[Cite as *State v. Williams*, 2004-Ohio-4695.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20255

vs. : T.C. CASE NO. 03CR2182

ALBERT G. WILLIAMS : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 3rd day of September, 2004.

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GRADY, J.

{¶1} Defendant, Albert G. Williams, appeals from his conviction and sentence for possessing crack cocaine in violation of R.C. 2925.11(A), which were entered following Williams' plea of no contest after the trial court had denied his Crim.R. 12(C)(3) motion to suppress evidence.

Williams filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶2} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED BY THE POLICE ILLEGALLY SEARCHING HIM."

{¶3} When considering a motion to suppress, the trial court assumes the role of the trier of facts and, as such, is in the best position to resolve conflicts in the evidence and determine the credibility of the witnesses and the weight to be given to their testimony. *State v. Retherford* (1994), 93 Ohio App.3d 586. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *Id.* Accepting those facts as true, the appellate court must then independently determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id.*

{¶4} The record indicates, and the trial court found, that Williams was lawfully detained by Dayton Police Department officers pursuant to *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, on suspicion of drug trafficking. Williams does not contest that finding. Neither does he contest the trial court's further finding that the officers were authorized under the particular circumstances by *Terry* to perform a weapons pat-down. Williams does contest the trial court's finding that seizure from his pants pocket of crack cocaine discovered there in

the course of the weapons frisk was lawful under the "plain feel" rule of *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334.

{¶5} The weapons pat-down authorized by *Terry* "must, like any other search, be strictly circumscribed by the exigencies which justify its initiation . . . Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby . . ." *Id.*, at p. 25. If during the course of a *Terry* pat down frisk for weapons a police officer feels an object whose contour or mass makes its identity as illegal contraband immediately apparent, the officer may seize the items. *Minnesota v. Dickerson, supra; State v. Groves* (Feb. 13, 2004), Montgomery App. No. 19951, 2004-Ohio-662. However, the officer is not permitted to manipulate or squeeze the object in order to ascertain its incriminating character. *Dickerson, supra; State v. Evans*, 67 Ohio St.3d 405-414, 1993-Ohio-186; *State v. Heard* (Mar. 7, 2003), Montgomery App. No. 19322, 2003-Ohio-1047.

{¶6} Dayton Police Officer Edmond Trick testified that he was conducting a surveillance of the Unicorn Bar in Dayton and saw Defendant Williams engaged in conduct outside that location which he suspected was drug trafficking. After two other officers responded to his call for assistance, they and Officer Trick approached Defendant Williams, who had gone inside the Unicorn Bar. Officer Williams testified:

{¶7} "We approached Mr. Williams, asked him if he could step outside. We needed to speak with him briefly. He responded yes and he was willing to walk outside with us.

{¶8} "Q. Okay. Did you put any hands on him at that time?

{¶9} "A. Uh, no, I believe not. We just asked him to step outside the bar.

{¶10} "Q. Once outside, what if anything did you say or do?

{¶11} "A. I advised Mr. Williams that I received information or we believed that he was outside making drug transactions. We were going to conduct a pat down search of his outer clothing to check for any type of contraband.

{¶12} "Q. The purpose of your search was to check for contraband?

{¶13} "A. And/or weapons because drugs and weapons normally go together –

{¶14} "Q. Okay.

{¶15} "A. – with one another.

{¶16} "Q. I know you say that kind of casually. Is that based upon your experience?

{¶17} "A. Yes." (T. 12-13).

{¶18} Officer Trick also testified that he'd made approximately fifty drug arrests in his thirteen years experience as a police officer, and that about half that

number had weapons on their person when arrested, including knives and razor blades. One had a gun. He also testified that police have recovered handguns in the area of the Unicorn Bar. (T. 13).

{¶19} Officer Trick described the weapons pat-down he performed, beginning at the area of Defendant's neck and upper body and continuing downward. He made the following responses to the prosecutor's questions:

{¶20} "Q. Okay. And you're gesturing with a flat hand. Do you have like an open palm as you're moving down the body?

{¶21} "A. Yes.

{¶22} "Q. Okay. And is that the procedure you followed with the defendant in this case?

{¶23} "A. Yes.

