IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT OF FLORIDA

APPEAL NUMBER 5D08-4268

JERRY RANDELL BROXTON
Appellant-Petitioner,

v.

STATE OF FLORIDA
Appellee-Respondent.

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, LAKE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT BROXTON

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TABLE OF CONTENTS

Pages

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

I. THE TRIAL COURT ERRED IN DENYING BROXTON'S MOTION TO SUPPRESS.

The State's summary of its argument is that Broxton (1) was properly detained, for a civil infraction, (2) was properly frisked for a weapon when the officer had a reasonable basis for doing so, and (3) Broxton then voluntarily revealed the contents of his pocket. [AB, p. 5][1]

The State makes a number of factual assertions as if they were fact findings made by the lower court, but they are not.[2] For example, the State asserts that "he

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[1] References to the State's Answer Brief will be in the form "AB" followed by the pertinent page number of the Answer Brief. References to Broxton's Initial Brief will be in the form "IB" followed by the pertinent page number.

[2] The lower court's *fact findings* carry a presumption of correctness, whereas the lower court's determination of the legal issues and mixed questions of law and fact carry no such presumption and are subject to *de novo* review. Unlike a trial record being reviewed for sufficiency of the evidence, the State does not get the benefit of a "light most favorable" standard to factual matters in the record on a motion to suppress *as to "fact" matters which the lower court did not rely upon and as to which the lower court did not make findings of fact*.

If the State believed that additional fact findings were required to support and uphold its position below, it was incumbent upon the state, *as the party who had the burden of proof on the motion to suppress the results of a search and seizure based on probable cause, and not based on a warrant*, to have the lower court make the required fact findings.

The State is not permitted at this stage of the proceedings to cherry pick "facts" from the record as to which no findings were made, and rely upon such facts to support its argument now. This is a variation of the Typsy Coachmen problem: this Court can uphold a lower court's ruling on *legal* grounds other than those cited by the lower

knew that *sportsmen typically carry weapons*." [AB, pp. 6-7] The lower court made no such finding and on the facts of this case it is contradicted by the record. There were no weapons. Then the State asserts that Broxton "*acted somewhat suspiciously*." [AB, p. 7] The lower court did not make such a finding, and it is not supported by the record. Next, the State asserts that Broxton "*was trying to leave*." [AB, p. 7] The lower court made no such finding and it is contradicted by the record. Finally, the State asserts that Broxton "acted somewhat suspiciously by trying to leave *and then by admitting he had neither a proper license nor any identification*." [AB, p. 7]

The State's first case citation of authority for the validity of the stop and detention is *Dewberry v. State*, 905. So.2d 963, 966 (Fla. 5th DCA 2005). [AB, p.8] However, *Dewberry* expressly states that it is not authority for the detention issue:

> *We begin our analysis by noting that the validity of the stop in the instant case is not contested by Dewberry and is not an issue for us to resolve*. [footnote 1]
>
> [footnote 1] The police may validly stop a vehicle to issue a citation for the commission of a traffic infraction. See *Hatcher v. State*, 834 So.2d

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court, but it must do so based on a fully developed record. If a fact was essential for determination of the issue, the State had the burden of showing that below, so that Broxton, as the opposing party, would have known that he needed to challenge that "fact" and obtain a fact finding in his favor. This Court cannot now make *fact findings* from a cold record but is limited to the fact findings made by the lower court to uphold the State's ruling.

> 314 (Fla. 5th DCA 2003). In this circumstance, the officer may be justified in asking the driver or passenger to exit the vehicle for officer safety. Id.; see also *Moore v. State*, 874 So.2d 42 (Fla. 2d DCA 2004).

Dewberry v. State, 905 So.2d 963, 966 (Fla. 5th DCA 2005) (emphasis supplied).

The only other authority the State cites is *State v. Louis*, 571 So.2d 1358, 1359 (Fla. 4th DCA 1990). Although *Louis* did require the appellate court to make a finding that a detention and frisk was authorized, *it did so in the context of a traffic stop*. Broxton acknowledged in his initial brief that under *Terry* a police officer has the authority to conduct a temporary detention incident to a *traffic stop* and thereafter conduct a frisk. [IB, pp. 20 *ff*.] The Supreme Court's reasoning in *Terry* was based exclusively upon the well established history of danger to police officers in traffic stop encounters. That point was underlined once again in *Louis*, which the State cites:

