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

JOHNNY JEROME BRINKLEY

Appellant,

Appeal No. CRC 11-00042APANO
UCN 522011AP000042XXXXCR

STATE OF FLORIDA

Appellee.
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Opinion filed April 11, 2012.

Appeal from an Order Denying
Motion to Suppress
entered by the Pinellas County Court
County Judge John D. Carballo

Charles A. Greene, Jr., Esquire
Attorney for Appellant

Joel Berman, Esquire
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Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Johnny Jerome Brinkley's appeal from a decision of the Pinellas County Court to deny his Motion to Suppress. Mr. Brinkley was inside a house when police executed a search warrant on the premises. He

was searched and marijuana was found in his pocket. Mr. Brinkley argues that search was unlawful and the evidence of marijuana in his pocket should have been suppressed. He pleaded no contest reserving the right to appeal. We affirm the ruling of the trial court.

Factual Background and Trial Court Proceedings

Police executed a search warrant on a small house in St. Petersburg. They had conducted two previous controlled purchases of marijuana at the house. During each controlled purchase, a black handgun was seen in the house and an unknown black male who identified himself as "J" was present. The search warrant authorized the search of the home "and persons thereon reasonably suspected of being involved in the illegal activity which is the subject of this warrant." The validity of this search warrant is not disputed and is not a subject of this appeal.

A police detective testified that about twenty minutes prior to the execution of the search warrant, a confidential informant was in the residence and reported that Mr. Brinkley was sitting on the couch, in the living-room area of the house. When the search warrant was served Mr. Brinkley, was in the kitchen of the home. The police ordered Mr. Brinkley to the floor while the home was searched. Mr. Brinkley complied. An initial search for weapons was conducted on him with negative results. There was an odor of fresh marijuana throughout the house. Marijuana was found in plain view in both bedrooms and the living room of the home, although not in the kitchen. A second, more thorough search of Mr. Brinkley revealed 1.5 grams of marijuana on his person. Four other men, Demetrius Gray, Rodney Lumpkin, Javon Moody and Jason Gomillion were also present in the home and were detained and interviewed.

Mr. Brinkley filed a motion to suppress asserting that there was no lawful basis for the second search of his person. After hearing, the trial court entered a written order denying Mr. Brinkley's motion. In pertinent part that order stated the officers had a legal right to be present at the residence, that marijuana was found throughout the residence, that the smell of marijuana was emanating throughout the residence and the search of Mr. Brinkley was lawful.

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).

The Personal Search of Mr. Brinkley
Pursuant to the Search Warrant

In the present case about twenty minutes prior to the execution of the search warrant, a confidential informant was in the residence and reported that Mr. Brinkley was sitting on the couch, in the living-room area of the house. The search of the house pursuant to the search warrant revealed marijuana in plain view in both bedrooms and the living room, the odor of fresh marijuana throughout the small house and the presence of Mr. Brinkley in the kitchen. Given the totality of these circumstances, the officers could

reasonably suspect that Mr. Brinkley was involved in the illegal activity which was the subject of the warrant. The second search of Mr. Brinkley was authorized by the present search warrant. He was a person found on the premises reasonably suspected of being involved in the illegal activity.

Detentions and Personal Searches
Incident to the Execution of a Search Warrant for Contraband

A warrant to search a citizen's residence for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. *Michigan v. Summers,* 452 U.S. 692, 704-705, 101 S.Ct. 2587, 2595 (1981); *Belvin v. State,* 585 So.2d 1103, 1106 (Fla. 2nd DCA 1991). However the officers may not, pursuant to the execution of a search warrant for contraband, search the occupants of the searched premises based entirely on their presence at the scene. *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342 (1979); *See Belvin,* 585 So.2d at 1106. Probable cause to search a person is a reasonable ground for belief of guilt, and that belief of guilt must be particularized with respect to the person to be searched. *Maryland v. Pringle,* 540 U.S. 366, 371, 124 S.Ct. 795, 800 (2003). This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. *Ybarra,* 444 U.S., at 91, 100 S.Ct. 338.

In the present case, even assuming arguendo, the warrant did not specifically provide for the search of individuals reasonably suspected of drug activity, probable cause existed for Mr. Brinkley's arrest making the disputed search lawful as a search incident to arrest. The facts and circumstances detailed above provide probable cause to

arrest[1] Mr. Brinkley for possession of marijuana. *See Pringle*; *see also Dixon v. State,* 343 So.2d 1345 (Fla. 2d DCA 1977). "To prove constructive possession of contraband [at trial], the state must 'show beyond a reasonable doubt that [1] the defendant knew of the presence of the contraband and [2] that he had the ability to exercise dominion and control over it.'" *Jiles v. State,* 984 So.2d 622, 623 (Fla. 2nd DCA 2008). "Although an inference that a defendant knew of the presence of contraband does not arise from the defendant's '[m]ere proximity to [the] contraband,' [...] the location of contraband in plain view of the defendant is sufficient to establish the knowledge element of constructive possession." *Jiles*, 984 So2d at 623, (internal citation omitted). Probable cause is not the same standard as proof beyond a reasonable doubt. Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. *Illinois v. Gates*, 462 U.S. 213, 245, n. 13, 103 S.Ct. 2317, 2335 (1983). Once an officer has probable cause to arrest [a suspect], the officer can conduct a search of that person as incident to the arrest prior to the arrest actually being effected. *State v. McCray,* 626 So.2d 1017, 1019 (Fla. 2nd DCA 1993).

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[1] Probable cause for arrest exists when the totality of the facts and circumstances within an officer's knowledge would cause a reasonable person to believe that an offense has been committed by the person being arrested. *Chavez v. State,* 832 So.2d 730, 747 (Fla.2002). "'Probable cause is a fluid concept that deals in probabilities, which include common sense conclusions by law enforcement officers.' [...] Probable cause is not the same standard as beyond a reasonable doubt, and 'the facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based.' [...] " *State v. Catt*, 839 So2d 757, 759 (Fla. 2nd DCA 2003) (internal citations omitted). "No officer has a duty to prove every element of a crime before making an arrest. *Scarbrough v. Myles,* 245 F.3d 1299, 1302-03 (11th Cir.2001). 'Police officers are not expected to be lawyers or prosecutors.' *Id.* at 1303 n. 8." *Jordan v. Mosley,* 487 F.3d 1350, 1355 (11th CIR. 2007).

Conclusion

In the present case, the factual findings of the trial court were supported by competent, substantial evidence. We agree the search of the Mr. Brinkley was lawful and conclude that the trial court properly denied the Motion to Suppress.

IT IS THEREFORE ORDERED that the order of the trial court is affirmed.

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

Original order entered on April 11, 2012, by Circuit Judges Raymond O. Gross, L. Keith Meyer, Jr., and R. Timothy Peters.

cc: Honorable John D. Carballo
Charles A. Greene, Jr, Esquire
Office of the State Attorney