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 PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

SCOTT MICHAEL FOSTER,
Appellee.
_____/

UCN: 512019AP000048APAXWS
Case No.: 19-AP-48
Lower No.: 18-MM-6776

On appeal from Pasco County Court,
Honorable Joseph Poblick

Justin L. Homburg,
Assistant State Attorney,
for Appellant.

Steve Bartlett, Esq.,
The Law Office of Steve Bartlett, P.A.,
for Appellee.

ORDER AND OPINION

Because Appellant did not argue before the trial court that law enforcement had a reasonable suspicion to stop Appellee for either neglect of a child or Driving Under the Influence, those issues are not preserved for appellate review. Because the law enforcement officer that conducted the stop did not testify to facts supporting a finding that he stopped Appellant for a welfare check, the trial court's order granting Appellee's motion to suppress is affirmed.

STATEMENT OF THE CASE AND FACTS

Appellee was charged by Information with Driving Under the Influence (DUI) and Refusal to Submit to Testing. He moved to suppress all statements and evidence obtained from what he alleged was an illegal traffic stop. The motion asserted that after the stop, law enforcement conducted a DUI investigation after which Appellee was

arrested. Appellee's motion argued that law enforcement did not have a reasonable suspicion that a crime had occurred and therefore the stop was illegal.

At the motion hearing, Appellee's ex-wife, Rachel Foster, testified that during a phone conversation, their then-nine-year-old son told her that Appellee had picked him up from school but that later he could not wake up Appellee. As a result of this phone call, Ms. Foster drove to Appellee's house. She testified that their son sounded nervous on the phone and looked relieved when she arrived. She testified that their son had told her on previous occasions that he had seen Appellee drinking and later "falling asleep" and had been unresponsive and not able to be awoken. She testified that their son told her that had occurred on the night in question, as well. She testified that she met law enforcement eight houses down from Appellee's house and that that was also where law enforcement stopped Appellee's vehicle. On cross-examination, she testified that their son never said that he smelled alcohol on Appellee. She testified that he told her he was hungry because it was dinner time but that he was not malnourished or neglected or anything like that. At this point, Appellant rested.

Appellee's presentation of evidence consisted solely of playing the officer's body-worn camera video of his interviews of Ms. Foster and the son, and the stop and conversation with Appellee. In the video, Ms. Foster stated that her son had called to tell her that Appellee was passed out and she drove to Appellee's house to pick up their son. She stated that if their son had not called her, she would not have known that Appellee was not going to pick up their daughter from gymnastics at 8:00 p.m. She stated that when she arrived, the son's eyes were swollen and teary and he said things like "I'm so worried" and "I'm so hungry. Daddy hasn't fed me yet. I mean, he's passed out." She told the officer that she had picked up the daughter from school at 4:20 to take her to gymnastics and Appellee had picked the son up from school around 5:30. She stated that she assumed Appellee was still passed out in the house but did not actually see him because the son was waiting for her outside the house when she arrived.

In the video, the son stated that Appellee picked him up around 5:30 or 5:45 but had not yet fed him. He stated that Appellee usually fed him after picking him up "when he's not drunk or anything." He stated that Appellee had "just been acting very strange" and just fell asleep for a long time. He stated that he knew his sister needed to be picked

up at 8:00 p.m. and, starting at 7:15 p.m., kept trying to wake Appellee up for that purpose but he just kept falling asleep. He stated he was worried about his sister being left at gymnastics so he called his mother, Ms. Foster. He stated that at some point, Appellee woke up to answer a phone call from an Aunt Heather but then fell back asleep for another 25 minutes. The son did not say how long Appellee was asleep in total.

The son stated that he did not see Appellee drinking but that his sister told him that she saw him drinking a liquor bottle in the bathroom. In response to the officer's question regarding whether he can make himself a meal, the son stated that he can make cereal and nothing else. He stated that Appellee had been drinking and passing out "for, like a month. Or, like, a couple of weeks it will be good and then he'll just drink and get mad." He stated that when Appellee has not been drinking, Appellee can be woken up after falling asleep. The son stated that he has not personally observed Appellee drinking but he has seen a lot of liquor bottles.

