

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 10, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 98-2896-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEROME A. ENGL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

SNYDER, P.J. Jerome A. Engl appeals from a judgment convicting him of possession of marijuana contrary to § 961.41(3g)(e), STATS., and possession of cocaine contrary to § 961.41(3g)(c). Engl contends that the search of his pants pockets following a traffic stop violated his Fourth Amendment protections because it exceeded the scope of a *Terry* frisk. We are not persuaded and thus we affirm.

The facts are not disputed. On May 1, 1998, around 2:00 a.m., City of Sheboygan Police Officer Scott Mittelstadt observed Engl's vehicle fail to make a complete stop at a stop sign; his vehicle then appeared to accelerate in excess of the speed limit. Mittelstadt pursued Engl and noticed that his vehicle crossed the center line of the road twice and continued at a hurried pace. Engl then pulled his vehicle over to the curb. Once Mittelstadt reached Engl's car, he flashed his squad car lights. Engl exited his car and walked away from Mittelstadt until Mittelstadt called out to Engl to come back. Engl complied.

Mittelstadt noticed that Engl was "extremely nervous" and that he frequently placed his right hand in his right front pants pocket. Mittelstadt repeatedly asked him to keep his hands out of his pockets. Mittelstadt also observed that Engl's eyes were "very watery and somewhat glazed." Mittelstadt conducted field sobriety tests of Engl, including the horizontal nystagmus test, the walk-and-turn test and the one-legged-stand test. Engl had difficulty with each of these tests. During the tests, Mittelstadt was joined by another officer. At the end of the field tests, Mittelstadt decided to conduct a pat-down search of Engl for weapons because he continued to appear nervous and continued to reach for his right front pocket. While attempting to perform the pat-down, Engl again reached for his right front pocket. Mittelstadt then placed Engl's arm above his head and ordered him to stop reaching for his pocket. When Mittelstadt began patting down Engl's right front pocket area, he felt "some hard objects." Again, Engl brought his hand down to his pocket. Mittelstadt responded by placing Engl's arm above his head. Mittelstadt then searched inside Engl's pocket and removed the objects he found, which included marijuana and a pipe. Engl was then arrested.

Engl brought a motion to suppress the contraband evidence due to an improper search. The trial court ruled that the search was permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), and thus denied Engl's motion. Engl now appeals.

Engl does not contest the constitutionality of Mittelstadt's initial pat-down search. However, he does dispute whether Mittelstadt's more intrusive search of his pants pocket exceeded the scope of the *Terry* frisk. Whether a search or seizure passes constitutional muster is a question of law subject to de novo review. See *State v. King*, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993).

A *Terry* search permits a pat-down "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29. The Fourth Amendment prohibits only unreasonable searches; in determining whether a search is reasonable, this court balances the need for the search against the invasion of the suspect's privacy entailed in the search. See *State v. Morgan*, 197 Wis.2d 200, 208, 539 N.W.2d 887, 891 (1995). Pat-down searches are justified when an officer has a reasonable suspicion that a suspect may be armed. See *id.* at 209, 539 N.W.2d at 891. The nature and scope of a pat-down search should not extend beyond self-protection of an officer. See *State v. Swanson*, 164 Wis.2d 437, 454, 475 N.W.2d 148, 155 (1991). "The *Terry* doctrine precludes reaching into a suspect's pockets during a frisk for weapons unless the officer feels an object that could be used as a weapon." *Swanson*, 164 Wis.2d at 454, 475 N.W.2d at 155.

Engl contends that Mittelstadt's search was unconstitutional because there was "no evidence in the record that Officer Mittelstadt suspected that the hard objects he felt in Engl's pockets might have been weapons." Engl argues that

his position is similar to the defendant's in *State v. Ford*, 211 Wis.2d 741, 565 N.W.2d 286 (Ct. App. 1997). There, officers conducted a pat-down search of Ford because they were investigating possible drug trafficking, Ford smelled of marijuana, and the officers routinely performed pat-down searches during street interrogations for safety reasons. *See id.* at 743, 565 N.W.2d at 287-88. During the pat-down of Ford, the officer felt a large wad in his front pants pocket which Ford explained was money. *See id.* at 743, 565 N.W.2d at 288. When the officer's hands approached Ford's front waist area, Ford became "jumpy" and he grabbed the officer's hand. *See id.* Because Ford was not cooperating, the officer placed handcuffs on him. *See id.* at 743-44, 565 N.W.2d at 288. When the officer resumed his pat-down, Ford continued to be "jumpy" as the officer approached his front waist area. *See id.* at 744, 565 N.W.2d at 288. Even though the officer had not felt a weapon or contraband, he searched the front of Ford's boxer shorts with a flashlight and discovered contraband between his thigh and genitals. *See id.*

In *Ford*, the State conceded that the officer's more intrusive search of Ford exceeded the scope of a *Terry* pat-down but argued that the search was nonetheless warranted by probable cause. *See Ford*, 211 Wis.2d at 744-45, 565 N.W.2d at 288. We concluded that the search was improper because the officer did not feel anything resembling a weapon or contraband. *See id.* at 746, 565 N.W.2d at 289.

Engl asserts that our holding in *Ford* is controlling in this case. However, the State responds, and we agree, that the instant case is distinguishable from *Ford* because Mittelstadt, unlike the officer in *Ford*, felt "hard objects" in Engl's pants pocket that could have been a weapon. At the suppression hearing, Mittelstadt testified as follows:

I reached down and this time I was able to feel the outside and I did feel some hard objects, however he immediately brought his arm down again. I placed them [sic] above his head and grabbed both hands like this above his head, so he could not do anything. I reached in the pocket and at that point I tried to remove the hard items in there and I did find several items of contraband.

Mittelstadt also explained:

- A. It felt like a hard object. Initially I could not tell for sure. I believe there were several hard objects in that pocket and I could not tell exactly what they were initially.
- Q. Your concerns at that point were what?
- A. I was still concerned about a weapon.

Although Mittelstadt never testified that he believed the “hard objects” he felt were or could have been a weapon, he did state that he was generally concerned about a potential weapon. Engl’s anxiety and his repeated efforts to place his hand in his right front pants pocket alerted Mittelstadt that he might have been concealing a weapon. Mittelstadt explained that he chose not to perform a pat-down of Engl until a back-up officer arrived because he wanted “the situation [to] be a little more secure.” We are satisfied that the feel of a hard object, such as a pipe, through a suspect’s pants pocket could lead a reasonable officer to believe that the suspect was carrying a weapon, such as a knife or a small gun. Thus, considering Engl’s behavior and the “hard objects” in his pocket, we believe that Mittelstadt acted reasonably in searching Engl’s pocket during his pat-down for weapons. We conclude that Engl’s Fourth Amendment rights were not violated.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.



