

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

O.W.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-3839

February 24, 2023

Appeal from the Circuit Court for Hillsborough County; Lawrence Lefler, Judge.

Howard L. Dimmig, II, Public Defender, and William L. Sharwell, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

BLACK, Judge.

O.W. appeals from the disposition order adjudicating him delinquent for three firearm offenses. He challenges only the denial of his dispositive motion to suppress. Because the trial court erred in denying the motion, we reverse the disposition order and remand with directions to vacate the order and discharge O.W.

In his motion to suppress, O.W. argued that the officers who stopped him did not have the requisite suspicion to conduct a weapons pat down. Testimony from the suppression hearing and the body cam footage of the arresting officer admitted into evidence at the hearing establish the operative facts.¹

Officers conducted a traffic stop upon seeing two individuals riding bicycles with no lights at night. One bicyclist had stopped and was speaking with an officer when the other officer—the arresting officer—asked O.W. to stop. O.W. complied. O.W. also complied with the arresting officer's request for his name, date of birth, and address; O.W. repeated the information when necessary and volunteered the spelling of his name and his address. While on his bicycle, O.W. had a jacket over his left shoulder; the jacket remained over his left shoulder during the initial stage of the encounter after O.W. had dismounted from the bicycle. O.W. kept his left arm still and the left side of his body angled away from the arresting officer; he faced the other officer and the other bicyclist. When asked at the suppression hearing what this behavior indicated to him, the arresting officer testified: "It was telling me that there's, possibly, a weapon placed in his waistband. He was trying to hide it from me."² When asked why he had this "concern or suspicion,"

¹ The body cam footage is in our record. We are therefore "in the same position to review it as the trial court." *State v. Monroe*, 280 So. 3d 499, 503 (Fla. 2d DCA 2019); *cf. State v. Vazquez*, 295 So. 3d 373, 378 (Fla. 2d DCA 2020) ("Our record contains the recording of Vazquez's interview, and we 'may independently review the audio recording of an interview to assess whether competent, substantial evidence supports the trial court's findings.' " (quoting *State v. Thompson*, 193 So. 3d 916, 919-20 (Fla. 2d DCA 2016))).

² We note that at no time did the arresting officer ask O.W. to remove the jacket from his shoulder.

the arresting officer testified that it was O.W.'s demeanor and the way he spoke to the arresting officer that caused the concern. The arresting officer further testified that O.W. was "[n]ervous, [had] shakiness in his voice," and "didn't really want to look at" the arresting officer.³ The arresting officer testified that he asked O.W. if he could conduct a pat down for officer safety and that O.W. declined the pat down.⁴ When asked again why he believed a pat down was necessary, the arresting officer responded, "Just from his demeanor, his actions." The arresting officer then testified that the firearm ultimately discovered in O.W.'s groin area had not been visible, not even as a bulge in O.W.'s clothing. He explained that he felt the firearm during the sweep of O.W.'s waistband area and that O.W. was placed in handcuffs and the firearm was ultimately removed.⁵

³ This testimony conflicts with what the body cam footage depicts to the extent that this court noted no shakiness in O.W.'s voice and no discernable reticence on O.W.'s part. O.W. looked at the arresting officer when answering questions and looked down at his feet when not answering questions. The body cam footage shows that O.W. pulled up his pants once and touched his forehead once as he began answering the officer's questions but that he otherwise remained still.

⁴ Immediately after asking for O.W.'s phone number, the arresting officer asked O.W. if he had any weapons on him. With no hesitation, O.W. answered "No."

⁵ Contrary to the arresting officer's testimony, the body cam footage makes it clear that O.W. had been handcuffed and forcibly placed facedown in the road before the firearm was felt in O.W.'s groin area. After O.W. denied the arresting officer's request to do a pat down, the arresting officer reached forward and grabbed O.W.'s jacket, again asking if O.W. had something on him. O.W. repeatedly replied "no" and then dropped to the ground. Each officer took one of O.W.'s arms and forcibly maneuvered O.W. so that he was lying facedown. While O.W. was facedown with his arms held behind his back, the officers continued to ask what he had on him. The arresting officer ultimately stated, "Just

During cross-examination, the arresting officer testified that he did not observe a weapon or see a bulge in O.W.'s pants. He confirmed that the firearm was found in O.W.'s groin area, not on O.W.'s left hip area where the jacket had been; he also testified that he had no idea whether the firearm had been in O.W.'s groin area the whole time.

