

LAW ENFORCEMENT NEWSLETTER

May 2016

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

I've heard it said that no man is safe while the legislature is in session. If that's so, and it may well be, then we are safe as the 2016 session has ended. We will, as always, circulate detailed information in the September issue of the Legal Bulletin in order to be certain that bills passed by the legislature were actually signed into law by the Governor. Most will

have an effective date of October 1st; anything of importance that might be effective earlier will be distributed separately.

Of primary significance to us may be the interplay between the United States Supreme Court's Hurst decision on the death penalty and the legislature's response by passing a new procedure that is effective

already. The Hurst case did not, as some might suggest, find Florida's death penalty to be unconstitutional. What the decision ruled on was simply some elements of how Florida processes potential death cases. To address that, the legislature has now provided that the jury must make affirmative unanimous findings as to the existence of specific aggravating factors before a death recommendation can be made. Although not required by Hurst, the legislature also amended Florida law to require that a death recommendation be by a super-majority vote of 10 or more as opposed to the previous bare majority of 7 jurors. Other technical changes of less significance were also passed. This was actually a big victory for law enforcement interests in that



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**CONTINUED: MESSAGE FROM
 STATE ATTORNEY
 BILL CERVONE**

there was a considerable push to require a unanimous death recommendation. Had that happened not only would one or two jurors have held the ability to thwart the will of a large majority but also the reality of most cases would have been that a death sentence was impossible to obtain.

Also of note is that virtually none of the expanded gun rights bills proposed this year passed. Open Carry and Campus Carry in particular failed after much heated debate and maneuvering. The law enforcement community in general acted together in opposition to these bills; even though there is legitimate disagreement in our ranks about some aspects of these proposals the majority position car-

ried the day. The day, however, is certain to return in the 2017 session.

Finally of general interest, efforts to curtail the ability of the prosecution to file direct adult charges against juveniles charged with serious crimes also failed at the end of the session. Statewide numbers on direct file cases show that this process is used less than ever before and with appropriate discretion. Some, however, continue to believe that even violent juveniles should be kept out of the adult system and, potentially, prison. This, too, will likely be back again in 2017.

LAW ENFORCEMENT MEMORIAL DATES

The 2016 Alachua County Law Enforcement Memorial will be on May 5th at the Veteran's Memorial Park site. A reception will start at 6pm and the ceremony will begin at 7pm.

This year's Baker County Law Enforcement Memorial will also be on May 5th at 7pm at the Sheriff's Office complex in Macclenny.

The combined Bradford-Union County Law Enforcement Memorial was held on April 28th this year in Starke.



SAO STAFF CHANGES

ASA Katrina Hardin resigned in January. Katrina and her husband have relocated to the Atlanta area where he has taken a new position.

ASA Adam Urra also resigned effective at the end of the January. Adam is entering private practice with a Jacksonville firm.

ASA Chris Eisey has replaced Adam as the Chief of the State Attorney Firearm Enforcement Unit. **ASA Glenn Bryan** has been re-assigned to the SAFE Unit. Other transfers that have occurred are **ASA David Byron** to the Alachua County sex crimes unit and **ASAs Kate Hartman**

and **Jamie Whiteway** to the felony division in Alachua County.

New to the SAO are **ASAs Mike Alvarez and Lenora Floyd**, both of whom started in January. Mike is a 2014 University of Florida Law School grad who has been working in private practice in Jacksonville. He is assigned to the Gainesville County Court division. Lenora is a 2012 Florida Coastal Law School grad who has been in private practice in Williston and who previous to her law school graduation worked for Court Services in Alachua County. She is assigned to the Levy County office, where she will handle county court dockets.



The SAO Is Now On Twitter

The **SAO** has established a Twitter feed to better disseminate information to the media and others such as law enforcement agencies. Like us at #8THCIRCUITSAO. For more information contact Deputy Chief Investigator Darry Lloyd at 352-374-3670.

Congratulations To...

