Third District Court of Appeal

State of Florida, July Term, A.D., 2011

Opinion filed August 3, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-996
Lower Tribunal No. 10-222

The State of Florida,
Appellant,

vs.

D.F., a juvenile,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Pamela Jo Bondi, Attorney General, and Heidi Milan Caballero, Assistant Attorney General, for appellant.

Carlos J. Martinez, Public Defender, and Howard K. Blumberg, Assistant Public Defender, and Armando G. Hernandez, Special Assistant Public Defender, for appellee.

Before ROTHENBERG, LAGOA, and EMAS, JJ.

LAGOA, J.

The State of Florida ("State") appeals from the trial court's order granting appellee D.F.'s motion to suppress physical evidence. Because the record supports the trial court's ruling that D.F. was illegally seized, we affirm the order suppressing the contraband.

I. FACTUAL AND PROCEDURAL HISTORY

During a multi-agency investigatory sweep at an apartment complex, a detective, who was participating as an "eyeball," observed D.F. discard baggies of suspected marijuana. D.F. was subsequently arrested and transported to the Juvenile Assessment Center ("JAC"). During a search at the JAC, a small bag of marijuana was found hidden in D.F.'s hair. D.F. filed a motion to suppress, contending that this contraband was a product of the initial illegal seizure that occurred during the investigatory sweep, in violation of his Fourth Amendment rights. D.F. was charged with one count of possession of marijuana upon the grounds of a juvenile detention facility in violation of section 985.11, Florida Statutes (2010).

At the suppression hearing, the trial court heard testimony from the following individuals: Detective Fowler, who was present in the "eyeball" vehicle; Officer Narcisse, who participated in the sweep; and D.F. Based on this testimony, the trial court found that at least twenty police officers arrived at the complex in four or five unmarked and six marked police vehicles. The officers, who were

wearing bulletproof vests that identified them as police, took "tactical" positions, approached and swarmed the complex with firearms drawn, and made verbal commands such as "police" and "stop."[1] Some of the officers approached a breezeway between two of the apartment buildings; D.F was seated on a nearby stairway of one of those buildings.[2] Looking through binoculars, Detective Fowler, who was in a vehicle outside the complex, observed D.F. drop baggies of suspected marijuana to the ground. After the initial sweep, Detective Fowler recovered the suspected marijuana and arrested D.F. As to D.F., the trial court noted his testimony that he felt free to leave during the approach, but found that D.F. did not move until the officers instructed him to do so.

The trial court granted the motion to suppress, concluding that based on the totality of circumstances, a reasonable person in D.F.'s position would not have felt free to leave, that D.F. submitted to the police show of authority, and that the seizure was not supported by probable cause, reasonable suspicion, or subject to a

[1] The testimony established that the officers came in from multiple gate entrances and surrounded the complex.

[2] Detective Fowler testified that the officers were headed towards the targeted area, which was the corner of the building where D.F. was sitting, along with the breezeway between the two buildings. Detective Fowler testified that narcotics were sold and people congregated in this area.

warrant exception. As a result, the trial court suppressed the fruit of the illegal seizure. This appeal ensued.[3]

II. ANALYSIS

The issue in this case is whether D.F. was seized as a result of the police's show of authority at the time D.F. dropped the suspected contraband.[4] As stated in United States v. Mendenhall, 446 U.S. 544, 554 (1980), "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." See also Caldwell v. State, 41 So. 3d 188, 195 (Fla. 2010). In addition, the person must submit to the officer's show of authority. The determination whether a seizure has occurred by a show of authority requires the application of an objective test, and "not whether the citizen perceived that he was being ordered to restrict his movement." California v. Hodari D., 499 U.S. 621, 628 (1991); see also Caldwell, 41 So. 3d at 195-97. This objective standard is not

[3] The trial court's application of the law to the facts and its legal conclusions are subject to de novo review. See Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002); State v. Lennon, 963 So. 2d 765, 768 (Fla. 3d DCA 2007). However, the "determination of historical facts enjoys a presumption of correctness and is subject to reversal only if not supported by competent, substantial evidence in the record." State v. Triana, 979 So. 2d 1039, 1042 (Fla. 3d DCA 2008); see also Pagan, 830 So. 2d at 806.

[4] The State does not contest the trial court's finding that the sweeps, which were regularly conducted for "investigatory purposes," were without individualized suspicion. The State also does not dispute that the sweep was a show of police authority.

concerned with the officers' subjective intent, but with what the officers' "words and actions would have conveyed to a reasonable, innocent person." Caldwell, 41 So. 3d at 196-97; see also Michigan v. Chesternut, 486 U.S. 567, 574, 576, n.7 (1988).