The court denied the motion to suppress without elaboration, stating that "the [body cam] video speaks for itself" and finding that *State v. Vera*, 666 So. 2d 576 (Fla. 2d DCA 1996), "has almost identical facts" to those of this case.

On our review of the denial of the motion to suppress, we determine whether competent substantial evidence supports the trial court's factual findings and review de novo the trial court's application of the law to the facts. *Dawson v. State*, 58 So. 3d 419, 421 (Fla. 2d DCA 2011).

"Ordinarily the issuance of a citation for failing to have a bicycle light would not validate a weapons frisk." *Richardson v. State*, 599 So. 2d 703, 706 (Fla. 1st DCA 1992). "To pat down an individual detained following a noncriminal traffic infraction, the officer must possess some information indicating that the detainee poses a threat to the officer's safety or to the safety of others." *Goodman v. State*, 280 So. 3d 537, 544 (Fla. 2d DCA 2019) (comparing cases). That is, "[f]or a weapons pat-down search to be valid, an officer must identify objective facts indicating that the person detained is armed and dangerous." *Dawson*, 58 So. 3d at 422; cf. *T.M. v. State*, 37 So. 3d 384, 385-86 (Fla. 4th DCA 2010) ("Following an investigatory stop, ' "police officers are authorized to

put him in handcuffs, we're going to get it." The officers then radioed that they had a "juvenile resisting," and O.W. was handcuffed. Officers thoroughly patted down O.W. while he was on the ground, finding nothing. They then stood him up and continued the pat down. The firearm was located in the groin area of O.W.'s underwear.

execute a pat-down for weapons only where they have a reasonable suspicion to believe that a suspect is armed with a dangerous weapon." ' ' (quoting *Ray v. State*, 849 So. 2d 1222, 1224 (Fla. 4th DCA 2003))). And "[o]ne of the recognized circumstances justifying a weapons pat-down is the combination of the defendant's nervousness and the officer's observation of a bulge in the defendant's clothing." *Ray*, 849 So. 2d at 1225; see also *Richardson*, 599 So. 2d at 706 ("[T]he officer's description of appellant's conduct, together with the observation of the bulge, was enough to permit the judge's approval of the limited pat-down which disclosed the weapon.").

We first address the case relied upon by the trial court, *Vera*, and conclude that the trial court's reliance on it was misplaced. The determinative fact in that case is not present in this one: a visible bulge in the defendant's clothing.

As in the instant case, the defendant in *Vera* was stopped for not having a light on his bicycle and testimony presented at the suppression hearing included that the defendant was nervous and looked down. Because of the defendant's behavior, the officer in *Vera* "walked around behind the defendant and saw a bulge in his right rear pocket which appeared to be a weapon. The officer touched the pocket and confirmed it was a gun" before securing the defendant and removing the gun from the pocket. *Vera*, 666 So. 2d at 577. Based on the visible bulge in the rear pocket of the defendant's pants which "appeared to be a gun bulging out [of] the pocket," this court concluded that the officer had the requisite suspicion to pat down the defendant and ultimately to search the pocket based on the officer's pat down. *Id.* ("This plain viewing of what appeared to be a gun bulging out [of] the pocket provided probable cause to search the defendant by feeling and searching his pocket to

confirm that it was a gun."). It is apparent from our conclusion that the visible bulge along with the defendant's actions gave the officer reasonable suspicion to conduct a pat down search. This conclusion is bolstered by the facts and determinations in other relevant cases including *Ray, Dawson, Nelson v. State*, 268 So. 3d 837 (Fla. 2d DCA 2019), and *Goodman*.

In *Ray*, a case with strikingly similar facts to ours, the Fourth District reversed the judgment and sentence based on the erroneous denial of a dispositive motion to suppress. The arresting deputy had stopped Ray in an area known for drug activity for Ray's failure to have the proper lighting on his bicycle. The deputy described Ray's movements as "furtive," testified that Ray would not "stay open" to the arresting deputy, and stated that Ray was reluctant to remove his hands from his jacket pocket. 849 So. 2d at 1224. The facts established no link between Ray and drugs or other criminal activity, and the arresting deputy "expressly acknowledged that he did not observe any bulges in Ray's clothing." *Id.* at 1225. The Fourth District concluded that such circumstances were "insufficient to establish a reasonable suspicion that Ray was armed with a dangerous weapon." *Id.*; see also *Coleman v. State*, 723 So. 2d 387, 388 (Fla. 2d DCA 1999) (holding that the trial court erred in denying the motion to suppress where the officer "did not observe any criminal activity and there was no bulge in Coleman's clothing that could indicate that he was carrying a weapon"); *L.D. v. State*, 770 So. 2d 164, 165 (Fla. 4th DCA 2000) ("The officer saw no weapon and articulated no reason to believe Appellant was carrying a weapon. The officer admittedly did not observe any bulge, abnormal behavior, or furtive movement. Absent some additional articulable suspicion that Appellant might be armed, we find the facts in this case

