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Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

NOTICE

Sirs/Mesdames:

Please take notice that the Court's First Division, issued a Resolution dated **December 5, 2022** *which reads as follows:*

"G.R. No. 244795 ***(Alex Amado y Escasa vs. People of the Philippines).*** – This is an Appeal by *Certiorari*[1] seeking to reverse and set aside the August 13, 2018 Decision[2] and February 8, 2019 Resolution[3] of the Court of Appeals *(CA)* in CA-G.R. CR No. 39532, which affirmed the October 12, 2016 Decision[4] of the Regional Trial Court of Balanga City, Bataan, Branch 2 *(RTC)* in Criminal Case No. 10796. The RTC found Alex Amado *y* Escasa (*petitioner*) guilty beyond reasonable doubt of Violation of Commission on Elections *(COMELEC)* Resolution[5] No. 7764-A or the *COMELEC Gun Ban* during the 2007 Elections.[6]

The Antecedents

Petitioner was charged with violation of COMELEC Amended Resolution No. 7764-A in an Information, the accusatory portion of which provides:

> That on or about April 5, 2007, in Balanga City, Bataan, Philippines and within the jurisdiction of this Honorable Court, the said accused, while inside the Dhels[7] Videoke Bar, a public place, did then and there willfully bear and carry a Caliber .38 Revolver with Serial Number PR11022808 with five (5) live ammunitions during the election period.

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[1] *Rollo*, pp. 29-43.
[2] Id. at 29-43; penned by Associate Justice Henri Jean Paul B. Inting (now a Member of the Court) and concurred in by Associate Justices Mariflor P. Punzalan Castillo and Danton Q. Bueser.
[3] Id. at 45-46; penned by Associate Justice Henri Jean Paul B. Inting (now a Member of the Court) and concurred in by Associate Justices Mariflor P. Punzalan Castillo and Danton Q. Bueser.
[4] Id. at 61-65; penned by Presiding Judge Antonio Ray A. Ortiguera.
[5] COMELEC Amended Resolution No. 7764-A.
[6] *Rollo*, p. 65.
[7] Referred to as "Dell's" in other parts of the record.

CONTRARY TO LAW.[8]

On arraignment, petitioner, with the assistance of counsel, pleaded not guilty to the offense charged.[9]

At the pre-trial conference conducted on December 6, 2007, the prosecution and the defense stipulated on the following facts:

> 1) Alex Amado admits that he is the same person charged in this criminal information;
> 2) Accused admits that he is a resident of Brgy. Tenejero, Balanga City;
> 3) Accused admits that at the time of the incident, he was employed with the Blue Squad Security Specialists, Inc.;
> 4) Accused admits that as such, he was issued a firearm; and
> 5) Prosecution admits that the firearm issued was among those guns exempted on gun ban but the exemption was issued to the company[,] not to the private individual[.][10]

Trial thereafter ensued.[11]

The summarized evidence for the prosecution is as follows:

> The prosecution presented as evidence the testimonies of the following witnesses: 1) [Police Officer I] Romeo Manzanillo (PO1 Manzanillo); 2) Atty. Gilbert S. Almario (Atty. Almario); 3) PO2 Liberato Santos (PO2 Santos); and 4) Atty. Fernando F. Cot-om (Atty. Cot-om). Its version of the facts, as briefly summarized by the Office of the Solicitor General, is as follows:
>
> > x x x On April 5, 2007, [PO2 Santos] and [PO1 Manzanillo] conducted the "Oplan Bakal Kapkap" in all entertainment establishments of Balanga City, Bataan especially the videoke bars and night clubs. While they were searching inside Dell's Videoke Bar around 1 o'clock in the morning, they saw [petitioner] sitting alone drinking liquor or beer. They noticed that an object bulged from the right side of his waist. The police officers thus approached him. They asked him to raise his shirt and when he did so, they found a .38 caliber revolver with 5 bullets. They asked [petitioner] if he had any document from COMELEC granting him an exception from the election period gun

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[8] *Rollo*, pp. 29-30; records, p. 1.
[9] Id. at 30.
[10] Id.
[11] Id.

> ban. Since [petitioner] was not able to do so, the police operatives confiscated his gun and informed him of his violation and his constitutional rights.
>
> As regards witness Atty. Almario, he identified in court a Certification from the Office of the Provincial Election Supervisor of Bataan that it has no record of granting [petitioner] an exemption from the COMELEC gun ban and that the office is not authorized to grant exemptions.
>
> With respect to witness Atty. Cot-om, a COMELEC representative, he identified a Certification issued by the COMELEC Law Department stating that [petitioner] was not granted any exemption to carry firearms during the election period of 2007.[12]

Meanwhile, based on petitioner's testimony, the evidence for the defense is summarized as:

> x x x On 05 April 2007, at around 1:20 o'clock a.m., [petitioner] was on duty at the Bureau of Internal Revenue (BIR) - Balanga City Office as a security guard. While on duty, he felt sleepy thus, he decided to buy cigarettes at Dell's Videoke Bar; since that was the only place, which was open at that time. While buying cigarettes, the police arrived and suddenly frisked him. The police found a gun tucked under his waist. Amado introduced himself to the police and told them that he is a security guard. When asked why he has a gun, he told the police that he was alone on duty and cannot leave his gun at his post so he decided to bring it with him. After his arrest, he was brought to the police station. He tried to explain that he was employed by Blue Squad Specialist[s], Inc. To prove his employment status, he identified his Certificate of Employment. He also identified a COMELEC Certification and a Security Personnel Permit showing that the gun he was carrying was exempted by the COMELEC.[13]

The RTC Ruling

In its October 12, 2016 Decision, the RTC found petitioner guilty beyond reasonable doubt of the crime charged. The dispositive portion of the decision reads:

> WHEREFORE, the Court finds the accused Alex E. Amado GUILTY beyond reasonable doubt of violation of COMELEC Resolution No. 7764-A and sentences him to suffer an indeterminate sentence of one year of imprisonment as minimum to two years of imprisonment as maximum, not subject to probation, and he shall suffer

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[12] Id. at 31-32.
[13] Id. at 32.

