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IN THE SUPREME COURT OF THE STATE OF FLORIDA,

LARRY CHARLES WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No.: SC13-2315
L.T. No.: 4D12-2964

****
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Larry Charles Williams, appealed his conviction and sentence. Respondent at bar was the Appellee in the Fourth District Court of Appeal.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State"."

The following symbols will be used:

R = Record on Appeal

IB = Initial Brief of Petitioner

T = Transcript of the Suppression Motion

STATEMENT OF THE CASE AND FACTS

The procedural history and facts on which the Fourth District Court of Appeal relied in making its decision are found in Williams v. State, 127 So. 3d 643 (Fla. 4th DCA 2013), rev. granted, - So.3d – (Fla. May 22, 2014) which Respondent adopts as its statement of the case and facts for the purpose of determining jurisdiction in this appeal:

> The following facts were established at the hearing on the motion to suppress and were the basis for the trial court's ruling. The arresting officer, a St. Lucie County deputy, was an experienced narcotics law enforcement officer. On the day of Williams' arrest, at approximately 1:00 a.m., the deputy and his partner approached a vehicle with a female occupant in a parking lot near a night club. The deputy was clothed in apparel identifying him as a law enforcement officer. Upon approaching the vehicle, the deputy looked inside the vehicle and noticed a crack cocaine pipe in plain view. A criminal investigation ensued. The deputy returned to his vehicle to continue his investigation when he noticed Williams approach the driver's side of the vehicle, lean in toward the driver's side window, and begin speaking with the female occupant. Upon seeing Williams, the deputy asked Williams: "Hey man, what's going on? What are you doing?" Williams became startled and took a step back at which point, the deputy noticed Williams' clenched fist. The deputy could not recognize anything in Williams' hand, but "it was very suspicious" to him and he feared the possibility that Williams was clenching a weapon or drugs. The deputy provided an example in which a weapon could be concealed in a clenched hand. Williams started to walk away and the deputy attempted to stop Williams by saying: "Hey man, where are you going?

> Come here, let me talk to you." Williams turned around, unclenched his fist, and dropped what turned out to be cocaine. The trial court denied the motion to suppress, reasoning that the deputy had reasonable suspicion to stop Williams based on the totality of the circumstances.

Id., at 644-645.

SUMMARY OF THE ARGUMENT

Respondent contends the Fourth District properly considered the totality of the circumstances leading to a reasonable suspicion to stop Petitioner. During the course of conducting a criminal investigation for narcotics with the occupant of a vehicle at 1:00 a.m., Petitioner walked over to the vehicle and spoke with the occupant. He was just ten feet from the officer as the officer was running the occupant's license verification. Upon acknowledging the police officer, Petitioner stepped back from the vehicle with a clenched fist and began to walk away. Accordingly, the motion to suppress was properly denied.

Should this Court find that the officer did not have a founded and reasonable suspicion to stop Petitioner, in the alternative, Respondent contends this Court adopt the rationale of Judge Taylor in her concurring opinion and affirm the trial court's ruling.

ARGUMENT

THE FOURTH DISTRICT PROPERLY CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES IN FINDING THE POLICE HAD A REASONABLE AND FOUNDED SUSPICION TO STOP PETITIONER

Petitioner contends the Fourth District misapplied controlling United States Supreme Court and this Court's law on founded suspicion and upheld the investigatory stop of Petitioner on less than the requisite founded suspicion.[1]

It is well-settled that a trial court's findings on a motion to suppress are presumed to be correct. Escobar v. State, 699 So. 2d 984, 987 (Fla. 1997); Medina v. State, 466 So. 2d 1046, 1049-50 (Fla. 1985). The findings of the trial court based upon the facts before it should be overturned only where there is a clear abuse of discretion. Without a clear showing of error, the reviewing court must affirm the trial court's interpretation of the evidence and reasonable inferences and deductions derived there from in a manner most favorable to sustaining the trial court's rulings. Cole v. State, 710 So. 2d 845, 855 (Fla. 1997); Terry v. State, 668 So. 2d 954, 958 (Fla. 1996); Perez v. State, 673 So. 2d 160, 162 (Fla. 4th DCA 1996).

