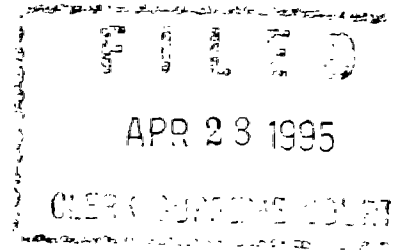


IN THE COURT OF APPEALS OF IOWA

No 5-088 / 94-289



STATE OF IOWA,

Appellee.

vs.

GARRICK JOHN FORKENBROCK,

Appellant.

Appeal from the Iowa District Court for Johnson County, John R. Sladek,
District Associate Judge.

Garrick John Forkenbrock appeals the judgment and sentence entered upon his
conviction of possession of marijuana. **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney
General, J. Patrick White, County Attorney, and Richard Westphal, Assistant County
Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

HAYDEN, J.

On August 17, 1993, around 8:30 p.m., Iowa City Police Officer McMartin stopped a car, in which Garrick Forkenbrock was a passenger, for running a red light. The driver of the car told McMartin he did not have his license with him. McMartin ran a check on the license by name and discovered it was suspended. While McMartin was in his patrol car awaiting the results of the check, he noticed Forkenbrock was looking back at him from time to time and doing something near the area of his lap. Forkenbrock exited the car and started to walk toward McMartin. McMartin instructed him to return to the car. Forkenbrock explained to McMartin he wanted to get to the pet store before it closed.

When police back-up arrived McMartin arrested the driver. McMartin asked Forkenbrock if he could check him for weapons and was told no. McMartin noticed a bulge under Forkenbrock's t-shirt and thought it was a fanny pack of some sort. Suspicious that Forkenbrock was carrying a weapon, McMartin decided to pat him down. McMartin lifted Forkenbrock's t-shirt and saw a rolled-up plastic bag stuck in the zipper of a fanny pack, and in the bag he saw a green plant material he believed was marijuana. McMartin placed Forkenbrock under arrest.

Forkenbrock was charged with possession of marijuana. He filed a motion to suppress the evidence obtained as a result of the search. He argued McMartin did not have reasonable suspicion to justify the pat-down search. He also argued the officer

exceeded the permissible scope of a pat-down search by lifting his t-shirt. After a hearing the court denied the motion.

Forkenbrock was found guilty as charged and was ordered to pay a fine of \$250, plus a thirty-percent surcharge, and court costs. Forkenbrock appeals. Forkenbrock argues there was no justification for a pat-down search and further, even if there was, the officer exceeded the permissible scope of a pat-down search.

I. Scope of Review.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. *Rinehart v. State*, 234 N.W.2d 649, 658 (Iowa 1975); *State v. Jeffries*, 417 N.W.2d 237, 239 (Iowa App. 1987).

II. Justification for Pat-Down Search.

Defendant does not dispute the validity of the initial stop of the car in which he was a passenger. Officer McMartin initiated the stop after observing the car run a red light at a high rate of speed. He contends Officer McMartin was unreasonable in conducting a pat-down of his person during the course of his stop. We disagree.

It is true a pat-down for weapons during an investigatory stop, known as a "stop and frisk," constitutes a search and seizure implicating the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889, 903 (1968). The officer may conduct a weapons frisk on the reasonable belief the defendant may be

armed and poses a threat to the officer's safety. *Id.* at 28. 88 S. Ct. at 1883, 20 L. Ed. 2d at 910. The officer need not have probable cause to arrest the individual, nor be absolutely certain the individual is armed. *Id.* "The issue is whether 'a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" *State v. Riley*, 501 N.W.2d 487, 489 (Iowa 1993) (quoting *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909)).

In this case, the officer observed defendant making furtive movements in the area of his waist or seat. The officer also observed at the defendant's waist what he believed to be "a fanny pack of some sort, possibly the type that many off-duty officers have to carry their weapons in that are specially designed to do that." At this point defendant exited the car and began walking towards the police officer. Under these circumstances, we hold it was not unreasonable for the officer to conduct a pat-down search to protect the safety of himself and others at the scene.

III. Scope of Pat-Down Search.

Under *Terry*, an officer who reasonably fears for his own or other's safety may conduct a "carefully limited search of the outer clothing . . . in an attempt to discover weapons." 392 U.S. at 30-31, 88 S. Ct. at 1884-85, 20 L. Ed. 2d at 911. Defendant argues the search here exceeded the scope of a lawful *Terry* pat-down search.

The officer observed a large bulge at defendant's waist which he believed was capable of carrying a weapon. The tail of defendant's t-shirt was hanging over the pack. The officer moved the t-shirt to fully expose the pack.

Immediately upon lifting his t-shirt I could see that there was a rolled-up plastic bag stuck in his zipper of the fanny pack with approximately an inch sticking out, and I could see that it contained what I believed to be marijuana. It was green plant material. It was very visible.

The officer's manipulation of defendant's t-shirt to permit him to inspect the pack did not violate the Fourth Amendment under *Terry*. *Terry* permits officers to search defendant's outer clothing. The officer did not exceed this limitation by moving the tail of the t-shirt to look at a fanny pack worn outside defendant's pants at his waistline. Examining defendant's outer clothing and effects visually before touching him constitutes a lesser invasion of defendant's privacy, not a greater one. Further, containers whose contents are open to "plain view" may be seized under the Fourth Amendment without a warrant. *See State v. Schrier*, 283 N.W.2d 338, 346 (Iowa 1979) (officer was reasonable in looking into knapsack found on floor of defendant's car when marijuana was plainly visible in outside pocket of knapsack). We hold the officer did not exceed the scope of a permissible pat-down under *Terry*.

We affirm the trial court on all issues presented. Conviction affirmed.

AFFIRMED.