IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT LAPAUL DIXON,	:	
Appellant,	:	
vs.	:	Case No. 2D13-3750
STATE OF FLORIDA,	:	
Appellee.	:	
________________________________	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 12, 2012, the State Attorney for the 10th Judicial Circuit in and for Polk County, Florida filed a two-count information alleging that Robert LaPaul Dixon committed 1) possession of cocaine in violation of Fla. Stat. §893.13 (2011), a third-degree felony and 2) possession of drug paraphernalia in violation of Fla. Stat. §893.147 (2011), a first-degree misdemeanor on March 15, 2012. VI: R10-11.

The defense filed a motion to suppress on September 4, 2012, then requested a hearing upon an amended motion to suppress filed on November 5, 2012. VI:R13-16, VI:R48-77. The motion was heard on November 26, 2012. VI:R48-77. The trial court denied the motion on the basis that the stop had been predicated upon a valid traffic infraction and continued the bifurcated hearing for further proceedings to discuss the K-9 sniff that occurred following the stop. VI:R74. At jury selection on July 8, 2013, the defense withdrew the K-9 reliability argument and preserved the previously denied motion as dispositive for appellate purposes. VI:T4.

On July 11, 2013, Mr. Dixon's trial resulted in jury verdicts of guilty as to both charges alleged. VI:R20. Following the verdict, Mr. Dixon was adjudicated as to both offenses and sentenced to three years of standard probation with conditions to serve sixty days in the county jail, license suspension for two years, no alcohol, no drugs, warrantless

searches, drug evaluations and follow-up treatment. VI:R39-40; VII:T152-155.

Mr. Dixon filed a timely notice of appeal on August 1, 2013. VI:R30.

STATEMENT OF THE FACTS

On March 15, 2012, at approximately 8:20 p.m., Mr. Robert LaPaul Dixon was stopped for a technical traffic violation because he admittedly utilized a clear, plastic cover over his vehicle license plate. VI:R61; VII:T83, 111,116. Polk County Officer Christopher Diaz, the stopping officer, however, could read the license plate through the clear cover without obstruction. VI:R64. His ride-along officer, Steven Valk, deemed the plate to be obstructed only "at times." VI:R67. The alleged traffic violation led to a K-9 sniff and a subsequent search revealing two baggies of cocaine in the dash and syringes in the glove compartment. VI:R58.

The defense motion to suppress was denied by the trial court on the basis that, regardless of any obstruction, the transparent license plate cover was probable cause for Officer Diaz and Officer Valk to stop Mr. Dixon, detain him for a K-9 sniff and search of his vehicle. VI:R13-19.

At trial, Officer Diaz testified that he charged Mr. Dixon with paraphernalia after syringes were located in the glove box and he recognized them to be insulin syringes. VII:T96-97. No testimony was taken from Officer Diaz, FDLE Chemist James Gibson nor Officer Valk that residue was located nor tested on the syringes. VII:T56-156. After the state completed its presentation of evidence, the defense moved for judgment of acquittal as to both counts, and was denied by the trial court.

VII:T104-105. Mr. Dixon took the stand to testify on his own behalf and stated that the insulin needles belonged to his wife, a diabetic. VII:T114.

SUMMARY OF THE ARGUMENT

Appellant's dispositive motion to suppress evidence was erroneously denied by the trial court because there was no probable cause for the stop on the basis that Appellant violated rules regarding license plate obstruction with use of a clear, plastic cover through which the stopping officer could clearly see the entirety of the plate. Furthermore, Appellant's motion for judgment of acquittal at trial was erroneously denied because the state failed to show beyond a reasonable doubt that Appellant possessed drug paraphernalia. For these reasons, Appellant is entitled to a reversal of his convictions and discharge.

ARGUMENT

ISSUE I: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS BECAUSE OFFICERS DID NOT HAVE PROBABLE CAUSE TO STOP APPELLANT.

In this case, Officer Diaz testified, "I actually was [able to view the license plate]." Further, he stated, "Uhm, I mean it's a cover, it covers the entire plate. The – the cover over the plate is a violation in and of itself. The reason why the clear plastic covers are still a violation is because it *has a potential to create a* glare, especially at night when there are headlights and streetlights illuminated." VI:R64. Mr. Dixon's license plate was not obscured or illegible; therefore, there was no probable cause for stopping his vehicle and detaining him to conduct a K-9 sniff and search of his vehicle.

