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IN THE SUPREME COURT OF FLORIDA

AMY HINMAN,

Petitioner, Case No. SC12-2501

v.

STATE OF FLORIDA,

Respondent.
______________________/

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

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "Hinman." Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State. The symbol "R." will refer to the record on appeal below.

STATEMENT OF THE CASE AND FACTS

Defendant, Amy Hinman, was charged in a one count information pursuant to section 893.135(1)(C)(1)(C), *Florida Statutes*, for trafficking in an illegal substance based on an incident that occurred on or about February 4, 2009. (R. 7-9). On February 23, 2009, defense counsel filed a motion to suppress physical evidence and memorandum of law in support. (R. 13). In the motion, Defendant alleged (1) the pat-down violated defendant's Fourth Amendment right against unreasonable search and seizure because the officer did not have reasonable suspicion to believe she was armed; and (2) the physical evidence seized was obtained from an unlawful, warrantless search. (R. 15-16).

A motion to suppress was argued before the court on September 1, 2011. (R. 26-32). At the hearing, Officer Orlando Lopez, who was working patrol with the Miami Police Department, testified that on February 4, 2009, he and Officer Parker initiated a stop of Defendant's vehicle for a traffic

infraction, after she was observed running a red light. (R. 32-33, 38). Prior to initiating the stop, the officers were on the lookout for a vehicle, matching the description of the vehicle Defendant was driving, heading north of 147th avenue that was part of a narcotics investigation. (R. 33). Immediately after receiving the notification, Officer Lopez observed a vehicle matching its description run a red light and initiated a stop. (R. 33, 34). The officers had no other information other than the description of the vehicle and that the passenger was female at the time of the stop. (R. 34, 42).

Upon approaching the stopped vehicle Officer Lopez greeted the passenger and then asked if she had any weapons or drugs in the vehicle for officer safety and based on policy. (R. 35-37, 39). Defendant stated that she did not have any weapons, but "then she hesitated, and then said, 'I have a bag [of pills].'" (R. 36). Defendant was then asked to step out of the vehicle. "Once she stepped out of the vehicle, she went in her right pocket and pulled out a bag [of pills] and put it on the hood of the vehicle" without being asked. (R. 37, 45). The officers did not pat-down Defendant when she stepped out of the vehicle or ask her to remove the drugs from her pocket. (R. 45). Officer Lopez acknowledged that Defendant was not free to leave at the time he asked her whether she had drugs or weapons in the car, "because of the traffic stop." (R. 40)

The lead detectives arrived at the scene after the stop and took over the investigation. (R. 45). Officer Lopez did not *Mirandize* Defendant and could not recall if any other officer did. (R. 44-45).

No other witnesses were called to testify. The Court acknowledged that Defendant was stopped for a valid traffic violation, but expressed concern regarding the drug question stating:

> How is that question regarding drugs, especially in light of the fact that you are stopping her for a valid traffic violation, and he also knows that he is following this person and stopping her for the narcotics team.
>
> How is it okay to ask that question? How is that question not designed to elicit an incriminating response?

(R. 46).

In response, the State provided the following case law in support of its position that the officer's line of questioning was proper and not likely to elicit an incriminating response: *State v. Martissa*, 18 So. 3d 49 (Fla. 2d DCA 2009) and *State v. Olave*, 948 So. 2d 995 (Fla. 4th DCA 2007). Defense counsel offered *State v. Hall*, 537 So. 2d 171 (Fla. 1st DCA 1989). The hearing was then adjourned and rescheduled to a later date so that the trial court could review the case law. (R. 50).

When the suppression hearing recommenced on September 16, 2010, the trial court granted the defendant's motion to

suppress. (R. 56). The trial court made the following statement following its ruling:

> I'm basing my decision on the fact that the officer testified that he was alerted by Narcotics, to stop the car.
>
> He was given a description of the car, and told that it was occupied by a female driver. When he saw the car, he simultaneously – at the time of the traffic infraction, he stopped her.
>
> . . .
>
> And, while I believe it's completely acceptable for hin [sic] to ask her, at that point, for officer safety, if she had any weapons, he could not give me any safety reasons for asking her about drugs. . . ."

