IN THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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CASE NO. 3D11-103

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TOBY DUNCAN,

Appellant/Defendant,

v.

STATE OF FLORIDA,

Appellee/Plaintiff.

_____

ON APPEAL FROM THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICAL CIRCUIT OF MONROE COUNTY, FLORIDA

_____

INITIAL BRIEF OF APPELLANT

_____

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QUESTION PRESENTED

Whether the trial judge erred by denying the defendant's motion to suppress physical evidence of the computer because it was obtained through a violation of the defendant's fourth amendment rights by exceeding the scope of an investigative traffic stop where (1) the deputy stopped the defendant based on a BOLO report of a burglary and neither the defendant's physical profile nor license plate matched the details of the burglary suspect in the BOLO; (2) the defendant did not voluntarily consent to the Deputy's search of his trunk; and (3) the seized computer was not in plain view, but the deputy had to move the computer to fully view the property label.

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STATEMENT OF THE CASE AND OF THE FACTS

Toby Duncan ("Mr. Duncan")[1] was charged in a criminal case with unlawfully taking or knowingly possessing property of Miami-Dade College Library, in the Sixteenth Judicial Circuit of Florida. Mr. Duncan filed a motion to suppress the computer seized by the arresting officer. The district court held a bench trial hearing on the motion and denied the motion to suppress. Subsequently, Mr. Duncan entered a plea of nolo contendre reserving the right to challenge on appeal the denial of the motion to suppress. After the final judgment, as to the charges of theft, Mr. Duncan was sentenced to serve in the county jail for a term of six (6) months, with a term of probation of three (3) months upon completion of the six months. Mr. Duncan appeals to reverse the trial judge's denial of the motion to suppress tangible evidence from the trial court.

Around five o'clock, a robbery had occurred at a 7-11 in Big Coppit Key. (R. 24, 31-32). A Be On the Look Out ("BOLO") report was sent out describing a steel blue Dodge Charger heading south on U.S. 1. (R. 25, 26, 38). Deputy Norman Sheffield (the "Deputy"), pulled over Mr. Duncan based on the BOLO report and not a traffic infraction on December 17, 2010. (R. 43, 48).

Mr. Duncan did not match the description of the burglary suspect in the BOLO report when the Deputy pulled Mr. Duncan over based on that bulletin and

[1] Mr. Duncan was the defendant in trial court; he is the appellant in this Court.

asked him to get out of his vehicle. (R. 44, 45, 46, 47, 48). The BOLO report stated the burglary suspect as being five foot six inches (5'6"), thirty five (35) years old, with dark brown hair and brown eyes, which did not correspond with Mr. Duncan's six foot one inch (6'1") height, nineteen (19) years of age, sandy hair, and blue eyes. (R. 44, 45, 46, 47, 48). Mr. Duncan's license plate ending in 426 did not match the license plate of the burglary suspect in the BOLO report ending in forty-two (42). (R. 27, 33, 38, 47). The Deputy used his emergency lights when he pulled over Mr. Duncan. (R. 39, 48). The Deputy stopped Mr. Duncan because Mr. Duncan's car matched the color of the suspect's vehicle reported in the BOLO report of a recent burglary in the area, and the Deputy saw the number forty-two (42) in the last three numbers of the license plate. (R. 38). The Deputy determined Mr. Duncan was not the suspect in the BOLO report. (R. 50, 63).

The Deputy ordered Defendant out of the car to do a pat down search, and removed Mr. Duncan's keys from the ignition. (R. 40, 51-52). The Deputy detained Mr. Duncan to do a search of the glove compartment and a field test on the laundry detergent that fell out of Mr. Duncan's glove compartment. (R. 40, 41, 50). The field test determined the white powdery substance was in fact laundry

detergent and not contraband. (R. 52, 72). The bag of white powder fell out of the glove compartment when Mr. Duncan was reaching for his registration and insurance information. (R. 40, 41, 50).

The Deputy restated, "I've gotta see that dirty laundry." (R. 56). The record is silent as to whether Mr. Duncan voluntarily consented to the Deputy's request to search his trunk. Consequently, Mr. Duncan went to open his trunk, but was not in possession of his keys. (R. 73). Only then did the Deputy and Mr. Duncan realize that the keys were on the roof of Mr. Duncan's car. (R. 73). The Deputy handed Mr. Duncan his keys. (R. 78). Pursuant to the Deputy's request, Mr. Duncan proceeded to open the trunk of his car. (R. 41, 51, 73, 74).

