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

CHRISTINA SALVATORE ALLEN

Appellant,

Appeal No. CRC 11-00048APANO
UCN 522011AP000048XXXXCR

vs.

STATE OF FLORIDA

Appellee.
_____/

Opinion filed January 23, 2012.

Appeal from an Order Denying
Motion to Suppress
entered by the Pinellas County Court
County Judge Dorothy L. Vaccaro

Marc N. Pelletier, Esquire
Attorney for Appellant

Courtney A. Tew, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Christina Salvatore Allen's appeal from an order of the Pinellas County Court denying her Motion to Suppress. After reviewing the briefs and record, this Court affirms the order of the trial court.

Factual Background and Trial Court Proceedings

Appellant, Christina Salvatore Allen, was charged by Uniform Traffic Citation with Driving Under the Influence of Alcoholic Beverages. Ms. Allen filed a Motion to Suppress. After hearing, the trial court denied the motion making the following factual findings and reaching the following conclusions of law:

> On April 27, 2010 at approximately 1:51 a.m. in Palm Harbor, FL, Deputy Diebold observed a vehicle pull into a parking lot and park in front of the Eagle Landing Restaurant. Deputy Diebold observed that no one exited the vehicle for approximately twenty minutes. At that time, Deputy Diebold made contact with the vehicle and upon approaching, observed a female, later identified as the Defendant, Christina Allen, sleeping in the front seat with the driver's seat reclined. The keys to the vehicle were in Defendant's lap and the Defendant was rubbing her stomach. Deputy Diebold knocked on the window and Defendant did not move. Deputy Diebold knocked again this time louder with his flashlight and, at that time, Defendant woke up, looked around, ignored him and went back to sleep. Deputy Diebold knocked again with his flashlight on the window and Defendant woke up again and opened the driver's door. Deputy Diebold asked if Defendant was okay. During the conversation with the Defendant, Deputy Diebold smelled a strong odor of alcohol coming from Defendant's breath and observed Defendant had bloodshot eyes and slurred speech. Upon making these observations, Deputy Diebold asked Defendant to step out of the vehicle. Based on the signs of impairment observed, Deputy Diebold then contacted another deputy who arrived on scene to conduct a DUI investigation.
>
> The Court finds that the investigatory stop was justified. No criminal activity was necessary to first make contact with the Defendant since this was nothing more than a citizen encounter. Once Deputy Diebold made contact with the Defendant, he developed concern for the well-being of the Defendant and suspected Defendant may be ill or impaired based on her behavior in the vehicle. When Deputy Diebold knocked on the door, this was not enough to show authority but was done in an effort to wake up the Defendant. Once Defendant woke up, she voluntarily opened the door of the vehicle. Deputy Diebold's concern for the Defendant's well-being is evident by the fact that the first thing he asked Defendant when she opened the door was if she was okay. After Defendant voluntarily opened the door, Deputy Diebold was provided with the reasonable suspicion necessary to ask Defendant to step out of the vehicle and conduct a DUI investigation. This is because upon Defendant opening the door, Deputy

> Diebold observed multiple signs of impairment, including the odor of alcohol, slurred speech and bloodshot eyes.

Ms. Allen entered a change of plea agreement reserving her right to appeal the trial court's denial of her Motion to Suppress. This appeal was timely filed.

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). The individual may, but is not required, to cooperate with the police at this stage. *Popple,* 626 So2d at 186; *Morrow v. State,* 848 So.2d 1290, 1292 (Fla. 2nd DCA 2003). 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). "The test for determining if someone has been seized is whether 'in view of all of the

circumstances surrounding the incident, a reasonable person would have believed that [she] was not free to leave [or terminate the encounter].'" *State v. Galicia*, 948 So.2d 983, 984 (Fla. 2nd DCA 2007).

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 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 man 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). "A determination that reasonable suspicion exists ... need not rule out the possibility of innocent conduct." *United States v. Arvizu,* 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

3. *Investigatory Stops & Lawfully Parked Vehicles.* "Legally parked cars do not give police officers a basis for detaining or searching persons therein. *Sites v. State*, 582 So.2d 813 (Fla. 4th DCA 1991)." *Alvarez v. State*, 695 So.2d 1263, 1263 -1264 (Fla. 2nd DCA 1997); *See State v. Baez,* 894 So.2d 115, 123 -125 (Fla. 2004). "It is well-settled that merely observing an individual in a legally parked car is insufficient to raise a well-founded suspicion of criminal activity sufficient to support a stop.FN6"