The Gilchrist County Sheriff's Office held its annual awards ceremony on March 3rd. Among those honored by Sheriff Schultz and the Department were Mathew Rexroat as Deputy of the Year, Scotty Douglas as Investigator of the Year, Mandy Hughes as Correctional Officer of the Year, and Brent Owens as Civilian of the Year. Deputies Jeff Davis and Mathew Rexroat also received the Department's Life Saving Award for their efforts in saving the life of a boating accident victim. The Capt. Tony Cruse Community Involvement Award was presented to Leonard Knuckles.



Any changes in agency email addresses should be reported to our office at clendenin@sao8.org.

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Legal Bulletin, please call Chief Investigator Paul Clendenin at the SAO at 352-374-3670.



Congratulations To...

The Alachua County Sheriff's Office SWAT Team won the 2016 South-east Missouri SWAT Challenge in Fredericktown, Missouri, in April, besting 13 other teams in a five event competition simulating real life scenarios and emphasizing weapon expertise and physical fitness. The team won four of five events and finished second in the fifth. Members of the team are Sgts. Joe Vangorder and Josh Crews and Deputies James Ferguson, Barrett Boyette, Chris Drake, Wes Krames, and Marvin Gunn. They will now move on to the 34th Annual International SWAT Round Up to be held in November in Orlando.



Assistant State Attorney Carla Newman Speaks with Baker County School Kids during a Courthouse Field Trip

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Supreme Court Changes Rules On Access To Counsel

The Florida Supreme Court issued an opinion on April 21st that significantly changes the rules regarding allowing defense counsel access to a suspect who is being interrogated. The opinion also implicates the necessity of Miranda warnings in some situations that begin as non-custodial interviews. This new opinion reverses an earlier opinion of the 2nd DCA as well as existing law.

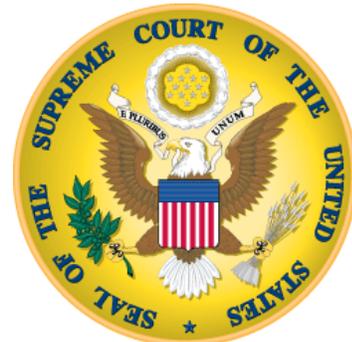
In the case, the defendant agreed to accompany deputies who were investigating a missing person report to the Hernando County Sheriff's Office for an interview. Although he was driven there in a deputy's vehicle he was not handcuffed and he was told that he was not under arrest. Ultimately and after several hours he confessed to the murder of the person who was missing; during his confession (but not before that point in the interview) he was given Miranda warnings, after which he continued to talk.

At some point before he started to confess but during the interview an attorney retained by the defendant's parents showed up. He was refused access to the defendant despite telling officers that he wanted all questioning to stop. The defendant was never told that the attorney was there.

To cut to the chase, the Supreme Court ultimately ruled that when an individual is being questioned in a non-public area and an attorney retained on his behalf arrives at that location the Due Process clause of the Florida Constitution requires that police notify the defendant of the attorney's presence and purpose. As the Court stated, "a person can no longer be deprived of the critical information that an attorney is present and available to provide legal advice based on pure police conjecture that the individual is not in custody."

This leads to the second part of the Court's ruling, that being the defendant's custody status for Miranda purposes as well as unsolicited access to counsel. While not in custody initially, the Court held, an encounter of this sort may under the totality of the circumstances steadily evolve into a custodial setting. Without belaboring a very lengthy discussion in the case about those circumstances, suffice it to say that the Court appears to have focused on the tone of the interview, including its accusatory nature, and other factors such as the defendant only having been allowed to use the bathroom under escort, and perhaps most problematic having been told that the possibility of leaving the sheriff's office was "uncertain." Calling modern day interrogation more psychologically than physically oriented, the court also stated that "it is not necessarily a single specific comment, question, or circumstance that converts an encounter from noncustodial to custodial."

This is, of course, not helpful and provides little if any guidance. The new case, State v McAdams, will require careful study which there has been no time to do as of this publishing deadline. At this point a word to the wise will suffice: you must allow access to an attorney who shows up demanding to see a person who is being interviewed, and you'd best take a cautious approach as to when Miranda warnings are given, even if your suspect has voluntarily come in for questioning.



Detention Of Vehicle Passengers

One of the thorniest problems facing patrol and other officers is the risk posed by passengers in a vehicle being stopped for a traffic violation and the existing rule of law in Florida that they may not be detained. In an opinion issued in early April, the 5th DCA has reversed itself and allowed that.

