instruct Respondent to remove his shoes (T1 108). Thus, Officer Schmidt's question did not raise the Fourth Amendment stakes of

the encounter. "[M]ere police questioning does not constitute" a search or seizure. Muehler v. Mena, 544 U.S. 93, 101 (2005).

Once Officer Schmidt saw the suspected cocaine, he was entitled to seize it. See Lynch v. State, 2 So. 3d 47, 67 (Fla. 2008) ("seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity"). Therefore, even if the suspicion did not amount to probable cause, the police properly seized the cocaine during an investigatory detention based on reasonable suspicion.

CONCLUSION

The trial court properly denied Respondent's motion to suppress evidence. Therefore, the State requests that this Honorable Court reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was sent by courier to Gary Lee Caldwell, Assistant Public Defender, Counsel for Respondent, at 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on July 28, 2010.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

_____
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