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 PINELLAS COUNTY

ELTON GARCIA,
Appellant,

v.

Appeal No. CRC 10-00046 APANO
UCN ~~522010MM000614XXXXNO~~

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed _____.

Appeal from a judgment and sentence
entered by the Pinellas County Court,
County Judge Paul A. Levine

Charles E. Lykes, Jr., Esquire
Attorney for Appellant

Joseph T. Murray III, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Elton Garcia's, appeal from a conviction, after a jury trial, of Loitering or Prowling, a second degree misdemeanor, in violation of § 856.021 Fla. Stat. (1997). After review of the record and the briefs, this Court affirms the judgment and sentence.

Factual Background and Trial Court Proceedings

At approximately 10 p.m. on February 11, 2010, the Appellant, Elton Garcia, was observed by a resident in an apartment complex checking the doors of automobiles parked in the parking lot; both driver and passenger side, to see if they were unlocked. Mr. Garcia was then seen banging on the framework of a screen-enclosed porch of an apartment. It looked to the resident as if Mr. Garcia was attempting to break-in to the apartment. The resident confronted Mr. Garcia and told him he did not belong there, that he should leave or the resident would call police. Mr. Garcia turned and walked toward the resident "yelling obscenities." The resident told Mr. Garcia three times to "back off." Mr. Garcia ignored the warnings and continued approaching the resident. When Mr. Garcia got within eight to ten feet from the resident, Mr. Garcia reached into his pocket; in response the resident drew a handgun, for which he had a concealed weapons permit, and again directed Mr. Garcia to leave. Mr. Garcia continued to walk toward the resident; walked around him and left the complex. The resident called 911. Police responded and, shortly thereafter, a canine unit located Mr. Garcia approximately five hundred feet away on the ground between two cars, each of which was parked with their bumpers abutting a large shrub. The resident was promptly brought to the area and identified Mr. Garcia.

Officer Michael Morea of the Clearwater Police Department initially attempted to talk with Mr. Garcia who was standing outside a police car; Mr. Garcia was "very hostile, uncooperative, cursing, so on and so forth." Mr. Garcia, among other things, told the officer; "I haven't done anything, you assh***," "Why are you even talking to me," "Why are you bothering me," "Why do I need to listen to you." Officer Morea felt his

initial attempt to talk with Mr. Garcia "wasn't getting anywhere" so he had him sit in the back seat of the police car while the officer continued his investigation.

Shortly thereafter Officer Morea returned to Mr. Garcia read him his *Miranda* warnings. Officer Morea asked Mr. Garcia what he was doing in the gated apartment complex. Mr. Garcia responded that it was a free country. Officer Morea also asked Mr. Garcia, why he was in the area, did he live at the apartment where he was banging on the screen enclosure, was he visiting a friend, and similar questions. Mr. Garcia did admit that he did not live in the apartment but did not provide responsive answers to the questions. Officer Morea told Mr. Garcia there was an allegation that he was attempting to break into an apartment. In response Mr. Garcia starting laughing and told Officer Morea that he was going to watch him fry in court for stopping him illegally. Officer Morea then advised Mr. Garcia that he was placing him under arrest for attempted burglary. Mr. Garcia responded, "[d]o I look like a burglar to you? You're such an idiot." Mr. Garcia continued making other hostile remarks to the officer.

On March 12, 2010, a Misdemeanor Information was filed charging Mr. Garcia with Loitering and Prowling. A jury trial was conducted. At the conclusion of the State's case, the Appellant moved for judgment of acquittal arguing that his initial detention when the officers found him on the ground between the two vehicles constituted an arrest prior to him being given an opportunity to explain himself as required by the Loitering and Prowling statute. That motion was denied. The jury found Mr. Garcia guilty of the charged offense.

Standard of Review

In this appeal, Appellant argues his motion for judgment of acquittal should have been granted. In reviewing a motion for judgment of acquittal, a de novo standard of review applies. *Pagan v. State,* 830 So.2d 792, 803 (Fla.2002), *cert. denied,* 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed.2d 137 (2003); *State v. Fagan,* 857 So2d 320 (Fla. 2nd DCA 2003).

Analysis

Appellant argued to the trial court and in this appeal that he was arrested as soon as law enforcement found him on the ground between the two vehicles. That arrest, he argues, was prior to being afforded an opportunity to explain himself as required by the Loitering and Prowling statute and his motion for judgment of acquittal should have been granted. In addition in this appeal he argues the officers had not seen the misdemeanor offense of Loitering or Prowling occur, therefore any arrest for that charge would be illegal.

There are several difficulties with Mr. Garcia's argument. The most significant of which is the argument ignores the distinction between a *detention* and an *arrest.* Mr. Garcia's initial detention was not an *arrest.*

> An arrest includes four elements: (1) A purpose or intention to effect an arrest under a real or pretended authority; (2)[a]n actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested; (3)[a] communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; and (4)[a]n understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him.

Melton v. State, 75 So.2d 291, 294 (Fla.1954); *Bravo v. State,* 963 So.2d 370, 374 - 375 (Fla.2nd DCA 2007). Appellant was not *arrested* until Officer Morea advised him

that he was placing him under arrest for attempted burglary. Prior to that Mr. Garcia was being detained while the police conducted their initial investigation. During that initial investigation the officer asked Mr. Garcia repeated questions about his presence in the apartment complex. Mr. Garcia responded to the officer with a series of hostile, confrontational, non-responsive and inappropriate comments and behavior. Mr. Garcia was given an extensive opportunity to explain himself prior to his arrest but repeatedly failed or refused to do so. Given the record in this case, Mr. Garcia certainly has no legitimate complaint. Moreover, Appellant was not arrested for Loitering or Prowling.

The Arrest for Attempted Burglary

This record before this court establishes that Officer Morea had sufficient probable cause to arrest the Mr. Garcia for attempted burglary.

> "'Probable cause is a fluid concept that deals in probabilities, which include common sense conclusions by law enforcement officers.' (citation omitted). Probable cause is not the same standard as beyond a reasonable doubt, and 'the facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based.'"

State v. Catt, 839 So2d 757, 759 (Fla. 2nd DCA 2003).

> "The existence of probable cause justifying a warrantless arrest depends on whether, when the arrest was made, 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [person arrested] had committed or was committing an offense.' *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). Determining whether the probable-cause standard is met requires an evaluation of 'the totality of the circumstances.' *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)."

Jenkins v. State, 924 So2d 20, 24 (Fla. 2nd DCA 2006). Officer Morea's arrest of Mr. Garcia for attempted burglary was lawful.

The Motion for Judgment of Acquittal

In moving for a judgment of acquittal, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." *Beasley v. State,* 774 So.2d 649, 657 (Fla. 2000). Courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. *Reynolds v. State,* 934 So.2d 1128, 1145 (Fla. 2006). In the present case, the motion for judgment of acquittal was properly denied.

Conclusion

Based upon the foregoing, this court finds the trial court properly denied the motion for judgment of acquittal. The judgment and sentence of the trial court should be affirmed.

We affirm the judgment and sentence.

IT IS THEREFORE ORDERED that the Judgment and Sentence of the trial court are affirmed.

ORDERED at Clearwater, Florida this 28 day of April, 2011.

cc: Honorable Judge Paul A. Levine
Charles E. Lykes, Jr., Esquire
Office of the State Attorney