

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

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO.: 16-2014-MM [REDACTED]

D [REDACTED] A [REDACTED]
Defendant.

AMENDED MOTION TO DISMISS

Defendant [REDACTED] by and through his undersigned attorneys and pursuant to Rule 3.190(c)(4), Florida Rules of Criminal Procedure, hereby moves this Honorable Court to dismiss the Information filed in the above-captioned cause. As grounds for this Motion, Defendant states as follows:

1. For purposes of compliance with Rule 3.190(c)(4), Defendant will not dispute and will attest to the material facts produced in the State's discovery and other filings.
2. For purposes of the instant Motion to Dismiss, the Arrest and Booking Report will be referred to as "Arrest Report." The transcript for the deposition of Officer B.L. Key (#72560), conducted on July 22, 2014, will be referred to as "Transcript." The previously disclosed video recording of Defendant's arrest, dated April 22, 2014, will be referred to as "Video." Defendant will be referred to as "the suspect" and "listed suspect," to replicate the language used in the Arrest Report.

UNDISPUTED MATERIAL FACTS

3. The material undisputed facts alleged and/or conceded by the State of Florida, and found in the Arrest Report and other materials referenced herein, are set forth below.
 - a. On April 22, 2014, [Officer B.L. Key (#72560) of the Jacksonville Sheriff's Office] was dispatched to 3701 Emerson St (Wacko's Bar and Grill) in reference to a drunken dispute.
 - b. Upon [Officer Key's] arrival, [she] made contact with [REDACTED] who was unable to pay his tab. He informed [Officer Key] that he had called a

friend (listed suspect).

- c. When the suspect arrived he became extremely irritated about the situation.
- d. The suspect walked over to the ATM to get the necessary money to pay the tab.
- e. The manager on duty ([REDACTED]) instructed the suspect to pay the tab and then leave the premises.
- f. The suspect continued to become more upset with the situation. He stated that "this is bullshit and fucked up."
- g. [Officer Key] then asked the suspect to please pay the bar tab and exit the premises.
- h. At this time, the suspect had received the cash to pay the tab from the ATM.
- i. [Officer Key] once again asked the suspect to pay the tab and leave the premises, the suspect responded, "fuck you."
- j. The suspect turned his body in a bladed manner and refused to pay the tab.
- k. Officer Key stated "one more chance. Pay him or you're gonna go to jail for trespass" [See *Video*, 00:00-00:02]. Defendant responded: "I am. It's recording. Give me a break. Tell me one more time, please" [See *Video*, 00:02-00:08].
- l. Officer Key then placed Defendant under arrest for the charge of trespass.
- m. While attempting to handcuff the suspect he jerked his arm away.
- n. After a brief struggle to overcome resistance the suspect was handcuffed.
- o. When asked at deposition whether she had any conversation with management personally, Officer Key responded: "I don't recall." [See Transcript, p. 10, 18-20].
- p. When asked at deposition why she didn't speak with management after her arrival, Officer Key responded: "Not that I recall" [See Transcript p. 12, 22-24].
- q. When asked at deposition whether management at any point prohibited the suspect from entering the premises, Officer Key responded: "No, sir, not that I recall" [See Transcript, p.

11, 7-9].

- r. Officer Key was asked at deposition whether the manager at Wacko's ever gave the suspect a time frame in which to pay the money in question. She responded: "Not that I know of" [See Transcript p. 12, 12-16].
- s. Officer Key was asked at deposition whether the Wacko's manager ever said "Pay right now or leave." She responded: "Not that I know of" [See Transcript p. 12, 17-19].
- t. Officer Key was asked at deposition whether she ever told the suspect you're trespassing. She responded: "Not that I recall" [See Transcript p. 20, 5-7].
- u. Officer Key was asked at deposition whether she ever told the suspect something to the effect of "You're time to pay has expired. Pay right now or you're trespassing." Officer Key responded: "Not that I recall" [See Transcript p. 19, 1-4].

4. As a result of the incident on April 22, 2014, the State of Florida has charged Defendant in a two-count Information with Trespass (Structure or Conveyance) (M1) and Resisting without Violence (M1).

APPLICABLE LAW

5. To prove the crime of Trespass (Structure or Conveyance) at trial, the State of Florida must establish the following three elements beyond a reasonable doubt:

- (i) The defendant willfully entered or remained in the structure/conveyance alleged, or, having been authorized, licensed, or invited to enter or remain in the structure or conveyance, the defendant willfully refused to depart after having been warned by the owner or lessee or person authorized by the owner or lessee to depart;
- (ii) The structure or conveyance alleged was in the lawful possession of the person alleged; and
- (iii) Defendant's entering or remaining in the property was without the permission, express or implied, of the person alleged or any other person authorized to give that permission. See Fla. Std. Jury Instr. (Crim.) 13.3 (Trespass- On Property Other Than a Structure or Conveyance).