> FN6. First District: *State v. Holloman*, 824 So.2d 901 (Fla. 1st DCA 2002)(suppression order affirmed where officers ordered defendant out of legally parked car); *Harrelson v. State*, 662 So.2d 400 (Fla. 1st DCA 1995)(quashing affirmance of order denying suppression motion where trooper ordered defendant out of legally parked car); Second District: *Parsons v. State*, 825 So.2d 406 (Fla. 2d DCA 2002)(reversing denial of

suppression motion where police only observe legally parked car in parking lot at 1:40 a.m.); *Hrezo v. State*, 780 So.2d 194 (Fla. 2d DCA 2001)(reversing denial of suppression motion where police only observe car legally parked); *Shaw v. State*, 778 So.2d 389 (Fla. 2d DCA 2001)(same); *Brown v. State*, 744 So.2d 1149 (Fla. 2d DCA 1999)(same); *Danielewicz v. State*, 730 So.2d 363 (Fla. 2d DCA 1999)(reversing denial of suppression motion where police only observe car legally parked in parking lot at 1:30 a.m.); *Allen v. State*, 703 So.2d 1162 (Fla. 2d DCA 1997)(reversing denial of suppression motion where police only observe legally parked car in parking lot); *Alvarez v. State*, 695 So.2d 1263 (Fla. 2d DCA 1997) (reversing denial of suppression motion where police observe legally parked car in parking lot at 4:00 a.m.); *Horton v. State*, 660 So.2d 755 (Fla. 2d DCA 1995)(reversing denial of suppression motion where police only observe car legally parked); Fourth District: *Miranda v. State*, 816 So.2d 132 (Fla. 4th DCA 2002)(reversing denial of suppression motion where police observe legally parked car in parking lot at 5:00 a.m.); *Ippolito v. State*, 789 So.2d 423 (Fla. 4th DCA 2001)(reversing denial of suppression motion where police observe legally parked car at gas station at 3:00 a.m.); *Currens v. State*, 363 So.2d 1116 (Fla. 4th DCA 1978) (reversing denial of suppression motion where police observe legally parked car in parking lot at 1:40 a.m.); Fifth District: *Young v. State*, 803 So.2d 880 (Fla. 5th DCA 2002)(reversing denial of suppression motion where police only observe car drive into parking lot and legally park at 12:25 a.m.); *Baker v. State*, 754 So.2d 154 (Fla. 5th DCA 2000)(reversing denial of suppression motion because police only observe legally parked van at 3:00 a.m.); *Bowen v. State*, 685 So.2d 942 (Fla. 5th DCA 1996) (reversing denial of suppression motion where police observe legally parked car in parking lot at 1:20 a.m.). Compare *Mendez v. State*, 678 So.2d 388 (Fla. 4th DCA 1996)(affirming denial of suppression motion where car was observed illegally stopped in middle of street); *J.E. v. State*, 731 So.2d 788 (Fla. 5th DCA 1999)(affirming denial of suppression motion where car observed in park closed to cars without boats); *State v. Roux*, 702 So.2d 240 (Fla. 5th DCA 1997)(reversing suppression because, although police could not detain defendant based solely on observing defendant in legally parked car, defendant exited vehicle and committed battery on a law enforcement officer).

State v. Taylor, 826 So.2d 399, 403 -404 (Fla. 3rd DCA 2002).

The Present Case

In the present case, the trial court's factual findings that when the deputy "knocked on the [car] door, this was not enough to show authority but was done in an effort to wake up [Ms. Allen]" and that she voluntarily opened the door of the vehicle

were supported by competent, substantial evidence. The deputy's initial contact with Ms. Allen was a consensual encounter. Nothing done by the deputy prior to Ms. Allen voluntarily opening the car door was sufficient to transform the consensual encounter into an investigatory stop.

> *See, e.g., State v. Baez,* 894 So.2d 115, 115–17 (Fla.2004) (officer engaged in consensual encounter where he came upon defendant's vehicle, used flashlight to look inside, saw defendant slumped over, and knocked on window with flashlight to awaken defendant, who then voluntarily got out of vehicle before officer asked for identification); *Blake v. State,* 939 So.2d 192, 196–97 (Fla. 5th DCA 2006) (nothing more than consensual encounter occurred when officer illuminated his spotlight to see individuals sitting in vehicle and defendant subsequently exited vehicle); *State v. Wimbush,* 668 So.2d 280, 281–82 (Fla. 2d DCA 1996) (encounter was consensual where officer illuminated car's interior with spotlight and asked driver for identification); *State v. Hughes,* 562 So.2d 795, 797–98 (Fla. 1st DCA 1990) (officers approaching defendant's parked vehicle and shining flashlight inside was not functional equivalent of a stop).

State v. Goodwin, 36 So.3d 925, 927 (Fla. 4th DCA 2010); *see also State v. Galicia,* 948 So2d 983, 984 (Fla. 2nd DCA 2007). Once Ms. Allen opened the car door the deputy observed multiple signs of impairment, including the odor of alcohol, slurred speech and bloodshot eyes. These observations provided reasonable suspicion sufficient to justify an investigatory stop. *See State v. Jimoh,* 67 So3d 240, (Fla. 2nd DCA 2010), (motion for rehearing en banc denied on January 21, 2011).

Conclusion

The order of the trial court denying Ms. Allen'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 23 day of January, 2012.

Original order entered on January 23, 2012 by Circuit Judges Raymond O. Gross, L. Keith Meyer, Jr., and R. Timothy Peters.

cc: Honorable Dorothy L. Vaccaro
Office of the State Attorney
Marc N. Pelletier, Esquire