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

RUSSELL WARREN LEWERS

Appellant,

Appeal No. CRC 10-00068 APANO
UCN~~522011MM001356XXXXNO~~
UCN~~522011MO01357XXXXNO~~

STATE OF FLORIDA

Appellee.
_____/

Opinion filed _____.

Appeal from an Order Denying
Motion to Suppress
entered by the Pinellas County Court
County Judge Susan P. Bedinghaus

Frank D. L. Winstead, Esquire
Attorney for Appellant

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

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Russell Warren Lewers' appeal from a decision of the Pinellas County Court to deny his motion to suppress. The Appellant pled no contest to Possession of Marijuana and Possession of an Open

Container of Alcohol but reserved the right to appeal the denial of his motion to suppress. After reviewing the briefs and record, this Court affirms the ruling of the trial court.

Factual Background and Trial Court Proceedings

At approximately 11:00 a.m. on January 19, 2010, Officer Leonard Merritt of the Clearwater Police Department was on a bicycle patrolling an area of downtown Clearwater which includes Station Square Park. The officer had worked in law enforcement for nineteen years, had received formal narcotics training, had experience in narcotics investigations and had witnessed numerous hand-to-hand drug transactions. Officer Merritt, had been assigned to the team, whose area of responsibility included Station Square Park, for seven years. Station Square Park has a reputation for drug activity based upon multiple prior arrests and it has been the subject of multiple complaints from business owners and citizens related to drug use, drug sales, alcohol consumption, and problems related to the homeless. Upon approaching the park, Officer Merritt observed, from a distance of approximately fifty to sixty feet, the Appellant, Russell Warren Lewers, transfer an object to Kenneth Suddeth. As he continued approaching on his bicycle, Officer Merritt observed Mr. Suddeth inspect the received item while holding it down low and then immediately place the item into his right front pocket. The Appellant and Mr. Suddeth then immediately separated. Officer Merritt approached the two men and asked them what they were doing. Mr. Suddeth responded by stating that he just got to the park and Mr. Lewers stated that he was there charging his phone. Officer Merritt then asked Mr. Suddeth if he had anything illegal on his person to which he replied no. Mr. Suddeth then consented to a search of his person which revealed a marijuana cigarette inside of a Pall Mall pack of cigarettes which was the only

item inside of Mr. Suddeth's right front pocket. Immediately thereafter, Mr. Suddeth began asking for a break so as not to be arrested and stated that he only wanted to smoke with Mr. Lewers and Mr. Lewers handed him the pack, which Mr. Suddeth believed was a cigarette.

Officer Merritt then asked Mr. Lewers if he had anything illegal on him and Mr. Lewers responded he did not and did not want to be searched. Despite Mr. Lewers' opposition to being searched, Officer Merritt stated he had justification for a search and conducted a search of Mr. Lewers. The search revealed marijuana.

The Appellant filed a motion to suppress asserting that there was no lawful basis for the search. At the conclusion of the evidentiary hearing, the trial court made detailed factual findings and a ruling denying the motion. Thereafter a written order denying the motion was entered.

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).

Involved Points of Law

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. The fact that the police officers are in uniform and armed does not in and of itself amount to a "show of authority". *State vs. Jenkins*, 616 So2d 173 (Fla. 2nd DCA 1993). An encounter remains consensual unless the police prevent a citizen from exercising the right to walk away, whether by using intimidating language, displaying a weapon, touching the person, or approaching in a group of officers. *See State v. Wilson,* 566 So.2d 585 (Fla. 2nd DCA 1990); *State v. M.J.*, 685 So2d 1350 (Fla. 2nd DCA 1996).

> (A)person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Mendenhall, 446 U.S. at 554-55.

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).

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. *Terry* , 392 U.S. at 23, 88 S.Ct., at 1881.

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Id., at 21-22, 88 S.Ct., at 1879-1880; *see Gaines v. Craven*, 448 F.2d 1236 (CA9 1971); *United States v. Unverzagt*, 424 F.2d 396 (CA8 1970).

Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923 (1972).

