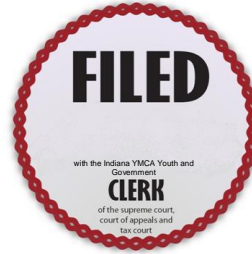


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**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH AND
GOVERNMENT**

LEON HART)	
)	
Defendant-Appellant,)	
)	
vs.)	No. 94A04-1209-CR-1359
)	
STATE OF INDIANA)	
)	
Plaintiff-Appellee)	

Appeal from the Fligg Superior Court, No. 94D03-1008-FB-1201
The Honorable Terry Hanratty, Judge

August 30, 2010

Fogarty, Judge.

This case requires us to determine the constitutionality of a novel police procedure which, as far as we can tell, has never been reviewed on appeal by this court or any other. An officer

investigating a suspected drug deal directed appellant Leon Hart from a car, ordered him to raise his hands high overhead, and then discovered a handgun in his pocket when she hoisted up his sagging pants that had dropped to hang around his knees. Hart appeals from his conviction of possession of a firearm by a serious violent felon. We must decide whether the unique wardrobe assist was a search subject to constitutional regulation and, if not, whether it was the kind of seizure-related contact otherwise prohibited by the Fourth Amendment. Because we hold that the officer's tactic was neither a search nor an unreasonable touching during a lawful investigative detention, we affirm.

Facts and Procedural History

Whittacker police officer Donna Anderson and her partner, John Cavanaugh, were on patrol on a November 2008 afternoon in a high-drug-activity area when they noticed a car parked with its engine idling in a Corby's Restaurant parking lot. Officer Donna had seen many drug deals, and several things in addition to the location aroused her suspicion that she was witnessing another one. The driver, Moose Krause and a man later identified as appellant Leon Hart sat in the front seat, and a third man, Dan Dorman, approached and entered the back seat without any food from Corby's Restaurant. No one in the car appeared to be eating. Dorman began to look down at his lap. As the officers walked to the car they saw the rear occupant drop a plastic bag to the floor. They asked the man what the bag contained, and he replied, "Some weed." Hart seemed nervous to Officer Anderson while her partner was questioning the rear occupant.

The officers ordered the men out of the car. Officer Anderson directed Hart to raise his hands above his head. Hart wore loose-fitting jeans, which, when he stood, were hanging down around his knees. Officer Anderson decided to pat-frisk Hart for weapons. But first, she pulled his pants up. As she lifted Hart's pants, she felt a hard object in his front pocket. She asked Hart what it was, and he responded that he did not know. The officer surmised that it was a handgun and removed a .380 caliber pistol from Hart's pocket.

Because Hart had prior violent-crime convictions, the state charged him with possession of a firearm by a serious violent felon. Hart moved the trial court to suppress the gun evidence, arguing that the seizure of the car and its occupants was unsupported by reasonable suspicion and that the officer conducted an unconstitutional frisk when she hoisted his pants. The trial court denied Hart's motion to suppress, reasoning that the officers lawfully approached the car and ordered the occupants out based on their seeing the marijuana, that Officer Anderson reasonably chose not to direct Hart to reach for his own pants out of concerns for her own safety, and that Officer Donna did not search Hart but instead found the gun by accident as she was "help[ing] him get his pants into a decent position."

Hart waived his right to a jury trial and submitted the case to the trial court on stipulated facts, preserving for appeal his challenge to the stop and alleged search. The trial court found Hart guilty of possession of a firearm by a serious violent felon. Hart appeals, challenging the trial court's admission of the gun evidence as a result of an unconstitutional seizure and search.

Standard of Review

Hart first challenged the admission of evidence through a motion to suppress but now appeals following a completed trial. Thus, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We will not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. *Cole v. State*, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007).

Hart argues that the district court failed to vindicate his state and federal constitutional rights by denying his motion to suppress the gun evidence that resulted from the officer's alleged

search. The United States and Indiana constitutions guarantee the right of persons not to be subjected to “unreasonable searches and seizures.” U.S. Const. amend. IV; Ind. Const. art. 1, § 11. Evidence seized in violation of this guarantee generally must be suppressed. *Duran v. State*, 930 N.E.2d 10 (Ind. 2010). Hart correctly argues that in limited circumstances the Supreme Court has interpreted the state constitution to provide greater protection than the Fourth Amendment provides. *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2006); *Litchfield v. State*, 824 N.E.2d at 358–59; *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001); see Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 Ind. L.Rev. 575, 577 (1989). But Hart does not contend that this is such a circumstance, and we will analyze his constitutional claims under a single standard.

