

IN THE SUPREME COURT OF OHIO

Syeta Davis	:	08-1483
	:	
Plaintiff-Appellee,	:	On Appeal from the Montgomery
	:	County Court of Appeals,
v.	:	Second Appellate District
	:	
State of Ohio	:	Court of Appeals
	:	Case No. 22572
Defendant-Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT SYETA DAVIS**

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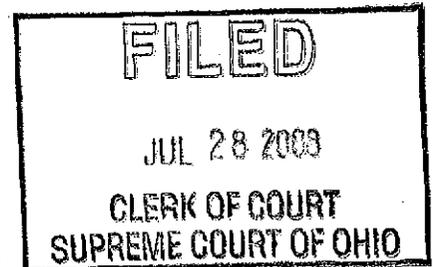


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**WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The court of appeals has exercised a colossal temerity, tantamount to “a lark”, divorcing themselves from the litigating parties. They posited a speculation, absent of physical or corroborative evidence, and effectively retried the case, based on a supposition plucked out of thin air, as opposed to the word of the law, regardless of their remonstrances to the contrary, notwithstanding.

They have expatiated on their experience as to how opposite sexes would react under these circumstances. The irony of this case is that the officers in the case in reality could very well react in the opposite manner than was presumed by the court of appeals (180 degrees off). Accepting the trial court’s assumption of credibility of the witnesses, we must move forward, and wonder as to the court of appeal’s shocking divergence.

It is respectfully submitted that to allow the District Court’s ruling to stand would deny this Appellant a fair and just disposition, and would work to improperly expand the limited *Terry* privilege thereby eroding the protection offered all citizens under the Fourth Amendment.

STATEMENT OF THE CASE AND FACTS

Dayton male police officer Hieber was conducting an investigation of a suspicious vehicle in a carwash. After securing the male driver in the back of his cruiser, Officer Hieber approached the female passenger who was seated in the passenger seat of the vehicle. The female passenger was Syeta Davis, the within Appellant. When asked for identification, Ms. Davis opened her purse, at which time Officer Hieber observed a baggie containing pills in the purse. Hieber also noted what appeared to be marijuana in a baggie between the passenger seat and the console of the vehicle. He then asked Ms. Davis to exit the vehicle and conducted a patdown for weapons, after which he placed her, without handcuffs, in his cruiser. Defendant Davis was wearing "very short shorts" and a "skimpy" tight-fitting top. Officer Hieber then radioed for another crew to assist him.

Dayton female police officer Oreck arrived on the scene and was instructed by Hieber to "handle" the Defendant by issuing her a minor misdemeanor ticket for the marijuana, and to check the drug hotline to verify that the pills were a Schedule IV controlled substance. Officer Hieber advised Ms. Davis that he did not intend to arrest her, but to issue a ticket and let her go. Subsequently, Officer Oreck removed the Defendant from the cruiser to conduct a second and more invasive patdown during which she felt "hard plastic" in the Defendant's groin area. When asked, the Defendant informed Oreck that the object was a pill bottle. She was not questioned as to the contents of the bottle, but Oreck demanded that the Defendant retrieve the same. After examining the contents of the pill bottle, Oreck placed the

Defendant under arrest, and subsequently removed a baggie containing powdered cocaine from “underneath her bra”.

Pursuant to a motion to suppress the evidence seized from the Defendant’s person, the trial Court suppressed the additional drugs found during Oreck’s second patdown, concluding that the officer “did not have reasonable belief that Defendant was armed when she conducted the patdown”. The Court of Appeals opinion notes that the Defendant was *not* under arrest when Oreck conducted the second patdown, concluding, therefore: “Stated simply, whether Hieber had probable cause to arrest Davis for the pills is irrelevant to our analysis”(p. 5-6)

The sole issue addressed by the District Court was whether or not Officer Oreck “lacked reasonable suspicion that Davis was armed to justify a second patdown search (p. 5-6). The Court, citing *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965 at Par. 13, concluded “Despite the fact that Davis was wearing very tight clothing consisting of very short shorts and a short skimpy top, it was possible for her to conceal a small weapon in her groin and breast area – areas which a male officer may be reluctant to pat down”(p. 6)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The *Terry* case provides only a limited privilege.

Terry v. State (1968), 392 U.S. 1, allows an investigating officer, for his or her protection, to patdown frisk a suspect who is not under arrest for the *sole purpose* of determining whether the suspect is armed. Such a patdown does not violate the Fourth Amendment of either the constitution of Ohio or the Constitution of the United States. This privilege is limited, however, and does not permit a thorough intrusive search of the person of the suspect to obtain suspected contraband, or for any other purpose or purposes.