The Fourth District did not depart or recede from precedent of this Court or the United States Supreme Court in finding there was a basis for reasonable

[1] In Origi v. State, 912 So.2d 69 (Fla. 4th DCA 2005), the Fourth District equated "founded suspicion" with "reasonable suspicion".

suspicion to stop Petitioner. Accordingly, the Fourth District acknowledged that "a bare suspicion or "mere 'hunch' that criminal activity may be occurring is not sufficient. Williams, 127 So. 3d at 645. However, as the Fourth District observed:

> Factors that may be considered in establishing reasonable suspicion include: "the time; the day of the week; the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge." May v. State, 77 So.3d 831, 834 (Fla. 4th DCA 2012).

Williams, 127 So. 3d at 645.

In citing these factors, the Fourth District has only echoed this Court's observations as to factors to be taken into account when analyzing whether an objective foundation exists for reasonable suspicion. See State v. Stevens, 354 So.2d 1244, 1247 (Fla. 4th DCA 1978) ("[t]here will be borderline cases, of course, in which reasonable men might differ as to whether the circumstances witnessed by an officer gave an objective foundation to his suspicion. Certain factors might then be evaluated to determine whether they reasonably suggested the suspect's possible commission, existing or imminent, of a crime: the time; the day of the week; the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; anything incongruous or unusual in the situation as interpreted in the light of the

officer's knowledge.")

Moreover, in Williams, the Fourth District analyzed the facts within the parameters of the totality of the circumstances in compliance with precedent of this Court and the United States Supreme Court.

It is well-settled that reasonable suspicion for a warrantless detention exists when an officer has specific, articulable facts, along with any rational inferences, that lead him to reasonably conclude that a person is, has been, or soon will be engaged in criminal activity. Terry v. Ohio, 392 U.S. 1, 21 (1968). See Popple v. State, 626 So. 2d 185, 186 (Fla. 1993) ("The second level of police-citizen encounters involves an investigatory stop. . . . At this level, 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.").

The United States Supreme Court has held that a determination of whether a reasonable, articulable suspicion exists to create a circumstance for the police to lawfully conduct a Terry stop is based upon the totality of the circumstances. United States v. Sokolow, 490 U.S. 1(1989).

Reasonable suspicion must also be assessed based on "the totality of the circumstances—the whole picture," United States v. Arvizu, 534 U.S. 266, 277, (2002), and "from the standpoint of an objectively reasonable police officer,"

Ornelas v. United States, 517 U.S. 690 (1996); Arvizu, 534 U.S. at 277. A police officer may draw inferences based on his own experience. Ornelas, 517 U.S. at 700; United States v. Cortez , 449 U.S. 411,418 (1981) ("[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.").

"[I]nnocent behavior will frequently provide the basis" for reasonable suspicion. Sokolow, 490 U.S. at 10; see also Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (acknowledging this fact and recognizing that an officer can detain an individual to resolve an ambiguity regarding suspicious yet lawful or innocent conduct). "[T]he relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts." Sokolow, 490 U.S. at 10 (internal quotation marks omitted).

Florida courts have emphasized that no single factor is dispositive to establish that an officer's suspicion leading to a Terry-stop is reasonable. Instead, the circumstances, as they are known to the officer at the time of the investigative stop, are viewed in their totality. Hernandez v. State, 784 So.2d 1124, 1128 (Fla. 3rd DCA 1999) . Additionally, the officer's training and experience is taken into consideration to determine whether anything incongruous or unusual reasonably triggered the officer's suspicion to conduct a stop. Id. at 1126. See Jenkins v.

