

30549-0-III  
COURT OF APPEALS  
DIVISION III

FILED  
July 16, 2012  
Court of Appeals  
Division III  
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAWES M. MARLATT, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering finding of fact 10:

The 'Terry' frisk revealed a large folding knife, and a soft object in the Defendant's change pocket which the Deputy suspected of being drugs.

(CP 23)

2. The court erred in concluding:

4. The Terry' frisk, after discovery of the wrench in the Defendant's pocket, was not unreasonable under either the U.S. Constitution, or the Washington State Constitution, art.1, sec.7.

(CP 24)

3. The court erred in denying the defendant's motion to suppress evidence found in a search of his person during a traffic stop.
4. Defense counsel provided ineffective assistance in failing to argue the search of Mr. Marlatt's person exceeded the permissible scope of a weapons search.

B. ISSUES

1. Under the Fourth Amendment and Const. Art. 1, § 7, does the manipulation of a soft item in the suspect's pants pocket, which the officer suspected to be drugs, exceed the permissible scope of a weapons search incident to an investigative detention?

2. Does failure to argue that evidence should be suppressed on the basis of well settled law regarding the “plain touch” doctrine constitute ineffective assistance of counsel?

### C. STATEMENT OF THE CASE

A sheriff’s deputy stopped Dawes Marlatt for driving a car with a defective headlight. (CP 22) Mr. Marlatt showed the deputy his drivers license and proof of insurance, but did not have the registration. (CP 22) A computer check revealed that the registration had expired three years earlier, although the car license plate displayed current license tabs. (CP 23)

The deputy asked Mr. Marlatt to get out of the car and saw that Mr. Marlatt had what looked like the handle of a wrench. (CP 17) The deputy decided to conduct a weapons search, in the course of which he felt a soft bulge in Mr. Marlatt’s front pants pocket. (CP 17)

The deputy suspected the soft bulge was a possible baggie of drugs, since in his experience drug users commonly package their drugs in baggies. (CP 17) “[F]rom outside the pocket, [he] manipulated the item between [his] right thumb and forefinger and felt that the bulge had a slightly more solid center.” (CP 17) He asked Mr. Marlatt what was in his pocket and obtained consent to remove the item from the pocket.

(CP 17) The deputy then recognized the object as a baggie of methamphetamine. (CP 17)

The State charged Dawes Marlatt with possession of a controlled substance. (CP 1) Mr. Marlatt challenged the admissibility of the evidence as the fruit of an unlawful search. (CP 4-8) The court found that “The ‘Terry’ frisk revealed a large folding knife, and a soft object in the Defendant’s change pocket which the Deputy suspected of being drugs” and asked Mr. Marlatt for consent to remove the object. (CP 23) Concluding that the *Terry* frisk was not unreasonable, the court denied suppression and convicted Mr. Marlatt on stipulated facts. (CP 44-55)

#### D. ARGUMENT

1. MANIPULATION OF A SOFT BULGE IN A SUSPECT’S PANTS POCKET IN THE COURSE OF AN INVESTIGATIVE DETENTION VIOLATES THE CONSTITUTIONAL PROHIBITION OF UNREASONABLE SEARCHES.

Our State and Federal Constitutions prohibit warrantless searches by government agents unless the search falls within one of the limited exceptions to the warrant requirement. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (*citing State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513(2002)). The fruits of such seizures are generally inadmissible in the State’s case against a criminal defendant. *State v. Kennedy*,

107 Wn.2d 1, 4, 726 P.2d 445 (1986) Evidence derived from a warrantless search may nevertheless be admissible if the trial court finds that the search was based on probable cause to believe evidence of a crime would be found or that the search falls within a judicially recognized exception to the warrant requirement. *Garvin*, 166 Wn.2d at 249 (citing *Duncan*, 146 Wn.2d at 171–72).

The admissibility of evidence derived from the search is decided by the trial court. The trial court’s factual findings must be supported by substantial evidence and must be sufficient to support its conclusions. *State v. Garvin*, 166 Wn.2d at 249; *State v. Hill*, 123 WN.2d 641, 644, 870 P.2d 313 (1994). The State bears the burden of proving the lawfulness of the search by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d at 250; *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). The trial court’s legal conclusions are reviewed *de novo*. *State v. Duncan*, 146 Wn.2d at 171.

