[Cite as *State v. Wilson*, 2005-Ohio-385.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84117

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
ANDREW WILSON	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 3, 2005
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from Common Pleas Court Case No. CR-442174
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

{¶ 1} Andrew Wilson appeals from the trial court's denial of his motion to suppress evidence following an evidentiary hearing. Wilson claims he was illegally searched by police, and the trial court should have suppressed the crack pipe they found that contained cocaine residue. After reviewing the record and for the reasons set forth below, we affirm the trial court's decision.

{¶ 2} On August 4, 2003, Cleveland Police Officer, Leslie Blasini, and his partner were patrolling the area of East 40th and

Cedar. The officers had received complaints from local citizens and city counsel members that drug activity in the area was rampant.

{¶ 3} While driving their zone car past an abandoned building on Cedar Avenue, Officer Blasini noticed two individuals sitting in the doorway. One of the individuals, later identified as Shirletha Solomon, was drinking an alcoholic beverage in a public place, in violation of Cleveland's prohibition against open containers. The other individual, identified as Andrew Wilson, was not seen by officers drinking an alcoholic beverage, but a can of beer was sitting in the grass within arm's reach.

{¶ 4} The officers decided to stop their zone car and approach Wilson and Solomon. Officer Blasini asked Solomon to stand up. When she did, a crack pipe fell from her person onto the ground in front of the officers. Solomon denied the crack pipe was hers. Officer Blasini then asked Wilson to stand up and provide him with some identification. Wilson told the officer he did not have any identification, but eventually provided Officer Blasini with a welfare card.

{¶ 5} Officer Blasini noticed that Wilson's hands and fingers were burned. Based on his experience as a police officer, he knew the burnt fingers were indicative of someone who had been smoking a hot crack pipe. He also noted that Wilson appeared to be very nervous. Because they were in a high drug activity area, he

decided to frisk Wilson to check for weapons. While patting Wilson down for weapons, Blasini felt a hard cylindrical object in the left, front pocket of Wilson's pants. Officer Blasini, certain that the object was a crack pipe, removed it and placed Wilson under arrest. Wilson denied that the crack pipe belonged to him.

{¶ 6} On September 18, 2003, Wilson was indicted by the Cuyahoga County Grand Jury on one count of possession of drugs, in violation of R.C. 2925.11, a fifth degree felony. Wilson pleaded not guilty to the indictment and filed a motion to suppress the crack pipe containing some cocaine residue claiming it was seized during an illegal search. After holding a suppression hearing, Wilson's motion was denied by the trial court. On November 20, 2003, Wilson entered a plea of no contest to the indictment. He was found guilty and sentenced to three years of community control sanctions, including random drug testing, community service, and participation in an outpatient drug treatment program. The trial court also suspended his driver's license for six months.

{¶ 7} Wilson (the "appellant") brings this timely appeal and alleges one assignment of error for review. In his sole assignment of error, the appellant claims the trial court should have suppressed evidence concerning the crack pipe found by the police because they stopped him and searched his pockets based upon a "hunch" that he was an illegal drug user, not on an articulable

suspicion that criminal activity was afoot, in violation of his Fourth Amendment rights.

{¶ 8} "[T]he standard of review with respect to motions to suppress is whether the trial court's findings are supported by competent, credible evidence. See *State v. Winand* (1996), 116 Ohio App.3d 286, 688 N.E.2d 9, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 645 N.E.2d 802. *** This is the appropriate standard because 'in a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.' *State v. Hopfer* (1996), 112 Ohio App.3d 521, 679 N.E.2d 321. However, once we accept those facts as true, we must independently determine, as a matter of law and without deference to the trial court's conclusion, whether the trial court met the applicable legal standard. *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141." *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101, 709 N.E.2d 913; see, also, *State v. Henry*, 151 Ohio App.3d. 128, 2002-Ohio-7180, 783 N.E.2d 609.

{¶ 9} When deciding whether a temporary stop is permissible under *Terry v. Ohio* (1967), 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868, we look to see whether the police had a reasonable suspicion that criminal activity was occurring. See *Illinois v. Wardlow* (2000), 528 U.S. 119, 123, 145 L.Ed.2d 570, 120 S.Ct. 673. The purpose of a *Terry* stop is not to accuse, but to investigate.

Facts which might be given an innocent construction will support the decision to detain an individual momentarily for questioning, so long as one may rationally infer from the totality of the circumstances that the person may be involved in criminal activity. *United States v. Cortez* (1981), 449 U.S. 411, 417, 66 L.Ed.2d 621, 101 S.Ct. 690. A police officer must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489. An area's reputation for criminal activity is an articulable fact that is part of the totality of the circumstances surrounding a stop. Id.; see, also, *State v. Brumfield*, Hamilton App. No. C-030389, 2003-Ohio-7102.