State, 524 So.2d 1108, 1109 (Fla. 3d DCA 1988) ("A 'founded' suspicion is one which has some factual foundation in the circumstances observed by the officer when those circumstances are interpreted in light of the officer's knowledge.") (quoting G.J.P. v. State, 469 So.2d 826, 827 (Fla. 2d DCA 1985)).

At the suppression motion, Deputy Ryan Register ("Register") was the state's sole witness. He testified that he had over 120 hours of DEA narcotics and undercover investigations training (T 5). Upon approaching a vehicle with Nikki King ("King") as the sole occupant he and his partner observed a crack pipe sticking out in plain view (T 8). As he ran her identification for warrants, he observed Petitioner approach the drivers side of the vehicle and, upon confronting Petitioner noticed a clenched fist (T 9, 10). He testified as follows:

> A Well, I had first feared obviously that he may have had a weapon and/or possibly illegal narcotics.
>
> Q Okay, and did you make contact with the black male?
>
> A I did, basically, you know, when I approached him, I said, "Hey, man, what are you doing," he backed up, he took a couple steps back, he looked at me, I realized he had a clenched right hand and he kind of just did a big right past me and in front what would've been the left front fender cause I didn't move from the left front fender of Miss King's car.
>
> Q And did you see him make any movement with his hand?

> A He walked past me and what happened, I said, "Hey, man, where are you going? Come here, let me talk to you," and when he turned around, he turned around in the motion and he opened his right hand which at what time I witnessed what I thought and it appeared to be with the size and shape and clarity hit the ground would have been a crack cocaine rock.

(T 11)

Register testified that King was not free to leave and as he was doing further investigation, he has safety concerns as when individuals approach the person (T 23). He also believed Petitioner could have had a weapon in his clenched fist (T 20). Register was standing by the hood of his partner's vehicle when Petitioner walked right by him and began conversing with King only ten feet away (T 8).

He further testified, as to his experience with weapons within clenched fists:

> A Weapons can very easily be concealed inside of a clenched fist.
>
> Q So, it's not necessarily, you know, a large knife or a firearm, but there are other types of weapons that you would have concern about; correct?
>
> A Correct, there was a deputy killed two months ago from a pendant around a necklace that was no smaller than an inch when it was extended.

(T 20)

The Fourth District considered the totality of the circumstances in this case and reasoned as follows:

> The cumulative impact of a number of factors leads us to conclude that the deputy had a reasonable basis for suspicion that Williams was or had been engaged in criminal activity. See State v. Jenkins, 566 So.2d 926, 927 (Fla. 2d DCA 1990) (recognizing that the cumulative impact of independent factors may provide sufficient basis for reasonable suspicion of criminal activity). First, it was 1:00 a.m. in a dark parking lot. Second, located in the parking lot was a vehicle in which the deputy had just discovered a crack pipe. Third, Williams approached this vehicle and proceeded to lean into the vehicle and engage with its occupant, who was under active investigation. Finally, after engaging with the occupant of the vehicle, the deputy asked Williams what he was doing and Williams started to leave the scene with a clenched fist. When considered in light of the deputy's extensive training and field experience, including both narcotics investigations and experience with small weapons that could be concealed within a fist, these facts provide justifiable reasons to suspect that Williams possessed either drugs or a weapon within his clenched fist. See, e.g., May, 77 So.3d at 834 (explaining that it is not absolutely necessary for an officer to observe drugs or money change hands in order to support a reasonable suspicion that a drug offense was committed and deference should be given to the officer's perspective); Gentles v. State, 50 So.3d 1192, 1198 (Fla. 4th DCA 2010) (noting that in certain circumstances, "[a] temporary detention of an individual may be justified by an officer's specific concern for his own safety").

Williams, 127 So. 3d at 645-646.

Finally, the Fourth District noted another circumstance within their "totality of circumstances" analysis:

> Specifically, none of the cases cited by Williams involve

> a suspect's interference with an ongoing and obvious investigation.

