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ORIGINAL

IN THE SUPREME COURT

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STATE OF NORTH DAKOTA

DEC 20 2002

State of North Dakota,)	STATE OF NORTH DAKOTA
)	
Plaintiff-Appellee,)	Supreme Court No. 20020197
)	
vs.)	District Ct. No. 09-01-K-3576
)	
Bruce Charles Tollefson,)	
)	
Defendant-Appellant.)	
_____)	

APPEAL FROM AMENDED CRIMINAL JUDGMENT AND COMMITMENT
DATED JULY 31, 2002, ENTERED IN CASS COUNTY DISTRICT COURT, EAST
CENTRAL JUDICIAL DISTRICT

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE iii

STATEMENT OF FACTS 1

ARGUMENT 4

I. The Trial Court correctly denied the Defendant’s motion to suppress because the
search of the Defendant’s person was lawful. 4

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

<u>Minnesota v. Dickerson</u> , 113 S.Ct. 2130 (1993)	4,5,9,10
<u>People v. Thurman</u> , 209 Cal. App. 3d 817 (1989)	8
<u>State v. Gregg</u> , 2000 ND 154, 615 N.W.2d 515	4
<u>State v. Haverluk</u> , 2000 ND 178, 617 N.W.2d 652	5
<u>State v. Heitzman</u> , 2001 ND 136 632 N.W.2d 1	4,6
<u>State v. Huffman</u> , 542 N.W.2d 718 (N.D. 1996)	4
<u>State v. Wamre</u> , 1999 ND 164, 599 N.W.2d 268	9
<u>State v. Zearley</u> , 444 N.W.2d 353 (N.D. 1989)	6,8
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968)	4

STATEMENT OF ISSUE

- I. The Trial Court correctly denied the Defendant's motion to suppress because the search of the Defendant's person was lawful.

STATEMENT OF FACTS

On November 15, 2001, Officer Rhonda Haff of the West Fargo Police Department stopped the Defendant for speeding. (Transcript of Motion Hearing of February 13, 2002 at 8 (hereinafter Tr.)). Officer Haff approached vehicle and asked the Defendant for his driver's license. (Tr. at 9.) He said he didn't have one. Id. During that conversation, Officer Haff detected an odor of an alcoholic beverage coming from the Defendant's breath. Id. Officer Haff asked the Defendant to exit the vehicle to further investigate whether the Defendant was under the influence of alcohol. Id.

As the Defendant exited his vehicle, he appeared very "jumpy." (Tr. at 9.) He was continually putting his hands in his pockets and fumbling with the waistband of his pants. (Tr. at 10.) Officer Haff repeatedly asked the Defendant to remove his hands from his pockets but the Defendant kept digging in his pockets. Id. Officer Haff testified the Defendant "was very jumpy, very fast movements, jittery, just wasn't acting normal." (Tr. at 10.) These behaviors made Officer Haff nervous and concerned for her safety as well as the safety of a citizen who was riding with her that evening. (Tr. at 10-11.)

Because of the concern for her safety, Officer Haff conducted a "pat down" search of the Defendant. (Tr. at 11.) She felt a long cylindrical object she thought was a "one-hitter" marijuana pipe but wasn't entirely sure what it was. Id. She testified it could have been a weapon. Id. She removed it from the Defendant's pocket. Id. It was a plastic tube with residue and burn marks on it used to ingest methamphetamine. Id.

Officer Haff then placed the Defendant in the back seat of her patrol car and proceeded to run his information through her computer. (Tr. at 12.) Officer Haff still detected an odor of alcohol coming from the Defendant's breath. Id. She had him perform some field sobriety tests. Id. He passed the Horizontal Gaze Nystagmus Test and failed the walk and turn test. Id. Officer Haff testified, "he was walking very rigidly, almost – I guess you can say – I mean, almost like a robot state . . . very rigid." (Tr. at 13.) Given his strange behaviors, she still thought he was under the influence of something. Id. She didn't think it was alcohol. Id.

Officer Haff then placed the Defendant under arrest for possession of the drug paraphernalia found in his pocket and located a Drug Recognition Expert to conduct further testing. (Tr. at 14.) The Defendant was transported to the West Fargo Police Department for further testing and was ultimately placed under arrest for driving under the influence of alcohol and/or a controlled substance. Id. He was also arrested for driving without liability insurance. (Tr. at 15.) A search of the Defendant's vehicle revealed a large quantity of methamphetamine and marijuana. See docket item #2 (affidavit of probable cause).

