IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

APPEAL NUMBER 5D08-4268

JERRY RANDELL BROXTON
Appellant

v.

STATE OF FLORIDA
Appellee.

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE
FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
LAKE COUNTY, FLORIDA

BRIEF OF APPELLANT
(ORIGINAL)

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
1932 Perry Place
Jacksonville, FL 32207

(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com

Counsel for Appellant
JERRY RANDELL BROXTON

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

References to the original record on appeal will be in the format "**R**" followed by the appropriate volume and page number or numbers as assigned by the clerk. The trial and post trial transcripts are in Volume II of the record on appeal, but the clerk did not separately paginate this volume, therefore references to the trial and post trial transcripts will be in the format "**RII-TR**" followed by the date of the transcript then the appropriate page or page numbers as assigned by the court reporter. For example, RII-TR-11/18/2008-121 would refer to page 121 of the transcript of the trial conducted November 18, 2008.

STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED IN DENYING BROXTON'S MOTION TO SUPPRESS.

II. FLORIDA STATUTES, § 893.01 VIOLATES DUE PROCESS BY IMPERMISSIBLY SHIFTING TO THE DEFENDANT THE BURDEN OF PROOF THAT HE DID NOT KNOW THE ILLICIT NATURE OF A CONTROLLED SUBSTANCE IN HIS POSSESSION BUT INSTEAD PRESUMES THAT HE HAD SUCH KNOWLEDGE EFFECTIVELY REMOVING THE REQUIRED ELEMENT OF *MENS REA* FROM THE OFFENSE.

III. POSSESSION OF A PERSONAL USE QUANTITY OF A PRESCRIPTION CONTROLLED SUBSTANCE WITH NO EVIDENCE OF INTENT TO DISTRIBUTE TO OTHERS IS NOT SUBJECT TO THE MINIMUM MANDATORY PENALTIES FOR TRAFFICKING.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Thirty year old Jerry Randell Broxton ("Broxton") was charged by information July 2, 2008 with trafficking in oxycodone,[1] the amount alleged to have been 15.3 grams, triggering a fifteen year minimum mandatory penalty and $100,000 fine upon

[1] At trial FDLE chemist Carol Peterson identified the drug to be a round white tablet with a marking "512" which she identified from the literature to be a 5 mg. dose oxycodone tablet. [RII-11/18/2008-47-52] This would have been a generic version of Percocet, manufactured by Mallinckrodt Pharmaceuticals, and consisting of a compound of 5 mg. oxycodone with 325 mg. acetaminophen (generic Tylenol).

http://pharmaceuticals.mallinckrodt.com/Products/Product.asp?UT=0&BusinessUnitID=1&PG=5&ProductID=5412&ProductGrp=UD

conviction. Florida Statutes, §§ 893.135(1)(c) and 893.03(2)(a). [RI-12]

September 23, 2008 the defense filed a pretrial motion to suppress the oxycodone tablet evidence, based on a challenge to the search and seizure of the evidence from the defendant, which had taken place the day he was arrested, May 12, 2008. [RI-26-29; RI-1]

October 15, 2008 a pretrial evidentiary hearing was conducted on the motion to suppress. [RI-142] November 10, 2008 the circuit court entered a written order denying the motion to suppress. [RI-36-49]

The case proceeded to trial by jury on November 17-18, 2008. [RII] The trial testimony for the state consisted of the arresting officer, Steve Adam, a Florida Fish and Wildlife Conservation officer, who arrested Broxton, and Fish and Wildlife officer John Wilkie, who assisted at the scene of the arrest. [RII-TR11/18/2008-2] In addition the state presented Florida Department of Law Enforcement ("FDLE") chemist Carol Peterson, who identified the drug and its weight. [RII-11/18/2008-47-52] At the appropriate point in the state's case the defense renewed its objection to the admission of the evidence subject to the motion to suppress. [[RII-11/18/2008-16] The defense renewed its motion to suppress at its argument for judgment of acquttal at the close of the evidence, and the court again denied the motion. [RII-11/18/2008-75]

Broxton was convicted November 18, 2008 of trafficking in oxycodone in an amount equal to 14 grams or more but less than 28 grams and sentenced to the minimum mandatory fifteen year term of imprisonment and the mandatory $100,000 fine. [RI-79; RII-11/18/2008-08; RI-91] This appeal followed in a timely manner thereafter with the filing of the notice of appeal on December 1, 2008. [RI-99-100]

Broxton's appellate counsel subsequently filed a timely motion to correct sentence under Rule 3.800(b)(2), Florida Rules of Criminal Procedure, arguing that his conviction was not subject to the fifteen year minimum mandatory trafficking sentence when the evidence showed a personal use quantity of a prescription controlled substance and there was no evidence of intent to distribute to third persons or that to subject him to a fifteen year minimum mandatory on these facts was cruel and unusual punishment. [SR-***] The trial court denied the motion. [SR-***] The clerk prepared a supplemental record and this briefing has followed the supplemental record.

STATEMENT OF FACTS RELEVANT TO SUPPRESSION ISSUE

Broxton filed a timely pretrial motion to suppress [RI-26] An evidentiary hearing was conducted on the motion to suppress, October 15, 2008. At that hearing Officer Steven Adam testified that he was an officer with the Florida Fish and Wildlife department. [RI-145] On May 8, 2008 he saw four men fishing at a pond

by Lakeview Terrace in Lake County off County Road 42 in the Altoona area. [RI-145-146] He approached them to inquire if they had fishing licenses, which are required by state law. Failure to have a fishing license while fishing is a civil infraction. [RI-146]

> Q So just so we're all on the same page here, not having a fishing license is what sort of violation?
>
> A It's a civil infraction.[2]

[RI-146]

He asked the defendant, Jerry Broxton, if he had a fishing license, and Broxton said no. [RI-147-148] At this point Broxton was detained, he was not free to leave.

> Q At the time when you guys were standing there and you were going to write him a citation, he was not under arrest, was he?
>
> A No, he wasn't under arrest. He wasn't free to go. I was going to issue him a citation.

[RI-153]

He then asked Broxton for identification. Broxton said he did not have any identification. The officer's purpose in asking for identification was to check to see

---

[2] Freshwater fishing licenses are mandated under Florida Statutes, § 379.354(1)(a). Violation of this statute is a non-criminal infraction, which can only be prosecuted by citation. Florida Statutes, § 379.401(1)(a). There is nothing in the record to establish whether the area being fished was exempt from licensure under Florida Statutes, § 379.353.

if Broxton had a recently expired fishing license, and if so, he would only issue Broxton a warning, not a citation. Alternatively, he needed to see identification to write a citation. [RI-148]

> Q So just to clarify, you wanted to get his identification to see if he had a recently expired license and cut him a break and let him go?
>
> A Just write him a warning.
>
> Q Or if you were going to write him a citation, you needed to know who he was?

[RI-148]

Officer Adam testified that dealing with people who are fishing, they often have a knife with them to cut their fishing line. [RI-149] He noticed several bulges in Broxton's pockets, and based on his experience, someone with bulges in his pocket might have a weapon or a knife for use in fishing. [RI-149] So Officer Adam patted Broxton down. [RI-149]

> Q Okay. Did you observe anything about him that lead you to believe he might be armed?
>
> A No. No, nothing in particular other than the simple fact that you're fishing, and a lot of times when you're fishing, you have like a knife or something with you to cut your line.
>
> Q Did you observe anything about him physically that lead you to believe that he might have a weapon? Did

he have anything about him?

