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

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT COURT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

THADDEUS CIESLAK

Appellant,

v.

Appeal No. CRC 11-00035 APANO
UCN ~~522010CT012931XXXXXX~~

STATE OF FLORIDA

Appellee.
_____/

522011AP000035XXXXCR

Opinion filed April 12, 2012.

Appeal from an order and judgment entered
by the Pinellas County Court
County Court Judge Lorraine M. Kelly

Stephen Higgins, Esquire
Attorney for Appellant

Benjamin J. Kanoski, Esquire
Assistant State Attorney
Attorney for Appellee

ORDER AND OPINION

PER CURIAM.

THIS MATTER is before the Court on the defendant Thaddeus Cieslak's appeal from a decision of the Pinellas County Court denying his Motion to Suppress and his subsequent conviction for DUI. After reviewing the briefs and record, this Court finds the lower court erred in denying the Motion to Suppress and thus reverses the judgment and sentence.

Brief Facts

A sheriff's deputy was on routine patrol on February 9th, 2010, at approximately 4:00 A.M. when she saw Appellant apparently asleep behind the wheel of a running vehicle. The deputy had no knowledge of any criminal activity at this point. The deputy parked behind the vehicle and turned the spotlight on, but never activated the pursuit lights or a siren. She then exited her vehicle to check on the person in the car. She knocked on the window until Appellant awoke. Then, the deputy identified herself as a law enforcement officer and gestured with her finger in a downward motion for Appellant to roll down his window. When Appellant complied and began conversing with her, the deputy noted the smell of alcohol on Appellant's breath. The deputy conducted a DUI investigation and issued Appellant a Uniform Traffic Citation and arrested him. Appellant filed a motion to suppress evidence obtained from the stop, claiming it resulted from an unlawful search and seizure. The trial court denied that motion finding that there was a consensual encounter until the deputy developed grounds for a DUI investigation. Appellant was then convicted of DUI by a jury. Appellant is seeking reversal of the trial court's decision and his subsequent conviction.

Standard of Review

The standard of review for motions to suppress is that the appellate court affords a presumption of correctness to a trial court's findings of fact but reviews de novo the mixed questions of law and fact that arise in the application of the historical facts to the protections of the Fourth Amendment. *Wyche v. State*, 987 So. 2d 23, 25 (Fla. 2008)(citing *Fitzpatrick v. State,* 900 So.2d 495, 510 (Fla.2005)).

Reasoning

The Florida Supreme Court has defined three levels of police-citizen encounters. *Popple v. State*, 626 So.2d 185, 186 (Fla. 1993). The first level is a consensual encounter and involves only minimal police contact. *Id.* A citizen may voluntarily comply with a police officer's requests or choose to ignore them during such an encounter. *Id.* Constitutional safeguards are not invoked because the citizen is free to leave. *Id.* The next level of police-citizen encounters is "an investigatory stop." See *Terry v. Ohio*, 392 U.S. 1 (1968). A "well-founded, articulable suspicion of criminal activity" is required for a law enforcement officer to lawfully perform an investigatory stop. *Popple*, 626 So.2d at 186. Mere suspicion is not enough. *Id.* The third level of police-citizen encounters is an arrest, which must be supported by probable cause that a crime has been or is being committed. *Id.* A consensual encounter becomes an investigatory stop and Fourth Amendment protection is triggered at the point where a citizen who is approached by an officer reasonably believes that he or she is no longer free to leave. *Florida v. Royer*, 460 U.S. 491, 514 (1983).

A person is seized if, under the circumstances, a reasonable person would conclude that he or she is not free to end the encounter and depart. Even when an officer makes only a request, it can still constitute a seizure as a show of authority because it restrains a person's freedom of movement if a reasonable person, under the circumstances, would believe that he or she *should* comply. *Popple*, 626 So. 2d at 188. There would be no difference in outcome if the statement or action by the officer were a request or an order. *Id.* In *Popple*, a deputy investigating an abandoned stolen car saw Mr. Popple sitting in a car parked on the side of the road about four blocks away. *Id.* at 186. The deputy decided to inquire whether Popple knew anything about the stolen car or if he was having car trouble. *Id.* The deputy parked his cruiser behind Popple and

after observing Mr. Popple acting in a nervous manner, the deputy asked Mr. Popple to exit his vehicle to insure the deputy's own safety. *Id.* When Popple exited, the deputy saw a cocaine pipe in plain view. *Id.* He arrested Popple and seized eight cocaine rocks discovered in the search incident to the arrest. In our case, as in *Popple*, the judge did not find that the deputy had any reasonable suspicion of criminal activity. R. 60 - 61. However, it is well established that an officer does not need a well-founded suspicion to approach an individual to ask questions. *Popple,* 626 So. 2d at 187 (Fla. 1993) (citing *Florida v. Royer*, 460 U.S. 491(1983)). Finally, *Popple* held that whether characterized as a request or an order, the deputy's direction for Mr. Popple to exit his vehicle constituted a show of authority that restrained his freedom of movement because a reasonable person under the circumstances would believe that compliance was required. *Popple*, 626 So. 2d at 188. Following *Popple*, if the deputy's direction for Appellant to roll down his window constituted a show of authority which restrained his freedom of movement, then it is a seizure without articulable suspicion even if the initial encounter was consensual.

