IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff	)	Cause No. 1316-CR01650-01
	)	Division No. 2
v.	)	
KEVIN L. MACKEY, Defendant	)	

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

COMES NOW the defendant, Kevin L. Mackey, by and through the undersigned counsel, pursuant to Missouri Supreme Court Rule 24.05, the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 15, and 18(a) of the Missouri Constitution, and hereby moves this Honorable Court to suppress from trial in this cause any evidence seized as a result of an impermissible search of Defendant that was purportedly done pursuant to *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

Specifically, the search is unconstitutional in that it was not conducted for the proper purpose of officer safety as required by *Terry* because Defendant was already handcuffed and multiple police officers were present at the scene. *See, e.g, State v. Haldiman*, 106 S.W.3d 529 (Mo. App. W.D. 2003).

Additionally, officers exceeded the permissible scope of a lawful *Terry* search by not first patting down the outer clothing of Defendant before reaching into Defendant's pocket. Moreover, the object that officers recovered from Defendant's pocket was a vial, which makes it unreasonable for officers to believe that the item in Defendant's pocket

was a weapon, and accordingly, officers did not have a valid basis to search Defendant without a warrant. *See*, *e.g.*, *State v. Hensley*¸770 S.W.2d 730 (Mo. App. S.D. 1989).

FACTUAL BACKGROUND

1. On November 2, 2012, Grandview Police Officer Paul Brooks observed a black 1998 Ford Taurus travelling eastbound at the 121000 block of Blue Ridge.

2. According to Officer Brooks, the vehicle was traveling at a very slow rate of speed, and the vehicle would stop in the lane of traffic several times and then continue eastbound at a slow rate of speed.

3. Officer Brooks then "conducted a vehicle check" of the car and identified Defendant as the driver of the vehicle.

4. Officer Brooks asked Defendant to turn his vehicle off, which Defendant did. However, the car was not put into the "park" position, and as a result the vehicle started to role backwards until Defendant put his foot on the brake.

5. Officer Brooks then "held Defendant at gunpoint" until other officers arrived.

6. Defendant was then "escorted out of his vehicle" and placed in handcuffs.

7. After being placed in handcuffs, "Officer Murphy" then "conducted a 'Terry' frisk" of Defendant and located a glass vial containing a liquid.

8. Officer Brooks believed the liquid to be PCP.

9. Defendant was then transported to the Grandview Police Department for booking.

LEGAL ARGUMENT

10. Police may only conduct a "frisk" of a person's outer clothing if that individual has been validly stopped and there is reason to believe, based on specific and articulable facts, that the individual is armed and dangerous or otherwise poses a threat of injury to the police. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

11. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *State v. Rushing*, 935 S.W.3d 30, 32 (Mo. ban 1996). As outlined in *Terry*:

> The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Terry, 392 U.S. at 29.

12. Thus, in order to be valid constitutional encounter, the officer conducting the *Terry* search must have a reasonable, articulable suspicion that the individual is armed and dangerous at the time of the pat-down search. *See, e.g, State v. Haldiman*, 106 S.W.3d 529 (Mo. App. W.D. 2003) (holding that officer did not have a reasonable, articulable suspicion that defendant was armed and dangerous at the time he conducted a pat-down search of defendant after traffic stop, and thus drug evidence obtained as a result of pat-down search was subject to suppression).

13. Additionally, even if an officer conducts a valid pat-down search of an individual, the officer may not reach inside the individual's pocket to remove items which do not readily appear to be weapons or contraband. *See State v. Hensley*¸770

S.W.2d 730 (Mo. App. S.D. 1989). In holding that officers exceeded the permissible scope of a *Terry* search, the *Hensley* court stated as follows:

> Here, [the officers] knew, when they touched the objects in question through the clothing of [the two men], that they were not weapons which could be used to harm the officers. Since they had such knowledge, no reasonably prudent man could possibly be in fear that the vial in Hensley's shirt pocket that [the officer] thought was a bullet, or the small film canister found in Weber's pocket by [an officer], was a weapon that could be used by [either man] to endanger the safety of the two officers. Under those circumstances, and since the law enforcement officers had no warrant and were not making a search incident to a legal arrest for probable cause, the extraction of the film canister from Weber's pocket and the vial from Hensley's pocket, and opening those receptacles for further examination, amounted to an illegal search in violation of the state and federal constitution.

Id. at 736 (citations omitted).

14. In the instant case, the *Terry* search was not conducted for the proper purpose of officer safety and is therefore unconstitutional. Defendant had already been placed in handcuffs at the time that he was searched. Additionally, Defendant had already been ordered out of the vehicle, and multiple officers were present and had responded by that time. Further, there were no allegations that Defendant was threatening the safety of the officers. Indeed, no officer observed any weapons in the vehicle. These factors indicate the lack of a threat to the officer's safety. Because the "sole justification" for a *Terry* stop is officer protection, and here there was no reasonable threat to officer safety, this Court must find that the search was unconstitutional in that it was not conducted for the proper purpose and therefore does not qualify as an exception to the Fourth Amendment warrant requirement.

15. Additionally, and even if this Court concludes that the search was done for the proper purpose, the search was still unconstitutional because it exceeded the scope of a permissible *Terry* search. An officer cannot simply reach into an individual's pocket, but rather must first pat-down the individual and make some determination that the item that the officer felt is a weapon or contraband. There is no indication that the officer made any attempt in this case to ascertain the nature of any items in the Defendant's pocket before simply reaching into Defendant's pocket. Therefore, the officer exceeded the permissible scope of a *Terry* search and any evidence seized as a result of the officer's unconstitutional warrantless search must be suppressed.

CONCLUSION

WHEREFORE the above and foregoing reasons, Defendant respectfully requests this Honorable Court enter its Order suppressing from trial in this cause any evidence seized as a result of the unconstitutional search of Defendant, and for any further relief deemed just and proper under the circumstances.

Respectfully submitted,

/s/ Jonathan Bailey

Jonathan Bailey, Mo Bar No. 65386
Attorney for Defendant
Oak Tower, 20th Floor
324 East 11th Street
Kansas City, MO 64106-2417
Phone: 816-889-2099
Fax: 816-889-2999
E-Mail: Jon.Bailey@mspd.mo.gov

Certificate of Service

I hereby certify that on this 5th day of May, 2014, an electronic copy of the foregoing was sent through the Missouri e-Filing System to all attorneys of record.

/s/ Jonathan Bailey

_____

Jonathan Bailey