On appeal, the State contends that D.F. was not seized when he discarded the contraband because (1) there was no show of authority directed at D.F. – the officers did not direct their attention towards D.F. or make any commands to him, and (2) D.F. did not submit to the police show of authority. We disagree. First, the trial court's factual findings are supported by competent, substantial evidence, and therefore cannot be overturned by this Court. Second, the trial court properly applied the law to those factual findings in determining that a reasonable person in D.F.'s position would not feel free to leave and that D.F. submitted to the police show of authority.

As to the State's first argument, there is sufficient evidence to support the trial court's finding that a reasonable person in D.F.'s position would believe that the police activity was directed towards him. The record reveals a display of police authority directed towards individuals in the immediate targeted area of the sweep. The officers, who were armed and wearing bullet-proof vests, surrounded the complex, approached the targeted area (of the building corner and breezeway) with guns drawn, announcing "police" and commanding certain persons not to

move. It is undisputed that D.F. was sitting on a stairway near the targeted area when the officers made, as conceded by the State, this show of police authority. Detective Fowler testified that, in addition to the breezeway, one of the targeted areas was the corner of the building where D.F. was sitting. He stated that "the stairwell is basically right at the corner of that building[,] . . . [t]hey were technically going towards his direction, but not to him[,]. . . . [the police activity was] not directed at him specifically[,] . . . [and] [t]hey were directed towards the breezeway and then west of [D.F.], [t]o the west side of the building, but not directly – directed directly towards him." This evidence demonstrates that D.F. was in, or in close proximity to, the targeted area, and that a large number of officers were approaching this limited area of the building corner and breezeway.

Contrary to the State's contention, there is no requirement that the officers' attention during the approach be specifically directed toward D.F. or that the officers direct any command to him. See Hollinger v. State, 620 So. 2d 1242, 1243 (Fla. 1993) (holding that defendant submitted to show of authority during a drug sweep where "the officers did not actually tell anyone to 'freeze' and . . . their attention was not specifically directed toward [defendant]").[5]

[5] The Hollinger opinions indicate that the police, who were conducting a drug sweep, announced "Sheriff's Office" when they approached a group of people and that Hollinger was standing approximately three feet away when he dropped a tissue. Hollinger, 620 So. 2d at 1242 (stating that several members of the sheriff's department approached a group of people when an officer noticed Hollinger put his

With respect to the second argument, the record contains sufficient evidence to support the trial court's finding that D.F. submitted to the show of authority. It is undisputed that D.F. remained seated on the stairway throughout the incident. Although D.F. testified that he felt free to get up and walk off, he also testified that when he saw the officers he did not move because he did not want the officers to "feel" that he was "running for something or [had done] something," that if the officers felt he was running, he would have been charged with something, and that he did not move after the officers said "get down" and "don't move." Thus, D.F. testified that he felt free to leave but that doing so would have resulted in him being charged. The fact that D.F. did not move supports the trial court's finding

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hand behind his back and drop a tissue, which contained cocaine rocks); State v. Hollinger, 596 So. 2d 521, 522 (Fla. 1st DCA 1992) (stating that officer walked toward Hollinger who was standing approximately three feet from the group located at the north end of the parking lot).

The State concedes that the facts of Hollinger are "strikingly similar" to this case. It argues, however, that in this case, unlike Hollinger, the record does not support the trial court's findings that (1) the officers made verbal commands, such as "police, stop" and otherwise ordered individuals to the ground; and (2) the officers swarmed the complex and prevented egress from the complex. The record includes testimony supporting the trial court's findings: Officer Narcisse and D.F. testified that the officers made verbal commands such as "police," "get down" and "don't move." In addition, Detective Fowler testified that at least twenty officers participated in the sweep coming from multiple entrances around the complex; Officer Narcisse testified that the officers surrounded the complex; and D.F. testified that during a "blitz," the officers surrounded the entrances. See L.C. v. State, 23 So. 3d 1215, 1217 (Fla. 3d DCA 2009) (stating that all reasonable inferences and deductions from the evidence must be interpreted in a manner most favorable to the trial court's ruling).

that D.F. submitted to the show of police authority and his decision to remain seated was related to the officers' presence. See Hollinger, 620 So. 2d at 1243 ("A person who flees from a show of authority has not been seized, while a person who remains in place and submissive to the show of authority has been seized.") (emphasis added).

As the Supreme Court stated in G.M.v. State, 19 So. 3d 973, 980 (Fla. 2009):[6]

> It strains the bounds of reason to conclude that under these circumstances, a reasonable person would believe that he or she was free to end the encounter with police and simply leave. See Mendenhall, 446 U.S. at 554, 100 S.Ct. 1870. Moreover, it would be both dangerous and irresponsible for this Court to advise Florida citizens that they should feel free to simply ignore the officers, walk away, and refuse to interact with these officers under such circumstances. Instead, as a matter of safety to both the public and law enforcement officers, we conclude that a citizen who is aware of the police presence under the specific facts presented by this case is seized for Fourth Amendment purposes and should not attempt to walk away from the police or refuse to comply with lawful instructions.

