[Cite as *State v. Stamper,* 2004-Ohio-5366.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 03-MA-144
VS.	)	
	)	OPINION
JOHN E. STAMPER,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 02 CR 42
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul J. Gains Mahoning County Prosecutor Attorney Jason M. Katz Assistant County Prosecutor 21 W. Boardman St., 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Gregg A. Rossi ROSSI & ROSSI 26 Market St. 8th Floor P.O. Box 6045 Youngstown, Ohio 44501

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 29, 2004

DONOFRIO, J.

{¶1} Defendant-appellant, John E. Stamper, appeals from a Mahoning County Common Pleas Court decision overruling his motion to suppress the crack cocaine found in his cigarette package.

{¶2} At approximately 3:25 a.m. on January 2, 2002, Officers Kevin Mercer and Brian Booksing noticed a pickup truck stopped at the corner of Marshall and West in Youngstown. They stopped to check the vehicle since it was not moving and its brake lights were on. Officer Mercer approached the truck and noticed appellant, who appeared to be passed out at the wheel. Appellant was sweating profusely. The truck was still in drive, so Officer Mercer reached in and put it in park. He then shook appellant by the arm, asked him if he was o.k., and helped him step out of the truck.

{¶3} Upon helping appellant out of the truck, Officer Mercer conducted a pat down of appellant's person. He felt a long, slender object consistent with a closed knife. Officer Mercer removed the item, which turned out to be a crack pipe. He then placed appellant under arrest for drug paraphernalia. The arrest led to a further search at the police station that revealed a rock of crack cocaine in appellant's cigarette pack.

{¶4} A Mahoning County Grand Jury indicted appellant on one count of possession of cocaine, a fifth degree felony in violation of R.C. 2925.11(A)(C)(4)(a). On July 31, 2002, appellant filed a motion to suppress the crack cocaine alleging the officers found it as a result of an illegal pat-down search. The court held a hearing on the motion on January 9, 2003, where it heard testimony from Officer Mercer. In its January 23, 2003 judgment entry, the court overruled the motion to suppress. Thereafter, appellant entered a no contest plea. The trial court found him guilty and sentenced appellant to: three years of community control, with conditions of

completing the day reporting program at Community Corrections Association and random drug/alcohol tests; a six-month driving suspension, with occupational privileges after 30 days; and a $500 fine.

{¶5} The trial court stayed appellant's sentence pending this appeal. Appellant filed his timely notice of appeal on August 8, 2003.

{¶6} Appellant raises two assignments of error, the first of which states:

{¶7} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE SINCE THE PAT DOWN FRISK WAS NOT CONSTITUTIONALLY PERMITTED."

{¶8} Appellant argues that the trial court should have suppressed the cocaine found on his person as the "tainted fruit of the poisonous tree." Appellant argues that the officers had no basis to conduct a pat down search of him. He claims that the search failed to comply with the requirements set out by the United States Supreme Court in *Terry v. Ohio* (1968), 392 U.S. 1. He argues that in *Terry*, the Court held that a frisk is a search and, as such, must be independently supported. He asserts that a *Terry* frisk is not a search for evidence, but only a search for weapons. Appellant argues that, under *Terry*, the officer conducting the frisk must have reasonable suspicions about the presence of a weapon in order to conduct a protective search. He points out that the officer must reasonably suspect that the detainee is armed. Additionally, appellant notes that the State has the burden to establish the reasonableness of a *Terry* frisk.

{¶9} Appellant also cites to *State v. Lozada* (2001), 92 Ohio St.3d 74, for support. In *Lozada*, the Ohio Supreme Court held that "[d]uring a routine traffic stop, it is unreasonable for an officer to search the driver for weapons before placing him or her in a patrol car, if the sole reason for placing the driver in a patrol car during the investigation is for the convenience of the officer." Id. at paragraph two of the syllabus. Appellant points out that the court found that a police officer cannot, as a matter of routine, frisk a person for weapons after instructing him or her to sit in the police cruiser.