Hart retreats somewhat from his argument to the trial court, conceding now that the police lawfully approached the parked car and looked inside and that, on observing the bag of marijuana in plain view in the rear passenger compartment, they could also order the three occupants out to search the car. Hart challenges only the police conduct that occurred after he left the car. He argues that police unlawfully seized and pat-searched him without having a reasonable, articulable suspicion that he was involved in criminal activity and that he was armed and dangerous. His arguments do not persuade us.

I. The Seizure

Hart was seized when the officer ordered him from the car and instructed him to raise his hands. A person has been “seized” when, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). A reasonable person would not have believed that he was free to leave after a police officer discovered illegal drugs in his car and ordered him to get out and to raise his hands. So Hart was seized and we must decide whether the seizure was lawful.

To lawfully seize a person temporarily to investigate a crime, a police officer must have a reasonable, articulable suspicion that the person was or will be engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). This is not a high standard, and we apply it in view of the totality of the circumstances from an objectively reasonable officer’s perspective. *Shotts v. State*, 925 N.E.2d 719 (Ind. 2010). In doing so, we recognize that trained law enforcement officers may interpret circumstances using inferences and deductions beyond the competence of untrained persons.

One factor courts have considered is whether a reasonable person in the defendant’s position would feel free to leave, *Campos v. State*, 885 N.E.2d 590, 601 (Ind. 2008), but the law is clear that in the context of an investigatory stop a person is, at least temporarily, not free to leave. Established law allows an officer making a traffic stop to detain a person upon reasonable suspicion of criminal activity and to ask questions to determine identity and verify or disprove the officer’s suspicions. *State v. Washington*, 898 N.E.2d 1200, 1204 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439-40, (1984)). A person stopped by police, while “seized” and momentarily not free to go, is ordinarily not considered in custody. *Clarke v. State*, 868 N.E.2d 1114, 1118–19 (Ind. 2007).

Hart argues that the bag of marijuana found in the passenger compartment cannot justify his detention because spotting the drugs would not reasonably lead an officer to suspect that Hart was involved with them. Hart casts the episode with himself as the uninvolved occupant of a car in which someone else’s contraband just happened to be discovered in the back seat. But his characterization misses the bigger scene: police came upon a stopped and idling car in a fast-food restaurant’s parking lot in an area known to them as a place of drug dealing; they observed that the car was occupied by three men having no apparent business with the restaurant, including a man who wandered up to the car and into the back seat; and they watched Hart sitting nervously when the back-seat occupant told the officers that the bag he had tried to hide on the floor contained “some weed.” These circumstances would lead a reasonable officer to suspect that Hart was engaging in a drug deal. The seizure and brief investigative detention that arose

from that suspicion therefore did not violate the Fourth Amendment or Indiana Constitution Article 1, Section 11.

II. The Search

During an investigative detention, an officer may conduct a pat-search if she has a reasonable, articulable suspicion that the suspect might be armed and dangerous. *Terry*, 392 U.S. at 30; *Lawrence v. State*, 375 N.E.2d 208 (Ind. 1978). This pat-search is “a carefully limited search of the outer clothing . . . to discover weapons which might be used” against the officer. *Terry*, 392 U.S. at 30. Hart argues that the officers did not reasonably suspect that he was armed and dangerous and that the pat-search revealing the handgun was therefore illegal.

The trial court found that the contact that revealed the gun was not a search at all. It described the officer’s conduct as “an accidental finding of a gun as she’s trying to help him get his pants into a decent position.” The description fits.

As a result of the lawful seizure and the officer’s specific directions, which effectively prevented Hart from holding his own pants up or raising them, Hart was standing in a public parking lot on a busy Whittacker street with his hands high in the air and his pants drooping at his knees. Even assuming that Hart intended his pants to sag somewhat, the district court aptly construed the knee-level positioning as “extreme.” The record indicates that the officer had decided to conduct a pat-search, but that before beginning she wanted to hoist Hart’s pants. She did not testify about her motive. Perhaps she decided to raise Hart’s pants to afford him a bit of dignity regardless of her planned search. Or perhaps she wanted to avoid the risk of contacting his private parts through his underwear during her pat-search. Either way, we agree with the district court that the officer’s incidental contact with the gun while lifting Hart’s pants on decency grounds was not a search.