A search for weapons incident to a brief seizure for investigative purposes is lawful if the officer has reasonable grounds to believe the person detained is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Here, the trial court found such a search was justified by Mr. Marlatt’s possession of a wrench and the suspicious circumstance of the car registration discrepancy.

The sole justification for the search is officer safety and the search is accordingly limited. *Terry*, 392 U.S. at 27. “If a protective search for weapons goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). In the course of conducting a weapons search, if an officer feels an object that he reasonably suspects is a weapon, he may remove the item to verify or dispel his suspicion. *Id.* at 375.

If, in the course of a lawful search an officer sees an object that he immediately recognizes as contraband, he may seize the item. *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994). The immediate recognition of the nature of the evidence provides probable cause for such a seizure. *Id.* at 118. Such a seizure falls within the plain view exception to the warrant requirement. *Id.*

Likewise, if, in the course of a lawful search such as a weapons search pursuant to *Terry*, the officer feels an object that he immediately and clearly recognizes as incriminating evidence, he has probable cause for continuing the search and may seize the item. *Id.*; *Dickerson*, 508 U.S. at 373. This exception to the warrant requirement is generally referred to as the plain touch doctrine. *Garvin*, 166 Wn. 2d at 247-48.

Under this doctrine, the recognition that an item is contraband must be immediate, since the search is limited to the narrow purpose of protecting the officer from dangerous weapons. *State v. Hudson*, 124 Wn. 2d at 116. If the officer touches an item that is not recognizable as a weapon, further search of the item, such as squeezing or manipulating it, exceeds the scope of the lawful weapons search and violates constitutional protections. 124 Wn. 2d at 117

The officer's written report clearly shows he had no reason to suspect the bulge in Mr. Marlatt's pocket was a weapon. It is abundantly clear that he manipulated it because he had an articulable suspicion that it was a drug-related item and he manipulated it in an effort to confirm this suspicion. This search violated Mr. Marlatt's right to be free of unconstitutional searches. The ensuing questioning and consent to search were products of the unlawful search, as was the actual seizure of the baggie. Neither Mr. Marlatt's responses nor the physical evidence was admissible against him. 166 Wn.2d at 254. His conviction resulted from counsel's ineffective assistance.

2. FAILURE TO ARGUE THAT MANIPULATION OF A SOFT OBJECT FELT IN THE SUSPECT'S POCKET EXCEEDED THE PERMISSIBLE SCOPE OF A WEAPONS SEARCH DEPRIVED THE DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove that:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). But absent any reasonable basis for failing to raise an issue that will necessarily result in the defendant's acquittal, defense counsel's representation is deficient. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

The undisputed record establishes that the evidence derived from the officer's manipulation of the bulge in Mr. Marlatt's pants was the fruit of an unlawful search and was inadmissible. This was the only evidence supporting Mr. Marlatt's conviction. Had counsel challenged the evidence on this specific basis, the court would necessarily have suppressed the evidence and Mr. Marlatt could not have been convicted. The record discloses no reasonable basis for failing to present this argument.

E. CONCLUSION

Mr. Marlatt's conviction resulted from a search that exceeded the scope of a lawful weapons search, and from defense counsel's failure to present that issue in the trial court; it should be reversed and dismissed.

*Id.*

Dated this 16<sup>th</sup> day of July, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

|                      |   |                 |
|----------------------|---|-----------------|
| STATE OF WASHINGTON, | ) |                 |
|                      | ) |                 |
| Respondent,          | ) | No. 30549-0-III |
|                      | ) |                 |
| vs.                  | ) | CERTIFICATE     |
|                      | ) | OF MAILING      |
| DAWES M. MARLATT,    | ) |                 |
|                      | ) |                 |
| Appellant.           | ) |                 |

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I certify under penalty of perjury under the laws of the State of Washington that on July 16, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on July 16, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 16, 2012.

  
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