A I saw several bulges, you know, in his pockets that I couldn't identify without patting him down.

Q So in your training and experience, someone who has bulges in their pocket might have a weapon?

A They might have, yes.

Q And people who are fishing might have a knife?

A Yes.

[RI-149]

However, after patting Broxton down, Officer Adam did not feel any weapons in Broxton's pockets. [RI-149-150]

Q And when you patted him down, did you feel any weapons in his pocket?

A I didn't feel any weapons in his pocket. I felt a lighter and the cigarette that he had in one of his pockets. I went to the other pocket and patted it down. And he was pretty cooperative through the whole thing.

[RI-149-150]

Broxton was "cooperative through the whole thing." [RI-150] But Broxton was not free to leave:

Q So he wasn't free to leave at the time when you patted him down, was he, because you still hadn't issued the citation?

A No.

[RI-157]

Officer Adam felt something that had the consistency of a plastic bag, and inquired further about it and in response to the officer's query, Broxton exposed the bag:

> A During the pat down, while I was patting him down, I felt the consistency of a plastic bag or plastic of some sort in one of his pockets. And I asked him what was in the bag.
>
> Q Okay. What happened when you asked him what was in the bag?
>
> A He stated that it was some fishing tackle. And he opened up a pocket or opened up the flap and kind of exposed a bag but didn't remove the bag. But just fishing tackle. So then I was watching it and it was - - it was a bag that had some pills in it.

[RI-151]

Broxton opened his pocket and showed the bag in compliance with a request from Officer Adam:

> Q Did he open his left pocket for you?
>
> A He poured the contents out.
>
> Q And did he offer to open the right pocket before you asked him what was in it?
>
> A No.
>
> Q So it was only after you asked him that he

opened the pocket?

A It was after I asked him what was in the pocket. I didn't ask him to open the pocket. I asked him what was in the pocket or I asked him what was in the bag, not really knowing that it was a bag even. But I thought, I figured it might.

[RI-158]

When Officer Adam saw pills in the bag, he ordered Broxton to remove the bag and turn it over to him:

Q Okay. In your training and experience, is there anything unusual about these pills being in the bag?

A Yes. Usually when somebody is carrying pills in a bag rather than in like a prescription bottle or something like that, it's usually illegal. So I asked him to remove the bag at that point when I saw the pills.

Q Okay. So at that point you were concerned that the pills may be illegal because they weren't packaged?

A Yes.

[RI-151]

Broxton testified that he opened his pocket and gave the bag to Office Adam because the officer asked him to do so and he did not want to cause trouble:

Q During that contact, did Officer Adams ever ask you to open your pocket?

A Yes, ma'am.

Q Why did you open your pocket?

A He asked me to, and I didn't want to cause no trouble.

Q Did you feel like you could leave?

A No, ma'am.

Q What happened after you opened your pocket?

A He requested that I give the bag, the contents to him for him and his other (indiscernible) that showed up so they could identify the pills.

[RI-163]

At oral argument on the motion, after the evidentiary portion of the hearing, the State argued that the pat down and frisk was authorized under Florida Statutes, § 901.151:

> The bulge in the pocket first noticed by the officers looked as though it might be caused by a gun. The officers had every right to make a frisk for their own safety pursuant to 901.151, which is the Florida stop and frisk law.

[RI-167]

The State conceded that the officer did not have any authority to search the pocket or order Broxton to empty out his pocket after the frisk:

> "At that point he had no right to reach into his pocket or empty his pocket or ask him to empty his pocket . . ."

[RI-169]

The defense argued that because it was a civil infraction, the officer had no right to stop and frisk in the first place:

> MS. HARGROVE [Defense Counsel]: Your Honor, to break it down into simpler form, this was started out as nothing more than a traffic violation, a civil infraction, in which by Florida statutes, an officer has no right to search someone, has no right to do a stop and frisk. Only can stop and frisk be accomplished when the officer believes that someone has committed, is committing or is about to commit a crime.

[RI-170]

After the pretrial evidentiary hearing the trial court entered a written order denying Broxton's suppression motion. [RI-36] The order states:

> On May 12,2008 late in the afternoon Officer Steve Adam of the Florida Wildlife Commission was traveling on CR 42 in Lake County Florida a rural part of the County. Officer Adam noticed several males fishing in a pond and decided to stop and check to determine if they had fishing licenses. Officer Adams[3] was alone and proceeded on foot and encountered the subjects and asked the male nearest to him to see his fishing license (Ronald Chandler). He did not have a license. While dealing with the first subject the officer noticed the defendant walking towards some vehicles. The officer approached the defendant and asked to see his fishing license and the defendant said he did not have a fishing license. Officer Adams asked for identification and the defendant said he did not have any but identified himself as Jerry Broxton.
>
> Officer Adams noticed bulges in the defendant's pockets and the defendant pulled out a pack of cigarettes and lighter from one pocket. The officer felt the other pocket for a knife or weapon and testified it

[3] The correct spelling of the officer's name was "Adam" without an "s."

had the consistency of a plastic bag. Officer Adams asked the defendant what was in the bag and the defendant replied fishing tackle and opened the pocket and exposed a plastic bag with pills inside.

After seeing the bag of pills the officer asked to see the bag and then took possession of the bag and pills.

Officer Adams read a Miranda warning to the defendant and the pills were identified as a controlled substances and the defendant was then arrested for possession of controlled substances. All the subjects were issued citations for failure to have fishing license. The defendant argues this was an improper search.

This situation involved a law enforcement officer encounter which was perfectly legal, i.e. to determine if the defendant had a fishing license and the questions asked were permissible. 1) Do you have a fishing license? Answer: No. 2) Do you have identification? Answer: No. 3) What is in the bag? Answer: fishing tackle.

The defendant then voluntarily opened his pant pocket and exposed a plastic bag with pills inside it; there by increasing the encounter from a civil infraction encounter to a Terry Stop. Terry vs. Ohio, 392 US 1,20 LE 2d 889 (1968); At this point the officer developed a wellfounded suspicion that criminal activity was afoot.

The Law Enforcement Officer did not violate the 4th Amendment or the Florida Constitution by approaching the defendant and his companions to determine if he had a fishing license.

The Officer had a right under the circumstances (rural area, alone, with four fisherman) to do a cursory pat down of the defendant; and simply asking the defendant a question about "what's in the bag" did not amount to search or a seizure.

Accordingly, in looking at the facts and all the surrounding circumstances the Defendant's Motion to Suppress is denied pursuant to Ingram vs. State, 928 So.2nd 423, 1st DCA 2006.

[RI-36-37]

STATEMENT OF FACTS RELEVANT TO SENTENCING ISSUE

Broxton testified at trial. He explained that he took the pills in question from his step-father's bedroom dresser for his personal use to feed his drug addiction:

> A As I -- before I went fishing, I went into his bedroom and I seen these pills that was on the counter. And I took them and put them in my pocket and went fishing down on the lake on the same property where I was at.
>
> Q So were you down there fishing with friends of yours?
>
> A They're actually -- there were people down there, but they're not considered friends. I just know them. People that -- there is like three houses, and they live in the other houses up there. And they was already down fishing before I got down there.
>
> Q Why did you take the pills?
>
> A Because I have a problem with drugs since I was about 15 years old.
>
> Q What were you going to do with them?
>
> A Take them.
>
> Q Did you know what they were?
>
> A No, ma'am.
>
> Q Did you care what they were?
>
> A At the time, no, ma'am.
>
> Q Since you were arrested, what's happened?

A Well, I gained about 80 pounds. And I started working with R.L. and I'd gotten family intervention. You see them here today.

