IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: **10-AP-38**
LOWER COURT CASE NO: 48-2010-MM-2281

DEXTER LAMB,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.
_____/

Appeal from the County Court for Orange County, Florida, Faye L. Allen, County Court Judge

Robert Wesley, Public Defender, and Kimberly M. DeVries, Assistant Public Defender, for Appellant

Lawson Lamar, State Attorney, and David H. Margolis, Assistant State Attorney, for Appellee

Before Shea, Adams, and Johnson, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Dexter Lamb (herein "Appellant") appeals the final order of plea and sentence rendered July 1, 2010. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1).

Facts

Appellant was arrested and charged with loitering and prowling. Counsel filed a Motion to Suppress his incriminating "statements, clothing, observations, confessions, written statements, or other evidence obtained as a result of the illegal stop in this case."

On June 25, 2010, the Court conducted a suppression hearing . First, Deputy Bryan Meadows testified as follows: A little after 1:00 a.m. on March 4, 2010, the

Orange County Sheriff's office received a call from an unknown person, stating that a car had pulled up near his residence, and four people got out and started walking around the neighborhood. As the officer pulled into the neighborhood, he noticed four individuals walking along the sidewalk; he got out of his car, asked if he could ask them some questions, and they began walking back toward him. All were wearing dark-colored clothing and gloves and denied having identification. The female suspect said they were walking because she was looking for a friend's house, she was low on gas, and her cell phone was broken. One of the suspects, but not Appellant, had a bulge in his pocket, and the officer asked if he could search for his safety; the suspect agreed, and the search revealed a flashlight, screwdriver, and wire cutter pliers. After the officer gave *Miranda* warnings, Appellant indicated they were looking for "unlocked cars that they could get into and steal from."

On cross-examination, Meadows acknowledged that he did not receive any identifying information regarding the caller. The trial court asked for clarification regarding the timing of the arrival of the backup officers; Meadows was not certain but said they arrived before Appellant told him about looking for unlocked cars.

Appellant called co-defendant Jennifer Nash, who testified as follows: She had recently pled no contest to her charges. She said the other officers arrived before the group was told to sit down and the questioning began. She admitted she and her companions were in the neighborhood "for the cars," but when asked directly if they were there to break into cars, she insisted that she personally was not.

Appellant testified as follows: As the group walked toward the first deputy, other cars approached and one officer told him to sit down or remain where he was. However, on cross-examination, he testified the questioning occurred "like right before" the backup arrived. He denied having identification other than a Bank of America card, and denied that he was wearing gloves.

The Court denied the Motion to Suppress, finding the tip was sufficiently corroborated because the officer saw four persons wearing dark clothing, walking in the neighborhood where the tipster had said, and also finding the loitering and prowling statute gave the officer the right to stop people who might possibly be violating the statute.

On July 1, 2010, Appellant pled no contest; counsel indicated "the State has agreed since it was a stop motion that the motion was dispositive and he's going to reserve his right to appeal the motion to suppress in this case." The Court stated: "It sounds like you're at least reserving the right to appeal the judge's ruling that was done of June 25th of 2010. Just because you reserve it doesn't mean (indiscernible) appeals (indiscernible) behalf." The Court withheld adjudication and imposed a $300 fine plus court costs and fees.

Issues on Appeal

Appellant alleges the Court erred in denying his Motion to Suppress because there were no legal grounds to stop him. He argues the State did not sufficiently prove the officer corroborated the anonymous tip, where only innocent details were provided and no crime was alleged to have occurred, and further argues the testimony elicited from his witness about why the four were in the neighborhood was improper.

Standard of Review

"A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Terry v. State,* 668 So. 2d 954, 958 (Fla. 1996). A motion to suppress presents a mixed question of law and fact. The standard of review for the findings of fact is whether they are supported by competent, substantial evidence; review of the application of the law to the facts is de novo. *Ornelas v. United States,* 517 U.S. 690 (1996).

The State argues Appellant did not successfully reserve his right to appeal, citing *M.N. v. State,* 16 So. 3d 280 (Fla. 2d DCA 2009). In *M.N.*, the court accepted the plea, noting that M.N. was reserving the right to appeal the denial of a motion to continue, but did not expressly find the motion to be dispositive. *See also D.J.P. v. State,* 67 So. 3d 1077 (Fla. 2d DCA 2011) (Villanti, J., specially concurring) (D.J.P.'s failure to obtain a definitive ruling on the dispositiveness of his motion from the trial court precludes review of the denial of that motion on appeal).

In his Reply brief, Appellant cites *Lamb v. State*, 55 So. 3d 751, 753 (Fla. 2d DCA 2011) (no relation to Appellant): "Because the trial court gave Lamb the impression that she was preserving her right to appeal the ruling on her motion to suppress, we conclude that a finding of dispositiveness can be inferred from the record." In the instant case, the State was silent and the Court accepted the representation that the parties had agreed the motion was dispositive.

This Court finds the issue was sufficiently, if inartfully, preserved for appeal, or in the alternative, dispositiveness can be inferred from the record.

Anonymous Tip

Appellant alleges there were no legal grounds to stop him. In support, he argues there was no evidence that the anonymous tipster became a citizen informant by revealing a name or that the actions the tipster reported "were anything illegal."