The State of North Dakota charged the Defendant with Possession of over 50 grams of methamphetamine with intent to deliver (a class AA felony), possession of marijuana with intent to deliver (a class B felony), possession of drug paraphernalia (a class C felony), and possession of marijuana (a class A misdemeanor). (Appendix at 6-7).

The Defendant moved the trial court to suppress the evidence. (Appendix at 8.) The trial court denied Defendant's motion to suppress finding the search of the Defendant's person lawful. (App. at 15.) The Defendant entered conditional guilty pleas to all four counts and now appeals claiming the trial court erred in denying the motion to suppress.

ARGUMENT

I. The Trial Court correctly denied the Defendant's motion to suppress because the search of the Defendant's person was lawful.

The Defendant has appealed from the trial court's denial of the motion to suppress. "When reviewing a district court's ruling on a motion to suppress, [this Court] defer[s] to the district court's findings of fact and resolve[s] conflicts and testimony in favor of affirmance." State v. Gregg, 2000 ND 154, ¶ 19, 615 N.W.2d 515; State v. Heitzmann 2001 ND 136 632 N.W.2d 1, ¶ 8. This Court "affirm[s] the district court's decision unless, after resolving conflicting evidence in favor of affirmance, [this Court] concludes there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence." Gregg at ¶ 19; see also Heitzmann at ¶ 8.

"The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures." Heitzman at ¶ 9; State v. Huffman, 542 N.W.2d 718 (N.D. 1996). Searches and seizures conducted without a warrant are unconstitutional unless they fall within one of the recognized exceptions to the warrant requirement. Minnesota v. Dickerson, 113 S.Ct. 2130, 2135 (1993). "One such exception was recognized in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) which held that 'where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. . . ' the officer may briefly stop the

suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions.'" Dickerson at 2135 (quoting Terry). When an officer makes such a stop, the officer "may conduct a pat-down search of a person when the officer "possesses an articulable suspicion that an individual is armed and dangerous.'" State v. Haverluk, 2000 ND 178, 617 N.W.2d 652.

In this case, Officer Haff stopped the Defendant's vehicle for speeding. (Tr. at 9.) She "could smell an odor of alcohol coming from his breath." (Tr. at 9.) She had the Defendant exit the vehicle. (Tr. at 9.) She then "noticed [the Defendant] was getting very jumpy." (Tr. at 9.) He started digging in his pockets. (Tr. at 9.) The Defendant was "very fast and fidgety digging through both his front pockets at the front of his pants, the waist of his pants." (Tr. at 10.) This continued for about a minute to a minute and a half. (Tr. at 10.) Officer Haff repeatedly asked him to stop but the Defendant "continued to dig in his pockets and fumble with the front of his waistband." (Tr. at 10.) The Defendant's behavior made Officer Haff nervous. (Tr. at 10.) She was also concerned for a citizen rider she had with her that night. (Tr. at 11.) She decided to conduct a pat-down search at that point. (Tr. at 11.)

Given the Defendant's nervous, fidgety behavior and his refusal to follow Officer's Haff's orders to keep his hands out of his pockets, Officer Haff had a reasonable and articulable suspicion the Defendant may have been armed and dangerous. Therefore, she was justified in conducting a pat-down search of the Defendant.

“Where a stop of a person without a warrant is justified, ‘a carefully limited search of the outer clothing’ for potential weapons is permissible for safety reasons.” State v. Zearley, 444 N.W.2d 353 (N.D. 1989) (quoting Terry). “When an outside clothing pat-down search reveals the presence of an object of a size and density that reasonably suggests the object might be a weapon, the searching officer is entitled to continue the search to the inner garments where the object is located in order to determine whether the object is in fact a weapon.” Heitzmann at ¶ 13.

During the pat-down search in the present case, Officer Haff “felt a hard object in [the Defendant’s] pants pocket.” (Tr. at 11.) She testified it “had the same feeling as maybe a one-hitter” but could have been a weapon. (Tr. at 11.) During the motion hearing, Officer Haff testified to the following:

THE COURT: The question really is did you reasonably suspect that it might have been a weapon?

OFFICER HAFF: With his actions and how jumpy he was, I didn’t know. I really didn’t know.

Q Were you concerned that it might have been a weapon?

A I was concerned that he might have a weapon on him. Yes.

Q This thing that you felt, that you described as a round object, did you have any notion that that might have been a weapon when you reached in there to pull it out?