[RII- TR-11/18/2008-67-68]

STANDARDS OF REVIEW

A trial court's ruling on a motion to suppress comes to the appellate court with a presumption of correctness. *State v. Ernst*, 809 So.2d 52, 54 (Fla. 5th DCA 2002). Accordingly, the evidence and all reasonable inferences "must be interpreted in a manner most favorable to an affirmance." Id. If the trial court's findings of fact are supported by competent, substantial evidence, the appellate court must accept them. See, e.g., *Weiss v. State*, 965 So.2d 842, 843 (Fla. 4th DCA 2007). By contrast, the appellate Court reviews questions of law involved in any suppression analysis *de novo*. *Ernst*, 809 So.2d at 54, cited in *State v. Nowak*, 1 So.3d 215, 217 (Fla. 5th DCA 2008).

The appellate standard of review for an illegal sentence is *de novo* review. *Jackson v. State*, 925 So.2d 1168, 1170, n.1 (Fla. 4th DCA 2006).

SUMMARY OF ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING BROXTON'S MOTION TO SUPPRESS.

Officer Adam did not have authority to conduct a frisk in the course of writing a citation for the civil infraction of fishing without a license because Florida Statutes,

§ 901.151 limits the right to frisk to criminal investigations and mandates exclusion of evidence not obtained in compliance with § 901.151. Additionally, on the facts of this case (detention for a civil infraction other than a traffic infraction, in daylight, in view of a public roadway, with a non-threatening cooperative individual) the frisk constituted an unreasonable intrusion on Broxton's right of privacy under the Fourth Amendment. Even if the officer had the authority in principle to frisk in a civil infraction setting, the officer did not have a justifiable fear for his own safety or the safety of others to justify a frisk on the facts of this case. The use of the "magic word" bulge, did not standing alone and in context, justify a frisk. In any event, once the frisk was done and it was determined that there was no weapon, the officer was not authorized to pursue the investigation of the "bulge" further and the prolonged detention and further pursuit of the investigation of the bulge was impermissible under *Terry*.[4] Broxton's compliance with the officer's request in showing the officer what was in his pocket and turning it over to the officer at his direction, was not freely and voluntarily done, that is was not a consent search, but was merely acquiesence in the officer's show of apparent authority.

[4] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

II. FLORIDA STATUTES, § 893.01 VIOLATES DUE PROCESS BY IMPERMISSIBLY SHIFTING TO THE DEFENDANT THE BURDEN OF PROOF THAT HE DID NOT KNOW THE ILLICIT NATURE OF A CONTROLLED SUBSTANCE IN HIS POSSESSION BUT INSTEAD PRESUMES THAT HE HAD SUCH KNOWLEDGE EFFECTIVELY REMOVING THE REQUIRED ELEMENT OF *MENS REA* FROM THE OFFENSE.

Under Florida Statutes, § 893.01 the burden was impermissibly shifted to Broxton to prove that he did not know the illicit nature of the pills in his pocket. This was Broxton's only defense so he was by necessity prejudiced by this shifting of the burden to him as the defendant to disprove what is in fact a required element of the offense. This improper shifting of the burden of proof violates Due Process.

III. POSSESSION OF A PERSONAL USE QUANTITY OF A PRESCRIPTION CONTROLLED SUBSTANCE WITH NO EVIDENCE OF INTENT TO DISTRIBUTE TO OTHERS IS NOT SUBJECT TO THE MINIMUM MANDATORY PENALTIES FOR TRAFFICKING.

Broxton argues that under accepted principles of statutory construction, the legislature did not intend to punish individual drug addicts who are found in possession of a personal use quantity of a controlled substance when there is no evidence of distribution or intent to distribute to third persons.

Alternatively, Broxton argues that on the facts of his case it constitutes cruel and unusual punishment to sentence Broxton to a fifteen year minimum mandatory sentence for simple possession of less than $1/10^{th}$ gram of actual oxycodone, when the

evidence shows that he was simply an addict who had taken the medication from his step-father's prescription to feed his own personal drug addiction.

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING BROXTON'S MOTION TO SUPPRESS.

A. A *TERRY* STOP PAT AND FRISK IS NOT AUTHORIZED IN AN ENCOUNTER FOR A CIVIL INFRACTION OUTSIDE THE CONTEXT OF A TRAFFIC STOP.

(i) FLORIDA STATUTES § 901.151 LIMITS *TERRY* STOP PAT AND FRISK TO *CRIMINAL* INVESTIGATIONS.

The State expressly relied upon the authority of Florida Statutes, § 901.151, which provides in pertinent part as follows:

> (1) This section may be known and cited as the "Florida Stop and Frisk Law."
>
> (2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the ***criminal*** laws of this state or the ***criminal*** ordinances of any municipality or county, *the officer may temporarily detain such person for the purpose of ascertaining the identity of the person* temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.
>
> . . .

> (5) *Whenever any law enforcement officer authorized to detain temporarily any person* ***under the provisions of subsection (2)*** has probable cause to believe that any person whom the officer has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, *the officer may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon.* If such a search discloses such a weapon or any evidence of a criminal offense it may be seized.

Florida Statutes, § 901.151 (emphasis supplied).

The State itself introduced evidence below to establish that Officer Adam was ***not*** investigating a ***criminal*** offense, but only a non-criminal, civil infraction, that is, whether Broxton possessed a valid freshwater fishing license. Florida's legislature has expressly limited *Terry* stop and frisk authority to criminal investigations. Because this investigation was not criminal (before the officer frisked Broxton), it was not authorized under Florida Statutes, § 901.151(2), therefore the officer did not have authority to frisk Broxton before issuing a civil infraction.

The consequence of this is that the evidence seized as a result of this search which was not done in compliance with Florida Statutes, § 901.151, is that the evidence obtained was not admissible in court. This exclusionary rule is dictated by Florida Statutes, § 901.151(6), which expressly mandates exclusion as a remedy for non-compliance with § 901.151:

> (6) No evidence seized by a law enforcement officer in any search under this section shall be admissible against any person in any court of this state or political subdivision thereof unless the search which disclosed its existence was authorized by and conducted in compliance with the provisions of subsections (2)-(5).

The lower court's order simply ignored the lack of authority to conduct the frisk in the first place and instead based its order denying the motion to suppress solely upon its finding that *after* the frisk Broxton voluntarily consented to show what had been felt in the pat-down to the officer upon the officer's request, citing *Ingram v. State*, 928 So.2d 423 (Fla. 1st DCA 2006).[5] The lower court erred in so ruling, because it failed to consider the validity of the initial frisk which led to the seizure of the oxycodone pills.

Clearly the Florida legislature has the authority to set a more restrictive standard for a *Terry* stop and frisk than may be required by the Fourth Amendment.

> It is, further, a well-settled principle of federal constitutional law that state courts, in interpreting and applying their own state constitutional provisions and law on search and seizure, may impose more restrictive standards on state police activity and thereby accord a person greater rights than that required by the Fourth Amendment as interpreted by the

---

[5] Broxton disputes the lower court's voluntariness finding as argued *infra*, but in any event, unless the initial frisk was authorized by law, evidence derived therefrom is inadmissible. The result of the illegal frisk cannot then bootstrap back to justify the search. *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902 - 1903 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification" citing *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168 (1959) and *Johnson v. United States*, 333 U.S. 10, 16-17, 68 S.Ct. 367, 370 (1948).

United States Supreme Court.

