

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOE MAZE SMITH, JR.,
Respondent.

No. 84737

FILED

FEB 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order granting a pretrial petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.¹

Respondent Joe Maze Smith, Jr. was charged with one count of unlawfully carrying a concealed firearm. The justice court conducted a preliminary hearing and bound Smith over to the district court. Smith filed a pretrial petition for a writ of habeas corpus, arguing that the State did not show probable cause for the charge. After a hearing, the district court granted the petition and dismissed the charge. On appeal, the State argues that the district court erred in concluding that it had not shown slight or marginal evidence supporting the charge of unlawfully carrying a concealed firearm. Following an order directing the parties to file briefs, we agree and reverse.

On appeal from an order granting pretrial habeas relief based on a lack of probable cause, our role “is to determine whether all of the evidence received at the preliminary hearing establishes probable cause to believe that an offense has been committed and that defendant committed it.” *Lamb v. Holsten*, 85 Nev. 566, 568, 459 P.2d 771, 772 (1969). To establish probable cause, the State need only present slight or marginal

¹Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

evidence that the accused committed the crime alleged. *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). While we defer to the district court's factual determination as to probable cause and will reverse only for substantial error, *Sheriff v. Provenza*, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981), we review questions of law in its decision de novo, *Sheriff v. Witzenberg*, 122 Nev. 1056, 1059, 145 P.3d 1002, 1004 (2006).

A witness at the preliminary hearing testified that she saw Smith point a handgun at a vehicle and then place the gun in the back of his pants in front of a casino. Smith entered the casino, where he was subsequently detained. Smith admitted to the police that he pulled out the gun and pointed it at the vehicle. An officer, who watched surveillance video and spoke with Smith, testified that after pointing the gun at the vehicle, Smith concealed the gun on the back of his person and walked inside the casino. A Sig Sauer P320 9mm handgun, loaded with 17 rounds, was seized from Smith's girlfriend's purse and impounded.

Smith argued in the pretrial habeas petition that the State did not show that (1) the gun was designed as a weapon from which a projectile may be expelled by explosion or combustion, (2) the gun's barrel length was less than 12 inches, and (3) Smith did not have a concealed weapons permit. The district court denied relief on the first ground, determining there was slight or marginal evidence that the gun was capable of expelling a projectile, given the evidence that the gun was loaded and that Smith told police he had a gun. The court granted relief on the second ground and on a ground not raised by Smith—that the State had not presented sufficient evidence that the gun was concealed. The court declined to consider the third ground asserted in the petition.

The State argues that it met its burden of showing that the gun's barrel length was less than 12 inches. The definition of “[f]irearm

capable of being concealed upon the person’ applies to and includes all firearms having a barrel less than 12 inches in length.” NRS 202.253(3).² The district court’s finding that the State did not present sufficient evidence of this element is not supported by the record. Two witnesses testified that Smith had been carrying a handgun and concealed it in his waistband. This supported a reasonable inference that the firearm had a barrel that was less than 12 inches in length, and thus the State presented slight or marginal evidence of this element. *See State v. Covington*, 229 A.3d 1036, 1042-43 (2020) (holding that sufficient evidence was presented for a jury to find beyond a reasonable doubt that a gun barrel was less than 12 inches long where a witness testified that the firearm was “a handgun” that was transferred from a car glove compartment to the defendant’s waistband). As the record does not support the district court’s finding, the district court substantially erred.

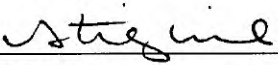
The State also argues that it carried its burden of showing that the weapon was concealed. The district court determined that the State did not present sufficient evidence of this element. The district court’s factual findings in this regard are not supported by the record. In particular, there was evidence that Smith was wearing bulky clothing and a long shirt and that although he struggled to put the weapon in the back of his pants because of the long shirt, he was ultimately successful in doing so. Further, a police officer, who watched the surveillance video and interviewed Smith,

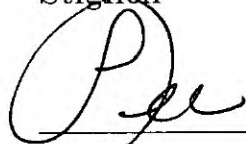
²As the State concedes that the definition of “[f]irearm capable of being concealed upon the person” applies, we need not address whether NRS 202.253 is applicable. The sections in NRS 202.253 were renumbered in 2021. *See* 2021 Nev. Stat., ch. 496, § 6, at 3224. Because the amendments took effect after Smith was charged, *see id.* § 10(1), at 3225, and the district court referred to the section numbers before the 2021 amendment, we refer here to those pre-amendment section numbers. The substance of the relevant sections did not change.

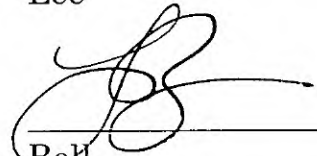
testified that Smith concealed the weapon on the back of his person. Thus, slight or marginal evidence was presented that the weapon was concealed. See NRS 202.350(8)(a) (“Concealed weapon’ means a weapon described in this section that is carried upon a person in such a manner as not to be discernible by ordinary observation.”). By granting relief based on findings that are not supported by the record, the district court substantially erred.

Having concluded that the district court committed substantial error in granting the pretrial habeas petition, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Stiglich


_____, J.
Lee


_____, J.
Bell

cc: Hon. Jasmin D. Lilly-Spells, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk