



Police Law Bulletin



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**NORTH CAROLINA****COURT OF APPEALS**

Frisk of Defendant Was Proper; Force Used Against Defendant Was Not Excessive and Did Not, Thereby, Render Search Unreasonable

State v. Henry, No. COA14-561 (18 November 2014)

At approximately 10:00 a.m. on February 1, 2012, Johnston County Sheriff's Deputy Greg Collins was patrolling for traffic violations when he saw a gray Hyundai suddenly come to a complete stop in the middle of a blind curve. The posted speed limit was 45 miles per hour, and Deputy Collins testified that he and three or four other motorists behind the Hyundai were forced to stop abruptly to avoid hitting it. While the cars were stopped, Deputy Collins watched as a female ran out from a cemetery beside the road and climbed into the Hyundai's passenger seat. At that point, Deputy Collins ran a check on the vehicle's license plate, which came back to a leased vehicle from Charlotte. When the Hyundai continued driving north, Deputy Collins followed it for about a mile, then activated his blue lights to conduct a traffic stop as the car turned into a driveway. When Deputy Collins reached the driver's side door, he recognized the Defendant as someone he had a lot of previous involvement with related to narcotics. Deputy Collins noticed Defendant "seemed nervous" and "was sitting there shaking." When Deputy Collins asked Defendant for his license and registration, Defendant reached over with his left hand to open the vehicle's glove box while keeping his right arm in a position where Deputy Collins could not see it. When Deputy Collins asked Defendant where he and his female passenger were going; Defendant said nothing, but his passenger said they were headed to an ATM, which struck Deputy Collins as odd, given that the car had been traveling in the opposite direction of the closest available ATM. The passenger replied that Defendant was driving her to pick up her ATM card, but Deputy Collins noticed that although they claimed to be friends, neither Defendant nor his passenger appeared to know each other's names. After Deputy Collins asked Defendant to step out of the vehicle, he noticed there was something in Defendant's right hand, but could not tell what it was because Defendant had his right hand closed with his thumb and index finger rubbing it together in a clinched fist. Deputy Collins asked Defendant if he was holding his car keys, but Defendant said they were still in his car, which Deputy Collins confirmed. Deputy Collins asked Defendant multiple times to open his hand, but Defendant

repeatedly refused. This led Deputy Collins to suspect Defendant might be carrying a weapon, so he ordered Defendant to turn around and place his hands on top of the vehicle in order to conduct a frisk. When Defendant partially complied with this order but still refused to drop what was in his hand, a scuffle ensued, which was captured by the video camera in Deputy Collins's patrol car and during which Deputy Collins was able to get both Defendant's hands up above the car and pin Defendant against the car. At that point Defendant started lunging across the cab of the vehicle and extending his right hand, but still refused to open it and kept saying there's nothing in my hand. Eventually, Deputy Collins took Defendant off his balance, spun him around and put him on the ground, where the two men continued to struggle. After refusing still more requests to open his hand, Defendant stated, "there's a tissue in my hand," but nevertheless refused to drop it until Deputy Collins had to force Defendant's right hand behind his back and forcibly removed the item that was in his hand. The item Defendant had been holding was, in fact, a tissue.

Deputy Collins placed Defendant under arrest for resisting a public officer, then conducted a search incident to arrest to ensure that Defendant had no weapons. Once the immediate area was secured, Deputy Collins continued his search and found a plastic baggie containing an off-white rocky substance near the left rear driver's side of the vehicle where he and Defendant had been struggling. Subsequent SBI testing showed the substance to be approximately 0.55 grams of crack cocaine.

Before his trial, Defendant filed a motion to suppress the evidence against him, alleging it was the fruit of an unreasonable search that violated his Fourth Amendment rights. Although he did not object to the constitutionality of the traffic stop, Defendant contended Deputy Collins lacked reasonable suspicion to conduct a *Terry* frisk, arguing primarily that the mere fact of his previous drug convictions was insufficient to justify a search for contraband. Given the totality of the circumstances, the trial court concluded that Deputy Collins did have reasonable suspicion to conduct a *Terry* frisk and, accordingly, denied Defendant's motion to suppress. A jury found Defendant guilty of felony of possession of cocaine and resisting, delaying, or obstructing a public officer. Later, Defendant pled guilty to having attained habitual felon status, thereby enhancing his punishment. Defendant preserved his right to appeal.

The Court of Appeals found that the frisk was proper. Deputy Collins knew Defendant had prior convictions for drug offenses, observed Defendant's nervous behavior inside his vehicle, and saw him deliberately conceal his right hand and refuse to open it despite repeated requests. Furthermore, he knew from his training and experience that people who deal in narcotics frequently carry weapons, and that many weapons are small enough to conceal within a person's hand.

Furthermore, the officer did not use excessive force by taking the defendant to the ground during a valid traffic stop. Deputy Collins' actions were not so unreasonably intrusive as to violate Defendant's Fourth Amendment rights.

Accordingly, the Court of Appeals held that the trial court did not err in denying Defendant's motion to suppress.

Drugs Found During Valid Pat Down for Weapons; Arrest Supported by Probable Cause; Strip Search Was Reasonable

State v Robinson, No. COA11-1163 (19 June 2012)

Shortly after midnight on March 5, 2009, Detective Tisdale and Officer Pittman of the Charlotte-Mecklenburg Police Department were on patrol in a marked vehicle. The officers noticed three men sitting in a car parked in a parking lot off of a street that ran through an apartment complex. The officers stopped the patrol car and approached the vehicle to talk to the men. As Detective Tisdale spoke with the driver, he noticed defendant, who was seated in the back of the car, held a large number of bills of varying denominations. At the same time, Officer Pittman, who had approached the passenger side of the vehicle, noticed a machete in the front seat between the driver and the front seat passenger. The front seat passenger was asked to step out of the vehicle. While Tisdale continued to talk to the driver, defendant dropped the money he was holding onto the floor of the car and “suddenly moved back, lifted up his waist area, and placed his hands behind his back.” Once the front seat passenger exited the vehicle, Officer Pittman observed crack cocaine in plain view in the front right passenger seat and therefore, arrested the front seat passenger. Detective Tisdale then ordered the defendant out of the vehicle and performed a pat down of him. When the detective moved to defendant’s crotch area, he placed his flat hand between his crotch area and his buttocks and felt a hard-like substance between defendant’s buttocks. Based upon his training and experience with subjects that conceal illegal narcotics in the buttocks area, the officer placed defendant in cuffs and escorted him to the police vehicle, about 20’ away, in order to perform a more thorough search. The detective opened the rear door of the car and positioned defendant between that door and the passenger seat. He asked defendant to lean forward at the waist and the officer looked down the rear of defendant’s pants with his flashlight. He could see a clear plastic baggie protruding from defendant’s buttocks. He asked defendant to spread his buttocks apart so the item could fall out. Defendant complied. A baggie containing crack cocaine then fell down defendant’s pants leg onto the ground. Defendant was transported to the magistrate’s office and a magistrate’s order was issued charging him with felonious possession of cocaine.

Defendant filed a motion to suppress the cocaine. The motion was denied by the trial court judge. Defendant pled guilty to felonious possession of cocaine, but reserved the right to appeal the denial of his motion to suppress.

First, while defendant conceded that the totality of the circumstances in the present case, including the presence of an unconcealed weapon and what appeared to be drugs in the front seat, provided ample justification to pat down defendant for weapons. Defendant argued, however, that the manner and scope of the search went beyond that allowed for a frisk. In essence, defendant asserted that the detective initially performed a complete pat-down of defendant’s person for the purpose of determining if defendant had any weapons and then, having ascertained that defendant was not armed, undertook an entirely new search of defendant’s person for the purpose of discovering unlawful drugs and found the hard substance only after the weapons search had already revealed that defendant was not carrying a weapon.

The Court of Appeals found that this argument of the defendant had no merit. Detective Tisdale’s testimony described a single pat-down search conducted in a fluid manner following

defendant's removal from the vehicle. During the course of this valid pat-down for weapons, the officer discovered a hard object between defendant's buttocks.

