

**IN THE COUNTY COURT OF THE [REDACTED] JUDICIAL CIRCUIT
IN AND FOR [REDACTED] COUNTY, FLORIDA**

STATE OF FLORIDA

Plaintiff,

vs.

CASE NO.: [REDACTED]

DIVISION: [REDACTED]

[REDACTED]
Defendant.

**MOTION TO SUPPRESS WARRANTLESS SEARCH
AS A RESULT OF DEFENDANT'S INVALID CONSENT, AND
INCORPORATED MEMORANDUM OF LAW**

COMES NOW, the Defendant, [REDACTED], by and through his undersigned counsel, pursuant to Rule 3.190(g), Florida Rule of Criminal Procedure, and moves this Honorable Court to suppress any and all evidence obtained in the above-styled case found as a result of the unlawful search of the Defendant, stemming from the Defendant's invalid consent, and as grounds in support thereof would state the following:

1. The Defendant is facing numerous felony charges as follows: 2 Counts of Defrauding a Financial Institution; 2 Counts of Criminal Use of Personal Identification; 1 Count of Grand Theft; 4 Counts of credit card forgery; and 1 Count of Possession of Unlawfully Issued, Stolen, Fictitious, Blank, Forged or Counterfeit Identification Card, all of which stem from the unlawful detention and warrantless search of the Defendant on [REDACTED], 2016.

2. On [REDACTED], 2016, while at the [REDACTED] Airport, the Defendant was approached by five (5) law enforcement officers of the Narcotics Interdiction Task Office (NITF): Detectives [REDACTED], [REDACTED], [REDACTED], and SA [REDACTED].

3. Detective [REDACTED] stopped the Defendant, identified herself to the Defendant as a law enforcement officer, and told the Defendant that she and the other officers were part of a task force conducting searches of travelers in the airport.

4. Detective [REDACTED] then began questioning the Defendant regarding where he was traveling and how he purchased his plane ticket. Detective [REDACTED] checked the Defendant's boarding pass as well as his driver's license.

5. Despite having no reasonable suspicion to stop and detain the Defendant, the officers refused to let the Defendant leave to board his flight. Instead, with the other four (4) officers surrounding and obstructing the Defendant's passage, Detective [REDACTED] continued questioning the Defendant.

6. Detective [REDACTED] next began questioning the Defendant regarding the contents of his bag. Detective [REDACTED] advised the Defendant that she would need to search his belongings and instructed him to turn over his bag. The Defendant asked Detective [REDACTED] "**do I have to?**" and Detective [REDACTED] responded "**yes.**"

7. Detectives [REDACTED] and [REDACTED] began to search the Defendant's bag without the Defendant's consent. Detective [REDACTED] further demanded to search the Defendant's wallet, which was located in the Defendant's left pant pocket.

8. At no time did the detectives obtain the Defendant's valid, verbal consent. Further, the detectives took no steps to obtain a written consent form from the Defendant or to apply for a search warrant.

9. In fact, prior to, and during, the search of the Defendant, the Defendant spoke loudly to draw the attention of passengers around, pleading

with them to stop what they were doing and observe the unlawful encounter he was facing.

10. The undersigned attempted to obtain a video recording from the [REDACTED] [REDACTED] Airport of the incident to support, but the video had been destroyed.

11. The unlawful, warrantless search of the Defendant's bag allegedly revealed two credit card skimmers, an [REDACTED] driver's license with the name "[REDACTED]," and five Capital One credit card issued to "[REDACTED]."

12. Upon being told he was going to be placed under arrest, the Defendant allegedly fled the area. The Defendant was ultimately apprehended and charged with the aforementioned offenses.

MEMORANDUM OF LAW

The Defendant moves this Honorable Court to suppress any and all evidence seized as a result of the unlawful, warrantless search of the Defendant's person and bag, which searches were performed without the Defendant's valid consent. The evidence seized in this case must be suppressed as "tainted fruit of the poisonous tree," having been illegally seized as a result of unlawful law enforcement activity, in violation of the Fourth Amendment to the United States Constitution and in violation of Article 1 Section 12 of the Constitution of the state of Florida. *Wong Sun v. United States*, 371 U.S. 471 (1963).

I. **ANY ALLEGED CONSENT BY THE DEFENDANT WAS MERE ACQUIESCENCE TO AUTHORITY AS A RESULT OF AN UNLAWFUL DETENTION**

Both the United States and Florida Constitutions forbid unreasonable searches and seizures. U.S. Const. Amend. IV; Fla. Const. Art. I, Sec. 12. When the validity of a warrantless search rests on consent, the State has the burden of proving that the consent was freely and voluntarily given based upon the totality of the circumstances surrounding the purported consent. *Generally, State v. Othen*, 300 So.2d 732, 733 (Fla. 2d DCA 1974) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-29 (1973)). If a reasonable person under the circumstances would believe that he should acquiesce to authority, such acquiescence is deemed a mere submission and consent is thus involuntary. *Poppel v. State*, 626 So.2d 185 (Fla. 1993).

In *Poppel v. State*, the Florida Supreme Court explained that there are three levels of police-citizen encounters, the first two of which are applicable in the case at hand. The first level is considered the consensual encounter and involves only minimal police contact. *Id.* During a consensual encounter, a citizen may either voluntarily comply with a police officer's requests or choose to ignore them. *Id.* Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked. *Id.*

In the case at hand, the Defendant was clearly not involved in a consensual encounter where he would have been free to leave. He was stopped and surrounded by five (5) officers in the airport (where law enforcement and travelers alike are already on high-alert), who demanded his identification and

boarding pass, questioned him, blocked his path, demanded to search his bag and wallet, and told the Defendant “yes” he “had to” provide his bag when asked if he *had* to give his bag up to be searched, all while the Defendant attempted to grab the attention of a passerby to witness the unlawful search unfolding.

