IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

CASE NO: 5D23-0118
LT NO: 16-2021-MM-014027

JASON HASSAN BAXTER,
APPELLANT,

vs.

STATE OF FLORIDA,
APPELLEE.
_____/

ON APPEAL FROM THE COUNTY COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from Appellant's conviction on a charge of use, or possess with intent to use, drug paraphernalia following a plea of guilty and sentencing on April 5, 2022. The record on appeal consists of one volume and one supplemental volume. Appellant will designate all references to the record on appeal by "R." followed by the correct page number(s), and references to the supplemental record on appeal by "Supp. R." followed by the correct page number(s). The supplemental volume contains a DVD and references to this DVD will be designated as State's Ex. 1 with the corresponding time stamp. Appellant, Jason Hassan Baxter, will be referred to as Appellant or Baxter. Appellee, the State of Florida, will be referred to as the State or Appellee.

ARGUMENT

Appellant incorporates all arguments in his Initial Brief and replies to Appellee's Answer Brief as follows:

The State misconstrues and misstates crucial facts and case law with regard to the assertion that Officer Accra's initial encounter with Baxter fell under the community caretaking exception to the warrant requirement, thereby not triggering Fourth

Amendment safeguards. Indeed, calling the encounter "community caretaking" or in concern for Baxter's "well-being" does not make it so. Such ascription is an empty assertion, without any factual basis.

First, the State, without any factual support, states that Officer Accra's "*primary concern* in approaching Baxter was to ensure his well-being." (Answer Brief, p. 5, emphasis added). However, Officer Accra never makes that statement. In fact, it is clear from both Officer Accra's testimony and from the body camera footage that his "primary concern" was not Baxter's wellbeing but was the investigation of a possible crime. Officer Accra admitted on cross examination that the reason he approached Baxter was because he thought the situation was "suspicious" and he "thought something might have been going on." (R. 48). He stated on direct that it was a high priority for the "midnight squad" as pronounced by his superiors to "ensure property crimes aren't being committed" so he wanted to make sure a burglary was not in progress. (R. 46).[1]

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[1] Additionally, there is no record evidence as to whether being parked outside a closed business is "illegal" and no evidence as to whether any signs were on the property warning of any such prohibition. The case law seems to make the distinction between vehicles that were legally and illegally parked in the context of

Before even approaching Baxter, Accra illuminated his vehicle's emergency lights and he said he did so because he wanted to be seen by other officers in the event "things go wrong." (R. 46). The body camera footage shows Accra approach Baxter, saying, "the only reason I'm making contact with you is because you parked outside a closed business" while then asking for his identification which he kept for the duration of the detention. (State's Ex. 1, 00:40). Also, at some point during this initial contact, another officer arrived on scene, with then two officer vehicles with emergency lights illuminated and then a third and maybe more (the recording is unclear) surrounding Baxter's vehicle. None of the officers asked Baxter whether he had a medical marijuana card or any other related questions until after he was ordered out of the vehicle.

Incontestably, both by Accra's admissions in his testimony and by the recording of what actually transpired during this initial

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welfare checks. The Baez case cited by the State, State v. Baez, 894 So. 2d 115 (Fla. 2004) involves a car parked in an abandoned warehouse; Brumelow, infra, involved a legally parked car; Gentles v. State, 50 So. 3d 1192 (Fla. 4th DCA 2010) (legally parked); Greider v. State, 977 So. 2d 789 (Fla. 2d DCA 2008) (legally parked). Whether the vehicle occupant is asleep is also a critical fact. In the instant case, no evidence exists whatsoever that Baxter appeared in any kind of medical distress.

contact, the officer's "primary concern" was not for Baxter's welfare but was in the investigation of a potential crime. These are quite apparently not the actions and statements of an officer ensuring a citizen is not experiencing a health crisis. In fact, the camera footage reveals that Officer Accra could see that Baxter was not in distress from quite a distance away as Baxter rolled down his car window to ask the officer why he was approaching. If the officer was legitimately concerned for Baxter's wellbeing, he should have ended the encounter once he could assess that Baxter was not "ill, tired, or driving under the influence." Dep't of Highway Safety & Motor Vehicles v. Morrical, 262 So. 3d 865 (Fla. 5th DCA 2019).

The instant case bears some factual similarities to Taylor v. State, 326 So. 3d 115 (Fla. 1st DCA 2021). In Taylor, a sheriff's deputy responded to a call at 4:30 a.m. about a man sleeping in a vehicle with a "fairly large knife" on his lap. Id. at 117. At the suppression hearing, the officer confirmed that he had no reason to believe the defendant had committed, was committing, or was about to commit a crime. Id. The officer never suggested he was concerned about the defendant's health or safety. Id. Nevertheless, the officer called for backup and six deputies arrived on scene

shortly, including a K9 deputy. Id. The responding officer then opened the driver's side door and pulled the defendant out of the vehicle while he was still asleep, confiscated the knife, while the K9 narcotics dog alerted the officers to the presence of narcotics. Id. A search ensued and illicit drugs and paraphernalia were discovered and the defendant was charged with various drug-related offenses. Id.