A decision to arrest for loitering and prowling may not be based on an anonymous tip. *Simms v. State*, 51 So. 3d 1264, 1268 (Fla. 2d DCA 2011). "At most, it may have justified an attempted consensual encounter. Moreover, because loitering and prowling is a misdemeanor, 'only a police officer's own observations may be considered in determining whether probable cause exist[s] to make a warrantless arrest.'" *Id*.; *Freeman v. State*, 617 So. 2d 432, 433 (Fla. 4th DCA 1993). Therefore, the trial court erred in denying the motion to suppress based on a finding that the anonymous tip was sufficiently corroborated.

Officer's Opportunity to Dispel Alarm Per the Statute

The trial court denied the Motion to Suppress based in part on a finding that the

deputy's alarm was not dispelled and therefore, the stop was proper. Appellant alleges the trial court should have found there was "no reasonable suspicion to dispel or justify the stop, given all the circumstances" and should have suppressed the stop because walking through the neighborhood at 1 a.m. was not suspicious.

One suspected of loitering and prowling must be given an opportunity "to dispel any alarm or immediate concern" by identifying himself and explaining his presence and conduct. §856.021(2), Fla. Stat. In evaluating whether there was a reasonable suspicion to justify the stop and the resulting search, the court must consider the totality of the circumstances "as interpreted in light of the officer's knowledge." *Johnson v. State*, 696 So. 2d 1271, 1273 (Fla. 5th DCA 1997); *quoting United States v. Cortez*, 449 U.S. 411, 417 (1981). An officer must be able to articulate facts demonstrating that the suspect's "conduct posed a threat to public safety or an imminent breach of the peace." *G.G. v. State*, 903 So. 2d 1031, 1033 (Fla. 4th DCA 2005).

In *Bowser v. State*, 937 So. 2d 1270 (Fla. 2d DCA 2006), the Second District Court of Appeal reversed the revocation of probation, where Bowser allegedly committed a violation by loitering and prowling. Bowser and his companions were walking down the street at 2 a.m., looking into unoccupied vehicles. He told an officer he was on his way home, but when he later identified home as being in the opposite direction, the officer did not believe him. However, the Second District held:

> The record reflects no evidence of the required *imminent* threat to the peace, public safety, or property. The possibly suspicious circumstances of four people looking into cars in a dark parking lot was not sufficient to raise justifiable alarm of an immediate threat.

Id. at 1271. (emphasis in original) Therefore, the appellate court found that the State had failed to establish by a preponderance of the evidence that Bowser was loitering and prowling, as required to support the finding that he had violated a condition of probation.

In *Simms v. State*, 51 So. 3d 1264 (Fla. 2d DCA 2011), the Second District reversed an order granting a motion to suppress. Officers responded to a call that someone was trying to open car doors and saw Simms walking between vehicles in the area in question. He claimed to have been visiting a friend, but would not divulge the friend's name or address, and was arrested for loitering and prowling. The appellate court held there was no record that he was "crouching" between the cars and even if he was, the record did not support a conclusion that the officers had "a reasonable concern for imminent threat to persons or property." *Id.* at 1267.

In the instant case, the officer was justified in questioning Appellant and his companions. However, although they lacked identification, they did not flee or refuse to identify themselves. The female in the group claimed they were looking for a friend's house, which the officer did not find to be very credible, but the failure to provide a sufficient explanation for his or her presence is not an element of the crime of loitering and prowling. *T.W. v. State*, 675 So. 2d 1018, 1019 (Fla. 2d DCA 1996); *Simms*, 51 So. 3d at 1267. Based on *G.G.*, *Bowser*, *Simms*, and *T.W.*, it appears the facts did not establish an imminent threat to the peace, public safety, or property, and the trial court erred in finding the officer's suspicion was not dispelled.

The fact the officer discovered a flashlight, screwdriver, and wire cutter pliers in the pocket of one of Appellant's companions does not change this conclusion.

"Possession of burglary tools may support a suspicion of imminent criminal activity after the fact, but the offense of loitering and prowling must be completed prior to any police action." *D.S.D. v. State*, 997 So. 2d 1191, 1194 (Fla. 5th DCA 2008).

Objectionable State Cross-Examination

Defense counsel objected when the State cross-examined defense witness Jennifer Nash about why the group was in the neighborhood that night. The trial court overruled the objection, and Nash answered "for the cars," although she insisted that she personally was not there to break into cars. Appellant argues that Nash's intent was irrelevant. He contends: "The test is whether the deputy had a reasonable suspicion at the time of the stop, detention, search, etc. based on the facts at that point. Again, Ms. Nash was not asked at the hearing what she told the deputy; she was asked why she was there, a fact this deputy may never have truly known."

There are two elements to the crime of loitering and prowling: (1) the accused must loiter or prowl in a place, at a time, or in a manner not usual for law-abiding individuals, (2) under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. *Hunter v. State*, 32 So. 3d 170 (Fla. 4th DCA 2010); §856.021(1), Fla. Stat. Unlawful intent is not an element of the offense. *Sult v. State*, 906 So. 2d 1013, (Fla. 2005), *citing Wyche v. State*, 619 So. 2d 231 234-236 (Fla. 1993). Therefore, it appears this line of questioning was irrelevant.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that trial court's denial of the Judgment and Sentence are hereby REVERSED, and this case is REMANDED for further proceedings.

DONE AND ORDERED on this __2nd_____ day of October 2012.

_/S/_____
TIM SHEA
Circuit Court Judge

_/S/_____
GAIL A. ADAMS
Circuit Court Judge

_/S/_____
ANTHONY H. JOHNSON
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Final Order Reversing Trial Court has been provided this ___2nd____ day of October 2012 to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; and the Office of the Public Defender, 435 North Orange Avenue, Suite 400, Orlando, Florida 32801.

_/S/_____
Judicial Assistant