STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTESE D. SMITH,

Defendant-Appellant.

UNPUBLISHED
January 17, 1997

No. 186234
LC No. 94-006812

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction for possession of 50 grams or more but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). Defendant was sentenced to ten to twenty years' imprisonment. We affirm.

Defendant's first claim on appeal is that the narcotics evidence obtained as a result of the investigative stop conducted by Officers Petty and Young should have been suppressed at trial. We disagree. It should be noted that defendant failed to raise the admissibility of the cocaine at trial. Ordinarily, a party must object to the admission of evidence at trial, and may not raise the issue for the first time on appeal absent extraordinary circumstances. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However, because defendant's claim alleges plain constitutional error which could have been decisive of the outcome, we will consider his claim for the first time on appeal. *Grant*, *supra* at 547. Additionally, because the trial court never specifically addressed the issue of whether the investigative stop and frisk in this case violated the Fourth Amendment, this Court's review is essentially de novo. Upon review of the record, we find that the investigative stop and frisk was reasonable, and that the trial court property admitted the resulting cocaine evidence.

Under the Fourth Amendment, as well as the analogous provision in the Michigan Constitution, the police may make a brief investigative stop where they have a reasonable, particularized suspicion, based on objective facts, that an individual has been, is, or is about to engage in criminal activity. *Brown v Texas*, 443 US 47, 51; 99 S Ct 2637; 61 L Ed 2d 357 (1979); *People v Armendarez*, 188 Mich App 61, 66-67; 468 NW2d 893 (1991). The police may then conduct a limited patdown of the

individual's outer garments for weapons if there are reasonable grounds to believe that the individual is armed and dangerous. *Terry v Ohio*, 392 US 1, 27, 30; 88 S Ct 1868; 20 L Ed 2d 889 (1968). The question is whether a reasonably prudent person, in light of the totality of the circumstances, would fear for his own safety or the safety of others. *Id.*; *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

Accordingly, there are three main considerations involved in assessing the validity of an investigative stop and frisk. The first question is whether the initial stop was reasonable under the circumstances. In the present case, Officers Petty and Young had reason to believe that a robbery had just been committed. They stopped defendant's van because it matched the description given them by the robbery victim of the getaway car. According to the robbery victim's description, the officers were looking for a newer model, green Aerostar van, as well as two black males, seventeen to twenty-one years old, one being six feet in height, the other between five-foot six and five-foot eight. Shortly thereafter, the officers observed a 1994 green Aerostar van, occupied by two black men, in the area. We believe that these facts gave the officers reasonable suspicion that criminal activity had taken place and that the van and its occupants were involved, and that they were therefore justified in making the initial stop.

Next, this Court must assess whether the decision to conduct a patdown search was justified under the circumstances. As we have previously stated, a police officer who has made a valid investigative stop may perform a limited patdown search for weapons if there are reasonable grounds to believe that the individuals are armed and dangerous. *Terry*, *supra* at 27, 30. In the case of a vehicle stop, the officer may, again based on reasonable grounds to believe that the occupants are armed, order the individuals out of the car and frisk them for weapons. *Michigan v Long*, 463 US 1032, 1047; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). In the present case, according to information from the victim, the officers had reason to believe that the robbers were armed at least with a sawed-off shotgun. This suspicion was further confirmed when Officer Young saw the passenger of the van attempt to kick a gun under the seat. Although the officers did have their guns drawn on defendant at the time, we believe that this fact did not alleviate the need for the officers to determine whether he was armed. Accordingly, we find that these circumstances gave the officers reasonable grounds to believe that defendant was armed, and that the officers were justified, for their own protection, in frisking him for weapons.