A “search” is an intrusion into an area in which a person has a reasonable expectation of privacy. *Terry*, 392 U.S. at 9, 17 n. 15. An intrusion that constitutes a search also tends to reveal the contents of the area. *See State v. Hardy*, 577 N.E.2d 212 (Ind. App. Ct. 1998) (concluding that search occurred when police ordered suspect to open his mouth so they could look for contraband).

Officer Anderson’s adjusting Hart’s pants was not a search. She hoisted his pants presumably to conceal rather than to reveal. Her contact with his pants may have been a precursor to her pat-search, but it was not itself the search. We need not decide whether Officer Anderson would have inevitably discovered the handgun during the eventual pat-frisk or whether the eventual pat-frisk was justified. She had already discovered the gun before she began the pat-frisk, and we hold that her contact with Hart’s clothing during the constitutionally justified investigative stop under these circumstances was not a search requiring additional justification.

We emphasize that the officer’s conduct was objectively reasonable despite its arguably invasive nature. We acknowledge that one might be offended by an officer’s realigning of his pants: it is the sort of thing that one usually prefers to do for himself. But Officer Anderson’s action arose from her legitimate concerns about her own safety and about potential unnecessary embarrassment to Hart. By prohibiting Hart from raising his own pants, she prevented him from accessing the handgun that she reasonably and correctly suspected he possessed. Moreover, by refusing to leave the pants hanging at his knees, she avoided potential claims that she unreasonably humiliated Hart by public exposure or by incidentally groping his inadequately covered crotch during the planned pat-frisk. *See United States v. Ford*, 232 F.Supp.2d 625, 630 (E.D. Va. 2002) (concluding that officer “engaged in a highly invasive search by exposing the defendant’s buttocks on the side of a public highway in broad daylight” and that the search was unreasonable under the Fourth Amendment); *Garcia v. N.Y. State Police Investigator Aguiar*, 138 F.Supp.2d 298, 303–04 (N.D. N.Y. 2001) (analyzing claim of officer’s inappropriate touching of woman’s crotch and breasts during pat-search for reasonableness under the Fourth Amendment). And even if Hart would take no personal offense at being pat-frisked in only his

underwear, we do not interpret the Fourth Amendment as requiring the officer to subject herself unnecessarily to that indignity.

Hart argues that affirming the trial court would encourage officers to trample the privacy of young people who participate in the baggy-pants-fashion trend. The concern is unwarranted. Our holding arises from the unique facts here. Because judicial holdings are limited by their facts, we are confident that our opinion will not be misconstrued to suggest that an officer can freely meddle with a person's clothes to the refrain, "Pants on the ground, pants on the ground" under the guise of providing public assistance.

Hart has not made and the facts would not support the claim that the officer's raising of his pants was a pretext to explore for contraband in his pockets; the officer had no motive to look for justification to search because she had already concluded that a pat-search was justified and she intended to conduct one immediately after Hart's pants were suitably rearranged. Hart also did not raise any credibility challenge in the trial court to the officer's underlying testimony that her quick encounter with the outside of his pants led her immediately to perceive the detail that Hart had "a semiautomatic handgun" in his pocket. *See Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993) (stating that the warrantless seizure of contraband is justified when an "officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent"). Our holding rests on the uncontested fact that the officer became immediately aware that Hart possessed a handgun after she inadvertently felt the gun through his pants while realigning them to allay her legitimate safety and decency concerns.

Hart raises other arguments that mistakenly assume that the officer's touching of his pants constituted a search. We do not address these arguments.

Conclusion

Police lawfully detained Hart after reasonably suspecting that he and others were exchanging illegal drugs. The officer reasonably ordered Hart to raise his hands and reasonably decided to adjust his excessively sagging pants. The adjustment did not constitute a search and was not conducted in a manner that raises any constitutional concerns. Therefore, we affirm Hart's conviction.

