FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4899

STANLEY JOHN KILBURN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
J. Scott Duncan, Judge.

May 29, 2020

ROBERTS, J.

The appellant was charged with carrying a concealed weapon. Shortly after his arrest, the appellant filed a motion to suppress arguing that the officer illegally searched him. The trial court denied his motion. After receiving the trial court's order, the appellant pleaded no contest to the charge and preserved his right to appeal the trial court's denial of his motion to suppress.

At the hearing on the appellant's motion to suppress, Deputy Beach of the Escambia County Sheriff's Office testified that while he was patrolling the back parking lot of the Key West Motel at 8:30 in the morning, he noticed a Dodge Ram pickup truck parked with the driver's door open. He also noticed that the truck had a

translucent license plate cover and that it appeared the truck had an out-of-state plate, but he could not tell for sure. The appellant was in the driver's seat.

Deputy Beach parked and approached the truck in order to discuss the license plate cover with the driver and to give him a verbal warning about the license plate cover. According to Deputy Beach, he "was just going to have a talk, it wasn't -- it really wasn't even investigatory at that point." As Deputy Beach was approaching, the appellant got out of the truck holding a knife. When the appellant saw the deputy, he placed the knife on the front seat of the truck and raised his hands. When he raised his hands, Deputy Beach saw the butt of a handgun sticking out of the appellant's waistband. The deputy then "closed the distance and put [his] hands on him and kind of guided him up against the vehicle and began to detain him." After the appellant was handcuffed, placed in the back of the deputy's patrol car, and read the *Miranda*[1] warning, the deputy asked the appellant if he had a concealed-weapons license, and the appellant responded in the negative. The appellant was then arrested for carrying a concealed weapon without a license in violation of section 790.01, Florida Statutes (2017). According to Deputy Beach, at the time of the appellant's initial seizure, "other than the firearm, [he] had no reason to detain him at that point."

The Fourth Amendment to the United States Constitution and Article I, section 12 of the Florida Constitution guarantee the right to be free from unreasonable searches and seizures. The Florida Constitution expressly provides that this right is to be construed in conformity with the Fourth Amendment as construed by the United States Supreme Court. In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the United States Supreme Court held as follows:

> [W]here a police officer observes unusual conduct which causes him to reasonably conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him.

In this case, Deputy Beach clearly stated that he had no other reason for seizing the appellant other than the fact that he was armed. The deputy did not articulate that any crime was afoot and stated he was not conducting an investigation. According to the deputy, his "sole intent was . . . to have a little conversation about the translucent tag and just have a conversation about that."

At the suppression hearing, the trial court recognized that the sole basis for detention in this case was the presence of the handgun. The court looked to two cases that seem to present a conflict, *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2010), and *Mackey v. State* (*Mackey I*), 83 So. 3d 942 (Fla. 3d DCA 2012).

In *Regalado*, a Fort Lauderdale police officer was approached by a citizen who reported "some guy was over there flashing his gun to a couple of friends." The officer was in the process of getting a description of the man when Regalado walked by. The informant identified Regalado to the officer as the man who had the gun. The officer began to follow Regalado. As the officer got within six or eight feet of Regalado, he observed a bulge in Regalado's waistband, which, from his training, he believed to be a handgun. The officer, concerned that Regalado was going to get lost in the crowd, drew his revolver and ordered Regalado to the ground. The officer then patted Regalado down and retrieved the handgun. At the suppression hearing, the officer admitted that Regalado had not threatened the officer nor had Regalado threatened anyone else. Furthermore, the informant did not report that Regalado threatened anyone. The officer had not observed any crime take place.

The Fourth District Court of Appeal reasoned that it was not illegal to possess a firearm in Florida if one has a concealed-weapons permit, a fact that cannot be determined by mere observation. The court ruled that unless the officer had a reasonable belief that some crime had been committed, was being committed, or was about to be committed, stopping someone solely

based on possession of a firearm was a violation of the Fourth Amendment. *Regalado*, 25 So. 3d at 605–06.

