

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY, FLORIDA
APPELLATE DIVISION**

MICHAEL MIDDLEBROOKS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

UCN: 512016CF004254A000WS
Appeal No: CRC16004254CFAWS
Lower No: 15-8445-WJZT-WS

_____/_____
On appeal from Pasco County Court,
Honorable Debra Roberts,

Brooke Elvington, Esq.,
for Appellant,

Office of the State Attorney,
for Appellee.

ORDER AND OPINION

Appellant properly reserved his right to appeal the lower court's ruling on his motion to suppress. However, the trial court did not err in denying Appellant's motion, finding that the evidence was obtained pursuant to a consensual encounter. The trial court is therefore affirmed.

STATEMENT OF THE CASE AND FACTS

Appellant was charged with driving with a suspended license in violation of § 322.34(2) Fla. Stat. Appellant filed a motion to suppress, arguing that all evidence seized was the result of an unlawful stop. The trial court issued an order denying Appellant's motion. Appellant was then permitted to change his plea to no contest in exchange for a withhold of adjudication and six months' probation. Appellant's plea agreement indicated that he was reserving his right to appeal.

On July 9th, 2015, shortly after midnight, Deputy Hans Bollenbacher was driving on a two-lane residential road behind Appellant's car. Deputy Bollenbacher observed Appellant and a female passenger through the rear window of the vehicle. The deputy testified that Appellant and the female passenger were visibly arguing. Subsequently,

Appellant slowed the vehicle to a “rolling stop” and the female passenger exited the moving vehicle, and rushed to the rear of the car. Deputy Bollenbacher activated his emergency lights and initiated contact with the passenger. Deputy Bollenbacher testified that he was concerned about potential domestic abuse. The deputy further testified that after speaking with the female passenger, his concerns of physical violence were dispelled, but he remained concerned that there was a domestic dispute in progress. Deputy Bollenbacher then checked the identification of both the female passenger and Appellant to determine if there were any active injunctions or warrants for either person. Through this search, Deputy Bollenbacher learned that Appellant’s license was suspended in 2013, and thus cited Appellant for driving with a suspended license.

The trial court denied Appellant’s motion to suppress, finding that Appellant voluntarily stopped his vehicle. Further, the court found that the contact with the deputy was a consensual encounter. Appellant sought timely review in this Court. For the reasons below, we affirm the trial court’s decision.

STANDARD OF REVIEW

Under Florida Rule of Appellate Procedure 9.140(b)(2)(A)(i), a defendant may not appeal from a guilty or nolo contendere plea unless the defendant expressly reserves the right to appeal a “dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.” See Fla. R. App. P. 9.140(b)(2)(A)(i); *T.A.R. v. State*, 2 So. 3d 993, 993 (Fla. 2d DCA 2008).

“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). There is a presumption of correctness to the trial court’s rulings on motions to suppress. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). The appellate court should review the trial court’s application of the law to the facts of the case pursuant to a de novo standard. See *Ornelas v. U.S.*, 517 U.S. 690, 698 (1996). Findings of fact by the trial court are reviewed subject to the substantial competent evidence standard, and are accepted by the appellate court unless they are “clearly erroneous.” *Id.*

LAW AND ANALYSIS

First, we address the issue of whether Appellant properly reserved his right to appeal the trial court’s order.. Where the record can be construed to suggest that the trial

court gave tacit approval as to the appealability of a motion, courts have given appellants the benefit of any uncertainty, and have proceeded to discuss the merits of the cases. *England v. State*, 46 So. 3d 127, 129 (Fla. 2d DCA 2010). Appellant emphasizes that the plea form indicates on its face that Appellant was entering the plea subject to his right to appeal the denial of the suppression motion. Further, the trial court explicitly asked Appellant whether he was reserving his right to appeal the denial of the motion prior to accepting Appellant's plea and imposing a sentence. Appellant responded in the affirmative. Appellant argues that the trial court gave tacit approval with regards to the appealability of the motion to suppress. We agree, and as such, the Court should hear the issue on its merits.

The Court finds that Deputy Bollenbacher acted pursuant to a consensual encounter, and thus, was authorized to conduct a warrant check. Police officers may conduct welfare checks and such checks are considered consensual encounters. *Dermio v. State*, 112 So. 3d 551, 555 (Fla. 2d DCA 2013). During these encounters, Florida courts have held that a law enforcement officer can request identification to run routine warrants, and active injunction checks, and that such questioning does not elevate these encounters into an investigatory stop subject to Fourth Amendment protections. *State v. Baez*, 894 So. 2d 115, 117 (Fla. 2004). In *Baez*, the court found that it was not unreasonable for an officer to proceed with an identification check where a stop was conducted pursuant to a consensual encounter. *Id.* The court held that the officer had not yet eliminated reasonable concern and justified articulable suspicion of criminal conduct. *Id.* In the present case, the deputy testified that he made contact with the passengers because he was concerned for their welfare and safety. After he witnessed the female passenger leave the moving vehicle, he initiated his emergency lights and made contact with the occupants. The deputy testified that after speaking to the female passenger, he remained concerned that there was a domestic dispute in progress. Contrary to Appellant's argument, the deputy's safety concerns were not dismissed.

Appellant argues that Deputy Bollenbacher conducted an investigatory stop on Appellant's vehicle when he activated his emergency lights, but this fact is not dispositive. The use of emergency lights can convert a consensual encounter into an investigatory stop, however, the activation of emergency lights is not a *per se* seizure under the Fourth

Amendment. Rather, activation of emergency lights is “*one important factor*” to be considered in a totality-based analysis as to whether a seizure has occurred. *G.M. v. State*, 19 So. 3d 973, 979 (Fla. 2009). The Court must view the totality of the circumstances surrounding Deputy Bollenbacher’s encounter with Appellant to determine if the activation of the lights elevated the encounter to an investigatory stop. Here, Deputy Bollenbacher activated his lights in response to a person jumping out of a moving vehicle that ultimately stopped in the middle of a road. A reasonable person could infer that the deputy’s actions were in response to a safety concern. The totality of the circumstances gives credence to the trial court’s conclusion that Deputy Bollenbacher conducted a valid welfare check. The conduct of the passengers did not dispel Deputy Bollenbacher’s safety concerns, and the deputy was authorized to conduct a warrant check pursuant to such an encounter. The trial court’s findings of fact are not clearly erroneous.

CONCLUSION

The trial court did not err in denying Appellant’s motion to suppress evidence. The order of the trial court is affirmed.

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

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida on this ____ day of _____, 2017.

Original Order entered on January 11, 2017, by Circuit Judges Kimberly Campbell, Linda Babb and Susan Barthle.

Copies to:

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Office of the State Attorney

Honorable Debra Roberts