6. A trespass must be conducted willfully, that is, the entry or remaining must be knowingly and purposely done, with general intent. *Rozier v. State*, 402 So. 2d 539 (Fla. 5th DCA 1981), decision approved, 436 So. 2d 73 (Fla. 1983).

7. Authority to enter upon or remain in property need not be given by express words. It may be implied from the circumstances. It is lawful to enter or remain in the property of another if, under all the circumstances, a reasonable person would believe that he or she had the permission of the owner or occupant. See Fla. Std. Jury Instr. (Crim.) 13.3 (Trespass- In Structure or Conveyance).

8. When an invitation has been extended to enter an open business, actual communication is necessary to put a person on notice that he is no longer welcome on the property and may be arrested for trespass. *K.M.B. v. State*, 69 So. 3d 311, 314 (Fla. 4th DCA 2011); *Smith v. State*, 778 So.2d 329, 331 (Fla. 2d DCA 2000) (citing *Corn v. State*, 332 So.2d 4, 8 (Fla.1976)).

9. In upholding trespass convictions, Florida appellate courts have consistently required an actual communication of a specific directive to either leave or not enter upon the premises. See *State v. M.A.D.*, 721 So.2d 412 (Fla. 3d DCA 1998) (stating that suspect had been warned by supermarket employees and the police that he was no longer permitted to “hang out” in front of the store); *Melton v. State*, 546 So.2d 444 (Fla. 1st DCA 1989) (explaining that the police specifically told the defendant that he was required to depart the premises); *R.C.W. v. State*, 507 So.2d 700 (Fla. 1st DCA 1987) (commenting that the defendant, who was arrested for trespassing in a mall parking lot had been given a written trespass warning not to come back to the mall).

10. A police officer does not have the legal authority to conduct an investigatory stop or arrest for trespass unless the owner or his or her agent first warned the potential trespasser that he or she is no longer permitted to be present. *Gestewitz v. State*, 34 So. 3d 832, 834-35 (Fla. 4th DCA 2010); *S.N.J. v. State*, 17 So.3d 1258, 1259 (Fla. 2d DCA 2009) (stating that Florida's criminal trespass statute “requires that notice be given before a person can be guilty of trespassing on property,” and that individuals “c[an]

be legally detained for trespassing only if they were first warned to leave the property"); *Rodriguez v. State*, 29 So. 3d 310, 312 (Fla. 2d DCA 2009).

11. Where a person other than the actual owner or occupant gives an order to depart the property, the State must show beyond a reasonable doubt that the person giving the order to leave was an actual designee authorized to give such orders. See § 810.08(1); *B.C. v. State*, 70 So. 3d 666 (Fla. 1st DCA 2011).

12. Florida Statutes § 843.02 (2014) provides that: "whoever shall resist, obstruct, or oppose any [law enforcement or probation] officer or other person legally authorized to execute process . . . in the law execution of a legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree misdemeanor."

13. To obtain a conviction for Resisting Without Violence, the State of Florida must prove the following four elements beyond a reasonable doubt: (i) The defendant resisted, or obstructed, or opposed the victim; (ii) At the time, the victim was engaged in the execution of legal process or the lawful execution of a legal duty; (iii) At the time, the victim was an officer or a person legally authorized to execute process; and (iv) At the time, the defendant knew that the victim was an officer or a person legally authorized to execute process. Fla. Std. Jury Instr. (Crim.) 21.2 (Resisting Officer Without Violence); *Polite v. State*, 973 So.2d 1107 (Fla., 2007).

14. The element of lawful execution of a legal duty requires an officer to have either a founded suspicion to stop the person, or probable cause of criminal conduct to make a warrantless arrest. *EAB v. State*, 851 So.2d 308, 311 (Fla. 2d DCA 2003); *I.Y.D. v. State*, 711 So.2d 202, 203 (Fla. 2d DCA 1998); *S.G.K. v. State*, 657 So.2d 1246, 1247 (Fla. 1st DCA 1995).

15. The crime of resisting an officer without violence does not take place if the officer lacks well-founded suspicion of criminal activity or probable cause that a crime has been committed. *Harris v. State*, 647 So.2d 206 (Fla. 1st DCA 1994); *S.G.K. v. State*, 657 So.2d 1246, 1247 (Fla. 1st DCA 1995). For this reason, the unlawfulness of an arrest or detention is a recognized defense to a charge of Resisting Without

Violence. *State v. Anderson*, 639 So.2d 609, 610-11 (Fla. 1994).