The court determines the stop's legitimacy by considering the totality of the circumstances surrounding the stop. *McMaster,* 780 So.2d at 1029. An officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Terry,* 392 U.S. at 21. In assessing the reasonableness of the stop, we must look at the facts available to the officer

at the moment of the stop and determine whether they " 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate." *Id.* at 21-22, 88 S.Ct. 1868 (quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). Further, in determining whether an officer acted reasonably, "due weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27, 88 S.Ct. 1868. *See Ellis v. State,* 935 So.2d 29, 32 (Fla. 2nd DCA 2006).

> "[E]ven in *Terry* the conduct justifying the stop was ambiguous and susceptible of an innocent explanation." *Illinois v. Wardlow,* 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). *Terry* does not require absolute certainty nor does it require an officer to ignore facts that indicate an individual may be committing a crime simply because those facts do not rise to the level of probable cause to make an arrest. *Terry,* 392 U.S. at 21-22, 26, 88 S.Ct. 1868. Where the facts known to an officer suggest, but do not "necessarily" indicate ongoing criminal activity, an officer is entitled to detain an individual to resolve the ambiguity. *Wardlow,* 528 U.S. at 125, 120 S.Ct. 673.

Ellis, 935 So.2d at 33. The Florida Constitution and the United States Constitution do not forbid the application of common sense in the detection of crime and the apprehension of criminals. What they forbid is unreasonable searches and seizures. *State v. Nittolo,* 317 So.2d 748, 750 (Fla. 1975).

3. *Probable Cause to Search. Probable cause* is the minimum requirement for a lawful search. *U. S. v. Ortiz,* 422 U.S. 891, 896, 95 S.Ct. 2585, 2588 (1975).

> The United States Supreme Court has explained that the probable cause standard "depends on the totality of the circumstances." *Maryland v. Pringle,* 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). "Probable cause exists when 'there is a *fair probability* that contraband or evidence of a crime will be found in a particular place.' " *United States v. Grubbs,* 547 U.S. 90, 95, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006) (emphasis added) (quoting *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). "[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules." *Pringle,* 540

> U.S. at 370–71 (alteration in original) (quoting *Gates,* 462 U.S. at 232). Probable cause is a " 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Id.* at 370 (quoting *Gates,* 462 U.S. at 231).

Harris v. State, --- So3d ----, 2011 WL 1496470, 8 (Fla. 2011). "The burden is on the State to demonstrate that the police had probable cause to conduct a warrantless search. *See Doctor v. State,* 596 So.2d 442, 445 (Fla.1992); *see also Hilton v. State,* 961 So.2d 284, 296 (Fla.2007) ("When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was reasonable.")." *Harris,* 2011 WL 1496470 at 8.

The Present Case

In the present case, the trial court's factual findings are supported by competent, substantial evidence. We construe the evidence presented at hearing and the reasonable inferences from that evidence in a manner most favorable to upholding the trial court's ruling. Accordingly, we conclude that Officer Merritt's original approach and initial single question of the two men was a consensual encounter. He simply asked them what they were doing. Officer Merritt then turned his attention to questioning and searching Mr. Suddeth. When that was complete Officer Merritt had *probable cause* to believe Mr. Lewers had just passed marijuana to Mr. Suddeth and that Mr. Lewers had moments before possessed marijuana. This provided Officer Merritt with *probable cause* to search Mr. Lewers.[1]

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[1] *See State v. Hankerson,* --- So3d ----, 2011 WL 1496482 (Fla. April 21, 2011); *State v. Anderson,* 591 So2d 611, 612-613 (Fla. 1992); *State v. Walker,* 991 So2d 928, 930-931(Fla. 2nd DCA 2008); *Coney v. State,* 820 So2d 1012, 1013-1014 (Fla. 2nd DCA 2002); *Williams v. State,* 769 So2d 404, 406 (Fla. 2nd DCA 2000); *Burnette v. State,* 658 So2d 1170, 1171 (Fla. 2nd DCA 1995); for discussions of cases involving an observation by law enforcement of hand-to-hand transfers of unknown items and suspected narcotics violations of law.

Conclusion

Considering the totality of the circumstances, 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 17 day of May, 2011.

cc: Honorable Susan P. Bedinghaus
Frank D. L. Winstead, Esquire
Office of the State Attorney