State v. Small, 483 So.2d 783, 786 (Fla. 3rd DCA 1986), citing *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791 (1967) (" [O]ur holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."); *Oregon v. Hass*, 420 U.S. at 719, 720 n. 4, 95 S.Ct. at 1219 n. 4 (1975) (" [A] state is free as a matter of its own law to impose greater restrictions on police activity than this Court holds to be necessary upon federal constitutional standards" (e.s.) and a state may interpret its own state law and "constitutional prohibition of unreasonable searches and seizures as being more restrictive [on the police] than the Fourth Amendment of the federal constitution."

Nothing in Article I, Section 12 of the Florida Constitution precludes the *legislature* from setting more restrictive conditions upon stop and frisk as a matter of statute nor precludes the legislature from mandating an exclusionary rule for violations of a statutory restriction on search and seizure. For example, it is well settled that Florida courts are bound by Florida's electronic surveillance statute, which is more restrictive than the Fourth Amendment (and federal law), in determining the admissibility of electronic surveillance evidence. See e.g., *State v. Tsavaris*, 382 So.2d 56 (Fla. 2nd DCA 1980) (looking to Florida wiretap law to determine admissibliity of recording that was not subject to exclusion under the

Fourth Amendment); *Ibar v. State*, 938 So.2d 451, 468 (Fla. 2006) (upholding trial court's exclusion of recording made only with consent of one of two parties).

Under Florida Statutes, § 901.151, the Florida legislature has statutorily limited stop and frisk to detentions based on reasonable suspicion of *criminal* activity, excluding detentions for civil infractions, and mandated exclusion of evidence not seized in conformity with the requirement of § 901.151.

(ii) A PAT AND FRISK IS AN UNREASONABLE INTRUSION IN THE PERSONAL PRIVACY AND SECURITY OF A PERSON DETAINED FOR A CIVIL INFRACTION OUTSIDE THE CONTEXT OF A TRAFFIC STOP BY A POLICE OFFICER.

In *Terry* the Supreme Court authorized limited detentions based upon reasonable suspicion of *criminal* activity, and in the course of such detentions, if the officer had reasonable suspicion that the detainee is armed and dangerous, further authorized a pat-down, or light frisk of the detainee. *Terry* does not authorize detention and frisks of persons detained for suspicion for *non*-criminal conduct.

Nevertheless, the Supreme Court has approved under Fourth Amendment analysis, frisks of drivers and passengers of vehicles stopped for civil *traffic* infractions after the detaining officer determined on a reasonable suspicion basis that the driver or passenger was armed and dangerous, analogizing the detentions and

searches to *Terry* stops. See e.g. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330 (1977) (approving authority of officer to order driver to exit vehicle, and after exited, noticing bulge under shirt, resulting in frisk and discover of pistol and ammunition under shirt);[6] *Arizona v. Johnson*, 129 S.Ct. 781 (2009) (pat down of back seat passenger of car stopped for traffic violation permitted under *Terry* standard of reasonable suspicion that passenger was armed and dangerous).

In these and other cases the Court has analogized the detention of a person for a civil *traffic* infraction to a *Terry* stop; that is, the initial detention is justified by the purpose of the traffic stop and the subsequent investigation is limited in scope in both duration and intrusiveness to that permitted under a *Terry* analysis.

The United States Supreme Court has never, however, authorized *Terry* stop frisks of citizens in any context other than criminal investigations or traffic stops.[7]

---

[6] Although the frisk in *Mimms* followed the officers observation of the bulge, without further elaboration, whether the observation of the bulge alone would have authorized the frisk was not at issue in *Mimms* and therefore not part of *Mimms* holding. The lower court had assumed *arguendo* that the bulge was sufficient to justify the frisk but decided the case, as did the Supreme Court, solely on the lawfulness of the officer's order that the driver exit the vehicle.

[7] A Westlaw search of the United States Supreme Court database using the search terms "frisk or pat-down" resulted in 78 cases. Counsel reviewed all 78 cases and not one involved a civil infraction related frisk or pat-down other than traffic stops. After an equally diligent search of the Florida state case law, counsel has been unable to find a single reported decision involving a pat and frisk being conducted in the context of the issuance of a civil infraction outside the setting of a traffic stop

In justifying the frisk in a traffic stop, the Court expressly noted and based its holding on statistics which established the danger officers face in making traffic stops. The Supreme Court has never extended this rationale to non-criminal, civil infraction detentions outside the traffic stop context.

Even under *Terry* analysis, "the officer's action [must be] justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, at 20, 88 S.Ct. 1868, at 1879; *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568 (1985) (same). In applying *Terry*, the Court has several times indicated that the limitation on "scope" is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted. See, e.g., *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 188, 124 S.Ct. 2451, 2459 (2004) (an officer's request that an individual identify himself "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop"); *United States v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675 (1985) (examining, under *Terry*, both "the length and intrusiveness of the stop and detention"); *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319 (1983) (plurality opinion) ("[A]n investigative detention must be

---

by a police officer. If the frisk were to be upheld in Broxton's case, it would be a case of first impression.

temporary and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion ....").

The "officer's action [must be] justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place," and in Broxton's case, Officer Adam was investigating the least serious class fish and game offense under his authority, that is, fresh water fishing without a license. It was daytime, in plain view of a public highway, and Broxton was completely cooperative and non-threatening.

Officer Adam is an officer with the Florida Fish and Wildlife Conservation Commision, which had absorbed the Florida Game and Fresh Water Fish Commission. This is an agency which has lost only three officers in the past 60 years to hostile gunfire. And all three officers who were killed by gunfire were shot by hunters, none by fishermen. No officer has ever been killed by a knife.[8]

Given these circumstances, the frisk of Broxton was an ureasonable intrusion

---

[8] This figure comes from the Officer Down Memorial Webpage:

http://www.odmp.org/search.php?searching=1&agencyid=1280&cause=19

A fourth officer was shot by hostile fire but the shooting was in connection with an attempted criminal arrest unrelated to the officer's official duties and did not involve either a hunter or fisherman.

on his right of privacy under the Fourth Amendment, applicable to the State under the Fourteenth Amendment, as well as an unreasonable intrusion on Broxton's right of privacy under Article I, § 23 of the Florida Constitution and right to be free from unreasonable search and seizure under Article I, § 12 of the Florida Constitution.

B. THE OFFICER HAD NO JUSTIFIABLE FEAR FOR HIS SAFETY TO JUSTIFY A PAT AND FRISK.

The applicable standard that this Court is required to follow[9] is that set forth in *Terry v. Ohio*, which held:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others is in danger.

Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868 (1968) (citations omitted), cited in *Check 'n Go of Florida, Inc. v. State,* 790 So.2d 454, 458 (Fla. 5th DCA 2001).

There was nothing about the circumstances of Officer Adam's encounter with Broxton that would cause a reasonably prudent man to believe that his safety or the

---

[9] In accordance with the Conformity Clause in Article I, section 12, of the Florida Constitution, this "search and seizure" issue is subject to the applicable United States Supreme Court precedents. *Holland v. State*, 696 So.2d 757, 759 (Fla.1997); *Perez v. State*, 620 So.2d 1256 (Fla.1993).

safety of others was in danger.

Cases often appear to conflate without discussion the two prongs of the frisk predicate, armed and dangerous. But the predicate requires both armed *and* dangerous. Clearly a person can be armed and yet in no way dangerous. Under the circumstances of this encounter, a Game and Fresh Water Fish conservation officer doing a routine fishing license inspection, the least serious civil infraction within his authority to enforce, in broad daylight, in plain view of a public roadway, with an individual who was completely cooperative, and with a known history of only three armed attacks, all by hunters, none ever by a fisherman, in sixty years of the agency's history, there was no objective basis for this officer to consider that either his own safety or the safety of others was at risk.

