[Cite as *State v. Wehner,* 2017-Ohio-2788.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 27217
	:	
v.	:	Trial Court Case No. 2016-CR-00133
	:	
MARSHALL WEHNER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 12th day of May, 2017.

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HALL, P.J.

{¶ 1} Marshall Wehner appeals from his conviction and sentence following a no-contest plea to one count of heroin possession, a fifth-degree felony.

{¶ 2} In his sole assignment of error, Wehner contends the trial court erred in overruling his motion to suppress a heroin capsule found in his sweatshirt pocket during a search conducted by a Miamisburg police officer. Wehner argues that the officer unlawfully seized and searched him without probable cause or reasonable suspicion and without his consent. Therefore, he maintains that the heroin capsule should have been suppressed. For its part, the State asserts that Wehner voluntarily consented to the officer's search of his pocket and that the trial court properly overruled the suppression motion on that basis.

{¶ 3} The only witnesses at the suppression hearing were Wehner and Kevin Current, the officer involved. Current testified that he saw Wehner walking through an alley while on patrol on October 1, 2015. Current knew Wehner from prior encounters. He previously had engaged in numerous conversations with Wehner, who on several other occasions had allowed the officer to search him for drugs.

{¶ 4} On the day in question, Current had a suspicion, based on information received from other officers, that Wehner may have visited someone on the front porch of a drug house. As a result, he approached Wehner on foot and "started talking with him." Current first said something like "Hey, Marshall," and "normal conversation" followed. Current testified that he did not block Wehner's path, adivse him he was not free to leave, or do anything to prevent him from leaving. Current denied Wehner ever saying that he did not want to talk or asking to leave. During their conversation, Wehner denied

being in possession of anything illegal. Current responded by stating that he believed Wehner had purchased heroin and asking for permission to search Wehner. According to Current, Wehner consented to the officer "check[ing] him." Current testified that Wehner then "started to reach into his pockets to show * * * what was in his pockets, basically." At that point, Current "told him keep his hands out of his pockets and I'll check for him." Current denied grabbing Wehner's arm or doing anything other than telling Wehner not to "reach in." Current then reached into Wehner's sweatshirt pocket and retrieved a heroin capsule.

{¶ 5} In his testimony, Wehner admitted knowing Current and having had several prior encounters with the officer. Wehner also admitted having given Current permission to search him on prior occasions. With regard to the day in question, however, Wehner stated that he did not feel "free to leave" when Current approached him. He claimed he was "afraid" and was "wanting to be free to go." He believed that he would be "grabbed" if he tried to walk away. Wehner also testified that he denied Current's request to search him. According to Wehner, he also attempted to show the officer that he did not have "any weapons or anything." Wehner testified that Current responded by grabbing his arm and telling him not to move or to reach into his pockets. At that point, the officer reached into Wehner's sweatshirt pocket himself and found the heroin capsule. Wehner insisted that he did not give Current permission to do so.

{¶ 6} After hearing the testimony of Current and Wehner, the trial court made the following factual findings on the disputed issue of consent to search:

> On the day in question, Officer Current asked the Defendant if he was in possession of any drugs. The Defendant responded that he was not

> in possession of any drugs. Officer Current then asked him if he could check. Defendant then consented to the officer checking. At that time the Defendant started to put his hands into his center sweatshirt pocket – Officer Current stopped him and told him he would check. Officer Current then went into the Defendant's center sweatshirt pocket and found the capsule that forms the basis of the charges herein. The Defendant was not in custody or arrested and permitted to leave.
>
> The Defendant admitted that he had been searched previously; that the previous searches were consensual and that during the previous consensual searches, the Officer went into and searched his pockets.

(Doc. #18 at 1-2).

{¶ 7} Based on its factual findings, the trial court then concluded:

> The Court finds that the Defendant consented to the search of his sweatshirt. Officer Current knew the Defendant and the Defendant had permitted him to search him previously and the scope of the previous search included reaching into the Defendant's pockets. This Court finds the Defendant once again consented to the search and accordingly the Defendant's Motion to Suppress is overruled.

(*Id*. at 2).

{¶ 8} Following the trial court's suppression ruling, Wehner pled no contest to fifth-degree felony heroin possession. (Doc. #20). The trial court accepted the plea, made a finding of guilt, and sentenced him to five years of community control. (Doc. #20, 21).

{¶ 9} On appeal, Wehner contends his entire encounter with Current was non-

consensual and that the officer lacked reasonable, articulable suspicion or probable cause of wrongdoing to detain him. Therefore, he asserts that he unlawfully was seized when Current began speaking to him. Wehner further denies giving Current permission to search his sweatshirt pocket. As a result, he insists that the search of his pocket was unlawful. Finally, regardless of the legality of the initial encounter, Wehner maintains that an unlawful seizure and search occurred the moment Current instructed him not to reach into his pocket, prevented him from moving, and searched the sweatshirt pocket. At that point, Wehner asserts that he undoubtedly was seized and searched without consent or other justification.

