County Criminal Court: CRIMINAL LAW—Search and Seizure—Stop. The trial court properly granted the motion to suppress. There was no reasonable basis to support Appellee's continued detention and the subsequent DUI investigation. Affirmed. *State of Florida v. Kenneth B. Stephens*, No. 13-CF-6135-WS (Fla. 6th Cir. App. Ct. January 29, 2015).

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 PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

KENNETH B. STEPHENS,
Appellee.
_____/

UCN: 512013CF006135A000WS
Appeal No: CRC1306135CFAWS
L.T. No: 13-2423WJZT-WS

On appeal from County Court,

Honorable Debra Roberts,

Andrew Parker, Esq.,
Assistant State Attorney,
for Appellant,

Nicholas Michailos, Esq.,
Assistant Public Defender,
for Appellee.

ORDER AND OPINION

We find the trial court properly granted Appellee's motion to suppress, finding no basis to support Appellee's continued detention and the subsequent DUI investigation. The State was provided adequate notice by the motion to suppress filed pursuant to Fla. R. Crim. P. 3.190(g), that the DUI investigation would be challenged at the hearing. The order of the trial court is affirmed.

STATEMENT OF THE CASE AND FACTS

Appellee was arrested for DUI in violation of § 316.193, Fla. Stat. On the evening of the arrest, Deputy Rux of the Pasco County Sheriff's Office observed a truck backed into a driveway with the interior light on and observed Appellee leaning over the vehicle's center console. The Deputy continued his patrol and after passing the same house approximately five minutes later, made the same observation. The Deputy stopped his vehicle and turned on his spotlight, and Appellee still did not move. At that point the Deputy became concerned for Appellee's welfare, called in a suspicious vehicle over his radio, and approached the vehicle, at which point he noticed Appellee was asleep and the vehicle running. The Deputy woke Appellee who either stated he had passed out or fallen asleep, appeared out of it and confused, and had trouble locating his driver's license. Deputy Rux testified that Appellee seemed impaired to him, but the only fact he could articulate was that it took Appellee longer than usual to find his driver's license. Deputy Rux testified that he never requested a DUI investigation or suggested to another officer that Appellee might be impaired, but that the other officers simply responded to his calling in a suspicious vehicle. At the hearing on the motion, the Deputy could not state a reason to continue Appellee's detention after the initial welfare check. When backup units arrived Deputy Cinelli began a DUI investigation and arrested Appellee for DUI. Deputy Rux stated that after Deputy Cinelli arrived the welfare check turned into a criminal investigation, and that Deputy Rux had Appellee's driver's license and was running a license history check when Deputy Cinelli arrived and began the DUI investigation, when there was no longer concern for Appellee's welfare.

Appellee filed a motion to suppress the evidence obtained as a result of the investigatory stop and detention. The trial court found that while the initial welfare check was legal, the continued detention of Appellee, including taking Appellee's license so that he was not free to retreat from the encounter, was unrelated to the welfare check and there was no reasonable basis for the continued detention or the subsequent DUI investigation. The trial court granted the motion to suppress the evidence obtained as a result of the DUI investigation. State filed a timely notice of appeal.

STANDARD OF REVIEW

"Appellate review of a motion to suppress involves questions of both law and fact." *Rosenquist v. State*, 769 So. 2d 1051, 1052 (Fla. 2d DCA 2000). We review the trial court's application of the law to the facts of the case, and the ultimate determination of the lack of reasonable suspicion pursuant to a de novo standard. *See id.*; *Ornelas v. U.S.*, 517 U.S. 690, 698 (1996). Findings of fact by the trial court are reviewed for "clear error," and we will give deference to inferences drawn from those facts by the trial court and law enforcement officers. *See Ornelas*, 517 U.S. at 699.

LAW AND ANALYSIS

State first contends the motion to suppress did not raise the issue of an unlawful continued detention, or allege a lack of reasonable suspicion to conduct an investigatory stop, and therefore the State was not put on notice that the DUI investigation would be challenged at the hearing on the motion. State claims that as a result, at the hearing the State only called Deputy Rux to testify and did not call Deputy Cinelli, who made the determination to conduct a DUI investigation. The trial court concluded Deputy Rux had conducted a legal stop of Appellee, based on the concern for his welfare, but found no basis to conduct a DUI investigation and granted the motion.