Because there was no objective basis to consider Broxton armed *and* dangerous, the frisk of Broxton was impermissible under *Terry* and the Fourth Amendment of the United States Constitution and Article I, §§ 12 and 23 of the Florida Constitution.

C. THE BULGE DID NOT JUSTIFY A PAT AND FRISK.

The bulge alone did not on the facts of this case support a finding of reasonable suspicion that Broxton was armed. There was no testimony from Officer Adam that he thought the bulge indicated a weapon, instead his conclusion was based only on

his experience that fishermen often have knives with them for cutting fishing line. This was nothing more than speculation as applied to Broxton. The use of the "magic word" "bulge," does not automatically overcome Broxton's Fourth Amendment right of privacy.

D. ONCE THE FRISK DETERMINED THE BULGE WAS NOT A WEAPON, THE OFFICER WAS NOT AUTHORIZED TO PROCEED FURTHER.

Clearly the officer would not have been justified in reaching into Broxton's pocket after determining the bulge he saw was *not* a weapon:

> However, even if we assume the officer had a reasonable suspicion to conduct a pat-down search of Thomas, no view of the evidence supports a finding that the officer had probable cause to reach into Thomas' pocket and seize the piece of crack cocaine. A *Terry* pat-down search of Thomas restricts the officer to exploring Thomas' outer clothing to determine if he is carrying a weapon or something that could be used as a weapon. The officer exceeded his authority by putting his hands into Thomas' pocket when he knew Thomas was not carrying a weapon. See, e.g., *Warren v. State*, 547 So.2d 324 (Fla. 5th DCA 1989) (held that, even assuming the officer had a reasonable suspicion to stop the defendant, that gave him only the right to conduct a limited weapons search, and he exceeded the permissible scope of the search when he seized two pieces of rock cocaine from the defendant's shirt pockets because he never asserted that he believed the defendant was carrying a weapon and it would have been unreasonable for him to believe that the small objects seized were weapons);

Thomas v. State, 644 So.2d 597, 598 (Fla. 5th DCA 1994).

Terry held that "[w]hen an officer is justified in believing that the individual

whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." 392 U.S., at 24, 88 S.Ct., at 1881. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence...." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct.1921, 1923 (1972). A protective search - permitted without a warrant and on the basis of reasonable suspicion less than probable cause - must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, *supra*, at 26, 88 S.Ct., at 1882; see also *Michigan v. Long*, 463 U.S. 1032, 1049, and 1052, n. 16, 103 S.Ct. 3469, 3480-3481, and 3482, n. 16 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 93-94, 100 S.Ct. 338, 343-344 (1979). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits must be suppressed. *Sibron v. New York*, 392 U.S. 40, 65-66, 88 S.Ct. 1889, 1904 (1968).

Terry 's second prong is concerned with detentions, in other words, seizures. See *Florida v. Royer*, 460 U.S. 491, 499, 103 S.Ct. 1319, 1325 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.") (emphasis added). Questioning that is unrelated to the legitimate

purpose of the detention is significant in determining whether a detention has exceeded its lawful duration. The nature of the questioning during a detention may show that the justification for the original detention no longer supports its continuation. When a police officer reasonably suspects only that someone is carrying a weapon and stops and frisks that person, the officer, after finding nothing in a pat down, may not thereafter further detain the person merely to question him about a possible crime unrelated to the lawful purpose of the detention. This is not because the questioning itself is unlawful, but because at that point suspicion of weapon possession and dangerousness has evaporated and no longer justifies further detention. When the officer is satisfied that the individual is not carrying a weapon, the officer may not detain the person longer to investigate a possible charge lacking reasonable suspicion. At that point, continuation of the detention is no longer supported by the facts that justified its initiation. *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

Once Officer Adam determined from his frisk that there was no weapon present, he unduly prolonged the detention when instead of proceeding to write the citation for fishing without a license he instead pursued what could only have been intended as a continued search for evidence of a crime. If the soft bulge was not a weapon it's only relevance or interest to Officer Adam would be if it were illegal

drugs, and indeed, that is what Officer Adam was searching for. Under *Terry* and *Sibron* the continued detention and request that Broxton reveal what was in his pocket was illegal and the evidence obtained was the fruit of an illegal detention and search.

E. IN OPENING HIS POCKET AFTER THE FRISK, BROXTON DID NOT FREELY AND VOLUNTARILY CONSENT TO THE SEARCH BUT MERELY ACQUIESCED IN THE OFFICER'S SHOW OF APPARENT AUTHORITY.

Broxton's case is analogous to *Sizemore v. State*, 939 So.2d 209 (Fla. 1st DCA 2006), and *Howell v. State*, 725 So.2d 429 (Fla. 2nd DCA 1999). In *Sizemore*, the defendant was the driver of an automobile who, while returning to his vehicle after being issued a warning citation for a defective tag light, was stopped by an officer and asked whether he had "anything on his person that would get him into trouble." Id. at 210. The defendant placed his hand in his pocket, at which time the officer asked the same question again. Defendant then removed marijuana from his pocket and was subsequently arrested. Id.

The First District held that the defendant's giving of the marijuana was not voluntary because it was handed to the police in "the presence of a canine unit at the scene," and because "the positioning of the officers' vehicles [was] in such a manner as to make the defendant's departure from the scene difficult." Id. at 212. Officer

Adam testified that Broxton was not free to leave at the time he was asked what was in his pocket, and the officer had in fact already frisked Broxton without his consent or permission.

In *Howell*, which is also factually similar to Broxton's case, a police officer pulled over an automobile containing three passengers. The defendant was the driver. Because of the passengers' suspicious activity observed by the officer, he ordered all three of them out of the car. A back-up deputy arrived at the scene. With the defendant standing nearby, the officer and the back-up deputy proceeded to conduct pat-down searches of the passengers. Id. at 430. The defendant "obviously knew he was about to get patted down because [the officers] had just patted down the passengers." Id. At this time (and before he was patted down), the defendant told the officers he was carrying a firearm. The officers then searched the defendant's person and retrieved the gun. Id.

The Second District, in suppressing the firearm, held that it was unlawfully seized because it was not voluntarily given by the defendant. Id. at 431. This was because the defendant "stated he had a gun only after he observed the officers complete a pat-down search of the passengers and as [the officer] was approaching him to conduct a pat-down search." Id. As a result, the Second District held that the defendant's "admission was the product of the imminent pat-down search and not the

result of an independent act of free will." Id.

"A mere submission to the apparent authority of a law enforcement officer does not render an action voluntary in the constitutional sense." *State v. Hall*, 537 So.2d 171, 172-73 (Fla. 1st DCA 1989) (citing *Ingram v. State*, 364 So.2d 821 (Fla. 4th DCA 1978)).

In Broxton's case, the trial judge should have granted Broxton's motion to suppress because, in examining the totality of the circumstances, Broxton's act of showing the bag of pills to Officer Adam and then handing the bag to Officer Adam was not voluntary. This is because, as in *Sizemore* and *Howell*, Broxton's action was not the product of his own free will, and was mere submission to police authority.

Like the defendant in *Sizemore*, Broxton was detained and had already been frisked without his consent. Under these circumstances a reasonable person in Broxton's circumstances would have felt compelled to comply with the officer's request and show or tell what was in his pocket. His actions were not free and voluntary, but merely the acquiesence in the officer's show of authority.