{¶10} In this case, appellant claims that Officer Mercer acted unreasonably in patting him down without any facts on which to believe he was armed. He points to the following facts to support his position. Officer Mercer did not smell alcohol. He did not know appellant's identity, nor did he ask. He did not ask appellant if he had any weapons. Appellant had no outstanding warrants. Appellant was not combative or aggressive. They were not in a high crime area. Officer Mercer's partner was with him, while appellant was alone. It was not necessary to pat appellant down to render any medical assistance. And Officer Mercer patted appellant down as soon as he helped appellant out of the truck. Appellant contends that all of these facts lead to the conclusion that the pat down was unreasonable.

{¶11} Our standard of review with respect to a motion to suppress is first limited to determining whether the trial court's findings are supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608. Such a standard of review is appropriate as, "[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Venham* (1994), 96 Ohio App.3d 649, 653. An appellate court accepts the trial court's factual findings and relies upon the trial court's ability to assess the witness's credibility, but independently determines, without deference to the trial court, whether the trial court applied the appropriate legal standard. *State v. Rice* (1998), 129 Ohio App.3d 91, 94. A trial court's decision on a motion to suppress will not be disturbed when it is supported by substantial credible evidence. Id.

{¶12} The Fourth Amendment provides that "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." Warrantless searches are per se unreasonable unless the search falls within a noted exception. *Katz v. United States* (1967), 389 U.S. 347, 357. The United States Supreme Court set out one such exception in *Terry*, 392 U.S. 1. According to *Terry*, a police officer may frisk a person

who is legally stopped if the officer "has reason to believe that he is dealing with an armed and dangerous individual." Id. at 27. In justifying a *Terry* stop, the officer "must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. An officer cannot conduct a protective search as a pretext for a search for contraband, a search for convenience, or as part of his or her normal routine or practice. *State v. Stiles*, 11th Dist. No. 2002-A-0078, 2003-Ohio-5535, ¶16, citing *State v. Evans* (1993), 67 Ohio St.3d 405, 414; *Minnesota v. Dickerson* (1993), 508 U.S. 366, 378; *Lozada*, 92 Ohio St.3d at 77.

{¶13} When determining whether a *Terry* stop was reasonable, we are to look to the totality of the circumstances. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87. Additionally, we are to view these circumstances through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. Id. at 87-88. Thus, we must examine the facts through the eyes of Officer Mercer, a police officer with six years experience.

{¶14} First, we must look at whether the stop was reasonable. Appellant does not take issue with the stop, his arguments surround the ensuing pat down and seizure of the crack pipe. Thus, we will only briefly examine the stop. While this stop was not a routine traffic stop, it was reasonable. Officer Mercer saw a truck running, yet sitting still at an intersection at 3:25 in the morning. (Tr. 6-7). When he approached the truck, Officer Mercer noticed that the driver was slumped over the steering wheel and appeared to be passed out. (Tr. 8). Officer Mercer testified that this could have been a medical situation where he would have had to render medical assistance. (Tr. 40). Thus, the stop was reasonable pursuant to the police community caretaker function. See *State v. Norman* (1999), 136 Ohio App.3d 46.

{¶15} The harder question is whether the frisk was reasonable. Thus, we must examine the facts as testified to by Officer Mercer. In testifying regarding the reasonableness of a frisk, "[t]he officer need not artfully articulate his justification, but there must be evidence in the record that the officer was aware of specific facts that

would suggest that he may be in danger." *State v. Whitfield* (Nov. 1, 2000), 7th Dist. No. 99 CA 111. Officer Mercer stated that when he approached appellant, who was passed out at the wheel, he noticed that appellant was sweating very profusely. (Tr. 8). When he saw this, Officer Mercer reached in the car and put it in park. (Tr. 8). He then grabbed appellant by the arm, shook him a little bit, and asked him if he was all right. (Tr. 8). He helped appellant out of the truck because appellant was having trouble keeping his balance. (Tr. 26). Appellant began to come to and realize his surroundings as he got out of the truck. (Tr. 26).

