

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: **07-AP-82**  
LOWER COURT CASE NO: 48-2007-MM-4085-O

RICHARD ALLEN MOTES,  
Appellant,

vs.

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_/

Appeal from the County Court for Orange County,  
Florida, John E. Jordan, County Court Judge

Robert Wesley, Public Defender, and Melisa Taylor,  
Assistant Public Defender, for Appellant

Lawson Lamar, State Attorney, and Christina J. Dubois,  
Assistant State Attorney, for Appellee

Before Latimore, Roche, and Komanski, J.J.

**PER CURIAM.**

**FINAL ORDER REVERSING TRIAL COURT**

Richard Allen Motes (herein "Appellant") appeals the final order of judgment and sentence, rendered on November 8, 2007. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1).

On April 6, 2007, Appellant was arrested for resisting an officer without violence, and the State filed an information on May 4, 2007. On November 8, 2007, he was convicted as charged and sentenced to 2 days time served in the Orange County Jail and 363 days of probation with conditions.

At trial, Clinton Keller of the Orlando Police Department testified that he responded to a call for service and saw two vehicles - a truck and an SUV - parked on the side of a residential road, and saw Appellant lying under the truck. Another person, identified as Michael Stake, was crouching

between the two vehicles and holding a tire iron. Using his radio, Keller asked for a Teletype check of Mr. Stake's driver's license and tag on the truck. He received no response from Appellant after identifying himself as an officer. Mr. Stake dragged Appellant from under the truck, whereupon Appellant became "belligerent and agitated." Officer Keller told him to stay seated and provide identification, but he repeatedly tried to get up, so the officer forcibly directed him to the curb. He said that Appellant "jumped back up directly in my face and said, fuck off." Officer Keller said he was checking on "public safety - citizen safety concerns."

On cross-examination, counsel asked what crime Officer Keller was investigating, and he described it as "a suspicious incident by the complainant, a citizen who called, in reference to two suspicious white males crouched between two vehicles on a residential roadway with the defendant laying underneath the vehicle, obviously asleep on the roadway." He found the scene suspicious because Mr. Stake claimed to be changing a flat tire, but there was no jack and he could not see any flat tires. He said he could not determine whether they were the actual owners of the vehicle until he obtained identification. He subsequently found that the truck belonged to Mr. Stake, and acknowledged that Appellant and Mr. Stake had not committed a crime before he arrested Appellant.

The first issue on appeal is whether the trial court erred in denying the Motion for Judgment of Acquittal when the State did not establish that the officer was engaged in a lawful duty, as required for a prima facie case of resisting an officer without violence

A de novo standard of review applies when reviewing a motion for judgment of acquittal. *Reynolds v. State*, 934 So. 2d 1128, 1145 (Fla. 2006). In moving for a judgment of acquittal, a defendant admits the facts stated and "every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." *Reynolds v. State*, 934 So. 2d 1128, 1145

(Fla. 2006), quoting *Beasley v. State*, 774 So. 2d 649, 657 (Fla. 2000).

In order to stop and detain a person for investigation, an officer must have a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. Whether an officer has a “founded suspicion” for a stop depends on the totality of the circumstances, interpreted in light of the officer's knowledge and experience at the time of the stop. A mere “hunch” that criminal activity may be occurring is not sufficient.

*Ippolito v. State*, 789 So.2d 423, 425 (Fla. 4th DCA 2001).