insufficient to justify the ensuing seizure."); *cf. State v. Nichols*, 52 So. 3d 793, 796 (Fla. 5th DCA 2010) ("[T]he arresting officer was justified in conducting a protective pat-down in this case because the stop of the defendant [for the noncriminal jaywalking violation] was valid and the officer's observation of a bulge in the defendant's waistband created an objectively reasonable suspicion that the defendant was armed with a dangerous weapon and posed a threat to the officer's safety.").

In *Dawson*, this court highlighted the lack of a visible bulge in the defendant's clothing, making the defendant's refusal to comply with the officer's request to remove his hands from his pockets the only objective factor in determining whether reasonable suspicion sufficient for a weapons pat down was present. 58 So. 3d at 421. We concluded that such behavior was insufficient and restated that "routine patdown searches based on general concern for officer safety are not constitutionally permitted." *Id.* at 422 (quoting *McNeil v. State*, 995 So. 2d 525, 526 (Fla. 2d DCA 2008)); *see also D.B.P. v. State*, 31 So. 3d 883, 885-86, 887 (Fla. 5th DCA 2010) (concluding that "D.B.P.'s act of putting his hands in his pockets during a stop for a noncriminal infraction in a high crime area" was insufficient to provide the requisite reasonable suspicion for a pat down).

Additionally, in *Nelson*, 268 So. 3d at 838, this court focused on the lack of a visible bulge or other indication of a weapon and cited with approval the holding in *C.D. v. State*, 82 So. 3d 1037, 1039-40 (Fla. 4th DCA 2011), that "[furtive] movement by an individual detained for a noncriminal infraction is insufficient to warrant a pat-down or any protective search." *See also E.H. v. State*, 593 So. 2d 243, 244 (Fla. 5th DCA 1991) ("Although the officer expressed concern that E.H. kept reaching into his pocket, the [S]tate never established that the officer had

probable cause to believe that E.H. was armed with a dangerous weapon. There was no testimony, for example, that the officer observed a bulge in E.H.'s pocket or made any other observation which caused him to believe that a dangerous weapon might be present.").

Finally, in *Goodman*, yet another case involving the failure of the defendant to have a light on his bicycle at night, this court concluded that the trial court erroneously denied the motion to suppress where

the officer testified that he conducted the pat-down of Mr. Goodman because (1) he attempted to avoid the initial stop, (2) he appeared nervous, (3) he placed his bicycle between himself and the officer, (4) he sat down on the curb without being instructed to do so, and (5) while sitting there, "he hunched over then leaned toward his right side as if to conceal something."

280 So. 3d at 543. This court emphasized that "[t]o pat down an individual detained following a noncriminal traffic infraction, the officer must possess some information indicating that the detainee poses a threat to the officer's safety or to the safety of others," not simply that the individual is hiding something that may or may not be a weapon. *Id.* at 544.

As this court has stated, "even though the facts of this case reveal an alarming result of the pat-down—a gun—we are not permitted to be distracted by the fruit of the search." *Dawson*, 58 So. 3d at 421. We must focus on whether the facts support a reasonable suspicion for the pat down. See *Brown v. State*, 224 So. 3d 806, 810 (Fla. 2d DCA 2017) ("[O]ur focus must be on the justification for the search." (quoting *Dawson*, 58 So. 3d at 421)); accord *Hunt v. State*, 700 So. 2d 94, 95 (Fla. 2d DCA 1997). Here, while O.W.'s stance was not typical and could give an officer reason to believe he was hiding something, the arresting officer saw no indication of a weapon and articulated no reason to believe that

O.W. was carrying a weapon. The arresting officer lacked the requisite suspicion to conduct a pat down search of O.W.; the dispositive motion to suppress should have been granted.

Accordingly, we reverse the disposition order and remand for O.W.'s discharge.

VILLANTI and SLEET, JJ., Concur.

Opinion subject to revision prior to official publication.