CASSIDY, J, concurs. MATEUS, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH
AND GOVERNMENT**

LEON HART)	
)	
Defendant-Appellant,)	
)	
vs.)	No. 96A01-0812-CV-0020
)	
STATE OF INDIANA)	
)	
Plaintiff-Appellee)	

MATEUS, Judge, dissenting

I respectfully dissent from the majority’s conclusion that “hoisting” Hart’s pants was not a search. A warrantless protective search is permissible under the Fourth Amendment, however, adjustments to one’s clothing exceeds the scope of the exception. Thus, the evidence discovered pursuant to the search was improperly admitted.

I. Unconstitutional Seizure and Search

The distinction between a consensual police-citizen encounter requiring no justification and an encounter requiring reasonable and articulable suspicion that the individual is involved in criminal activity is based on whether a seizure has taken place. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). The general Fourth Amendment rule is that a seizure “requires either physical force . . . or, where that is absent, submission to the assertion of authority.” *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Under the Indiana Constitution, a seizure occurs when “a reasonable

person in the defendant's shoes would have concluded that he or she was not free to leave.”
Duran v. State, 930 N.E.2d 10 (Ind. 2010)

The officer testified that after removing the occupants from the vehicle she intended to conduct a pat-search to determine if the occupants had weapons because “a lot of times weapons are involved in narcotics activity.” To that end, after the officer got Hart out of the car, she “had his hands up behind his head and asked him to put his legs together so [she] could pull his pants up.”² This conduct transformed what had been a consensual encounter into a seizure requiring constitutional justification. The officer asserted her authority over Hart and he submitted to that authority: she gave him two directions beyond getting out of the car—hands up behind his head and move his legs together—and he complied with those directions. *See, e.g., United States v. Brown*, 401 F3d 588, 595 (4th Cir. 2005) (“Brown was seized, and his Fourth Amendment rights triggered, at least as early as when he submitted to Officer Lewis’ order by leaning toward and placing his hands on the adjacent car.”). Moreover, no reasonable person in Hart’s position would have concluded that he was free to leave. Hart was seized before the officer put her hands on his pants.

The police, however, did not have reasonable and articulable suspicion that Hart was involved in criminal activity. The officer did not testify to any observations of Hart suggesting he was involved in criminal activity. In the short period of time she observed the occupants of the car—about a minute— she did not notice any furtive movements or anything about his behavior.

The officer’s observation of the rear seat passenger’s possession of a small amount of marijuana, as the trial court noted, “a bag of pot, however small the amount of pot may have been,” did not provide police with a reasonable articulable suspicion that Hart was involved in

² The officer said that when Hart got out of the car, “his pants were—his jeans were down around his knees.” (R at 15.)

criminal activity. The trial court did not make any findings that Hart was involved with the rear passenger's possession of the marijuana.

Mere presence in a vehicle does not provide an inference of association with the contraband by other occupants. *See State v. Slifka*, 256 N.E.2d 90, 91 (Ind. 1977) (passenger's mere presence in motor vehicle did not provide probable cause to believe he constructively possessed marijuana in closed glove compartment); *State v. Eggersgluess*, 483 N.W.2d 94, 97 (Minn. App. 1992) (other vehicle occupants' possession of open bottles did not provide reasonable suspicion that everyone in car was involved in criminal activity); *see also Ybarra v. Illinois*, 444 U.S. 85, 90–92 (1979) (search warrant for bar tender and bar did not permit search of patrons).

Mere presence in a vehicle also does not permit an inference that all occupants are engaged in a joint enterprise. *See Maryland v. Pringle*, 540 U.S. 366, 372 (2003) (evidence indicated occupants were engaged in common enterprise to conceal wrongdoing and there was no information about which of three occupants owned contraband). When evidence links contraband with a particular individual, the inference that another particular person may be the possessor of the contraband may be negated. *See United States v. Di Re*, 332 U.S. 581, 584 (1948) (informant singled out guilty party from many at scene of crime). Here, officers observed only the rear seat passenger possess or do anything with the small amount of marijuana.

