

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**

**ELIZABETH LOPEZ,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**UCN: 512017AP000040APAXWS
Appeal No.: 17-AP-40
L.T. No.: 16-MM-3766**

On appeal from Pasco County Court,
Honorable Frank Grey,

Thomas Matthew McLaughlin, Esq.,
for Appellant,

Tyler Fleming, Esq.,
Assistant State Attorney,
for Appellee.

ORDER AND OPINION

Appellant raises five arguments on appeal. For the reasons detailed below, the trial court erred when it denied Appellant's third motion for judgment of acquittal because law enforcement was not engaged in a legal duty. Because this error requires reversing and vacating Appellant's conviction, the remaining arguments are moot and the Court need not address them.

STATEMENT OF THE CASE AND FACTS

On May 25, 2018, the Appellant was charged by Information with Obstructing or Resisting an Officer Without Violence, a first-degree misdemeanor, in violation of section 843.02, Florida Statutes (2015). The Information alleged that the Appellant ignored lawful commands given by Pasco Sheriff Deputy Michael Young while the deputy was executing a legal duty.

In the light most favorable to the State, on April 12, 2018, law enforcement was called by Jessica Drew, the Appellant's daughter, for a clothing assist at a house leased by the Appellant and the Appellant's boyfriend Douglas Berube. Ms. Drew, Ms. Drew's boyfriend, and her children were tenants of the Appellant's house and had been kicked out of the house without legal process and without being permitted to remove all of her family belongings. Many of the remaining family belongings were eventually removed from the house by the Appellant and Mr. Berube. Subsequently, pursuant to Ms. Drew's consent, law enforcement and Ms. Drew gained entry to the house over the verbal objections of the Appellant and Mr. Berube as well as Mr. Berube's attempt to close the front door. The purpose of entry was to conduct a final walkthrough to make sure none of Ms. Drew's family belongings remained inside the house and the garage.¹

Deputy Young remained with the Appellant in the kitchen while the final walkthrough was conducted. The deputy told the Appellant not to go into the garage. As Ms. Drew and the other deputies walked towards the garage, "some words were said" and the Appellant became very upset and tried to go towards the garage despite Deputy Young's instruction to the contrary. Deputy Young put his arm out in front of the Appellant to prevent her from going to the garage, whereupon she "put her hands on me, pushed my arm out of the way, and then I told her - - I stated to her that - - there was multiple times I told you not to touch us or touch me and then I told her to get on the ground." At this point, the Appellant was detained by Deputy Young. The Appellant resisted the deputy's attempt to detain her and he had to use force to bring her down. The Appellant then had to be told multiple times to put her hands behind her back.

Deputy Young testified that a clothing or property assist is a situation where law enforcement "goes with people so that they can retrieve property from a residence that they are either moving out of or still living at, if there's any injunctions or other issues, so that they can get their stuff back so that confrontation between parties can be avoided and peace can be kept." The deputy testified on cross-examination that the clothing assist in this case started as a civil dispute.

¹ During trial, the parties disagreed as to whether Ms. Drew was a tenant of the house on April 12th and whether law enforcement had valid consent to enter the house to conduct the final walkthrough during the clothing assist. However, these contested issues are not pertinent to the Court's resolution of this appeal.

On October 18, 2017, the jury found the Appellant guilty of the crime as charged. The trial court adjudicated her guilty and sentenced her to 12-months' probation. On October 27, 2017, the Appellant timely-filed a written third motion for judgment of acquittal. See Fla. R. Crim. P. 3.380(c). The State did not file a written response to the motion. A hearing on the motion was held on November 6, 2017 and November 13, 2017. During the second day of the hearing, the trial court found that law enforcement was executing a lawful duty. Later that day, the trial court issued a written order denying the motion. That same day, the Appellant filed a Notice of Appeal.

STANDARD OF REVIEW

The Court reviews a trial court's order on a motion for judgment of acquittal under a *de novo* standard of review. *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). "The purpose of a motion for judgment of acquittal is to challenge the legal sufficiency of the evidence." *Anderson v. State*, 504 So. 2d 1270, 1271 (Fla. 1st DCA 1986). If "the State has brought forth competent evidence to support every element of the crime, a judgment of acquittal is not proper." *Id.* "When a defendant moves for judgment of acquittal, he admits all facts in evidence adduced and every conclusion favorable to the State reasonably inferred therefrom." *Id.*

LAW AND ANALYSIS

Appellant argues that the trial court erred when it denied her third motion for judgment of acquittal because law enforcement was not engaged in the performance of a legal duty. Appellant argues that a clothing assist is not a legal duty and therefore law enforcement was merely "on the job."