In *Mackey I*, a Miami police officer was driving his patrol car when he saw Mackey standing on one side of a fence by an apartment complex. The officer slowed down. As he drove slowly by Mackey, he saw a solid object inside Mackey's pocket. As he drew closer, the officer saw a "piece of the handle sticking out. Not much, but a piece enough for [him] to identify a firearm." The officer got out of his car, approached Mackey, and asked whether Mackey had anything on him. Mackey replied "no." The officer conducted a pat-down of Mackey and recovered the firearm he had previously seen. The officer asked Mackey if he had a concealed-weapons license, and Mackey replied in the negative. The officer then arrested Mackey for carrying a concealed firearm without a license.

The Third District Court of Appeal held that even without a reasonable suspicion that some crime had been or was about to be committed, an officer was entitled to stop someone based on mere possession of a firearm until the officer could confirm such firearm was legally carried. *Mackey I*, 83 So. 3d at 946–47. The court then certified express and direct conflict with *Regalado*.

The Florida Supreme Court took up *Mackey I* based on express and direct conflict with *Regalado*. *Mackey v. State* (*Mackey II)*, 124 So. 3d 176 (Fla. 2013). However, in the end, the supreme court did not resolve the conflict. It relied on the trial court's findings that Mackey was in a high crime area and that he openly lied to the officer during the consensual encounter, providing, under the totality of the circumstances, the officer with a reasonable suspicion that criminal activity was occurring.

In this case, it is a possibility that Deputy Beach could have articulated reasonable suspicion for a *Terry* stop. But he clearly did not. On the contrary, he expressly stated that the only reason for the seizure and search of the appellant was the presence of the handgun. At the suppression hearing, the trial court stated that it agreed with the reasoning contained in *Mackey I*. The trial court stated that it was illegal to carry a concealed weapon in Florida with an exception for those who possess a concealed-weapons

license. It viewed this exception as an affirmative defense. The trial court ultimately found that the sole basis for the seizure and search of the appellant was the possession of the handgun and explicitly found the search and seizure lawful.

The trial court's ruling is contrary to law for two reasons. First, *Terry* clearly requires both a reasonable suspicion that criminal activity is afoot and a reasonable suspicion that the subject might be armed in order to do a stop-and-frisk. Without a reasonable suspicion of criminal activity, the officer cannot go further. Bearing arms is not only legal; it also is a specifically enumerated right in both the federal and Florida constitutions. *See Norman v. State*, 159 So. 3d 205, 212 (Fla. 4th DCA 2015) (holding that based on the Second Amendment, "it is clear that a total ban on the public carrying of ready-to-use handguns outside the home cannot survive a constitutional challenge under any level of scrutiny"), *approved*, 215 So. 3d 18 (Fla. 2017). The citizens of Florida have spoken through their Legislature and have stated that those who possess a license to carry a concealed weapon have the right to carry a concealed firearm.

Other courts have also taken the position that legally carrying a weapon is not justification for a *Terry* stop; there must be additional facts present.[2] Most notably, the Pennsylvania Supreme Court recently reconsidered its landmark case that

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[2]*See Pulley v. Commonwealth*, 481 S.W. 3d 520, 526–27 (Ky. Ct. App. 2016) (holding that because residents have the right to openly carry firearms, the possession of an unconcealed firearm without additional facts does not justify a *Terry* stop and temporary seizure of the unconcealed firearm to determine if the firearm is legal); *Commonwealth v. Colon*, 30 N.E.3d 860, 863 (Mass. App. Ct. 2015) ("Mere possession of a firearm does not, by itself, justify a stop."); *State v. Z.U.E.*, 315 P.3d 1158, 1169 (Wash. Ct. App. 2014) ("[M]ore than mere possession of a firearm is necessary to support an investigatory stop."), *aff'd*, 352 P.3d 796 (Wash. 2015); *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (noting that the Fourth Amendment would be eviscerated if an investigatory detention was allowed based on a person openly

> held that the "possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed."