The facts of the case, Aguiar v State, are straight forward. Aguiar was a front seat passenger in a car stopped for a brake light violation. When the car stopped, he immediately got out of the passenger side door. The officer ordered him back into the car, which he ultimately complied with. At that point, the officer saw what turned out to be a bag of cocaine on him, for which he was arrested.

The law has been clear for decades that "as a matter of course" an officer making a traffic stop can order the driver out of the car. The United States Supreme Court recognized as early as 1977 that there are inordinate risks in making a traffic stop, not from the reaction to the stop but from whatever else the driver of a vehicle might be involved in. For that reason alone, any minimal inconvenience to a driver being told to exit is far outweighed by officer safety concerns.

In 1997 the United States Supreme Court extended that rule to passengers, noting that while there may be no reason to detain a passenger for some violation the driver has committed as a practical matter the passenger has already been stopped by virtue of the vehicle being stopped anyhow. In terms of the motivation to conceal something more serious than the traffic stop, however, the Supreme Court noted that the passenger may have every bit as much motivation to employ violence to prevent apprehension.

The problem with the 1997 case was that it didn't go far enough to make the rule clear, leaving open the question of how much control of passengers an officer might exercise. Various Florida courts thereafter limited their rulings to the authority to order a passenger to exit a vehicle. The 5th DCA has now clarified this, noting that just because previous decisions "did not discuss a heightened danger that could arise from

allowing a passenger to walk away, uncontrolled, from the immediate scene, does not mean that those dangers do not exist. They do."

The 5th DCA went on to discuss United States Supreme Court cases more recent than those other Florida courts have relied on, all recognizing the danger that traffic stops can pose to officers and all coming down on the side of officer safety in allowing them to exercise control over passengers. The 5th DCA therefore concluded that it was lawful for the officer to have ordered Aguiar back into the car.

Because this decision conflicts with other Florida districts the decision was certified to the Florida Supreme Court for resolution of that conflict. How long that may take is unknown, but certainly months. And in the interim, what does all of this mean? Technically, only that an officer can order a passenger to return to the vehicle when a traffic stop is made. More broadly, and more importantly, that an officer may restrain a passenger's liberty in any reasonable fashion. Because the 1st DCA, under whose rulings we operate, has not rendered an opinion on this matter it is also important to note that the 5th DCA holding may be persuasive and could be controlling if a similar issue comes up here before the Florida Supreme Court resolves the matter. Our courts could, however, also reject this argument in favor of the conflicting opinions from other DCAs. Given the logical basis for it, not to mention the increasing violence directed at law enforcement officers across the state and country, one would hope that did not happen.



Inevitable Discovery

Everyone is familiar with the legal concept of inevitable discovery, which in general holds that even if there has been some procedural error by officers if they inevitably would have found contraband by legal means then suppression is not required. There are, however, limits on that. The Florida Supreme Court explained one in late December.

In the case, Rodriguez v State, the defendant was thought to be harboring a person who a bail bondsman was looking for, either to notify him of a required hearing or possibly to return him to custody for failing to appear. The bondsman went to Rodriguez's home, who said he did not know the other individual. When asked by the bondsman if he would let him look around the house to be sure, Rodriguez agreed. Once inside, the bondsman came across a locked room, which Rodriguez agreed to open. Sure enough, that room contained a fairly large marijuana grow operation. The bondsman called police to report that.

When detectives arrived, they too were allowed in and once they saw the grow operation they arrested Rodriguez. Although he had signed a consent to search form, Rodriguez moved to suppress, claiming that his consent had not been voluntary because of the large show of force that the detectives had arrived with. The trial judge agreed, but ruled that even so the detectives would have inevitably been able to get a search warrant had Rodriguez not consented and would have inevitably found the grow operation that way. The lead detective had testified that he would indeed have gotten a warrant if Rodriguez had not consented to the search. The 3rd DCA upheld those findings.