DISQUALIFICATION to hold public office and DEPRIVATION of the right of suffrage. The subject firearm and ammunitions are ordered released to Blue Squad Security Specialists, Inc.

SO ORDERED.[14]

The RTC held that all the elements for violating the gun ban were present in the case. It relied on the testimony of the prosecution witnesses, PO1 Manzanillo and PO2 Santos,[15] who positively and categorically asserted that on April 7, 2007, within the election period, they caught petitioner carrying a loaded firearm inside Dell's Videoke Bar, a public place. It observed that the defense admitted the foregoing but argued that petitioner was covered by an exemption from the COMELEC. The RTC found the exemption not applicable since petitioner was not at his post while carrying the firearm.[16]

The RTC also did not give any credence to petitioner's argument that his act of carrying the firearm outside his area of assignment was due to exigent circumstances. Petitioner asserted that he needed to buy cigarettes because he was sleepy and there was no one with whom he could leave his gun. The RTC observed that the prosecution witnesses testified that when they first saw petitioner, he was sitting down and drinking beer, not buying cigarettes. Further, he admitted that he left his post for not less than 15 minutes. It would not have taken petitioner that long to buy cigarettes. Lastly, he was wearing a grey shirt at Dell's Videoke Bar, not his uniform.[17]

Unsatisfied, petitioner filed an appeal before the CA. In his Appeal Brief,[18] petitioner posited that the RTC erred in disregarding his defense of exemption from the gun ban. He also alleged, for the first time on appeal, that the firearm and ammunitions confiscated from him are inadmissible for having been obtained as a result of an illegal search and seizure.

The CA Ruling

In its August 13, 2018 Decision, the CA denied the appeal and affirmed the RTC Decision. The *fallo* of the CA decision reads:

WHEREFORE, the appeal is DENIED.

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[14] Id. at 65.
[15] Id. at 63, referred to as PO1 Santos in the RTC Decision.
[16] Id. at 63-64.
[17] Id. at 64.
[18] Id. at 49-60.

The October 12, 2016 Decision rendered by the Regional Trial Court, Branch 2, Balanga City, Bataan in Criminal Case No. 10796 is AFFIRMED *in toto*.

SO ORDERED.[19]

The CA held that the RTC did not err in convicting petitioner of the crime charged. It found that the prosecution was able to establish beyond reasonable doubt the presence of the elements for violation of the COMELEC gun ban.[20]

The CA likewise emphasized that the issue pertaining to the admissibility of the prosecution's evidence was never raised before the trial court. Having been raised for the first time on appeal, it is barred by estoppel.[21]

Nevertheless, the CA proceeded to tackle the merits of petitioner's contentions, which it found untenable. The CA held that there was probable cause to justify the search conducted on him because, in light of the nationwide election gun ban being implemented at the time of the arrest, a noticeable bulging object on petitioner's waist constituted basis for police operatives to believe that petitioner was carrying a gun in a public place. Further, petitioner voluntarily consented to the police officer's request to raise his shirt.[22]

Likewise, the CA found no merit in petitioner's claim of exemption from the COMELEC gun ban. It adopted the RTC's reasoning on this point.[23]

Petitioner moved for reconsideration,[24] which the CA denied in its February 8, 2019 Resolution.[25]

Hence this appeal.

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[19] Id. at 42.
[20] Id. at 36.
[21] Id. at 35.
[22] Id. at 40.
[23] Id. at 36-42.
[24] Id. at 78-84.
[25] Id. at 45-46.

ISSUES

Petitioner ascribes the following errors on the part of the CA:

I.

THE COURT OF APPEALS GRAVELY ERRED IN AFFIRMING THE PETITIONER'S CONVICTION OF VIOLATION OF COMELEC RESOLUTION NO. 7764-A DESPITE THE INADMISSIBILITY OF THE PROSECUTION'S EVIDENCE.

II.

THE COURT OF APPEALS GRAVELY ERRED IN AFFIRMING THE PETITIONER'S CONVICTION OF VIOLATION OF COMELEC RESOLUTION NO. 7764-A DESPITE HIS VALID DEFENSE OF EXEMPTION FROM THE COMELEC GUN BAN.[26]

Petitioner, in his appeal, prays that he be acquitted of the crime for which he was convicted. *First,* petitioner claims that his arrest was illegal. Hence, the search and seizure that followed it was likewise illegal.[27]

Petitioner posits that the police officers had no probable cause to search him; that, in fact, such search was a fishing expedition. The police officers merely relied on their observation that there was something bulging on his waist. This is insufficient to incite suspicion of criminal activity supposedly being committed by petitioner to validate a warrantless search and seizure. Since there was no probable cause to justify the warrantless search and consequent seizure, the gun and ammunitions purportedly seized from petitioner is deemed inadmissible. He also highlights the fact that the police officers entered Dell's Videoke Bar without a search warrant.[28]

Second, petitioner claims that he was exempt from the COMELEC gun ban. Dell's Videoke Bar was just 20 meters away from the BIR office he was stationed at, and thus well within the immediate vicinity of petitioner's

[26] Id. at 17.
[27] Id. at 18.
[28] Id. at 18-20.

place of work. The prosecution also stipulated that petitioner's company was issued an exemption from the gun ban.[29]