{¶16} Officer Mercer testified that when he noticed appellant was passed out and sweating profusely it indicated to him a possible high use of drugs, probably crack cocaine or heroin. (Tr. 10). He also testified that appellant seemed incoherent and was not sure what was going on or where he was. (Tr. 10). Officer Mercer testified that based on his experience, a person such as appellant, who has consumed a high amount of drugs would have very unpredictable behavior. (Tr. 10). He stated that such a person might cooperate or the person might become extremely agitated and combative at any point. (Tr. 10-11). Officer Mercer testified that he did not know what appellant might do. (Tr. 11).

{¶17} As soon as Officer Mercer helped appellant from the truck, he patted appellant down. (Tr. 28). Officer Mercer testified that at that time, he had "no idea whether [appellant] was armed, unarmed, whether he was violent, confrontational." (Tr. 29). He stated that the sole reason he patted appellant down was to determine if appellant had any weapons so he could ensure his safety. (Tr. 31).

{¶18} Additionally, we may consider the officer's experience on the force. *Stiles*, 11th Dist. No. 2002-A-0078, at ¶17. Officer Mercer had six years experience with the Youngstown Police Department and, before that, he had some part-time experience as a patrolman for Liverpool Township and as a reserve deputy for Columbiana County. (Tr. 4-5). And we may consider the time of day and the lighting conditions. See *State v. Andrews* (1991), 57 Ohio St.3d 86, 88. The stop took place at 3:25 a.m. and Officer Mercer testified that it was very dark and the area had very

poor lighting. (Tr. 6, 9). Additionally, Officer Mercer suspected, based on appellant's condition, that appellant was high on drugs. Courts have noted that weapons are often involved in drug transactions. *Whitfield*, 7th Dist. No. 99 CA 11, citing *State v. Williams* (1990), 51 Ohio St.3d 58, 62; *State v. Jones* (Dec. 3, 1999), 1st Dist. No. C-990125. It is naïve not to associate drugs with guns. *Whitfield*, 7th Dist. No. 99-CA-11, citing *Jones*, 1st Dist. No. C-990125. Thus, high use of crack cocaine or heroin can be a factor to consider in determining if an individual is armed and dangerous.

{¶19} While these facts support Officer Mercer's frisk of appellant, other facts tend to suggest that Officer Mercer may not have needed to frisk appellant. He testified that before he frisked appellant, he did not know appellant's name, did not know if he had any outstanding warrants, and had not yet asked for his driver's license. (Tr. 27). Additionally, Officer Mercer testified that he would not consider the intersection where he found appellant to be a high crime area. (Tr. 18). Furthermore, he stated that as he was helping appellant from the truck, appellant was not resisting or showing any aggression or combativeness. (Tr. 30).

{¶20} Considering all of the facts surrounding the pat down, Officer Mercer acted reasonably in frisking appellant. Officer Mercer testified that he conducted the frisk for his safety since he believed appellant was high on crack or heroin and could react aggressively. This was a potentially dangerous situation and Officer Mercer had to proceed with due caution for his safety and appellant's safety. Appellant was passed out at the wheel of his car in the early morning hours and sweating profusely. While appellant was not acting violently at the time, Officer Mercer knew from his experience that people in appellant's condition could become agitated and combative at any point. Furthermore, given appellant's reasonably suspected high drug use, Officer Mercer had reason to believe appellant was armed. And given the likelihood that appellant was high on drugs and could turn violent at any moment, he would be more likely to use a weapon than if he was sober.

{¶21} Substantial credible evidence exists in the record that Officer Mercer was aware of specific facts that suggested that appellant may be armed and

dangerous. Thus, the trial court properly overruled appellant's motion to suppress. Accordingly, appellant's first assignment of error is without merit.

{¶22} Appellant's second assignment of error states:

{¶23} "ASSUMING ARGUENDO THAT THE PAT DOWN SEARCH WAS AUTHORIZED, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE SINCE THE SCOPE OF THE FRISK AND REMOVAL OF THE OBJECT EXCEEDED THE SCOPE OF A LAWFUL FRISK UNDER THE CIRCUMSTANCES."