16. Where a police officer conducts an unlawful arrest or detention, an individual has a recognized right to resist those unlawful actions without violence. *Hadley v. State*, 846 So.2d 1236, 1238 (Fla. 1st DCA 2003). A defendant is furthermore entitled to a jury instruction on this principle and a failure to give the instruction constitutes reversible error if there is any evidence to support the instruction. *Id.*

17. In the absence of evidence of proof of notice to the defendant by either the posting of the property or by actual communication, a police officer does not have probable cause to suspect a defendant of the crime of trespass. *Fabian v. State*, 710 So. 2d 114, 116 (Fla. 2d DCA 1998).

18. Similarly, an arresting officer lacks probable cause to believe that an arrestee was committing a trespass, absent any actual communication to the arrestee prior to his arrest that the arrestee could no longer enter upon or remain on the property. *Baker v. State*, 813 So. 2d 1044 (Fla. 4th DCA 2002).

ANALYSIS

19. Defendant submits that the State's undisputed material facts do not establish a prima facie case of guilt for Trespass or Resisting Without Violence.

20. The undisputed material facts establish that Defendant, after being invited on to the premises, was never ordered to leave. Defendant was instructed repeatedly that he was to first pay the tab, and then leave the premises. This instruction to first pay the tab is, as a matter of law, an invitation to remain until such time as payment had been made. At the time of his arrest, Defendant had not paid the tab. The invitation was therefore still in effect. Defendant was never given a time frame in which to pay, was never told that he was presently required to leave, and was never told that he was trespassing. Thus, there was no actual communication that Defendant must then and there depart the premises.

21. Defendant did not, at any point, refuse to leave the subject premises.

22. Prior to Defendant's arrest, the management of Wacko's had not communicated a withdrawal of its consent for Defendant to remain for purposes of paying the tab, and had not advised Officer Key that

management's consent had been withdrawn.

23. Prior to Defendant's arrest, Officer Key did not speak personally with management at Wacko's regarding Defendant. The officers on the scene were originally responding to a call that pertained to Nicholas James Mitchell, and Mr. Mitchell's failure to pay a tab. Having not spoken with management regarding Defendant, Officer Key could not have been designated by management as a person authorized to act with regard to Defendant.

24. If any authorization (express or implied, direct or indirect) was given to Officer Key, the authorization concerned Nicholas James Mitchell, the subject of the call that brought officers to Wacko's in the first place. Defendant was not even present when officers arrived to receive such authorization [See Transcript p. 8, 3-6].

25. Defendant was never advised that he had the option of simply leaving without paying.

26. Immediately prior to Defendant's arrest, Officer Key re-extended the invitation for Defendant to remain, stating that Defendant had "one more chance" (See *Video* 00:00-00:02).

27. Even assuming, *arguendo*, that consent to remain on the premises had been effectively withdrawn, and assuming, *arguendo*, that the withdrawal was actually communicated to Defendant, and assuming, *arguendo*, that Officer Key obtained authorization to act on behalf of Wacko's with regard to Defendant, Defendant's remaining on the property cannot, as a matter of law, be described as "willful" because Defendant was not given the option of leaving. It is undisputed that Officer Key's final statement before placing Defendant under arrest for trespass was "Pay him or you're gonna go to jail for trespass" (See *Video* 00:02-00:08). Thus, Defendant's choices were to remain and pay the tab, or else go to jail. Leaving the premises was not an option.

28. Defendant's arrest was based on Officer Key's mistaken legal conclusion that Defendant had committed the crime of trespass. Officer Key lacked probable cause to make the subject arrest, and her misapprehension of the law cannot be used, under any "good faith" exception, to salvage an otherwise

unlawful law enforcement activity. *Frank v. State*, 912 So. 2d 329 (Fla. 5th DCA 2005). As such, the element of lawful execution of a legal duty is not met and the charge of resisting an officer without violence cannot be sustained. *Harris v. State*, 647 So.2d 206 (Fla. 1st DCA 1994); *S.G.K. v. State*, 657 So.2d 1246, 1247 (Fla. 1st DCA 1995).

29. Based on the foregoing, Defendant is entitled to a dismissal in this cause as a matter of law.

WHEREFORE, Defendant respectfully requests that this Honorable Court enter an Order dismissing the above-captioned cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of the State Attorney, Jacksonville, Duval County, Florida by electronic mail and/or e-filing portal on this 28th day of August, 2014.

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