Proposition of Law No. II: The search of the person of a suspect must stop when a concealed object is determined not to be a weapon.

In this case, a second more intrusive patdown was performed upon a female suspect who was not under arrest, and who was wearing thin, snug-fitting and “skimpy” short shorts and a clinging halter-top. It is noted by the District Court that a female officer may be less hesitant to touch private areas of a female suspect’s person. Even so, female Officer Oreck, when feeling an unknown object in the groin area, immediately concluded that the same was “plastic”. When advised that the object was a pill bottle, Oreck ordered Defendant to “retrieve” what the officer had already concluded was a pill bottle. If this officer had concluded, to the contrary, through tactile contact, that the object was metallic, or had heft, or had some other characteristic of a weapon, such further physical intrusion would, arguably, be consistent with *Terry*, but that is not what the testimony reveals. The fact is that Officer Oreck, at the instant she ordered the removal of the plastic pill bottle, knew

that it was not a weapon, and that a plastic pill bottle posed no threat whatsoever to her or to male Officer Hieber. Officer Oreck's pursuit of the plastic bottle, well knowing it was not a weapon, was purely for the purpose of finding contraband. The issue, therefore, is *not* whether she had reasonable cause to believe the object was, or could be, a weapon. She obviously knew, at that time, it was not.

Oreck could only have determined the object she felt was a pill bottle through manipulation. She may not employ manipulation to an object "*previously determined not to be a weapon*", in order to ascertain its incriminating nature (*Emphasis added*). (see *State v. Evans* (1993), 67 Ohio St. 3d 405)

In *Matter of Coleman* (1993), WLLLL 541582 (Ohio App. 8 Dist.) 4, citing *Evans, supra*, at 414, as follows:

"Obviously, once the officer determines from his sense of touch that an object is not a weapon, the pat-down frisk must stop.... The specific question raised... concerns what future actions are permissible under *Terry* if the searching officer is unable to determine from the patdown that the suspect is not carrying a weapon"

"In answering this question, it is important first to emphasize that *Terry* does not require that the officer be absolutely convinced that the object he feels is a weapon before grounds exist to remove the object. At the same time, a hunch or inarticulable suspicion that the object is a weapon of some sort will not provide a sufficient basis to uphold a further intrusion into the clothing of a suspect. When an officer removes an object that is not a weapon, the proper question to ask is whether that officer reasonably believed, due to the object's "size or density" that it could be a weapon".

Obviously, Oreck could not reasonably believe the pill bottle "could be" a weapon.

CONCLUSION

Terry and its progeny restrict the invasiveness of a warrantless stop/investigation to the officer's security. The discovery of a plastic pill bottle without knowledge of its contents exceeds the limits of a patdown and further it implies manipulation. The expansion of the case law cited herein involves matters of individual rights and thus is a substantial constitutional question involving matters of public and great general interest. The appellant requests that this court grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

Respectfully submitted,



Jack Harrison

**COUNSEL FOR APPELLANT,
SYETA DAVIS**

FILED
 2008 JUN 13 AM 8:44
 COURT OF APPEALS
 MONTGOMERY CO. OHIO



IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. CASE NO. 22572
v.	:	T.C. NO. 2007-CR-2970
SYETA DAVIS	:	
Defendant-Appellee	:	

.....
OPINION

Rendered on the 13th day of June, 2008.

.....
 MARK J. KELLER, Atty. Reg. No. 0078469, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, OH 45422
 Attorney for Plaintiff-Appellant

JACK HARRISON, Atty. Reg. No. 0005076, 130 W. Second Street, Suite 604, Dayton, OH 45402
 Attorney for Defendant-Appellee

.....
 WOLFF, P.J.

The State of Ohio appeals from an order of the Montgomery County Court of

THE COURT OF APPEALS OF OHIO
 SECOND APPELLATE DISTRICT

Common Pleas, which granted in part Syeta Davis's motion to suppress evidence. For the following reasons, the suppression order will be reversed and the case will be remanded for further proceedings.

The State's evidence at the suppression hearing, which was credited by the trial court, revealed the following facts.

At approximately 12:38 p.m. on July 22, 2007, Dayton Police Officer Jeff Hieber was patrolling the Gettysburg Car Wash, which is located at 3115 North Gettysburg Avenue in Dayton. The car wash is located in a high drug area, and Hieber had previously made numerous drug arrests there.