A I --

Q You reached in his pocket and pulled it out, right?

A Right.

Q That's what I understood your testimony to be.

A Uh-huh.

Q When you reached in to grab it, did you have any idea in your mind that that might have been a weapon?

A I didn't know what it was. I mean, for -- I wasn't 100 percent sure of what actually was in his pocket.

Q Well, unless you're superman and have x-ray vision, you're never going to be 100 percent certain what's in the pocket unless --

A Exactly.

Q You empty it, right?

A Right.

Q You agreed to that. Well, what I'm trying to figure out is that what you were thinking when you reached in that pocket to take it out. I mean -- and so far you haven't really -- I mean, well, I know you weren't sure about what it was, but I'm not quite sure what it is you thought it might have been. I mean, I know what you knew it was once you had it. Are you following me at all?

A Right.

Q Before you've seen it and you felt this round object on the outside, you made

a decision you were going to reach into his pocket and pull it out, right?

A Right.

Q When you made that decision, what did you think you were reaching for?

A I wasn't sure and that's when I asked Mr. Tollefson if there was anything in there that was going to poke me, hurt me.

Q So poking you, you may have thought it might have been a syringe?

A I wasn't -- you know, I just -- I asked him if there was, you know --

Q You just didn't have any idea what it was. You just thought it was round and hard and you wanted to see what it was.

A Right.

Q And that's what you were thinking?

A That's what I was thinking.

(Tr. at 24-6.)

This Court, quoting a California appellate court recognized “we cannot impose a condition of certainty that the object is a weapon before allowing an officer to continue the pat search to the inner clothing site where the object is located.” Zearley at 358 (quoting People v. Thurman, 209 Cal. App. 3d 817 (1989)). “To do so would frustrate the objective of the pat search. Id. Therefore, because Officer Haff could not say with certainty the item was a weapon did not prohibit her from removing the item from the Defendant's pocket. In this case, the district court found:

1) The “pat-down” search of the Defendant yielded an object that could have been a weapon.

2) Officer Rhonda Haff was reasonably concerned for her safety.

3) Officer Haff was entitled to retrieve the item from the Defendant’s pocket.

(Appendix at 14). The State believes there is sufficient competent evidence to support the trial court’s findings and the decision does not go against the manifest weight of the evidence.

Furthermore, the Defendant argues that because Officer Haff thought the object was a one-hitter marijuana smoking pipe, she should not have removed it from his pocket. However, the State believes she could have removed it under the “plain feel” exception to the warrant requirement established in Minnesota v. Dickerson, 113 S.Ct. 2130 (1993).

During the course of a lawful search, “if police officers are lawfully in a position from which they view an object, whose incriminating character is immediately apparent, and the officers have a lawful right of access to the object, they may seize it without a warrant.” State v. Wamre, 1999 ND 164, ¶ 16, 599 N.W. 2d 268 (citing Dickerson). This is referred to as the “plain view” doctrine. Wamre at ¶ 16. In Minnesota v. Dickerson, the United States Supreme Court used this same concept to encompass a “plain-feel” exception to the warrant requirement. Dickerson at 2135-8. The Court recognized that an officer can use the sense of touch to determine whether or not an object is contraband. Dickerson at 2137-8.

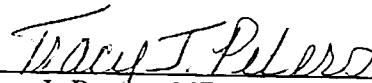
“If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.” Dickerson at 2137. The phrase “incriminating character is immediately apparent” means the same as “probable cause to believe an item is contraband.” Dickerson at 2137.

In the present case, Officer Haff observed the Defendant was “very jumpy, very fast movements, jittery, just wasn’t acting normal.” (Tr. at 10.) She testified her initial thought was that the item in his pocket was a one-hitter marijuana smoking device. (Tr. at 11.) She thought the Defendant was under the influence of something other than alcohol. (Tr. at 13.) Officer Haff was not required to ignore the object just because she initially thought it was a one-hitter marijuana smoking pipe. Based on the size and shape of the object, the Defendant’s behavior that led her to believe he was under the influence of something, and the Defendant’s unwillingness to keep his hands out of his pockets, the State believes she had probable cause to believe the item was contraband. Therefore, if she had not thought it was a weapon but simply thought it was a marijuana smoking pipe, she still could have seized the object under the “plain feel” exception in Dickerson.

CONCLUSION

The trial court correctly denied the Defendant's Motion to Suppress. The State respectfully requests this Court affirm the trial court.

Respectfully submitted this 19th day of December, 2002.



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