

**IN THE COURT OF APPEALS OF IOWA**

No. 9-698 / 08-1940  
Filed October 21, 2009

**STATE OF IOWA,**  
Plaintiff-Appellant,

**vs.**

**BRIAN WAYNE MAKIN,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Fayette County, Nathan A. Callahan, District Associate Judge.

The State seeks discretionary review of a district court ruling granting a defendant's motion to suppress evidence found as a result of a search conducted by a police officer, contending that the officer conducted a valid pat-down search that resulted in the discovery of marijuana. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Mary Tabor and Karen Doland, Assistant Attorneys General, and W. Wayne Saur, County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Schechtman, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**VAITHESWARAN, P.J.**

The State seeks discretionary review of a ruling granting Brian Makin's motion to suppress marijuana found in his pocket.

***I. Background Facts and Proceedings***

Officer Ted Phillips of the Oelwein Police Department stopped a vehicle with an exposed license light. Brian Makin was a passenger in the vehicle. After the driver consented to a search of the vehicle, Officer Phillips ordered Makin and another passenger out of the car. By this time, Officer Tommasin had arrived at the scene.

Officer Tommasin, who was standing with the passengers, noticed "a large bulge in the front left pocket" of Makin's pants. He ordered Makin to take his hands out of his pockets. Initially, Makin did not comply. Officer Tommasin repeated the order. This time, Makin removed his hands and placed them on his head. Officer Tommasin performed a pat-down search which uncovered no weapons but did uncover a bag of marijuana.

The State charged Makin with "Manufacturing or Possession of a Controlled Substance with Intent to Manufacture or Deliver a Controlled Substance." Makin moved to suppress the evidence obtained in the search. Following a hearing, the district court granted the motion. The State applied for and was granted discretionary review.

***II. Analysis***

As a preliminary matter, we note that no one questions the validity of the initial stop of the vehicle, the validity of the vehicle search, or the validity of Officer Phillips's command to have Makin exit the vehicle. The sole argument

pertains to Officer Tommasin's pat-down search of Makin. On this point, Makin contends that the search "was impermissible under the Fourth Amendment [to the United States Constitution]."<sup>1</sup>

The United States Supreme Court recently addressed the validity of a pat-down search under similar circumstances. In *Arizona v. Johnson*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009), an officer ordered back-seat passenger Lemon Johnson out of a validly-stopped vehicle based on signs that Johnson might be involved in gang activity and based on the officer's desire to question him about that activity at a distance from the front-seat passenger. *Johnson*, \_\_\_, U.S., 129 S. Ct. at 785, 172 L. Ed. 2d at 701. When Johnson was ordered out, the officer already suspected he might have a weapon. *Id.* The officer conducted a pat-down search which uncovered a gun. *Id.*

After summarizing the "stop and frisk" case law that began with *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the court held as follows:

To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

*Id.* at \_\_\_, 129 S. Ct. at 784, 172 L. Ed. 2d at 700. The Court did not decide whether the facts afforded the officer reasonable suspicion to conduct the pat-down search of Johnson, noting that the state appellate court "assumed without

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<sup>1</sup> Although Makin's motion also cited the relevant provision of the Iowa Constitution, no argument has been made under the Iowa Constitution.

deciding” this issue. *Id.* at \_\_\_, 129 S. Ct. at 788 n.2, 172 L. Ed. 2d at 705 n.2. The Court left the issue open for consideration on remand. *Id.*

Our record allows us to decide the question of whether Officer Tommasin had reasonable suspicion to believe Makin was armed and dangerous. Review of this issue is de novo. *State v. Kreps*, 650 N.W.2d 636, 640 (Iowa 2002).

As in *Johnson*, Officer Tommasin suspected that Makin might have a weapon. He testified, “Mr. Makin was facing me and had both hands in his pockets; and there was a large bulge in the front left pocket.” He continued, “At that point in time I became fearful for my safety and Officer Phillips’s safety as to what the object was in the front left pocket.” He described the nature of the search as follows:

I felt along the side of his pockets, and I asked him what it was that was in his pocket. He was—He said it was butane fuel. I asked if I could pull it out and he said I could. I felt—Underneath that was an object I felt could be a knife. I reached in and grabbed both objects out. And as I pulled them out, I noticed a small bag of marijuana in there.

In describing what he believed to be the weapon, Officer Tommasin stated:

It did not feel like a squared-off regular Zippo a rounded-off Bic like a typical lighter would be. With the small oblong shape as it was, I thought it could definitely be a knife. And I have a knife similar to that, that is that small in nature.

Additionally, Officer Phillips testified that he had earlier observed Makin acting nervous and fidgety.

We conclude this combination of facts could have objectively led Officer Tommasin to fear for his safety and the safety of Officer Phillips. See *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909 (“The officer need not be absolutely certain that the individual is armed; 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.”). Accordingly, we reverse the district court’s suppression ruling and remand for further proceedings.<sup>2</sup>

**REVERSED AND REMANDED.**

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<sup>2</sup> The State also argues that Officer Tommasin’s reach into Makin’s pocket was consensual. We find it unnecessary to decide this issue.