{¶ 10} Under the totality of the circumstances approach, police officers are permitted to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Cortez*, 449 U.S. at 418. Thus, a court reviewing the officer's reasonable suspicion determination must give due weight to the officer's trained eye and experience and view the evidence through the eyes of those in law enforcement. Id.; see, also, *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271.

{¶ 11} The protective pat-down search under *Terry* is limited in scope to this protective purpose and cannot be employed by the searching officer to search for evidence of crime. Obviously, once 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.

{¶ 12} In the instant matter, Officer Blasini observed Solomon drinking alcohol in a public place and decided to approach her and the appellant. Upon approaching, Officer Blasini noticed an open can of beer in the grass within arm's length of the appellant. Both the appellant and Solomon were in violation of a city of Cleveland municipal ordinance regarding the drinking of alcohol in a public place. When Officer Blasini asked Solomon to stand and produce identification, a crack pipe fell from her person and onto the ground.

{¶ 13} Officer Blasini then asked the appellant to provide him with some identification. Officer Blasini took notice of the burn marks on the appellant's fingers and hands, which is indicative of someone who has been smoking a hot crack pipe, his nervous behavior, and his lack of proper identification, along with the fact that they were in a high crime and drug area, and he decided to pat down the appellant for weapons, suspecting he might be a

crack user. Officer Blasini testified that he has learned from his police experience that crack users often have and use box cutters, small knives, and broken crack pipes as weapons. Officer Blasini stated that he recognized most people who lived in the area and had never seen the appellant before.

{¶ 14} During the pat down for weapons, Officer Blasini felt a hard, cylindrical object in the appellant's left front pant's pocket, which he felt certain was a crack pipe; he had the opportunity moments before to observe Solomon's crack pipe. The appellant denied ownership of the crack pipe.

{¶ 15} The drinking of an alcoholic beverage in public by Solomon initially led to the investigative stop. Officer Blasini had a reasonable suspicion that the appellant was engaged in criminal activity when he saw a beer can sitting within arm's reach of the appellant. The burns on the appellant's hands, his nervous behavior, and the nature of the neighborhood led Officer Blasini to believe that the appellant was an illegal drug user who smoked crack cocaine. A crack pipe had already been dropped on the ground by the appellant's companion. These observations, taken along with the officer's past police experience with crack users, led him to believe the appellant may be armed with a weapon. Officer Blasini had testified that crack users have and often use box cutters, small knives, and broken crack pipes as weapons. However, once Officer Blasini felt what he unmistakenly knew to be a crack pipe,

he is not required to ignore the found contraband while searching for weapons according to the "plain feel" doctrine. See *Minnesota v. Dickerson* (1993), 508 U.S. 366.

{¶ 16} We find that, based on the totality of the circumstances, the officers had a reasonable suspicion of criminal activity and, moreover, that a protective search was warranted; therefore, we hold that the trial court's decision to deny the appellant's motion to suppress was supported by competent and credible evidence. The appellant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

ANTHONY O. CALABRESE, JR., J., CONCURS;

DIANE KARPINSKI, J., DISSENTS WITH SEPARATE DISSENTING OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

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Plaintiff-appellee	:	
	:	DISSENTING
v.	:	
	:	OPINION
ANDREW WILSON	:	
	:	
	:	
Defendant-appellant	:	

DATE: FEBRUARY 3, 2005

KARPINSKI, J., DISSENTING:

{¶ 17} I respectfully dissent because I believe that the state failed to demonstrate either a reasonable basis for a pat down of

defendant or probable cause to search defendant and seize the crack pipe.[1]

{¶ 18} This court has previously explained that, under *Terry v. Ohio*, "a police officer may make a brief, warrantless, investigatory stop of an individual without probable cause to arrest where the officer reasonably suspects that the individual is or has been involved in criminal activity. In assessing that conclusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *City of Cleveland v. Floyd Fields,* Cuyahoga App. No. 82070, 2003 Ohio App. LEXIS 1869 *Fields*, at ¶18 (citations omitted).

High Drug Area

{¶ 19} One fact the officer repeatedly emphasized was that the area was a high drug area. As this court in *Floyd* previously observed, however, a high drug area, even a "special attention" area,

> **{¶ 20}** "does nothing to create reasonable suspicion in a particular case. If this were so," this court has explained, "any individual found in an area so designated would be a criminal suspect subject to a *Terry* stop. Even in high crime areas, a citizen is entitled to the presumption that he obeys the law. The investigatory stop in a high crime or 'special attention' area still requires specific, articulable facts about the individual suspect ***."

[1]The majority twice says that the crack pipe that the officer found on defendant "contained crack residue." Ante pp. 2 and 3. At the suppression hearing no evidence whatsoever was presented identifying what the pipe contained.