Williams, 127 So. 3d at 646 (emphasis added)

This factor cited in Williams of the "suspect's interference with an ongoing and obvious investigation" is particularly noteworthy. As Register testified, from his objective vantagepoint, a police officer cannot have civilian witnesses conversing with detained suspects under active investigation (T 23). Whether Petitioner actually intended to interfere with the investigation is not the issue. There was an "ongoing and obvious investigation" which Register was principally conducting.

Petitioner's contention that there is no evidence that he knew this was a police investigation is speculative . However, the facts presented to the court lend more credence to the fact that Petitioner knew there was an ongoing criminal investigation taking place of King. Register was with a police vehicle just ten feet away from King's vehicle and, though it was unmarked, had operational lights and siren (T 5); Register, who was standing at the front of the vehicle awaiting information on King and possible outstanding warrants, was wearing a ballistics vest which had emblazoned "Sheriff" across the chest and "Sheriff" across the middle of the back… [a]duty belt with gun, handcuffs, asp and OC" (T 6); and, Register's shirt had the word "Sheriff" down the sleeves of both arms as well (T

6). Petitioner walked right past Register to King's vehicle (T 21).

Petitioner cites Mosley v. State, 519 So. 2d 58 (Fla. 2d DCA 1988) to illustrate that a defendant observed with a clenched fist is not sufficient factor establishing probable cause. However, Mosley is distinguishable as the officers admitted the defendant's fists were clenched in a nonthreatening manner. Here, Register not only voiced concern regarding Petitioner's clenched fist but clearly illustrated the basis of his concern, from his personal law enforcement experience. Petitioner further cites Mullins v. State, 366 So. 2d 1162 (Fla. 4th DCA 1991) and Moore v. State, 584 So. 2d 1122 (Fla. 4th DCA 1991) for the proposition that being in an area at a "late hour", alone, does not provide an officer with founded suspicion. In Moore, the defendant was stopped on his bicycle at 2:00 a.m. several blocks from an ongoing burglary.

However, Mullins and Moore are distinguished from the facts in this case. Here, as the Fourth District noted, there was a compendium of circumstances from which the officer had a reasonable suspicion: 1) it was 1:00 a.m. in a dark parking lot; 2) an ongoing criminal investigation was occurring after a crack pipe had been discovered; 3) Petitioner, in the immediate presence of the police , began to engage the subject of the investigation who was being detained; and, (4) when asked what he was doing turned to the inquiring police officer and began to walk away with a

clenched fist. The Fourth District properly considered and, considered the effect of the meaning of the word, totality. State v. Cruse, 121 So.3d 91 (Fla. 3rd DCA 2013) (held officers had reasonable suspicion of criminal activity where encounter with defendant took place at ten o'clock in the evening, in a dark and poorly-lit area, in a high crime neighborhood known for shootings and narcotics, defendant and his associates were standing close to a chain link fence separating the field from a house and they appeared to be looking into the house as though they were casing the house in preparation for a burglary, and officer observed defendant manipulating something in his waistband, which, based on his training and experience, he believed was a firearm); Hernandez, 784 So.2d at 1127 (finding reasonable suspicion where the officer observed two vans backed up to each other with their back doors open in a parking lot at three o'clock in the morning because, while this scene may not arouse suspicion during the day, such an arrangement of the vehicles at that time of night was suspicious) . See, e.g., State v. Russell, 659 So.2d 465, 466 n. 1 (Fla. 3d DCA 1995) (holding that the defendant's presence in a dark alleyway, at six o'clock in the morning, behind a closed business, in an exclusively commercial area, supported the investigative stop, and explaining that knowledge of recent burglaries in an area is a relevant circumstance to be considered in determining the reasonableness of an officer's suspicion because

knowledge of the character of the area is part of an officer's expertise).