Hieber noticed several cars at the car wash, some of which were being washed or dried and others that were being vacuumed. One vehicle, a blue Firebird, caught his attention because it was being neither vacuumed nor washed, even though there were bays available for either activity. The Firebird was occupied by two people – a male, later identified as Wilson Winn, was in the driver's seat, and a woman, Davis, was in the front passenger seat. Davis was wearing "a very short pair of shorts" and a mid-waist, very tight top.

Hieber observed the Firebird for several minutes, and then slowly drove around the car wash to see what the other cars were doing. As he drove past the Firebird, the officer saw Davis with what appeared to be a marijuana cigarette and a baggie with marijuana in her hand. Hieber circled around the car wash and then pulled up behind the Firebird.

After Hieber stopped behind Winn's car, Winn jumped out of the car, looked at the officer, and leaned into the car "like he [was] handing or doing something inside the car." Hieber stated that Winn acted suspicious and nervous. Hieber exited his cruiser and

approached Winn. From outside the vehicle, Hieber could see a clear plastic baggie containing other small baggies of marijuana sticking out of the console area of the Firebird. Hieber asked Winn if he had a license, and Winn informed him that his license was suspended. Hieber walked Winn to his cruiser, patted him down, and placed him in the right rear of the cruiser. Hieber testified that Winn was being arrested, and that the vehicle was going to be towed.

Hieber then returned to the Firebird and asked Davis if she had identification. Davis opened her purse widely on her lap, and Hieber immediately saw another baggie inside her purse which appeared to contain a generic form of Vicodin, a Schedule IV drug. Hieber "made a mental note" of the pills. When Davis offered Hieber her driver's license, Hieber also observed approximately half of a baggie that had been shoved between the left side of the passenger seat and the console. The baggie appeared to contain green, leafy marijuana as well as a pack of papers and a loose-leaf of rolling papers. Hieber took Davis's driver's license from her. Davis told the officer that she had been the driver and that Winn had just been sitting there. Hieber retrieved the baggie from beside Davis, and he told her that she would receive a minor misdemeanor ticket. The officer asked Davis to step from the vehicle, he performed a patdown for weapons, and he placed Davis, without handcuffs, into his cruiser. Hieber testified that Davis was not under arrest but remained under investigation for the pills.

Hieber notified the dispatcher of his situation and requested another crew to assist him. While asking Davis for her date of birth and social security number, Hieber asked her about the pills in her purse. Winn responded that the pills belonged to his mother but that she had given the pills to Davis because Davis is pregnant and needed them for pain.

Dayton Police Officer Melissa Oreck arrived soon thereafter. Hieber advised her of the situation and asked her to handle Davis. Hieber asked Oreck to write a minor misdemeanor ticket for the marijuana and to check with the drug hotline to verify whether the pills were a Schedule IV controlled substance. The officers asked Davis to step out of Hieber's cruiser, and they walked her to the right rear of Oreck's cruiser.

Before being placed in Oreck's cruiser, Oreck conducted another patdown search. Oreck felt hard plastic in Davis's groin area. Davis informed her that it was a pill bottle. At Oreck's request, Davis retrieved the bottle and handed it to the officer. The bottle contained a baggie with a very large chunk of crack cocaine, another baggie with five or six empty gelcaps of heroin, and a baggie of Viagra pills. Davis was placed under arrest. Oreck subsequently performed another patdown of Davis and located a baggie of powdered cocaine underneath her bra.

Winn and Davis presented a different version of events at the suppression hearing. Winn stated that he was trying to retrieve his cell phone, not hide anything, when Hieber approached. Winn testified that Hieber approached him for having expired license plates, but he was arrested for driving without a license and marijuana. Davis denied rolling a joint or smoking at the car wash, and she stated that she did not open her purse in front of Hieber. Davis testified that she was transporting the pills in her purse to Winn's mother. She denied knowing what was in the pill bottle in her shorts or the baggie in her bra; she indicated that Winn had given them to her. Davis stated that Hieber searched the car and her purse without permission. The trial court did not credit Winn and Davis's testimony.

