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

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

**REPLY 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

CAREY HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Jessica A. De Vera
Assistant Public Defender
Florida Bar No. 89007
jdevera@pd15.state.fl.us
appeals@pd15.org

Attorney for Appellant

## TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

STATEMENT OF THE CASE AND FACTS ..... 1

ARGUMENT ..... 2

**POINT ON APPEAL** ..... 2

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. ..... 2

CONCLUSION ..... 8

**CERTIFICATE OF SERVICE AND ELECTRONIC FILING** ..... 9

**CERTIFICATE OF FONT** ..... 9

## TABLE OF AUTHORITIES

### Cases

*Blackmon v. State*, 53 So. 3d 1174 (Fla. 2d DCA 2011) .....5

*Brown v. Nagelhout*, 84 So. 3d 304 (Fla. 2012) .....4

*C.J.R. v. State*, 429 So. 2d 753 (Fla. 1st DCA 1983).....8

*Carpenter v. State*, 593 So. 2d 606 (Fla. 5th DCA 1992).....5

*Dorelus v. State*, 747 So. 2d 368 (Fla. 1999).....3, 4

*Ensor v. State*, 403 So. 2d 349 (Fla. 1981) .....2

*Gainier v. State*, 334 S.E.2d 385 (Ga. Ct. App. 1985) .....6, 8

*Goss v. State*, 301 S.E.2d 662 (Ga. Ct. App. 1983).....7

*Greenwade v. State*, 124 So. 3d 215 (Fla. 2013) .....10

*Holtzendorf v. State*, 247 S.E.2d 599 (Ga. Ct. App. 1978).....7

*Illinois v. Gates*, 462 U.S. 213 (1983) .....7

*Kent v. United States*, 383 U.S. 541 (1966).....10

*Locke v. United States*, 7 Cranch. 339, 3 L.Ed. 364 (1813) .....7

*Marsh v. State*, 138 So. 3d 1087 (Fla. 4th DCA 2014).....2, 3

*Marshall v. State*, 200 S.E.2d 902 (Ga. Ct. App. 1973) .....7

*Marthaller v. State*, 436 So. 2d 413 (Fla. 3d DCA 1983)..... 6, 7, 8

*People v. Lopez*, 243 N.Y.S.2d 333 (N.Y. App. Div. 1963) .....6

*State v. Bateman*, 526 S.W.3d 357 (Mo. Ct. App. 2017) .....9, 10

*State v. Dorelus*, 720 So. 2d 543 (Fla. 4th DCA 1998) .....3

*State v. Hankerson*, 65 So. 3d 502 (Fla. 2011) .....7

*State v. Hayes*, 333 So. 2d 51 (Fla. 4th DCA 1976) ..... 4

*State v. Jones*, 492 So. 2d 1261 (La. Ct. App. 1986) ..... 8, 9

*State v. Quinn*, 518 So. 2d 474 (Fla. 4th DCA 1988) ..... 4

*State v. Werner*, 181 N.W.2d 221 (Iowa 1970) ..... 9

*Thompson v. City of Little Rock*, 105 S.W.2d 537 (Ark. 1937) ..... 6, 8

**Florida Statutes**

§ 790.001 ..... 3, 6

§ 790.053 ..... 3

§ 790.25 ..... 3

**Other Authorities**

Ga. Code Ann. § 16-11-126 ..... 6

## 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 ##). Citation to pleadings in the instant case will use "IB" for Appellant's initial brief and "AB" for Appellee-State's answer brief, in the format (IB/AB ##). "/PDF" will be used as an additional reference for the parties briefs because the printed pagination does not match the document pagination.

## STATEMENT OF THE CASE AND FACTS

Appellant relies on his statement of case and facts as written in his initial brief. (IB 1-3). Appellant notes he inadvertently omitted a fact that may have bearing on the issue but was unaddressed in the answer brief – Officer Herny (the stopping officer) testified that he did not see the gun at Appellant's waist when he first looked into the vehicle. (T 248). This fact does not change Appellant's position since the backup officer, Berben, who was just outside Appellant's door, (T 292), gave no such testimony and said Herny's view was obstructed. (T 308).

## 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.**

Appellant accepts Appellee's concession that his motion for judgment of acquittal was preserved below. (AB 5).

However, Appellee seems to suggest that this Court should rely on the various factual findings made by the trial court. (AB 2-3, 10-11/PDF 6-7, 14-15). This is irrelevant foremost because, as both sides acknowledge, the Court's review is *de novo*. (IB 5/PDF 9; AB 5/PDF 9). Additionally, Appellant is not asking this court to reweigh the evidence below. (AB 7/PDF 11).