That should have been the end of the story but the Supreme Court disagreed and held instead that it is not sufficient to justify an inevitable discovery seizure that law enforcement *could have* sought a search warrant for which, as in this case, they had ample probable cause. Instead, law enforcement must *be in the process of* obtaining the warrant when an otherwise improper warrantless search occurs.

In ruling that way, the Supreme Court noted that the inevitable discovery rule, which has been legally recog-

nized for decades, seeks to balance the societal cost of allowing obviously guilty people to go free against the need to deter police misconduct, specifically illegal searches. To sustain a claim of inevitable discovery, the Court said, an investigation must be on-going and the State must show that the facts known to law enforcement at the moment of some unconstitutional procedure would have led them to the evidence notwithstanding the misconduct. Perhaps splitting hairs, the Court went on to say that this means that "there is no room for probable cause to obviate the requirement to pursue a search warrant, for this would eliminate the role of a magistrate and replace judicial reasoning with the current sense impression of police officers." The Court further noted that this was especially so when a home is involved.

This decision will severely limit the applicability of the inevitable discovery rule. It also points out a reality based maxim: when in doubt and if at all possible always seek a search warrant. Always. The time it takes to do so is well invested.



BLOOD DRAWS AND WARRANTS

Everyone should recall that in 2013 the United States Supreme Court issued an opinion styled Missouri v McNeely, which held that the natural metabolization of alcohol in the bloodstream does not create a per se exigency such as to justify the warrantless taking of a blood sample in a DUI case. In the first significant Florida case since McNeely was issued, the 5th DCA has now specifically held that law enforcement may no longer categorically obtain a blood sample without a warrant simply because alcohol is leaving a suspect's blood stream with the passage of time. Instead, a warrant must be obtained to do so, or, absent valid consent, exigent circumstances to justify proceeding without a warrant must be shown.

When McNeely was issued the hope remained that Florida's implied consent statute would serve to bridge the problems that were created by that opinion. The 5th DCA opinion, however, states that statutory implied consent is not the same as 4th Amendment consent and is not sufficient to overcome the warrant requirement. Rather, the Court ruled, the implied consent statute is directed to law enforcement's entitlement or obligation to obtain a blood sample, but that doing so must still be by warrant unless actual consent or exigent circumstances can be proven.

This new opinion, styled State v Liles, arose in Orange County in two traffic homicide cases. It was issued on April 8th, so its full import is not yet known. As the first opinion on this topic in Florida since McNeely was issued it is binding on 8th Circuit courts. The opinion does not define what sufficient exigent circumstances might be, and that will be a matter for future litigation. An unconscious suspect or a suspect being prepped for emergency surgery during which transfused fluids will clearly affect any alcohol levels, for example, may or may not suffice.

Liles or other cases from other areas of the state that disagree with or distinguish its facts may well end up before the Florida Supreme Court. Until and unless that happens, however, all agencies must be aware of the McNeely requirements.

Consensual Encounters, Investigatory Stops, And Arrest

Another of the thorniest and most fact specific problems we deal with are stop and frisk and search and seizure issues. Following is a recent opinion from the 5th DCA that outlines the differing types of citizen encounters an officer may have along with some factual examples that are applicable. Because the opinion contains a good review of the law it is being included in its entirety.

In reading this case, bear several things in mind. First, you'll note that two different trial judges ruled two different ways, one in favor of the State and one against. The point of that is that judges have enormous discretion in matters of this sort when it comes to their perception and interpretation of evidence. The second is that even minute differences in fact patterns can make all the difference in the world, which is why the SAO so often urges that officers document, document, and document again every detail of an incident such as this. We simply never know what one fact might win the day.



Consensual Encounters, Investigatory Stops, And Arrest

2016 WL 671986

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

**District Court of Appeal of Florida,
Fifth District.**

STATE of Florida, Appellant,

v.

Marques R. ALBERT, Appellee.

No. 5D15-996.

Feb. 19, 2016.

Appeal from the Circuit Court for Brevard County, [Robin C. Lemonidis](#), Judge.

Attorneys and Law Firms

[Pamela Jo Bondi](#), Attorney General, Tallahassee, and L. Charlene Matthews, Assistant Attorney General, Daytona Beach, for Appellant.

