LEGAL EAGLE

February 2025

Concealed Firearm

Jonathan Sheppard rode his bicycle through a "high-crime area" where police were conducting a surveillance operation unrelated to him. When he paused his bicycle, an officer observed him remove a gun from a waistband holster and transfer it into his backpack. The officer signaled a second officer to stop Sheppard. This officer removed Sheppard from the bicycle and placed him in handcuffs.

After being placed in handcuffs, Sheppard told the officers that he did not have a license (or permit) to carry a firearm. The police searched the backpack, found the gun, and arrested Sheppard for carrying a concealed firearm without a license and for possessing a firearm as a convicted felon.

Defendant filed a motion to suppress arguing that the police lacked reasonable suspicion to detain him. He moved to suppress both the firearm and his post-detention admission about possessing the firearm without a license.

Issue:

Did the police officers have a reasonable suspicion of criminal activity to detain Sheppard before they seized his firearm and acquired information about whether he was licensed to carry the firearm?

No, based on the change in statutory language making non-licensure an element of, rather than an affirmative defense to, the crime.

Carrying a Concealed Firearm:

The Fourth Amendment to the United States Constitution and the Florida Constitution guarantees 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. As such, in *Terry v. Ohio*, (S.Ct.1968), the United States Supreme Court held as follows, "Where 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 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."

However, in the present case, Deputy clearly stated that he had no other reason for seizing Defendant other than the fact that he was armed. Deputy did not articulate that any other crime was afoot and

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stated he was not conducting an investigation.

In *Regalado v. State*, (4DCA 2010), the court reasoned that it was not illegal to possess a firearm in Florida if one had a concealed-weapons permit, a fact that cannot be determined by the officer 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.

In *Mackey v. State*, (3DCA 2012), the D.C.A. 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. In other words, the existence of a permit was a defense not an element of the crime.

In that the two cases on their face were in conflict the Florida Supreme Court was asked to resolve the disagreement. In *Mackey v. State*, (Fla.2013), the Court ruled that the basis of the police stops in the two cases was inapposite, and thus there was no conflict to resolve. The court concluded, "Given the differing factual circumstances that preceded the two different stops at issue, we conclude that even though the decisions appear to be in conflict, the cases can be reconciled, and no actual conflict exists."

"In light of the foregoing, we approve the holding—but not the reasoning—of the Third District Court of Appeal that the *Terry* stop of Mackey was valid under the United States and Florida Constitutions. We further approve the conclusion of the Third District *that licensure is an affirmative defense* to the crime of carrying a concealed weapon."

Subsequently, the Florida Legislature amended section 790.01, expressly making non-licensure an element of, rather than an affirmative defense to, the crime of carrying a concealed weapon.

Court's Ruling:

"The issue before us is whether, under the facts and circumstances of this case, the police officers had a reasonable suspicion of criminal activity to detain Sheppard before they seized Sheppard's firearm and acquired information about whether Sheppard was licensed to carry the firearm. The trial court concluded that, based on this Court's decision in *Mackey I*, the police officers had the requisite reasonable suspicion to detain Sheppard."

"Possibly in response to our decision in *Mackey I* and our Supreme Court's decision in *Mackey II*, in its 2015 session the Florida Legislature amended section 790.01, expressly making non-licensure an *element* of, rather than an *affirmative defense* to, the crime of carrying a concealed weapon. The 2010 version of the statute under which Mackey was charged read, in relevant part, as follows:

(2) A person who carries a concealed firearm on or about his or her person commits a felony of the third degree....

(3) This section does not apply to a person licensed to carry ... a concealed firearm pursuant to the provisions of. s. 790.06. § 790.01(2), (3), F.S.

"While the relevant statute under which Sheppard was charged read, in relevant part, as follows:

(2) 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.... § 790.01 (2), F.S.