In its Comment,[30] the Office of the Solicitor General (*OSG*), representing the People, argued that the warrantless search and seizure was valid. It claimed that, given that there was a nationwide election gun ban, a bulging object on petitioner's right side constituted probable cause for police operatives to believe that petitioner was carrying a gun in a public place in violation of the COMELEC's directive. Thus, they had probable cause to request petitioner to raise his shirt. Further, the OSG emphasized that petitioner voluntarily submitted to the search. He is deemed to have waived his right to be secure against unreasonable searches. Hence, the search and seizure is valid, and the items confiscated are admissible in evidence.[31] The OSG also insists that the testimonies of the prosecution witnesses are credible. Petitioner's version of events should not be given weight. The witnesses' testimony that petitioner was drinking belies petitioner's claim that he went out of his place of duty only to buy a cigarette. Finally, it asserts that the police officers were deemed to be in the regular performance of their duties when they searched and apprehended petitioner in the absence of allegation or proof of malice and ill will on their part.[32]

In his Reply,[33] petitioner insists that there is no denying that the police officers' search was a fishing expedition. They conducted surveillance due to *Oplan Bakal Kapkap.* When they arrived at Dell's Videoke Bar, they announced the conduct of the operation, and that all customers would be frisked. They approached petitioner because of the bulge at his waist. Petitioner was not causing trouble when they approached him. This can hardly be considered a valid search. They had no satisfactory basis to suspect petitioner. Since there was no probable cause to justify the warrantless search, the gun and ammunitions seized from petitioner are inadmissible.[34] Petitioner also asseverates that he did not voluntarily raise his shirt. Faced with several police officers who were fully armed, he was intimidated and coerced to raise his shirt. He had no other choice but to comply. This cannot be considered as consent on his part.[35] In any case, petitioner insists that he was exempt from the COMELEC gun ban.

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[29] Id. at 20-21.
[30] Id. at 94-103.
[31] Id. at 96-99.
[32] Id. at 100.
[33] Id. at 131-137.
[34] Id. at 131-133.
[35] Id. at 133-134.

The Court's Ruling

The appeal must be denied for lack of merit. Petitioner is guilty of the crime charged. However, clarification needs to be made as to why the Court considers the search and seizure herein to have been legal.

Mere observation of a bulge on a person, by itself, does not constitute probable cause.

The right against unreasonable searches and seizures is enshrined in Section 2, Article III of the 1987 Constitution:

> SECTION 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

A distinction must be made between a reasonable search and an unreasonable search because the Constitution guards only against unreasonable searches.

In *People v. Sapla*,[36] the Court held:

> "[A]s a rule, a search and seizure operation conducted by the authorities is reasonable *only* when a court issues a search warrant after it has determined the existence of probable cause through the personal examination under oath or affirmation of the complainant and the witnesses presented before the court, with the place to be searched and the persons or things to be seized particularly described."[37]

There are, however, recognized exceptions to the general rule requiring a search warrant. These are:

(1) warrantless search incidental to a lawful arrest;
(2) seizure of evidence in plain view;

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[36] G.R. No. 244045, June 16, 2020.
[37] Id.

(3) search of a moving vehicle;
(4) consented warrantless search;
(5) customs search;
(6) stop and frisk; and
(7) exigent and emergency circumstances.[38]

Any search conducted without a search warrant or without any of the foregoing exceptional circumstances availing is considered an unreasonable search. By express provision of the Constitution, any evidence procured in violation of the right against unreasonable searches and seizures shall be inadmissible for any purpose in any proceeding.[39]

Unquestionably, this case does not involve a search warrant. The police officers herein conducted a warrantless search on petitioner, and only after discovering the firearm, arrested him on such basis. Incidentally, the Court thus finds petitioner's assertion, that the search conducted was subsequent to an unlawful arrest, to be misplaced. The facts established by the records do not support the assertion that the search was preceded by an arrest.

Going back, to be able to properly determine the reasonableness of the warrantless search performed by the police officers on petitioner, it is imperative that the Court first identify the kind of warrantless search involved. The CA, while it had a clear discussion regarding the presence of probable cause, failed to categorically identify the type of warrantless search involved herein.

Based on the records, it appears that the warrantless search sought to be conducted by the police officers was in the nature of a *stop and frisk* search or a Terry search.

The Court extensively discussed stop and frisk searches in *People v. Cogaed*:[40]

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[38] Id.
[39] CONSTITUTION (1987), Article III, Sec. 3, par. 2 reads:
SECTION 3.
(1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.
(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.
[40] 740 Phil. 212 (2014).

"Stop and frisk" searches (sometimes referred to as *Terry* searches) are necessary for law enforcement. That is, law enforcers should be given the legal arsenal to prevent the commission of offenses. However, this should be balanced with the need to protect the privacy of citizens in accordance with Article III, Section 2 of the Constitution.

The balance lies in the concept of "suspiciousness" present in the situation where the police officer finds himself or herself in. This may be undoubtedly based on the experience of the police officer. Experienced police officers have personal experience dealing with criminals and criminal behavior. Hence, they should have the ability to discern — based on facts that they themselves observe — whether an individual is acting in a suspicious manner. Clearly**, a basic criterion would be that the police officer, with his or her personal knowledge, must observe the facts leading to the suspicion of an illicit act.**

x x x x

Normally, "stop and frisk" searches do not give the law enforcer an opportunity to confer with a judge to determine probable cause. In *Posadas v. Court of Appeals*, one of the earliest cases adopting the "stop and frisk" doctrine in Philippine jurisprudence, this court *approximated* the suspicious circumstances as probable cause:

> The *probable cause* is that when the petitioner acted suspiciously and attempted to flee with the *buri* bag there was a probable cause that he was concealing something illegal in the bag and it was the right and duty of the police officers to inspect the same. x x x

For warrantless searches, probable cause was defined as "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the person accused is guilty of the offense with which he is charged."