{¶24} "Q. Okay. What if anything did you find while you were patting him down?

{¶25} "A. As I was patting down his outer clothing, I eventually got to his right front pants pocket. Patted that down. Inside the pants through his outer clothing I could feel that there was objects in there or an object that was about the diameter of a quarter. It was small, hard, kind of bumpy little bit.

{¶26} "Q. And based upon your feel of that object, was it apparent to you what it was at that time?[1]

[1]The underlined words do not appear in the typed

{¶27} "A. Yes, it was.

{¶28} "Q. And what did you believe it to be?

{¶29} "A. Crack cocaine.

{¶30} "Q. Okay. Did you continue the rest of your patdown?

{¶31} "A. At that point in time, and I don't believe I asked Mr. Williams what was in there. I think at that point in time I went in to retrieve what I felt was crack cocaine.

{¶32} "Q. Okay. Once you had retrieved that, upon visual inspection what did you find it to be?

{¶33} "A. It was definitely crack cocaine." (T. 14-15).

{¶34} On cross-examination, however, Officer Trick gave the following testimony:

{¶35} "Q. And you said the patdown that you conducted was to feel for contraband or weapons, correct?

{¶36} "A. Yes.

{¶37} "Q. And in your patdown, you indicated that you did feel what you believed to be crack?

{¶38} "A. Yes.

{¶39} "Q. That was in his front right pants pocket?

{¶40} "A. Yes.

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transcript that was filed on August 8, 2004, and subsequently made a part of the record of this proceeding. They do appear and are heard in the videotape transcript of the suppression hearing that was filed pursuant to App.R. 9(A).

{¶41} "Q. What type of pants was he wearing?

{¶42} "A. He had on shorts. They were blue. I believe they were blue jeans.

{¶43} "Q. Was this lump that you felt in a watchpocket or in the main pocket of the jeans?

{¶44} "A. It would've been in the watch pocket. He did have a little pocket that was - right front pocket.

{¶45} "Q. And was it in a baggy, did you say?

{¶46} "Q. Did you feel the baggy through the pants?

{¶47} "A. No. I couldn't tell the baggy, but I could feel the object that was in it.

{¶48} "Q. When you were feeling the object, did you squeeze it or manipulate it in any way?

{¶49} "A. Yes. I would touch it a little bit just to feel it a little bit more or determine -

{¶50} "Q. With your fingertips?

{¶51} "A. Yeah.

{¶52} "Q. Did you squeeze it?

{¶53} "A. I wouldn't say I squeezed it. But yes, I do kind of feel around it a little bit with my fingertips to try to determine what it was.

{¶54} "That was - I guess I should make myself clear. That was after I patted it down with the palm of my hand first.

{¶55} "Q. And based on those feeling, you went in and retrieved what you believed to be crack?

{¶56} "A. Yes.

{¶57} "Q. And you arrested Mr. Williams for crack at that time?

{¶58} "A. Yes." (T. pp. 24-25).

{¶59} If, as the prosecutor's question to Officer Trick suggested, it was apparent to him when he felt the object in the watch pocket of Defendant's pants with the palm of his hand that it was crack cocaine, then he was authorized under the rule of *Minnesota v. Dickerson* to reach inside the pocket and seize it. However, if the officer first had to manipulate the object with his fingertips to try to determine what it was, then the seizure is illegal. *Id.* The trial court made the following finding in that regard:

{¶60} "Upon patting down the Defendant, he felt an object that was readily apparent to him, by its feel, to be crack cocaine. An officer is permitted to retrieve contraband discovered during the course of a pat down for weapons when the identity of the item is apparent to the officer by its feel alone. See *Minnesota v. Dickerson* (1993), 508 U.S. 366 and *State v. Heard* (2003) Second District Court of Appeals, Montgomery County, case no. 19322. The officer testified that upon feeling the object with the palm of his hand, it was apparent that it was crack cocaine. The discovery of the crack cocaine was <u>not</u> caused by the officer manipulating or squeezing the object in the Defendant's pocket. The 'feeling around a little bit with

(his) fingertips' was not used to discover the item since it was apparent to the officer, but to confirm that the item was crack cocaine." (October 21, 2003, Decision and Entry at p. 3.)