> We reverse. To neutralize the scene of the traffic stop and prevent accidental injury from passing traffic, Weiner had the right to order appellee to stop his unusual behavior and stand still. An officer has a duty to protect an unarrested occupant of a stopped automobile from roadside injury. See *Kaisner v. Kolb*, 543 So.2d 732 (Fla.1989).
>
> Weiner also had the right to stop appellee and frisk him for weapons. During a temporary encounter with a citizen, an officer, while engaged in a traffic investigation, may conduct a limited protective search of that citizen for weapons, even without probable cause to believe that a crime has been committed. The officer needs only to have reason to believe, based on articulable facts, that his safety is in danger. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Graham v. State*, 495

> So.2d 852, 854 (Fla. 4th DCA 1986). ***Tragically, roadside shootings of police officers in this state and country are frequent enough to be on the mind of every officer who makes a traffic stop***. A person's unusual body movements and demeanor during an encounter with an officer gives the officer reason to believe the person has a weapon. *State v. Wilson*, 566 So.2d 585, 587 (Fla. 2d DCA 1990). Under the circumstances that existed at the time of the encounter, Weiner's fear for his safety was warranted since he reasonably believed that appellee might have a weapon in his jacket pocket. See *Graham*, 495 So.2d at 854.

State v. Louis, 571 So.2d 1358, 1359 (Fla. 4th DCA 1990) (emphasis supplied).

The State failed in its duty of candor to the Court to acknowledge that this is an issue of first impression and that in fact there is no authority supporting the State's position. *There is no reported authority expressly authorizing a detention and frisk by a game and fresh water fish officer of a person questioned about his fishing license.* As counsel noted in his Initial Brief for Broxton, a Westlaw search of the United States Supreme Court database using the search terms "frisk or pat-down" resulted in 78 cases. Counsel reviewed all 78 cases and not one involved a civil infraction related frisk or pat-down *other than traffic stops.* After an equally diligent search of the Florida state case law, counsel has been unable to find a single reported decision involving a pat and frisk being conducted in the context of the issuance of a civil infraction outside the setting of a traffic stop by a police officer.

If the authority of game and fish officers to frisk a person being questioned

about his fishing license under Florida Statutes, §§ 379.354(3) and 901.151 were to be upheld in Broxton's case, it would be a case of first impression and an expansion of the existing statutory construction as to which Broxton would not have had fair notice. [IB, pp 21-22] As this Court is aware, when an appellate court announces a new rule of Constitutional significance, *it may not be applied to the detriment of the defendant-appellant in the pending case, but may only be applied prospectively to future cases*, because to do otherwise violates federal Constitutional Due Process concerns. *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964):

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, 62 S.Ct. 237, 239, 'judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute,' for 'the objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss. * * *' Freund, The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 541 (1951). See Amsterdam, Note, 109 U.Pa.L.Rev. 67, 73-74, n. 34.
>
> If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, id., at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where

the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, s 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648. [footnote omitted] If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith v. Cahoon*, 283 U.S. 553, 565, 51 S.Ct. 582, 586, 75 L.Ed. 1264. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61.

The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. See, e.g., *Wright v. Georgia*, 373 U.S. 284, 291, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 456-458, 78 S.Ct. 1163, 1168-1169, 2 L.Ed.2d 1488; *Barr v. City of Columbia*, 378 U.S. 146, 84 S.Ct. 1734. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, 'a federal right turns upon the status of state law as of a given moment in the past-or, more exactly, the appearance to the individual of the status of state law as of that moment * * *.' 109 U.Pa.L.Rev., supra, at 74, n. 34. *When a state court overrules*

> *a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend (his) substantive right*.' *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107.
>
> When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either situation is this Court's statement in *Brinkerhoff-Faris, supra*, that '(i)f the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious,' and 'The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid * * * state statute.' Id., 281 U.S. at 679-680, 50 S.Ct. at 454.

Bouie v. City of Columbia, 378 U.S. 347, 354-355, 84 S.Ct. 1697, 1703 (1964).

Even if the Court were to find that as a general proposition of law a game and fish officer could *under appropriate circumstances*, that is, when there were genuine reasons for the officer to fear for his personal safety, there was no reasonable basis on the facts of this case for the officer to fear for his safety. As Broxton argued in his Initial Brief [IB, p, 23], Officer Adam is an officer with the Florida Fish and Wildlife Conservation Commision, which had absorbed the Florida Game and Fresh Water Fish Commission. This is an agency which has lost only three officers in the past 60 years to hostile gunfire. And all three officers who were killed by gunfire

were shot by *hunters, none by fishermen*. No officer has ever been killed by a knife.[3]

With this historical record coupled with the facts of this specific incident, there simply was no objective basis for the officer to fear for his personal safety, therefore there was no basis for the officer to frisk Broxton.