(R. 56)

Thus, the trial court based its decision to grant the motion to suppress on (1) the fact that the officer knew of a narcotics investigation when he initiated the stop based on a traffic infraction and (2) that the trial court did not find the officer's question regarding drugs to be a proper question relating to safety. (R. 56).

The State filed a notice to appeal the motion to suppress. (R. 63). In the initial brief to the Third District, the State argued that the trial court erred in granting the defense motion to suppress as defendant was not in custody for purposes requiring *Miranda* warnings and not subject to a custodial interrogation at a routine traffic stop based on the following cases: *State v. Martissa*, 18 So. 3d 49 (Fla. 2d DCA 2009); *State v. Olave*, 948 So. 2d 995 (Fla. 4th DCA 2007); *Hewitt v. State*,

920 So. 2d 802 (Fla. 5th DCA 2006).

On October 31, 2012, the Third District Court of Appeal issued an opinion reversing the lower courts order granting the motion to suppress physical evidence and statements. *State v. Hinman*, 100 So. 3d 220 (Fla. 3d DCA 2012). The court found that Petitioner was not in custody for the purposes of *Miranda* "[i]n the case of a lawful traffic stop such as this." *Id.* at 221.

Petitioner sought discretionary jurisdiction alleging direct and express conflict with *Berkemer v. McCarty*, 468 U.S. 420 (1984), *Caso v. State*, 524 So. 2d 422 (Fla. 1988), and *State v. Hall*, 537 So. 2d 171 (Fla. 1st DCA 1989). On June 3, 2013, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly found that Petitioner was not in custody for purposes of *Miranda* because this was a lawful traffic stop. Petitioner was not subject to a custodial interrogation at the time the officer stopped her for a traffic infraction and then asked if she had weapons or drugs. As a result, Petitioner was not entitled to the benefit of the procedural safeguards enunciated in *Miranda*. Further, even if Petitioner was subject to a custodial interrogation, this should not affect the admissibility of the physical evidence of the pills, which were voluntarily turned over without any request from law enforcement. Therefore, the Third District Court of Appeal's reversal on the issue of the motion to suppress should be affirmed.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE TRIAL COURT'S ORDER GRANTING THE MOTION TO SUPPRESS AS DEFENDANT WAS NOT IN CUSTODY FOR PURPOSES REQUIRING *MIRANDA* WARNINGS AND NOT SUBJECT TO A CUSTODIAL INTERROGATION AT A ROUTINE TRAFFIC STOP SUCH THAT DEFENDANT'S STATEMENTS AND VOLUNTARILY PRODUCED ITEMS SHOULD NOT BE SUPPRESSED.

A. The question regarding weapons and drugs was permissible for officer safety reasons, did not unduly prolong the routine traffic stop, or confront Petitioner with accusations of criminal wrongdoing

A routine traffic stop is analogous to an investigatory detention under *Terry* as it is first, "presumptively temporary and brief" and second, usually within the public view. *Berkemer v. McCarty*, 468 U.S. 420, 437-38 (1984). "One of the investigative techniques that *Miranda* was designed to guard against was the use by police of various kinds of trickery . . . to elicit confessions." *Berkermer*, 468 U.S. at FN 27. The brevity and other features of a routine traffic stop make the types of behavior *Miranda*[1] sought to safeguard against less likely to arise following a lawful traffic stop. Consequently, the Supreme Court of the United States has held that "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Id.* at 440. *Miranda* warnings are necessary when motorists are "subjected to restraints comparable to those associated with a formal arrest." *Id.* at 441. A person

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with an actual arrest. *State v. Martissa*, 18 So. 3d 49, 52 (Fla. 2d DCA 2009). A reasonable person is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." *State v. Alioto*, 588 So. 2d 17, 18 (Fla. 5th DCA 1991) (citation omitted) (internal quotation omitted).