The State responds that law enforcement was engaged in a legal duty because Ms. Drew had been illegally evicted from the house due to the Appellant's failure to comply with sections 82.035 and 83.57, Florida Statutes. Therefore, the State argues, Ms. Drew was still a legal tenant of the house and law enforcement had a legal duty under *Georgia v. Randolph*, 547 U.S. 103 (2006) to assist her in obtaining her belongings.

Section 843.02, Florida Statutes (2015), states in relevant part: "Whoever shall resist, obstruct, or oppose any officer . . . in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree . . ."

To be convicted, law enforcement must be engaged in a “legal duty,” not merely “on the job.” *McClain v. State*, 202 So. 3d 140, 142-43 (Fla. 2d DCA 2016) (citing *A.R. v. State*, 127 So. 3d 650, 652 (Fla. 4th DCA 2013)). Legal duties include serving process, legally detaining a person, or asking for assistance in an emergency situation. *A.R.*, 127 So. 3d at 653. A legal duty has been alternatively described as conduct consistent with the Fourth Amendment and any other relevant requirements of law. *M.R. v. State*, 198 So. 3d 1023, 1025 (Fla. 2d DCA 2016). While the list in *A.R.* is not exhaustive, it is illustrative of the difference between a legal duty and merely being on the job. See e.g., *S.G. v. State*, 43 Fla. L. Weekly D1656 (Fla. 1st DCA 2018) (State argued that the officer’s legal duty arose from section 985.101(1)(d), Florida Statutes, providing that a child may be taken into custody by law enforcement when the officer has probable cause to believe that the child is in violation of the conditions of probation); *M.M. v. State*, 674 So. 2d 883, 884 (Fla. 2d DCA 1996) (affirming conviction where law enforcement was arresting several third parties and the defendant interrupted that process by approaching the officers from the rear and yelling profanities).

This Court can find no case law addressing whether a “property assist” or a “clothing assist” meets the definition of a legal duty under section 843.02. However, existing section 843.02 case law is instructive. Deputy Young testified that a property or clothing assist is a matter wherein law enforcement helps one person retrieve property from the home of another person so as to prevent confrontation between them. Therefore, this was not a search and seizure under the Fourth Amendment, legal process was not being served, and there was neither testimony nor argument that this was an emergency situation. Finally, there is no section of the Florida Statutes, sections 82.035 and 83.57 included, nor any Florida case law that imposes upon law enforcement a legal duty to conduct clothing or property assists. Deputy Young himself testified that the clothing assist in this case arose from a civil dispute between the Appellant and Ms. Drew.

Randolph does not support the State’s argument. While the dicta² from the Supreme Court’s opinion cited by the State addresses law enforcement’s entry into a

² This portion of the *Randolph* opinion is dicta because it was not necessary to the holding or resolution of the case. In *Randolph*, the legal question before the Supreme Court was whether a co-tenant of a house could consent to a search for drugs over the objection of another co-tenant. *Id.* at 106.

residence to assist a tenant in recovering property, it neither expressly nor impliedly states that conducting a property or clothing assist is a "legal duty" of law enforcement. It states only that law enforcement does not commit a tort by entering a house for a property assist. *Randolph*, 547 U.S. at 118.

Because law enforcement was not performing a legal duty within the meaning of section 843.02 by conducting a clothing assist, Deputy Young was merely on the job within the meaning of the case law. The trial court should have granted the Appellant's third motion for judgment of acquittal on that basis.

CONCLUSION

Because law enforcement was not engaged in a legal duty, the trial court erred in denying the Appellant's third motion for judgment of acquittal. Appellant's conviction and sentence must be reversed.

It is therefore, ORDERED and ADJUDGED that the judgment and sentence is hereby REVERSED, and the cause REMANDED for discharge.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ____ day of _____, 2018.

Original Order entered on September 13, 2018, by Circuit Judges Linda Babb, Susan G. Barthel, and Daniel D. Diskey.

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