The State seeks to rely upon the "bulge" Officer Adam noticed in Broxton's pockets, but the officer himself acknowledged that one bulge turned out to be a package of cigarettes and a lighter. [Court's finding of fact, R1-36] When the officer frisked the other pocket he immediately determined that the item in the pocket was not a weapon but had the consistency of a plastic bag. [Court's finding of fact, R1-36]. Typically "bulge" cases are not bare bulges standing alone, but accompanied by some other circumstance that under the totality of the circumstances justified a reasonable objective fear for the officer's safety that the person detained was armed and dangerous. See, e.g., *Richardson v. State*, 599 So.2d 703 (Fla. 1st DCA 1992) (nighttime stop, person acted very nervous particularly when asked if he had a weapon, kept turning to keep his bag out of sight, where officer saw shirt was

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[3] This figure comes from the Officer Down Memorial Webpage:

http://www.odmp.org/search.php?searching=1&agencyid=1280&cause=19

A fourth officer was shot by hostile fire but the shooting was in connection with an attempted criminal arrest unrelated to the officer's official duties and did not involve either a hunter or fisherman.

untucked and there was a large bulge indicative of a gun); *McNamara v. State*, 357 So.2d 410 (Fla. 1978) (officer serving search warrant had prior information that suspect would be armed saw bulge).

We reiterate that *there are no reported decisions from either the United States Supreme Court or any Florida appellate court authorizing a frisk based on a bulge in any non-criminal detention context other than a traffic stop.* A bulge in a fisherman's pocket, who is not acting nervous, but being cooperative, during a daylight inquiry about a fishing license, is not enough to justify a frisk.

On this record even the State concedes that Officer Adam *had no authority to proceed further with the search of the pocket at that point*:

> Finally, the Defendant contends that once the pat down uncovered no weapons, there was no reason for the search to continue. *The State agrees with this proposition*.

[AB, p. 9, emphasis supplied]

Instead, the State argues that at this point, when asked what was in the pocket, Broxton voluntarily opened his pocket and showed the contents to Officer Adam. This conclusion, however, is a mixed question of law and fact which this Court must make *de novo*. Broxton notes that there is nothing in the record to support the conclusion that Broxton was acting other than in acquiescence to the officer's show

of apparent authority. The State acknowledges that Broxton was still detained at that point and therefore still subject to the direction and orders of the officer. His display of the contents of the pocket *in response to the officer's inquiry* was nothing more than a verbal act complying with the officer's inquiry.

The State relies on *Ingram v. State*, 928 So.2d 423, 429 (Fla. 1st DCA 2006), to argue that Broxton was not merely acquiescing to the officer's show of authority. Each case must be determined on its own facts. There are a number of important factual differences between Broxton and *Ingram*. First, in *Ingram*, Ingram was not the person being detained at the traffic stop, instead, the traffic stop was directed toward the intoxicated driver of the car. The officer did not order Ingram, the passenger, to even step out of the car, instead it was Ingram who asked the officer if he could step out of the car, and the officer did not object. Ingram was acting "very nervous." The officer *never frisked* Ingram*, but merely asked Ingram what was in his pocket.* Ingram then reached in his pocket and handed the item which contained the contraband to the officer. On these facts the First DCA found Ingram's action voluntary.

Contrast this with Broxton's case. Broxton was detained by Officer Adam then frisked and when the officer was not satisfied by the frisk alone he asked Broxton what it was he had felt in his pocket when he frisked him. Clearly under these

circumstances, with the officer continually advancing the intrusion of Broxton's privacy step by step Broxton and any reasonable person would have felt he had to respond to the officer's request and was not free to disregard it.

CONCLUSION

Based on the foregoing arguments and citations of authority and the arguments and citations of authority set forth in his Initial Brief, appellant Jerry Randell Broxton respectfully requests this Honorable Court vacate the judgment and conviction in his case and remand the matter for further proceedings consistent with the arguments set forth above, that is, that the lower court be mandated to grant Broxton's motion to suppress.

Broxton rests upon his Initial Brief for his arguments that the sentence should be vacated and the matter remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Kristen L. Davenport, Esq., Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, by United States Mail, first class postage prepaid, this 22ND day of September, 2009.

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William Mallory Kent