The instant case involves a routine traffic stop as police lawfully stopped Petitioner following a traffic violation.[2] The officers in this case happened to observe a traffic violation at almost the same time as they heard a BOLO describing a car matching the same description in connection with a separate narcotics investigation. (R. 32-37). Although, the officers were aware that this car matched the description provided, they could not be certain this was the correct vehicle or person the BOLO was referencing, as it does not appear that they had a tag

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2. Under the 1982 amendments to Article I, section 12 of the Florida Constitution, courts are required to construe the right against unreasonable searches and seizures in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Soca v. State*, 673 So. 2d 24, 27 (Fla. 1996) ("With the conformity clause amendment, we are bound to follow the interpretations of the United States Supreme Court with respect to the Fourth Amendment and provide to Florida citizens no greater protection than those interpretations.").

number or other distinguishing descriptive details, when they initiated a lawful traffic stop. (R. 34, 42).

As a preliminary matter, the trial court improperly based its decision to grant the motion to suppress on the fact that the officer knew of a narcotics investigation when he initiated the stop based on a traffic infraction and that the trial court did not find the officer's question regarding drugs to be a proper question relating to safety. (R. 56-57). The trial court made the following statement in its ruling:

> I'm basing my decision on the fact that the officer testified that he was alerted by Narcotics, to stop the car.
>
> He was given a description of the car, and told that it was occupied by a female driver. When he saw the car, he simultaneously – at the time of the traffic infraction, he stopped her.
>
> . . .
>
> And, while I believe it's completely acceptable for hin [sic] to ask her, at that point, for officer safety, if she had any weapons, he could not give me any safety reasons for asking her about drugs. . . ."

(R. 56).

Thus, the trial court's reasoning was clearly incorrect as the standard is not the subjective intent of the officers, but an objective standard. *Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984). For example, in *Berkemer v. McCarty*, the officer intended to arrest respondent when respondent stepped out of his vehicle and was having difficulty standing. *Id.* at 420. However, this fact was never communicated to respondent. *Id.* The officers' subjective unarticulated intent had "no bearing on

the question whether a suspect was 'in custody' at a particular time." *Id.* Rather, the only relevant inquiry was "how a reasonable [person] in the suspect's position would have understood his situation." *Id.*

The fact that the officers were aware that a vehicle matching the description of Petitioner's vehicle was the subject of a narcotics investigation is irrelevant where the officers observed Petitioner running a red light and that was the basis for the stop. *Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984); *Whren v. United States*, 517 U.S. 806 (1996) (holding that the reasonableness of a traffic stop depends solely on the validity of the basis asserted by the officer involved in the stop, and not the officer's subjective intentions.). In *State v. Kinnane*, appellant's car was stopped because it was speeding and there was a search warrant for the residence she was departing. *State v. Kinnane*, 689 So.2d 1088, 1088 (Fla. 2d DCA 1996). The trial court granted appellant's motion to suppress on the basis that the stop was pretextual. However, the Second District reversed finding there was sufficient evidence that appellant was speeding. Thus, even though officers had another reason to effectuate the stop, i.e. the search warrant for the residence, the fact that the appellant was speeding was sufficient to validate the stop. *Id.*

Additionally, in *State v. Thomas*, 109 So. 3d 814 (Fla. 5th DCA 2013) officers observed defendant in an empty parking lot behind a closed restaurant around midnight. *Id.* at 816. Based on the officer's experience in the area, he suspected possible drug activity. *Id.* at 817. The defendant drove away as the police approached, but was later stopped for driving with illegal window tints. *Id.* at 816. The police officer "acknowledged that he started following Thomas based on a 'hunch' or a 'suspicion' of possible drug activity." During the valid traffic stop, defendant was behaving nervously. As one officer ran his license, another asked if he could search defendant's person. *Id.* at 817. The defendant consented. *Id*. The officers were not required to *Mirandize* the defendant under these circumstances because there was no custodial interrogation. Thus, the trial court in the instant case improperly based its decision to grant the motion to suppress on the fact that the officer knew of a narcotics investigation when he lawfully stopped Petitioner based on a traffic infraction.