Commonwealth v. Hicks, 208 A.3d 916, 921 (Pa. 2019) (quoting *Commonwealth v. Robinson*, 600 A.2d 957, 959 (Pa. 1991)). After reviewing its own laws, which allow properly licensed individuals to carry a concealed firearm, the United States Supreme Court cases that interpret the Fourth Amendment, and other states' case law, the court determined that the holding in *Robinson* violated the *Terry* doctrine and overruled it. *Hicks*, 208 A.3d at 924–47. The court ultimately held that mere possession of a firearm without additional facts does not suggest that criminal activity is afoot. *Id.* at 945.

The second reason why the trial court's ruling is contrary to law is the fact that section 790.01 has changed since *Mackey I* and *Mackey II* were decided. Prior to the change in 2015, section 790.01 stated as follows:

> (1) Except as provided in subsection (4),[3] a person who carries a concealed weapon or electric weapon or device on or about his or her person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
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> (2) A person who carries a concealed firearm on or about his or her person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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carrying a firearm without more in a state that allows a person to openly carry).

[3]Subsection (4) is not relevant to this case.

> (3) This section does not apply to a person licensed to carry a concealed weapon or a concealed firearm pursuant to the provisions of s. 790.06.

As shown in subsections (1) and (2), until 2015, the elements of the crime were arguably, but incorrectly, met by anyone carrying a concealed weapon. In 2015, section 790.01 was amended to read as follows:

> (1) Except as provided in subsection (3), a person who is not licensed under s. 790.06 and who carries a concealed weapon or electric weapon or device on or about his or her person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (2) Except as provided in subsection (3), a person who is not licensed under s. 790.06 and who carries a concealed firearm on or about his or her person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
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> (3) This section does not apply to:
>
> (a) A person who carries a concealed weapon, or a person who may lawfully possess a firearm and who carries a concealed firearm, on or about his or her person while in the act of evacuating during a mandatory evacuation order issued during a state of emergency declared by the Governor pursuant to chapter 252 or declared by a local authority pursuant to chapter 870. As used in this subsection, the term "in the act of evacuating" means the immediate and urgent movement of a person away from the evacuation zone within 48 hours after a mandatory evacuation is ordered. The 48 hours may be extended by an order issued by the Governor.

Without conceding that *Mackey I* is correct, the 2015 statutory change made it even more clear that a law enforcement officer may not use the presence of a concealed weapon as the sole basis for seizing an individual. However, that has always been true based on a complete reading of section 790.01. A potentially lawful

activity cannot be the sole basis for a detention. If this were allowed, the Fourth Amendment would be eviscerated.

An alternate theory for affirming is advanced by the State's answer brief. According to the State, as Deputy Beach approached the appellant, he saw the butt of the handgun sticking out of the appellant's waistband and then arrested the appellant for the misdemeanor crime of open carrying of a handgun in violation of section 790.053, Florida Statutes. After this lawful arrest, according to the State, the deputy lawfully searched the area immediately around the appellant and found the unlawfully concealed handgun in the appellant's truck. This theory is contrary to what Deputy Beach said he was doing at the time and is also contrary to the entire analysis performed by the trial court at the suppression hearing. If this theory was used by the trial court, it would have been a simple matter to rule the seizure valid. There would have been no need for the detailed analysis of *Regalado* and *Mackey I*. There would have been no need to recognize the conflict and to choose *Mackey I* as the better ruling to apply.