{¶24} Appellant argues that even if the pat down was legal, the seizure of the crack pipe was not. He asserts that since Officer Mercer knew the item he felt in appellant's coat pocket was not a gun and it was not immediately apparent as a weapon, Officer Mercer had no right to remove it. Citing, *Dickerson*, 508 U.S. 366.

{¶25} When a police officer conducts a protective *Terry* frisk, the pat down is limited to its protective purpose and cannot be used to search for evidence of crime. *Evans*, 67 Ohio St.3d at 414; *Terry*, 392 U.S. at 29. The Ohio Supreme Court has noted:

{¶26} "[I]t 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. 3 LaFave, Search and Seizure (2 Ed.1987) 521, Section 9.4(c)." *Evans*, 67 Ohio St.3d at 415.

{¶27} The *Evans* Court continued, "'[s]omewhat more leeway must be allowed upon "the feeling of a hard object of substantial size, the precise shape or nature of which is not discernible through outer clothing," which is most likely to occur when the suspect is wearing heavy clothing.'" Id., quoting LaFave at 523.

{¶28} In this matter, upon frisking appellant, Officer Mercer felt a long slender object consistent with a closed knife in appellant's inside coat pocket. (Tr. 12). He testified that appellant was wearing a thick coat. (Tr. 32). He also testified that he could tell upon feeling the object that it was not a gun. (Tr. 33). And he stated that the object could have been consistent with a large ink pen. (Tr. 33). Officer Mercer then retrieved the object from appellant's pocket, which turned out to be a crack pipe. (Tr. 12-13). The crack pipe was glass, approximately six inches long and a quarter inch in diameter. (Tr. 13).

{¶29} Given the fact that Officer Mercer felt a long, slender object that he thought could have been a closed knife, the seizure of the object was reasonable. Moreover, Officer Mercer was entitled to "somewhat more leeway" since appellant was wearing a thick coat. So it would have been difficult for him to discern with certainty what the object he felt in the coat was.

{¶30} Additionally, appellant argues that because the burden was on appellee to demonstrate a legal search and seizure, the fact that appellee failed to produce the crack pipe at the suppression hearing required the court to rule in appellant's favor and suppress the cocaine.

{¶31} Appellee did not produce the crack pipe at the hearing. However, appellant has cited to no law that suggests appellee was required to do so. Officer Mercer testified as to the object's size and how it felt. Appellant did not dispute this testimony. Therefore, this did not affect the outcome of the suppression hearing.

{¶32} Accordingly, appellant's second assignment of error is without merit.

{¶33} For the reasons stated above, the trial court's decision is hereby affirmed.

Vukovich, J., concurs.
DeGenaro, J., dissents. See dissenting opinion.

DeGenaro, J., dissenting:

{¶34} I must respectfully dissent from the majority's opinion because the pat down of the defendant leading to the removal of the crack pipe from his clothing was unlawful.

{¶35} The majority accurately describes the law regarding the reasonableness of a protective search; before searching a suspect's person for weapons, an officer must reasonably suspect the suspect is armed and dangerous. Opinion at ¶12. But it inadvertently relaxes that standard for conducting a protective search when citing and relying upon this court's prior decision in *Whitfield.* In that case, this court stated that "[t]he officer need not artfully articulate his justification, but there must be evidence in the record that the officer was aware of specific facts that would suggest that he may be in danger." The majority has taken that statement out of context, placing the emphasis upon the suspect being dangerous rather than being *armed and dangerous*.

{¶36} As a result, the majority excuses the prosecution's failure to demonstrate that the officer had reason to believe, or did in fact believe, that Stamper was armed. The testimony elicited from the officer was quite the contrary. During cross-examination, the officer was asked, "Now, prior to the pat down, would you agree that at that point in time you had no basis to believe that Mr. Stamper was armed?" To which the officer responded, "At that point, I had no idea whether he was armed, unarmed, whether he was violent. I really didn't know what I had at that point."