The United States Constitution and the Florida Constitution protect individuals from being "compelled in any criminal matter to be a witness against oneself." Art. I, § 9, Fla. Const.; U.S. Const. amend V.

> Potential violations occur, if at all, only upon the admission of unwarned *statements* into evidence at trial. And, at that point, "[t]he exclusion of unwarned

statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation.

U.S. v. Patane, 542 U.S. 630, 641-642 (2004)(citation omitted). The procedural safeguard does not, however, apply "outside the context of the inherently coercive custodial interrogations for which it was designed," and *Miranda* warnings are only required when an individual is in custody. *Caso v. State*, 524 So. 2d 422, 423 (Fla. 1988) (quoting *Roberts v. United States*, 445 U.S. 552 (1980)).

The Supreme Court's decision in *Berkemer v. McCarty* is factually similar to the instant case. 468 U.S. 420 (1984). In *Berkemer*, respondent was stopped pursuant to a traffic stop after his vehicle was observed weaving in and out of highway lanes. *Id.* at 423. After failing to complete a field sobriety test, the officer asked respondent if he had been using intoxicants, and he replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." *Id.* at 423. The respondent was then formally arrested and taken to jail. *Id.* Respondent was given an intoxilyzer and blood alcohol test. *Id. 423.* No alcohol was detected in respondent's system. However, questioning continued for the purpose of the State Highway Patrol Alcohol Influence Report while at the jail, and respondent again gave incriminating responses relating to both alcohol and marijuana use. *Id.* 423-24. *Miranda* warnings were not given. While the United States Supreme Court clearly found

respondent was in custody for *Miranda* purposes when formally placed under arrest and instructed to get into the police car, the Court found "nothing in the record indicate[d] that respondent should have been given *Miranda* warnings at any point prior to the time [officer] placed him under arrest." *Id.* at 435, 441. Thus, respondent was not in custody for purposes of *Miranda* at the traffic stop, even though asked questions relating to an offense, and his statements prior to formal arrest were admissible.

The United States Supreme Court case of *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) is also similar to the instant case. Pursuant to a valid traffic stop, respondent was pulled over and asked for his license and registration. *Id.* at 9. A field sobriety test was administered and the officer asked respondent to recite the alphabet and whether he had been drinking. Respondent replied that he had been drinking. Having failed the sobriety test, respondent was formally arrested, placed in the police vehicle and given *Miranda* warnings. *Id*. at 10. Citing its earlier decision in *Berkemer v. McCarty*, 468 U.S. 442 (1984), the Supreme Court again determined that this was an example of a routine traffic stop, reflecting the same noncoercive features expounded on in *Berkemer v. McCarty*, and therefore not a custodial interrogation requiring *Miranda* warnings. There is an abundance of federal case law that states

that during a stop questions regarding whether there are drugs, weapons, contraband or information about other offenses are acceptable. In these cases, federal courts have routinely held this line of questioning does not amount to a custodial interrogation for purposes of *Miranda*.[3]