The Deputy did not look at the duffel bag of laundry as specifically stated. (R. 56). Instead, the Deputy ignored the duffel bag of dirty laundry and leaned in the trunk to look at the computer. (R. 56). The computer was wedged between a suitcase and the side of the car so that the Miami-Dade College Library label was not visible without the Deputy contorting his neck to see it. (R. 82, 83, 84). Because the Deputy wanted to see the whole label, he reached in and physically moved the computer to get a better view. (R. 82, 83). The label read that the computer was the property of Miami-Dade College Library. (R. 42). At that time, the Deputy placed Mr. Duncan under arrest. (R. 42).

STANDARD OF REVIEW

Review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. Ornelas v. United States, 517 U.S. 690, 699 (1996). Where the trial court's factual findings are supported by competent, substantial evidence, there is a presumption of correctness with regard to the trial court's determination of facts. Id. However, the trial court's application of the law to those facts is subject to review de novo. Id.

SUMMARY OF ARGUMENT

The lower court erred by misapplying the Fourth Amendment when it denied the motion to suppress tangible evidence. The Fourth Amendment permits officers to conduct a brief, investigatory stop if the officer has reasonable suspicion that criminal activity may be afoot. Terry v. Ohio, 392 U.S. 1 (1968). However, the scope of an investigative stop must be carefully tailored to and justified by the circumstances that made its initiation permissible. Id. at 18. Consent to a search must be freely and voluntarily given but a person's compliance to an officer's show of authority does not represent voluntary consent. Davis v. State, 946 So. 2d 575 (Fla. 1st DCA 2006). An officer may seize an item in plain view if probable cause exists to believe that the item evidences a crime, but [he] may not move the object to get a better view. Arizona v. Hicks, 480 U.S. 321 (1987). In this case, when there was no more reasonable suspicion, the Deputy continued to detain Mr. Duncan turning an investigatory stop into an illegal seizure. Mr. Duncan did not voluntarily consent to the search, but submitted to the Deputy's show of authority when he opened his trunk for the Deputy to search. The Deputy exceeded the scope of his plain view search when he leaned into the trunk and had to physically move the computer to see the property label. The trial court erred by granting the motion to suppress evidence, which was the result of an unlawful search and seizure in

violation of Mr. Duncan's Fourth Amendment rights.

ARGUMENT

1. The trial judge erred in denying the motion to suppress tangible evidence because the Deputy violated Mr. Duncan's Fourth Amendment Rights by unlawfully seizing Mr. Duncan, searching the trunk without Mr. Duncan's voluntary consent, and moving the computer to see the label.

The lower court erred by not granting Mr. Duncan's motion to suppress because the court should view the Deputy's search and seizure of the computer a breach of Mr. Duncan's Fourth Amendment rights. The Fourth Amendment permits officers to conduct a brief, investigatory stop if the officer has reasonable suspicion that criminal activity may be afoot, but that the scope of an investigative stop must be carefully tailored to its underlying justification, otherwise the seizure and detainment may become unlawful. The Deputy violated Mr. Duncan's rights by continuing to detain him after determining Mr. Duncan was not the suspect in the BOLO report and that the white powdery substance was just detergent. When a search is warrantless and based upon consent, the consent must be given freely and voluntarily and not merely in compliance to an officer's show of authority. Mr. Duncan followed the Deputy's order to exit the car and be frisked as a show of submission to the Deputy's authority. Mr. Duncan continued to comply with the Deputy's orders when he opened his trunk and did not give voluntary consent to search the trunk. For the officer to seize an item in plain view, he must have

probable cause to believe that the item evidences a crime, and the officer may not move object to get a better view. The Deputy leaned into to the trunk and moved the computer in order to see the property label. Because the lower court failed to see the Fourth Amendment rights violations the Deputy committed during his search and seizure of the computer, the lower court erred in denying Mr. Duncan's motion to suppress physical evidence

A. The trial court erred by erroneously granting the motion to suppress when the continued detainment of Mr. Duncan with lack of reasonable suspicion, constituted as an unlawful seizure.

The Deputy unlawfully detained and seized Mr. Duncan because the Deputy continued to detain Mr. Duncan without reasonable suspicion. The Fourth Amendment forbids unreasonable searches and seizures. U.S. Const. amend. IV. In determining whether a seizure has occurred, the totality of the circumstances surrounding the specific encounter must be considered. Id. When the police detain a person for any length of time, it is a "seizure" within the meaning of the Fourth Amendment. Id. Reliance on a BOLO report may warrant the temporary detention of a suspect. See 14A Fla. Jur. 2d Criminal Law – Procedure § 882 (2011). Nevertheless, an investigative detention must last no longer than necessary to effectuate the purpose of the stop. Florida v. Royer, 460 U.S. 491, 500 (1983). To stop and detain a person for investigation, an officer must have a reasonable