On July 27, 2007, Davis was indicted for possession of crack cocaine, possession of cocaine, and possession of heroin. Davis filed a motion to suppress the evidence. After

a hearing (held in three sessions), the motion was sustained in part and overruled in part. The court concluded that Heiber "was justified in making an investigatory stop and conducting a pat-down of Defendant for officer safety." The court denied the motion to suppress evidence obtained from the vehicle or from Davis's purse. The court, however, suppressed the additional drugs found during the pat-down by Oreck and any related statements. The court found that Oreck "did not have a reasonable belief that Defendant was armed when she conducted the pat-down."

On appeal, the State argues that the trial court erred in granting in part the motion to suppress. According to the State, "the sole issue to be reviewed *de novo* is whether the pills seen in Davis' purse provided Heiber with probable cause to arrest her." It states: "Since Heiber had probable cause to believe that the drugs were vicodin he was permitted to arrest Davis for them. Accordingly, the subsequent pat downs which revealed additional drugs would have occurred pursuant to a search incident to a lawful arrest."

The State's argument is unavailing. Even if Heiber had probable cause to arrest Davis for possession of vicodin, the fact remains that Davis was *not* under arrest for possession of the pills when Oreck conducted a second pat-down, and there is no evidence in the record that she was charged for possession of vicodin. Heiber testified that Davis's possession of marijuana was a minor misdemeanor for which he was going to write a ticket. In short, there is no evidence in the record that Davis would have been arrested – and that a search incident to an arrest would have occurred – in the absence of Oreck's discovery of the crack cocaine, heroin, and powdered cocaine. Stated simply, whether Heiber had probable cause to arrest Davis for the pills is irrelevant to our analysis.

We disagree with the trial court, however that Oreck lacked a reasonable suspicion

that Davis was armed to justify conducting a second patdown search. The police may conduct a limited protective search for concealed weapons if the officers reasonably believe that the suspect may be armed or a danger to the officers or to others. *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, at ¶13.

Although Davis had already been frisked for weapons by Hieber prior to being placed in his cruiser, a male officer might be more restrained when patting down a female. Despite the fact that Davis was wearing very tight clothing consisting of very short shorts and a short, skimpy top, it was possible for her to conceal a small weapon in her groin and breast areas – areas which a male officer may be reluctant to pat down. In short, we find that Oreck's patdown of Davis prior to placing her in her cruiser was lawful. Accordingly, the trial court erred in granting in part the motion to suppress.

The assignment of error is sustained.

The judgment of the trial court will be reversed, and the case will be remanded for further proceedings.

.....
FAIN, J. and GRADY, J., concur.

Copies mailed to:

Mark J. Keller
Jack Harrison
Hon. Barbara P. Gorman

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellant : C.A. CASE NO. 22572
 v. : T.C. NO. 2007-CR-2970
 SYETA DAVIS :
 Defendant-Appellee :

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Pursuant to the opinion of this court rendered on the 13th day of
June, 2008, the judgment of the trial court is reversed and the case is remanded for
 further proceedings.

Costs to be paid as stated in App.R. 24.

William H. Wolff, Jr.
 WILLIAM H. WOLFF, JR., Presiding Judge

Mike Fain
 MIKE FAIN, Judge

Thomas J. Grady
 THOMAS J. GRADY, Judge

THE COURT OF APPEALS OF OHIO
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THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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MONTGOMERY CO. OHIO
1

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY
CRIMINAL DIVISION

STATE OF OHIO, : CASE NO. 2007-CR-2970
 :
 Plaintiff, : (Judge Barbara P. Gorman)
 :
 v. :
 :
 SYETA L. DAVIS, : **DECISION, ORDER AND ENTRY**
 : **OVERRULING IN PART AND SUSTAINING**
 Defendant. : **IN PART DEFENDANT'S MOTION TO**
 : **SUPPRESS**

This matter is before the Court on the *Motion to Suppress* filed by Defendant Syeta L. Davis on September 13, 2007. Hearings on the matter were held in open court on October 31, 2007, November 30, 2007 and December 3, 2007 at which the following testimony was received. Dayton Police Officer Jeff Hieber testified for the State. Defendant testified on her own behalf and also called Wilson Winn. Following the hearings, Defendant filed a supplemental *Motion to Suppress*. This matter is properly before the Court.

I. FACTS

Dayton Police Officer Jeff Hieber ("Hieber") testified that on July 22, 2007 at approximately 12:38 p.m., he was patrolling the area near 3115 North Gettysburg in Dayton. According to Hieber, he patrolled the parking lot of the car wash located at that address because it is a high crime area. Hieber testified that he noticed a blue firebird parked in the lot with two occupants. It did not appear to Hieber that the occupants were washing the car as there was an empty bay nearby. Hieber stated that he drove slowly by the car and saw the female in the

passenger seat rolling a marijuana cigarette. According to Hieber, he was three to four feet away.

