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IN THE SUPREME COURT OF FLORIDA

LARRY CHARLES WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. _____
DCA Case No. 4D12-2964

PETITIONER'S BRIEF ON JURISDICTION

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

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PRELIMINARY STATEMENT

Petitioner, Mr. Larry Charles Williams, was the Defendant in the Circuit Court of the 19th Judicial Circuit, in and for St. Lucie County and the Appellant in the Fourth District Court of Appeal. Respondent was the State and the prosecution in the trial court and Appellee in the Fourth District Court of Appeal. *Williams v. State*, 38 Fla. L. Weekly D2408 (Fla. 4th DCA Nov. 20, 2013). *See* Appendix.

Review is sought pursuant to this Court's conflict jurisdiction under Article V, Section 3 (b)(3), *Florida Constitution*.

STATEMENT OF THE CASE AND FACTS

The facts relevant to a determination of whether discretionary review is warranted are set forth in the decision of the Fourth District as follows:

"Larry Williams appeals his judgment and sentence for possession of cocaine and marijuana. Williams argues that the trial court improperly denied his motion to suppress because the police lacked a founded suspicion to stop Williams. We affirm.

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.

Williams argues that the evidence does not support the trial court's conclusion that the deputy possessed reasonable suspicion to stop him. The State counters that the factual circumstances justified a stop. In the alternative, the State argues that the encounter between the deputy and Williams was consensual. We reject the State's alternative argument without further comment." *Williams v. State*, 38 Fla. L. Weekly D2408 (Fla. 4th DCA Nov. 20, 2013) [Appendix].

Petitioner filed a timely Notice to Invoke Discretionary Review on December 2, 2013.

SUMMARY OF THE ARGUMENT

The "express and direct" requirement is met if it can be shown that the holding of the district court is in conflict with another district court or this Court. *See Hardee v. State*, 534 So.2d 706 (Fla.1988). In addition, the conflict necessary for an exercise of this Court's discretionary jurisdiction is present as the lower court ***misapplied precedent*** from this Honorable Court. *See Jaimes v. State*, 51 So.3d 445, 446 (Fla.2010).

The instant decision of the Fourth District is in direct conflict with multiple decisions of other district courts of appeal or misapplied precedent from this Court, *Poppel v. State*, 626 So.2d 185 (Fla.1993). This Court should accept jurisdiction to resolve this conflict.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DISTRICT COURTS OF APPEAL OR MISAPPLIED PRECEDENT FROM THIS COURT.

This Court has discretionary jurisdiction to review the decision of the Fourth District Court of Appeal here because the decision "expressly and directly conflicts" with decisions of other district courts of appeal "on the same question of law." Article V, § 3(b) (3), *Fla. Const.*; *Fla. R. App. P.* 9.030(a) (2) (A) (iv). The "express and direct" requirement is met if it can be shown that the holding of the

district court is in conflict with another district court or this Court. *See Hardee v. State*, 534 So.2d 706 (Fla.1988).

In addition, the conflict necessary for an exercise of this Court's discretionary jurisdiction is present as the lower court ***misapplied precedent*** from this Court. *See Jaimes v. State,* 51 So.3d 445,446 (Fla. 2010) (identifying misapplication of decisions as a basis for express and direct conflict jurisdiction under Article V, section 3(b)(3), *Florida Constitution*.)

The Fourth District held that based on the "totality of the circumstances" there was "founded suspicion" to stop Petitioner under *Terry v. Ohio,* 392 U.S. 1 (1968), and the Florida Stop and Frisk Law, Section 901.151, *Florida Statutes* (2012), as follows:

> "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 v. State, 38 Fla. L. Weekly at 2408-2409.

The decision of the Fourth District is in direct conflict with *Jaudon v. State*, 749 So.2d 548 (Fla. 2d DCA 2000) (Investigatory stop of defendant was not justified by defendant's suspicious entry through hole in fence of apartment complex late at night; officers did not articulate any facts to demonstrate justifiable alarm or immediate concern for safety of persons or property, officers did not see defendant engage in any suspicious transactions, and defendant was leaving apartment complex and returning to his car when officers stopped him.); *Brown v. State*, 687 So.2d 13 (Fla. 5th DCA 1996) (defendant's act of sitting in parked truck at dusk in wooded area known for illegal dumping and making furtive movement when officers approached was not sufficient to give rise to founded suspicion of criminal activity or justify detention); *Shackelford v. State*, 579 So.2d 306 (Fla. 2d DCA 1991) (observation of defendant leaning into window of car in area known for street level drug sales, coupled with detaining officer's participation in drug sales where defendant was present did not create founded suspicion, no evidence close fist contained weapon.); *Stanton v. State*, 576 So.2d 925 (Fla. 1st DCA 1991)(No founded suspicion where defendant passenger in parked car with alleged drug dealer extended his arm into vehicle.); *Winters v. State*, 578 So.2d 5 (Fla. 2d DCA 1991)(A stop is not warranted solely

