**County Criminal Court**: CRIMINAL LAW – Search and Seizure – Stop – Trial court did not err in denying motion to suppress. Competent, substantial evidence in the record supported trial court's finding that Appellant's encounter with law enforcement was consensual where Appellant slowed his vehicle to speak with officer who had concluded his investigation of a complaint in the area and was preparing to leave; upon approaching the vehicle, officer observed Appellant smelled of alcohol and substance later identified as marijuana was visible on passenger seat. Order denying motion to suppress affirmed. *Morano v. State*, No. 13-00055APANO (Fla. 6th Cir. App. Ct. March 14, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

LESTER J. MORANO

Appellant,

Appeal No. CRC 13-00055APANO
UCN 522013AP000055XXXXCR

STATE OF FLORIDA

Appellee.
_____/

Opinion filed March 14, 2014.

Appeal from an Order Denying
Motion to Suppress
entered by the Pinellas County Court
County Judge Robert Dittmer

Simone A. Lennon, Esquire
Attorney for Appellant

Shawn N. Crane, Esquire
Assistant State Attorney
Attorney for Appellee

## ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Lester J. Morano's appeal from a decision of the Pinellas County Court to deny his motion to suppress. The Appellant pled no contest to Driving Under the Influence but reserved his right to appeal the denial of his motion to suppress. We affirm.

*Background*

Pinellas County Sheriff's deputies responded to a call for service at Isle Palms Mobile Home Park in Pinellas County. Deputy Wiltse, a responding deputy, testified, in pertinent part, at the hearing on the Motion to Suppress to several points: (1) the complainant talked with a responding deputy and advised that she was walking down the roadway when "[h]er husband yelled something at her" and "[s]he turned and yelled something back;" (2) the Appellant, Mr. Morano, a resident of the park, who happened to be driving by "believed they may have been arguing, reached out of his vehicle, grabbed her by the hand, gave her a kiss on the hand and told her something along the lines of, You don't need to deal with that or put up with that, or something along those lines, nothing threatening;" (3) that Mr. Morano drove back to the area as the deputies were talking with the complainant; (4) that Deputy Wiltse stepped onto to the grass beside the roadway as Mr. Morano was approaching at "idle speed." "As the van got closer, it was slowing down. I observed that the driver window was down. And I simply asked if I could speak with the gentleman and try to get his side of the story;" (5) When Deputy Wiltse approached Mr. Morano he noticed his eyes were bloodshot and glassy and he had

an odor of alcohol. A plastic bag with a green leafy substance, later identified as marijuana, was on the passenger seat.

Charles Acheson, the complainant's fiancée, testified, in pertinent part, that "[Deputy] Wiltse had gestured to Mr. Morano, he had waived like this (indicates), 'I need to speak to you'" and that it appeared to be an order to stop. Deputy Cory Hughes testified, in pertinent part, that Deputy Wiltse said something to the effect of, stop or pull over. Mr. Morano testified that Deputy Wiltse stated "pull over stop" and that he did not feel as if he had any choice but to stop.

The trial court denied the Motion to Suppress finding that law enforcement contact with Mr. Morano was a consensual encounter. Mr. Morano entered a plea of no contest reserving the right to appeal the denial of his Motion to Suppress.

*Standard of Review*

An appellate court employs a mixed standard of review in considering a trial court's ruling on a motion to suppress. The trial court's determination of historical facts enjoys a presumption of correctness and is subject to reversal only if it is not supported by *competent substantial evidence* in the record.

> "Competent substantial evidence" has been described as follows:
> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged.

*Joseph v. State*, 103 So.3d 227, 229 -230 (Fla. 4th DCA 2012). When reviewing a motion to suppress a circuit court sitting in its appellate capacity may not reweigh the evidence or make credibility determinations. *Duke v. State*, 82 So3d 1155, 1157 (Fla. 2nd DCA 2012). However, the trial court's determinations on mixed questions of law and fact and its legal conclusions are subject to de novo review. *See Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State*, 803 So.2d 598, 608 (Fla.2001); *State v. Hendrex*, 865 So.2d 531, 533 (Fla. 2d DCA 2003), *review denied*, 879 So.2d 621 (Fla.2004). *State v. Marrero*, 890 So.2d 1278, 1281 (Fla. 2nd DCA 2005). All evidence and reasonable inferences therefrom must be construed in a manner most favorable to upholding the trial court's ruling. *Newkirk v. State*, 964 So2d 861, 863 (Fla. 2nd DCA 2007).

*Issue*

Was the Appellant, Mr. Morano, subjected to an unlawful detention?

*Encounters vs. Stops*

"Obviously, not all personal [interaction] between [the police] and citizens involves 'seizures' of persons." … A seizure under the Fourth Amendment will only occur "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." … [T]his Court [has] identified three levels of police-citizen encounters. *Caldwell v. State*, 41 So.3d 188, 195 (Fla. 2010) (internal citations omitted).

1. *Consensual Encounters*. The first level of police-citizen encounters is considered a consensual encounter and involves only minimal police contact. During a consensual encounter a citizen may either voluntarily comply with a police officer's

requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Popple vs. State*, 626 So2d 185 (Fla. 1993); *Greider v. State*, 977 So2d 789 (2nd DCA 2008).