[6] In G.M., 19 So. 3d at 974, two undercover officers, who were in an unmarked car, activated the car's emergency lights, drove across the street, stopped three feet behind two parked cars and approached the car in which G.M was a passenger. The show of authority in the instant "sweep" case is similar to that of Hollinger, and decidedly more coercive than in G.M. See State v. Kasparian, 937 So. 2d 1273, 1276 (Fla. 4th DCA 2006) (noting that it "is readily apparent [that] the show of force in Hollinger is far more coercive than two officers walking up to a parked car").

As part of its second argument that D.F. did not submit to the police show of authority, the State contends that Detective Fowler's testimony establishes that D.F. voluntarily discarded the contraband before the police arrived at the area where he was seated.[7] A review of the testimony does not show that D.F. discarded the contraband before the arrival of the police. Detective Fowler testified that "Well, prior to [the officers] coming into my view walking past the respondent in the breezeway, I had my eye on the respondent and the other individual through binoculars. I observed Mr. F. from his left hand throw out what appeared to be some small baggies of marijuana to the ground." (Emphasis added). However, when asked "at what point during the approach or not during the approach, if that's the case, did he drop the baggies?" he answered: "Right as the officers coming from the south came into my view. So I don't know if he saw them further away coming northbound, but as I saw them is when I saw him . . . ." (Emphasis added). Detective Fowler also testified that the officers came from the north and the south parts of the complex and that he could not see the officers in the breezeway. Based on this testimony, we are not persuaded by the State's contention that Detective Fowler established that D.F. discarded the contraband before the police arrived in the area such that we can reverse the trial court's

[7] The contraband discarded by D.F. at the apartment complex is not at issue in this case. D.F.'s motion to suppress only addressed the small bag of marijuana found in his hair during the search of D.F.'s person when he was transported to the JAC.

findings. We, therefore, conclude that the record contains competent, substantial evidence to support the trial court's findings that a reasonable person in D.F.'s position would not have felt free to leave, and that D.F. submitted to the police officers' show of authority.

Accordingly, based on its findings, the trial court correctly applied existing case law in concluding that D.F. was illegally seized and that the evidence obtained must be suppressed. In affirming the trial court's order, we recognize that, as in Hollinger, there is record evidence that might support a contrary view. See, e.g., State v. Newton, 737 So. 2d 1252, 1252-53 (Fla. 5th DCA 1999) ("Where evidence involved at the suppression hearing supports both a finding of a consensual encounter and a seizure and where the trial judge makes a factual finding that a reasonable person under the circumstances would not feel that he was free to go, the trial court's decision to suppress the evidence will be affirmed." (citing Hollinger, 620 So. 2d at 1242). Because, however, there is sufficient evidence to support the trial court's finding that a reasonable person in D.F.'s position would feel that he was not free to leave and that D.F. submitted to the show of authority, we are compelled to affirm.

Affirmed.

ROTHENBERG, J. (dissent).

Based on the facts of this case, many of which were omitted in the majority opinion, I would reverse the trial court's order suppressing the marijuana found on D.F.'s person after his lawful arrest, which was based on a separate cache of marijuana he abandoned prior to being seized.

Pursuant to a multi-agency investigation, several units[8] responded to the Lincoln Fields apartment complex and entered the fenced-in complex from several different locations wearing bulletproof vests. Detective Fowler, a Miami-Dade police officer who was stationed on the opposite side of 20th Avenue across the street from the apartment complex, was assigned to serve as the "eyeball" of the operation. Detective Fowler testified that he was watching D.F. and another individual, who were seated on a stairway located near the corner of one of the apartment buildings and approximately six to eight feet from a breezeway between two apartment buildings as the officers entered through various openings into the complex. He testified that as the officers, who were coming from the south, came into his view (he was using binoculars), he saw D.F. throw down several baggies of marijuana. He continued to watch the officers as they walked right past D.F. as

[8] Approximately twenty officers were involved in the operation, however D.F. testified that he only saw eleven.

they headed into the breezeway. When Detective Fowler approached the breezeway, he noted that law enforcement had several individuals detained and seated on the ground, whereas D.F. and his companion were still sitting on the stairs and other residents and individuals had exited apartments or had come into the area to see what was going on. Detective Fowler retrieved the baggies of marijuana he witnessed D.F. discard, asked D.F. to come downstairs, and placed D.F. under arrest. While D.F. was being processed at the Juvenile Assessment Center, additional marijuana was found hidden in D.F.'s hair.