Even as Appellee seemingly relies on the trial court's findings, it does not address the misapplication of *Ensor* to hold "there is absolutely a distinction between the ordinary sight of another person and the trained observations of a police officer." (T 375-76 (discussing *Ensor v. State*, 403 So. 2d 349 (Fla. 1981)). It relies on *Marsh v. State* to suggest that officer identification cannot be dispositive. 138 So. 3d 1087 (Fla. 4th DCA 2014). *Marsh*, however, is not only factually distinguishable, but applied a similar misinterpretation of *Ensor* vis-à-vis its successor case, *Dorelus v. State*. 138 So. 3d at 1090 (citing 747 So. 2d 368 (Fla. 1999)).

As a factual matter, *Marsh*'s gun location in the wheel well did not meet legislatively set ways of carrying a firearm in a car and would be concealment. 138 So. 3d at 1090-91. *See* §§ 790.25(3) and (5), Fla. Stat. (2006) (describing lawful means of carrying firearm within a conveyance). Appellant's case lies in a gray area of the law – an instantly apparent gun that happens to be covered. *Compare* §§ 790.001(2), with 790.053(1), Fla. Stat. (defining conceal and open display per the "ordinary sight" of another). This legislative focus on "ordinary sight" makes a close reading of *Dorelus* all the more important.

In *Dorelus*, the supreme court revisited the precedent established in *Ensor*. 747 So. 2d at 370-73; (AB 9/PDF 13). *Dorelus* recognized an officer's immediate identification as a dispositive factor. Id. at 372. Indeed, it disapproved the idea that such recognition necessarily precludes dismissal. *Dorelus,* 747 So. 2d at 373 (discussing *State v. Dorelus*, 720 So. 2d 543, 544 (Fla. 4th DCA 1998) and its holding "the fact that the handgun was within the arresting officer's "open view" did not preclude a finding that it was a concealed firearm."). "Ordinary sight," it wrote, is not solely a question for the jury as "ordinary citizens." *Id*. at 372-73 (approving cases dismissing charges where at least one officer immediately recognized a firearm).

Among the cases *Dorelus* cited with approval is this Court's decision in *State v. Quinn*, which affirmed dismissal of a concealed firearm charge on an

officer's immediate identification. *Id.* at 373 (citing *Quinn*, 518 So. 2d 474 (Fla. 4th DCA 1988)). *Quinn* remains good law because *Marsh* did not expressly overrule it, and it must be considered here. *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012) (noting strong presumption of *stare decisis* unless circumstances significantly change or analysis was gravely erroneous); *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976) ("The District Courts of Appeal are required to follow Supreme Court decisions.").

Appellee also fails to address Appellant's cases demonstrating the prosecution's burden to show concealment from all vantage points. (IB 7-8, 10/PDF 11-12, 14). This principle is supported by *Dorelus*. *Dorelus*, 747 So. 2d at 372 ("Whether a crime has occurred should not depend on . . . the officer's initial vantage point."). *See also Blackmon v. State*, 53 So. 3d 1174, 1175 (Fla. 2d DCA 2011) (reversing conviction when prosecution failed to prove the gun was always concealed until pointed at the officer); *Carpenter v. State*, 593 So. 2d 606 (Fla. 5th DCA 1992) (dismissing charge when officer saw gun on the front seat only after driver stepped out). This narrow reading of concealment is not insular. *See State v. Bateman*, 526 S.W.3d at 538 ("A weapon is not concealed merely because it is not discernible from a particular single vantage point if it is clearly discernible from other positions; but it may be concealed if it is discernible only from a single particular vantage point."); *Goss v. State*, 301 S.E.2d 662, 664 (Ga. Ct. App. 1983)

(finding defendant did carry in an open manner because no one "failed to immediately recognize upon approaching defendant that he carried a pistol"). Under these cases, Appellee's concession that the imprint was visible depending on position cuts in favor of Appellant. (AB 10/PDF 14.) The evidence below failed to address any other vantage points. (IB 10/PDF 14).

Appellant also disagrees with Appellee's characterization the Officer Herny's identification of a gun came from his specialized training. (AB 10-11/PDF 14-15). The record reflects his explanation that his special training allowed him to identify its make, (T 314-15), and that his experience as an ordinary citizen gun holder made him avoid visible firearm imprints presumably because of the ready identification . (T 299-300). If anything, this testimony is favorable to Appellant.

Finally, Appellee's cited cases are distinguishable.

First, to the extent Appellee relies on search and seizure jurisprudence, those cases are inapposite to Appellant's case. (AB 7-9/PDF 11-13 citing *Marthaller v. State*, 436 So. 2d 413 (Fla. 3d DCA 1983); *Thompson v. City of Little Rock*, 105 S.W.2d 537, 537-38 (Ark. 1937); *People v. Lopez*, 243 N.Y.S.2d 333 (N.Y. App. Div. 1963); *Gainier v. State*, 334 S.E.2d 385, 385 (Ga. Ct. App. 1985).