Furthermore, like the defendant in *Howell*, Broxton was detained by more than one officer, because the backup officer had arrived. At this time, and worse than in *Howell*, Broxton had already been frisked, making his subsequent handing of the bag of pills "the product of [the] pat-down and not the result of an independent act of free

will." *Howell*, 725 So.2d at 431.

Broxton's free will was negated by the coercive conduct of Officer Adam - after finding that the object in Broxton's pocket was not a weapon, which at most was all Officer Adam was authorized to do, his continued interrogation was coercive. As in *Sizemore*, this interrogation in the presence of police authority served to negate Broxton's free will, caused him to submit to police authority, and led to him handing over the bag of pills. See also *Smith v. State*, 997 So.2d 499, 501 -502 (Fla. 4th DCA 2008)(disclosure and production of pill bottle with oxycodone and other drugs not voluntary when done in response to police questioning while driver of vehicle was being searched).

As Chief Judge Parker stated in dissent in *Cubby v. State*, 707 So.2d 351, 353 (Fla. 2nd DCA 1998):

> I conclude that the key to this case is whether Cubby's actions established a voluntary consent to the pat-down search or whether his actions were mere acquiescence to the officer's authority. When the validity of a search rests on consent, the State must demonstrate that such consent was unequivocally given and not merely deference to apparent authority of the law enforcement officers. See *Thompson v. State*, 555 So.2d 970 (Fla. 2d DCA 1990).

The burden was on the state to establish that Broxton's disclosure and production of the pill bag after being frisked was voluntary and not merely deference to the apparent authority of Officer Adam. The state failed to meet its burden and the

lower court erred in upholding the search on this basis.

II. FLORIDA STATUTES, § 893.01 VIOLATES DUE PROCESS BY IMPERMISSIBLY SHIFTING TO THE DEFENDANT THE BURDEN OF PROOF THAT HE DID NOT KNOW THE ILLICIT NATURE OF A CONTROLLED SUBSTANCE IN HIS POSSESSION BUT INSTEAD PRESUMES THAT HE HAD SUCH KNOWLEDGE EFFECTIVELY REMOVING THE REQUIRED ELEMENT OF *MENS REA* FROM THE OFFENSE.[10]

Florida Statutes, § 893.101, Florida Statutes (2003), which removed guilty knowledge as an element of possession of a controlled substance and added lack of knowledge of the illicit nature of a controlled substance as an affirmative defense, is facially unconstitutional on substantive due process grounds, thus, the trial court's failure to *sua sponte* instruct the jury on guilty knowledge constitutes fundamental error.

Florida Statutes, § 893.101 removes illicit knowledge as an element of a possession offense and makes the lack of such knowledge an affirmative defense to be proved by the defendant. But due process requires the State to prove the elements of an offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), and it places limits on a State's authority to "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime now defined in their

[10] This argument is taken from a brief filed by Paul E. Petillo, Esq. in *Scott v. State*, 4D03-4860.

statutes." *Patterson v. New York*, 432 U.S. 197, 210 (1977). See also *Jones v. United States*, 526 U.S. 227, 241-42 (1999)(recognizing limit on State's authority to omit traditional elements from definition of crimes and instead require accused to disprove such elements.)

In *Apprendi v. New Jersey*, 530 U.S. 465 (2000), the Court held that when a defendant's motivation for using a firearm increases the penalty for the offense, that motivation is an element that must be submitted to the jury and proved beyond a reasonable doubt; the State is not free to label that motivation a "sentencing factor" that is proved to the judge using a preponderance of the evidence standard. When the dissent in *Apprendi* suggested that the State could simply presume the motivation and require the defendant to disprove it in order to receive a lesser sentence, the majority responded as follows: "[I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, post, at 2390), we would be required to question whether the revision was constitutional under this Courts prior decisions." *Apprendi*, 530 U.S. at 49 n.16 (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*). This case raises that question.

As if following the dissent's suggestion in *Apprendi*, Florida has reversed the burden of the illicit knowledge finding (presuming that a defendant who possesses

a controlled substance knows the illicit nature of it) and requires the defendant to disprove such knowledge in order to be acquitted. But as noted above, there is a limit on the State's authority to omit traditional elements from the definition of crimes and instead require the accused to disprove such elements.

Knowing that one possesses an illegal substance, or "illicit knowledge," is a traditional element that must be proved by the State because it is a *mens rea* element. In fact, the illicit knowledge element has a better "traditional" element pedigree than *Apprendi*'s "purpose to intimidate on the basis of race" element. This is because the "purpose to intimidate" element had never been recognized as an element by New Jersey courts, yet the Supreme Court recognized that it was an element because it was a form of *mens rea*:

> By its very terms, this statute mandates an examination of the defendant's state of mind--a concept known well to the criminal law as the defendant's *mens rea*. It makes no difference in identifying the nature of this finding that *Apprendi* was also required, in order to receive the sentence he did for weapons possession, to have possessed the weapon with a "purpose to use [the weapon] unlawfully against the person or property of another," ' 2C:39-4(a). A second *mens rea* requirement hardly defeats the reality that the enhancement statute imposes of its own force an intent requirement necessary for the imposition of sentence. On the contrary, the fact that the language and structure of the "purpose to use" criminal offense is identical in relevant respects to the language and structure of the "purpose to intimidate" provision demonstrates to us that it is precisely a particular criminal mens rea that the hate crime enhancement statute seeks to target. The defendant's intent in committing a crime is perhaps as close as one

might hope to come to a core criminal offense "element."

Apprendi, 530 U.S. at 492-493 (footnotes omitted).

Moreover, it is no answer to suggest that because the Legislature could eliminate the illicit knowledge element, then it does not offend due process to require the defendant to disprove it. The Court rejected the same type of challenge in *Apprendi*, 530 U.S. at 490 n. 16 (responding to suggestion that state could get around Court's holding by raising maximum penalties, Court stated:

> Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. *Patterson v. New York*, 432 U.S., at 228-229, n. 13, 97 S.Ct. 2319 (Powell, J., dissenting). So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." Ibid.

In addition, because the illicit knowledge element is the difference between guilt and innocence, the constitutionality of section 893.101 is even more suspect. *Patterson*, 432 U.S. at 226 ("The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies a fortiori if the factor makes the difference between guilt and innocence."(e.s.)).

At present illicit knowledge of the controlled substance is a fact designated by

the Legislature as one that determines criminal liability; if that fact is present, the defendant is guilty and may be sent to prison, and if it is not present, the defendant is not guilty and must be acquitted. Stated differently, Florida imposes criminal sanctions only on those who choose to possess a controlled substance, not on those who happen to possess a controlled substance. That choice is the *mens rea* or criminal intent, which is, as the Supreme Court stated, "as close as one might hope to come to a core criminal offense 'element.' " *Apprendi*, 530 U.S. at 493. Accordingly, due process commands that that "core criminal offense 'element' " be proved by the State beyond a reasonable doubt.

Section 893.101 demonstrates that any offense element can be re-labeled an affirmative defense. But *Apprendi* teaches that labels do not control. Indeed, the distinction between elements and defenses is one of those issues that "generates the 'deep structure' of all systems of criminal law." George P. Fletcher, Basic Concepts of Criminal Law 5, 93-110 (Oxford U. Press 1998).

Accordingly, Florida Statutes, § 893.01 violates Due Process by its presumption that Broxton knew the illicit nature of the pills he possessed, improperly shifting the burden of proof to Broxton to prove the contrary. Its application on the facts of Broxton's case constitute's fundamental error, because Broxton asserted that he did not know what the substance was that he possessed.

