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

STATE OF FLORIDA

Appellant,

Appeal No. CRC 10-00038APANO
UCN: ~~522009CT114339XXXXXX~~
522010AP000038XXXXCR

AUSTIN BOTTIE

Appellee.
_____/

Opinion filed _____.

Appeal from an Order Granting
Motion to Suppress
entered by the Pinellas County Court
County Judge James V. Pierce

Jeffrey M. Lowe, Esquire
Office of the State Attorney
Attorney for Appellant

Sean K. McQuaid, Esquire
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from an order of the Pinellas County Court granting Appellee's Motion to Suppress. After reviewing the briefs and record, this Court affirms the order of the trial court.

Factual Background and Trial Court Proceedings

On August 14th of 2009 at approximately 4:47 a.m. Sergeant Thomas Goettel of the Pinellas County Sheriff's Office responded to a call involving a vehicle that had collided with a house. When the sergeant arrived at the scene the fire department was there, and the Appellee was behind the wheel of the vehicle. His speech "was very slurred and [he] seemed incoherent." The sergeant did not notice any odor of alcohol.

The Appellee was taken to a hospital. The sergeant also went to the hospital shortly thereafter and proceeded to the room where the Appellee was being treated by the hospital staff. The sergeant testified "I advised him that there was a crash investigation going on, that I suspected impairment and that I wanted to get urine [sample] from him and he said, 'okay.'"

The hospital staff "was attempting to get him to urinate, I guess, for their testing and so forth, and a lot of time had transpired with them trying to get him to urinate..." "[A] long time expired with them trying to get the urine sample. And then they administered a catheter." The sergeant did not ask the medical staff to administer a catheter. The Appellee "wasn't happy about getting a catheter inserted." "He wasn't happy about it at all." However the Appellee did not specifically tell anyone that he didn't want the sergeant to take a urine sample from the catheter. The sergeant then requested and received from the medical staff a urine sample from the catheter.

Mr. Bottie filed a motion to suppress asserting that there was an unlawful search and seizure as the actions of law enforcement in obtaining a urine sample by a forced catheterization by hospital staff exceeded the scope of the consent provided. After an evidentiary hearing, the trial court granted the motion. The trial court found "[t]he State

failed to prove by a preponderance of the evidence based on the totality of the circumstances that the urine sample was the product of an intelligent, knowing and voluntary decision, as opposed to an acquiescence of the lawful authority." The State appeals the order granting the motion to suppress.

Standard of Review

Our review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. All evidence and reasonable inferences therefrom must be construed in a manner most favorable to upholding the trial court's ruling. However, we review the trial court's application of the law to those facts de novo. *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 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2nd DCA 2007); *Newkirk v. State,* 964 So2d 861, 863 (Fla. 2nd DCA 2007).

The Present Case

In the present case, Mr. Bottie was intoxicated, injured, in pain, in the hospital emergency room being attended by multiple hospital personnel, when the sergeant requested consent and received a simple, "okay". Thereafter Mr. Bottie could not or did not urinate in a cup. The hospital staff proceeded to insert a catheter into Mr. Bottie's penis over his complaints or expressions of discomfort. Law enforcement did not ask the medical staff to administer the catheter.

In construing the evidence and the reasonable inferences drawn from that evidence in a manner most favorable to upholding the trial court's ruling, this court

concludes there was competent substantial evidence to support the County Court's finding and ruling on the motion to suppress. This court is required to affirm.

Conclusion

The order of the trial court granting Appellee's Motion to Suppress should be affirmed.

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

GROSS, Judge. Concurs

ANDREWS, Judge, Dissenting.

Respectfully, I dissent.

No Presumption of Correctness

Although "[a]n appellate court reviewing a ruling on a motion to suppress presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence[,]" the trial court's application of the law to the historical facts is subject to de novo review. *Cuervo v. State,* 967 So.2d 155, 160 (Fla.2007). In *Connor v. State,* 803 So.2d 598, 608 (Fla. 2001) the supreme court held "appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution."

In its order granting the motion to suppress the trial court states, in sum and substance, the following:

> "The State failed to prove by a preponderance of the evidence based on the totality of the circumstances that the urine sample was the product of an intelligent, knowing and voluntary decision, as opposed to an acquiescence of the lawful authority."

No findings of facts are made either on the record or in the final order. Where the trial court fails to make findings of fact either in its order or on the record the presumption of correctness is not accorded. *See State v. Reed*, 421 So.2d 754 (Fla. 4th DCA 1982) ("[t]he presumption of correctness ordinarily attributed to the findings of the trial court does not apply where there were no findings of fact. *Ponder v. State,* 323 So.2d 296 (Fla. 3d DCA 1975); *Herzog v. Herzog,* 346 So.2d 56 (Fla.1977)").

Proof by Preponderance of the Evidence.