Fla. R. Crim. P. 3.190(g) requires a motion to suppress clearly state the particular evidence to be suppressed, the reasons for suppression, and a general statement of the facts. This requirement allows both the State and the trial court to prepare for argument on the issue. *Woodbury v. State*, 730 So. 2d 354 (Fla. 5th DCA 1999). State claims the motion indicated the challenged stop was the initial stop by Deputy Rux, and not the later DUI investigation by Deputy Cinelli. Therefore, State was not made aware this issue would be raised at the hearing and did not call Deputy Cinelli to testify as to the basis for the DUI investigation. Specifically, State claims the motion did not mention a lack of reasonable suspicion to conduct a DUI investigation.

The motion states that Deputy Rux "conducted an investigatory stop on Defendant's person without probable cause or a well-founded articulable suspicion that Defendant had violated any traffic laws or was involved in any criminal activity." Further,

the motion alleges the stop was illegal, and therefore the DUI investigation was illegal, and specifically states that the "DUI investigation in this case was conducted in violation of the Constitutions of the United States and the State of Florida, as amended, as well as the Florida Statutes, section 901.151."

State claims *State v. Christmas*, 133 So. 3d 1093 (Fla. 4th DCA 2014), supports its argument. In *Christmas*, the court found that use of the phrase "other grounds to be argued ore tenus" in a motion to suppress was essentially meaningless, and it was error to grant a motion to suppress based on grounds which the State was not provided notice would be at issue. *Id.* at 1095-96. At the hearing on the motion, the reliability of a dog used in a K-9 unit was called into question, but reliability was not raised in the motion, and the State was not provided the opportunity for a hearing on the specific issue of reliability despite requesting one. *Id.* The court found the untimely disclosure of a challenge to "the reliability of the dog deprived the state of notice." *Id.* at 1096-97. Appellant claims the motion in this case similarly did not provide State adequate notice to prepare for the hearing, and it was error to consider a challenge to the basis for the DUI investigation at the hearing.

Appellee points out that the motion mentions the investigatory stop in paragraphs two, three and four, and includes citation to § 901.151, Fla. Stat., which provides that a person shall not "be temporarily detained . . . longer than is reasonably necessary to effect the purposes of that detention." *Id.* Although Deputy Rux testified he suspected Appellee was impaired, he could not articulate any objective facts to support Appellee's continued detention once there was no longer a welfare concern, which was the basis for the initial investigatory stop. Deputy Rux agreed that Appellee's behavior could be consistent with that of a person abruptly woken up from a deep sleep. Nevertheless, Appellee was not free to leave after the initial detention, his driver's license was not returned to him, and he was asked to step out of his vehicle when Deputy Cinelli arrived on the scene and began a DUI investigation which led to Appellee's arrest.

Once Deputy Rux determined there was no longer concern for Appellee's welfare the legitimate purpose of the stop ended, and there was no reasonable, articulable basis for the continued detention and DUI investigation. Although State claims the

motion does not challenge a lack of reasonable suspicion, the motion states that the Deputy "conducted an investigatory stop on Defendant's person without probable cause or a well-founded articulable suspicion that Appellee had violated any traffic laws or was involved in any criminal activity." This was sufficient to put State on notice that Appellee intended to challenge the reasonable suspicion to support a DUI investigation. It was not necessary that the Deputy who conducted the DUI investigation testify at the hearing, because the illegal detention occurred when Deputy Rux continued to detain Appellee prior to Deputy Cinelli's arrival and the subsequent DUI investigation, with no basis for doing so. A seizure occurs when "a reasonable person would conclude that he or she is not free to end the encounter and depart." *Popple v. State*, 626 So. 2d 185, 188 (Fla. 1993). An officer must have a reasonable suspicion an individual is committing, has committed, or is about to commit a crime, before that person may be detained. *Terry v. Ohio*, 392 U.S. 1 (1968); § 901.151, Fla. Stat. Evidence obtained as a result of an illegal stop must be suppressed. *State v. Murphy*, 793 So. 2d 112 (Fla. 2d DCA 2001). The trial court correctly granted Appellee's motion to suppress.

CONCLUSION

The record demonstrates no reasonable, articulable basis to support Appellee's continued detention and the subsequent DUI investigation. The trial court correctly granted the motion to suppress.

It is ORDERED AND ADJUDGED that the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 29th day of January, 2015.

Original order entered on January 29, 2015, by Circuit Judges Daniel D. Diskey, Shawn Crane and Linda Babb.