"A statute should not be construed to bring about an unreasonable or absurd result, but rather to effectuate the obvious purpose and objective of the legislature. The law favors a rational and sensible construction of statutes so as to avoid an unreasonable or absurd result." George v. State, 203 So.2d 173, 175-76 (Fla. 2d DCA 1967). The obvious purpose of Fla. Stat. 316.605(2011) is that an officer of the law not be hindered from viewing the license plate of drivers at 100 feet, and, in this case, Officer Diaz's view of the plate was not obscured.

In order to legally stop and seize a person, law enforcement officers must have a founded or reasonable suspicion that the person has committed, is committing, or is about to commit a crime. Fla. Stat. §902.151(2)(2013); Popple v. State, 626 So.2d 185,186 (Fla. 4th DCA 1992);Sumlin v. State, 433 So.2d 1303, 1304 (Fla. 2d DCA 1983). A "mere" or "bare" suspicion will not suffice. Id. at 1304. A "hunch" that criminal activity may be occurring is not sufficient. See Walker v. State, 846 So.2d 643 (Fla. 2d DCA 2003) and McCloud v. State, 491 So.2d 1164 1167 (Fla. 2d DCA 1986).

It is essential that there be an objective standard in which to justify the stop of a motorist because, absent an objective standard, there would be no protection against unreasonable seizures. See Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). A seizure of one's person by the police implicates the Fourth and Fourteenth Amendments because the Fourth Amendment protects against unreasonable seizures. Id. Without the reasonableness standard, officers would be authorized to stop vehicles at their unrestrained discretion. See State v. Garcia, 696 So.2d 1352, 1354 (Fla.App. 5 Dist.,1997).

Fla. Stat. §316.605 (2010) states, in pertinent part that "[e]very vehicle…shall…display the license plate… in such manner as to prevent the plates from swinging, and all letters,

numerals, printing, writing, and other identification marks upon the plates regarding the word "Florida," the registration decal, and the alphanumeric designation shall be clear and distinct and free from defacement, mutilation, grease, and other obscuring matter, *so that they will be plainly visible and legible at all times 100 feet from the rear or front*. Except as provided in s. 316.2085(3), vehicle license plates shall be affixed and displayed in such a manner that the letters and numerals shall be read from left to right parallel to the ground. No vehicle license plate may be displayed in an inverted or reversed position or in such a manner that the letters and numbers and their proper sequence are not readily identifiable. *Nothing shall be placed upon the face of a Florida plate except as permitted by law or by rule or regulation of a governmental agency…"* (emphasis added).

Florida District Courts have not specifically addressed whether a transparent cover over a license plate is a violation of Fla. Stat. §316.605(2011) to justify a probable cause stop leading to search and arrest. Consistently, however, Florida Courts have found that other similar vehicle accessories were not violative of the statute and therefore could not form the basis for subsequent searches and investigations. See State v. St. Jean, 697 So.2d 956 (Fla. 5th DCA 1997) (holding that an ornamental frame around the perimeter of the tag did not rise to the level of reasonable suspicion to initiate a stop). Further, this Honorable Court, in Harris v. State, 11 So.3d 462 (Fla. 2d

DCA 2009), determined that an attached trailer hitch did not obscure a driver's tag to justify a stop of the vehicle under Fla. Stat §316.605 (2006). This Court held that "[m]atters external to the tag, such as trailer hitches, bicycle racks, handicap chairs, u-hauls, and the like are not covered by the statute [and], [i]f the legislature chooses to bring such items external to the license plate within the statute, simple and concise language can accomplish the task." Id.

"Although the language of section 316.605 is broad, the overall statutory scheme suggests that the 'identification marks' that must be visible and legible are those that 'identify' the 'registration.' State v. St. Jean, 697 So.2d 956 (Fla. 5th DCA 1997).