At around 8:15 p.m., Appellee left his house in his vehicle. Appellee was alone in the vehicle. At that time there was no concern for the son because the son was with his mother. The vehicle was stopped by law enforcement. Appellee told the officer that his son was at home and he was leaving to pick up his daughter at 9:00 p.m. Appellee then changed his explanation, telling the officer he was leaving to go look for his son, not picking up his daughter. He stated that he and the son were watching NFL Live at 7:30 p.m. but that he fell asleep for about an hour and 15 minutes. The officer pointed out that an hour and 15 minutes would be 8:45 but that the current time was 8:15. At that point, the video ended.

Appellant first argued that the motion should be denied because Appellee "has cited to no law, no authority, nothing that would give [the trial court] jurisdiction to grant this motion. There are general legal principles discussed in the motion, but there's been no presentation of any legal authority."

As to the merits of the motion itself, Appellant argued that law enforcement had reasonable suspicion that a crime had occurred or was occurring. Appellant argued that law enforcement stopped Appellee based upon reasonable suspicion of child abuse and that the DUI investigation did not begin until after the stop. Appellant argued that the video was sufficient to show that based upon Ms. Foster and the son's statements, in

conjunction with their recitation of Appellee's history of drinking and passing out while watching the son, law enforcement had a reasonable suspicion of child abuse to warrant the traffic stop. In support, Appellant cited to *State v. Flowers*, 566 So. 2d 50 (Fla. 2d DCA 1990); *Doe v. State*, 973 So. 2d 682 (Fla. 4th DCA 2008).

The trial court asked what evidence there was actually establishing that Appellee was intoxicated. Appellant cited to *State v. Evans*, 692 So. 2d 216 (Fla. 4th DCA 1997), a case where a McDonald's employee told law enforcement that a drive-thru customer was drunk. Appellant argued that the court in that case held that because the informant was a known employee and not an anonymous tipster, it was reliable and provided reasonable suspicion for a DUI traffic stop. Appellant argued that likewise, in this case, the son was a reliable informant regarding child abuse resulting from Appellee's drinking and therefore law enforcement had a reasonable suspicion to stop Appellee.

Finally, again citing to *Evans*, Appellant argued that the son's testimony that Appellee could not be awoken combined with the officer observing Appellee getting into his vehicle created a legitimate concern for the safety of the motoring public warranting a brief investigatory stop to determine whether Appellee was ill, tired, or driving under the influence. Appellant argued that appellate courts had upheld welfare check stops in situations that were less suspicious than were usually required for other types of criminal behavior.

Appellee argued that Appellant could not establish what law enforcement's basis was for stopping Appellee because the officer in question did not testify. Thus, Appellee continued, there was no testimony explaining what facts established a reasonable suspicion that a crime was being committed or whether the officer felt he even had a reasonable suspicion.

Appellee argued that even if the stop was for child abuse, the facts did not give rise to a reasonable suspicion. Appellee argued that the son testified that he did not see Appellee drinking and the son did not state that he had smelled any alcohol on Appellee's breath. The son did not say that Appellee was driving erratically after picking him up from school. The only testimony of what occurred that night was that Appellee fell asleep and the son could not wake him. This, Appellee continued, was not reasonable suspicion of child abuse.

On rebuttal, Appellant stated that "the son told the officer that his father was acting funny were his words, and so there was testimony that he was behaving oddly" and that he was already a half an hour late picking up his daughter, that he was looking for his son, and that the son said Appellee was acting "funny." Appellant argued that "there was more than enough for the officer to stop him at that time."

The trial court granted the motion to suppress. Appellant timely-appealed.

STANDARD OF REVIEW

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). The appellate court reviews the trial court's application of the law to the facts of the case pursuant to *a de novo* standard. *Id.*; *Ornelas v. U.S.*, 517 U.S. 690, 698 (1996); *State v. Petion*, 992 So. 2d 889, 894 (Fla. 2d DCA 2008). A trial court's ruling on a motion to suppress comes to the appellate court "clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *See Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002). The reviewing court is bound by the trial court's factual findings if they are supported by competent, substantial evidence. *Id*.

LAW AND ANALYSIS

On appeal, Appellant argues that the trial court erred by granting Appellee's motion to suppress because law enforcement had three bases for conducting a traffic stop: (1) reasonable suspicion of neglect of a child, (2) reasonable suspicion of DUI, and (3) facts supporting a welfare check. None of these arguments warrant reversal.