upon an officer's observation of a black male in a high-crime district leaning into the window of a white man's car stopped in the middle of the street who walks away upon seeing an officer approach.); *Baggett v. State*, 531 So.2d 1028, 1030 (Fla. 1st DCA 1988) ("the fact that appellant placed his hand in his jacket after seeing Officer Nye did not give rise to a founded suspicion"); *R.B. v. State*, 429 So.2d 815 (Fla. 2d DCA 1983) (fact that defendant quickly placed his hand in pocket after seeing police car and walking faster did not give rise to founded suspicion). The decision of the Fourth District also conflicts with *McMaster v. State*, 780 So.2d 1026 (Fla.5th DCA 2001):

> In [*Illinois v.*] *Wardlow*, [528 U.S. 119 (2000)], the Court held that although presence in a high crime area is not sufficient to justify a stop of an individual, it is a factor that may be considered along with other factors in determining whether a reasonable suspicion exists. The Court further held that another factor that may be considered is the unprovoked flight of the individual upon noticing the presence of the police. The Court concluded that the officers had a reasonable suspicion to stop the respondent because "it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion but his unprovoked flight upon noticing the police." 528 U.S. at 124, 120 S.Ct. 673. Thus presence in a high crime area and unprovoked flight upon noticing the police are sufficient to find a reasonable suspicion to stop and investigate. Therefore, we must determine whether these two factors are sufficiently established by the evidence in the instant case as the State suggests.
>
> The evidence contained in the record clearly establishes that McMaster was in a location that the police officers considered to be a high crime area. However, the record is devoid of any evidence that McMaster engaged in unprovoked flight upon noticing the presence of the officers and, in fact, the testimony establishes that McMaster did not flee the police officers. We find from the evidence in the record that all the officers had

> was a curiosity about what McMaster was doing driving through a high crime area at 11:00 at night. There are no other facts which support a reasonable suspicion for the stop in the instant case. Because the officers did not have the reasonable suspicion necessary to authorize an investigatory stop, the initial detention was illegal and the resulting acquisition of the cocaine and drug paraphernalia was the fruit of an unconstitutional seizure. The trial court erred in denying the motion to suppress.

McMaster, 780 So.2d at 1026.

The importance of taking this case. The decision of the Fourth District[1] articulated but misapplied the applicable test for "founded suspicion" relying on factors unknown and unknowable to both the deputy sheriff and Petitioner Williams. The Fourth District included innocent and inapplicable factors in its "totality of circumstances" calculation and got it wrong.

1. Petitioner approached a vehicle in a parking lot near a nightclub to speak to a female occupant. There was no indication that a so-called "criminal" investigation was being made of this female occupant.

2. Second, a citizen having a clenched fist is wholly innocent conduct.

3. Third, Petitioner turned and left when approached by the deputy which totally and completely belied the ridiculous notions that Petitioner was impeding a criminal investigation or presented a threat to this deputy as he tried to walk away from the law enforcement officer.

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1 . The decision was written by one appellate judge the two others concurred

4. As a citizen, Petitioner had every right under the Fourth Amendment to walk away and said action cannot and is not a factor for "founded suspicion."

See Judge Taylor concurring opinion ("Here, the mere fact that Williams walked up to the driver in a parked vehicle and then quickly backed way with a clenched hand after becoming aware of the presence of police officers did not give rise to a well founded suspicion that Williams had committed, was committing, or was about to commit a criminal offense.")

All that is left here is conjecture, guess work, a hunch that Petitioner had contraband in his clinched fist which is not enough. *Poppel v. State,* 626 So.2d 185 (Fla. 1993). This Honorable Court should accept jurisdiction to resolve the conflict.

CONCLUSION

Based on the foregoing arguments and authorities cited, Petitioner requests this Honorable Court to exercise its discretionary jurisdiction and review this cause on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND E-FILING

I CERTIFY that a copy of this Petitioner's Brief on Jurisdiction has been furnished to Mitchell A. Egber, Assistant Attorney General, 1515 North Flagler Drive, 9th floor, West Palm Beach, FL 33401 by e-service at CrimAppWPB@myfloridalegal.com; and electronically filed in with this Court on this 4th day of December, 2013.

/s/ Anthony Calvello
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CERTIFICATE OF FONT SIZE

I CERTIFY that this brief has been prepared with 14 point Times New Roman font as required by *Fla. R. App. P.* 9.210.

/s/ Anthony Calvello
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Assistant Public Defender
Appellate Counsel