{¶ 21} Id., at ¶25, citing *State v. Clark*, 139 Ohio App.3d 183; 743 N.E.2d 451; 200 Ohio App. LEXIS 3814.

Burn Marks

{¶ 22} Among his reasons for the pat down, the officer included the burn marks he observed on defendant's hands as "an indicator of somebody who's been smoking a hot crack pipe." Tr. 11. The trial judge also cited this observation as a basis for denying the motion to suppress. Although the officer spoke in the progressive form of the verb ("been smoking"), such burns, as defense counsel correctly observed, do not indicate current use. The officer did not indicate the burns were fresh. The burn marks, therefore, do not provide a basis for reasonably suspecting defendant had been engaging in criminal activity at that time and location.

Demeanor

{¶ 23} Another reason the officer cited for his suspicions was that defendant's demeanor was "just a little bit nervous." In a very recent case, the Sixth Circuit has held that nervousness is an "unreliable indicator." *U.S. v. Richardson* (2004) 385 F.3d 625; 2004 U.S. App. LEXIS 20061, 630. The officer acknowledged, furthermore, that defendant did not say anything "threatening" to him or "make any kind of threatening gestures." Tr. 21. The officer further volunteered that defendant was not "belligerent in any form or anything like that." Tr. 13-14. Moreover, defendant

complied with each request the officer made. Defendant's total demeanor, therefore, provided no reasonable basis to suspect criminal activity.

Illegal Acts

{¶ 24} When asked whether he observed defendant do anything illegal, the officer noted that "there was beer around him" and "in the grassy area there was a can of beer." He further observed that co-defendant had Wild Irish Rose with her and "in that area a lot of people share all those things." Tr. 20. The officer did not specifically say, however, what he has just described was illegal. The trial judge, on the other hand, expressly noted, as a circumstance for denying the motion to suppress, that defendant was with a woman drinking from an open container and "that he had a beer within his reach." The court added, however that "it wasn't clearly established whether that was his beer or it was just an old beer laying around." Tr. 30. That qualification was sufficient to disqualify this circumstance as any basis for reasonable suspicion of defendant engaging in criminal activity. Moreover, drinking from an open container is a minor misdemeanor (R.C. §4301.62), not an arrestable offense (R.C. §2935.26).

Loitering

{¶ 25} When pressed, the officer offered hypothetically: "If you want to call loitering illegal, yes, then he was loitering in an area that he shouldn't have even been there." Tr. 20-21. The

officer does not explain why defendant should not have been there except to say he was sitting in an area of an abandoned building and he did not recognize him as from the area. Tr. 8. Such evidence would not satisfy the simple offense of loitering, which is a minor misdemeanor.[2] Again, because loitering here could be only a minor misdemeanor, the officer would be justified in asking defendant his name and perhaps telling him to move on or perhaps citing him. But nothing more.

Crack Pipe

{¶ 26} The officer also gave a reason that he saw a crack pipe. Tr. 11. This pipe, however, fell from the skirt of the person sitting next to defendant. Whereas this pipe could justify a brief inquiry to defendant, for example, asking his name, the pipe, even with the other circumstances the officer named, would not justify a pat down.

{¶ 27} The trial court also listed the companion's crack pipe as a reason to deny the motion to suppress. Mere association and conversation with someone possessing a crack pipe, however, does not warrant a reasonable suspicion that defendant was engaged in any drug activity, especially since the companion was currently observed drinking Irish Rose, not smoking crack. Again, the

[2]Nor would the facts here qualify as a violation of Cleveland Ordinance 607.19.

officer's observation could justify a brief investigatory detention, but nothing more.

Identification

{¶ 28} One reason Officer Blasini cited repeatedly for the pat down was that defendant "did not have an ID on him." Tr. 11. A bit later, the officer said "he didn't have proper ID on him." Tr. 14. In fact, the officer admitted under cross-examination that defendant presented a Cuyahoga County welfare card, which contained defendant's name and social security number. The officer did not find this identification acceptable because it was "not a state ID card" and therefore not "legal to us." Tr. 18.

{¶ 29} The trial court concluded the totality of circumstances were sufficient for the police "to inquire of the defendant in this case, and they did, and he did not have a state ID in this case." Thus the trial judge apparently believed that the absence of a state ID justified an inquiry. The police officer, however, believed it a proper basis for a pat down.

{¶ 30} The Second District has held that

> where a person stopped for a minor misdemeanor furnishes the police officer with his name and social security number, and that information is verified by computer, the person has offered satisfactory evidence of his identity. (Citations omitted.) Although we have not required the police to go to extraordinary lengths to verify identification information, *** police officers cannot avail themselves of the exception to the citation only provision of R.C. 2935.26 [which says a law enforcement officer is not authorized to arrest for the commission of a minor misdemeanor except for specific exceptions] by

> refusing to attempt to verify identification information if the means for doing so are readily available.