An officer does not need a founded suspicion of criminal activity to approach and talk to someone. *Terry v. Ohio,* 392 U.S. 1, 34, 88 S.Ct. 1868, 1886, 20 L.Ed.2d 889, 913 (1969); *State v. Raines,* 576 So.2d 896 (Fla. 2d DCA 1991). "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *See United States v. Drayton,* 536 U.S. 194, 200, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). Likewise, an officer may approach an individual on the street or in another public place and inquire as to his or her reason for being there, and may request to see identification, without triggering constitutional safeguards regarding seizures. *State v. Robinson,* 740 So.2d 9, 12 -13 (Fla. 1st DCA1999); *See Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991; *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *State v. Baldwin*, 686 So.2d 682, 685 (Fla. 1st DCA 1996). While most citizens respond to a police request, the fact that they do so without being told they are free not to respond does not eliminate the consensual nature of their response. *State v. Simons,* 549 So.2d 785, 787 (Fla. 2nd DCA 1989); *State vs. Carley*, 633 So2d 533 (2nd DCA Fla. 1994); *See Drayton,* 536 U.S. at 206.

2. *Investigatory Stops.* To justify an investigatory stop, the officer must have a *reasonable suspicion* that the person detained committed, is committing, or is about to

commit a crime. § 901.151(2) Fla. Stat. (2006); *Popple v. State*, 626 So2d 185 (Fla. 1993); *Dept. of Highway Safety & Motor Vehicles v. DeShong*, 603 So2d 1349 (2nd DCA Fla. 1992); *Randall v. State*, 600 So2d 553 (Fla. 2nd DCA 1992). A *reasonable suspicion* is "a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge." *McMaster v. State*, 780 So2d 1026 (5th DCA Fla. 2001). While "*reasonable suspicion*" is a less demanding standard than *probable cause* and requires a showing considerably less than a *preponderance of the evidence*, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). "Mere" or "bare" suspicion, on the other hand, cannot support detention. *State v. Stevens*, 354 So2d 1244 (4th DCA Fla.1978*); Coleman v. State*, 333 So.2d 503 (Fla. 4th DCA 1976). Mere suspicion is no better than random selection, sheer guesswork, or hunch, and has no objective justification. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Thomas v. State*, 250 So.2d 15 (Fla.1st DCA 1971).

3. *Seizure.* [A] person has been "seized" within the meaning of the Fourth Amendment only if, *in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.* … [I]n addition to circumstances indicating that a reasonable person would not feel free to leave, the person must either (a) in fact be physically subdued by the officer, or (b) submit to the officer's show of authority. … The "seizure" analysis does not depend on what the particular

suspect believed, but on whether the officer's words and actions would have conveyed to a reasonable, innocent person that he was not free to leave. *Caldwell,* 41 So.3d at 196 - 197 (internal citations omitted).

*The Present Case*

The trial court, at the hearing, made the following factual findings and announced the following ruling:

> There is testimony from independent witness. … But Mr. Acheson indicated that the officer -- what did he say said -- I need to speak with you. He said the defendant agreed. And when we followed up on that, what he said was sure. We have a circumstance where the officers are at a location. They do not proactively go after anyone. They happen to be there as the defendant is driving by. I think the officers could have easily said -- they might have had a problem because you would have impeached them with their report. But I was thinking they might have gone more towards, you know what, it may have still been a battery even though we weren't investigating this as an abduction. It may have still been a battery. And under those circumstances, we had to look into this a little bit further. But they didn't do that. They just said, no, really we weren't investigating anything. I wanted to talk to the guy and say, look, it's probably not a good idea to do that. I agree. In my mind, I would have thought that they did want to investigate this a little bit further before blowing it off, but apparently they didn't.
>
> So it seemed that there was a very casual atmosphere of, look, this isn't a crime. We're not going to do anything about this. In fact, we're on our way out of the park. We're getting ready to leave, oh, here's the van. Oh, hey, sir, let me talk to you for a second. And that's the basis of the encounter. I don't think that's unreasonable.
>
> So given all of the surrounding circumstances, I'm going to deny the motion finding that it was a consensual encounter.

These findings by the trial court were supported by competent substantial evidence in the record and enjoy a presumption of correctness. The trial judge is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses. Our role in an appellate capacity is limited. We do not reweigh evidence, make credibility determinations or presume to substitute

our judgment for that of the trial court. We are simply assigned the task of making sure the trial court's factual findings are supported by competent substantial evidence in the record and that the trial court's application of law to those factual findings was correct.

*Conclusion*

This court concludes that the order of the trial court denying Appellant's Motion to Suppress should be affirmed.

IT IS THEREFORE ORDERED that the order of the trial court denying Appellant's Motion to Suppress is affirmed.

ORDERED at Clearwater, Florida this 14th day of March, 2014.

Original order entered on March 14, 2014, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Robert Dittmer
Simone A. Lennon, Esquire
Office of the State Attorney