Because Sheppard was charged under this revised version of the statute, Sheppard argues, as he did below, that *Mackey I* is no longer controlling. Sheppard asserts that, for the officer to have constitutionally initiated the investigatory stop based on a presumed violation of section 790.01(2), the officer must have had a reasonable suspicion of *both* the *concealed carry* and the *unlicensed status* of the person carrying the firearm. The State argues that, irrespective of the statutory change, the context of both Sheppard's presence in a high crime area and his relocating his firearm from waistband to backpack provided the officer a reasonably objective suspicion that Sheppard 'has committed, is committing or is about to commit' a crime, thus justifying the investigatory stop." The D.C.A. disagreed.

"We agree with Sheppard and conclude that, under the specific facts and circumstances presented in this case, the statutory change to section 790.01 – making non-licensure an element of, rather than an affirmative defense to, the crime – significantly undercuts the applicability in this case of our holding in *Mackey I*. Indeed, the 2015 amendment to section 790.01 renders *Mackey I* dispositively distinguishable."

"In the instant case, there

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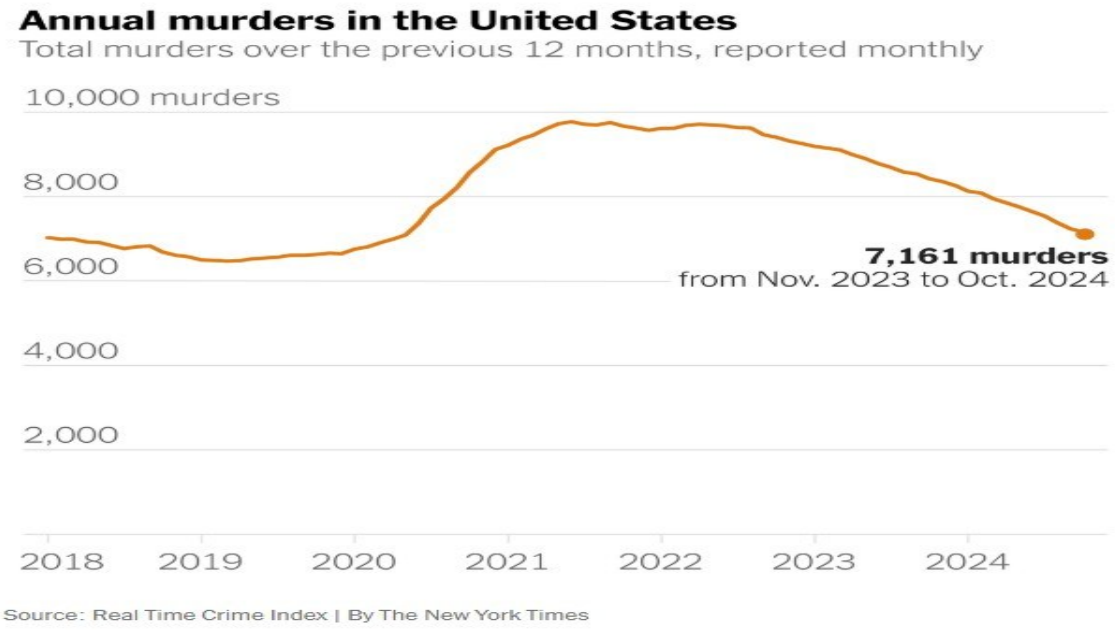
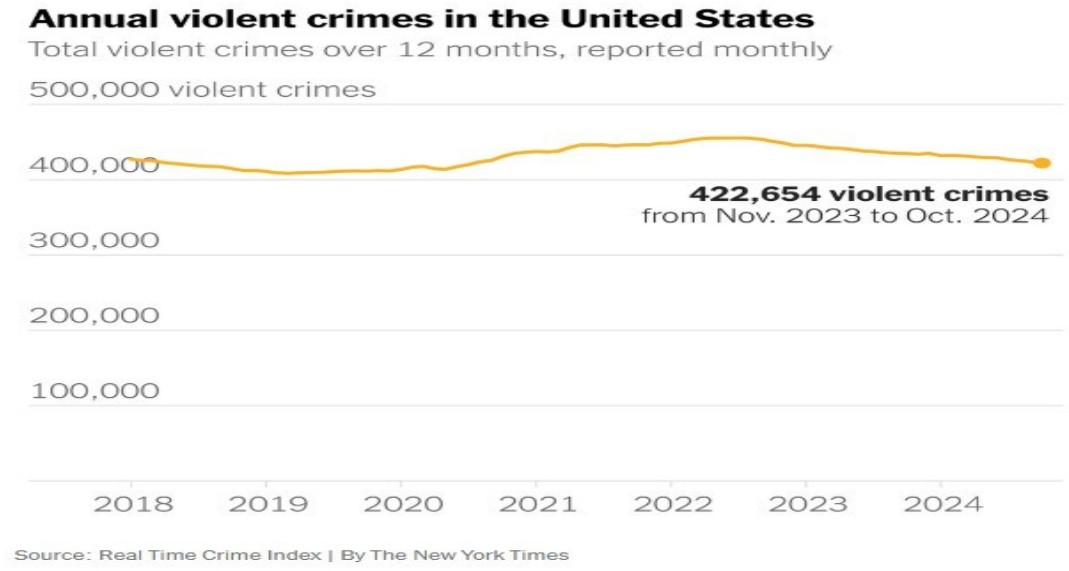
Violent Crime Drop in 2024





