IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MANNY ROMERO JR.,
Appellant.

No. 2 CA-CR 2014-0141
Filed October 16, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20133766001
The Honorable Christopher Browning, Judge

REVERSED AND REMANDED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial, appellant Manny Romero Jr. was convicted of two counts of misconduct involving weapons based on his unlawful possession of a deadly weapon. The trial court imposed concurrent 4.5-year prison terms. On appeal, Romero argues the court erred by denying his motion to suppress the fruits of a frisk of his person conducted by a police officer. Romero contends the frisk was unlawful because the officer who conducted it lacked reasonable suspicion that Romero either had committed or was about to commit a criminal offense.

¶2 The state agrees with Romero and concedes the trial court erred in failing to suppress the evidentiary fruit of the frisk: the state's discovery of the weapon in Romero's possession. "Although we are not required to accept the state's confession of error," *State v. Dominguez*, 192 Ariz. 461, ¶ 7, 967 P.2d 136, 138 (App. 1998), we agree with the state and accept its concession here.

¶3 The trial court acknowledged that this was a "close case" but found that the officer who had conducted the search had articulable grounds to believe Romero was armed and presented a "reasonable safety concern," relying on the now vacated decision of *State v. Serna* (*Serna I*), 232 Ariz. 515, 307 P.3d 82 (App. 2013), to support its ruling. In vacating that opinion, our supreme court recently clarified that a reasonable suspicion the person to be searched "is armed and dangerous" is insufficient under the Fourth Amendment. *State v. Serna* (*Serna II*), 235 Ariz. 270, ¶ 21, 331 P.3d 405, 410 (2014). An officer cannot "frisk an armed individual absent reasonable suspicion that the person was engaged or was about to engage in criminal activity." *Id.* ¶ 1. That necessary additional showing was absent here.

¶4 Pursuant to a consensual encounter with Romero, the officer "reached out" towards Romero's pocket and asked to search it. Romero responded by turning away and insisting that no search of his person could be conducted in the absence of some lawful authority. It is not a crime in Arizona for an adult to possess a concealed weapon. *Id.* ¶ 22. For this reason, the officer's suspicion that Romero might have a weapon on his person could not, standing alone, constitute reasonable suspicion that Romero was engaged in criminal activity. Nor does a person's perceived lack of cooperation with a consensual encounter provide such reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

¶5 We thus reverse the trial court's ruling that denied the motion to suppress the evidence and statements resulting from the detention and frisk, vacate Romero's convictions and sentences, and remand for further proceedings consistent with this decision. We do not address Romero's double jeopardy claim related to his conviction under the first count of his indictment because our disposition has rendered the issue moot.