In *Davis v. State*, 973 So. 2d 1277, 1279 (Fla. 2d DCA 2008), the Second District Court of Appeal addressed a similar situation where restaurant employees reported a “suspicious incident” but there was no evidence regarding the substance of the incident. The Second District reversed a conviction for resisting without violence, explaining:

In determining whether an officer was engaged in the lawful execution of a legal duty, we must apply the legal standards governing the officer's duty at the point that the resistance occurs. See *Tillman v. State*, 934 So. 2d 1263, 1271 (Fla. 2006). In cases involving an investigatory detention, it is necessary for the State to prove that the officer had a reasonable suspicion of criminal activity that would support the detention. *Id.*; see also *J.H.M. v. State*, 945 So. 2d 642, 645 (Fla. 2d DCA 2006); *J.R.P. v. State*, 942 So. 2d 452, 453-54 (Fla. 2d DCA 2006); *Slydell v. State*, 792 So. 2d 667, 671 (Fla. 4th DCA 2001); *S.G.K. v. State*, 657 So. 2d 1246, 1247 (Fla. 1st DCA 1995).

In this case, the State presented evidence that the officers were responding to a complaint of a “suspicious incident” by employees of the Green Room Restaurant. The State also presented evidence that the employees stated that Davis was involved in the incident. However, the State did not present any evidence regarding the substance of that complaint or the “suspicious incident.” Therefore, the State did not establish any basis for a reasonable suspicion of criminal activity by Davis.

We reject the State's argument that it established the element of a lawful execution of a legal duty with testimony that the officers were responding to a complaint by the employees of the Green Room Restaurant. The fact that an employee on private property makes a complaint to the police does not vitiate the requirement that a detention to investigate the complaint be supported by reasonable suspicion of criminal activity. Without information regarding the nature of the complaint the officers were investigating, there was no way to determine whether the officers were engaged in the lawful execution of a legal duty when they detained

Davis to investigate the complaint

In the instant case, there was some testimony about why Officer Keller stopped to investigate. Significantly, however, the State could not establish that the officer had a reasonable suspicion of criminal activity on Appellant's part. The officer merely stated he was investigating "a suspicious incident by the complainant, a citizen who called, in reference to two suspicious white males crouched between two vehicles on a residential roadway with the defendant laying underneath the vehicle, obviously asleep on the roadway." However, the fact that a citizen makes a complaint to the police does not vitiate the requirement that a detention to investigate the complaint be supported by reasonable suspicion of criminal activity. Viewing the evidence in a light most favorable to the State, it appears that Officer Keller had nothing more than a "hunch."

Furthermore, Officer Keller acknowledged that he received identification from Mr. Stake, who was identified as the owner of the vehicle under which Appellant was lying. It appears to be undisputed that Appellant was sleeping or unconscious when the officer arrived. If he had taken the time to first ascertain that Mr. Stake was the owner of the vehicle, he would have had even less of a hunch of criminal activity.

Based on the foregoing, this Court finds that the trial court erred in denying the Motion for Judgment of Acquittal, because the State did not establish that the officer was engaged in a lawful duty, as required for a prima facie case of resisting an officer without violence.

The second issue on appeal is whether the trial court erred in not instructing the jury on the claim of unlawful arrest, "where the jury could not have understood that this was an issue it must decide." However, the Court finds this issue was not properly preserved for appeal, because the defense made no request for such an instruction.

Therefore, it is hereby ORDERED AND ADJUDGED that trial court's denial of the Motion

for Judgment of Acquittal is hereby REVERSED, and this case is REMANDED for further proceedings.

DONE AND ORDERED on this \_\_11\_\_\_\_ day of November 2008.

\_\_\_\_\_/S/\_\_\_\_\_  
**ALICIA L. LATIMORE**  
Circuit Court Judge

\_\_\_\_\_/S/\_\_\_\_\_  
**RENEE A. ROCHE**  
Circuit Court Judge

\_\_\_\_\_/S/\_\_\_\_\_  
**WALTER KOMANSKI**  
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Final Order Reversing Trial Court has been provided this \_\_11\_\_ day of November 2008 to Melisa Taylor, Assistant Public Defender, 435 North Orange Avenue, Orlando, Florida 32801; and to Christina J. Dubois, Assistant State Attorney, 415 North Orange Avenue, Orlando, Florida 32801.

\_\_\_\_\_/S/\_\_\_\_\_  
Judicial Assistant