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3. *United States v. Morse*, 569 F.3d 882, 883 (8th Cir. 2009) (finding *Miranda* warnings not necessary where respondent asked if he had anything on his person that the officer should know about after a traffic stop) ; *United States v. Coleman*, 700 F.3d 329, 333 (8th Cir. 2012) *cert. denied,* 133 S. Ct. 2369 (U.S. 2013) (finding respondent was not in custody for purposes of Miranda when following a routine traffic stop officer asked about travel plans and criminal history); *United States v. Johnson*, 680 F.3d 966 (7th Cir. 2012) (finding defendant was not in custody at a traffic stop when officer asked if defendant had anything on him prior to a pat-down); *United States v. Garcia*, 646 F.3d 1061 (8th Cir. 2011) (finding defendant was not in custody for purposes of Miranda when he gave officers his phone number during traffic stop); *United States v. Schlatter*, 411 Fed. Appx. 896, 900 (7th Cir. 2011) (finding brief questioning at the scene of the traffic stop was not a custodial interrogation such that statements about drugs should be suppressed) (unpublished); *United States v. Everett*, 601 F.3d 484 (6th Cir. 2010)(finding officer's inquiry as to weapons and drugs were both related to safety concerns);*United States v. Porras-Palma*, CR. 10-50044-JLV, 2010 WL 2484090 (D.S.D. 2010) *report and recommendation adopted sub nom. U.S. Porras-Palma*, CR. 10-50044-JLV, 2010 WL 2464864 (D.S.D. 2010) (finding "questions asked of Mr. Porras–Palma that elicited the incriminating statement about his legal status in the United States" following a traffic stop did not require *Miranda* warnings.) (unpublished); *United States v. Valenzuela*, 494 F.3d 886, 890 (10th Cir. 2007) ("For several years the rule in this circuit has been police officers are free to question individuals regarding the presence of weapons. . . .Recent precedent informs us that the second portion of Detective Baxter's first question, *i.e.,* whether "other illegal items" were in the car, was also permissible.").

Petitioner was not in custody for the purposes of *Miranda* at the time of her routine traffic stop for running a red light. The Second District Court of Appeal case of *State v. Martissa* is significantly analogous to the instant case. *State v. Martissa*, 18 So. 3d 49 (Fla. 2d DCA 2009). In *Martissa* the officer was aware that the appellant's vehicle was seen in front of a suspected drug house prior to initiating a stop. *Id.* at 50. However, the stop was validly based on a taillight that was not functioning. *Id.* Upon approaching the appellant the officer learned appellant had a suspended license. *Id.* Before going back to his police cruiser to confirm that the appellant's license was suspended, appellant was asked to step out of the vehicle and was advised that "he was observed leaving an area known for the sale of illegal narcotics, and . . . asked . . . if he had any illegal narcotics on him." *Id.* at 51. To which appellant answered affirmatively, acknowledging that he had crack cocaine in the car. *Id.*

Noting that the officer in *Martissa* "did not directly confront [appellant] with an allegation that he had actually committed a drug crime," the Second District Court of Appeal found the officer's line of questioning proper and the defendant was not in custody for purposes of *Miranda*. *Id.* The Second District went on to explain that "[d]uring a traffic stop an officer may ask if a person is in possession of a weapon or

drugs." *Id.* at 52 (citing *Hewitt v. State*, 920 So. 2d 802, 805 (Fla. 5th DCA 2006)); *State v. Stone*, 889 So. 2d 999, 1000 (Fla. 5th DCA 2004) (stating that a stop was not "prolonged in any meaningful sense" by an officer asking the defendant if he possessed weapons or drugs.). The appellant in *Martissa* was not in custody under these circumstances. Thus, the suppression order was reversed.

In the instant case, the officer's inquiry into whether Petitioner had drugs or weapons in the vehicle did not convert the encounter into a custodial interrogation. First, the inquiry did not unduly extend the duration of the stop, and second, the officers did not confront Petitioner with accusations of criminal wrongdoing. An officer's inquiries into matters unrelated to the "traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration." *See Arizona v. Johnson*, 555 U.S. 323, 325 (2009)(citation omitted); *State v. Jenkins*, 3 A.3d 806, 826 (Conn. 2010) ("These inquiries are permissible even if they are irrelevant to the initial purpose of the stop, namely, the traffic violation, so long as they do not "measurably extend" the stop beyond the time necessary to complete the investigation of the traffic violation and issue a citation or warning.').