[James S. Purdy](#), Public Defender, [Nancy Ryan](#), and Joseph J. St. Angelo, Assistant Public Defenders, Daytona Beach, for Appellee.

Opinion

[EDWARDS](#), J.

*1 The question presented in this case is whether a police officer may ask a citizen twice to come over and speak to him without infringing upon that citizen's Fourth Amendment rights. The State appeals the trial court's order on rehearing granting Marques Albert's motion to suppress evidence, and it argues that the rehearing judge erroneously concluded that the interaction between the police officer and Albert constituted an investigatory stop that was not supported by reasonable suspicion. The State points out that the motion to suppress was originally denied by a different judge, who concluded that the encounter was consensual after observing the police officer and Albert testimony. Based on the totality of the circumstances in this case, we find that this was not an investigatory stop. We reverse and remand to the trial court for further proceedings.

Albert was charged with possession of cocaine under twenty-eight grams, possession of hydromor-

Consensual Encounters, Investigatory Stops, And Arrest Continued

phone, and possession or use of drug paraphernalia. The charges stem from an encounter with Officer Jeremy Pergerson, a K-9 officer with the Titusville Police Department. Albert filed a motion to suppress the evidence that Pergerson obtained from Albert during their encounter.

Judge John Griesbaum held the original hearing on Albert's motion. At this hearing, Pergerson testified that on March 9, 2014, while patrolling an area he considered a "high crime" and "high drug" area, he identified Albert and other individuals at a residence. Based on Pergerson's patrol duties and prior investigations, he testified that he knew drug activity occurred at the residence on a daily basis. Pergerson explained that Albert had something in his hand that he appeared to be picking at, while a woman standing near Albert was looking at whatever he held in his hand. The officer further testified that one of the individuals noticed him approach, and alerted Albert to Pergerson's arrival. According to Pergerson, Albert immediately became nervous, shoved whatever he was holding into his pockets, and began to walk away.

Pergerson believed Albert was involved in a drug transaction, but admitted that he did not have enough information at that time to justify conducting an investigatory stop to detain Albert. While staying between his marked patrol car and the sidewalk, Pergerson asked Albert to come over to him. Albert asked Pergerson why he was bothering him and said he was not doing anything wrong. During the encounter, Pergerson was the only police officer present, he did not block Albert's path, did not follow him on foot, did not activate the police car's siren or lights, and did not draw his pistol or any other weapon. The officer did not tell Albert that he was not free to leave, nor did he ask him to remove anything from his pockets. After asking him a second time to come over, Albert walked over to the officer. When Albert approached him, Pergerson detected the odor of marijuana on Albert and observed in plain view a cigar tube that had been cut in half protruding from Albert's pocket. Following those observations, Pergerson searched Albert and discovered contraband that led to his arrest.

*2 Albert testified at the hearing that he was compelled to walk toward Pergerson because the officer threatened to release the K-9 from the patrol car if Albert did not comply. According to Albert, the officer kept touching a button or control on his belt, which Albert believed could be used to let the K-9 out of the car. Though Pergerson had his Dutch Shepherd dog in his patrol car, a marked K-9 unit, he denied ever threatening to release the dog. As far as Pergerson was concerned, if Albert did not respond he would have been free to walk away.

The original written order denying the motion to suppress was issued in August 2014. In this order, Judge Griesbaum reviewed the testimony, including the differing accounts of whether the officer said that he would release the dog if Albert refused to come over. The trial court found the officer's testimony more credible, and determined that no such threat or show of force had occurred. The court found that the totality of the circumstances were such that a reasonable person in Albert's position would have felt free to leave or decline Pergerson's request and that Albert was not detained by

Consensual Encounters, Investigatory Stops, And Arrest Continued

Pergerson. The court then concluded that there had been no seizure. Thus, the officer's observations during the consensual encounter provided a basis for the search which led to discovery of the evidence. For those reasons, the trial court denied the motion to suppress.