{¶37} On re-cross-examination, the officer was again questioned about the search and the following exchange occurred:

{¶38} “Q: Sergeant Mercer, from your observations, as you approached the vehicle, you'd agree that you observed no evidence of any criminal activity at that point in time; is that correct?

{¶39} “A: That's correct.

{¶40} “Q: All right. And also with regard to whether he was armed or unarmed, can you point to me and this court one fact upon which you had the belief that he was armed before you patted him down, one fact?

{¶41} “A: That I absolutely knew he was armed before I patted him down?

{¶42} “Q: Yes.

{¶43} “A: No, I cannot.”

{¶44} Although the officer could not articulate a reason to believe that Stamper was armed, the majority has provided him one; the officer suspected that Stamper was high on drugs. The majority states that weapons are often involved in drug transactions. Accordingly, the majority concludes that the suspected use of crack cocaine or heroin can be a factor to consider in determining if an officer's frisk was reasonable, citing to *Whitfield* for support.

{¶45} In *Whitfield*, this court cited *State v. Williams* (1990), 51 Ohio St.3d 58, 62, to note that weapons are often involved in drug transactions. But neither *Williams* nor *Whitfield* noted that weapons are likely to be found in every drug offense. Rather, the Supreme Court suggested in *Williams* that weapons were likely to be found when drug trafficking was involved. Other courts have come to the same conclusion. It is significant to note, however, that they reach this conclusion based upon the nature of the offense; not the mere presence of drugs.

{¶46} In *State v. Evans,* 67 Ohio St.3d 405, 1993-Ohio-0186, the Supreme Court explained:

{¶47} "The right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed. See *State v. Williams* (1990), 51 Ohio St.3d 58, 554 N.E.2d 108; see also *United States v. Ceballos* (E.D.N.Y.1989), 719 F.Supp. 119, 126: 'The nature of narcotics trafficking today reasonably warrants the conclusion that a suspected dealer may be armed and dangerous.'" Id. at 413.

{¶48} The First District elaborated on this issue in *State v. Warren* (1998), 129 Ohio App.3d 598:

{¶49} "We recognize that the nature of the suspected offense for which an individual is stopped may contribute to, or altogether establish, a suspicion that the individual is armed. For example, one commentator suggests that suspicion that an individual has committed, was committing, or was about to commit a type of crime for which the offender would likely be armed' such as robbery, burglary, rape, assault with weapons, homicide, and dealing or possession of large quantities of drugs--would provide a reasonable suspicion to frisk. This rationale was evidently followed by the Ohio Supreme Court in *Williams*. In *Williams*, the court upheld a search where an officer, acting alone, had just discovered a large quantity of growing marijuana that three men were actively harvesting. The officer suddenly encountered Williams, who gave the officer implausible reasons for his presence. The court held that these circumstances provided the officer with enough suspicion that Williams was armed to perform a protective search.

{¶50} "However, the same commentator specifically notes that suspicion that an individual is trafficking in small quantities of drugs is not enough to justify a belief that the individual is armed. We agree. Officers Rhone and Bruner saw a tiny amount of what they believed to be crack cocaine in a tissue--such a small amount that they did not field-test it or charge Warren for it, and evidently left it on the city street. We refuse to hold that the nature of this suspected crime, even in a high-crime area, provided the justification to frisk Warren." Id. at 605. (footnotes omitted)

{¶51} The majority has done what the First District refused to do, extend *Williams* to say that anyone suspected to be under the influence of drugs is likely to be armed. This creates a smoke screen for officers to improperly search for suspected contraband rather than suspected weapons. The purpose of a limited search under *Terry* is to allow an officer to pursue his or her investigation without fear of violence; it is not intended to provide the officer with an opportunity to ascertain evidence of a crime. *Evans* at 405.

{¶52} Because the officer in this case could articulate no valid reason why he believed Stamper was armed, I would reverse the judgment of the trial court and grant Stamper's motion to suppress.