As has been long recognized, "probable cause [to search] . . . means less than evidence which would justify condemnation." *Locke v. United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813). It does not require a prima facie showing of

criminal activity, but only the probability. *State v. Hankerson*, 65 So. 3d 502, 506 (Fla. 2011) (citing *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). Under the law, an officer can search a person with a gun-shaped bulge (i.e., possible gun) in his pocket, *see e.g.*, *Marthaller*, 436 So. 2d 413, but the prosecution would not have a prima facie case of possession of a concealed firearm if the bulge turns out to be a starter pistol.

*Holtzendorf v. State* and *Marshall v. State*, (AB 7-8/PDF11-12), two Georgia cases affirming concealed firearm convictions, are inapplicable because their law at that time required firearms to be carried "in an open manner and fully exposed to view." *See Goss v. State*, 301 S.E.2d 662, 663-64 (Ga. Ct. App. 1983) (discussing *Holtzendorf*, 247 S.E.2d 599 (Ga. Ct. App. 1978) and *Marshall*, 200 S.E.2d 902, 902-03 (Ga. Ct. App. 1973) and recognizing changes to the statute, Ga. Code Ann. § 16-11-126). Florida's law does not have this language. § 790.001(2), Fla. Stat.

Likewise *Marthaller*, *C.J.R.*, *Thompson*, *Jones*, and *Gainier*, (AB 8-9/PDF 12-13), are inapposite because observers could not identify the object before it was seized by the police – that is, it was indiscernible as a firearm by ordinary observation. *See State v. Jones*, 492 So. 2d 1261, 1263 (La. Ct. App. 1986) ("reached for object concealed under his shirt [and officer] believed[ed] he had a weapon"); *Gainier v. State*, 334 S.E.2d 385, 385 (Ga. Ct. App. 1985) ("a bulge"); *Marthaller*, 436 So. 2d 413, 414 ("a bulge"); *C.J.R. v. State*, 429 So. 2d 753, 753

(Fla. 1st DCA 1983) ("a bulge in his shirt"); and *Thompson v. City of Little Rock*, 105 S.W.2d 537, 537-38 (Ark. 1937) (noting two separate searches needed to find gun). As discussed in Appellant's initial brief, evidence of an unidentifiable object suffices for prima facie concealment. (IB 7/PDF 11). Here there was never any doubt about the nature of the firearm. (T 244, 310).

Other cases cited had direct evidence of the defendant's effort to conceal the firearm. (AB 8/PDF 12). In *State v. Werner*, one witness described defendant taking the gun, putting it inside his waist, and covering it with his shirt. 181 N.W.2d 221, 222-23 (Iowa 1970). In another case, the defendant, who was walking in the area of a recent report of gun fire, turned away from officers as soon as he saw them, attempted to go back inside a house, ignored officers calling out to him, and then reached under his shirt for an object. *State v. Jones*, 492 So. 2d 1261 (La. Ct. App. 1986). Perhaps the closest factually to Appellant's case is *Bateman*, where officers approached a vehicle that had just crashed into a parked car. *State v. Bateman*, 526 S.W.3d 357, 358 (Mo. Ct. App. 2017). (AB 9/PDF 13). They watched Bateman stagger out into the street, hunched over and clutching his right upper thigh or waist. *Id*. at 358-59. One officer saw the outline of a gun in Bateman's pants only after he ordered Bateman to raise his hands. *Id.* at 359. Another officer, approaching from a different angle, saw only a bulge even after

Bateman's hands were up. *Id*. That officer found out it was a firearm only when he removed it from Bateman's waist. *Id*.

Unlike *Bateman*, where the defendant clutched directly at the area where the gun was hidden, Appellant's case lacks evidence connecting his alleged suspect behavior with the item concealed. (IB 10-11/PDF 14-15; T 237, 292-95, 296-97, 400-01). This nexus between criminality and evidence is necessary to withstand a motion for judgment of acquittal. *See Greenwade v. State*, 124 So. 3d 215 (Fla. 2013) (finding testimony about test of each seized baggy necessary to sustain conviction for trafficking amount of cocaine).

Appellee invites the Court to rely on assumptions to link Appellant's behavior to the gun's location and thereby sustain Appellant's conviction. This is not a proper role for the appellate court. *See Kent v. United States*, 383 U.S. 541, 561 (1966) ("Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions."). A plea for "common sense" cannot substitute for the lack of evidence in this case. (*See* AB 9-12/PDF 14-16). Because the gun's outline was clear and immediately identifiable as such when Appellant stood outside the car, (T 244, 310), Appellant must prevail.

## CONCLUSION

This court should vacate Appellant's conviction for carrying a concealed firearm and remand for a new sentencing on the remaining count.

## 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 and Paul Patti, III, Assistant Attorneys General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at paul.patti@myfloridalegal.com and CrimAppWPB@MyFloridaLegal.com this 27 day of December, 2017.

/s/ JESSICA A. DE VERA
Assistant Public Defender

## 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).

/s/ JESSICA A. DE VERA
Assistant Public Defender