ORIGINAL

IN THE SUPREME COURT

20020197

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	
	)	Supreme Court No. 20020197
	)	
vs.	)	
	)	Cass County No. 09-01-K-3576
Bruce Charles Tollefson,	)	
	)	
Defendant-Appellant.	)	

On Appeal From the District Court of the County of Cass,
East Central Judicial District, State of North Dakota

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from convictions of four offenses concerning substances.

Defendant was charged pursuant to an Information (App., pp. 6) with four offenses as follows: Count 1, Possession of a Controlled Substance with Intent to Deliver, a Class AA Felony; Count 2, Possession of a Controlled Substance with Intent to Deliver, a Class B Felony; Count 3, Possession of Drug Paraphernalia, a Class C Felony; and Count 4, Possession of a Controlled Substance, a Class A Misdemeanor.

Preliminary hearing was held on January 3, 2002, after which the Court per the Honorable Ralph R. Erickson determined there was sufficient probable cause to support the charged offenses. Defendant entered not guilty pleas to Counts 1, 2, and 3, and persisted in his not guilty plea previously entered as to Count 4.

Defendant filed a Motion to Suppress (App., pp. 8), and the State filed a Response (App., pp. 10). An evidentiary hearing was held on the Motion to Suppress on February 13, 2002. The Court took the matter under advisement. On March 27, 2002, Judge Erickson during a Dispositional Conference informed Defendant and counsel that he was denying Defendant's Motion to Suppress. On April 10, 2002, a written Order (denying the Motion to Suppress) was executed by Judge Erickson and filed with the Clerk. (App., pp. 14)

On April 22, 2002, the Defendant entered conditional pleas of guilty to all four counts of the Information. The Court and prosecutor had no objection to the Defendant entering such conditional pleas reserving the issue of suppression for appeal. Judge Erickson ordered a Pre-Sentence Investigation.

On July 29, 2002, the Defendant was sentenced by the Honorable John C. Irby. A written Amended Criminal Judgment and Commitment was executed by Judge Irby on July 31, 2002, and filed with the Clerk. (App., pp. 16-22) The Criminal Judgment provided for executed and suspended imprisonment as follows: Count 1, commitment for ten (10) years, with the Defendant first serving five (5) years and the balance of five (5) years suspended with supervised probation; Count 2, commitment for ten (10) years, with the Defendant first serving five (5) years and the balance of five (5) years suspended with supervised probation; Count 3, commitment for five (5) years; and Count 4, commitment for one (1) year. Such sentences were to run concurrent with each other. Judge Irby also stayed Defendant's sentence pending appeal.

On July 29, 2002, Defendant filed a timely Notice of Appeal. (App., pp. 23)

STATEMENT OF FACTS

On November 16, 2001, Officer Rhonda Haff of the West Fargo Police Department made a traffic stop of Defendant's vehicle on Sheyenne Street in the city of West Fargo. The reason for the traffic stop was speeding as clocked by a radar gun. (Transcript, February 13, 2002, pp. 8-9)

Officer Haff approached Defendant's vehicle and asked Defendant for his driver's license. The Defendant stated he did not have his driver's license with him. Officer Haff could detect an odor of alcohol coming from Defendant's breath. (Transcript, February 13, 2002, p. 9) The officer subsequently verified the Defendant had a current driver's license. (Transcript, February 13, 2002, p. 12)

Officer Haff requested that the Defendant exit his vehicle and go back with the officer to her patrol vehicle. The Defendant seemed quite nervous and kept putting his hands in the front pockets of his pants. (Transcript, February 13, 2002, pp. 9-10)

The Defendant's movements were making the officer nervous so she decided to "pat him down". The officer felt a hard object in Defendant's pants pocket and "thought it had the same feeling as **maybe** a one-hitter." When asked by the prosecutor if the object could possibly have been a weapon, Officer Haff stated, "It could have been. I don't know." The officer then took the item out of Defendant's pants and discovered that it was a hard plastic tube. (Transcript, February 13, 2002, pp. 10-11) Officer Haff didn't know for sure what the object was but it felt like maybe a one-hitter. (Transcript, February 13, 2002, pp. 23-24)

Later in the hearing during questioning by Judge Erickson, Officer Haff seemed to retreat from her stated belief that the object was maybe a one-hitter but she didn't know for

sure and proceeded to state that it might have been anything, and that she just wanted to see what it was. (Transcript, February 13, 2002, p. 26)

Once Officer Haff discovered the items from Defendant's pants pockets, the officer determined the Defendant was not free to leave and that she would be arresting him for possession of drug paraphernalia. (Transcript, February 13, 2002, pp. 15-16)

ARGUMENT

I. The District Court erred in denying Defendant's Motion to Suppress when the seizure of items from Defendant's person exceeded the permissible scope of a pat-down search for weapons.