In St. Jean at 957 (Fla. 5th DCA 1997), the Fifth District Court of Appeal discussed the statute in greater detail;

> "The use of license plate rims or frames which obscure the county name appearing at the bottom of the plate is a common practice of long-standing among the citizens of our state. They are frequently supplied by car dealers and many otherwise law abiding citizens install them specially to show allegiance to a club, fraternity, college or sports team or, as a means of other self-expression. It is extremely odd that such an obvious and prevalent practice has generated no reported decisions and no enforcement that the state can identify. Absent any more clear prohibition against this activity in Florida statutes, we decline to declare it a traffic infraction."

The Fifth District also opined that "in the likely event this issue comes up in another district," the statute produces an absurd result if interpreted to require legibility at all times from 100 feet because "we question whether the state could establish that the county name on the tags supplied by the State of Florida is visible and legible to a person with normal vision at 100 feet." Id. at 957.

In cases where a stop under Fla. Stat. 316.605(2010) was validated, the courts required both 1) a technical violation of the statute (i.e. existence of an accessory) and 2) testimony of an officer that observation of the tag was actually hindered or obscured by the "accessory". See Saviory v. State, 717 So.2d 200 (Fla. 5th DCA 1998) (holding that a blue cover over driver's plate and officer testimony of actual illegibility at 100 feet to be sufficient evidence of a valid traffic stop under Fla. Stat. §316.605(1997)) and State v. Parrish, 731 So.2d 101 (Fla. 2d DCA 1999) (holding that a stop was valid because a temporary tag was not visible to the officer).

In Garcia at 1352-1354, the Fifth District Court of Appeal discussed more confusion concerning Fla. Stat. §316.605:

> "In our view, section 316.605 does not set forth a reasonable standard to justify a traffic stop because a particular officer's inability to read a license tag or plate at a distance of 100 feet is hardly an objective standard. This is so because, for example, in bad weather all motorists would be subject to a stop regardless of whether they have properly displayed their license plates and expiration stickers issued by the state since the weather could impede the visibility of the license plate. Similarly,

> the myopic officer theoretically has more latitude in stopping vehicles than the officer with better vision. Perhaps a more reasonable approach would be for the statute to require that letters and numbers on tags, plates, and expiration stickers be a particular size, and that motorists display them in a particular designated manner and ensure that they are not obstructed or obliterated. However, such a change in the statute must, of course, be addressed by the legislature."

With regard to the similar statute, Fla. Stat. §316.221(2) (2007), this Honorable Court has held that, so long as an officer could clearly read the tag, the officer did not have probable cause to stop the driver. Langello v. State, 970 So.2d 491 (Fla. 2d DCA 2007). Compare, Davison v. State, 15 So.3d 34 (Fla. 1st DCA 2009) (holding that the officer had probable cause to initiate a traffic stop because the driver's plate was not illuminated at all). In Langello at 492, this Honorable Court held that the officer was mistaken in believing a traffic infraction occurred because the tag was "clearly legible" despite having been illuminated by only one of the two tail lights. Further, in declining to find a "technical" traffic infraction for a cracked windshield, the Florida Supreme Court has ruled that "a cracked windshield violates Fla. Stat. §316.610 (2001)**only if it renders the vehicle in 'such unsafe condition as to endanger any person or property**". (emphasis added).

In State v. Diaz, 850 So.2d 435 at 437 (Fla.2003), the Florida Supreme Court reversed the accused's conviction for felony driving with a suspended license because, once the officer

was satisfied that the temporary tag was valid, "he was without probable cause, reasonable or articulable suspicion, or any other type of cause to believe or consider that any violation had occurred or was occurring." In Diaz, the officer walked past the driver's temporary tag, discovered it was valid and then continued the stop to obtain information leading to the defendant's arrest. Id. The Florida Supreme Court found that "the only allowable personal contact an officer could make with the driver after determining that the tag was valid would be to explain the reason for the initial stop." Id. at 440. See also, Blackwelder v. State, 853 So.2d 479 (Fla. 2d DCA 2003) (holding that, under Diaz, after a police officer has totally satisfied the purpose for which he has initially stopped and detained the motorist, any continued detention constitutes an infringement of Fourth Amendment rights.)316.610(1).