Hieber continued to drive around the lot and came back behind the blue firebird and parked.

Hieber further testified that the male, who had been sitting in the driver's seat, jumped out and went halfway back into the car and appeared to be doing something inside the car. Hieber stated that as approached the driver side of the car, he could see a clear baggy sticking out of the console between the driver and passenger seats. Hieber testified that he asked the driver, whose name was Wilson Winn ("Winn") for identification, and Winn told him that his license was suspended. At that point, Hieber intended to investigate further and tow the vehicle because Winn's license was suspended, and he had seen the female with marijuana. Heiber patted Winn down and placed him in his cruiser.

Hieber testified that he then turned his attention to the female, whom he identified as Defendant Syeta L. Davis ("Defendant"). According to Hieber, when he asked her for identification, she opened up her purse wide and he could see in plain view a baggy containing white pills that appeared to be Vicadin. Hieber stated that he could also see by looking through the car window another baggy that contained marijuana shoved between the passenger seat and the console. According to Hieber, Defendant was wearing very short shorts and a skimpy top. He "lightly" patted her down, found no weapons or contraband and also placed her in the cruiser. He then requested assistance from other officers.

Officer Oreck ("Oreck") of the Dayton Police Department arrived. Oreck took over with respect to Defendant. According to Hieber, Defendant was going to receive a ticket for the marijuana that he saw her with and the pills in her purse were going to be identified. Defendant was removed from Hieber's cruiser. Hieber testified that because Defendant was going to be placed in Oreck's cruiser, Oreck conducted another pat-down for officer safety and per department procedure.

Hieber testified that he witnessed the pat-down and that Oreck felt a hard plastic object in Defendant's groin area. When Oreck asked what it was, according to Hieber, Defendant responded a "pill bottle." At Oreck's request, Defendant retrieved the pill bottle, and it contained crack

cocaine, gel caps filled with heroin and Viagra pills. Oreck also retrieved a baggy of cocaine from Defendant's bra.

Winn then took the witness stand. He testified that on July 22, 2007, Defendant had driven him to the car wash. After washing the car, he and Defendant saw Hieber patrolling. According to Winn, as he exited the car, he noticed that his phone had fallen out of his pocket, and he leaned back in to retrieve it from under the seat. According to Winn, he was not hiding anything as Hieber had testified.

Winn also testified that Hieber approached him and told him that the plates on the car were expired. Valid plates, not proven to be those on the firebird at the time in question, were admitted into evidence. Winn also testified that Hieber's video recorder was on during the entire encounter. Hieber later testified that to his knowledge, the recorder was not on and that no tape of the encounter exists.

Defendant then testified. She stated that she saw Hieber when he first drove up beside their car. She denied rolling a joint or smoking. Defendant further testified that Winn had reached back in to the car after exiting to retrieve his phone from under the seat. Defendant denied that she opened her purse in front of Hieber, and rather testified that she had her license out as soon as she saw Hieber because she had actually driven to the car wash. Defendant claims that Hieber searched her purse and her car without permission.

Defendant then addressed the vicadin pills found in her purse. She testified that they belonged to Winn's mother and she was merely transporting them from one house to another. The Court notes that Winn testified that his mother had given Defendant the pills to ease pain she was experiencing during her pregnancy.

Defendant then testified that she put the pill bottle containing the crack and heroin gel caps in her pants because she didn't know what was in the bottle. She also stated that Winn gave her the baggy of crack cocaine, and she put that in her bra because she didn't know what it was.

Defendant argues that each of the stop and search of Defendant, as well as her subsequent arrest, was unlawful, and that all evidence seized and statements made by her as a result should be suppressed.

II. LAW & ANALYSIS

At a motion to suppress hearing, the state must prove that the contested evidence is admissible by a preponderance of the evidence. *Athens v. Wolf* (1974), 38 Ohio St.2d 237, 313 N.E.2d 405. The weight of the evidence and the credibility of the witnesses both at trial and suppression hearings are primarily for the trial court. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583.