The drop in murders that began in 2022 has accelerated. Murders fell so quickly that 2024 could have ended with fewer murders than the year before the pandemic. If the drop in murders continued at the same rate for the rest of the year, 2024 had the largest percent decrease — nearly 16 percent — ever recorded nationwide.

Other violent crimes also declined. Robberies and rapes were lower than they were before the pandemic. Aggravated assaults were still elevated from the pre-Covid days, but they trended down in 2024. Property crimes as a whole also fell, although auto thefts in particular remained higher than they were before the pandemic.

Source: New York Times, Jan. 1, 2025, by German Lopez

Recent Case Law

Traffic Stop Issues

David Elias was a deputy sheriff, SWAT team member, and K9 officer, and was previously a narcotics patrol deputy. He testified that he conducted a traffic stop on Defendant shortly before 4:00 a.m., due to possible improper window tint and deficient taillight on a trailer. When he activated his sirens and lights, the vehicle did not stop immediately. Devin Denoncourt was the driver, and Cody Brunner was the passenger. Deputy had come into contact with Brunner many times before, including incidents involving drugs, thefts, and eluding. When he approached the vehicle, he asked the occupants for their driver's licenses, insurance, and registration. Defendant provided his driver's license and registration, but the registration did not match the tag on the vehicle. They also did not produce proof of insurance. Brunner said, "Hey, give me a minute, I'll go ahead and contact the registered owner, and I'll have him text that over."

After Brunner's request, Deputy returned to his patrol vehicle and deployed his K-9 for a vehicle sniff which took about 40 to 45 seconds. Another Deputy was present during the K-9 sniff when he alerted to the driver's side door. At no point during that 40 seconds did Brunner or Defendant indicate they had the insurance information available. Deputy testified that because the driver is supposed to be able to supply proof of insurance *within a reasonable amount of time*, he allowed Defendant to obtain the proof of insurance, rather than issuing a citation right away.

After K-9 Odie alerted, Deputy asked Defendant to step out of the vehicle. Defendant did not face Deputy when stepping out of the car and began messing with his pants. Deputy told him to stop and to turn around, which is when he noticed a bulge in Defendant's pants. When asked if he had anything illegal on him Defendant said 'no.' Given the K-9's alert and the Deputy's experience that drugs and weapons are "very often seen together," the Deputy was concerned about the presence of possible weapons. For his safety, he conducted a pat-down.

When asked what the bulge was, Defendant got defensive and pulled up his shirt to show he did not have anything; however, as he did so, Deputy observed the corner of a plastic Ziploc bag protruding out of his waistband. Based on his experience, knowledge, and training "every single time" he finds a bag in an individual's pants or crotch area, "it's never contained anything but drugs." Once Deputy retrieved the baggie, Defendant was arrested for multiple felony drug offenses.