Malacat v. Court of Appeals clarifies the requirement further. ***It does not have to be probable cause, but it cannot be mere suspicion. It has to be a "genuine reason" to serve the purposes of the "stop and frisk" exception:***

> Other notable points of *Terry* are that while probable cause is not required to conduct a "stop and frisk," it nevertheless holds that **mere suspicion or a hunch will not validate a "stop and frisk."** ***A genuine reason must exist, in light of the police officer's experience and surrounding conditions, to warrant the belief that the person detained has weapons concealed about him.***

In his dissent for *Esquillo v. People*, Justice Bersamin reminds us that **police officers must not rely on a single suspicious circumstance. There should be "presence of *more than one* seemingly innocent activity, which, taken together, warranted a reasonable inference of**

> **criminal activity**." The Constitution prohibits "unreasonable searches and seizures." Certainly, reliance on only one suspicious circumstance or none at all will not result in a reasonable search.[41]

From the foregoing, it is clear that for a stop and frisk search to be considered reasonable, there must be a genuine reason to warrant the belief that the person has weapons concealed on his person.

In the instant case, the genuine reason which the CA relied upon to justify the search is found in the testimonies of PO1 Manzanillo and PO2 Santos.

During his direct examination, PO1 Manzanillo testified as follows:

> Prosec. Lumabas:
> Q: Now you said that on April 5, 2007, you implemented this Project Oplan Bakal you claim, where did you implement this Operation Bakal?
> A: At Dell's Videoke.
>
> Q: Where is this Dell's Videoke bar situated?
> A: Along the Capitol Drive, Balanga City.
>
> Q: What time did you implement this Oplan Bakal project?
> A: More or less 1:20 in the early morning.
>
> Q. And who was with you then when you implemented this Oplan Bakal?
> A. PO1 Liberato Santos [and] P/Insp. Pepe Alindayao.
>
> Q. And what prompted you to conduct this Operation Bakal project at Dell's Videoke bar?
>
> Witness:
> A. Lahat po ng bahay-aliwan, we conduct our surveillance, in all videoke bars and bahay-aliwan from Balanga to Dinalupihan, and we just passed by that videoke bar.
>
> Prosec. Lumabas:
> Q. So you just choose (sic) that Dell's Videoke Bar at random?
> A. No sir, we just went to all videoke bars.
>
> Q. Now, when you conducted this Oplan Bakal at Dell's Videoke bar, what happened next?
> A. We decided to announce through the microphone that we are going to conduct an Oplan Bakal sir, and all the customers will be frisked, and they

[41] Id. at 229-230; 232-234. (Emphasis supplied, citations omitted)

all volunteered to raise their shirts, and then we saw Mr. Amado having a firearm tucked on his waist.

Q. When you say Mr. Amado, are you referring to the accused in this case whom you identified a while ago?
A. Yes, sir.

Q. And you saw the gun tucked at the waist of Alex Amado?
A. Me and PO1 Liberato Santos sir.

Q. And after you saw the gun tucked at the waist of accused Alex Amado, what did you do next?
A. We arrested him and told him of his rights and also about his violation sir.

Q. What did you tell him when you informed him of his violation?
A. That he violated the Omnibus Election Code.[42]

On cross-examination, PO1 Manzanillo testified in the following manner:

Q: You stated that you implemented Oplan Bakal. Was it the only establishment that you have conducted Oplan Bakal?
A: No mam.

Q: Where else?
A: All the facilities of Balanga mam.

Q: How many establishments?
A: More or less six (6) mam.

Q: Can you still remember those establishments?
A: No mam.

Q: Were you able to apprehended (*sic*) person whose operating the Oplan Bakal?
A: Only Alex Amado at Dhel's Videoke Bar mam.

Q: What was the accused doing?
A: He was drinking at the videoke bar alone mam.

Q: What is his position?
A: He was just seated on the table mam.

Q: **Was he facing towards you?**
A: **Yes mam.**

Q: **If he was facing you on a chair and table, so you saw how its positioned?**

[42] TSN, October 23, 2008, pp. 3-4.

A: **It's PO1 Liberato Santos saw because he was seated at the right side mam.**

Q: If it's PO1 Liberato Santos who saw the accused, what did you see when you saw the accused?
A: I saw the gun when we directed him to stand up and raise his shirt mam.

Q: When you saw the accused sitting and drinking at the table, of course you can see the waist?
A: Yes mam.

Q: So, like any other people in videoke bar they are just sitting and drinking?
A: Yes mam.

Q: And then you only pick particularly Alex Amado to raise his shirt?
A: Yes mam.

Q: And before you asked him to stand up and raise his shirt there was nothing suspicious?
A: Yes mam.[43]

On redirect examination, PO1 Manzanillo made the following statements:

Q: In the cross examination of the defense, you said that you only caused to stand particularly Alex Amado inside the Dhel's Bar. Why was it that it's only Alex Amado whom you let to stand at that time?
A: No sir, all of them were searched, all inside the bar.

Q: All of them were asked to stand up?
A: Yes sir.

Q: All of them were asked to raise their shirts?
A: Yes sir.[44]

Meanwhile, PO2 Santos testified during his direct examination in the following manner:

Q: On April 5, 2007, do you recall reporting for duty?
A: Yes sir and we were conducting "[Oplan Bakal Kapkap]".

Q: What is this "[Oplan Bakal Kapkap]"?

[43] TSN, March 13, 2015, pp. 2-4.
[44] Id. at 8-9.

A: That was the Comelec directives (sic) prior to 2007 Elections sir.

Q: Where did you conduct the "Oplan Bakal Kapkap" on April 5, 2007?
A: At all establishments of Balanga City especially the videoke bar and night clubs sir.