Finally, this Court must determine whether the scope of the search exceeded what is reasonable for a valid *Terry* patdown. A patdown search under *Terry* must be confined to a limited search of the outer clothing for weapons. *Terry*, *supra* at 30. Here, defendant claims that the patdown search performed by Officer Petty also requires analysis under the so-called "plain feel" doctrine. According to the "plain feel" doctrine, the officer may seize nonthreatening contraband that is discovered during the protective patdown, but only if its incriminating nature is immediately apparent. *Minnesota v Dickerson*, 508 US 366; 113 S Ct 2130; 124 L Ed 334 (1993); *People v Champion*, 452 Mich 92, 104-106; 549 NW2d 849 (1996). The incriminating nature of an object is considered immediately apparent "if the officer develops probable cause to believe that the item felt is contraband before going beyond the legitimate scope of the patdown search." *Champion*, *supra* at 105-106.

Defendant's claim is that because Officer Petty could not have reasonably mistaken the cocaine for a weapon, and because she testified that she did not know what the object was, she exceeded the scope of a *Terry* patdown by reaching into defendant's pocket to verify its identity. Upon review of the evidence relating to the patdown search in this case, we conclude that such an extensive analysis is unnecessary.

Two recent Michigan cases have addressed the applicability of the "plain feel" doctrine. In *People v Massey (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 197677, issued 11/12/96), the officer conducted a patdown on the defendant and felt a bulge in his jacket pocket. The officer immediately realized it was not a weapon, and thought it may have been contraband. *Id.* The officer retrieved the object, which turned out to be a brown paper bag that contained a clear plastic bag containing cocaine. *Id.* At the suppression hearing, the officer testified that he had to take the bag out of the defendant's pocket to know what it contained. *Id.* Relying on the "plain feel" doctrine, the trial court refused to suppress the evidence. *Id.* In reversing the defendant's conviction, this Court found that the officer's testimony failed to demonstrate that the character of the bulge as contraband was immediately apparent, and that his continued search was therefore unjustified. *Id.*

In *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996), the officer conducting the patdown search felt what he immediately identified as a pill bottle tucked inside the defendant's sweatpants near the groin region. *Id.* at 95. Believing that the bottle contained contraband, the officer opened it, discovering cocaine. *Id.* The officer testified that he knew that contraband was commonly carried in such pill bottles. *Id.* In upholding the trial court's refusal to suppress the evidence, the Court found that under the totality of the circumstances, the officer had probable cause to believe that the pill bottle contained contraband. *Id.* at 110-115.

The patdown searches in *Massey* and *Champion* are distinguishable from the case at bar, however, in that the officers in those cases knew that the objects they felt were not weapons. Here, Officer Petty testified that she did not know whether the object in defendant's pocket was a weapon. Therefore, we find that an analysis of the "plain feel" doctrine, and its corresponding inquiry into whether an object was immediately apparent as contraband, is unwarranted.

In the present case, Officer Petty testified that she did not know whether the object in defendant's pocket was a "weapon or anything else." Moreover, defendant and his companion were suspected of having committed an armed robbery, and Officer Young had already seen one gun. Therefore, we believe that it was reasonable under the circumstances for Officer Petty to retrieve and identify the object for the safety of herself and the other officers.

Defendant's next claim on appeal is that he was denied effective assistance of counsel at trial. Specifically, defendant asserts that defense counsel failed to object to the admissibility of the cocaine evidence at trial and failed to conduct proper discovery, and that these failures resulted in prejudice to defendant. Based on a review of the record in this case, we disagree.

In order to establish a claim of ineffective assistance of counsel under the Sixth Amendment, as well as the analogous provision in the Michigan Constitution, a defendant must show that "counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial." *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994). The errors complained of must be so serious that defense counsel "was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. Moreover, counsel's performance must be viewed in light of all of the facts and circumstances, and there is a strong presumption that counsel rendered adequate assistance and exercised reasonable judgment. *Id.* Finally, a defendant must show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *Id.* at 694.

Defendant first argues that he was denied effective assistance of counsel because defense counsel failed to object to the admission of the cocaine evidence either in a pretrial evidentiary hearing or at trial. We find that this claim is not supported by the record.