Denoncourt filed a motion to suppress arguing the traffic stop was unreasonably prolonged, the officer conducted an illegal pat-down, and, based on the totality of the circumstances, Deputy illegally seized the item found in his pants. The trial court granted the motion finding that the stop itself was permissible, but the K-9 walk and sniff "was an unnecessary step added to the stop prior to ever completing the purpose of the stop." On appeal, that ruling was reversed.

Issue:

Was the traffic stop lawful? **Yes**. Did the dog sniff unduly prolong the stop? **No.** Was the pat-down search lawful? **Yes**.

Lawful Traffic Stop:

The stopping of a motorist is reasonable and constitutionally valid "where a police officer has probable cause to believe a traffic violation has occurred." An officer has probable cause "where the facts and circumstances within an officer's knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed." *Stone v. State*, (4DCA 2003).

Generally, a traffic stop is reasonable only insofar as "it is 1. justified at its inception and 2. reasonably related in scope to the circumstances which justified the interference in the first place." But during a traffic stop, an officer can request the documents concerning the travel—such as driver's license, registration, a rental contract, or, the driver's log and shipping documents. The officer can also inquire about the trip being taken and can ask questions on any subject so long as the questioning does not prolong the detention beyond what is otherwise

necessary to perform such routine tasks as computer checks and preparing reports and citations."

Additionally, if information obtained by such inquiries and other observations during the stop creates reasonable suspicion to believe that a crime has been or is being committed, as in the present case, the officer can take reasonable steps to investigate.

The United States Supreme Court has stated that ordering the driver (and passengers) from the vehicle is reasonable and within the Fourth Amendment parameters for officer safety reasons. **The request is incident to the stop**. *No separate exigency is required nor needs to be articulated*. *Pennsylvania v. Mimms*, (S.Ct.1977).

The proper scope of a traffic stop includes "certain negligibly burdensome precautions" taken for officer safety. Brief questions about a driver's criminal history are no more burdensome than computer background checks, which the courts have routinely permitted. In addition to issuing a ticket or warning, a police officer's "mission includes ordinary inquiries incident to [the traffic] stop." Those inquiries "involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Because record checks "serve the same objective as enforcement of the traffic code"—namely, "ensuring that vehicles on the road are operated safely and responsibly"— those inquiries do not unconstitutionally extend the traffic stop. *Rodriguez v. United States*, (S.Ct.2015).

A traffic stop becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket. *See Illinois v. Caballes*, (S.Ct.2005).

A K-9 sniff can be conducted during a lawful traffic stop without offending the Fourth Amendment, but it may not prolong the stop, "absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *State v. Creller*, (Fla. 2024) (quoting *Rodriguez v. United States*, (S.Ct.2015)). A sniff search can be conducted before the traffic stop has been concluded, but not after. The critical question is not whether the sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " These inquiries include checking the driver's license, determining whether there are any warrants against the driver, and inspecting the vehicle's registration and proof of insurance. An officer has the right and responsibility, when the driver admits that he is driving a vehicle owned by someone not present, to run the tag number, and "the traffic stop should not be considered completed until such information, if it can be obtained within a reasonable period, is returned." *State v. Brown*, (5DCA 1997).

Court's Ruling:

"Here, Deputy Elias asked for the occupants' licenses, registration, and insurance. The occupants requested that Elias give them time to obtain the insurance information, since the vehicle belonged to their friend. Because Elias was waiting on Defendant and the passenger to provide the insurance information, the stop had not yet concluded. The K-9 sniff, which took about 40 seconds, occurred during the time the occupants were still attempting to obtain the insurance information, and neither occupant informed Elias they had the information prior to the sniff. Thus, the stop was still in progress. Accordingly, the K-9 sniff was proper because it did not prolong the stop. See*, Flowers v. State*, (1DCA 2020) (affirming denial of motion to suppress where stop was still in progress when sniff was conducted and officer had not yet written traffic citation)."