III. POSSESSION OF A PERSONAL USE QUANTITY OF A PRESCRIPTION CONTROLLED SUBSTANCE WITH NO EVIDENCE OF INTENT TO DISTRIBUTE TO OTHERS IS NOT SUBJECT TO THE MINIMUM MANDATORY PENALTIES FOR TRAFFICKING.

A. THE LEGISLATURE DID NOT INTEND POSSESSION OF PERSONAL USE QUANTITIES OF CONTROLLED SUBSTANCES WITHOUT EVIDENCE OF DISTRIBUTION OR INTENT TO DISTRIBUTE BE SUBJECT TO TRAFFICKING MINIMUM MANDATORY PENALTIES.

It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided. To determine legislative intent, we must consider the act as a whole "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject." *Foley v. State*, 50 So.2d 179, 184 (Fla.1951) (emphasis added), cited in *State v. Webb*, 398 So.2d 820, 824 (Fla. 1981). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme." *FDA*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal citation omitted). In determining legislative intent, we must give due weight and effect to the title of Florida Statutes, § 893.135, which was placed at the beginning of the section by the legislature itself. The title is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent. *Berger v. Jackson*, 156 Fla. 251, 768, 23 So.2d 265 (1945).

> Applying these rules of statutory construction to § 893.135, which is titled: "Trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking"

there is no doubt that the legislature intended the drug trafficking statute to apply only to persons who traffick in controlled substances.

Trafficking is a term of commerce, not consumption. "Trafficking" is a gerund derived from the verb "to traffic." The Random House Dictionary of the English Language, 2006 (2d ed. 1987), defines the verb "traffic" as follows: to carry on traffic, trade, or commercial dealings; to trade or deal in a specific commodity or service, often of an illegal nature. "Traffic," as a noun, is defined as trade; buying and selling; commercial dealings.

A law regulating controlled substances which prohibits "trafficking" is intended to the illegal commerce in drugs, not the consumption by the end user. To

apply the law otherwise is to lead to an absurd and unreasonable result. The evidence in Broxton's case established that Broxton was not engaged in any commerce of the drug but was simply an end user, an addict.[11]

Broxton's case is nothing more than possession of a small quantity of a prescription controlled substance by a person who did not hold the prescription, for his own personal use. Broxton's offense was outside the intended scope of § 893.135. Instead, the lower court should have directed a verdict on the lesser included offense of simple possession of oxycodone.

B. A FIFTEEN YEAR MINIMUM MANDATORY SENTENCE FOR PERSONAL USE POSSESSION OF A PRESCRIPTION CONTROLLED SUBSTANCE IS CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Historically, the Eighth Amendment has protected individuals with respect to the method of punishment, not the length of a period of incarceration. *Hall v. State*, 823 So.2d 757, 760 (Fla.2002) (citing *Harmelin v. Michigan*, 501 U.S.

---

[11] In *State v. Benitez*, 395 So.2d 514, 517 (Fla. 1981), spoke of section 893.135 as a means "to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the 'pusher' on the street." (Emphasis supplied.) Its discussion of the quarry sought to be captured by this statute ended on the street. It did not go into the home of the consumer.

957, 979, 111 S.Ct. 2680 (1991)). The United States Supreme Court has not reached a consensus on the standard to be applied in assessing the constitutionality of long prison sentences. See generally *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179 (2003) (plurality opinion) (explaining the Supreme Court's history of analyzing Eighth Amendment issues). However, in 2003, a majority of the Court agreed that "[t]hrough th[e] thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' "-that a "gross disproportionality principle is applicable to sentences for terms of years." *Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S.Ct. 1166 (2003).

The only case in which the Supreme Court has invalidated a prison sentence because of its length was *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001 (1983). The defendant in *Solem*, who had previously been convicted of six nonviolent felonies, was sentenced to life imprisonment without the possibility of parole for writing a "no account" check for $100. Id. at 279-81, 103 S.Ct. 3001. The Court's proportionality analysis was "guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id. at 292. The Court concluded that the sentence of life imprisonment without the possibility of parole was "the penultimate sentence for

relatively minor criminal conduct" and was "significantly disproportionate" to the crime. Id. at 303.

Since *Solem*, the Court has heard only two cases in which a sentence has been challenged on proportionality grounds. The Court upheld both sentences, without agreeing on a rationale. In *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), the defendant was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without parole. A majority of the court concluded that the sentence imposed did not violate the Eighth Amendment. Id. at 994-96, 1009, 111 S.Ct. 2680. Justice Scalia, joined by Chief Justice Rehnquist, opined that proportionality review should apply only in death penalty cases. Id. at 994, 111 S.Ct. 2680. Justice Kennedy, joined by Justices O'Connor and Souter, interpreted the Eighth Amendment as forbidding only extreme sentences that are "'grossly disproportionate'" to the crime. Id. at 1001, 111 S.Ct. 2680 (quoting *Solem*, 463 U.S. at 288, 103 S.Ct. 3001). Looking at the three criteria used in *Solem*, Justice Kennedy concluded that the second and third factors, which involve an intrajurisdictional and interjurisdictional comparison, should be used only in the rare instance in which an inference of gross proportionality exists based on the gravity of the offense and the harshness of the sentence. Id. at 1005, 111 S.Ct. 2680. The four-member dissent criticized Justice Kennedy for abandoning the second and third

factors because it "makes any attempt at an objective proportionality analysis futile." Id. at 1020, 111 S.Ct. 2680.

Twelve years after *Harmelin*, the Supreme Court could still not reach a rationale for an Eighth Amendment analysis that would command a majority in *Ewing*, 538 U.S. at 11, 123 S.Ct. 1179. The defendant in *Ewing* was convicted of felony grand theft for shoplifting three golf clubs, each valued at $399. Id. at 18, 123 S.Ct. 1179. Because of his prior convictions, the defendant was sentenced to prison for twenty-five years to life under California's "Three Strikes and You're Out" law. Id. at 20, 123 S.Ct. 1179. Writing for a plurality of three, Justice O'Connor applied Justice Kennedy's analysis in *Harmelin* and concluded that the sentence was not grossly disproportionate to the crime. Id. at 23-30, 123 S.Ct. 1179. Justices Scalia and Thomas concurred in the judgment but argued that prison sentences should not be subject to a proportionality analysis. Id. at 31-32, 123 S.Ct. 1179. The dissenters argued that *Ewing* was one of the rare cases in which a court can say that the "punishment is 'grossly disproportionate' to the crime." Id. at 37, 123 S.Ct. 1179.

The Florida Supreme Court has interpreted the decisions in *Solem*, *Harmelin*, and *Ewing* as requiring that at a minimum a prison sentence must be grossly disproportionate to the crime to constitute cruel and unusual punishment solely because of its length. *Adaway v. State*, 902 So.2d 746, 750 (Fla.2005). This

conclusion is directly supported by the majority opinion in *Lockyer*, 538 U.S. at 72, 123 S.Ct. 1166, in which the Court stated that the one principle clearly established in its case law was that a gross proportionality analysis is applicable to sentences for terms of years.

