DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, Judge

CACR06-493

November 29, 2006

CALVIN FRED MEEKS III

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT
[NO. CR 2004-43]

HON. DAVID G. HENRY, CIRCUIT JUDGE

AFFIRMED

In accordance with Rule 24.3 of the Arkansas Rules of Criminal Procedure, Calvin Fred Meeks III entered a conditional plea of guilty in the Arkansas County Circuit Court to the charge of possession of methamphetamine, reserving his right to appeal the denial of his motion to suppress. He received a sixty-month sentence in the Arkansas Department of Correction on the substantive charge, and his probation was also revoked. On appeal he argues that the trial court erred in denying his motion to suppress evidence because the police officers did not have reasonable suspicion to seize and search his person. We affirm.

At Meeks's suppression hearing, State Police officer David Chastain testified that on March 8, 2004, at 7:59 p.m., he made contact with Meeks. At the time, Chastain was patrolling a "rural" stretch of Highway 33, accompanied by Arkansas County sheriff's

deputy Bobby Webb. According to Chastain, the evening was dark and they observed a vehicle pulling a trailer that did not have any lights. Chastain activated his blue lights to stop the vehicle, and the driver, Mark Burris, pulled into his driveway. Chastain admitted that his stop of Burris's vehicle was "just probable cause," and he "thought there was a good chance Mr. Burris might have drugs in his car."

Chastain stated that he accompanied Webb to the driver's side of the vehicle, and he looked inside and noticed Meeks. He testified that he knew Meeks from having "encountered" him before for drug offenses, including the theft of anhydrous ammonia, an ingredient in methamphetamine manufacturing. However, he admitted that at that time, he had "no idea" that Meeks had committed any offense that night. While Webb was speaking to Burris, Chastain asked Meeks, who had been a passenger, but voluntarily exited the vehicle, to step to the rear of the vehicle. According to Chastain, he did not notice any suspicious bulges in Meeks's long-sleeve-work shirt or jeans and the only thing that "raised" his suspicion about Meeks was that he was acting "real nervous and wouldn't look at me or anything." Nonetheless, Chastain stated that he "asked Mr. Meeks if I could pat him down for my safety."

Chastain claimed that when he made his request, he observed Meeks "throw an object onto the hood of my truck." He recognized the object, a hollow ink pen shaft, as a "tooter," a device that abusers of methamphetamine use to ingest smoke from the burning drug. At

that point he attempted to handcuff Meeks, eventually requiring the assistance of Deputy Webb to subdue him.

Mark Burris testified that on the night in question he and Meeks were returning from a job, towing a portable welding unit. As they approached his house, a police vehicle turned around and started following them. The police activated their blue lights, and he continued on to his driveway where he thought he could pull off the road safely. As he was searching for the registration, the police noticed that he had a passenger, and he told the officer it was Meeks. He subsequently heard the other officer order Meeks to the ground and observed a scuffle ensue. The police subdued Meeks and after a full search, allegedly found controlled substances. Burris stated that he was not charged with any traffic violation, or any other type of offense, that night.

Meeks testified that after Burris pulled into his driveway, he began to search for his registration. Burris asked him to look in the glove box, but when he saw "all kinds of stuff" in it, he told Burris that he ought to try to find it himself. Meeks stepped out of the truck and Burris continued to look for the paperwork. At that point, Chastain confronted him saying, "Well there's Meeks, tank thief." Chastain called him to the back of the police vehicle, but he initially refused. When Chastain insisted, he walked over. Chastain then ordered him to empty his pockets. According to Meeks, Chastain planted the ink pen shaft and began to try to handcuff him. Eventually, a state trooper arrived and told him that they had received a tip

that Burris was carrying a load of marijuana, and "all you need to do is just tell us where the marijuana is."

Deputy Webb testified that he was riding with Chastain on the night in question and that he noticed that Burris's trailer did not have tail lights. He admitted that he did not give Burris a citation for the defective lights. The trial court denied Meeks's suppression motion.

On appeal, Meeks argues that the trial court erred in denying his motion to suppress evidence because the police officers did not have reasonable suspicion to seize and search his person. Significantly, he asserts that he was "seized" when Chastain ordered him to empty his pockets. Meeks contends that the seizure was unlawful because Chastain admitted that he saw no unusual bulges in his clothing and that the only articulated suspicion that Chastain could testify to was that he was "acting real nervous and not looking at him," which are insufficient facts to satisfy the requirements of Rule 3.4 of the Arkansas Rules of Criminal Procedure and Article 2 § 15 of the Arkansas Constitution. Citing *Meadors v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980), he further argues that Chastain did not have reasonable suspicion that he had committed or was about to commit a felony or violent misdemeanor, therefore the search was illegal, and the evidence should be suppressed. We find no merit in this argument.

In reviewing a circuit court's denial of a motion to suppress evidence, this court conducts a de novo review based on the totality of the circumstances. *See Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We review findings of historical facts for clear error, and

we determine whether those facts give rise to reasonable suspicion or probable cause, giving considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts and deferring to the superior position of the trial judge to pass upon the credibility of witnesses. *See id*.

First, Meeks relies extensively on his own testimony to establish the factual predicate for his argument. However, his testimony varies considerably from the account that Chastain gave of the encounter. While we review all the evidence under the totality of the circumstances, we give considerable weight to the version of the facts that support the trial judge's findings and defer to the credibility determination upon which it is based. *See id.* Accordingly, because Meeks's argument fails to address Chastain's account of what transpired, Meeks's argument fails to mesh with the operant facts of this case.

The failure to deal with Chastain's version of what transpired results in Meeks's argument proceeding from the faulty major premise that he was "seized" when he was ordered to empty his pockets and the discovery of the so-called "tooter" occurred after that seizure. According to Chastain, Meeks was not seized and the pat-down search did not occur prior to the discovery of the "tooter." Moreover, in Chastain's account of the incident, he did not mention that he ordered Meeks to "empty his pockets," and he affirmatively stated that the extent of his intended intrusion upon Meeks's person was limited to a "pat down." Accordingly, the scenario that we must apply the law to, contains neither the seizure nor the search that Meeks premises his argument on, and for that reason, Meeks's argument must

fail. We are mindful that even under the facts as related by Chastain, there was arguably a detention of Meeks when Chastain "asked" him to step to the rear of the vehicle and speak with him. However, Meeks does not challenge the propriety of that detention. Similarly, Chastain asserted that he "asked" Meeks if he could pat him down. Whether Meeks consented to the pat-down was never established in the hearing, and it is not addressed on appeal. Finally, as we noted previously, Chastain asserted that the discovery of the "tooter" occurred prior to his conducting the pat down, so even if the pat down was unlawful, under the facts that we must consider, it had yet to take place when the alleged contraband was revealed to Chastain.

As a final note, we are troubled by the fact, as Meeks notes, that Chastain testified that Meeks was "nervous and evasive," yet obviously could not relate to the court what about Meeks's demeanor was "evasive." We believe it is no coincidence that "nervous and evasive" were the very words that our supreme court in *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003), held were relevant in assessing whether there was reasonable suspicion to conduct an investigatory stop and pat-down search of a person. However, as we noted previously, Meeks does not address the propriety of the investigatory stop—asking him to step to the rear of the vehicle—and the discovery of the "tooter" occurred prior to the initiation of the pat down.

Affirmed.

VAUGHT and BAKER, JJ., agree.