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

JEFFREY SALOMON, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 4D17-2610 L.T. CASE No. 2016CF005272

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court of the Fifteenth Judicial Circuit,
In and for Palm Beach County, Florida
Felony Criminal Division "U"

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PRELIMINARY STATEMENT

Appellant was the criminal defendant and Appellee was the prosecution for the State of Florida in Felony Criminal Division "U" of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida. Citation to the record below will use "R" for the record proper, paginated 1-281, and "T" for trial transcripts, paginated 1-482, in the format (R/T ##).

STATEMENT OF THE CASE AND FACTS

When Appellant got out of the car at request of police, there was no doubt that he had a firearm at his waist. Because an item cannot be "concealed" when it is clearly delineated and identifiable despite its covering, Appellant's conviction for carrying concealed firearm cannot stand.

Statement of the Case

Carrying a Concealed Firearm was the second of two firearm counts charged against Appellant. (R 58). A jury found him guilty as charged on both. (R 107-08; T 465). He was sentenced to 60 months for Carrying a Concealed Firearm, concurrent to a 150-month sentence on Count 1. [1] (R 152-59; T 221-22). He timely filed his appeal of the conviction and sentence. (R 166).

Evidence at Trial

An officer stopped a vehicle around 2:30 AM because it had driven on the sidewalk without apparent reason. (T 233). He called for backup. (T 234). Both officers parked behind the vehicle. (T 289). The car's interior was lit by its lights. (T 291).

Shining a flashlight on the vehicle, the stopping officer made his way to the driver's window. (T 235-36). He saw the person in the front passenger seat leaning

[1] Count 1 charged actual possession of a firearm by a convicted felon, and Appellant properly received a three-year mandatory minimum term as part of his 150-month sentence.

toward the driver (i.e., toward the stopping officer). (T 236). Appellant was that passenger, (T 237), and Jean Louis was the driver. (T 239). Though he focused on Louis, the stopping officer noticed Appellant's awkward body position, heavy breathing, sweating, and glances at him and his backup. (T 237). The backup officer was on Appellant's side of the car, (T 240), where the door was slightly ajar. (T 291). He thought Appellant looked very nervous, and noticed he was staring straight ahead but his body was angled toward Louis. (T 293-94).

The stopping officer found out Louis's license was invalid. (T 241). The car was a rental so Appellant could not drive it. (T 241). They decided to tow the vehicle and told Louis and Appellant to get out of the car. (T 242, 256). Appellant was very awkward getting out of the car, which the backup thought was odd, like he was trying to conceal something. (T 296-97). The backup did not elaborate on what that effort looked like.

Once Appellant was outside the car, both officers immediately recognized he had a gun by its outline at his waist. (T 244, 310).

The backup saw it first as Appellant stood to get out – an outline that included the tip of the slide and "the clear butt of the firearm." (T 297-98). The backup could also tell it was an automatic, but conceded a person unfamiliar with firearms would not be able to do so. (T 314). He said it was "pretty common" for a shirt to cling to a person's stomach and the butt of a firearm. (T 300). Because of

this common fact, he made sure any firearm he carried off-duty was concealed in a way that people could not see its outline. (T 299-300).

As the backup handcuffed Appellant, the stopping officer came around and instantly identified the firearm by its outline under Appellant's shirt. (T 243-44, 266-67). He knew the firearm was not in Appellant's hands at any point because he paid close attention to them. (T 243-44, 262-63, 268-70, 279).

The gun was loaded. (T 247). The parties stipulated it was an operable firearm. (T 316).

The driver, Louis, said the firearm found was one he had put under the passenger seat. (T 337). He said the officers did not find any firearm when they searched him and Appellant. (T 335). The officers only found it when they searched the vehicle before the tow. (T 335). Appellant did not know Louis had a gun in the car. (T 338). Without objection, it came out Louis had previously been stopped driving a stolen vehicle, which he said he had purchased on the street. (T 345-47). He also admitted not wanting Appellant in trouble and would prevent that if he could. (T 352-53). The jury's verdict reflected its disbelief of Louis's testimony. (T 465).

Appellant moved for a judgment of acquittal on the element of concealment, which the trial court denied. (T 318, 371-75). That denial is the subject of this appeal.

SUMMARY OF THE ARGUMENT

The trial court should have granted Appellant's motion for judgment of acquittal because the State did not prove concealment. No one knows if the firearm was visible or identifiable to other people before Appellant got out of the car, and his awkwardness was the only suggestion of an effort to conceal anything. While his shirt was covering the gun, the court mistakenly disregarded the officers' brightline identifications of the gun – a gun so clearly outlined that one officer could tell its make without uncovering it. Appellant's conviction for carrying a concealed firearm must be reversed, and he should be resentenced on the remaining count.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN BOTH OFFICERS IMMEDIATELY IDENTIFIED THE OBJECT OUTLINED AT HIS WAIST AS A GUN.