Q: Do you know Alex Amado?
A: Yes sir.

x x x x

Q: Why do you know Alex Amado?
A: Because during that time, we were conducting this "[Oplan Bakal Kapkap]", we saw this person at Belle's (sic) Videoke Bar at around 1AM. And when we were searching, we noticed that something was bulking or bulging on his side. We asked him to raise his shirt and we found a .38 revolver with 5 ammunitions.

x x x x

Q: What did you do when you saw a gun from Alex Amado?
A: We asked him if he has any document from Comelec showing exemption sir.

Q: Was he able to show certificate of exemption?
A: No sir.[45]

During his cross-examination, PO2 Santos made the following remarks:

Q: On April 5, 2007 you implemented the said operation and you saw the accused, correct?
A: Yes Sir.

Q: What is the position of the accused when you saw him?
A: He was on Del's Videoke Bar.

Q: Was he standing or what?
A: He was seating drinking liquor or beer.

Q: And when you saw him what did you do?
A: We first ask the person or the manager a permission to announce using the microphone announcing that we will implement the Oplan Kapkap Sita.

Q: I mean did you approach the accused?
A: When we were about to stand up we notice that there is a bulge in his side, that is why we approached him.

[45] TSN, February 12, 2016, pp. 3-4.

Q: On what part or place of his body in left or right?
A: Right side.[46]

From the foregoing, it is evident that only PO2 Santos spotted the bulging or bulking on the right side of petitioner while he was seated. While the police officers had intended to search all the customers present in the videoke bar, they paid special attention to petitioner due to the alleged bulk or bulge spotted on his right side by PO2 Santos.

This brings to fore the primordial question in this case: Does a mere bulk or bulge on the side of a person, on its own and absent any other element suggesting the character of the bulge or bulk, constitute genuine reason to justify a stop and frisk search?

The answer is no.

Jurisprudence shows that a mere bulge or bulk in the waist area of a person does not constitute a genuine reason to conduct a stop and frisk search.

In *People v. Bansil*,[47] *(Bansil)* the law enforcement agents received information from an informant that a suspect in a killing in Quiapo some weeks before was in the vicinity of the Muslim mosque in Quiapo, Manila. Responding to the information, they proceeded to the Muslim area where they saw several persons conversing at the corner of Elizondo Street. One of the persons had a suspicious bulge on his stomach, and when frisked, a .45 cal. pistol with an extended magazine and six live bullets was recovered from the center front of his waistline. The Court held that the arrest was invalid. It declared that the "bulging waistline" alone, in light of the fact that the agents zeroed in on therein accused and his companions eating halo-halo at a small restaurant despite the informant failing to provide a specific place, was insufficient to constitute probable cause for the arrest of the accused.[48]

While the discussion in *Bansil* centered on the validity of the arrest, it is submitted that the reasoning equally applies to the search conducted on therein accused. After all, therein accused was only arrested because he was frisked due to a suspicious bulge on his waistline which produced a firearm and live bullets. The search involved in *Bansil* was clearly a stop and frisk

[46] TSN, March 8, 2016, p. 6.
[47] 364 Phil. 22 (1999).
[48] Id. at 33.

search. The Court therein declared his invalid arrest because it was a result of an unreasonable search.

In contrast are the factual circumstances in *Manibog v. People*,[49] *(Manibog)* where the police received information from an asset that therein petitioner was standing outside the Municipal Tourism Office of Dingras, Ilocos Norte with a gun tucked at his waist. They proceeded to the Municipal Tourism Office and found therein petitioner standing outside the building. As they moved closer to him, they noticed a bulge on his waist which they deduced to be a gun due to its distinct contour. The Court held that the combination of the tip from the police asset and the arresting officers' observation of a gun-shaped object under the petitioner's shirt "suffices as a genuine reason for the arresting officers to conduct a stop and frisk search on petitioner."[50]

The factual circumstance of the instant case is more akin to that of *Bansil.* Here, the testimony of the prosecution witnesses established that petitioner was merely drinking at Dell's Videoke Bar when PO2 Santos noticed a bulging on his right side. Petitioner's act of drinking cannot be characterized as criminal in any manner. There was also no information given to the policemen beforehand about petitioner having a gun at the premises. Further, PO2 Santos did not even describe the bulge or bulk he noticed at the right side of petitioner. It is unclear what led PO2 Santos to believe that the bulge or bulk was a firearm. The bulging waistline alone, in view of these factual circumstances, hardly constitutes as genuine reason to justify a stop and frisk search.

It must be emphasized that the noticeable bulging object on petitioner's body was never described as having the shape or contour of a gun. This is in direct contrast with the circumstances in *Manibog,* where the Court carefully observed that the law enforcement agents were able to deduce that the bulge under therein petitioner's clothes was a firearm due to its contour. It is a slippery slope for the Court to hold that a mere bulging, with nary an indication of its shape that would, at the very least, suggest the illusion of a firearm, constitutes as genuine reason for a stop and frisk search.

Neither is the Court inclined to give greater leeway to the police officers by the mere fact that a nationwide election gun ban was in place at the time of the arrest. Jurisprudence requires that a "genuine reason must

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[49] G.R. No. 211214, March 20, 2019, 897 SCRA 565.
[50] Id. at 583.

exist, in light of the police officer's experience and surrounding conditions, to warrant the belief that the person detained has weapons concealed about him."[51] The implementation of a law is not a genuine reason to justify a stop and frisk search. To follow this reasoning would allow law enforcement agents to merely invoke implementation of a law as ground to suspect any ordinary person in public places. This is, once more, a slippery slope. It must be stressed that nothing about the conditions during the search in question even remotely suggests that a criminal activity was being carried out. Worse, the prosecution did not even bother to establish the reasoning behind *Oplan Bakal Kapkap* particularly zeroing in on videoke bars and nightclubs in the enforcement of the COMELEC gun ban.

Based on the foregoing, the Court finds that petitioner could not have been validly subjected to a stop and frisk search.

There is a valid consented warrantless search in the instant case.