Approximately six months later, Albert filed a motion for rehearing requesting the court review its conclusions of law, asserting that Albert's counsel had not provided the original judge with a potentially relevant case, *Beckham v. State*, 934 So.2d 681 (Fla. 2d DCA 2006). Albert asserted that if the original judge had been provided with *Beckham*, he would have granted the motion to suppress. Judge Robin Lemonidis presided over the motion for rehearing. Albert argued that Pergerson displayed a show of authority by repeatedly asking Albert to come over to him. The State responded that Pergerson only asked Albert twice to come over, and he did not pursue Albert or the other individuals that were on the property. On rehearing, the court reversed the order denying the motion to suppress and ruled that Pergerson's repeated requests for Albert to come to him constituted an investigatory stop. The court held that the circumstances surrounding the stop did not indicate that the officer had a reasonable or well-founded suspicion of criminal activity to justify an investigatory stop. Thus, on rehearing, the motion to suppress was granted.

When reviewing a trial court's ruling on a motion to suppress, an appellate court is bound by the trial court's factual findings, so long as they are supported by competent substantial evidence. *State v. D.R.*, 67 So.3d 372, 373 (Fla. 3d DCA 2011). The determination of the existence of probable cause is a legal issue that must be reviewed de novo. *Pagan v. State*, 830 So.2d 792, 806 (Fla.2002).

*3 In *Popple v. State*, 626 So.2d 185, 186 (Fla.1993), the Florida Supreme Court outlined three levels of police-citizen encounters. The first level is consensual and involves minimal police contact. 626 So.2d at 186. During such an encounter, a citizen may choose to comply with or ignore an officer's requests. *Id.* The second level, investigatory stop, permits an officer to reasonably detain a citizen temporarily if the officer has a reasonable suspicion that the citizen has committed, is committing, or is about to commit a crime. *Id.* The investigatory stop requires a well-founded, articulable suspicion of criminal activity to avoid violating a citizen's Fourth Amendment rights. *Id.* The third level of police-citizen encounter is an arrest which must be supported by probable cause that a crime has been or is being committed. *Id.*

"It is well established that an officer does not need to have a founded suspicion to approach an individual to ask questions." *Id.* at 187; see also *Beckham*, 934 So.2d at 683. "[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...." *Popple*, 626 So.2d at 187. "A court, when determining whether a particular encounter is consensual, must look to all the circumstances surrounding the encounter when deciding if the police conduct would have communicated to a reasonable per-

Consensual Encounters, Investigatory Stops, And Arrest Continued

son that the person was free to leave or to terminate the encounter.” *Voorhees v. State*, 699 So.2d 602, 608 (Fla.1997) (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). The test for seizure is whether, under the circumstances, a reasonable person would conclude that he is not free to leave the encounter. *Voorhees*, 699 So.2d at 608.

In *Beckham*, the Second District Court of Appeal reversed a trial court’s denial of a motion to suppress because the officers lacked a well-founded suspicion to conduct an investigatory stop of Mr. Beckham. 934 So.2d at 686. As will be discussed below, *Beckham* did not require the Second District Court of Appeal to rule on whether that police-citizen encounter was consensual or an investigatory stop. A police officer, familiar with Beckham’s reputation for selling drugs, received a tip that Beckham was selling drugs. *Id.* at 682. While in a marked police car being driven by a police trainee, the officer noticed Beckham on a bicycle in a car wash stall with two pedestrians. When the police car pulled off the street, onto the car wash parking lot, the two pedestrians began walking away, and Beckham started to ride off on his bicycle. *Id.* The trainee called to Beckham, who either ignored or did not hear him. *Id.* Beckham continued riding away on his bicycle. The trainee called to him again, this time by name, and Beckham stopped. *Id.* At the suppression hearing, Beckham testified “that the officers pulled up in their car and directed him to ‘hold it right there.’” *Id.* at 683 n.1. The officers approached him and noticed he was nervous and reaching into his pockets. *Id.* The trainee asked for Beckham’s consent to perform a pat-down search. *Id.* Beckham agreed to the pat-down, but stated that the officer could not search in his pockets. *Id.* Because Beckham’s pants were so large and baggy, the pockets stood open and the officer could plainly see marijuana inside of them without having to reach inside. *Id.* at 683. “The officer retrieved the marijuana, arrested Beckham and after a further search, found additional contraband.” *Id.*