"The officer's request for Defendant to step out of the vehicle was also proper. See*, State v. Benjamin*, (5DCA 2017) (holding that where defendant was lawfully detained, officer could properly order him to exit vehicle, even if officer did not have particularized basis to believe defendant was a threat to his safety); *see also Pennsylvania v. Mimms*, (S.Ct.1977) (holding once motor vehicle has been lawfully detained for traffic violation, officers may order driver to get out of vehicle without violating Fourth Amendment)."

"As to the pat-down search, under the Florida Stop and Frisk Law, an officer who has validly stopped an individual may search that individual 'only if the officer has probable cause to believe that the individual is armed with a dangerous weapon and poses a threat to the officer or any other person.' Probable cause for a stop and frisk requires 'an articulable reasonable belief or suspicion that the individual is armed and poses a threat to the officer.' In determining the reasonableness of

an officer's suspicion, trial courts must consider the totality of the circumstances as viewed by an experienced police officer."

As an aside, it is important to understand that the Florida Supreme Court has clarified that when the term "probable cause" is used in section 901.151, means "reasonable belief or suspicion," and does not rise to the level of justification required for an arrest. Therefore, the officer must have possessed a *reasonable belief* that the defendant was armed and presented a threat to his safety. Moreover, the search of the defendant must be strictly limited to the extent necessary to reveal the weapon and protect the officers. See, *State v. Webb*, (Fla.1981).

"The facts of the instant case are similar to those in *Leach v. State*, (5DCA2007). Here, Deputy Elias stopped Defendant's vehicle in the early morning hours shortly before 4:00 a.m.; the vehicle did not stop right away despite having multiple opportunities to do so; the vehicle belonged to someone else; the K-9 alerted to the presence of the odor of narcotics on the vehicle; in Elias's experience, weapons are found with drugs eight out of ten times; when Defendant exited the vehicle, he faced away from Elias and was moving his hands furtively around his waistband; and when Defendant turned to face Elias, Elias noticed a bulge in Defendant's pants. Considering the totality of the circumstances, Elias had a reasonable suspicion that Defendant posed a threat to his safety."

"[Officer] had probable cause to search Defendant's person based on the totality of circumstances. In addition to those circumstances we found to authorize the pat-down search, we also note that Defendant made furtive movements towards his waistband, which, in Elias's experience, appeared to be an attempt to conceal something; when Defendant voluntarily lifted his shirt up, Elias observed the corner of a plastic baggie; and in Elias's experience and training as a narcotics patrol deputy, K-9 Officer, and SWAT team member, during which he has conducted 'thousands' of pat-down searches, anytime he has found a bag in someone's pants or crotch, it one hundred percent of the time contained drugs."

"Based on these circumstances, we find that Elias had probable cause to search Defendant's person, which led to the discovery of the drugs from which the charges stemmed. See*, Santiago v. State*, (4DCA 2012)(providing officer does not need to 'know' item is contraband, and finding of probable cause does not require absolute certitude, but rather, totality of circumstances allows reasonable officer to believe, more likely than not, a crime has been committed)."

"Accordingly, the trial court erred in granting Defendant's motion to suppress. REVERSED."

Lessons Learned:

This opinion makes it abundantly clear that offense reports and testimony must relate back to the officer's experience, knowledge, and training, with specificity. Set out years of experience, specialized training and experience, number of cases handled, and areas of study. Generalized statements will not suffice, as can be seen from the Florida Supreme Court's decision in *Doctor v. State*, (Fla.1992), where they evaluated whether an officer's testimony was sufficient to support the seizure of a bag of crack cocaine hidden in a suspect's groin area. The Court noted as follows:

"Deputy Aprea testified that he had made approximately 250 arrests for possession of a controlled substance, had been present during approximately 1000 arrests and had seen or felt crack cocaine approximately 800 times. He further stated that during the course of 130 search warrant arrests, he had discovered cocaine hidden in the groin area on 70 occasions."

