

# 13-09: Frisk of a Person Who is Suspected of Carrying a Concealed Firearm

Case: Mackey v. State, 38 Fla. L. Weekly S724 (2013)

Date: October 17, 2013

Subject: Frisk of a Person Who is Suspected of Carrying a Concealed Firearm

**FACTS:** An officer was driving through a high crime area during daytime hours. The officer observed the suspect, later identified as Mackey, standing nearby. As the officer slowly drove by, he noticed a bulge in Mackey's pocket. The officer then observed a handle protruding from the bulge, and determined that the bulge was a firearm. Although the officer could only see the handle, the officer made this determination based on his training and experience. The officer exited his vehicle and began conversing with Mackey. During the conversation, the officer asked Mackey whether Mackey "had anything on him"? Mackey replied, "No." The officer then asked Mackey if he would consent to a pat-down. Without waiting for a reply, the officer performed the pat-down. During the pat-down, the officer found and removed a gun from Mackey's pocket. The officer then asked Mackey whether he had a concealed weapons permit. When Mackey said "no," the officer arrested him for Carrying a Concealed Firearm. After the arrest, the State determined that Mackey had been previously convicted of Sale and Delivery of Cocaine. As a result, Mackey was charged with both Carrying a Concealed Firearm and Carrying a Firearm by a Convicted Felon.

Mackey filed a motion to suppress. In his motion, Mackey argued that the officer frisked him before acquiring a reasonable suspicion that Mackey had committed a crime. He further argued that the unlawful frisk should result in suppression of the firearm and any admissions he made after the frisk. The trial court denied the motion, finding that the officer had a reasonable suspicion to frisk. The defendant appealed to the Third District Court of Appeals, which affirmed the denial of the motion to suppress. Mackey then sought review in the Florida Supreme Court.

**RULING:** Simply seeing a partially concealed firearm does not, standing alone, justify a frisk since many people may lawfully possess a concealed firearm. However, the frisk in this case was justified because there were additional factors. (See discussion.)

**DISCUSSION:** In Florida, carrying a concealed firearm is a felony; however, carrying a concealed firearm is legal if the person has a proper permit. The defendant argued that the officer frisked him without having any reason to believe that the defendant lacked a concealed weapons permit. According to the defendant, the officer should have confirmed that the defendant did not have a concealed weapons permit before patting him down. The Florida Supreme Court rejected this argument. The Court explained that a frisk does not require the officer to prove, in advance, that the defendant committed a crime. Instead, the officer simply needs a reasonable suspicion that the person was unlawfully carrying a concealed firearm. In this case, the officer observed the defendant carrying a gun in a partially concealed manner. However, because many people can lawfully carry concealed firearms, additional observations were needed before the officer could lawfully perform the frisk. In this case, (1) Mackey was in a high crime area, and (2) he lied to the officer when the officer asked if he was carrying anything. These additional facts created a reasonable suspicion that Mackey, unlike many citizens, may have been carrying unlawfully. As a result, the frisk was justified.

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Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their activities.