

In the County Court of the Ninth Judicial Circuit,
in and for Orange County, Florida

STATE OF FLORIDA)

)

v.) Case No.: MO22-95

)

MARY WHITTAKER)

**MEMORANDUM IN SUPPORT OF DEFENDANT WHITTAKER’S MOTION TO
SUPPRESS**

Defendant Mary Whittaker submits this memorandum of law in support of defendant’s motion to suppress testimony of Officers Taylor and Marcum, and evidence they obtained from Defendant.

QUESTIONS PRESENTED:

1. Did law enforcement officers violate Mary Whittaker’s constitutional right against unreasonable search and seizure when they, without a warrant or exigent circumstances, blocked Mary’s path, demanded that she disclose whether she had contraband on her person, and threatened to arrest her?
2. Under the totality of the circumstances, would a reasonable person who has grown accustomed to regular warrantless police searches have believed she was free to leave or ignore two officers who block her path, demand to know if she is carrying contraband, and threaten to arrest her?

FACTS:

On November 5, 1998, Mary Whittaker and two friends had taken refuge from the afternoon heat in a shaded area behind her apartment building. Shortly before 3:00 p.m. they were walking around the side of the building towards the street, when Mary was approached by two uniformed officers who blocked her way at a fence gate.

Officer Taylor and Officer Marcum (who she knows as Manley). Police often arrest people in that area for drug use because the path leads to a high drug area called “the Hole”. Mary had been stopped and arrested and searched by law enforcement officers many times before, without warrants. Officer Taylor had arrested her at least once before and knew she had previously used cocaine.

This time the officers blocked her way and demanded that she disclose any contraband on her person. The officers did not have a warrant. Mary was threatened with jail, or if she only had drug paraphernalia, a notice-to-appear. She surrendered a crack pipe from her pocket and was asked to search herself. Once Officer Taylor took the crack pipe, he issued a notice to appear for unlawful possession of drug paraphernalia.

ARGUMENT:**A. THE OFFICERS CONDUCTED A WARRANTLESS SEIZURE OF MARY WHITTAKER’S EFFECTS, WHICH IS PRESUMPTIVELY UNREASONABLE**

Article I, section 12 of Florida’s Declaration of Rights protects “[t]he right of the people to be secure in their persons [...] and effects against unreasonable searches and seizures”. "A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s

possessory interests in that property.” Jones v. State, 648 So.2d at 669, 675 (Fla. 1994) (quoting United States v. Jacobsen, 466 U.S. 109, 112 (1984)).

When Officer Taylor took Mary’s personal effects and placed them into evidence, Mary was deprived of physical possession of her personal property. “[T]o challenge a seizure, the defendant only need establish that the seizure interfered with his or her constitutionally protected possessory interests.” Jones, 648 So.2d at 675. Therefore Officer Taylor “seized” Mary’s effects within the meaning of Article I, section 12 of the Florida Constitution.

Warrantless seizures are presumptively unreasonable. State v. Teamer, 151 So.3d 421, 426 (Fla. 2014) (“When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was reasonable.” (citing Hilton v. State, 961 So.2d 284, 296 (Fla. 2007))); Bicking v. State, 293 So.2d 385 (Fla. 1st DCA 1974) (warrantless search is prima facie case of unreasonableness). Officer Taylor did not have a warrant when he seized Mary’s personal effects, therefore the seizure is presumptively unreasonable.

B. THE SEIZURE OF MARY’S EFFECTS DOES NOT FALL INTO AN ESTABLISHED EXCEPTION TO WARRANT REQUIREMENT

The State cannot demonstrate that Officer Taylor’s seizure of Mary’s effects falls into one of the “few specifically established and well-delineated exceptions” to the warrant requirement. Katz v. United States, 389 U.S. 347, 357 (1967); *accord* Jones, 648 So.2d at 674. “Those exceptions are consent, lawful arrest, hot pursuit, stop and frisk and probable cause with exigent circumstances.” Potts v. Johnson, 654 So.2d 596, 599 (Fla. 3rd DCA 2011). The burden

of proof lies with the State, but nonetheless the defense asserts that none of the established exceptions apply to the present case.

1. MARY WHITTAKER DID NOT PROVIDE FREE AND VOLUNTARY CONSENT

The State cannot prove that Mary consented to the seizure of her personal effects. When considering the voluntariness of a consent, one must consider the totality of the circumstances. Connor v. State, 803 So.2d 598, 609 (Fla. 2001). There is substantial evidence that under the totality of the circumstances, the encounter was non-consensual, and Mary merely acquiesced to the police's show of authority.

Two uniformed police officers approached Mary as she was walking in broad daylight and blocked her path. This distinguishes the present case from consent to search cases where the defendant's path was not blocked. *Compare* Taylor v. State, 848 So.2d 1191 (Fla. 5th DCA 2003) (defendant was sitting on porch when one officer approached him); State v. Collins, 661 So.2d 962, 965 (Fla. 5th DCA 1995) (officers did not impede defendant's departure with their bicycles). "[A] significant characteristic of a consensual encounter is that 'the officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer inquiries, and the person may not be detained without reasonable objective grounds for doing so.'" State v. Poole, 730 So.2d 340, 342 (Fla. 5th DCA 1999) (citing State v. Simmons, 549 So.2d 785, 786 (Fla. 2nd DCA 1989)). The officers in this case physically hindered Mary's freedom to leave, which is strong evidence that the encounter was not consensual.

