County Criminal Court: CRIMINAL PROCEDURE—Dismissal. Dismissal was improper where the State demonstrated the knife had uncommon features and was not a "common pocketknife" excluded by definition from § 790.01(1), Fla. Stat., as a matter of law. Reversed and remanded. *State of Florida v. Bradley Dean*, No. 13-CF-007424-WS (Fla. 6th Cir. App. Ct. December 3, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

BRADLEY DEAN,
Appellee.
_____/

UCN: 512013CF007424A000WS
Appeal No: CRC1307424CFAWS
L.T. No: 13-5121-MM-WS

On appeal from County Court,

Honorable Anne Wansboro,

Bryan K. Doeg, Esq.,
Assistant State Attorney,
for Appellant,

Michael Tewell, Esq.,
Assistant Public Defender,
for Appellee.

ORDER AND OPINION

We find it was error to dismiss charges against Appellee for carrying a concealed weapon in violation of § 790.01(1), Fla. Stat. The State demonstrated prima facie evidence sufficient to withstand a motion to dismiss that the knife found in Appellee's possession was not a "common pocketknife," excluded from the definition of a weapon provided in the statute, as a matter of law. The cause is therefore reversed and remanded for further proceedings.

STATEMENT OF THE CASE AND FACTS

On August 22, 2013, Appellant, State of Florida, charged Appellee, Bradley Dean, with first degree misdemeanor for carrying a concealed weapon in violation of § 790.01(1), Fla. Stat. On October 9, 2013, Appellee filed a motion to dismiss pursuant to Fla. R. Crim. P. 3.190(c)(4), which permits a motion to dismiss be filed before or at the time of arraignment, alleging the existence of "no material disputed facts and the undisputed facts do not establish a prima facie case." The Rule further provides that the court may permit a defendant to plead and later file a motion to dismiss at a time set by the court. The Rule requires that other than "objections based on fundamental grounds, every ground for a motion to dismiss that is not presented by a motion" within the time provided by the Rule shall be considered waived. *Id.* The trial court granted the motion to dismiss, finding that as a matter of law there was no dispute as to whether the knife carried by Appellee was a "common pocketknife," and therefore exempt from the statute's application by definition. The State now appeals, contending it was error to dismiss the charge against Appellee because the State demonstrated a prima facie case and provided sufficient evidence that the knife was not a "common pocketknife" to withstand a motion to dismiss. We agree.

STANDARD OF REVIEW

A motion to dismiss may only be granted if there are no disputed material facts and the undisputed facts do not establish a prima facie case against the defendant. *State v. Holland*, 975 So. 2d 595 (Fla. 2d DCA 2008). All facts and inferences are to be construed in favor of the non-moving party, and this Court's standard of review for an order granting a motion pursuant to Fla. R. Crim. P. 3.190(c)(4) is de novo. *Id.*

LAW AND ANALYSIS

Appellant maintains the trial court erred by granting the motion to dismiss because Appellee presented insufficient grounds to support dismissal, and because Appellant's written response to the motion and additional evidence admitted by stipulation of the parties was sufficient to demonstrate the unusual nature and function

of the knife that was in Appellee's possession, which demonstrated prima facie evidence to support the charge.

Appellant contends the knife in question is very unusual and designed to be highly concealable, and therefore is not a "common pocketknife" exempted from the statute's application. During the hearing on the motion, two pieces of evidence were entered by stipulation of the parties: a "BOLO" issued by Deputy Thomas, the arresting officer, warning other deputies of the existence of the knife found in Appellee's possession, because of its unusual ability to be concealed, and a "YouTube" video entitled "Iaian Sinclair, card sharp knife skills video review."[1]

The findings of fact of the trial court included that Appellee was charged with violation of § 790.01(1), Fla. Stat., that Appellee was in possession of a knife, that the knife was less than four inches long and folds into the shape of a credit card and can fit in a billfold, that the blade of the knife folds into a handle, that the knife requires four steps before the blade is placed in position, that the knife does not have a hilt guard, and that the knife was not used in a threatening manner. The court found that the knife was not a switchblade. The court stated that it could not determine from the evidence presented whether the knife has a single or double edged blade, whether the knife had a notched "combat style" grip, or whether the knife was in an open or locked position when carried by Appellee.

Appellant alleges error based on the unusual nature of the knife and its design, which Appellant claims is intended to make the knife highly concealable. Further, that the arresting officer was so alarmed by the nature of the knife that he distributed photographs of the knife via "BOLO" to warn other deputies of its existence. Appellant claims that because the statute does not provide a specific definition, courts must use the usual dictionary definition of "common" and "pocketknife" to determine whether a specific knife falls under the exception provided in § 790.001(13), Fla. Stat., that common pocketknives, plastic knives, and blunt-bladed table knives are not considered weapons for purposes of the statute. *See L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997)

[1] The video may be found at the following link: http://www.youtube.com/watch?v=CiPeuWzQ1Pk.

(inferring the Legislature to have intended the term "common pocketknife" to mean "[a] type of knife occurring frequently in the community which has a blade that folds into the handle and that can be carried in one's pocket"). Webster's dictionary defines "common" as "occurring or appearing frequently," or "not rare." Appellant claims the knife in question cannot be considered a "common pocketknife" and therefore it was a question for the jury as to whether the knife could be considered a weapon, and it was error to grant the motion to dismiss. We agree. Although the knife may be a pocketknife, it cannot be said that as a matter of law the knife meets the definition of "common pocketknife." Therefore it was error to dismiss the charges at this stage in the proceedings.