On appeal, the First District Court of Appeal reversed the denial of the motion to suppress evidence of the drugs and paraphernalia discovered during the search, holding the warrantless search of the defendant's vehicle was not reasonable under the Fourth Amendment as part of a permissible welfare check. Id. The court relied on established precedent that analyzed the scope of a permissible welfare check as being conducted "solely for safety reasons" and "limited to prevent the exception from becoming an investigative tool that circumvents the Fourth Amendment." Id. at 118. Because the "purpose of the welfare check regulates its scope . . . the welfare check should end when the need for it ends" absent "reasonable suspicion that criminal activity is or was afoot." Id., citing Riggs v. State, 918 So. 2d 274,

279 (Fla. 2005); State v. Brumelow, 289 So. 3d 955 (Fla. 1st DCA 2019). The court also noted that "a welfare check, particularly one that evolves into a search and seizure, must be commensurate with the perceived exigency at hand." Id. The court in Taylor found that a welfare check may have been initially reasonable in that situation, but that the officers exceeded the scope of the welfare check when it evolved into a Fourth Amendment seizure. Id.

However, the Taylor court also noted that whether the officers were actually conducting a welfare check was questionable, since the officer "never sought to inquire into Taylor's wellbeing before pulling him out of the vehicle." Taylor at 118. In the instant case, the legitimacy of the welfare check is also questionable, in that, upon approaching Baxter, Accra told him "The only reason I'm making contact with you is because you were parked outside a closed business." (State's Ex. 1, 00:32 et. seq.). It was apparent, even before he neared Baxter's vehicle, that Baxter was not in any distress. In fact, he was not asleep, as the defendant in Taylor was, and he was never in any apparent medical distress.

As such, the search was unreasonable in this case because 1) the officers never conducted a welfare check but rather the

encounter was investigatory from its outset by the very admission of the officers and it lacked reasonable suspicion to support such investigation; 2) it would have been unreasonable to conduct a welfare check in these circumstances because it was not commensurate with the perceived exigency at hand and Baxter was not in apparent distress; and 3) even if the encounter began as a welfare check, it should have ended upon confirmation that Baxter was not in any distress.

The State in its Answer Brief also misconstrues the "consensual" nature of welfare checks as meaning that they can be conducted for any reason or no reason at all. The case law clearly holds otherwise. The Taylor court emphasized that "[b]oth the scope and manner of a welfare check must be reasonable" and they cannot be used as a guise in order to circumvent the Fourth Amendment. Taylor at 118. A community caretaking stop must be necessary for the protection of the public based on specific, articulable facts. Majors v. State, 70 So. 3d 655 (Fla. 1st DCA 2011). Here, the only reason the officers approached Baxter at the outset was because he was parked outside a closed business. Baxter was obviously awake, alert, not in distress and not doing

anything to indicate he was in any danger. See also Greider v. State, 977 So. 2d 789 (Fla. 2d DCA 2008) (when officer saw a parked car with towels rolled up in the windows like curtains, he approached out of concern for the occupants but once he spoke to the driver through the passenger-side window and his concerns were dispelled, the encounter should have ended.); State v. Brumelow, 289 So. 3d 955 (Fla. 1st DCA 2019) ("searches and seizures conducted under the community caretaking doctrine are solely for safety reasons and must be 'totally divorced form the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'")

Because the officer did not have "specific articulable facts" to support the need for a welfare check, it follows that he did not have reasonable suspicion to support the investigation of a crime. Reasonable suspicion is not established simply from a car being parked outside a closed business. Jordan v. State, 707 So. 2d 338 (Fla. 2d DCA 1998).

Therefore, the initial contact in this case was not a welfare check or community caretaking, nor was there reasonable suspicion

sufficient to begin an investigation. As such, the motion to suppress evidence should have been granted.

In addition, the State's argument with regard to the search related to the officer's alleged detection of the odor of marijuana also requires clarification. The State cites to no Fifth District Court of Appeal case law on this issue, and the federal case law cited actually supports Baxter's argument. In the instant case, the only alleged reason for the search was the odor of fresh – not burnt – marijuana. The federal cases indicate that such may be included in the "totality of circumstances" supporting a probable cause finding, but not as the sole reason for probable cause. In the instant case, the officers cited to this alleged fact as the sole reason for the search. Considering changes to the federal and state law legalizing hemp and marijuana in certain circumstances, without additional justification, probable cause for the search did not exist. Therefore Baxter's arrest and subsequent search were unlawful.

CONCLUSION

The trial court should have suppressed all evidence obtained from the unlawful search and seizure as fruit of the poisonous tree. Because the Motion to Suppress was dispositive, Appellant

respectfully requests this Honorable Court reverse the Judgment and Sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served, via the Florida Courts E-Filing Portal, on the Office of the Attorney General, at crimapptlh@myfloridalegal.com, this 20 day January, 2023.

ELIZABETH HOGAN WEBB

CERTIFICATE OF COMPLIANCE

I certify that this brief is in conformity with all font and word count provisions pursuant to Rule 9.045, Fla. R. App. P. and complies with Rule 9.100, Fla. R. App. P.

ELIZABETH HOGAN WEBB