Mary asked if she was in "trouble" with the police, who had initiated the encounter by blocking her way and demanding that she disclose whether she had contraband on her person.

Officer Taylor replied by intimidating Mary with the prospect of being arrested and taken to jail, but if all she had on her was paraphernalia he would issue a notice-to-appear instead. Mary knew the threat of arrest was credible because while walking in the same area (the vicinity of her home) she had been arrested and searched numerous times previously, including at least once by Officer Taylor. This carrot and stick approach is evidence that the consent was not voluntary. *See State v. Sills*, 852 So.2d 390, 393 (Fla. 4th DCA 2003) (possibility of more lenient treatment for cooperating with police was carrot that enticed Sills' actions and contributory evidence that his consent was not given voluntarily); *cf. Watts v. State*, 788 So.2d 1040, 1041-42 (Fla. 2nd DCA 2001) (attention given to the fact Watts did not allege officers threatened him or used threatening tone of voice).

“Consent must be given unequivocally and not be mere deference to the apparent authority of the police [...] Whether consent is voluntary is a question of fact to be determined under the totality of the circumstances and established by a preponderance of the evidence.” *State v. Toussaint*, 168 So.3d 308, 311 (Fla. 5th DCA 2015) (citing *Cox v. State*, 975 So.2d 1163, 1168 (Fla. 1st DCA 2008)). Given the totality of the circumstances, the blocking of Mary's way, the history of being arrested and searched, the threat of being arrested and searched regardless of her consent, and the demanding tone of voice, a reasonable person in Mary's position would not have believed she was free to terminate the encounter. Therefore, Mary's actions should be considered acquiescence to police authority, not free and voluntary consent.

2. SEIZURE OF MARY WHITTAKER'S EFFECTS WAS NOT INCIDENT TO LAWFUL ARREST

Florida Statutes do not allow law enforcement officers to arrest a person without a warrant for a misdemeanor offense unless the offense was committed in the presence of the officer. *See* Fla. Stat. § 901.15. The Officers do not allege seeing Mary commit the misdemeanor of possession of drug paraphernalia with intent to use. They did not see the contraband until Mary acquiesced to the officers' show of authority and produced the evidence from her pocket. The State may not prove the lawfulness of the seizure by asserting a lawful arrest while simultaneously justifying the arrest with the evidence seized.

3. OFFICERS WERE NOT IN HOT PURSUIT OF MARY WHITTAKER

According to the charging affidavit, Officer Taylor saw Mary walk toward him while engaged in casual conversation. The Officers knew Mary from previous encounters, including where she lived and that she had family in the area. The Officers had not observed Mary commit any crime that day, and furthermore she was not fleeing but was walking casually in the direction of the officers. *See generally* State v. Markus, 211 So.3d 894, 907 (Fla. 2017) (hot pursuit involves fleeing suspect).

4. OFFICERS LACKED PROBABLE CAUSE AND NO EXIGENT CIRCUMSTANCES WERE PRESENT

Officer Taylor did not allege in the charging affidavit that he observed Mary commit any crime before approaching her. The affidavit does not allege that the Officer saw smoke or noticed the distinct smell of crack cocaine. Neither does it allege that Mary showed visible signs

of cocaine influence. There was no allegation that serious injury was imminent and there was no allegation of imminent destruction of evidence. The defense asks the Court to take judicial notice that in cases where there is probable cause and exigent circumstances, the police usually make clear notation to that effect. The only individualized circumstances given in the affidavit are that Mary was known to have previously used cocaine, and that she was seen walking around her home, which happens to be an area with a reputation for cocaine abuse.

The present case does not involve a warrant, which may authorize a search of all persons present at a given place but only for a specified amount of time. Stokes v. State, 604 So.2d 836 (Fla. Dist. Ct. App. 1992). Warrants also serve as a check on police power by insuring “that the deliberate impartial judgement of a judicial officer will be interposed between the citizen and the police”. Wong Sun v. United States, 371 U.S. 471 (1963). The state and federal Constitutions guarantee Mary’s right to be secure from unreasonable searches and seizures. The Court should not recognize probable cause and exigent circumstances in the present case because it would give the police perpetual authority to search Mary’s person and seize her personal effects, thus destroying the very security guaranteed by the state and federal Constitutions.

5. MARY WHITTAKER’S EFFECTS WERE NOT IN PLAIN VIEW

Officer Taylor’s affidavit does not allege that the officers could see drug paraphernalia before they blocked Mary’s path and demanded that she disclose whether she had any on her. Mary had to dig into her pockets to produce the contraband; there was nothing untoward in plain view.

C. THE EVIDENCE IS TAINTED AND SHOULD BE SUPPRESSED

Because the seizure of Mary's effects is presumptively unreasonable and the State cannot meet its burden to prove that the seizure was reasonable, the Court should find that the police violated Mary's right to be secure against unreasonable seizures of her effects. Any testimony or evidence stemming from the unlawful seizure should be suppressed pursuant to the exclusionary rule. Bender v. State, 359 So.3d 429, 434 (Fla. 5th DCA 2023). This would include the real evidence unlawfully seized as well as pertinent testimony of Officers Taylor and Markham regarding said evidence.

CONCLUSION:

For the reasons set forth, defendant Mary Whittaker requests this Court grant her motion to suppress and to dismiss the charge against her for lack of evidence.

Respectfully submitted,

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