In the instant case, Petitioner was observed running a red light. (R. 33). During the traffic stop, Petitioner was first greeted and then asked if she had any drugs or weapons in the car, a routine officer safety inquiry. (R. 36-37, 39). As in *Martissa*, this line of questioning did not unduly prolong the temporary detention necessary for a routine traffic stop and did not confront the Petitioner with allegations that she had committed a crime. There was nothing in the record to suggest that the routine stop had transitioned into the functional equivalent of a formal arrest at the time this question was posed.

In *United States v. Everett*, 601 F.3d 484 (6th Cir. 2010), following a valid traffic stop, the officer asked about weapons and narcotics in the car. The Sixth Circuit found that although the question relating to drugs was "less directly related to officer safety—the additional delay caused by the insertion of several extra words, under the totality of the circumstances" was slight. *Id.* at 495. Also, in finding the issue was "less directly related to officer safety" the Sixth Circuit determined that the officer's inquiry as to weapons and drugs were both related to safety concerns.

The fact that two officers approached Petitioner's vehicle did not turn this routine traffic stop into the equivalent of a formal arrest. The United States Supreme Court in *Berkemer v.*

McCarty noted that the "fact that the detained motorist typically is confronted by only one or at most two policemen" in public is a factor that mutes any sense of vulnerability associated with a routine traffic stop. *Berkemer v. McCarty*, 468 U.S. at 439. Also, in *State v. Dykes*, more than one officer was present at a traffic stop where defendant's *Miranda* rights were not violated. *State v. Dykes*, 816 So. 2d 179 (Fla. 1st DCA 2002). The First District Court of Appeal did not find there was a functional equivalent of an arrest where one officer briefly questioned the appellant while another officer was preparing a traffic citation in *Dykes*. *Id.* at 180. Thus, the question posed to Petitioner in the instant case, with more than one officer present, did not in and of itself create a coercive environment that would transform a routine traffic stop into the equivalent of a formal arrest. *See also State v. Thomas*, 109 So. 3d 814 (Fla. 5th DCA 2013).

In the instant case, the police officer first greeted Petitioner and then asked a single routine officer safety question regarding if she had any weapons or drugs in the vehicle. (R. 32-34; 36, 39).[4] Petitioner contends that a person would expect to first be asked for his or her license and

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4. The officers specifically stated that the question regarding drugs and weapons was a routine question related to officer safety. (R. 36-37).

registration. It is well settled that there is an inherent risk associated with traffic stops. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) ("[W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. 'According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings-A Tactical Evaluation, 54 J.Crim.L.C. & P.S. 93 (1963).'").

Therefore, whether an officer asks a question pertaining to officer safety before or after he or she requests license and registration should not be at issue. It is reasonable that any questions relating to officer safety would be asked prior to allowing the driver to delve into her bag or glove compartment where there could easily be a weapon or contraband. In the instant case, the officer only asked a single question following his greeting. At this point in the routine traffic stop, the officer was not required to *Mirandize* Petitioner.

Additionally, there are a variety of reasons an officer may not initially ask for a driver's license and registration, such as upon approaching the vehicle the officers' suspicions are dispelled. *See D.A. v. State*, 10 So. 3d 674, 678 (Fla. 3d DCA 2009) (citing *State v. Diaz,* 850 So.2d 435 (Fla.2003)). This was the case in *State v. Diaz*, where a valid traffic stop was

initiated because the officer was unable to see the expiration date on defendant's temporary tag. *State v. Diaz*, 850 So.2d at 436. As the officer approached the vehicle and before he made contact with defendant, he observed the tag was current. *Id.* Thus, a reason to further detain defendant based on the tag no longer existed. The officer in *Diaz* continued the temporary detention of the motorist and obtained further information from him after it was clearly determined that no question remained concerning a violation of law. *Id.* at 436. Thus, after the officer dispelled any suspicion of a traffic violation, any further detention would violate defendant's Fourth Amendment rights. *Id.*