Nonetheless, the CA also mentioned – although merely in passing – that petitioner voluntarily consented to a search. While the police had intended to frisk the patrons of the bar, what instead happened was they asked them to lift their shirts up. The records do not show that there was any actual pat down or frisking that took place, on the date in question, of either petitioner or any of the bar patrons. The OSG maintains that petitioner voluntarily raised his shirt upon the request of the police officers and is, thus, deemed to have waived any objections thereto. In short, the OSG claims that the search conducted is reasonable because it was a consented warrantless search, one of the recognized exceptions.

It is well-established in Our jurisdiction that the right against unreasonable searches and seizures may be waived. In *People v. O'Cochlain*,[52] the Court explained the nature and characteristics of a voluntary waiver or consented warrantless search:

> The constitutional immunity against unreasonable searches and seizures is a personal right which may be waived. A person may voluntarily consent to have government officials conduct a search or seizure that would otherwise be barred by the Constitution. Like the Fourth Amendment, Section 2, Article III of the Constitution does not proscribe voluntary cooperation.

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[51] *Malacat v. Court of Appeals*, 347 Phil. 462, 481 (1997).
[52] G.R. No. 229071, December 10, 2018, 889 SCRA 121.

> Yet, a **person's "consent to a [warrantless] search, in order to be voluntary, must be unequivocal, specific and intelligently given, [and] uncontaminated by any duress or coercion[.]"** The question of **whether a consent to a search was "voluntary"** or was the product of duress or coercion, express or implied, **is a question of fact to be determined from the totality of all the circumstances.**
>
> > **Relevant to this determination are the following characteristics of the person giving consent and the environment in which consent is given**: (1) the age of the defendant; (2) whether [he] was in a public or a secluded location; (3) whether [he] objected to the search or passively looked on; (4) the education and intelligence of the defendant; (5) the presence of coercive police procedures; (6) the defendant's belief that no incriminating evidence [will] be found; (7) the nature of the police questioning; (8) the environment in which the questioning took place; and (9) the possibly vulnerable subjective state of the person consenting.
>
> Consent to a search is not to be lightly inferred, but shown by clear and convincing evidence. The government bears the burden of proving "consent." In the US, it has been held that when the government relies on the "consent" exception to the warrant requirement, two (2) main issues must be litigated: did the defendant indeed consent, and did the defendant do so with the requisite voluntariness? Here, we have ruled that **to constitute a waiver, it must *first* appear that the right exists; *secondly*, that the person involved had knowledge, actual or constructive, of the existence of such a right; and, *lastly*, that said person had an actual intention to relinquish the right.**
>
> While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of effective consent. On the other hand, lack of objection to the search and seizure is not tantamount to a waiver of constitutional right or a voluntary submission to the warrantless search and seizure. Even when security agents obtain a passenger's express assent to a search, this assent ordinarily will not constitute a valid "consent" if the attendant circumstances will establish nothing more than acquiescence to apparent lawful authority. The Fourth Amendment inquiry of whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter applies equally to police encounters that take place on trains planes, and city streets. "Consent" that is the product of official intimidation or harassment is not consent at all.[53]

Hence, for there to be a valid consented warrantless search or a voluntary waiver of the right against unreasonable searches and seizures, the Court must determine whether the following requisites are present: (1) it must appear that the rights exist; (2) the person involved had knowledge,

[53] Id. at 170-173. (Emphasis supplied, citations omitted)

actual or constructive, of the existence of such right; and (3) said person had an actual intention to relinquish the right.[54]

Further, in determining whether such waiver is indeed voluntary and freely given, the following circumstances must be taken into consideration: (1) the age of the defendant; (2) whether he was in a public or a secluded location; (3) whether he objected to the search or passively looked on; (4) the education and intelligence of the defendant; (5) the presence of coercive police procedures; (6) the defendant's belief that no incriminating evidence will be found; (7) the nature of the police questioning; (8) the environment in which the questioning took place; and (9) the possibly vulnerable subjective state of the person consenting.[55]

In *People v. O'Cochlain,*[56] the Court held that there was a valid warrantless search based on express consent. It noted that the record is devoid of any evidence that the accused therein manifested any objection or hesitation when the security screening officer requested to conduct a pat down search on him. The request was articulated to him and he verbally replied to the request. Further, he voluntarily raised his hands. His affirmative reply and action are not merely an implied acquiescence or a passive conformity. Further, the Court found that it is reasonable to assume that the accused therein is an educated and intelligent man because he was a 53-year old working professional who claimed to be employed or associated with a drug addiction center. Thus, the Court therein concluded that the accused knew, actually or constructively, his right against unreasonable searches and that he intentionally conceded the same.[57]

Meanwhile, in *People v. Montilla,*[58] the Court held that therein accused consented to the search as shown by the evidence. The accused readily acceded to the request to open his travelling bag. The Court ruled that "he spontaneously performed affirmative acts of volition by himself opening the bag without being forced or intimidated to do so, which acts should properly be construed as a clear waiver of his right."[59]

The Court finds that there was a valid consented warrantless search in the instant case based on the factual circumstances.

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[54] *People v. Sapla*, supra note 34, citing *People v. Tudtud*, 458 Phil. 752, 785 (2003).
[55] *People v. O'Cochlain*, supra note 50 at 171, citation omitted.
[56] Id. at 170-173.
[57] Id. at 173.
[58] 349 Phil. 640 (1998).
[59] Id. at 662.

