



**LGIT'S ROLL CALL REPORTER
MARCH 2009**

An officer who has reasonable suspicion to believe that a container in a stopped vehicle contains a weapon may not open it unless a pat-down proves inconclusive or a pat-down is unlikely to reveal the presence or absence of a weapon.

QUESTION: If an officer has a reasonable suspicion to believe that a container observed in a stopped vehicle contains a weapon, can the officer immediately open the container?

ANSWER: No. The officer may not open the container unless "frisking" it would not likely reveal the presence or absence of a weapon or "frisking" it proved inconclusive.

CASE: *Ernest James McDowell v. State of Maryland*, Maryland Court of Appeals
Decided February 19, 2009

In *McDowell v. State*, the Court of Appeals proved once again that it will not fill in gaps in an officer's testimony given during a suppression hearing in order to affirm a conviction. **In doing so, the Court of Appeals overturned the decision of the Court of Special Appeals reported in the May 2008 Roll Call Reporter.**

The facts in this case established that just before midnight on December 20, 2005, Trooper Gussoni stopped a pickup truck traveling southbound on U.S. Route 301 in Queen Anne's County, after observing it weaving erratically. The truck was being driven by Hugh Hines; it was owned by Ernest McDowell, who was in the passenger seat but had no identification. Hines said he was coming home from New York City and was tired. Both men appeared nervous. McDowell was staring straight ahead and, according to the trooper, appeared "out of it." Trooper Gussoni returned to his car to check the status of Hines's license and the vehicle registration. He also requested a warrant check on both men. While he was waiting, Trooper Gussoni observed McDowell bend down and twist his body several times. Concerned that McDowell might be retrieving a weapon, the trooper called for backup. He was informed that it would take 20 minutes for backup to arrive. Trooper Gussoni decided not to wait and approached the passenger side of the truck. He stood just behind the side window and saw McDowell reaching underneath his seat and then behind the seat into a gym bag. He described the bag as "a standard gym bag, two and a half feet by a foot and a half." In the trooper's opinion, the bag was large enough to hold a weapon. Trooper Gussoni knocked on the window and asked McDowell what he was reaching for. McDowell replied that he was looking for cigarettes. When the trooper asked if there were cigarettes in the bag, McDowell replied "no." Believing that the bag might contain a weapon, Trooper Gussoni ordered

McDowell out of the car and told him to bring the bag with him. He then directed McDowell to open the bag. The trooper observed prescription bottles, clothing, syringes, and a plastic bag containing a white powdery substance in the bag. Believing that the plastic bag contained cocaine or heroin, Trooper Gussoni took possession of the gym bag and, when backup arrived, he arrested McDowell. A further search of the bag revealed knotted plastic bags containing 55.5 grams of heroin.

McDowell was charged with drug-related offenses and he moved to suppress the evidence. For a reason not explained in the opinion, the gym bag was not introduced as evidence. The trial court denied the motion to suppress and McDowell was convicted and sentenced to twenty (20) years. McDowell appealed.

On appeal, the Court of Special Appeals affirmed. *See Roll Call Reporter*, May 2008. However, the Court of Appeals then agreed to hear the case. The Court of Appeals agreed that Trooper Gussoni had sufficiently articulated his reasonable suspicion that the gym bag might have contained a weapon. The factors supporting this conclusion were: the trooper was alone; the pickup was stopped late at night in a rural area; the two men appeared nervous; McDowell's lack of identification and appearance; backup would not arrive for twenty minutes; McDowell's bending and twisting in a manner consistent with reaching for a weapon; McDowell's reaching into the gym bag; the size of the gym bag; and McDowell's improbable and inconsistent answer when asked about the bag.

The court next turned to the manner in which Trooper Gussoni examined the bag. In other words, the issue became, in light of the circumstances, whether the trooper was justified in immediately directing McDowell to open the bag. The court answered this question in the negative. Based on the testimony at the suppression hearing, specifically the trooper's limited description of the gym bag, the court ruled that he went too far in ordering it to be opened. The court said "Trooper Gussoni offered no explanation for why a pat-down (of the gym bag) would not have sufficed; nor was the bag itself produced for the court's inspection." In the absence of the bag or more descriptive testimony, the court refused to speculate as to whether a pat-down would have been effective. Without specific testimony as to why a pat-down of the bag would not have sufficed, the court concluded that Trooper Gussoni had exceeded the scope of what is allowed under *Terry v. Ohio*. Consequently, the court ruled that the motion to suppress should have been granted, and McDowell's conviction was reversed.

NOTE: Once again, an officer's lack of articulation at a suppression hearing provided the court with the basis for its decision. The first mistake was not introducing the gym bag as evidence. The second mistake was not having the trooper articulate the reasons (if any existed) as to why a mere "frisk" of the gym bag would not have revealed whether or not a weapon was inside. In the court's words, "having an officer explain why it is necessary to conduct that search or by demonstrating from the container itself that a pat-down would not have revealed the presence or absence of a weapon" is not a difficult burden, but a necessary one. Accordingly, officers facing similar circumstances should be prepared to testify why a frisk of the container was inconclusive or why, based on the container's construction or other circumstance, a frisk would have been pointless.

By John F. Breads, Jr., Director of Legal Services, Local Government Insurance Trust

This publication is designed to provide general information on the topic presented. It is distributed with the understanding that the publisher is not engaged in rendering legal or professional services. Although this publication is prepared by professionals, it should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.