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

NICK WILLIAM DOVELLAS

Appellant,

Appeal No. CRC 12-00040APANO
UCN 522012AP000040XXXXCR

vs.

STATE OF FLORIDA

Appellee.
_____/

Opinion filed April 18, 2013.

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

Lynda B. Barack, Esquire
Attorney for Appellant

Jayson A. Alfonso, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PER CURIAM.

THIS MATTER is before the Court on Appellant, Nick William Dovellas' appeal from an order of the Pinellas County Court denying his Motion to Suppress. The Appellant pleaded no contest to Possession of Marijuana and to Possession of

Paraphernalia but reserved the right to appeal the denial of his motion to suppress. This Court reverses the order of the trial court.

Background

Appellant was a visitor at a residence at approximately 1:00 a.m. on March 11, 2011 when deputies arrived in response to an unrelated domestic disturbance complaint. The owner of the home wanted everyone to leave. Deputy Richard Trump of the Pinellas County Sheriff's Office advised Mr. Dovellas that he would have to leave. The individual that brought Appellant to the residence had been arrested; the Appellant had no transportation. At the hearing on the Motion to Suppress Deputy Trump testified generally that he discussed with Appellant his need to have friends, family, a taxi or somebody come get him and take him home. Appellant's father was called but was unsure of the location of the residence and it was agreed that Mr. Dovellas would meet his father at a service station on U.S. Highway 19 which was "about a mile, mile and a half" away. Deputy Trump offered to drive Appellant to the service station in his sheriff's cruiser but only if a pat-down was done on Mr. Dovellas before he got in the vehicle. Mr. Dovellas "[a]t first he immediately became argumentative saying that he didn't wish to be searched." The deputy testified:

> I explained to him again, I said, "The only reason that I'm doing a pat down is because I'm putting you in the back of my car behind me, and for my safety I want to make sure you don't have any weapons or illegal items on you that are going to get dumped in my car and I don't want to get shot in the back of the head."
>
> "If you'd rather walk, you're welcome to walk." I said, "The Mobil station's that way," I said, "or I'll give you a ride. It's up to you."

There followed more discussion with Mr. Dovellas. The deputy further testified:

> I asked him do you want a ride or not? This is your last chance because otherwise I'm going to leave. And he said he wanted a ride. Well, then it

> went back into the discussion of before I put you in the car, just like if I put you in my car or even the judge, you know, I'm going to pat you down and make sure you don't have any weapons or anything before I put you behind my cage.

The entire exchange lasted "[p]robably a minute or so, if that." Appellant agreed and the pat-down was performed. Deputy Trump performed the pat-down; in that process he felt "a little something in [Appellant's] pocket on the right pocket," the deputy then lifted Mr. Dovellas' shirt and saw "a plastic Baggie hanging out of the front pockets of his pants." The deputy removed the baggie form the pocket. At that point Mr. Dovellas "acknowledged with damn." The deputy "asked [Appellant] then what it was and [Appellant] said it was marijuana." The deputy could not see the contents of the plastic baggie and did not smell any odor coming from the baggie. Mr. Dovellas was driven to his father's location, given a Notice to Appear and released.

In contrast to the deputy's testimony, Mr. Dovellas then testified generally that he attempted to walk away, that the deputies stopped him from leaving claiming that he needed to proceed with them to meet his father and finally coerced him to submit to the pat-down.

In his Motion to Suppress Mr. Dovellas asserted there was no lawful basis for a pat-down and any evidence seized should be suppressed. After evidentiary hearing, the trial court denied the motion in a detailed written order making extensive factual findings. Mr. Dovellas entered a change of plea agreement reserving his right to appeal.

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. 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).

> "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). 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).

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). A request that a person remove his hands from his pockets, when made to ensure an

officer's safety, does not elevate a consensual encounter into a detention. *State v. Woodard,* 681 So.2d 733, 735 (Fla. 2d DCA 1996); *Lang v. State,* 671 So.2d 292, 294 (Fla. 5th DCA 1996); *Sander v. State,* 595 So.2d 1099, 1100 (Fla. 2d DCA 1992). *Contra R.J.C. v. State*, 84 So.3d 1250, 1255 -1256 (Fla. 4th DCA 2012); *Harrison v. State,* 627 So.2d 583 (Fla. 5th DCA 1993); *Canion v. State,* 550 So.2d 562 (Fla. 4th DCA 1989); *Evans v. State,* 546 So.2d 1125 (Fla. 3d DCA 1989).