Appellant claims the opinions relied on in Appellee's motion to dismiss from the 17th Judicial Circuit Court are not binding precedent on the Sixth Judicial Circuit, and that it was error to rely on these opinions rather than authority from the District Courts of Appeal and the Florida Supreme Court, which Appellant claims supports its position in this matter. See *L.B. v. State*, 700 So. 2d 370, 372-73 (Fla. 1997) (holding that *"*a pocketknife with a blade of four inches in length or less was a common pocketknife," absent any additional unusual features); *K.H. v. State*, 29 So. 3d 426 (Fla. 5th DCA 2010) (affirming the lower court's denial of a motion to dismiss, based on the finding that the knife had a switchblade function which was not usual for a common or ordinary pocketknife, but was characteristic of a knife intended for use as a weapon); *J.R.P. v. State*, 979 So. 2d 1178, 1179 (Fla. 3d DCA 2008) (holding a pocketknife found in an open position or that has characteristics distinctive of a weapon, "such as a hilt guard or notched combat-style grip" would not be considered a common pocketknife); *R.L.S. v. State*, 732 So. 2d 39 (Fla. 2d DCA 1999) (remanding case to the lower court to determine whether the exception applied, applying the reasoning in *L.B. v. State*, *supra*).

Based on the record in this case, and viewing the matter in the light most favorable to the State, we find that due to the uncommon features of the knife it is not a common pocketknife as a matter of law, and it was error to dismiss the cause at this stage in the proceedings. Appellant further claims that the trial court's decision was

contrary to *State v. Ortiz*, 504 So. 2d 39, 40 (Fla. 2d DCA 1987), in which the Court held that the question of "whether a knife is a 'common pocketknife' ordinarily involves a factual determination which may not be made by a trial court in proceedings under rule 3.190(c)(4)." *See State v. Fry*, 422 So. 2d 78, 79 (Fla. 2d DCA 1982) ("it is not the trial court's function to make factual determinations" when considering a motion pursuant to Rule 3.190(c)(4), or "to determine whether the state's evidence excludes all reasonable hypotheses of innocence").

Appellee responds that the trial court correctly found there to be no material issue of fact as to whether the knife in question was a common pocketknife, and therefore correctly granted the motion to dismiss. Appellee relied on two cases as authority for the motion to dismiss: *State v. Granato*, Case No. 05-57AC10A (Broward Cty. 2006), and *State v. Fitchett*, Case No. 98-5354MO10A (Broward Cty. 1998), neither of which are binding on this Court. Appellee maintains that the Second District Court's Opinion in *Ortiz*, 504 So. 2d 39, is no longer good law because the Florida Supreme Court provided a definition for "common pocketknife" in *L.B. v. State*, *supra*, and that the *Ortiz* opinion has been rendered "obsolete" by the Court's opinion in *L.B.* Appellee further relies on the fact that the Supreme Court in *L.B.* relied on an Attorney General's Opinion stating that a pocketknife with a blade of 4 inches or less was a common pocketknife. *See L.B. v. State*, 700 So. 2d 370, 373 (Fla. 1997). However, the opinion in *L.B.* specifically states that the Court refrains from issuing any "bright line" rule as to whether pocketknives in excess of 4 inches would not fall within the exemption. *See id.* n.4. And, Opinions of the Attorney General are not binding precedent on the courts. *See Bunkley v. State*, 882 So. 2d 890 (Fla. 2004). In *Bunkley*, the Florida Supreme Court held that the opinion "in *L.B.* recognized the rule that whether a knife is a 'common pocketknife' is a jury question, and stated that in most cases the answer will be obvious to fact-finders." *Id.* at 895. Although the Court held in *Bunkley* that "[t]he decisional law of Florida was clear in 1989 that the determination of whether Bunkley's knife was a dangerous weapon or an exempted common pocketknife was ordinarily a question of fact for a properly instructed jury, not a pure question of law," the Court was unclear as to whether the opinion in *L.B.* rendered a change in that law. *See id.*

We do not hold that the law in Florida requires that the question of whether a knife meets the definition of a “common pocketknife” for purposes of the statute must always be a question for the jury. However, in the case at hand, the record demonstrates that State presented evidence sufficient to withstand a motion to dismiss, and that the knife in this case, despite having a blade that is less than four inches long, has uncommon features and is not a “common pocketknife” as a matter of law. We therefore reverse and remand the cause for further proceedings consistent with this opinion.

CONCLUSION

The knife in this case does not meet the definition of a common pocketknife as a matter of law. Therefore it was error to dismiss the cause at this stage in the proceedings. We reverse the order of the trial court and remand the cause for further proceedings consistent with this opinion.

It is ORDERED AND ADJUDGED that the order of the trial court is REVERSED and the cause is REMANDED for further proceedings consistent with this opinion.

Done and ordered in Chambers at New Port Richey, Pasco County, Florida this 3rd day of December, 2014.

Original order entered on December 3, 2014, by Circuit Judges Stanley R. Mills, Linda Babb and Daniel D. Diskey.