COURT OF APPEALS DECISION DATED AND FILED

March 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2015AP195-CR

Cir. Ct. No. 2013CF1555

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVE C. DETERDING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 LUNDSTEN, J. During a lawful pat-down for weapons, an officer felt an object in one of Deterding's pants pockets. The officer removed the object, which turned out to be a plastic bottle of urine that Deterding said was for work-related drug testing. This discovery and a subsequent investigation led to evidence

that Deterding was operating while under the influence of controlled substances, and to Deterding's conviction for a fifth-offense operating while under the influence crime. Deterding argues that his Fourth Amendment rights were violated when the officer removed the then-unknown object from Deterding's pants pocket. We disagree and conclude that, under the circumstances, it was reasonable for the officer to believe that the object might be a weapon. We affirm the judgment of conviction.

Background

¶2 The officer who performed the pat-down on Deterding was the sole witness at the suppression hearing. The officer's testimony supplies the pertinent facts.

¶3 On the day in question, police received reports of a vehicle driving erratically and striking a barrier wall on an Interstate highway. The testifying officer located the vehicle, which was sitting on a freeway shoulder. The officer approached and encountered Deterding, who was changing a flat tire.

¶4 The officer questioned Deterding about the reports of erratic driving. Deterding was "pacing around" and "couldn't stand still." As the officer continued to interact with Deterding, he noticed that Deterding had a knife clipped into his pants pocket. The officer took the knife from Deterding's person, and, it is undisputed, legally commenced a pat-down to determine whether Deterding was armed.

¶5 In the course of the pat-down, the officer felt a "large" and "hard" object in one of Deterding's pants pockets. The officer could not tell what the object was. Although the officer did not testify in any greater detail as to what the

object felt like, the circuit court obviously inferred what the officer felt from what the officer then pulled from Deterding's pants pocket. The officer removed a plastic bottle containing a yellowish liquid.[1] A photograph of the bottle was admitted into evidence. Thus, in addition to the officer's description, we, like the circuit court, infer that the officer felt a smooth and uniformly rounded object. That is to say, a smooth, hard, bottle-like object.

¶6 The officer questioned Deterding about the bottle, and Deterding stated that the bottle contained urine for work-related drug testing. Additional questions and investigation produced evidence that Deterding was under the influence of one or more controlled substances.

¶7 Based on the photograph and the officer's testimony, the circuit court found that the object in Deterding's pants pocket could have been a can of mace or other type of weapon. The court concluded that the officer reasonably removed the object from Deterding's pants pocket.

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[1] To the extent that Deterding relies on isolated parts of the officer's testimony to argue that the officer identified the object as a plastic bottle *before* removing the object from Deterding's pocket, Deterding mischaracterizes the record. Consistent with the circuit court's findings of fact, the officer's testimony as a whole makes clear that the officer was unable to identify the object until he removed it from Deterding's pocket.

We also note that Deterding purports to complain that the officer gave insufficiently specific testimony about what the object felt like through Deterding's pants. This is not, logically, a stand-alone argument. Obviously, the circuit court's findings of fact and our conclusions based on those findings of fact are limited by the evidence that was presented. Deterding's argument that that evidence was insufficient has no life apart from the arguments we address in the text.

Discussion

¶8 Deterding contends that the intrusion into his pants pocket to seize the bottle violated the Fourth Amendment. We agree with the circuit court that there was no such violation.

¶9 When reviewing the denial of a motion to suppress, we uphold the circuit court's findings of fact unless those findings are against the great weight and clear preponderance of the evidence. ***State v. McGill***, 2000 WI 38, ¶17, 234 Wis. 2d 560, 609 N.W.2d 795. We review de novo, however, whether the facts as found by the circuit court satisfy constitutional requirements. *See* ***id.***

¶10 A ***Terry*** pat-down, such as the officer undertook here, must be strictly limited to what is necessary for the discovery of weapons that might be used to harm the officer or others nearby. *See* ***Minnesota v. Dickerson***, 508 U.S. 366, 373 (1993); ***McGill***, 234 Wis. 2d 560, ¶34. However, "***Terry*** has never been interpreted to impose a subjective requirement that the officer conducting the search be *convinced* that the object he detects on the suspect's person is a weapon before he may legally seize it." ***McGill***, 234 Wis. 2d 560, ¶35. "All that is required is a *reasonable belief* that the object might be a weapon." ***Id.*** Whether such a reasonable belief is present depends on all of the facts available to the officer at the time. *See* ***id.***, ¶¶36-37; ***State v. Limon***, 2008 WI App 77, ¶28, 312 Wis. 2d 174, 751 N.W.2d 877.

¶11 Deterding concedes that the officer felt something that could have been a bottle or at least a bottle-shaped object. But in Deterding's view, the only reasonable belief was that the object was a harmless bottle, as opposed to a canister that might propel a dangerous substance such as mace. We disagree.

¶12 It is significant that the officer felt a large, hard object that the officer was unable to identify. As the State points out, this view finds support in a leading treatise:

> Under the better view, … a [further] search is not permissible when the object felt is soft in nature. If the object felt is hard, then the question is whether its "size or density" is such that it might be or contain a weapon. But because "weapons are not always of an easily discernible shape," it is not inevitably essential that the officer feel the outline of a pistol or something of that nature. Somewhat 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," most likely to occur when the suspect is wearing heavy clothing. Under this approach, courts have upheld as proper searches turning up certain objects other than guns, such as a pocket tape recorder, a pipe, a pair of pliers, cigarette lighter, several keys taped together, an ammunition clip, a metal money clip full of money, a bi-fold wallet, tightly wrapped bags of crack cocaine, a small package packed full of hard plastic, a pointed vial, or a prescription bottle.