A. Stop and Search of Defendant

The Second Appellate District Court of Appeals of Ohio has held that, in order to justify the detention and investigation of an individual, a police officer must have a “reasonable, articulable suspicion of criminal activity.” *State v. Bradley* (July 25, 1997), 2nd Dist. No. 16247, citing *Terry v. Ohio* (1968), 392 U.S. 1, 20 L.Ed.2d 889. “An officer’s actions must be viewed in light of the totality of the circumstances, and the court must determine what a reasonable police officer would have done.” *Bradley*, supra, at *6-7, citing *State v. White* (1996), 110 Ohio App.3d 347, 352, 674 N.E.2d 405. Under the totality of the circumstances test, “[t]hese circumstances must be viewed through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold. Accordingly, the court must take into consideration the officer’s training and experience and understand how the situation would be viewed by the officer on the street.” *State v. Martin*, 2004 Ohio 2738 (citations omitted).

Even though an investigatory stop of an individual is justified, it does not necessarily follow that a frisk for weapons is also warranted. See *State v. Lynch* (June 6, 1998), Montgomery App. No. 17028. As a general rule, only probable cause justifies an intrusion upon the sanctity of one’s person. See *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. “The state bears the burden of proving that one of the few established exceptions applies in order for evidence seized as a result

of a warrantless search to survive a motion to suppress.” *State v. Bean* (Ohio Com. Pl. 1992), 63

Ohio Misc.2d 434, 631 N.E.2d 198, citing, *State v. Kessler* (1978) 53 Ohio St.2d 204, 373 N.E.2d 1252.

In *Terry v. Ohio* (1968), 392 U.S. 1, 20 L.Ed.2d 889, the United States Supreme Court held that:

There must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonable prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or “hunch,” but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

In the case at bar, Hieber was justified in making an investigatory stop and conducting a pat-down of Defendant for officer safety. Hieber credibly testified that he observed Winn acting suspiciously and making furtive movements when he drove up behind the vehicle. Reliance on clandestine gestures to make a stop are permissible “when other factors indicating reasonable suspicion are present.” *State v. Phelps*, 1998 Ohio App. LEXIS 3480 (Montgomery County July 31, 1998). In addition to Winn’s behavior, Hieber testified that Winn and Defendant did not appear to be washing their car, and that they were in an area known for drug activity. Further, he saw Defendant rolling a marijuana cigarette when he drove past the vehicle she occupied. Finally, Hieber’s testimony that he saw vicadin pills in plain view in Defendant’s purse and a baggy containing marijuana shoved between Defendant’s seat and the console justified Hieber’s decision to further investigate and pat down Defendant for officer safety before placing her in his cruiser.

As set forth in the facts, Defendant’s and Winn’s version of what happened differed from Hieber’s testimony. The weight of the evidence and the credibility of the witnesses both at trial and suppression hearings are primarily for the trial court. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20,

437 N.E.2d 583. In this case, the Court finds Hieber's credibility to far outweigh that of both

Defendant and Winn. Based on such determination, Defendant is not entitled to the suppression of any evidence obtained from the vehicle she occupied or her purse.

Additional evidence was found on Defendant's person during the pat-down by Oreck, and she made some statements related to the pat-down. As set forth above, officers are permitted to conduct a pat-down under a narrowly drawn exception for officer safety. In this case, that exception did not apply to the pat-down conducted by Oreck. Hieber testified that he had previously patted Defendant down for officer safety and placed her in his cruiser. Thus, he felt comfortable that she was not armed. Further, Defendant was wearing very short shorts and a skimpy top, rather than bulky clothes where weapons could be hidden. Based on these facts, the Court finds that Oreck did not have a reasonable belief that Defendant was armed when she conducted the pat-down. Accordingly, all evidence seized from Defendant's person as a result of Oreck's pat-down and all related statements are hereby suppressed.

.III. CONCLUSION

Accordingly, Defendant's *Motion to Suppress* is SUSTAINED in part and OVERRULED in part.

SO ORDERED:


BARBARA P. GORMAN, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by

ordinary mail this filing date.

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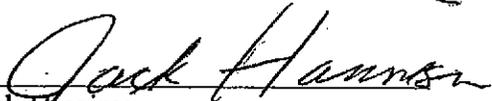
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WILLIAM HAFER, Bailiff

225-4392

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Mark J. Keller, Assistant Prosecuting Attorney, and Matthew H. Heck, Jr., Prosecutor, Montgomery County Prosecutor's Office, 301 West Third St., Fifth Floor, Dayton, Ohio 45422, on this 28th day of July, 2008.



Jack Harrison

**COUNSEL FOR APPELLANT,
SYETA DAVIS**