Thus, in the present case Deputy Aprea's testimony regarding his experience in apprehending drug offenders *went well beyond a generalized statement or mere conclusion that he was an experienced officer.* Rather, he offered specific statistics evidencing his significant experience with this particular aspect of drug trafficking.

Additionally, while the D.C.A. in the present case referenced the connection between guns and drugs, other cases have been more specific. "The [trial] court overruled Walker's objections. Stating that 'guns and drugs go together,' the court found that the gun, whether it was Walker's or Elliott's, was reasonably foreseeable to Walker given his and Elliott's involvement in 'a significant drug conspiracy for some period of time' and the [Sentencing] Guidelines' recognition that 'there's generally a connection' 'when guns and drugs are present at the same location.'' *United States v. Walker,* (11th Cir. 2019).

"Guns and drugs 'are a dangerous combination'—as courts across the country have consistently

found. *Smith v. United States*, (S.Ct.1993) ('When Congress enacted the current version of [Sentencing Guidelines] it was no doubt aware that guns and drugs are a dangerous combination.... They create a grave possibility of violence and death.') See also, *United States v. Castano*, (6th Cir. 2008) ('Individuals engaged in drug trafficking frequently carry firearms because such individuals commonly feel the need to protect themselves and because they sometimes carry large amounts of money or large amounts of drugs, and they feel the need to protect themselves or their money or drugs .... Typically, if somebody is selling drugs or buying drugs it's a dangerous situation.')." *Orrego Goez v. United States*, (United States District Court, S.D. Fla. 2023).

State v. Denoncourt
5th D.C.A.
(Dec. 27, 2024)

Burglary with Assault

The Victim met Odis Grimes in 2008 in 8th or 9th grade. They dated intermittently until they had a daughter together in 2015. They broke up but maintained a contentious co-parenting relationship.

The Victim called Grimes on the phone to confront him about his accusations that a member of her family was molesting their daughter. Approximately 30 to 40 minutes later, the Victim heard two explosions and glass shattering outside her apartment. She discovered that her vehicle had two bullet holes in the windshield. She also heard Grimes' voice from outside yelling, "Let's go bitch. Let's go bitch." She testified that she was scared because she knew it was Grimes. While hiding behind a door she saw Grimes break the window of her apartment with the barrel of a gun.

Security video of the incident entered into evidence, showed a man, whom the Victim identified as Grimes, breaking the Victim's apartment window, attempting to open the door, and pointing his shotgun inside the apartment through the broken window. Defendant was charged with burglary with an assault while in possession of a firearm.

At the close of the State's case, Defense counsel moved for judgment of acquittal arguing that based on the Victim's testimony there was no evidence of an assault because Grimes did not know Victim was inside the apartment. The motion was denied, and on appeal, that ruling was affirmed.

Issue:

Did the evidence at trial establish that Defendant threatened the Victim and caused her to fear that violence was imminent? **Yes**.

Burglary with Assault:

To establish the charged crime the State was required to prove beyond a reasonable doubt that the Defendant "did unlawfully enter or remain in a property, to wit: the residence of Victim, the same being occupied by Victim, the property of Victim, without the consent of Victim, as owner or custodian, with Defendant having an intent to commit an offense therein, to wit: Assault, and in the course of committing said Burglary, Defendant was armed or did arm himself with a dangerous weapon, to wit: a shotgun, and made an assault or battery upon Victim, by pointing the firearm through the residence window, in violation of § 810.02, F.S.

State did not have to prove that Defendant had specific intent to do violence to the victim, but rather that Defendant committed acts that were substantially certain to put the victim in fear of imminent violence, for Defendant to be guilty of burglary with assault or battery. *Thomas v. State*, 4DCA 2020).

Burglary" means entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein. Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment if in the course of committing the offense, the offender:

(a) Makes an assault or battery upon any person; or

(b) Is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon. See, F.S. 810.02.