Appellate review of a motion to suppress is a mixed question of law and fact, bonded to federal law. Art. I,§ 12, Fla. Const., Perez v. State, 620 So.2d 1256 (Fla. 1993) and State v. Clark, 986 So.2d 625, 628 (Fla. 2d DCA 2008). Although a trial court's ruling on a motion to suppress comes to this Honorable Court clothed with a presumption of correctness, the standard of review for the trial judge's factual findings is whether competent substantial evidence supports the judge's ruling. Caso v. State, 524 So.2d 422 (Fla. 1988) and Stone v. State, 856 So.2d 1109, 1111 (Fla. 4th DCA 2003). The standard of review for the trial judge's application of the law to the factual findings

is *de novo*. Ornelas v. U.S., 517 U.S. 690, 116 S. Ct. 1657, 134 L.Ed.2d 911 (1996) and Backus v. State, 864 So.2d 1158, 1159 (Fla. 4th DCA 2003). Mr. Dixon's right to appeal was specifically reserved due to the dispositive nature of the suppression motion. Sommers v State, 404 So.2d 366 (Fla 2d DCA 1981).

Officer Diaz was able to read the license plate of Mr. Dixon and based the stop not upon his inability to observe the plate, but based upon a technical reading of Fla. Stat. §316.605 (2011). It should also be noted that even uncovered license plates have a tendency to glare in light (natural or unnatural). Further, Mr. Dixon did not put anything on his license plate to actually obscure the plate. Like others who apply a frame to show allegiance to a club or those who receive a frame indicating their car dealer, Mr. Dixon applied a plate frame that was clear for aesthetic purposes.

Prevailing case law on similar matters requires this Honorable Court to find that the transparent license plate cover did not actually hinder the observation of the license plate and therefore could not form the basis for probable cause to initiate a traffic stop. Officer Diaz read and validated the plate prior to talking to Appellant, and therefore, the stop should have ended there. Evidence obtained as a result of this illegal stop should have been suppressed by the trial court. The appellant is entitled to discharge.

ISSUE II: JUDGMENT OF ACQUITTAL WAS ERRONEOUSLY DENIED AS TO THE ALLEGATION OF DRUG PARAPHERNALIA POSSESSION.

The trial court should have granted judgment of acquittal because the elements of possession of paraphernalia were not proved by the State.

The trial court should consider whether the State has presented sufficient evidence to establish a prima facie case when considering a motion for a judgment of acquittal. T.S.J. v. State, 605 So.2d 1338, 1339 (Fla. 5th DCA 1992). In Terry v. State, 668 So.2d 954, 964 (Fla. 1996), the Supreme Court discussed the definition of sufficiency:

> "In other words, for this Court to find that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). In contrast, sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded."

Further, the trial court should grant a judgment of acquittal in circumstantial evidence cases if the State "...fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." State v. Law, 559 So.2d 187, 188 (Fla. 1989). If the State does not present evidence inconsistent with the defense's hypothesis of innocence, then the evidence presented is insufficient as a matter of law to warrant a conviction. Lynch

v. State, 293 So.2d 44 (Fla. 1974); Lord v. State, 667 So.2d 817 (Fla. 1st DCA 1995). In Fowler v. State, 492 So.2d 1344, 1347 (Fla. 1st DCA 1986), the court said:

> "it is for the court to determine, as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense ..."

No matter how strong the evidence of guilt is in a circumstantial case, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. J.R. v. State, 671 So.2d 278 (Fla. 2d DCA 1996).

The analysis for determining whether there is sufficient evidence has two parts. First, the court must look at the evidence after the end of the State's case to determine whether the State has presented a prima facie case. State v. Pennington, 534 So.2d 393 (Fla. 1988); Lord. Then the court must look at the case as a whole and determine whether the evidence presented excludes every reasonable hypothesis of innocence asserted by the defense. Id. The evidence must be viewed in the light most favorable to the State, but the court must also accept the defense's version of the case unless it is shown to be false with legally competent evidence. McAuthur v. State, 351 So.2d 972 (Fla. 1977); Lord.

Mr. Dixon was found guilty of possession of drug paraphernalia. The facts of the case do not support this

conviction.