The District Court per the Honorable Ralph R. Erickson denied the motion to suppress and sustained the search of the person of Defendant and the items seized during the search for the following reasons:

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.

4). Once the drug paraphernalia was removed from the Defendant's pocket, he was placed under arrest, and the subsequent search of his vehicle was a valid search incident to that arrest. (App., pp. 14-15)

Law enforcement officers have a right to conduct a "pat-down" search of individuals for weapons if they have a reasonable belief or concern for their safety. This pat-down or stop and frisk exception to the warrant requirement is discussed by the United States Supreme Court in the case of Terry v. Ohio, 392 U.S. 1 (1968).

The initial step in the pat down analysis is whether the police officer, or reasonably prudent man (woman), in the circumstances would be warranted in the belief that their safety or that of others was in danger. Id., at p. 27. Officer Haff testified that the Defendant was nervous and fidgety, and was constantly putting his hands in his front pants pockets. The

officer stated this behavior caused her to have safety concerns. This behavior by Defendant quite likely allows the officer to do a frisk or pat-down search for weapons.

The next step in the pat-down analysis is the permissible scope of the search. The United States Supreme Court has authorized an officer to "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." Id., at p. 30.

The concept of the reasonableness is inherent throughout the pat-down search for weapons. The United States Supreme Court indicated the search for weapons was to be "carefully limited". Terry, supra., at p. 30. If the officer conducting the pat-down search feels something they reasonably believe is a weapon, then the officer would be entitled to go into pockets, etc. to retrieve the weapon. In the instant case, Officer Haff's reasonable belief **at the time** was that the object "may be a one-hitter". She expressed no reasonable belief that it was a weapon. When pressed by the prosecutor and the Court to indulge in after the fact speculation, Officer Haff stated the object could possibly have been a weapon.

It is interesting to note Officer Haff's testimony at the preliminary hearing at such time when the matter of suppression was not in issue. During such preliminary hearing, Officer Haff gave the following testimony:

Q You indicated that you thought you felt a one hitter?

A Correct.

Q How did you determine or think that it was a one hitter?

A Just through – I mean, training and experience of what one looks like and what it would – feels like. (Transcript Preliminary Hearing, June 3, 2002, p. 15, Docket No. 22)

It is essential that the Court require a reasonable belief on the part of the officer that an object discovered during the pat-down is a weapon before the officer would be allowed to go further and retrieve the object. The Fourth Amendment itself would require this as it prohibits unreasonable searches and seizures. All aspects of the search and seizure need to meet a test of reasonableness. Unless this requirement is in place, law enforcement officers would have little restrictions on conducting a more general search merely to satisfy their curiosity.

In the instant case, it is clear that Officer Haff did not entertain any reasonable belief that the object she felt was a weapon. Officer Haff testified that due to her training and experience, her initial thought was that the object was "maybe a one hitter". It seems quite clear that Officer Haff's decision to go into the pockets of the Defendant was to satisfy her curiosity. Officer Haff's following testimony clearly demonstrates this:

Q So what were the thoughts that went through your mind when you felt this was that it could have been a one-hitter, it might be a one-hitter?

A That was my thought, it could have been or it could have been something else.

Q And so that's why you kind of went in to just kind of find out more exactly what it was?

A Correct. (Transcript, February 13, 2002, p. 19)

The United States Supreme Court has also enlarged the scope of the pat-down search for weapons to also allow seizure of contraband discovered during such search. However, this search and seizure has certain limitations. In the case of Minnesota v. Dickerson, 508 U.S. 366 (1993), the United States Supreme Court stated:

> 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. (Id., at pp. 375-376, emphasis added)

Officer Haff's thoughts at the time she conducted the pat-down search and felt this hard object fall short of justifying the search and seizure on the Minnesota v. Dickerson, supra., rationale. She felt something that, based on her training and experience, led to the thought the object "may be a one-hitter." Officer Haff certainly did not establish that the contour or mass of this object made its identity immediately apparent. She conceded it could have been many things including a pen or pencil. (Transcript, February 13, 2002, p. 19)

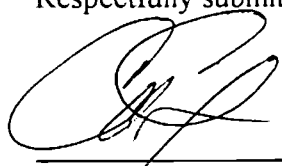
In summary, for the foregoing reasons the District Court erred in sustaining the search and seizure of the items from Defendant's person on the basis of the "pat-down" search for weapons exception to the warrant requirement.

CONCLUSION

The District Court erred when it denied Defendant's Motion to Suppress. This Court should reverse such decision by the District Court and remand the case for further proceedings.

Dated this 23rd day of October, 2002.

Respectfully submitted.



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