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).

Consent Searches

"[A] search pursuant to consent," if "properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity. But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Luna-Martinez v. State*, 984 So.2d 592, 597 (Fla. 2nd DCA 2008). [T]he voluntariness of a consent to search depends on whether-given the totality of relevant circumstances-"a reasonable person would understand that he or she [was] free to refuse" consent. (citation omitted). A defendant's consent will be considered

involuntary only if "in the totality of the circumstances, [the defendant's] consent was not his own 'essentially free and unconstrained choice' because his 'will ha(d) been overborne and his capacity for self-determination critically impaired.' " *Luna-Martinez,* 984 So.2d at 598.

> To determine the voluntariness of consent, we consider the totality of the circumstances. *Kutzorik v. State,* 891 So.2d 645, 647 (Fla. 2d DCA 2005). Three factors inform this analysis: "(1) the time and place of the encounter[,] (2) the number of [deputies] present[,] and (3) the [deputies'] words and actions." *Id.; see also Miller v. State,* 865 So.2d 584, 587 (Fla. 5th DCA 2004). We analyze these factors "from the perspective of a reasonable person, untrained in the law, deciding whether he or she is free to end the encounter."

Hardin v. State, 18 So.3d 1246, 1248 (Fla. 2nd DCA 2009). Where the police have not engaged in illegal conduct, the State bears the burden of showing the voluntariness of a consent to search by a preponderance of the evidence. *Reynolds v. State,* 592 So.2d 1082, 1086 (Fla.1992).

The Scope of a Consent Search

The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect? *Florida vs. Jimeno*, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991); *Davis vs. State*, 594 So2d 264 (Fla. 1992). When given a general consent to search one's person, a police officer may indeed seize objects found in that person's pocket, and if they consist of closed containers, the officer may open them. *Allen v. State*, 909 So.2d 435, 438 (Fla. 5th DCA 2005). However, if the consent was given, not to discover evidence of crime, but to perform a pat-down for officer safety then the scope of the search is more limited. Any container revealed in that search that is not a weapon cannot be opened. *See Crawford v. State,* 980

So.2d 521, 523 (Fla. 2nd DCA 2007). When relying upon consent to justify a search, law enforcement has "no more authority than that reasonably conferred by the terms of the consent." *State v. Wells,* 539 So.2d 464, 467 (Fla.1989); *Alamo v. State*, 891 So2d 1059 (Fla. 2nd DCA 2004).

The Present Case

The repeated, stated purpose of the pat-down in the present case was not to discover evidence of a crime, but for officer safety. As such, the lawful scope of that search was limited. When the deputy felt "a little something in [Appellant's] pocket" there is nothing in the record that suggests there was any thought it was a weapon or a threat to officer safety. Therefore the limited scope of the pat-down did not permit the deputy to lift Mr. Dovellas' shirt or to investigate the contents of the baggie. *See Crawford,* 980 So.2d at 523.

Conclusion

The order of the trial court denying Mr. Dovellas' Motion to Suppress should be reversed.

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

ANDREWS, Judge and GROSS, Judge. Concur

PETERS, Judge, Dissenting.

Respectfully, I dissent.

The record reflects the primary and most repeated, stated purpose of the pat-down was for officer safety. However, the deputy, at least once, testified that he told Mr. Dovellas "I'm putting you in the back of my car behind me, and for my safety I want to make sure you don't have any weapons *or illegal items on you that are going to get*

dumped in my car." (emphasis added). The trial court order denying the motion to suppress contained no specific factual finding about that testimony but did find the testimony of the deputy to be credible. The issue suggested by this record is whether the deputy's nominal mention of anything illegal that might get dumped in the cruiser was enough to reasonably expand the scope of a consensual pat-down for officer safety. I believe it was and that the search conducted in this case did not exceed the authority reasonably conferred by Mr. Dovellas' consent. Moreover, the trial court's legal conclusion that Mr. Dovellas freely and voluntarily consented to the search of his person was supported by competent, substantial evidence. I would affirm.

ORDERED at Clearwater, Florida this 18th day of April, 2013.

Original order entered on April 18, 2013, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Dorothy L. Vaccaro
Lynda B. Barack, Esquire
Office of the State Attorney