[Cite as *State v. Sylvester*, 2017-Ohio-2845.]

wCOURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
DONTARIOUS SYLVESTER	:	Case No. 16CA76
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 15-CR-942
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 15, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GARY D. BISHOP Prosecuting Attorney	ROBERT GOLDBERGER 10 West Newlon Place Mansfield, Ohio 44902
By: BRANDON PIGG Assistant Prosecuting Attorney 38 S. Park Street Mansfield, Ohio 44902	

Baldwin, J.

{¶1} Appellant Dontarious Sylvester appeals a judgment of the Mansfield County Common Pleas Court convicting him of possession of heroin (R.C. 2925.11(A), (C)(6)), possession of cocaine (R.C. 2925.11(A), (C)(4), and possession of marijuana (R.C. 2925.11(A)) upon a plea of no contest. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 2, 2015, Officer Paul Webb of the Mansfield Police Department responded to a call concerning a fight in Johns Park in Mansfield. The report stated that about 20 people were involved in the fight, and a man had a gun. The man with the gun was described as a black man with dreads, wearing red shorts. The call further stated that the man with the gun was near a black Monte Carlo. Officer Webb knew Johns Park to be an area associated with shootings and drug crime.

{¶3} When Webb arrived on the scene, Officer Grimshaw was talking to a man at the black Monte Carlo. Webb saw four to five males walking away from the car, including appellant. Appellant was with a Mr. Hammett, who had dreadlocks and also had a warrant.

{¶4} Webb asked the men to stop, and they complied. Appellant was the closest person to Webb, so he advised appellant that he was going to pat him down for weapons. Based on Webb's experience, it was not uncommon for more than one gun to be involved in a fight of this nature. He asked appellant to place his hands against a nearby fence, and began an open palm pat-down for weapons. He felt a large object in appellant's right pocket. Because it was "pretty large," Webb squeezed the item to make sure it was not

a weapon. Upon squeezing it, he recognized the object as a baggie of marijuana. He stopped immediately and asked appellant what the object was. Appellant responded that it was marijuana. Appellant was placed under arrest. At the Richland County Jail, officers discovered cocaine and heroin in appellant's left sock.

{¶5} Appellant was indicted by the Richland County Grand Jury with possession of heroin, possession of cocaine, and possession of marijuana. Appellant filed a motion to suppress, arguing that the officer did not have a reasonable suspicion of criminal activity to justify the stop and pat-down, and that the officer could not seize the baggie of marijuana based on the plain feel doctrine. After a hearing, the trial court overruled the motion to suppress. Appellant pled no contest to all charges and was sentenced to thirty months of community control.

{¶6} Appellant assigns a single error:

{¶7} "THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE."

{¶8} Appellant first argues that Officer Webb did not have a reasonable suspicion of criminal activity to justify stopping appellant and patting him down for weapons.

{¶9} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 889 (1968). Because the "balance between the public interest and the individual's right to personal security" tilts in favor of a standard less than probable cause in such cases, the

Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot." *United States v. BrignoniPonce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). In *Terry*, the United States Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See, *State v. Chatton*, 11 Ohio St.3d 59, 61, 463 N.E.2d 1237 (1984). The propriety of an investigative stop must be viewed in light of the totality of the circumstances surrounding the stop "as viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 57 Ohio St.3d 86, 87–88, 565 N.E.2d 1271 (1991); *State v. Bobo*, 37 Ohio St.3d 177, 178, 524 N.E.2d 489 (1988).

{¶10} Officer Webb responded to a call of a fight involving a gun in a park known for high drug crime and for shootings. The person with the gun was reported to be associated with a black Monte Carlo. When Webb arrived at the park, he saw Officer Grimshaw talking to a man near the Monte Carlo, and four or five men, including appellant, walking away from the Monte Carlo. Based on the reports concerning a fight in the park with the presence of a gun, and on appellant's proximity to the car associated with the report of a gun, the officer had a reasonable suspicion of criminal activity to justify stopping appellant.

