

IN THE COURT OF APPEALS OF MARYLAND

No. 142

September Term, 1995

STATE OF MARYLAND

v.

WILLIAM L. SMITH

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Murphy, Robert C.
(retired, specially
assigned)

JJ.

Dissenting Opinion by Raker, J.,
in which Rodowsky, J., and Karwacki,
J., join.

Filed: April 15, 1997

I would reverse the judgment of the Court of Special Appeals and affirm the judgment of the trial court. Officer White's actions were reasonably related in scope to the circumstances which justified the encounter with Petitioner in the first place, and, therefore, his pat-down of Smith was reasonable.

I agree with the conclusion of Judge Garrity in his dissenting opinion that "[i]f a suspect, while fleeing from a police officer responding to the report of a discharge of weapons in a high crime area, is seen to place an object that the officer believes to be a handgun into his waistband, the police officer ought to be allowed to conduct a thorough protective pat-down search of that particular area on stopping the suspect, even though a mere cursory pat-down failed to reveal the object that had been in fact tucked into a shirt-covered waistband in back of appellant's pants." *Smith v. State*, 106 Md. App. 665, 680-81, 666 A.2d 883, 890 (1995) (Garrity, J., dissenting).

The majority recognizes that the reasonableness of a *Terry* stop must be assessed on a case-by-case basis. Maj. op. at 8. The majority also recognizes that Officer White had a reasonable, articulable suspicion that Smith was armed and dangerous, and thus was entitled to engage in a minimally intrusive frisk for concealed weapons. *Id.* at 9. The majority reasons, however, that once the officer conducted a pat-down and detected nothing, "the risk of harm to the officer is no longer of sufficient magnitude to outweigh the individual's competing interest in personal security,

and the police officer may not further intrude upon the suspect." *Id.* at 9-10. The majority concludes that "upon feeling nothing in patting down Smith, Officer White no longer had the same suspicion that Smith was armed and dangerous, and thus had no legal basis for escalating his search." *Id.* at 12. The majority then holds that "when Officer White failed to detect a weapon-like object, his frisk of Smith should have ceased." *Id.* at 11. I disagree.

The authority of the police officer to protect himself from harm from an individual that he reasonably believes is armed is not so limited. Simply because the officer did not detect a weapon during a "cursory" pat-down does not inevitably lead to the conclusion that the officer "had no further reason to suspect that the appellant was armed." *Id.* at 12. A police officer's interest in self-protection arises when he reasonably believes that a suspect is armed and dangerous. At that point, as the Supreme Court noted in *Terry*, the officer has an interest in "taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Terry v. Ohio*, 392 U.S. 1, 23, 88 S. Ct. 1868, 1881, 20 L. Ed. 2d 889, 907 (1968). I find no support for the "one time and you're out" rule that the majority seems to fashion. An officer should be permitted to "double-check" to determine whether a suspect is armed and to minimize any risk to his or her safety.

Certainly, the right to frisk has limitations and not every

pat-down justifies an intrusion beneath the surface of the suspect's outer clothing. Indeed, the majority does not seem to quarrel with the right of the officer, under certain circumstances, to conduct a limited pat-down beyond the suspect's outer clothing. *Maj. op.* at 8-9. The majority's objection is addressed to the officer's conduct in "verifying the results of the pat-down by a more intrusive search." *Id.* at 11. Here, however, the more thorough pat-down was warranted. Officer White's experience, combined with the earlier report of the discharge of a weapon and his observations of Smith, led him to believe that Smith was armed and dangerous. Even though the officer did not feel anything hard during the initial, cursory pat-down, the follow-up action of the officer was reasonable. The facts of this case justify the subsequent limited intrusion. Officer White was investigating the report of drug dealers and the discharge of a firearm on a street corner. He saw Smith place something in the back of his waistband that he believed was a handgun. The initial cursory pat-down did not dissipate his reasonable fear that Smith was armed.