When asked at what point D.F. threw down the baggies of marijuana, Detective Fowler testified as follows:

> A: . . . The units that came in from the south park walked directly past [D.F.] along with another young male and went to the breezeway area.
>
> Q: Okay. So they didn't stop [D.F.] at that time . . . .
>
> A: No.
>
> Q: . . . [I]s that correct? And so they continued past him to the breezeway and what, if anything, happened next?
>
> A: Well, prior to them coming into my view walking past [D.F.] in the breezeway, I had my eye on [D.F.] and the other individual through binoculars. I observed [D.F.] from his left hand throw out what appeared to be some small baggies of marijuana to the ground.
>
> Q: Okay. Now at what point during the approach or not during the approach, if that's the case, did he drop the baggies?

A: Right as the officers coming from the south came into my view. So I don't know if he saw them further away coming northbound, but as I saw them is when I saw him . . . .

Q: Okay. But they weren't approaching him, right?

A: No, they actually walked right past him.

Q: And they weren't going in his direction?

A: That stairwell is basically right at the corner of that building. They were technically going towards his direction, but not to him.

Q: Okay. But they passed him and went down the breezeway, right?

A: Yes.

. . . .

Q: Was any of this police activity directed towards this individual?

. . . .

A: They were directed towards the breezeway and then west of [D.F.]. To the west side of the building, but not directly - - directed directly towards him.

D.F., who also testified, confirmed Detective Fowler's testimony and explained that the police perform regular investigations at the apartment complex "[l]ike, Tuesdays and Thursdays or something . . . [y]eah, every other day." He testified that on this particular occasion the police ordered **certain people** to "get down." But that these orders **were not directed to him and he was free to leave**.

Q: You said that the officers would go and stop certain people, right? . . . But they didn't stop you?

A: No. I was sitting in the stairwell. No - - can't really see me. I wasn't walking nowhere. I was just sitting on the step.

Q: So you weren't afraid that they were coming after you, right?

A: Yeah.

Q: Yeah - - I'm sorry, you mean . . . .

A: Like, I wasn't afraid.

Q: Okay. And so you said you felt like you were free to go at that time, right?

A: Uh-huh.

Q: I'm sorry?

A: Yes

Despite this testimony, the trial court and the majority concluded that, prior to abandoning the marijuana, D.F. had been "seized" and thus the marijuana D.F. abandoned and the marijuana subsequently found on D.F.'s person must be suppressed as fruit of the illegal seizure. I respectfully disagree.

In determining whether a "seizure" has occurred the United States Supreme Court and our Florida Supreme Court have specifically held that the totality of all of the circumstances surrounding the specific encounter must be considered. See United States v. Mendenhall, 446 U.S. 544, 554 (1980); G.M. v. State, 19 So. 3d 973, 978 (Fla. 2009). In California v. Hodari D., 499 U.S. 621, 626 (1991), the United States Supreme Court clarified that for a "seizure" to have occurred, either

the person must be physically subdued, or he must submit to the officer's assertion of authority. Although the United States Supreme Court recognized that the test to be applied when determining whether an individual has been seized is an objective one, it held that "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," and cautioned that one must read this requirement carefully because the test "says that a person has been seized 'only if,' not that he has been seized 'whenever.'" Hodari, 499 U.S. at 627-28.

Under the totality of the circumstances in this case, the evidence should not have been suppressed. Although there was clearly a show of authority – multiple officers in vests and with guns drawn – D.F. testified that this occurs "every other day"; the police activity and commands to get down on the ground were not directed towards him; the officers were not even aware that D.F., who was seated on the stairway several feet from the breezeway where the officers were directing their attention, was even present; the officers did not approach D.F. and in fact walked past him; D.F. did not submit to the commands to get down on the ground; he did not feel threatened and believed he was free to leave; and had he not thrown down the drugs as he saw the officers approaching, he would not have been

involved at all. Under these circumstances, I would find that D.F. voluntarily abandoned the marijuana.

Additionally, the Florida Supreme Court in Hollinger v. State, 620 So. 2d 1242, 1242 (Fla. 1993), specifically recognized that where a person abandons contraband prior to being seized, the evidence should be admitted, citing to Hodari. In the instant case, D.F. abandoned the baggies of marijuana prior to the officers entering the breezeway, prior to any commands, and prior to the officers even being made aware of D.F.'s presence in the stairwell. Additionally, D.F. testified that none of the commands were directed towards him; he did not comply with the demands; and he felt that he, like the other residents and individuals that congregated in the area to watch the incident, was free to leave. Thus, D.F. did **not**, by his own admission, submit to the show of authority even **after** he voluntarily abandoned the contraband.

For these reasons, and based on the specific facts of this case, I would reverse the trial court's order suppressing the drugs found abandoned by D.F. and subsequently found on his person after his arrest.