

Open beer bottle not reasonable ground for search: panel

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Police violated the Fourth Amendment when they stopped a man on the street because he was carrying an open beer bottle, a federal appeals court has held.

In an opinion Thursday, the 7th U.S. Circuit Court of Appeals said the beer bottle was not enough by itself to raise a reasonable suspicion that Earkle J. Tyler was involved in criminal activity.

And this lack of suspicion made unconstitutional the police officers' decision to detain and search Tyler, the court said.

The court vacated Tyler's conviction on the federal drug charge that was brought against him after the officers discovered that he was carrying cocaine in addition to the bottle of beer.

The court sent the case back to U.S. District Judge James T. Moody of the Northern District of Indiana with instructions to grant Tyler's motion to suppress the cocaine.

Officers Adam Clark and James Onohan were patrolling a residential neighborhood in Hammond, Ind., one afternoon when they spotted Tyler with a nearly empty beer bottle in his hand.

The officers later testified that they approached Tyler under the mistaken belief that it was illegal to carry an open container of alcohol in public.

But the officers also testified that their primary purpose in stopping Tyler was to determine whether he was publicly intoxicated, which was against the law.

Tyler told the officers he had just picked up the bottle with the intention of throwing it in the trash.

While Tyler also said he had been drinking earlier in the day, both Clark and Onohan concluded that he was not drunk.

The officers ran a warrant check on Tyler and then returned his identification to him when the check revealed no active warrants.

As Tyler was putting his identification in his pocket, Clark noticed what he later described as a "bulge" in Tyler's waistband or left front pocket.

Clark later testified that he feared Tyler might be carrying a weapon and that Tyler's reaction to a query about what he was carrying increased that concern.

Clark testified that Tyler stepped back and raised the hand holding the beer bottle — the latter assertion, however, was not included in the police report on the incident — and then struggled with the officers when they grabbed his hand.

He took a sack from Tyler's pocket or the sack became dislodged during the struggle, Clark testified.

The sack contained a little more than 30 grams of crack cocaine and 24 grams of powder cocaine.

Moody denied Tyler's motion to suppress after concluding that the stop constituted an investigative detention under *Terry v. Ohio*, 392 U.S. 1 (1968).

Tyler then entered a conditional plea of guilty to possessing crack with the intent to distribute the drug. He was sentenced to the mandatory minimum sentence of 10 years in prison.

A three-judge panel of the 7th Circuit held that Moody should have suppressed the cocaine.

The panel rejected the argument — made for the first time on appeal — that the encounter between Tyler and the officers was a consensual one that did not raise any Fourth Amendment issues.

A seizure occurs when the circumstances would lead a reasonable person to believe he was not free to leave, the panel said, citing cases that included *Michigan v. Chesternut*, 486 U.S. 567 (1988).

Under the circumstances surrounding Tyler's encounter with the police, the panel said, "a reasonable person would have believed he was obliged to stay put."

"A reasonable person would not feel free to walk away after being confronted by two police officers and told he was committing a crime in the officers' presence," Judge Diane S. Sykes wrote for the panel.

"Moreover, the officers retained Tyler's identification while they ran a warrant check and told him he could not leave until the check was completed."

The panel also rejected the argument that a reasonable suspicion that Tyler was intoxicated justified the seizure.

Noting that Tyler was not slurring his words or staggering or weaving when he walked, the panel said the open beer bottle was the only factor supporting the decision to stop and question him.

"The absence of reasonable suspicion to justify the officers' initial *Terry* stop decides this case; everything that followed was fruit of the poisonous tree," Sykes wrote, citing *U.S. v. Jerez*, 108 F.3d 684 (7th Cir. 1997), and *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

Joining the opinion were Judges Diane P. Wood and Terence T. Evans. *U.S. v Earkle J. Tyler*, No. 06-2904.

Merrillville, Ind., attorney R. Brian Woodward of Casale, Woodward & Buls LLP argued the case before the 7th Circuit on behalf of Tyler. Assistant U.S. Attorney Sharon J. Johnson of Hammond argued the case on behalf of the government.