At trial, the State failed to present sufficient evidence constituting an offense of possession of drug paraphernalia in violation of Fla. Stat. §813.147(2013) because no evidence was presented that was inconsistent with the accused's innocence. The jury convicted due to a lack of sufficient testimony

Fla. Stat. §893.147(1)(2013) provides that "[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia: ... (a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter; or (b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance ...". "The presence of even a minuscule quantity of drug residue is sufficient circumstantial evidence to prove the element of intent to use." Nixon v. State, 680 So.2d 506 (Fla. 1st DCA 1996). "Conversely, when alleged drug paraphernalia tested negative for drug residue and the record was devoid of other evidence that appellant possessed the item with intent to use it for an illegal purpose, a violation of section 893.147(1) was not established." Id.

Evidence that drug paraphernalia was seen near defendant and near drugs which defendant admitted he intended to smoke was not legally sufficient to support defendant's conviction for possession of drug paraphernalia as the circumstantial evidence

was not inconsistent with defendant's innocence and State introduced no other evidence, such as incriminating statement, that defendant intended to use paraphernalia to smoke the crack cocaine. Dubose v. State, 560 So.2d 323 (Fla. 1st DCA 1990).

If the State presents no evidence that an accused used or intended to use alleged paraphernalia for illicit purposes, no evidence exists of residue on the alleged paraphernalia and no evidence exists that the evidence was designed for use to consume controlled substances, then evidence is insufficient to prove possession of drug paraphernalia. Williams v. State, 529 So.2d 345 (Fla. 1st DCA 1988). See also C.M. v. State, 83 So.3d 947 (Fla. 3d DCA 2012) (holding that evidence was insufficient to establish that juvenile used or possessed with intent to use ear dropper to inhale controlled substance so as to support the juvenile's conviction for possession of drug paraphernalia; and there was reasonable doubt whether the substance juvenile possessed was real marijuana or synthetic marijuana, there was no controlled substance in the proximity of juvenile or the ear dropper, and juvenile testified that he used the ear dropper to smoke synthetic marijuana, a non-controlled substance);Goodroe v. State, 812 So.2d 586 (Fla. 4th DCA 2002) (holding that evidence was insufficient to support defendant's conviction on possession of drug paraphernalia charge although arresting officer testified that there was some kind of residue on the pipe found in appellant's possession; the residue was not tested and no evidence was presented that the residue was a controlled

substance); and Ellis v. State, 528 so.2d 1327 (Fla. 5th DCA 1988) (holding that evidence that alleged paraphernalia belonged to husband was not refuted and therefore insufficient evidence existed to support conviction of wife for possession of drug paraphernalia).

Officer Diaz charged Mr. Dixon with possession of drug paraphernalia after syringes were located in the glove compartment of his vehicle. VII:T96-97. Such syringes were uncontroverted to be "insulin syringes" utilized by diabetics to inject insulin. VII:T96-97, 114. Officer Diaz recognized them to be insulin syringes. VII:T96-97. Mr. Dixon's testimony was also that they were insulin syringes, and further explained they belonged to his wife, a diabetic. VII:T114. No testimony was taken from Officer Diaz, FDLE Chemist James Gibson nor Officer Valk that any residue (controlled substance, blood, DNA nor otherwise) was located nor tested on the syringes. VII:T56-156. After the state completed its presentation of evidence, the defense moved for judgment of acquittal and that motion was erroneously denied.

In this case, there was a reasonable hypothesis of innocence that Mr. Dixon's wife was the possessor of the alleged paraphernalia (syringes) found in his vehicle. The trial court should have granted a judgment of acquittal in this case since the evidence the State presented failed to exclude this reasonable hypothesis of innocence. State v. Law, 559 So.2d 187, 188 (Fla.

1989). If the State does not present evidence inconsistent with the defense's hypothesis of innocence, then the evidence presented is insufficient as a matter of law to warrant a conviction. Lynch v. State, 293 So.2d 44 (Fla. 1974); Lord v. State, 667 So.2d 817 (Fla. 1st DCA 1995). Mr. Dixon is entitled to a discharge of the conviction and sentence in this case.

CONCLUSION

For the foregoing reasons, arguments, and authorities, this Honorable Court should reverse the judgment and sentence, and discharge Appellant.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 13TH day of January, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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