Can we apply this theory as part of a tipsy coachman analysis and affirm? No, we cannot. In order for a violation of the State's open-carry law to occur, it is not enough for an officer to see an unconcealed firearm. It is not a violation of the open-carry law for a person "to briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense." § 790.053, Fla. Stat. (2016). Deputy Beach did not testify as to the length of the exposure of the gun other than stating the gun "was concealed, but not really concealed." Neither did he testify that the firearm was "displayed in an angry or threatening manner, not in necessary self-defense." The trial court conducted no analysis of these factors and made no rulings as to them. We, as an appellate court, cannot go back and make these factual determinations for the trial court.

With regard to the dissent, our task is not to review the actions of the arresting officer, but to review the ruling of the trial court. As stated earlier, the trial judge conducted an analysis of the conflict between *Mackey I* and *Regalado* and ruled, "I find

myself more in agreement with *Mackey v. State*. And, so I believe that's the appropriate law that should apply." The trial court further stated, "[S]o that's why I believe the Third DCA in this case [*Mackey I*] is correct. And, I guess, at some point, if this is appealed, the First DCA can weigh in on it." So, here we are.

In Florida, 2,074,782 residents were licensed to carry concealed weapons as of January 31, 2020.[4] This represents 13.11% of Floridians over twenty-one years old. This number does not include those that do not need a license, such as law enforcement officers, and those who may carry under a different license, such as private investigators and security guards. Based on these numbers, approximately one out of every seven persons over the age of twenty-one may lawfully carry a concealed weapon in Florida. The thought that these millions of people are subject to seizure by law enforcement until their licenses are verified is antithetical to our Fourth Amendment jurisprudence. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) (the purpose of a *Terry* stop is not to discover evidence, but to allow an officer to conduct his investigation without fear of violence). No court would allow law enforcement to stop any motorist in order to check for a valid driver's license.

Based on the foregoing, we adopt the holding and rationale of *Regalado* and recognize conflict with the stated holding in *Mackey I*. Because the ruling on the motion to suppress, which permitted the firearm to be admitted into evidence, was dispositive, we REVERSE the conviction and sentence of the appellant.

B.L. THOMAS, J., concurs; OSTERHAUS, J., dissents with opinion.

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[4] Number of Licensees by Type, Florida Department of Agriculture and Consumer Services, Division of Licensing (2020), http://www.fdacs.gov/content/download/82618/file/Number_of_Licensees_By_Type.pdf.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

OSTERHAUS, J., dissenting.

I dissent because I think the majority gets the facts wrong about the two firearms. It disregards the law enforcement officer's testimony at the suppression hearing about discovering defendant Kilburn *openly* carrying the first handgun, which the trial court credited. Open carrying of weapons is still a crime in Florida. § 790.053, Fla. Stat.* Kilburn's detention for carrying this first firearm led to his detention and post-*Miranda* confession of carrying a second concealed firearm without a permit. Kilburn was then convicted on just a single charge of carrying a concealed firearm without a permit.

I see nothing here that required the trial court to suppress the firearms evidence. When the officer first approached Kilburn in the hotel parking lot to talk about a license-plate-cover issue, Kilburn was standing outside of his car shirtless and with a handgun sticking out the front of his waistband. When the officer saw Kilburn toss a knife back into the car and saw the openly carried firearm in his waistband, he feared for his safety. The officer was still ten or fifteen feet away from Kilburn and described the situation like this at the suppression hearing:

> A. I don't know if I said something, you know, to the effect of . . . don't move, or I might have said, Keep your hands in the air. But, you know, I was pretty close at that point, just closed the distance and put my hands on him and kind of guided him up against the vehicle and began to detain[.]

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*Kilburn has not challenged the constitutionality of Florida's open-carry prohibition.

> Q. Okay. And what was the purpose of the detention at that point?
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> A. Safety issue initially with a weapon and knowing, you know, Florida's not really an open-carry state, and it was, you know, concealed, yet not really concealed, it was, you know, investigatory detention at that point.
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> Q. Okay. Ultimately, was Mr. Kilburn arrested based on that possession of the firearm?
>
> A. He was and another.