{¶61} We are, as we said, bound by the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Retherford*. That includes the trial court's resolution of conflicts in the evidence. However, the fact that there may be some conflict in the evidence will not prevent reversal if the trial court's judgment is as a matter of law against the weight of the evidence, so that the court's conclusion is plainly the result of mistake or misapprehension. See 5 Ohio Jurisprudence 3d, Appellate Review, Section 510.

{¶62} Officer Trick testified that he told Defendant Williams that he would pat down Defendant's "outer clothing to check for contraband." (T. 13). He promptly corrected himself when asked by the prosecutor, saying that the purpose of the search was "[a]nd/or weapons, because drugs and weapons normally go together." (T. 13). However, though the addition of weapons reflects a valid purpose, his statement does not disclaim that his parallel and continuing purpose was to search for contraband.

{¶63} Officer Trick testified that he first believed the article was crack cocaine when he felt it with the palm of his open hand, inside the watch pocket of the pants Defendant wore. Why that was is not explained. However,

the officer said that his sense of touch revealed to him that the object was "about the diameter of a quarter. It was small, hard, kind of bumpy a little bit." (T. 12).

{¶64} Officer Trick conceded on cross-examination that before he reached inside Defendant's pocket to seize the article he felt he felt it "a bit more . . . with my fingertips to try to determine what it was." (T. 25). If the incriminating nature of the object was immediately apparent to him when he felt it with his open hand, the resulting probable cause isn't necessarily undermined because the officer manipulates it to confirm his understanding. However, it is counterintuitive that an officer would do that if its incriminating nature was immediately apparent when he first felt the object. More importantly, the officer's stated purpose in manipulating the object, to determine what it was, creates a strong inference that he was unsure of its identity when he first felt it, not that he was acting to confirm a firmly-held belief.

{¶65} Independent judicial review requires a court to act on more than an officer's conclusory assertions. There must be objective confirmation of some kind. When dealing with a "plain view" seizure, whether the incriminating nature of an object seized was immediately apparent to the officer when he saw it is susceptible to resolution upon objective criteria: its actual appearance, location, and lack of concealment. Those factors are less available for

use when the "plain feel" test is involved, if only because the object necessarily is concealed. However, whether the officer in fact immediately recognized the object for what it was when he first felt it can be determined with reference to its size, its location on the suspect's person, and the officer's subsequent actions.

{¶66} Applying those criteria, we conclude that the trial court misapprehended the evidence when it found that the incriminating nature of the object that Officer Trick first felt with the palm of his open hand was immediately apparent to him at that time.

{¶67} The object was small, irregular in shape, and located inside the watch pocket of Defendant's cut-off blue jeans, which is typically a tight spot. Unlike a gun or a knife, which by its mass and configuration is readily recognizable, the object that Officer Trick felt was not so readily recognizable.

{¶68} The officer testified that he first felt the object with the palm of his open hand. The sense of touch that involves might readily reveal the presence of a gun or knife, but it would not so easily reveal the presence of a small rock of crack cocaine.

{¶69} Finally, the officer's admission that he manipulated the object with his fingertips to determine what it was goes directly to the heart of the test *Dickerson* imposes. It crosses the line from a weapons search to a search for contraband. Officer Trick conceded that he knew

the object wasn't a weapon. (T. 25). He also stated, candidly, that he told Defendant before he searched him that the purpose for the pat-down was to locate any contraband Defendant had.

{¶70} The "plain feel" test doesn't require absolute certainty; probable cause is sufficient. *State v. Woods* (August 2, 1996), Montgomery App. No. 15392. However, probable cause requires indications which are sufficiently clear in their nature and meaning to cause a prudent person to believe that criminal activity is afoot. Officer Trick's testimony, taken as a whole, fails to demonstrate that degree of clarity with respect to the incriminating nature of the object he seized, when he first felt it and before he manipulated it with his fingertips to determine what it was, which the "plain feel" exception requires.

{¶71} The assignment of error is sustained. The judgment of the trial court will be reversed, and the matter will be remanded for further proceedings consistent with this opinion.

FAIN, P.J. and BROGAN, J., concur.

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