The elements of Assault are as follows: 1. an intentional, unlawful threat by word or act to do violence to the person of another; 2. an apparent ability to carry out the threat; and 3. creation of a well-founded fear that the violence is imminent. *Somers v. United States*, (Fla. 2022).

Court's Ruling:

"On appeal, Grimes contends that there was insufficient evidence to establish an intentional, unlawful threat to do violence (the first element) and creation of a well-founded fear that violence is imminent (the third element). Grimes relies on the Victim's testimony at trial that *she* did not think Grimes knew she was home. This ignores the ample evidence that Grimes *acted as though* he believed the Victim was home. Indeed, the first element has

to do with Grimes' *intent*, not the subjective beliefs of the Victim."

"The evidence at trial showed that Grimes went to the Victim's home shortly after they had a heated telephone conversation. Her vehicle was parked out front. When Grimes arrived, he yelled expletives that were seemingly directed at the Victim. The surveillance video—which is consistent with the Victim's testimony and quite graphic and compelling—shows Grimes pounding on the door with his shotgun, trying to open the door, breaking the apartment window, pointing his gun inside, and looking inside several times. Consequently, a finding that Grimes intended to threaten the Victim is supported by competent substantial evidence."

"The third element—a well-founded fear that violence is imminent—is also supported by substantial evidence. At trial, the Victim testified numerous times that Grimes threats caused her to be in fear.

"Accordingly, because both elements of assault that are challenged on appeal are supported by competent substantial evidence, we affirm. AFFIRMED."

Lessons Learned:

While not an issue in the present case, burglary with assault is the subject of many double-jeopardy appeals. Criminal Defendants have a constitutional right against double jeopardy. A court cannot convict a Defendant of two offenses for the same occurrence if one of the offenses does not require additional proof of fact. *Pizzo v. State*, (Fla. 2006) ("A defendant is placed in double jeopardy where based upon the same conduct the defendant is convicted of two offenses, each of which does not require proof of a different element."); *State v. Tuttle*, (Fla. 2015) ("Double jeopardy prohibits conviction for two crimes where all of the elements of one crime are subsumed within the elements of the second crime.").

Double jeopardy thus "bars dual convictions for burglary with assault and/or battery and simple battery when it is unclear whether the jury convicted the defendant of burglary with assault or burglary with battery." *Barber v. State*, (1 DCA 2019).

Grimes v. State
3rd D.C.A.
(Jan. 2, 2025)

Continued from page 2)

Concealed Firearm

was no consensual encounter between officers and Sheppard prior to the officer's investigatory stop of Sheppard. Thus, not only had the relevant statute changed, but, unlike with *Mackey*, the universe of information available to the officer to develop a reasonable suspicion of Sheppard was limited to the officer's observations. While the officer observed Sheppard with a concealed weapon in a high crime area, under the revised statute making non-licensure an element of the crime of concealed carry, *Sheppard's mere possession of the concealed weapon did not constitute criminal activity.* See, *Kilburn v. State*, (1DCA 2020) ('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.')."

"Thus, we are compelled to conclude that the officers lacked the requisite reasonable suspicion to conduct the subject investigatory stop. And, because the officer's stop of Sheppard was effectuated without the requisite reasonable suspicion, the trial court should have granted Sheppard's motion to suppress. … We, therefore, vacate Sheppard's conviction and sentence, reverse the trial court's order denying Sheppard's motion to suppress."

Lessons Learned:

The mere presence of a firearm is no longer sufficient. The officer must be able to articulate stop-and-frisk criteria. F.S. 901.151(2) codifies stop and frisk, "Whenever any law enforcement officer of this state encounters any person under circumstances which *reasonably indicate* that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state … the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense."

In sum, the Supreme Court determined that, given the totality of the circumstances (i.e., the officer's observation of Mackey with a concealed weapon in a high crime neighborhood coupled with Mackey's lying to the officer), the officer had reasonable suspicion to conduct an investigatory stop. Thus, the sole basis for the stop was not merely the observation of a concealed firearm.

Sheppard v. State
3rd D.C.A.
(Jan. 8, 2025)