Both officers testified they recognized a gun as soon as they saw Appellant in public view, and did not describe any difficulty or uncertainty in doing so. While one suggested Appellant's difficulty getting out of the car was an effort to conceal something, that effort did not hinder him from identifying the gun's make even before it was taken as evidence. The State never asked the officers if they saw any gun, any suspicious bulge, or furtive movement before Appellant stepped out of the car. The officers did not say if the gun might have been visible to someone inside or in front of the car, and the State did not ask the other occupant. Trial counsel properly moved for a judgment of acquittal at the close of evidence, but the court erroneously believed it needed to disregard the officers' observations in favor of a jury determination. Under these circumstances, the State failed to meet its burden and Appellant's conviction must be vacated.

Standard of Review and Preservation

A motion for judgment of acquittal is preserved when it is raised at the close of evidence, Fla. R. Crim. P. 3.380, and is subject to *de novo* review. *Tillman v. State*, 21 So. 3d 163 (Fla. 4th DCA 2009). The motion admits both the facts adduced in evidence as well as every reasonable inference favorable to the adverse

party. *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974). If a rational juror could not find the elements of the crime, even with every inference in favor of the State, the conviction must be overturned. *Turner v. State*, 29 So. 3d 361, 366 (Fla. 4th DCA 2010).

Prohibition on "Concealed" Firearms

Florida law prohibits a person from carrying a concealed firearm. § 790.01, Fla. Stat. (2017). A firearm is concealed when it is hidden from the ordinary sight of a person. *N.H. v. State*, 111 So. 3d 950, 951 (Fla. 2d DCA 2013).

Under Chapter 790, a firearm carried on the exterior of a tight shirt, even though encased by a holster, is not concealed. *Norman v. State*, 159 So. 3d 205, 209 (Fla. 4th DCA 2015), *approved on other grounds*, 215 So. 3d 18 (Fla. 2017), *cert pending at Norman v. Florida*, No. 17-68 (Jul. 13, 2017) (discussing constitutional ramifications of "open carry" provisions); § 790.053, Fla. Stat. (2017). A firearm whose handle is plainly visible and identifiable by an officer is not concealed. *Powell v. State*, 369 So. 2d 108, 108 (Fla. 1st DCA 1979), *rev. dismissed*, 373 So. 2d 461 (Fla. 1979) (affirming dismissal of charges); *Bethel v. State*, 93 So. 3d 410, 413 (Fla. 4th DCA 2012) (finding probable cause for open carrying of a weapon when officer "immediately recognized" a handgun by "four inches of the butt . . . sticking out of the defendant's right pants pocket").

Prima facie allegations of concealment occur when a gun is not apparent as-such or is out of sight of common observation. *State v. Sellers*, 281 So. 2d 397 (Fla. 2d DCA 1973) (determining prima facie case on officer's observation of a bulge in defendant's pocket which was slightly exposed gun); *Ensor v. State*, 403 So. 2d 349 (Fla. 1981) (same except under passenger floormat); *State v. Benjamin*, 187 So. 3d 352 (Fla. 4th DCA 2016) (reversing dismissal of charges when officer plainly saw tip of gun on floor of car under passenger seat). Testimony that a defendant "pulled out" a firearm initially unseen also proves a prima facie case at trial. *Spencer v. State*, 216 So. 3d 11 (Fla. 1st DCA 2015), *approved on other grounds at* 216 So. 3d 481 (Fla. 2017) (holding conviction was not fundamental error).

However, a court should grant a judgment of acquittal when the State does not prove the gun was never visible to others. *Blackmon v. State*, 53 So. 3d 1174, 1175 (Fla. 2d DCA 2011); *N.H. v. State*, 111 So. 3d 950, 951-52 (Fla. 2d DCA 2013). *Blackmon* and *N.H.* both dealt with officers who could not see a gun because of their direction of approach – in *Blackmon*, the officer was behind the defendant chasing him, and in *N.H.*, the child was behind a wall. *See also, Donald v. State*, 344 So.2d 633 (Fla. 2d DCA 1977) (granting motion to dismiss conceal firearm charge where officer approached from behind and felt a gun on the front of defendant body); *Adams v. State*, 987 So. 2d 1255, 1256 (Fla. 5th DCA 2008)

(granting judgment of acquittal when officers failed to testify to gun's concealment before defendant put it on the ground).