*4 The trial court denied Beckham’s motion to suppress and found that the search was not a consensual encounter, but rather an investigatory stop supported by reasonable suspicion. *Id.* The court reasoned that the officers’ prior information about Beckham coupled with the officers’ observations provided them with reasonable suspicion to justify the stop. *Id.* The trial court’s characterization of the stop as investigatory rather than consensual was not contested by the State on appeal. *Id.* at 683 n.1. The Second District reversed. *Id.* at 685. It found that the tip and the officer’s knowledge of Beckham’s prior drug charges was not sufficient to justify the detention. *Id.*

In *Beckham*, the Second District found that the trial court’s conclusion that it was an investigatory stop was supported by the factual findings. *Id.* at 683 n.1. The Second District stated that “Beckham stopped in acquiescence to the apparent authority of these uniformed officers exiting a marked patrol car. Although he did ignore the first call, since they continued to call and used his name, the trial court was justified in determining this was an investigatory stop.” *Id.* The Second District described Beck-

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ham's testimony, that the police officers told him to "hold it right there," as "consistent with the court's conclusion that the stop was an investigatory stop." *Id.* The outcome in *Beckham* only required a decision on whether or not the officers had the required well-founded suspicion to initiate the investigatory stop. There is also a factual difference between *Beckham* and Albert's situation, as the police officers approached Beckham in their car, while here, Albert walked over to Officer Pergerson. Therefore, *Beckham* does not answer the question presented by the instant appeal.

In *Chapman v. State*, 780 So.2d 1036 (Fla. 4th DCA 2001), a police officer observed Chapman on a bicycle potentially impeding traffic, but not committing any traffic violations. 780 So.2d at 1037. Without activating the lights or sirens on his patrol car, the officer asked Chapman to come to him to talk. *Id.* Chapman approached the officer and produced his identification when asked. *Id.* The officer noticed Chapman was nervous and shaking, and he asked to search him. *Id.* Chapman agreed and the search yielded six pieces of crack cocaine. *Id.* The trial court denied Chapman's motion to suppress evidence and found that the encounter was consensual, involved minimal police contact, and Chapman was free to ignore the officer's request. *Id.* The Fourth District Court of Appeal affirmed. *Id.* at 1038. The court noted that the circumstances, viewed in their entirety, indicated no coercion that would lead a reasonable person to believe he was not free to disregard the officer. *Id.* Further, it found that the officer's conduct was not confrontational, coercive, oppressive, or dominating. *Id.* *Chapman*, while differing from the instant case in some factual respects, addresses and answers the question presented here. We find *Chapman* to be well reasoned and helpful in our analysis.

*5 We are aware that there are other cases that involved more coercive or assertive police behavior than was present here, where courts have concluded that the police-citizen encounters were not consensual. See *F.E.H. v. State*, 28 So.3d 213, 214 (Fla. 4th DCA 2010) (holding a seizure, rather than a consensual encounter, occurred when several police officers jumped from their cars, and as the juvenile defendant started to walk away, he stopped and returned when one officer called to him: "yo, come here"); *Young v. State*, 982 So.2d 1274, 1275 (Fla. 4th DCA 2008) (finding a seizure occurred when an officer asked a pedestrian to come speak with him and a second officer blocked the sidewalk which prevented him from continuing to walk away); *Oslin v. State*, 912 So.2d 672, 675 (Fla. 5th DCA 2005) (finding a seizure occurred when officers shined a spotlight, activated the patrol car's air horn, and repeatedly called to defendant).

The factual differences between *F.E.H.*, *Young*, *Oslin*, and the instant case are sufficient to support and require different legal conclusions. Here, there was nothing preventing Albert from continuing to walk away, no police equipment was used to intimidate Albert, and there was only one officer who did nothing more than ask Albert, twice, to come speak with him. We conclude that the original order denying the motion to suppress was correct in finding this to be a consensual encounter that did not violate Albert's Fourth Amendment rights. Accordingly, we reverse the order entered following rehearing that granted the motion to suppress.

Consensual Encounters, Investigatory Stops, And Arrest Continued

REVERSED AND REMANDED.

[PALMER](#) and [TORPY](#), JJ., concur.

All Citations

--- So.3d ---, 2016 WL 671986