The determination of the existence of a valid consented warrantless search is factual in nature. On this score is *People v. Antonio*,[60] wherein it was declared that:

> Faced with the conflicting versions of the prosecution and the defense, **the trial court's choice of which version to believe is generally viewed as correct and entitled to the highest respect** because it is more competent to conclude so, having had the opportunity to observe the witnesses' demeanor and deportment on the witness stand, and the manner in which they gave their testimonies, and therefore could better discern if such witnesses were telling the truth. The trial court is thus in the best position to weigh conflicting testimonies. Therefore, unless the trial judge plainly overlooked certain facts of substance and value which, if considered, might affect the result of the case, his assessment on credibility must be respected.[61]

In the instant case, both the RTC and the CA found that petitioner was asked to raise his shirt and petitioner acceded to this request voluntarily. As a result, the police officers found a .38 caliber pistol with five ammunitions on his person.[62] The RTC even noted that "[t]he defense, it would seem, admits all of these facts but argues that the gun confiscated from the accused was covered by an exemption from the COMELEC."[63]

The totality of the factual circumstances established in the instant case leads the Court to find that petitioner voluntarily and knowingly waived his right against unreasonable searches and seizure when he raised his shirt. It must be emphasized that petitioner is a security guard. It is reasonable to assume that, at the very least, he has a basic degree of knowledge of his rights. Further, there were only two police officers involved in the search. Their number, as against petitioner's, does not seem to be of such intimidating quantity that it would vitiate petitioner's consent. Also, he was in a public place – a videoke bar filled with many other patrons. Significantly, the police officers had the cooperation of the management and had announced their intentions to all the customers present at Dell's Videoke Bar. It can hardly be said that any of this lends to an intimidating environment.

In addition, it is highly likely that petitioner did not believe that any incriminating evidence would be found on him. He was and still is banking on his firearm's alleged exemption from the COMELEC gun ban.

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[60] 433 Phil. 268 (2002).
[61] Id. at 272-273. (Emphasis supplied, citation omitted)
[62] *Rollo*, pp. 31 and 62.
[63] Id. at 63.

At this juncture, it would be remiss for the Court not to point out that the record is bare of any allegation or proof that petitioner felt intimidated during the search. He did not make any such statements during his testimony before the RTC on August 2, 2016.[64] The RTC and CA Decisions are absent of any such allegation. His Brief for the Accused-Appellant[65] before the CA and his petition before the Court are also bare of any such allegation. It is only when the OSG advanced in its Comment the position that petitioner waived his right against unreasonable searches and seizures that petitioner thought to claim in his Reply that he did not voluntarily raise his shirt. He argued that "[f]aced with several policemen who were fully armed, the petitioner was intimidated and coerced to raise his shirt. He had no other choice but to comply."[66]

The Court finds this hard to believe considering that this is the first instance petitioner claimed such. If he was truly intimidated and coerced to raise his shirt, petitioner would have testified as to such fact and would have argued the same all throughout the trial and the appeal process. The fact that he is only claiming it now, and in such a general manner (relying only the supposed presence of "several policemen who were fully armed"),[67] clearly throws its truth into suspicion. Again, only two police officers were involved and there is nary an allegation that they raised their firearm against petitioner, or that they even brandished such firearms at the time. Petitioner performed an affirmative act by voluntarily raising his shirt; there was a valid waiver of his right against unreasonable searches and seizures.

There being a consented warrantless search in the instant case, the .38 caliber pistol with five ammunitions seized from petitioner is admissible in evidence.

Petitioner is guilty of violation of COMELEC Amended Resolution No. 7764-A or the COMELEC Gun Ban during the 2007 Election Period.

Petitioner is charged with violation of the COMELEC gun ban as found in COMELEC Amended Resolution No. 7764-A,[68] which was issued to enforce the prohibited acts under the Omnibus Election Code, including Section 261(q), in relation to the May 14, 2007 National and Local

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[64] TSN, August 2, 2016, pp. 1-8.
[65] *Rollo*, pp. 47-60.
[66] Id. at 133.
[67] Id.
[68] COMELEC Amended Resolution No. 7764-A, promulgated on January 5, 2007, and accessed through https://comelec.gov.ph/?r=References/ComelecResolutions/NLE/2007NLE/res7764A

Elections.[69] The prohibition itself is found in Section 2(e) of COMELEC Amended Resolution No. 7764-A:

> **SECTION 2. Prohibition - During the election period from January 14, 2007 up to June 13, 2007, it shall be unlawful for**:
>
> x x x (e) **Any member of security** or police organization **of government agencies**, commissions, councils, bureaus, offices or government owned or controlled corporations **or privately-owned or operated security**, investigative, protective or intelligence agencies, **to bear firearms outside the immediate vicinity of his place of work**; and x x x (Emphasis supplied)

There are exceptions to this prohibition, found in Section 3 of COMELEC Amended Resolution No. 7764-A:

> **SECTION 3. Exceptions - The prohibition in the foregoing Section 2 shall not apply to the following persons, who are possessors of valid licenses to possess and permits to carry firearm** or appropriate and validly issued mission orders (MO)/property acknowledgment receipts (PAR), **provided that they apply for and are granted certificates of exemptions/permits by the Commission, to wit:**
>
> x x x x
>
> (f) **Members of duly authorized security of privately owned or operated security,** investigative, protective or intelligence agencies **in the actual performance of their duties within the specific area of their assignment and with prior written authority of the Commission on Elections**[.] (Emphases supplied)

The elements for a violation of a gun ban are well-established: (1) the person is bearing, carrying, or transporting firearms or other deadly weapons; (2) such possession occurs during the election period; and (3) the weapon is carried in a public place.[70] The burden to show that he or she has a written authority to possess a firearm is on the accused.[71]

All the elements are present in the instant case.

Petitioner was in possession of a firearm on April 5, 2007, which is well within the election period of January 14, 2007 to June 13, 2007. He was

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[69] COMELEC Amended Resolution No. 7764-A, promulgated on January 5, 2007, and accessed through https://comelec.gov.ph/?r=References/ComelecResolutions/NLE/2007NLE/res7764A

[70] *Dela Cruz v. People*, 776 Phil. 653, 691-692 (2016).