The instant case is distinguishable from cases like *Fowler v. State*, 782 So. 2d 461 (Fla. 2d DCA 2001) and *State v. Hall*, 537 So. 2d 171 (Fla. 1st DCA 1989) where the defendants were confronted with accusations of criminal activity. In *Fowler v. State*, following a lawful traffic stop, police asked the driver for his license. *Fowler v. State*, 782 So. 2d at 462. While running defendant's information dispatch informed the officer that it received calls that defendant had been selling drugs in the parks. *Id.* The officer confronted defendant with accusations and then asked him if he had anything on him. *Id.*

> [Officer] told [defendant] that he heard he had been selling drugs in the parks and asked if he had anything on him. [Defendant] responded, "Yes." [Officer] said,

> "You want to give it to me?" [Defendant] reached in his pocket and gave the officer a container of rock cocaine.

Fowler v. State, 782 So. 2d 461, 462 (Fla. 2d DCA 2001).

Under these facts, where defendant was confronted with accusations of criminal wrongdoing, he was entitled to *Miranda* warnings. *Id.*

State v. Hall is also distinguishable. *Hall* does not involve a traffic stop. Rather, while on surveillance officers observed defendant in a parked car and suspected drug use. *Id.* As the officers approached they noticed defendant place something under his seat. Upon approaching the vehicle an officer asked defendant what he placed under his seat. When the officer did not get a response, he then confronted the defendant telling him he had been observing him and believed he had drugs in the car. Then, the officer asked if there were drugs in the car, to which he was told yes. *Id.* Next, the officer said, "hand me the drugs . . . do you mind—do you want to hand them to me." *Id.* "Without speaking [defendant] reached under his seat and handed the officer various items of physical evidence." *Id.* at 172. The First District affirmed the suppression order as under these circumstances defendant was in custody and therefore entitled to *Miranda* warnings. *Id.* at 172.

However, the instant case is similar to *State v. Olave*, 948 So. 2d 995 (Fla. 4th DCA 2007), and consistent with federal cases that find officers may ask about unrelated issues during a

traffic stop, so long as the duration of the stop is not unduly extended.[5] In *Olave*, defendant was pulled over after he was observed in a van with the taillight out. *Id.* at 996. While one officer checked the status of defendant's license, a second officer asked "if he had any drugs or weapons in his pockets." *Id.* Defendant indicated that he had pills in his possession and then consented to a search of his person prior to any *Miranda* warnings. *Id.* The court found that the stop "did not prevent the police from asking [defendant] questions without giving *Miranda* warnings. *Id.* at 997 (citations omitted). Under these circumstances there was no custodial stop and defendant's admission to possession of the pills created probable cause for his arrest. *Id.*

Accordingly, Petitioner in this case was not in custody or subject to the equivalent of a formal arrest for purposes of *Miranda*. The officer's question regarding whether Petitioner had weapons and drugs was permissible for officer safety reasons and did not unduly prolong the routine traffic stop. Therefore, the trial court's order on the motion to suppress should be reversed and the Third District Court of Appeal's opinion should be affirmed.

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5. *Supra* footnote 3.

B. The Self-Incrimination Clause was not implicated because the pills were not a statement and were voluntarily produced

Notwithstanding any failure to give *Miranda* warnings, any failure to give *Miranda* warnings only affects involuntary statements and would not lead to the suppression of the pills that Petitioner voluntary gave to the police officers. The Self-Incrimination Clause of the Constitution provides: "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.

> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned ***statements*** into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation.

U.S. v. Patane, 542 U.S. 630, 641-642 (2004)(citation omitted) (emphasis added).