Officer White, testifying on behalf of the State at the hearing on the motion to suppress, described his encounter with Petitioner. The officer said:

I approached him from the front for my safety. I asked him to place his hands up where I could see them. At that time I detained him. . . . At that time I did a pat -- a stop and frisk pat down for my safety in the back of his waist area where I had seen him place an object. At

that time I pulled out his shirt to check under it at which time the object fell to the ground.

Following this testimony, the State qualified the officer as an expert in the "sub-area of narcotics trafficking, particularly in the use of the handgun in the narcotics trafficking as a street level dealer." The officer, as an expert as well as a fact witness, testified that he believed that Petitioner was "placing a weapon in the back of his waistband, the waist of his pants, or an object, some type of object he was placing in the back of his pants." Upon further inquiry from the court, the officer said that he believed that the object was possibly a weapon. He then said:

When I approached him, I asked him to -- if I could see his hands for officer's safety at which time I went up and conducted a pat-down for my safety. If the defendant did have a weapon, I wanted to know about it and recover it for my safety.

The judge then asked the officer:

[W]hat was the purpose of the technique where you sort of tugged at the shirt of the waistband which caused something to fall out? Is that a specific kind of technique that you learned in the academy or something?"

The officer responded:

No, your honor, when I went up and I went to perform my stop and frisk, the shirt was over the waistband. Basically, what I did is as I patted it, I pulled the shirt out just so I could see the waistband to make sure nothing was sticking out even though I had patted him, like to double check, and as I tucked the shirt back to see the waistband, that's when the object fell out.

On cross-examination, defense counsel asked the officer: "And you did a cursory pat-down of his belt area?" The officer responded in the affirmative and said:

When I patted him down, I didn't feel anything. That's when I got to the back, I just double checked and pulled his shirt back to make sure I didn't miss anything.

To be sure, "[g]eneral exploratory searches are not permitted, and police officers must distinguish between the need to protect themselves and the desire to uncover incriminating evidence." Maj. op. at 4. In this case, however, the officer could not have been more explicit that the subsequent pat-down was to protect himself and not to uncover incriminating evidence. Based on what he had observed earlier, he believed Petitioner had possibly placed a weapon in his waistband. For his own safety, he double-checked the waistband.

The trial judge, who saw and heard the witnesses, found that, after completing the "very cursory, short search," Officer White "tug[ged] at the shirt to see if tugging at the shirt would reveal the outline of a gun. . . ." This statement by the trial judge may be interpreted as a finding of fact that the officer pulled the shirt taut to see if the outline of a gun would be revealed. The tugging at the shirt, a limited, additional intrusion, is, in my view, reasonable under all of the circumstances.

The Supreme Court, in *Terry*, adopted a flexible model in assessing the reasonableness of an official intrusion upon an individual's protected interest. The Court recognized that there is no ready test to determine reasonableness other than balancing the need to search against the invasion which the search entails.

Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889, 905 (1968). Specifically, the Court stated:

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Id. at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 910-11 (citations omitted). In assessing the reasonableness of the governmental intrusion, the Court said: "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States v. Villamonte-Marquez*, 462 U.S. 579, 588, 103 S. Ct. 2573, 2579, 77 L. Ed. 2d 22, 30 (1983) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667-68 (1979)). The individual's interest to be free from arbitrary interference by officers must be balanced against the weighty interest in officer safety. See *Maryland v. Wilson*, No. 95-1268, 1997 U.S. LEXIS 1271 (1997).

The majority eschews the flexible approach set forth by the Supreme Court in favor of a bright-line rule, stating:

If a pat-down reveals no weapon-like objects, however, the risk of harm to the officer is no longer of sufficient magnitude to outweigh the individual's competing interest in personal security, and the police officer may not further intrude upon the suspect.

Maj. op. at 9-10. This approach reintroduces the rigidity condemned in *Terry*. The law does not require a police officer to risk bodily harm or death when the circumstances confronting that officer lead the officer to believe that his or her safety is in danger.

Judges Rodowsky and Karwacki join in the views expressed in this dissent.