Whether a person had a reasonable belief that he was free to leave is judged by the totality of the circumstances. *U.S. v. Mendenhall*, 446 U.S. 544 (1980). . Further, to establish that there was a show of authority to restrict Appellant's freedom to leave, it must be shown that Appellant actually submitted. *Hollinger v. State*, 620 So. 2d 1242, 1243 (Fla. 1993). A separate appeals panel in this circuit affirmed denial of a motion to suppress in very similar circumstances to this case with one crucial difference. *Allen v. State*, No. 11-00048APANO (Fla. 6th Cir. App. Ct. January 23, 2012). In that case, the defendant was asleep behind the wheel of her car in a legally parked space when an officer approached, knocked on the window, and the defendant eventually woke up. *Id.* Most importantly, once awake, the defendant *voluntarily* opened her car

door, after which law enforcement smelled a strong odor of alcohol and commenced a stop. *Id.* The defendant's voluntary action was not in response to any show of authority or perceived order. *Id.*

However, this Court finds the case at bar similar to *Danielewicz v. State.* 730 So. 2d 363, 364 (Fla. 2d DCA 1999). In *Danielewicz*, an officer saw the defendant's car parked in a legal parking space with the headlights on and the engine running. *Id.* at 364. The officer observed no traffic infraction, and he had no reason to believe there was any problem with the vehicle. The officer looked inside the car and saw the defendant in the driver's seat, apparently asleep. *Id.* The officer knocked on the window to get the defendant's attention and asked her to get out of the car several times. *Id.* When the defendant complied, the officer gathered evidence that led to her arrest for DUI. *Id.* The Second District found that this was an investigative stop without reasonable suspicion. *Id.* Relying on *Popple*, the *Danielewicz* court held that the officer's instruction to the defendant restrained her movements and amounted to a seizure of her person. *Id.*

This Court finds the record on appeal in the instant case compels a finding similar to the one in *Danielewicz* as opposed to *Allen*. Specifically, we find that a reasonable person in Appellant's position would believe that he was not free to go and Appellant submitted to the deputy's show of authority. Appellant was just awakened by the sound of the officer's knocking on his window, the officer was shining a light into the vehicle, the deputy identified herself as an officer, and gestured for the defendant to roll down his window. Only after this, did Appellant roll down his window. Thus, following *Popple*, Appellant did not consent to rolling down his window, but was "seized" when he submitted to the deputy's show of authority. In the totality of the circumstances, we find this is clearly a detention. Since, as the trial court held, the deputy did

not have the reasonable suspicion necessary to authorize an investigatory stop, the detention was illegal and the trial court erred in denying the motion to suppress.

This Court notes that the State did not argue that the deputy's actions were justified by her concern for Appellant's well-being and whether such concern should permit the officer to ask Appellant to roll down his window. In the case at bar, the trial judge found that the deputy had a concern for the welfare of Appellant, but found that the deputy did not have a reasonable articulable suspicion of any medical distress. Law enforcement officers may approach vehicles without reasonable suspicion of wrongdoing if there is a concern for the occupant's welfare. *Vitale v. State*, 946 So. 2d 1220 (Fla. 4th DCA 2007). They do not need to use the least intrusive means to do so, but their actions must be reasonable. *Vitale*, 946 So. 2d at 1223. Interestingly in *Danielewicz*, the Second District noted that the officer did not testify that he was concerned for the driver's personal health and thus needed additional factors before he could perform a valid stop. *Danielewicz*, 730 So. 2d at 364. In the case at bar, the deputy testified she *was* concerned for the driver's safety. Whether this alone was sufficient to justify the stop, following *Vitale*, was not argued. Thus, since this issue is not properly before us, we refrain from ruling on it.

ACCORDINGLY, THIS COURT REVERSES THE TRIAL COURT'S ORDER DENYING THE MOTION TO SUPPRESS AND REMANDS FOR ACTION IN ACCORD WITH THIS OPINION.

ORDERED at St. Petersburg, Florida this 11th day of April, 2012

Original order entered on April 11, 2012, by Circuit Judges Joseph A. Bulone, Thane B. Covert, and David A. Demers.

cc: Honorable Lorraine M. Kelly
Stephen Higgins, Esquire
Benjamin J. Kanoski, Assistant State Attorney