{¶ 31} *State v. Terry*, (Montgomery App. No. 15796), 1997 Ohio App. LEXIS 670.

{¶ 32} In *Terry*, the court held that if a police cruiser with an operational computer had arrived in sufficient time for the officer to have attempted to verify defendant's information as to her identity, prior to observing cocaine in her mouth, the evidence should have been suppressed. Similarly, in the case at bar, the officer testified that after the pat down he later checked out the ID and found it valid. Nothing in the record indicates that the officer could not have made this check earlier. Thus the circumstances of an open container or loitering coupled with the lack of a "state ID" were not sufficient to proceed to a pat down.

No Probable Cause for Search and Seizure

{¶ 33} There was no reason to suspect defendant was engaging in criminal activity. Even if, arguendo, all the circumstances had provided a reasonable suspicion of criminal activity, the police are permitted only an "investigatory detention" to question the person briefly and a "carefully limited search of the outer clothing in an attempt to discover weapons." *Terry v. Ohio* (1968), 392 U.S. 1; 88 S.Ct. 1868; 20 L.Ed.2d 889; U.S. LEXIS 1345; 44 Ohio Op.2d 383. The officer in the case at bar clearly stated the purpose of the pat down was to make sure that defendant did not

have any weapons. He further explained that "in that area" they "get a lot of box cutters, small knives, also the crack pipes," which broken can be used as a weapon. Tr. 12-13. But he testified he found only "what felt like a little cylinder."[3] Tr. 13. Not having felt anything that he identified as a weapon, the officer had no basis to believe that his safety was in danger.[4] The officer provided no justification, therefore, for proceeding past the pat down and reaching into defendant's pocket.

{¶ 34} Case law has clarified that to go beyond the pat down on the basis of feeling an object, the officer must say he felt an object whose form made its identity "immediately apparent." *State v. Cloud* (1993), 91 Ohio App.3d 366; 632 N.E.2d 932, citing *Minnesota v. Dickerson* (1993), U.S. 113 S.Ct. 2130, 124 L.Ed.2d 334, 508 U.S. 366. As the Second District Court has explained:

> For purposes of analysis ***, we will assume that an object coming within a police officer's plain feel during a proper pat-down frisk for weapons may be seized if the officer has probable cause to believe that the item is contraband before seizing it. In the case before us, Officer house testified that he could feel a small, hard object in the lower corner of Lander's coat pocket when he was patting it down for weapons. In order to reach a conclusion that this object was a piece of crack cocaine, the State necessarily relies upon Officer House's training and experience with respect to crack cocaine,

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[3]The officer was not certain whether this particular crack pipe was plastic or glass.

[4]The majority opinion erroneously states three times that the officer who patted down defendant was "certain that the object was a crack pipe." Ante pp. 3, 7 and 8. He never said he knew it was a crack pipe. Nor did he say he suspected it to be a gun or a weapon of any kind. He only said what it felt like: "a little cylinder."

> which appears to have been extensive. Significantly, Officer House made no claim he had probable cause to believe that the object was crack cocaine. On each of the two occasions when he covered this point in his testimony, he used the word 'suspected' to describe his conclusion, clearly indicating that his conclusion that the object might be crack cocaine was merely a suspicion, rather than probable cause to believe, that the object was crack cocaine."

{¶ 35} *State v. Groves*, 156 Ohio App. 3d 205, 2004-Ohio-662, citing *State v. Lander*, Montgomery App. No. 17898, 2000 Ohio App. LEXIS 120. In the case at bar, as in *Groves*, the officer made no claim that he had probable cause to believe that the object was a weapon or crack pipe. So the state has failed to satisfy its burden of proof that the officer had probable cause to proceed past the pat down. This court has previously ruled on a set of facts quite similar to those in the case at bar. In *State v. Lockett*, 99 Ohio App.3d 81; 649 N.E.2d 1302, defendant was near two people drinking beer while he was walking from a store and carrying a bag. There was no evidence defendant was engaging in any suspicious activity. Nevertheless, the officers searched defendant and arrested him for possession and using cocaine. This court held that

> "the inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."

{¶ 36} Id., citing *Sibron v. New York* (1968), 392 U.S. 40; 88 S.Ct. 1889; 20 L.Ed.2d 917, 62-63.

{¶ 37} The totality of circumstances in the case at bar does not provide a reasonable suspicion for proceeding to a pat down, much less for going past the pat down to search defendant. The officer never testified that he felt an object whose form made its identity as a weapon or crack pipe "immediately apparent."

{¶ 38} The officer never articulated probable cause, therefore, that defendant possessed a crack pipe or that he was an armed and dangerous person who could endanger himself or others. The motion to suppress, therefore, should have been granted.