"Ordinary Sight" Includes Officer Sight

The trial court relied on *Ensor v. State* for the premise that an officer and a civilian differ in their "ordinary sight." *Ensor v. State*, 403 So. 2d 349 (Fla. 1981). The idea presumably comes from the statement "the permissible and legal observations of a police officer in making an arrest and the observation of an average person making normal contact with an individual are clearly not the same." *Id*. at 355. This reading is overbroad, ignoring both *Ensor*'s factual context and subsequent clarification by the Supreme Court of Florida.

Ensor addressed a pretrial motion to dismiss a concealed firearm charged where an officer had seen the tip of a gun under a car floormat during a traffic stop. *Id*. at 351. In this posture, the question was whether the facts presented the "barest prima facie case," not whether the State had overcome all reasonable hypotheses of innocent and proved its case beyond a reasonable doubt. *State v. Yarn*, 63 So. 3d 82, 86 (Fla. 2d DCA 2011). Thus "absolute invisibility to other persons is not indispensable to concealment," and prosecution can proceed on an allegation of a partially concealed gun. *Ensor*, 403 So. at 354 (internal citation omitted). In *Ensor*, it was appropriate for a jury to determine if the gun's position was in "ordinary sight," *Id*. at 355, because "ordinary observation by a person other than a police

officer does not generally include the floorboard of a vehicle, whether or not the weapon is wholly or partially visible." *Id*. at 354.

The Supreme Court of Florida revisited *Ensor* in *Dorelus v. State*, 747 So. 2d 368 (Fla. 1999). It reiterated that determining concealment should focus on "the manner in which the weapon is carried," looking at variables like the gun's location, any cover by another object, and any effort by the defendant to conceal using his body. *Id*. at 371. It also clarified a court's proper treatment of officer observations:

> ***Ensor* does not mean . . . that a trial court, in evaluating the manner in which the weapon was carried, should discount the uncontroverted observations of a police officer that he or she recognized the object as a weapon.** We thus reject [the idea] that whether the weapon is hidden from "ordinary sight" should always be left to the trier of fact to view through the lens of the "ordinary citizen." . . . . [T]hat [the officer] 'immediately recognized' the object as a firearm [is] not the only method to resolve the issue of concealment as a matter of law.

Id. at 373. (internal citations omitted) (emphasis added).

Both cases thus recognize that "ordinary sight" is "the casual and ordinary observation of another in the normal associations of life" – undifferentiated between officer and citizen. Fla. Std. Jury Instr. (Crim.) 10.1. More importantly, Dorelus acknowledged that officer observations could be dispositive of concealment. *Dorelus* at 373. Appellant's is one such case.

An Unhidden Firearm

Here, the evidence suggested officers found the firearm holstered at Appellant's waist with the barrel of the gun inside his pants and the butt of the gun protruding above. The State did not show the gun was concealed and unidentifiable before Appellant stepped out. And while both officers described Appellant's seemingly awkward position inside the car, neither said his posture would have covered or concealed the gun. Indeed, as shown by their monitoring of Appellant's hands, these officers' focus may have been narrower than "ordinary sight" because of their training. Moreover the State failed to show a person inside or in front of the car could not have seen the gun – both locations would be "ordinary sight" under *N.H.* and *Blackmon*.

What was clear was when Appellant's was standing in ordinary view of the public (not some special investigatory circumstance like *Ensor*), both officers had no difficulty identifying a firearm at his waist because of its outline. **The outline was of such detail that the backup could even identify the make as an automatic.** Using the *Dorelus* factors, the shirt admittedly covered the gun but did not conceal it, and the backup gave no detail of how Appellant's difficulties getting out of the car helped him conceal anything -- the gun, the area where it poked up from his waist, or possible attempts to hide or drop it. Moreover, under *Dorelus*,

the trial court erred by discounting the two officers' unhesitating and immediate identification of the firearm.

Instead, Appellant's arrest sounds exactly like the open carry facts affirmed in *Bethel* – except that his shirt happened to be over the gun. But as the backup stated, a gun user who wants to conceal a gun would make sure it did not print through his clothing – by law, he might even be required to do so in public. *See Norman*, 159 So. 3d 205; § 790.053, Fla. Stat. (2017). Because Appellant was not shown to actively conceal the firearm and because officers could and did readily identify it through his shirt, the State failed to carry its burden. Appellant's conviction for carrying a concealed firearm must be reversed, and he must be resentenced on the remaining count with a corrected scoresheet. *Morris v. State*, 88 So. 3d 1045, 1047 (Fla. 4th DCA 2012).

CONCLUSION

Based on the foregoing arguments and authorities, this Court should vacate Appellant's conviction for carrying a concealed firearm and remand him for resentencing on Count I with a corrected scoresheet.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that this brief was electronically filed with the Court and a copy of it was served to Celia Terenzio, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 13th day of November, 2017.

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CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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