[71] Id. at 692.

carrying the weapon in a public place - a videoke bar. While petitioner was able to show a COMELEC certification and a security personnel permit demonstrating that the gun he was carrying was authorized by the COMELEC,[72] the exception found in Section 3(f) cannot be made to apply to him because he was not in the actual performance of his duties within his specific area of assignment while carrying the gun. As noted by the RTC and the CA, petitioner admitted that he was not at his post when he was carrying the firearm.[73] He was carrying said firearm while drinking at the videoke bar.

Petitioner's contention that he was merely buying a cigarette at Dell's Videoke Bar to drive away his sleepiness likewise holds no water. The Court agrees with both the RTC and the CA that his contention is unworthy of belief. Both prosecution witnesses testified that when they saw petitioner, he was sitting down and drinking beer, not buying cigarettes.[74] Further, petitioner admitted that he left his post for not less than 15 minutes.[75] Such is too long a period to buy a cigarette. Aside from being unworthy of belief, it will not save him because, even if true, he still was not in the actual performance of his duties and within his specific area of assignment at the time of the seizure. Petitioner himself admitted on the witness stand that he was advised or instructed by his security agency to not bring the gun.[76]

All told, the Court is convinced that petitioner is guilty of violating COMELEC Amended Resolution No. 7764-A.

Under Section 264 of *Batas Pambansa Blg.* 881, or the Omnibus Election Code, persons found guilty of an election offense "shall be punished with imprisonment of not less than one year but not more than six years and shall not be subject to probation. In addition, the guilty party shall be sentenced to suffer disqualification to hold public office and deprivation of the right of suffrage." The Indeterminate Sentence Law applies to offenses punished by both the Revised Penal Code (RPC) and special laws.[77]

In the instant case, the RTC sentenced petitioner to suffer imprisonment for a period of one year as minimum and two years as maximum, not subject to probation. It also imposed upon him

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[72] *Rollo*, pp. 40-41.
[73] Id. at 41, 63.
[74] Id. at 64.
[75] Id.
[76] TSN, August 2, 2016, p. 6.
[77] *Dela Cruz v. People*, supra note 68 at 698.

disqualification to hold public office and deprivation of the right to suffrage.[78] The Court finds the same to be proper.

The records are absent of any showing whether petitioner is currently detained or is out on bail. This is relevant to determine whether he has served more than the penalty imposed or whether he is qualified to the credit of his preventive imprisonment with his service of sentence, in accordance with Article 29[79] of the RPC, as amended by Republic Act No. 10592.[80] If petitioner has already served more than the maximum penalty herein imposed upon him or is qualified to the credit of his preventive imprisonment with his service of sentence, then his immediate release from custody is in order unless detained for some other lawful cause.

WHEREFORE, the appeal is **DENIED**. Petitioner Alex Amado *y* Escasa is **SENTENCED** to imprisonment of one (1) year as minimum to two (2) years as maximum in accordance with the Indeterminate Sentence Law, not subject to probation. He is **DISQUALIFIED** from holding public office and is **DEPRIVED** of the right to suffrage. The period of his preventive imprisonment shall be credited in his favor if he has given his written conformity to abide by the disciplinary rules imposed upon

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[78] Id.

[79] REVISED PENAL CODE, Article 29 reads:

Article 29. *Period of preventive imprisonment deducted from term of imprisonment.* — Offenders or accused who have undergone preventive imprisonment shall be credited in the service of their sentence consisting of deprivation of liberty, with the full time during which they have undergone preventive imprisonment if the detention prisoner agrees voluntarily in writing after being informed of the effects thereof and with the assistance of counsel to abide by the same disciplinary rules imposed upon convicted prisoners, except in the following cases:

1. When they are recidivists, or have been convicted previously twice or more times of any crime; and
2. When upon being summoned for the execution of their sentence they have failed to surrender voluntarily.

If the detention prisoner does not agree to abide by the same disciplinary rules imposed upon convicted prisoners, he shall do so in writing with the assistance of a counsel and shall be credited in the service of his sentence with four-fifths of the time during which he has undergone preventive imprisonment.

Credit for preventive imprisonment for the penalty of *reclusion perpetua* shall be deducted from thirty (30) years.

Whenever an accused has undergone preventive imprisonment for a period equal to the possible maximum imprisonment of the offense charged to which he may be sentenced and his case is not yet terminated, he shall be released immediately without prejudice to the continuation of the trial thereof or the proceeding on appeal, if the same is under review. Computation of preventive imprisonment for purposes of immediate release under this paragraph shall be the actual period of detention with good conduct time allowance: *Provided, however*, That if the accused is absent without justifiable cause at any stage of the trial, the court may *motu proprio* order the rearrest of the accused: *Provided, finally*, That recidivists, habitual delinquents, escapees and persons charged with heinous crimes are excluded from the coverage of this Act. In case the maximum penalty to which the accused may be sentenced is *destierro*, he shall be released after thirty (30) days of preventive imprisonment.

[80] AN ACT AMENDING ARTICLES 29, 94, 97, 98 AND 99 OF ACT NO. 3815, AS AMENDED, OTHERWISE KNOWN AS THE REVISED PENAL CODE. Approved: May 29, 2013.

convicted prisoners in accordance with Article 29 of the Revised Penal Code, as amended, and if he is not out on bail.

SO ORDERED." ***Hernando, J.,*** *on wellness leave;* ***Zalameda, J.,*** *designated as Acting Working Chairperson per S.O. No. 2939 dated November 24, 2022.*

By authority of the Court:

LIBRADA C. BUENA
Division Clerk of Court

by:

MARIA TERESA B. SIBULO
Deputy Division Clerk of Court
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(Crim. Case No. 10796)

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