suspicion that the person has committed, is committing, or is about to commit a crime. Popple v. State, 626 So. 2d 185, 186 (Fla. 1993). For example, use of emergency lights evidences an investigatory stop and is an important factor to be considered in the totality of circumstances as to whether a seizure has occurred. G.M. v. State, 19 So. 3d 973, 974 (Fla. 2009). A seizure occurs when police officers restrain the liberty of a citizen by physical force or other authority. Terry, 392 U.S. at 20. The test for whether a consensual encounter was transformed into a seizure is whether a reasonable person would have felt free to decline the officer's request and terminate the encounter. Davis, 946 So. 2d. at 578. See Popple, 626 So. 2d at 188 (finding a deputy's direction to exit the vehicle alone constituted a detention or seizure). A frisk or pat down results in a detention and a seizure. Hamilton v. State, 612 So. 2d 716 (Fla. 2d DCA 1993). See Terry, 392 U.S at 19 (finding officer seized petitioner and subjected him to a search when he took hold of him and patted down his outer clothing). See Royer, 460 U.S. at 499 (affirming that when investigating a person who is no more than suspected of criminal activity, police may not conduct a full search of his person automobile or other effects).

In the present case, a reasonable person would not have felt free to leave because the Deputy pulled Mr. Duncan over by the use of his emergency

headlamps, asked him to exit his car, removed the keys from the ignition so as to purposefully remove any opportunity for Mr. Duncan to leave, and frisked Mr. Duncan resulting in an unlawful seizure. If this Court finds that the Deputy had reasonable suspicion when he originally seized Mr. Duncan based on the BOLO report, and the white powdery substance falling out of the glove compartment, then once the Deputy realized, admittedly shortly after the initial stop, that Mr. Duncan was not the suspect in the BOLO report and the white powdery substance was nothing but laundry detergent, the Deputy no longer had reasonable suspicion to continue the detainment of Mr. Duncan. Yet, the Deputy continued to detain Mr. Duncan and searched the trunk of his car. Therefore, the continued detainment of Mr. Duncan was unlawful, and any evidence subsequently obtained from the unlawful search must be suppressed because the Deputy lacked reasonable suspicion to continue the detainment beyond the initial justification for the stop. Therefore, the investigatory stop turned into an unlawful seizure of Mr. Duncan.

B. **The trial court erred in denying the motion to suppress because Mr. Duncan only complied with the Deputy's show of authority and did not voluntary consent to the search of his trunk.**

Mr. Duncan did not voluntarily consent to the search of his trunk and computer, but only complied with the Deputy's show of authority to show him Mr. Duncan's laundry, which does not constitute consent or a lawful search. The

Fourth Amendment protects from unlawful search and seizures. U.S. Const. amend. IV. An officer can lawfully search and seize evidence without a warrant if a person gives them voluntary consent to search their property. Id.

> [C]onsent is obtained after the illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search . . . The consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action.

Davis, 946 So. 2d at 578. If a person gives consent to an officer for a search immediately after an unlawful seizure, the consent is no longer voluntary and becomes the officer showing authority over the person. See id. (deciding the defendant did not give voluntary consent to search his person because the search occurred immediately after an unlawful seizure). In order for a defendant to show the search was not obtained by voluntary consent, the defendant needs to show the officer had shown authority over them. California v. Hodari, 499 U.S. 621, 628 (1991). Showing the authority of an officer over a defendant is an objective test where the officer's words and actions would have conveyed to a reasonable person that they were being ordered to restrict their movements and comply with the officer's orders. Id. Also, the defendant must have yielded to the officer's orders and not have fled in order to show the defendant has been seized and therefore reasonably believes that they must comply with the show of authority of the

officer. Id. Whether consent was voluntary is considered in light of the "totality of the circumstances" surrounding the search to determine the scope of the consent. State v. Cross, 535 So. 2d 282, 284 (Fla. 3d DCA 1988), affirmed 560 So. 2d 228 (Fla. 1990). Consent to search an area or object does not give the officer permission to go beyond that consent and search by breaking open objects and destroying containers. See id. (affirming that the officer went beyond the scope of consent when he cut open the ball to find a controlled substance). When validity of search rests on consent, the state has the burden of proving that the requisite consent obtained was freely and voluntarily given. Royer, 560 U.S. at 496.

In the case at bar, the Deputy seized Mr. Duncan by a show of authority when the Deputy instructed Mr. Duncan to get exit his car, put his hands on top of the car, searched his person, and took Mr. Duncan's keys. The totality of these circumstances evidences that Mr. Duncan was seized by the Deputy and not free to leave or disregard the Deputy's instructions. The Deputy admits that Mr. Duncan was submissive to the Deputy's show of authority and complied with the orders, which restricted his freedom. A reasonable person in this situation would perceive the Deputy's further instruction of "I've gotta see that laundry" as a further show of authority. As such, Mr. Duncan did not freely and voluntarily comply with the Deputy's request, but did show in compliance with the Deputy's show of authority.

Therefore, Duncan's submission to the Deputy's authority abrogated any reasonable person's belief that Mr. Duncan reasonably consented to a search of his trunk.

However, if the Court finds there to be a reasonable doubt as to whether the consent was only given in response to the Deputy's show of authority, then the scope of the search was explicitly limited by the Deputy's specific request of "I've gotta see that laundry" to the duffel bag of laundry in Mr. Duncan's trunk. As such, the Deputy never received voluntarily consent to expand the scope of his search to include the seized computer used as evidence at the trial in the district court. The Deputy never obtained Mr. Duncan's free and voluntary consent to search the trunk of his car because the Deputy used his show of authority over Mr. Duncan to seize him, and coerce his consent to search the duffel bag of laundry in the trunk and then further used his authority exceed the scope of that coerced consent by unilaterally expanding the search to seize the computer. As a result of the unlawful search and seizure, the computer evidence must be suppressed.

C. The trial court erred by failing to consider that the Deputy exceeded the scope of the "plain view doctrine" when he searched the Defendant's trunk and physically moved the computer resulting in an unlawful seizure.

The Deputy did not lawfully search Mr. Duncan's trunk nor lawfully seize the computer because the Deputy overstepped exceeded the parameters of the

"plain view doctrine" during his search and physically moved the computer. The plain view doctrine allows an officer to seize, without a warrant, evidence found in plain view during a lawful observation. Horton v. California, 496 U.S. 128 (1990). For the plain view doctrine to apply for discovery of evidence, the Supreme Court set forth a three prong test, as follows: (1) the officer must be lawfully present at the place where the evidence can be plainly viewed, (2) the officer must have a lawful right of access to the object, and (3) the incriminating character of the object must be immediately apparent. Id. at 136-37. "[I]mmediately apparent" means that "at the time police view the object to be seized, they must have probable cause to believe that the object is contraband or evidence of a crime." Arizona v. Hicks, 480 U.S. 321, 326-27 (1987). An officer may not move the object to get a better view. See id. Any evidence discovered subsequent to and as a result of the unlawful seizure is fruit of the poisonous tree and must be suppressed. See Wong-Sun v. United States, 371 U.S. 471(1963). If there is any reasonable doubt as to whether an officer acted reasonably in conducting a search, it must be resolved in favor of the Defendant. Cross, 535 So. 2d at 282.

Here, the Deputy's scope for the search, if any, of Mr. Duncan's trunk was to look at Mr. Duncan's duffel bag full of laundry. However, the Deputy

completely ignored the laundry and went right for the computer, which was not in plain view because the facts show that it was wedged between other items in the trunk, and the Deputy admitted he could not see the identifying label on the computer without leaning into the open trunk and contorting his neck to get a better view. Even with such great efforts, the label was only partially visible and not immediately apparent because the Deputy admits to having to physically turn the computer so that he could in fact see the entire label. Additionally, the Deputy lacked probable cause that the computer was evidence of contraband or a crime because the record reflects that at the time of the Deputy's search of Mr. Duncan's trunk, he was not aware of any computer theft at Miami-Dade College. Lack of probable cause to believe the computer was evidence of a crime raises reasonable doubt as to whether the Deputy acted reasonably in conducting the search of Mr. Duncan and therefore should be resolved in favor of Mr. Duncan.

Further, the Deputy was not lawfully present in the place where the evidence was viewed, the Deputy did not have a lawful right of access, and the object was not immediately apparent. Therefore, the plain view doctrine does not apply because the Deputy exceeded the scope of the search of Mr. Duncan's trunk by ignoring the laundry and by moving the computer to inspect it more closely. As a result, the Deputy conducted an unlawful search and seizure and the evidence

obtained from that search, the computer, should be suppressed.

CONCLUSION

For the foregoing reasons, the district court's denial of Mr. Duncan's motion to suppress physical evidence should be reversed because the Deputy exceeded the scope of the plain view doctrine during his search of Mr. Duncan's trunk, without Mr. Duncan's voluntary consent to the search the trunk, after the Deputy had unlawfully seized Mr. Duncan. The facts show Mr. Duncan's Fourth Amendment right was violated and the motion to suppress the tangible evidence of the computer should have been granted.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to opposing counsel by U.S. Mail on this ___ day of June 2011.

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