The Florida Supreme Court approved the mandatory minimum sentences of § 893.135(1), Florida Statutes (1979), in *State v. Benitez*, 395 So.2d 514 (Fla.1981). In *Benitez*, the court noted that it had consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks. Id. at 518. While admitting that the penalties imposed in section 893.135 are severe, the *Benitez* court concluded that they are not cruel or unusual in light of "their potential deterrent value *and the seriousness of the crime involved*." 395 So.2d at 518. When *Benitez* was decided in 1981, § 893.15(1)(c)(1) did not include oxycodone as a controlled substance for which someone could be convicted of "trafficking in illegal drugs." In 1995, the Florida Legislature added oxycodone to the list of controlled substances in section 893.135(1)(c)(1). In any event, the seriousness of the crime as to which Broxton was convicted, is not that which was understood to be at issue in *Benitez*. That is, as we argue above, the legislature did not intend to ensnare end users, individual addicts possessing personal use quantities of oxycodone with no evidence of intent to distribute to third persons. Whether intended or not, this subset of

defendants is not that which the Florida Supreme Court addressed its analysis in *Benitez* when it approved minimum mandatory prison sentences for commercial traffickers.

Not only was Broxton merely an addict possessing a personal use quantity for his own personal use alone, but additionally, the quantity Broxton possessed was only .145 grams of actual oxycodone. Although the Florida Supreme Court has approved determining drug quantity for trafficking jurisdictional purposes to be based on the gross weight of the prescription tablet[12] - and under this approach the 29 generic Percocet tablets weighed in total 15.3 grams - the FDLE chemist testified that each tablet in fact contained only 5 *milligrams* of oxycodone, so that the actual amount of controlled substance possessed by Broxton was just slightly more than 1/10th of a gram.

In deciding whether a sentence is "grossly disproportionate" to a crime, *Harmelin*, 501 U.S. at 1005, 111 S.Ct. 2680, the court is first required to compare the gravity of the offense committed to the harshness of the penalty imposed. See id. at

---

[12] Under § 893.135(1)(c)(1) an individual can be found guilty of trafficking in oxycodone for possessing "any mixture" containing oxycodone that weighs at least four grams. The statute's language prompted the Florida Supreme Court to conclude that the total weight of an oxycodone tablet should be multiplied by the number of tablets in the possession of the accused to determine whether the weight of the substance meets the threshold for trafficking purposes. *State v. Travis*, 808 So.2d 194 (Fla.2002) (approving *Eagle v. State*, 772 So.2d 1 (Fla. 2nd DCA 2000)).

1001-02, 111 S.Ct. 2680 (opinion of Kennedy, J.). To evaluate the severity of a crime, the court must consider the harm caused or threatened to the victim or to society and the culpability and degree of involvement of the defendant. See *Solem*, 463 U.S. at 292, 103 S.Ct. 3001. In considering the culpability of the defendant, the court may look to the defendant's intent and motive in committing the crime. See id. at 293, 103 S.Ct. 3001.

In assessing the seriousness of Broxton's crime, what was the actual or potential harm that he caused to the victim or to society? Although drug crimes generally are considered serious, see *Harmelin*, 501 U.S. at 1002, 111 S.Ct. 2680 (opinion of Kennedy, J.), it denies reality and contradicts precedent to say that all drug crimes are of equal seriousness and pose the same threat to society. In *Solem*, 463 U.S. at 293, 103 S.Ct. 3001, the Supreme Court remarked on the importance that the "absolute magnitude" of the crime may play in assessing the harm that it causes or threatens, and the plurality in *Harmelin*, 501 U.S. at 1002, 1007-09, 111 S.Ct. 2680 (opinion of Kennedy, J.), repeatedly emphasized the amount of cocaine involved in the crime in explaining why the defendant's sentence did not violate the Eighth Amendment.

In *Harmelin*, Mr. Justice Kennedy observed that the 672 grams of pure cocaine that the defendant possessed had "a potential yield of between 32,500 and 65,000

doses," id. at 1002, 111 S.Ct. 2680, and that the state legislature could reasonably have decided that "this large an amount," id. at 1003, 111 S.Ct. 2680, warranted a mandatory sentence of life without parole. Id. After referring to the amount of cocaine, Mr. Justice Kennedy concluded that, given the crime's severity, an extended proportionality analysis was unnecessary. See id. at 1004-05, 111 S.Ct. 2680.

The pertinent statute in *Harmelin* mandated a life sentence without parole for possession of 650 grams of a "mixture" containing cocaine, see id. at 961 n. 1, 111 S.Ct. 2680 (opinion of Scalia, J.), and Mr. Justice Kennedy further noted that the defendant might have been prosecuted because he possessed "672.5 grams of undiluted cocaine" and other "trappings" of the drug trade, id. at 1008, 111 S.Ct. 2680. When explaining that the defendant's crime was much more serious than the crime in *Solem*, Mr. Justice Kennedy referred to "the threat posed to the individual and society by possession of this large an amount of cocaine" (emphasis supplied), id. at 1003, 111 S.Ct. 2680, and referred once more to the quantity of drugs involved in the defendant's crime in stating that state law gave notice of the penalty for the "possession of drugs *in wholesale amounts*," id. at 1008, 111 S.Ct. 2680 (emphasis supplied).

In contrast to the circumstances in *Harmelin*, Broxton, unlike *Harmelin*, did not distribute any drugs, and the amount of drugs that Broxton possessed was

extraordinarily small: 29 tablets, containing less than 1/10th of a gram of oxycodone. The weight or "absolute magnitude," *Solem*, 463 U.S. at 293, 103 S.Ct. 3001, of the drugs involved in *Harmelin* was approximately 6,725 times the weight of the drugs possessed by Broxton, and the 29 tablets was nowhere near the 32,500 to 65,000 doses of drugs involved in *Harmelin.*

The court is also required to consider the culpability of the defendant in determining proportionality of sentence. Broxton is the least culpable defendant imaginable - he was simply an addict who stole from his step-father's prescription a small quantity of pills for his personal use to feed his own addiction. He did not sell or distribute or have any intent to sell or distribute drugs to anyone other than himself, and then after having been arrested and bonded out on the charge, accepted a drug intervention, regained his health and got a job and went to work. Broxton simply does not bear culpability sufficient to sustain this sentence.

The court must next assess the severity of the sentence. The statute requires imposition of a minimum mandatory sentence which by its terms is not subject to any reduction for good behavior or other mitigating factors nor is it subject to parole. It is a true determinate sentence of fifteen years. Had Broxton been sentenced under the Florida Sentencing Guidelines, his presumptive sentence would have been 37 months and he would have been eligible for credit against his sentence for good behavior.

[RI-86-87]

In determining the severity of a sentence the court is required to consider the penalty imposed by other jurisdictions. The best comparison of the penalty assessed under § 893.135 against Broxton, is that to which he would have faced had he been prosecuted in federal court for the very same offense. The United States Congress has made the same conduct a *misdemeanor* under federal law. See 21 U.S.C. § 844, punishable by no more than *one year* incarceration.

Based on these principles, Broxton argues that his sentence is grossly disproportionate to his conviction and constitutes cruel and unusual punishment that violates the Eighth Amendment and Article I, § 17 of the Florida Constitution.

CONCLUSION

Appellant Jerry Randell Broxton requests this Honorable Court vacate his judgment, conviction and sentence and remand the case to the circuit court with instructions that the motion to suppress be granted or in the alternative that his conviction for trafficking be vacated and judgment for simple possession be imposed instead and that he be resentenced subject to the Florida Sentencing Guidelines without regard to any minimum mandatory penalty.

Respectfully submitted,

WILLIAM MALLORY KENT
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207
(904) 398-8000 Telephone
(904) 348-3124 Facsimile
kent@williamkent.com

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, by United States Mail, first class postage prepaid, this _____ day of April, 2009.

_____
William Mallory Kent