Second, defendant argued that the trial court erred by concluding that probable cause existed when Detective Tisdale felt something hard between defendant's buttocks. The Court of Appeals disagreed. The court noted that: 1. Defendant was sitting in a car parked in a high crime area; 2. A machete was observed between the front passenger's and driver's seats; 3. The front passenger possessed what appeared to be crack cocaine; 4. When law enforcement officers began speaking with the occupants of the car, the defendant dropped a large sum of money onto the floor; 5. After dropping the money, defendant immediately made a quick movement behind his back; and 6. While performing a lawful frisk for weapons, the detective discovered a hard substance between defendant's buttocks; the fact that "the substance was hidden in the cleft of the defendant's buttocks was significant since that is an unlikely place for carrying a legal substance." Based upon the foregoing facts, the court found that Detective Tisdale had probable cause to arrest defendant.

Finally, defendant contended that the trial judge erred by concluding that the search was not a "strip search" and that therefore, exigent circumstances were not required. In order for a roadside strip search to pass constitutional muster, there must be both probable cause and exigent circumstances. The Court of Appeals held that Detective Tisdale had ample basis for believing that contraband would be beneath Defendant's underclothing, and the detective took steps to protect defendant's privacy. Thus, any failure on the trial judge's part to analyze the case as a strip search when reaching his conclusion was irrelevant.

Therefore, the Court of Appeals left the trial court's decision undisturbed.

Search of Juvenile Exceeded Scope of a Lawful Frisk

In re D.B., COA10-1476 (16 August 2011)

On December 26, 2009, an officer with the Durham Police Department received a call about an activated burglar alarm at the clubhouse of the Crossings Golf Club. Upon arriving at the location, officers observed that a back rear window of the clubhouse was shattered and the door was open. The drawer of the cash register was missing, and was later found outside on a grassy area, about 100 feet from the building. Officers had secured the building when they received a dispatch regarding a suspicious person running from the golf course area, about two blocks away. The suspect was described as a black male wearing a dark-colored hooded sweatshirt, all black clothes, and blue jeans. One of the officers drove towards the location identified in the dispatch. He saw a black male with a dark hooded sweatshirt and blue jeans run through a yard from Oak Grove Parkway toward Brier Haven Drive. The officer stopped the individual. The juvenile was out of breath and sweating profusely. The officer asked the juvenile to put his hands on the patrol car, and the officer then frisked the juvenile. At some point when the officer was patting down the juvenile, he felt what he believed to be an identification card in the front pocket of the juvenile's sweatshirt. The officer asked the juvenile if he had any identification, but the juvenile wouldn't respond. Therefore, the officer reached into his pocket and removed the object which he thought was an identification card. Once he pulled the card out, he discovered it was actually a Visa card bearing the name Sharon Atkins. After the officer determined that the card had been stolen earlier that month, he placed the juvenile under arrest, put him in the patrol car, and drove him back to the clubhouse. The witness who had made the suspicious person report was

contacted and returned to the clubhouse where she made a positive identification of the juvenile as being the person she had seen running away from the golf course. The officer then advised the juvenile of his juvenile Miranda rights, which the juvenile waived. The juvenile then made several incriminating statements in response to the officer's questions.

Two juvenile petitions were filed against the juvenile, alleging delinquency in that he committed felony breaking and entering, felony larceny pursuant to the breaking and entering, and misdemeanor possession of property stolen from Ms. Atkins. The trial court entered orders adjudicating the juvenile delinquent on all counts. The juvenile appealed. Among other arguments, the juvenile contended that the trial court erred in overruling his objections to the admission of evidence found in his pocket i.e. Ms. Atkins' Visa card, because the officer's search exceeded the scope of a *Terry* frisk and was therefore, unconstitutional.

Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity and to gain information confirming or dispelling the officer's suspicions that prompted the stop. However, there is no authority for an officer to physically search a person for evidence of his identity in connection with a *Terry* stop or frisk. A *Terry* frisk may be used only for the purpose of determining whether a suspect is armed. Contraband or evidence of a crime may be confiscated only if it is immediately apparent as such to the officer during the frisk. Since an identification card is not a weapon nor was it immediately apparent to the officer as being as evidence of a crime, the officer's seizure of the card from the juvenile's pocket exceeded the scope of a lawful *Terry* frisk. Consequently, the Court of Appeals reversed the delinquency adjudication based upon the misdemeanor possession of stolen property offense.