(Emphasis added). Because Kilburn was using his waistband as a holster and had no shirt, the officer could see the firearm and legally detain him for carrying it openly. *Cf. Norman v. State*, 159 So. 3d 205, 227 (4th DCA 2015), approved, 215 So. 3d 18 (Fla. 2017) (rejecting Defendant's claim that his weapon was holstered and thus legally "concealed"). This is exactly what the State argued at the suppression hearing: "[The officer had] the obligation to conduct an investigation based on seeing the handle of the gun sticking out of the defendant's waistband [because] Florida is not an open carry state." None of the officer's testimony was disputed at the hearing and the trial court fully credited his rationale for detaining Kilburn:

> The officer's already seen a knife, and then he sees the butt of the gun. I think when you take into consideration all that, there was certainly reasonable suspicion to detain the subject, and there was a reason for officer safety to detain the subject.

Like the trial court, I see no problem with the officer's detention of Kilburn under these circumstances. Florida law makes it a misdemeanor crime when "any person . . . openly carr[ies] on or about his or her person any firearm or electric weapon or device" except as provided by law. § 790.53(1) & (3), Fla. Stat.; *see also Norman v. State*, 215 So. 3d 18 (Fla. 2017) (upholding Florida's open-carry law). And it was part of the officer's job to address Kilburn's conspicuous violation of law, the same as the officer did in *Bethel v. State*, 93 So. 3d 410, 413 (Fla. 4th DCA 2012):

> The officer testified that once the defendant exited the car, the officer saw four inches of the butt of a gun sticking out of the defendant's right pants pocket. The officer immediately recognized that the object was a handgun based on his experience of having seen thousands of handguns. Thus, the officer had probable cause to arrest the defendant for openly carrying on his person a firearm in violation of section 790.053(1). *Cf. Dorelus v. State*, 747 So. 2d 368, 372 (Fla. 1999) ("[A]lthough the observations of the police officer will not necessarily be dispositive, a statement by the observing officer that he or she was able to 'immediately recognize' the questioned object as a weapon may conclusively demonstrate that the weapon was not concealed as a matter of law because it was not hidden from ordinary observation.") (citation omitted).

In contrast, the majority opinion is premised upon rejecting the open-carry evidence and deciding this case as if Kilburn had concealed both of his firearms. If Kilburn had concealed both firearms, then I'd have no problem with the majority's straightforward application of *Regalado*. But the trial court credited the open-carry evidence. And I don't think we can infer its rejection of this evidence and wield it as a tool for reversing the order denying suppression. Rather, "[a] trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness, and we must interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining that ruling." *Van Teamer v. State*, 108 So. 3d 664, 666 (Fla. 1st DCA 2013) (quoting *State v. Gandy,* 766 So. 2d 1234, 1235–36 (Fla. 1st DCA 2000)).

Moreover, we needn't weigh into the *Regalado*-*Mackey* debate because those weren't open-carry cases. The officers in those cases searched defendants who were concealing their firearms with bulges and masses in their clothes. The majority opinion well covers the constitutional problems attendant in such searches for concealed weapons. Here, however, there was no *Regalado*- or *Mackey*-type guessing involved in the officer's decision to search the shirtless Kilburn, who had an openly visible firearm stuck in his waistband. According to the officer: "I was just going to have a

talk [with Kilburn] , . . it really wasn't even investigatory at that point until he turned and [I] saw the knife and then the firearm." Because Kilburn's case doesn't involve concealed "bulges" and "masses" of the sort addressed by *Regalado* and *Mackey,* those cases don't control.

In conclusion, I don't think the officer erred by detaining and questioning Kilburn upon seeing him openly carrying a firearm. Nor would I suppress his confession to having the second concealed firearm under the fruit of the poisonous tree doctrine. I would affirm.

Andy Thomas, Public Defender, Lori A. Willner, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, Quentin Humphrey, Assistant Attorney General, Tallahassee, for Appellee.