{¶11} In *Terry*, *supra*, the United States Supreme Court held that a limited pat-down search is justified when an officer reasonably concludes the individual, whose suspicious behavior he is investigating at close range, may be armed and, thus,

dangerous to the police officer and others. 392 U.S. at 24. In determining whether an officer's beliefs are reasonable, a court must consider the totality of the circumstances involved in the stop. *Bobo, supra,* at 180. An officer need not testify he was actually in fear of a suspect, but he must articulate a set of particular facts which would lead a reasonable person to conclude a suspect may be armed and dangerous. *State v. Evans*, 67 Ohio St.3d 405, 413, 1993–Ohio–186, 618 N.E.2d 162. Rather, "[e]vidence that the officer was aware of sufficient specific facts as would suggest he was in danger" satisfies the test set forth in *Terry, supra. Id.*

{¶12} In the instant case, the officer responded to a report of a fight involving around twenty people, one of whom had a gun. The person with a gun was associated with a black Monte Carlo, which appellant was walking away from when stopped by Webb. The park was known to the officer for drugs and other shootings, and in his experience, when one gun was present in a fight, it was not uncommon for more guns to be present. The officer had a reasonable basis to believe that appellant might be armed and that he might be in danger.

{¶13} Appellant next argues that the officer could not seize the baggie of marijuana pursuant to the plain feel doctrine.

{¶14} In *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the United States Supreme Court established the "plain feel" doctrine as it relates to a *Terry* pat-down search for officer safety. In *Dickerson*, the court held that police may seize contraband detected through the sense of touch during a valid, *Terry* pat-down if its identity as contraband is immediately apparent. *Id*.

{¶15} If the officer conducting the search must manipulate the object to determine its identity as contraband, said search exceeds the scope of a lawful *Terry* search and any resulting seizure of contraband by the officer is not justified under the plain feel doctrine. *Id.* at 378. "[O]nce the officer determines from his sense of touch that an object is not a weapon, the pat down frisk must stop. The officer, having satisfied himself or herself that the suspect has no weapon, is not justified in employing *Terry* as a pretext for a search for contraband." *Evans, supra,* at 414.

{¶16} In the instant case, Officer Webb did squeeze the baggie before he determined that it was marijuana. However, his testimony established that he squeezed the object for the purpose of determining if the object was a weapon, and did not further manipulate the object after determining that it was not a weapon:

> On patting him down, I felt an object in his right pocket. It was pretty large, so I squeezed it to make sure it wasn't a weapon. When I did, it ended up being a baggie that I recognized as marijuana. I asked Mr. Sylvester what it was, and he advised that it was marijuana. Tr. 14

> Q. At one point you did feel something in the Defendant's pocket, right?
>
> A. Yes, ma'am.
>
> Q. Once you got to that right pocket, what did you do?
>
> A. I squeezed the bag.
>
> Q. Again, tell us why you squeezed at that point.
>
> A. To ensure that it wasn't a weapon or it wasn't a hard object.

Q. Okay. You can sit down, sir. Once you felt that pocket, did you continue on with the other leg?

A. I stopped right there.

Q. You stopped immediately?

A. Yes, ma'am.

Tr. 17.

{¶17} Officer Webb had not yet satisfied himself that the object was not a weapon when he squeezed it, and the pat-down was therefore not a pretext for a search for contraband. Based on the testimony of Officer Webb, the trial court did not err in concluding that the search did not exceed the scope of a *Terry* pat-down.

{¶18} Finally, appellant argues that the officer's testimony that the baggie was immediately recognizable to him as marijuana defies credibility. However, this Court has previously affirmed the propriety of seizures of drugs based on the plain feel doctrine. *See, e.g., State v. Wehr,* 2014-Ohio-4396, 20 N.E.3d 1116(5th Dist. Richland); *State v. Mitchell,* 5th Dist. Stark No. 2006CA00136, 2007-Ohio-2545; *State v. Howard,* 5th Dist. Licking No. 2003-CA-0058, 2004-Ohio-2914. Further, before removing the baggie from appellant's pocket, Webb asked appellant what the object was, and appellant responded that it was marijuana.

{¶19} The trial court did not err in overruling appellant's motion to suppress. The judgment of the Richland County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Earle Wise, J. concur.