

Criminal law -- Driving under the influence -- Search and seizure -- Officer who observed defendant's jeep parked on a grass swale, with defendant asleep and the jeep's engine running, had no reasonable suspicion that defendant had committed, was committing, or was about to commit any crime -- Officer's removal of defendant's keys from ignition and request that defendant exit vehicle was a Fourth Amendment seizure, for which officer lacked reasonable suspicion -- All evidence obtained suppressed as ``fruit of the poisonous tree''

THE STATE OF FLORIDA, Plaintiff, vs. RAMON GONZALEZ, Defendant. County Court, 17th Judicial Circuit in and for Broward County, Traffic Division. Case No. 97-14722MM10A. May 19, 1998. Ginger Lerner-Wren, Judge. Counsel: Lloyd H. Golburgh, P.A., Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION TO

SUPPRESS: LACK OF REASONABLE SUSPICION

This cause, having come before this Court on Thursday, April 23, 1998 at 3:30 p.m. upon defendant's Motion to Suppress, and defendant having been present, and after hearing testimony of the state's police officer witness, and after hearing argument of counsel, and this Court being fully advised in the premises,

IT IS HEREBY ORDERED that defendant's motion is GRANTED;

IT IS FURTHER ORDERED as to the following findings of fact and conclusions of law:

FACTS

1. That defendant was arrested for DUI by Officer Lance Seltzer of the Davie Police Department on June 5, 1997.
2. That prior to the arrest, Officer Seltzer approached defendant's jeep, which was parked on a grass swale along the 8500 block of Nova Drive at approximately 4:00 a.m.
3. That defendant's jeep was off the roadway and not obstructing any traffic.
4. That Officer Seltzer, at the time that he approached defendant's vehicle, did not observe any traffic infraction.
5. That at the time he approached defendant's jeep, Officer Seltzer had no reasonable suspicion that defendant had committed,

was committing, or was about to commit any crime.

6. That Officer Seltzer approached defendant's car because it seemed suspicious to him; that he was not used to seeing cars parked where defendant's jeep was parked.

7. That upon approaching defendant's jeep, Officer Seltzer observed defendant to be sleeping behind the wheel with the engine running.

8. That Officer Seltzer immediately reached into the jeep and removed defendant's keys from the ignition.

9. That Officer Seltzer then shook and woke defendant.

10. That Officer Seltzer then requested Defendant to exit his vehicle for officer safety.

11. That after defendant exited his vehicle, Officer Seltzer smelled about defendant the odor of an alcoholic beverage and observed him to be unsteady on his feet and have bloodshot eyes.

12. That, after administering roadside exercises to defendant, Officer Seltzer arrested defendant for DUI.

#### CONCLUSIONS OF LAW

13. That at the time Officer Seltzer took defendant's keys out of his ignition, defendant had not committed a traffic infraction.

14. That at the time Officer Seltzer asked defendant from his car, he had no reasonable suspicion to believe defendant had committed, was committing, or was about to commit a crime.

15. That Officer Seltzer's removal of defendant's keys from his ignition and his request that defendant exit his vehicle was a seizure within the meaning of the fourth amendment to the United States Constitution.

16. That because Officer Seltzer had no probable cause to detain defendant for a traffic infraction, and because he had no reasonable suspicion to believe defendant had committed, was committing, or was about to commit a crime at the time he removed defendant's keys and asked him to step from his vehicle, his seizure was unlawful.

17. That this Court's decision to grant defendant's motion to suppress is controlled by the Florida Supreme Court's opinion in *Popple v. State*, 626 So.2d 185 (Fla. 1993). In *Popple*, supra, Ted Popple was sitting in a legally parked car in a desolate area when a sheriff's deputy, who was investigating stolen cars in the

area, approached Mr. Popple's vehicle from the rear. After the deputy noticed Popple making furtive movements, he asked Popple to exit his vehicle to ensure his safety. As Popple opened the door, the officer saw a cocaine pipe in plain view on the floorboard of the car. Popple was arrested, and the pipe and several rocks of cocaine were seized. He was later convicted of cocaine and paraphernalia possession.

On appeal, the Fourth District Court of Appeal affirmed the convictions when it found that the officer's request that Popple step from his vehicle did not elevate the incident from a consensual encounter to an investigatory stop. The Florida Supreme Court disagreed.

The Supreme Court in *Popple* laid out the three levels of a police-citizen encounter. The first level is that of a consensual encounter, wherein an officer may approach and speak to a citizen. That citizen has the right to voluntarily comply with the officer's requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, no constitutional safeguards apply. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

The second level of the police-citizen encounter involves an investigatory stop as enunciated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop.

The third level of the police-citizen encounter involves an arrest which must be supported by probable cause.

The state in *Popple*, *infra*, conceded that the deputy involved in that case did not have the well-founded suspicion necessary to authorize a temporary detention. However, it sought to justify the deputy's decision to order Mr. Popple out of his car by first arguing that because Popple was parked in a desolate area, the deputy acted reasonably in approaching Popple to check if he was experiencing car trouble or might know information about an abandoned vehicle. The state argued that the officer could have ordered Popple out of his car for the officer's own safety.

The Supreme Court disagreed with the state's argument and overturned the decision of the Fourth District Court of Appeal. It ruled that a significant identifying 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 a well-founded and articulable suspicion of criminal activity.

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. Whether characterized as a request or an order, the deputy's direction for Popple to exit his vehicle constituted a show of authority which restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply.

The *Popple* court went on to hold that Mr. Popple did not consent to exiting his vehicle, but rather was seized by virtue of submitting to the deputy's show of authority; that because the deputy did not have the reasonable suspicion necessary to authorize an investigatory stop, the initial detention was illegal and the resulting acquisition of the cocaine and drug paraphernalia was the fruit of an unconstitutional seizure.

The *Popple* opinion controls the decision of this Court in the matter at hand. When Officer Seltzer approached Mr. Gonzalez's vehicle, he was not making a traffic stop based upon probable cause. Had he had probable cause to believe that Mr. Gonzalez was committing a traffic infraction, he most certainly would have been able to order him out of the vehicle for officer safety and then conduct a DUI investigation upon observing characteristics consistent with an impaired driver. Also, at the time that Officer Seltzer confiscated Mr. Gonzalez's keys and directed Mr. Gonzalez from his vehicle, he did not have the required reasonable suspicion that Mr. Gonzalez was involved in a crime; that all of the observations made of Mr. Gonzalez by Officer Seltzer consistent with an impaired driver were made after the officer obtained the car keys and directed Mr. Gonzalez from his vehicle. Therefore, the seizure of Mr. Gonzalez by Officer Seltzer was illegal. See also *Sites v. State*, 582 So.2d 813 (Fla. App. 4 Dist. 1991); *Bowen v. State*, 22 Fla. L. Weekly D50 (Fla. App. 5 Dist. 1996); *Alvarez v. State*, 22 Fla. L. Weekly D1356 (Fla. App. 2 Dist. 1997); and *Zelinski v. State*, 22 Fla. L. Weekly D1508 (Fla. App. 2 Dist. 1997).

IT IS THEREFORE ORDERED AND ADJUDGED that defendant's motion to suppress evidence is GRANTED;

IT IS FURTHER ORDERED that all evidence obtained by the officers involved herein is suppressed as ``fruit of the poisonous tree.''

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