At hearing the investigating officer, Sgt. Thomas Goettel, offered the following testimony regarding his actions as they relate to collection of the urine in question:

Q. And so what did you do next after the investigation and contact with the defendant?
A. I advised him that there was a crash investigation going on, that I suspected impairment and that I wanted to get urine from him and he said, "okay."
Q. So you requested a urine sample?
A. Yes.
Q. The defendant responds "okay" --
A. Uh-huh.
Q. -- affirmative to urine sample, and then what happens after that?
A. *Well, during that time the ER staff was attempting to get him to urinate, I guess, for their testing and so forth, and a lot of time had transpired with them trying to get him to urinate into a -- a cup or whatever -- a container, and --*
Q. Okay. A bed pan of sorts or –
A. Yeah, it was one of the hospital urine bottle thing I believe, plastic.
Q. Like a jug or a container?
A. Yeah.
. . .

Q. *At any point did you ask medical staff to administer a catheter?*
A. *No.*
. . .

Q. Did you take urine from the catheter?

A. Yes.
Q. Can you explain that process?
A. *While the catheter was inserted, the nurses were gathering their sample, and while standing with a male nurse that was there actually getting the sample, I asked if they could supply me with a small sample of what they were collecting out of the tube.*
Q. Does the tube lead to a bag or a container of some sort -- was it being --
A. Yeah, *they were draining it into a container and then poured me a small sample of his urine into a separate container.*
. . .

Q. Was it your impression that the catheter was inserted entirely independently of your investigation?
A. *Yes.*
Q. *So the medical staff was conducting their medical procedures and they inserted the catheter?*
A. *Yes.*

(emphasis added) .

The testimony at hearing is clear and is clearly uncontroverted. The testimony reveals that when he asked the Appellee to provide him a urine sample the hospital staff was already attempting to collect the Appellee's urine. The officer states he asked for urine and "during that time the ER staff was attempting to get him to urinate." The testimony does not reveal that the urine was collected at the officer's request. The officer did not testify that at any time he asked the medical staff to collect the Appellee's urine nor did he ask that a catheter be used for the purpose of collecting urine. Yet that very notion was the subject of the defendant's motion and became the central theme of the defense counsel's argument to the trial judge. Repeatedly throughout his argument counsel for the defendant insisted that the defendant's consent was not voluntary because the defendant did not know he was consenting to having a catheter inserted to collect the urine. On one occasion counsel stated:

> Okay? So in other words, in order for there to be consent, you have to know what you're consenting to. . . So at the time when he said, "okay" he had to have known that he would be consenting to getting a catheter and

providing a sample to that. It would have to be intelligent voluntary. (sic)

If the testimony was that the defendant's urine was collected by catheter at the officer's request this argument would carry the day. Such is not the testimony here. Nothing in the record suggests that the urine was collected by catheter for any reason other than medical treatment. The circumstances here are no different than if the officer had arrived after the urine had been taken by catheter and asked the defendant if it was ok for the hospital to give him a sample of what was already collected. The only evidence presented is that the urine was being collected for medical purposes and the defendant consented to providing a sample of what was to be collected. Contrary to defense counsel's argument the officer is hard pressed to advise the defendant that a catheter may be used to extract his urine when the evidence is that the officer offered no input as to when, why or how the urine would be collected.

From my reading of the hearing transcript of these proceedings, I believe in order to find that the state has failed to meet its burden the trial judge has to arrive at the conclusion that the only witness to testify was incredible. No such finding was made.

Acquiescence to Police Authority

The trial court finds that the state failed to prove that the defendant's consent was not acquiescence to police authority. When there is a question of acquiescence to police authority the court is to look to the "totality of the circumstances." *State v. Evans,* 9 So.3d 767, 769 (Fla. 2 DCA 2009); *Dormezil v. State*, 754 So.2d 168 (Fla.5th DCA 2000); *Miami-Dade Police Department v. Martinez*, 838 So.2d 672 (Fla. 3d DCA 2003). It is insufficient to simply conclude that the state has failed, considering the "totality of the circumstances," to establish by a preponderance of the evidence that the consent was

knowing and voluntary without also stating a factual basis for the court's legal conclusion. A final order stating that the state failed to prove the defendant did not merely acquiesce to a show of authority must be accompanied by some act or set of circumstances demonstrating the officer's show of authority. The record should provide evidence that the officer's actions and behavior was coercive, tyrannical or dominating. *See State v. Jenkins*, 616 So.2d 173, 174 (Fla. 2d DCA 1993) ("[t]he record before us is devoid of any testimony that the officers' actions were coercive, oppressive or dominating; i.e., there was no 'show of authority' to which Jenkins could 'submit,' which would trigger a seizure of his person. The fact that the officers were in uniform, armed, and in a marked police cruiser in and of itself does not amount to a 'show of authority.'"); *See also State v. Parrish*, 731 So.2d 101 (Fla. 2d DCA 1999); *State v. M.J.*, 685 So.2d 1350 (Fla. 2d DCA 1996).

In *State v. Gamez*, 34 So.3d 245 (Fla. 2d DCA 2010) the defendant was stopped by police for a traffic infraction. He appeared nervous and was physically shaking. *Id.* at 246. The officer asked him to step away from the car and his associates who were inside the passenger compartment. *Id.* The officer asked for permission to search the car which the defendant granted. *Id.* The officer then asked the defendant if he could search his person and the defendant consented by raising his hands and spread his feet. *Id.* As he was patted down the defendant did not "*pull away or otherwise indicate he did not want to be searched.*" *Id.* (emphasis added). Upon feeling what he thought was contraband the officer asked the defendant to empty his pockets. *Id.* With the defendant's consent the officer searched the pockets himself and found illegal narcotics. *Id.* at 247. The trial

judge issued an order stating that the defendant's consent was concession to authority. *Id.* Reversing the ruling of the trial court the appellate court stated:

> Here, there is no evidence supporting Gamez's argument that his consent was a mere acquiescence to police authority. Gamez never testified that he felt his consent was not voluntary or that he felt he did not have a choice. Further, there was no evidence that Gamez suffered from a vulnerable, subjective state, caused by a mental condition, age, intelligence, or education . . . We also note that there was no evidence of a coercive circumstance or any coercive conduct by Detective Ogg, such as a show of force, threatening conduct, a prolonged detention, or deception.

Id. at 248-249 (citations omitted).

In *Watson v. State,* 979 So.2d 1148, 1150 (Fla. 1 DCA 2008), several officers entered the residence without a warrant because they heard commotion and suspected a gun had been fired. In a polite non threatening tone of voice one officer asked the defendant to stand so that he could check the area he was sitting in for weapons. *Id.* at 1151. After the officer checked the area he asked for permission to pat the defendant down for weapons to which the defendant consented. *Id.* Politely, the officer asked to take a look in the defendant's pockets to which the defendant consented. *Id.* Continuing the pat-down the officer searched the crotch area locating illegal narcotics. *Id.* The defendant moved to suppress arguing that his consent to the search of his person was acquiescence to police authority. *Id.* Rejecting the argument the court stated:

> Competent substantial evidence demonstrated that the officers briefly detained Appellant on the living room couch. The initial weapons pat-down by Officer Knighton *was not challenged.* A short time later, Sergeant Nechodom elicited Appellant's free and voluntary consent to a personal search, the scope of which clearly was within the limits approved by Appellant in both his oral replies and his body language. *See United States v. Griffin,* 530 F.2d 739, 742 (7th Cir.1976) (noting that "consent may be in the form of words, gesture, or conduct"); *Robbins_v. MacKenzie,* 364 F.2d 45, 48 (1st Cir.1966); *Ingram,* 928 So.2d at 430. *The record being devoid of any testimony that the officers acted in a coercive,*

oppressive, or dominating manner, Appellant's consent was not mere acquiescence to apparent police authority.

(emphasis added).

In *Luna-Martinez v. State*, 984 So.2d 592 (Fla. 2d DCA 2008) the defendant was awakened at 3:00 am by employing a ruse to gain entry. Several officers gathered at the residence. *Id.* 595. Once inside the residence the officer asked for permission to search which was also granted. *Id.* A trafficking amount of narcotics were found. *Id.* at 596. On appeal the defendant argued that the consent to search was acquiescence to authority. *Id.* at 596-597. Rejecting the argument the appellate court stated "[h]ere, the record supports the conclusion that the police did not make use of any 'overbearing tactics,' and that the defendant's 'will' was not 'overborne.'" *Id.* at 599.

In this case upon arrival at the hospital the officer testified he advised the defendant why he was there and asked for a urine sample to which he defendant consented. There was no testimony that the officer raised his voice, displayed his firearm, made threats of any kind or was in any way menacing. Only one officer was present at the hospital. The record does not reflect that the defendant was under arrest or threatened with arrest. "To conclude that a search is involuntary, the court must find that the defendant's 'will was overborne and his capacity for self-determination critically impaired.'" *State v. Gamez*, 34 So.3d 245, 248 (Fla. 2d DCA 2010) (citations omitted). No such findings were made here because no such evidence was presented at hearing.

In my view the record simply does not support the order of the trail court because the record is devoid of any evidence that the officer acted in a coercive, authoritative or menacing manner the absence of which cannot be a "show of authority." *State v. Jenkins*, 616 So.2d 173, 174. In other words, in this cause there is no evidence that the officer

made a "show of authority" to which the defendant should have felt compelled to acquiesce. The trial court has abused its discretion. I would reverse.

ORDERED at Clearwater, Florida this 8th day of February, 2011.

Original order entered on February 8, 2011 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable James V. Pierce
Office of the State Attorney
Sean K. McQuaid, Esquire