{¶ 10} Upon review, we are unpersuaded by Wehner's argument that his initial encounter with Current was non-consensual. Although Wehner claimed that he did not feel free to leave when the officer approached him, the test we apply is an objective one. *State v. Jirac*, 2d Dist. Montgomery No. 15-CR-756, 2016-Ohio-8187, ¶ 10. The focus is on the officer's conduct, not the defendant's subjective state of mind. *State v. Ramey*, 2d Dist. Montgomery No. 26705, 2016-Ohio-607, ¶ 25. The question is whether a reasonable person in Wehner's position would have felt that he was free to walk away. *State v. Ward*, 2d Dist. Montgomery No. 27030, 2017-Ohio-1391, ¶ 26 (recognizing that the issue is whether, under all of the circumstances, a reasonable person would have felt free to ignore the police and go about his business). Having reviewed the suppression-hearing transcript, we find nothing to support an objective belief that Wehner was not free to ignore Current and to continue walking. Therefore, the initial encounter was consensual. That being so, Current did not need any specific justification for approaching Wehner, asking questions, or asking to search him. *Id*. at ¶ 24-26.

{¶ 11} With regard to the search itself, Current testified that he simply asked for permission to search Wehner, who consented to the officer "check[ing] him" for anything illegal. The trial court was entitled to credit this testimony. Therefore, it did not err in concluding "that the Defendant consented to the search of his sweatshirt." (Doc. #18 at 2). We also see no evidence suggesting that Wehner's consent was anything other than voluntary. *Ward* at ¶ 45 (holding that the defendant's consent to a search was voluntary, even in the absence of findings by the trial court, where "there were no coercive police procedures, nor was [he] placed in handcuffs or in custody in any way").

{¶ 12} The next issue is whether Wehner's consent remained in effect, or whether he had revoked it, when Current reached into his sweatshirt pocket. "[A] suspect who has voluntarily consented to a search of his person for drugs may effectively withdraw his consent only by unequivocal conduct, in the form of an act, a statement, or some combination of the two, that is inconsistent with the consent previously given, and that, to an objective person, would reasonably communicate the withdrawal of consent." *State v. Riggins*, 1st Dist. Hamilton No. C-030626, 2004-Ohio-4247, ¶ 36.

{¶ 13} Wehner's attempt to reach into his own pocket did not constitute an unequivocal withdrawal of the consent to search that he had given to Current. During the hearing, Wehner admitted that he was attempting to show the officer that he did not have "any weapons or anything." Current similarly testified that Wehner "started to reach into his pockets to show me what was in his pockets, basically." Nothing in the record supports a finding that Wehner's attempt to reach into his sweatshirt pocket manifested a clear intent to interfere with the search or to revoke his consent. When viewed objectively, his conduct appears to have been an attempt to help facilitate the search, not to prevent it.

Compare United States v. Sanders, 424 F.3d 768, 775 (8th Cir. 2005) (holding that the defendant's act of repeatedly moving his hands down and blocking his pockets clearly manifested his intent to revoke his consent and not to permit a search).

{¶ 14} Finally, we are unconvinced that Current's act of telling Wehner not to reach into his pocket transformed the encounter into a non-consensual one. Although Wehner asserts that Current grabbed his arm and instructed him not to move, the trial court found only that the officer "stopped him [from reaching in] and told him he would check." (Doc. #18 at 1-2). The trial court made no finding that Current told Wehner not to move. Nor did the trial court find that Current grabbed Wehner's arm. In any event, stopping Wehner from reaching into his pocket, whether orally or physically, did not result in him being seized or detained, or in his consent being revoked.[1] Given the consensual nature of the encounter up to that point, Wehner simply could have walked away when Current rejected his attempt to facilitate the search by revealing what was in his pocket. In effect, Current indicated to Wehner that he would remove what was in the pocket without assistance. If Wehner insisted on reaching in himself, and Current did not agree with him doing so, Wehner could have disregarded the officer, indicated unequivocal withdrawal of consent and terminated the encounter. But Wehner, who already had given the officer permission to search him, did not terminate the encounter. Instead, he allowed Current to check his

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[1] " 'Factors that might indicate a seizure include the threatening presence of several police officers, the display of a weapon, *some physical touching of the person*, the use of language or tone of voice indicating that compliance with the officer's request might be required, approaching the person in a non-public place, and blocking the citizen's path.' " *Ward* at ¶ 49, quoting *State v. Belcher*, 2d Dist. Montgomery No. 24385, 2011-Ohio-5015, ¶ 22. We apply a totality-of-the-circumstances analysis, however, and the alleged momentary touching or grabbing, which Current denied, does not necessarily establish a seizure. *Ramey* at ¶ 26 (identifying "physical touching" as one factor among several that "might indicate a seizure").

pocket.

{¶ 15} Under the totality of the circumstances, we find no Fourth Amendment violation arising from Current's act of telling Wehner to "keep his hands out of his pockets" while the officer "check[ed] for him," as Wehner already had authorized him to do. *Compare Burton v. United States*, 657 A.2d 741, 748 (D.C. App.1994) (finding a lawful search where "[a]ppellant complied without comment with [a detective's] request to remove his hand from his pocket" and there was "no evidence that appellant did anything that could objectively be interpreted as signifying withdrawal of consent, such as pushing the detective away or attempting to leave his seat"); *Ward* at ¶ 47-48 (finding valid consent to search despite the fact that an officer "had a hold of" the defendant's arms).

{¶ 16} Based on the reasoning set forth above, we overrule Wehner's assignment of error and affirm the judgment of the Montgomery County Common Pleas Court.

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FROELICH, J. and WELBAUM, J., concur.

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