4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.6(c), at 910-12 (5th ed. 2012) (footnotes omitted).

¶13 We find additional support for this view in ***State v. Triplett***, 2005 WI App 255, 288 Wis. 2d 515, 707 N.W.2d 881. ***Triplett*** involved an officer's manipulation of a suspect's heavy outer clothing during a pat-down when the suspect's weight made it difficult to conduct a complete pat-down without manipulating the clothing. *See* ***id.***, ¶¶1, 5, 14. In upholding the officer's actions, we concluded in ***Triplett*** that police are entitled to an "effective" pat-down, that is, a pat-down that accomplishes its purpose, to "reasonably ascertain whether the subject of the patdown has a weapon." ***Id.***, ¶12. And, in reaching this conclusion in ***Triplett***, we cited favorably to persuasive case law that adopted the LaFave treatise's view. *See* ***id.***, ¶¶12, 13 (citing ***State v. Hudson***, 874 P.2d 160, 163

(Wash. 1994); ***State v. Evans***, 618 N.E.2d 162, 171 (Ohio 1993)). ***Triplett***, and its indirect approval of the view summarized in LaFave, thus support a conclusion that an officer's need for an "effective" pat-down may often require removing a hard, unidentifiable object of a sufficient size to be or contain a weapon.

¶14 The circuit court aptly surmised, based on the officer's description, that the object could have been a can of mace. To this, we add that the same evidence supports a suspicion that the object might have been capable of propelling a similarly dangerous liquid such as pepper spray.

¶15 Thus, we agree with the circuit court and the State that the officer could have formed a reasonable belief that the object he felt might be a weapon. Therefore, the officer was justified in removing the object from Deterding's pants pocket.

¶16 Deterding argues that reasonable suspicion is lacking because the particular officer who conducted the pat-down did not himself subjectively suspect that the object was a weapon. Whether this is true or not is beside the point. As our supreme court wrote in ***State v. Kyles***, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449:

> [W]e agree with the State that an officer's belief that his or her safety or that of others is in danger because the individual may be armed is not a prerequisite to a valid frisk. Because an objective standard is applied to test for reasonable suspicion, a frisk can be valid when an officer does not actually feel threatened by the person frisked or when the record is silent about the officer's subjective fear that the individual may be armed and dangerous. The law is very clear on this point.

Id., ¶23. Thus, like the circuit court, we focus on the officer's observations, not on his subjective thinking.

¶17 Deterding also argues that, when an officer expands the scope of a ***Terry*** weapons pat-down, as the officer did here when he retrieved the object from Deterding's pants pocket, the officer must use the least intrusive means available. We understand Deterding to be arguing that the officer should have asked Deterding what the object was instead of proceeding to remove it. We are not persuaded by this particular least-intrusive-means argument. The officer had no way of knowing whether Deterding's answer to such a question would have been truthful. Notably, Deterding supplies no authority for the proposition that an officer is obliged to ask such questions or rely on a suspect's answers when the officer otherwise reasonably suspects that an object might be or contain a weapon.

¶18 Before concluding, we note that Deterding makes a stand-alone, one-paragraph argument as to an additional Fourth Amendment issue. Deterding argues that, even if the officer reasonably removed the bottle from Deterding's pants pocket, a Fourth Amendment violation occurred when the officer questioned Deterding about the bottle's contents. Deterding argues that, at that point in time, the officer could see that the bottle was not a weapon and, therefore, that questioning Deterding about the bottle exceeded the permissible scope of a ***Terry*** pat-down. In support, Deterding cites ***United States v. Lemons***, 153 F. Supp. 2d 948, 959 (E.D. Wis. 2001). The court in ***Lemons*** appeared to conclude that an officer impermissibly expanded the scope or duration of a pat-down by questioning a suspect about objects removed from the suspect's pocket even though the officer could at that point plainly see that the objects were "nonweapons." *See* ***id.*** at 958-59.

¶19 Unlike in ***Lemons***, however, we think it apparent here that the officer had ample reason to suspect that Deterding was driving while under the influence of a drug or intoxicant, and that the bottle of urine, once in plain view,

was suspicious in a way that reasonably related to investigation of this suspected crime. Thus, questioning about the bottle was reasonable as part of the officer's ongoing investigation of suspected intoxicated driving. ***Lemons*** itself supports this conclusion by quoting case law for the proposition that an officer may ask questions unrelated to the purpose of a pat-down if the officer "'has reasonable suspicion regarding the issue on which he is questioning.'" *See* ***id.*** at 959 (quoted source omitted). Indeed, as far as we can tell, Deterding does not argue otherwise. That is, Deterding does *not* argue that the officer was illegally engaged in questioning him, before or after the frisk, about Deterding's suspicious driving behaviors. And Deterding does not argue that the bottle, combined with Deterding's assertion that it contained urine for work-related *drug* testing, was not fertile ground for additional questions.

Conclusion

¶20 For the reasons stated above, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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