In the alternative, Judge Taylor rendered a concurring opinion, agreeing with the result of the majority only. It was her opinion that there was no investigatory stop and that this case was a classic example of a "drop then stop" case:

> That said, however, I would nonetheless affirm the denial of the motion to suppress, because the evidence in this case does not show that the defendant complied with the officer's request to stop before he dropped the cocaine. Therefore the defendant was not unlawfully seized and the Fourth Amendment was never implicated. When the deputy attempted to stop Williams, Williams simply turned around and dropped a crack cocaine rock. "[A]n unlawful seizure takes place only if the person either willingly obeys or is physically forced to obey the police request. As such, there is no unlawful seizure when the person 'drops then stops,' even where the drop occurs after an order to stop." State v. Woods, 680 So.2d 630, 631 (Fla. 4th DCA 1996) (holding that defendant was not unlawfully seized before he dropped the handgun and cocaine while fleeing officer, although officer was three to four feet behind defendant when he turned around and dropped the items); see also California v. Hodari D., 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (a seizure requires either physical force or submission to a show of authority); Johnson v. State, 640 So.2d 136, 137–38 (Fla. 4th DCA 1994) (holding that no unlawful seizure of defendant occurred before defendant voluntarily abandoned cocaine rocks; he dropped the drugs after the officer asked him to stop but before he willfully obeyed, and the officer did not physically force the defendant to obey his request to stop); State v. A.M., 788 So.2d 398 (Fla. 3d DCA 2001) (holding that juvenile was not seized by police officer where juvenile had refused to stop and began to walk away after officer tried

to question him).

Williams, 127 So. 3d at 647.

Accordingly, should this Court find that Petitioner was not subject to an investigatory stop or that the officer did not have a reasonable suspicion, this Court should adopt Judge Taylor's rationale affirming the trial court. Petitioner dropped the cocaine on his own volition, i.e. abandoned, and not based upon any order or request of the police to stop. Moreover, in his testimony, Register never directed Petitioner to open his clenched fist. He testified:

> A He walked past me and what happened, I said, "Hey, man, where are you going? Come here, let me talk to you," and when he turned around, he turned around in the motion and he opened his right hand which at what time I witnessed what I thought and it appeared to be with the size and shape and clarity hit the ground would have been a crack cocaine rock.

(T 11)

To constitute "seizure of the person" under the Fourth Amendment, there must be either an application of physical force by the officer against the individual or a showing that the individual submitted to the officer's show of authority. See California v. Hodari D., 499 U.S. 621 (1991); State v. Bartee, 623 So.2d 458 (Fla.1993) (chase and order for defendant to stop did not constitute a seizure, therefore cocaine abandoned during defendant's flight was not fruit of the

poisonous tree and should not have been suppressed); Perez v. State, 620 So.2d 1256 (Fla.1993) (held police call for defendant to halt and subsequent chase did not constitute a seizure until defendant was caught; therefore, firearm which defendant dropped during chase was abandoned); State v. Woods, 680 So.2d 630, 631(Fla. 4th DCA 1996) (no evidence of submission to authority). Compare Lang v. State, 671 So. 2d 292, 294 (Fla. 5th DCA 1996) ('[i]n this case Lang had not been physically subdued, but he had submitted to the deputy's authority by beginning to comply with the deputy's instruction to get into the patrol car. Had the deputy here merely asked Lang to approach his car in order to speak with him, and Lang had thrown down the contraband, or had Lang refused to comply with the deputy's directive, Lang would have voluntarily abandoned the contraband, and it could have been used as evidence against him. Hodari; Bartee; Perez").

CONCLUSION

WHEREFORE based on the arguments and the authorities cited herein, Respondent respectfully requests that this Court affirm the Fourth District's opinion in Williams v. State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondents Answer Brief on the Merits" was sent by e-mail to: Anthony Calvello at acalvello@pd15.org on July 28, 2014.

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CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Respondent/Appellee hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

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