There must be an additional basis, independent of an officer's command for a driver to exit a vehicle, before a more serious intrusion is permitted. *See Pennsylvania v. Mimms*, 434 U.S. at 111–12 (holding that the *Terry* test controls when determining the validity of a pat-down search after a driver has been ordered out of a vehicle). In this case, the trial court noted only that Hart's sagging pants as the additional basis for the officer's conduct: the officer would not want Hart "holding onto his pants because it gives him the opportunity to reach for something that could be there" and that the officer "lifted up those pants to presumably get them up to his waist area . . . trying to help him get his pants into a decent position."

Sagging pants, as the trial court had noted, represent a current fashion popular with many young people. As such, they do not represent reasonable and articulable suspicion that the wearer is involved in criminal activity. *See, e.g., State v. Eli L.*, 947 P.2d 162, 166 (N. M. App. 1997) (facts, including sagging pants, did not constitute a reasonable inference that child was involved in criminal activity); *State v. Jones*, 835 P.2d 863, 867 (N. M. App. 1992) (defendant’s style of dress—sweat pants partially sagging down his buttocks—“was not furtive” conduct permitting detention). Even the court failed to articulate that whatever item might have been in the pants—and that Hart might have reached it—constituted a reasonable suspicion of criminal activity. Moreover, on the record it appeared that Hart’ pants stayed above his knees without him holding on to them.

Even if the circumstances, with or without the sagging pants, constituted reasonable and articulable suspicion that Hart was involved in criminal activity, they did not constitute reasonable and articulable suspicion that he was armed and dangerous. Possession of a small amount of marijuana is not the type of offense that warrants an inference that weapons may be involved. *See State v. Eggersglues*, 483 N.W.2d 79 (Minn App. 2002) (possession of open container not the type of infraction where individual would likely be armed and dangerous). The suggestion that any drug “activity” warrants a presumption that weapon may be involved and a pat-search is always appropriate, as expressed by the officer in this case, is wrong. *See Eggersgluess*, 483 N.W.2d at 97 (assumption that weapons might always be present does not amount to cause to pat-search for weapons).

The United States Supreme Court has rejected such blanket exceptions to the constitutional requirement of individualized suspicion. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (rejecting blanket exception to knock and announce requirement for drug cases based on generalizations involving drugs and guns). Similarly, the sagging pants did not constitute reasonable and articulable suspicion that Hart was armed and dangerous. *See e.g., State v. Eli L.*, 947 P.2d 162, 166 (N. M. App. 1997) (facts, including sagging pants, did not constitute a reasonable inference that child was armed and dangerous).

The trial court’s comment that the officer “lifted up those pants to presumably get them up to his waist area . . . trying to help him get his pants into a decent position,” also failed to provide a constitutional justification for the officer’s intrusion. The suggestion that the officer was helping Hart get decent sounds at first blush like the officer was performing a community caretaking function. However, the officer’s action here is not even remotely connected with any permissible caretaking role for police. *See Holly v. State*, 918 N.E.2d 323 (Ind. 2009) (warrant requirement exception where pursuing a community-caretaking function to render emergency assistance). There was no evidence of any emergency requiring police action. Moreover, there was not even any evidence that Hart’s sagging pants—however low they were—created any indecency whatsoever, much less one requiring police intervention. There was no indication of any nudity or indecency caused by Hart’s choice to let his jeans sag or that he wanted any assistance from police.³

For these reasons, the district court erred by denying the motion to suppress. Under the exclusionary rule, evidence recovered during an unlawful search is inadmissible at trial. *Trotter v. State*, 933 N.E.2d 572 (Ind. Ct. App. 2010). The gun seized from Hart must be suppressed. Without that evidence, there is no basis for the charge of possession of a firearm by a serious violent felon. Therefore, Hart’s conviction should be reversed.

³ The trial court’s position, that police could help return an individual with sagging pants to decency, would permit officers to approach many, many young people because of their fashion choice not because of any public safety or decency issues. The Constitution forbids that broad an interpretation of the exceptions permitting police to intrude upon an individual’s privacy. The approach urged by the government would allow a stop and frisk whenever an officer in a high-crime area encounters an individual with a criminal history who wears baggy clothing, including pants so saggy and loose they have to be held up, appears nervous in reaction to seeing the police, but does not try to evade or flee. Finding reasonable suspicion here does not merely recognize that some innocent people may be permissibly stopped, but would cast a much wider net.

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