1. Neglect of a Child

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the *specific legal argument* or ground to be argued on appeal or review must be part of that presentation if it to be considered preserved." *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) (emphasis added). Put another way: "Except in the case of fundamental error, appellate courts will not consider an issue that has not been presented to the lower court in a manner that specifically addresses the contentions asserted." *State v. Hunton*, 699 So. 2d 320, 321 (Fla. 2d DCA 1997) (quoting

Nevels v. State, 685 So. 2d 856, 857 (Fla. 2d DCA 1997)). This also applies to a state appeal from an order granting a motion to suppress. *See Hunton*, 699 So. 2d at 321.

While the precise wording of the argument before the trial court does not need to be identical to the initial brief, the specific legal error does need to be generally the same. *See Doherty v. State*, 640 So. 2d 1220, 1221 (Fla. 5th DCA 1994) ("the legal basis for the argument at the trial court level must be generally the same as the legal basis for the claim of error at the appellate level"); *Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005) (holding that the defendant's argument before the trial court that he was provided misleading or confusing information regarding his *Miranda* rights was not sufficient to preserve for appellate review the argument that he was not advised of his *Miranda* right to have an attorney present during questioning).

Appellant argued before the trial court that law enforcement had a reasonable suspicion to stop Appellee to investigate child abuse. However, Appellant argued for the first time before this Court in the initial brief that law enforcement had a reasonable suspicion to stop Appellee to investigate neglect of a child. While they are found within the same statutory section, child abuse and neglect of a child are two separate offenses with their own distinct elements.

Child abuse describes intentional or affirmative actions taken against a child. *See* § 827.03(1)(b), Fla. Stat. (2017) (defining child abuse as "1. Intentional infliction of physical or mental injury upon a child; 2. An intentional act that could reasonably be expected to result in physical or mental injury to a child; or 3. Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child").

In contrast, neglect of a child describes omissions or failures to act. *See* §827.03(1)(e), Fla. Stat. (2017) (defining neglect of a child as "1. A caregiver's failure or omission to provide a child with care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or 2. A caregiver's failure to make a reasonable effort to protect the child from abuse, neglect, or exploitation by another person").

Because Appellant did not argue before the trial court that law enforcement had a reasonable suspicion to stop Appellee to investigate neglect of a child, the issue was not preserved for appellate review. It cannot be raised for the first time on appeal.

2. Driving Under the Influence

A similar problem precludes Appellant's DUI argument. Appellant did not argue before the trial court that law enforcement had a reasonable suspicion to stop Appellee for DUI. To the contrary, Appellant specifically argued to the trial court that law enforcement did not stop Appellee for DUI and that the DUI investigation did not begin until after the stop. *See Hearing Tr. pp. 43-44*. Therefore, this argument was not preserved for appellate review.

3. Welfare Check

Appellant argues that the law enforcement officer had sufficient grounds to stop Appellee for a welfare check. While properly raised before the trial court, this argument does not warrant reversal.

Generally, a welfare check is a consensual encounter and not an investigatory stop. Therefore, it does not violate the Fourth Amendment of the United States Constitution because it is not a seizure. *Dermio v. State*, 112 So. 3d 551, 556 (Fla. 2d DCA 2013). In *Dermio*, the defendant was passed out in a parked car with the engine running. The law enforcement officer, concerned for the defendant's safety, approached the vehicle to check on the defendant's welfare. While the Second District Court of Appeal recognized that the law enforcement officer testified that she conducted a stop of an "investigatory" nature, the Second District held that this was not determinative because the officer "clearly testified that based on the time, location, Dermio's appearance, the fact that the car motor was running, and the fact the lights were on, she was concerned for Dermio's safety." *Id*. And while the officer's car blocked the defendant's vehicle, there was no seizure because the defendant was asleep and thus not aware that the officer had pulled up behind him. *Id*.

In the case below, however, there was a seizure because the law enforcement officer stopped Appellee's vehicle. Additionally, the law enforcement officer did not testify during the hearing to the facts and considerations that lead him to stop Appellee. Thus,

there was no testimony that the law enforcement officer was concerned for Appellee's safety or was checking on his welfare.

CONCLUSION

Because there was no law enforcement testimony supporting a welfare check, the trial court did not err by granting Appellee's motion to suppress. Appellant's remaining arguments were not preserved below and therefore may not be raised for the first time on appeal. Accordingly, the trial court's order granting Appellee's motion to suppress is affirmed.

It is therefore 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 this ___ day of _____, 2020.

Original Order entered on August 31, 2020, by Circuit Judges Shawn Crane, Susan G. Barthle, and Kimberly Sharpe Byrd.

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