In addition to the intimidating complement of the five (5) officers, the verbal acts of those officers, when telling the Defendant that they were going to search him despite his pleas for help from passing observers, and the physical acts of the officers blocking his path, would lead a reasonable person to understand as an assertion of authority to search. *See generally Luna-Martinez*, 948 So.2d 592, 600 (Fla. 2nd DCA 2013); *Miller v. State*, 865 So.2d 584, 587 (Fla. 5th DCa 2004). Clearly and unequivocally the Defendant was seized, and no reasonable person would presume he would be free to leave. *See also Young v. State*, 982 So.2d 1274 (Fla. 4th DCA 2008) (holding an encounter not consensual where defendant expressed desire not to engage in a consensual encounter, and officer obstructed defendant's path away from the officer).

Thus, the encounter in this case was the second level of police-citizen encounters, which is an investigatory stop as enunciated in *Terry v. Ohio*, 392 So.2d U.S. 1 (1968). At the investigatory stop level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. §901.151, Fla. Stat. In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal

activity. *Popple*, 626 So.2d at 185, 186. Mere suspicion is not enough to support a stop. *Id.*

The detectives here did not have a reasonable suspicion that the Defendant had committed, was committing, or was about to commit a crime; the Defendant was simply walking through the airport, trying to catch his flight, not unlike the thousands of other citizens in the airport. There was no basis for the stop of the Defendant.

When there is an illegal detention or other illegal conduct on the part of law enforcement authorities, consent will be found to be voluntary only if there is clear and convincing evidence that the consent was not the product of that illegal police conduct. *Hicks v. State*, 852 So.2d 954, 960 (Fla. 5th DCA 2003). Florida appellate courts regularly reverse denials of motions to suppress in cases of illegal detentions by law enforcement officers. *See Navamuel v. State*, 12 So.3d 1283, 1286 (Fla. 4th DCA 2009) (“The illegal pat down converted the consensual encounter into an unlawful stop. Because the state failed to show by clear and convincing evidence a break in the chain of events from the time the officers conducted the illegal stop and frisk and obtained appellant’s consent to search, his consent is deemed involuntary.”).

When a Fourth Amendment violation has occurred, evidence should be suppressed when it “has been come at by the exploitation of the illegality” and was not obtained “by means sufficiently distinguishably to be purged of the primary taint.” In this case, any and all evidence amassed from the unlawful,

warrantless search of the Defendant and his bag must be suppressed as the fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963).

II. **THE DEFENDANT'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED BY THE STATE'S FAILURE TO PRESERVE EXCULPATORY EVIDENCE, AND THUS ANY AND ALL EVIDENCE MUST BE SUPPRESSED.**

The Defendant's due process rights have been violated by the failure of the State and the law enforcement officers to preserve exculpatory evidence, to wit: video evidence from the [REDACTED] Airport of the incident on [REDACTED], 2016.

The undersigned attorney made the State aware of the highly likely existence of a video recording of the [REDACTED], 2016 incident involving the Defendant. The State did nothing to investigate or preserve such a recording. On [REDACTED], 2016, the undersigned filed *Defendant's Emergency Motion for Leave to Serve Subpoena Duces Tecum for Purposes of Preserving Video Evidence*, requesting the Court to enter an order permitting the Defendant to serve a subpoena on the Transportation Security Administration (TSA) and the [REDACTED] Sheriff's Office to preserve video surveillance of the events occurring on [REDACTED], 2016 at the Fort Lauderdale-Hollywood International Airport. It was not until [REDACTED], 2016 that the Court entered an Order granting the *Defendant's Emergency Motion for Leave to Serve Subpoena Duces Tecum for Purposes of Preserving Video Evidence*. Unfortunately, at that point, the surveillance video had already been destroyed, thereby forever depriving the Defendant of the

exculpatory evidence clearly showing the nonconsensual encounter between the Defendant and the five (5) detectives.

When determining whether a defendant's due process rights have been violated by the State's destruction of or failure to preserve evidence, a court must first consider whether the missing evidence was "materially exculpatory." *State v. Bennett*, 111 So.3d 943 (Fla. 2nd DCA 2013). The State has a duty to preserve materially exculpatory evidence, i.e., that which is more than simply "potentially useful," which "might be expected to play a significant role in the suspect's defense," and that is "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id. citing California v. Trombetta*, 467 U.S. 479, 488 (1984); *see also Arizona v. Youngblood*, 488 U.S. 51 (1988).

Here, clearly, a video recording of the incident would have provided the best evidence of the Defendant's non-consent to the unlawful search by the officers. There is no comparable evidence that could be obtained by the Defendant by any other reasonable means. Aside from the Defendant's own potential testimony, there is no evidence the Defendant could present of the incident itself or to impeach the officers that could have compared to a video recording. As a result of the State and officers' failure to preserve the video evidence, any and all evidence obtained from the unlawful, non-consensual search of the Defendant and his bag must be suppressed.

WHEREFORE, the Defendant respectfully requests this Honorable Court enter an order pursuant to Rule 3.190(g), Florida Rule of Criminal Procedure, suppressing any and all evidence obtained in the above-styled case found as a result of the unlawful search of the Defendant, stemming from the Defendant's invalid consent, including any and all statements by the Defendant, as well as a result of the States' failure to preserve materially exculpatory evidence. Other grounds to be argued ORE TENUS.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, [REDACTED]
[REDACTED], Florida [REDACTED] on this ___ day
of [REDACTED], 2016.