"[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement." *United States v. Patane*, 542 U.S. at 634. "An unwarned statement is one which is made without required *Miranda* warnings." *State v. Polanco*, 658 So. 2d 1123, 1125 (Fla. 3d DCA 1995). A statement is voluntary when in light of the totality of the circumstances it is "the product of a rational intellect

and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will." *United States v. Abdulla*, 294 F.3d 830, 836 (7th Cir. 2002); *State v. Polanco*, 658 So. 2d 1123, 1125 (Fla. 3d DCA 1995) ("[T]he unwarned statement does not violate the Fifth and Fourteenth Amendments so long as the unwarned statement is voluntary. Consequently an unwarned, voluntary statement does not trigger the "fruit of the poisonous tree" doctrine.").

In *United States v. Patane*, defendant was under arrest for violating a restraining order. *Id.* at 635. Officers had previously been informed by the Bureau of Alcohol, Tobacco and Firearms that defendant, a convicted felon, was illegally in possession of a Glock pistol. *Id.* 634-35. As officers were arresting defendant for violating the restraining order, they attempted to administer *Miranda* warnings. However, defendant interrupted and the officers did not attempt to complete the warnings. Rather, defendant was then asked about the pistol. *Id.* at 635. Defendant hesitated before stating, "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." As officers persisted, defendant told them that the pistol was in his bedroom and gave police permission to retrieve it. *Id.*

The Court held that "[i]ntroduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial." *United States v. Patane*, 542 U.S. 630, 643 (2004) (plurality opinion); *see* LaFave, 1 Substantive Criminal Law § 9.5(a) (3d ed.)([The *Elstad* rationale limits exclusion to the statement obtained from defendant in violation of *Miranda* (or its progeny), thereby allowing government use of secondary evidence obtained through that statement, provided that secondary evidence was otherwise legally obtained.).

Basing its reasoning on *Patane*, the Fourth District declined to suppress physical evidence derived from an unwarned but voluntary statement by appellant during a lawful traffic stop in *Noto v. State*, 42 So. 3d 814 (Fla. 4th DCA 2010). The defendant in *Noto* was pulled over after failing to come to a complete stop at a red light. *Id.* at 816. The defendant provided his driver's license and registration, and asked the officer why he was pulled over. *Id.* The officer did not answer the question but, took the license and registration back to his vehicle and indicated he would return. *Id.* When the officer returned he explained to defendant:

> that he is a narcotics investigator and what he observed earlier at the restaurant parking lot was consistent

> with a drug transaction. [Officer] asked if [defendant] had anything illegal. [Defendant] said no, but then stated that tomorrow was his birthday and he wanted to "get a little something." [Officer] asked what he had meant, resulting in [defendant's] admission that he picked up a gram of cocaine.

Id.

The Fourth District determined that *Noto v. State* was similar to *United States v. Patane*, and concluded that defendant's statements were unwarned but voluntary statements and therefore the physical evidence of the cocaine should not be suppressed. *Id.* at 818.

In the instant case, Petitioner seeks to suppress statements as well physical evidence, which were derived from an unwarned but voluntary statement by Petitioner to police during a lawful traffic stop. (R. 13-17). At the traffic stop, Petitioner stated that she did not have any weapons, but "then she hesitated, and then said, 'I have a bag [of pills].'" (R. 36). Petitioner was then asked to step out of the vehicle. "Once she stepped out of the vehicle, she went in her right pocket and pulled out a bag [of pills] and put it on the hood of the vehicle" without being asked. (R. 37, 45). The officers did not pat-down Petitioner when she stepped out of the vehicle or ask her to remove the drugs from her pocket. (R. 45). Petitioner's action of retrieving the contraband and giving them to law enforcement came almost simultaneously with her voluntary unwarned statements. Law enforcement did not request that she

retrieve the pills. The retrieval of the pills was not a statement, and therefore failure to give *Miranda* warnings does not prevent the pills from being admissible at trial. The pills in the instant case are analogous to the Glock pistol in *Patane*. Accordingly, the trial court's suppression of the pills Petitioner handed to police was an error.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court to affirm the Third District Court of Appeal decision reversing the trial court's findings.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on August 21, 2013: Howard Blumberg at appellatedefender@PDMiami.com; and HKB@PDMiami.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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