

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

LARRY L. MADISON

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

Appeal from the County Court
for Orange County, Florida
Maureen A. Bell, County Court Judge

Larry L. Madison, *pro se*
Appellant

Jeffrey Ashton, State Attorney
and Carol Levin Reiss, Assistant State Attorney
for Appellee.

Before LeBLANC, MYERS, S. KEST, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant seeks review of his conviction on two counts of carrying a concealed weapon and one count of resisting an officer without violence. He was represented by counsel when he entered no contest pleas to these charges on April 21, 2011. Counsel did not file an appeal. Appellant's *pro se* petition for belated appeal was granted.

A defendant is entitled to appeal a no contest plea only under the grounds listed in Florida Rule of Appellate Procedure 9.140(2). Appellant did not preserve any issues for appeal under this rule. Instead, he alleges that he has been convicted of non-existent crimes and thus the trial court committed fundamental error. The failure to preserve an issue for appeal does not divest

the appellate court of jurisdiction to review a claim of fundamental error. *State v. Jefferson*, 758 So. 2d 661, 666 (Fla. 2000).

Appellant challenges the underlying factual basis for his plea. He asserts that the kitchen knife and the CO2 air gun he allegedly carried did not legally qualify as weapons and thus he could not be convicted of carrying concealed weapons. During the plea colloquy, the trial court stated that it had read the charging documents and found a factual basis for the plea. This was adequate to put the facts on the record to support the entry of the plea. *State v. Sion*, 942 So. 2d 934, 937 (Fla. 3d DCA 2006). The arrest affidavit stated that a paring knife and a CO2 gun were found concealed on Appellant. The information, count (1), alleged that Appellant carried a concealed weapon: “to wit, a knife” and count (2) alleged that Appellant carried a concealed weapon, “to wit: a CO2 gun.”

It is a question of fact for a jury to determine whether any particular item fits the statutory definition of a weapon, depending upon its characteristics and use. *Dale v. State*, 703 So. 2d 1045, 1047 (Fla. 1997); *State v. Walthour*, 876 So. 2d 594, 597 (Fla. 5th DCA 2004). It cannot be said as a matter of law based on the charging documents alone that the kitchen knife and CO2 gun allegedly carried by Appellant were not weapons. Juries have found kitchen knives and air guns to be weapons. *Brooks v. State*, 726 So. 2d 341, 342 (Fla. 5th DCA 1999) (kitchen knife as deadly weapon); *Miller v. State*, 421 So. 2d 746, 747 (Fla. 4th DCA 1982) (knife as a dirk); *Goodwin v. State*, 68 So. 3d 309, 309 (Fla. 2d DCA 2011) (BB gun as deadly weapon). *Dale*, 703 So. 2d at 1047 (Fla. 1997) (BB gun as deadly weapon). Also, charging documents that allege possession of a knife and a BB pellet gun, respectively, are legally sufficient to withstand pre-trial motions to dismiss since whether these items are weapons under the facts of the case would be a question for the jury. *Clark v. State*, 993 So. 2d 1136 (Fla. 5th DCA 2008); *State v. Jeffers*,

490 So. 2d 968 (Fla. 5th DCA 1986). By alleging that Appellant carried concealed weapons, to wit, a knife and a CO2 gun, the State sufficiently alleged crimes to which Appellant could either choose to enter a plea or to proceed to trial challenging whether the items were concealed weapons depending upon their specific characteristics and how they were carried. Appellant voluntarily chose the former. He has not been convicted of non-existent crimes.

Appellant also asserts that there was no factual basis for the resisting charge since the officers were not acting within their lawful duty when they attempted to arrest him for carrying the knife and CO2 gun; that is, since those items were not weapons, the police could not arrest him for carrying them. As noted above, by entering a plea, he waived his right to a jury determination as to whether the items were weapons and thus waived his right to contest whether the officers were engaged in a lawful duty when they arrested him for carrying them.

IT IS THEREFORE ORDERED AND ADJUDGED that the decision of the trial court is AFFIRMED.

DONE AND ORDERED in Orlando, Orange County, Florida this 3rd day of August, 2015.

/S/

BOB LeBLANC
Presiding Circuit Judge

MYERS and S. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **the Honorable Maureen A. Bell**, Orange County Courthouse, 425 North Orange Avenue, Orlando, Florida 32801; **Carol Levin Reiss**, Assistant State Attorney, 435 N Orange Avenue, Orlando, Florida 32801-1526; and to **Larry L. Madison**, DC # X63893, Apalachee Correctional Institution, 35 Apalachee Drive, Sneads, Florida 32460 this 3rd day of August, 2015.

/S/

Judicial Assistant