This Court has held that "defense counsel is not required to make useless motions." *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985); *People v Lavearn*, 201 Mich App 679, 685; 506 NW2d 909 (1993), rev'd on other grounds 448 Mich 207; 528 NW2d 721 (1995). For the reasons we outlined in our earlier discussion of the *Terry* stop in this case, we conclude that a motion by defense counsel to suppress the cocaine would have been unsuccessful. Therefore, there is nothing on the record to indicate that defense counsel's failure to raise the motion fell below the objective standard of reasonableness required by the case law.

Defendant next argues that he was denied effective assistance of counsel because defense counsel failed to obtain the preliminary complaint reports of Officers Susan Namenye and Darrell Jones, who eventually testified at trial, and that this failure rendered defense counsel unprepared to examine them. We disagree.

This Court has held that in order to make a claim of defense counsel's unpreparedness, a defendant must show that his defense was prejudiced as a result. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). "Even the failure to interview witnesses does not itself establish inadequate preparation." *Id.* at 642. It must be shown that the failure to investigate resulted in defense counsel's failure to uncover "valuable evidence which would have substantially benefited the accused." *Id.*

Based on a review of the record, we conclude that defendant has failed to demonstrate that defense counsel's failure to obtain preliminary complaint reports of Officers Namenye and Jones resulted in ignorance of valuable evidence that would have substantially benefited defendant. In fact, the parties initially waived the officers' testimony, and they were almost not called at all because of the trial court's concern that their testimony would be merely cumulative. Therefore, nothing in the record

indicates that defense counsel's failure to request the officers' preliminary complaint reports fell below the appropriate objective standard of reasonableness.

Defendant's final claim on appeal is that the trial court erred in giving the requested jury instruction on the lesser included offense of possession. Specifically, defendant claims that he was denied due process and a fair trial because: (1) the instruction confused the jury and improperly influenced their decision; and (2) because defendant might have been acquitted of any wrongdoing if the only instruction given was on the original charge of possession with intent to deliver. We find that this argument is without merit.

In assessing defendant's claim, it is necessary to distinguish between cognate lesser included offenses and necessarily lesser included offenses. A cognate lesser included offense is one that is in the same class or closely related to the original charge. *People v Ora Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975). On the other hand, a necessarily lesser included offense is one that must be committed in order to commit the greater offense. *People v Lucas*, 188 Mich App 554, 581 n 26; 470 NW2d 460 (1991). This Court has held that possession of more than 650 grams of cocaine is a necessarily lesser included offense of possession with intent to deliver that amount. *People v Torres*, 209 Mich App 651, 659; 531 NW2d 822 (1995), rev'd in part and aff'd in part on other grounds 452 Mich 43; 549 NW2d 540 (1996). By analogy, possession of 50 grams or more but less than 225 grams must likewise be a necessarily lesser included offense of possession with intent to deliver that amount. Although this Court in *Lucas* noted that possession can be considered merely a cognate lesser included offense of possession with intent to deliver, in that case the possession charge involved a different amount than the possession with intent to deliver charge. *Lucas*, *supra* at 581-582.

Additionally, this Court has held that the trial court must instruct the jury on necessarily included offenses upon request. *Lucas*, *supra* at 581 n 26. Although the trial court may instruct the jury on a lesser included offense only where the defendant has been afforded adequate notice of that offense, there are no problems with such notice when the added charge is a necessarily included lesser offense. *People v Chamblis*, 395 Mich 408, 417-418; 236 NW2d 473 (1975), overruled on other grounds *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982); *People v Usher*, 196 Mich App 228, 232; 492 NW2d 786 (1992).

In the present case, defendant was originally charged with possession with intent to deliver 50 grams or more but less than 225 grams of cocaine. Upon request by the prosecutor, the trial court also instructed the jury on simple possession of that amount. Because the added charge was a necessarily included offense, and therefore defendant was on notice that he might have to defend against it, we conclude that the trial court did not err in instructing the jury accordingly.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey