

**FILED**

AUG 03 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30549-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAWES M. MARLATT, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
Deputy Prosecuting Attorney  
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in entering 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.

II.

ISSUES PRESENTED

- A. Did the defendant obviate the search issues by consenting to the police officer's removal of drugs from defendant's pants pocket?

- B. Did the defendant's council perform inadequately when he did not raise the issue involving a consensual search of the defendant's pants?

### III.

#### STATEMENT OF THE CASE

The Defendant was charged by information filed in Spokane County Superior Court with Possession of a Controlled Substance. CP 1.

The defendant sought a dismissal of the case based on the police officer's "Terry stop" and subsequent recovery of illicit drugs. After the trial court denied the defendant's motion, he proceeded to a stipulated facts trial based on the police reports.

The following facts are from the report of Dep. R. Brooke. CP 17.

On June 1, 2010, in the early morning hours, Dep. Burke noticed a southbound vehicle on Nevada St. travelling with only one headlight. Dep. Burke stopped the defendant's car and the defendant identified himself with a Washington driver's license. The defendant produced proof of insurance but had no registration. The vehicle's license had expired in 2007, but the plates had current 2010 tabs affixed.

The deputy returned to the defendant's vehicle with the intent to interview the defendant out of the presence of a female passenger. Prior to having the

defendant exit the vehicle, the deputy asked the defendant if he had any weapons on him. The defendant denied any weapons. The deputy advised the defendant to keep his hands out of his pockets. As the defendant got out of the car, he reached behind his back with his right hand. Dep. Burke grabbed the defendant's hand and pulled it back in front of the defendant. The defendant turned his body slightly and the deputy recognized the handle of an adjustable wrench in the defendant's right rear pants pocket. The deputy removed the item which turned out to be a 10-inch adjustable wrench.

The deputy moved the defendant from the defendant's car to the patrol car. Due to the defendant possibly reaching for the wrench after being advised to keep his hands out of his pockets, Dep. Burke advised the defendant that the deputy wanted to do a cursory search for weapons. The officer had the defendant face away and put his hands on his head.

The deputy felt a large folding knife in the defendant's left front pocket. The knife was removed and the search continued. On the right side of the defendant, the deputy felt a small soft bulge in the defendant's pants pocket. The defendant became "fidgety" and attempted to pull his hands from the deputy's grasp. Based on his police experience, Dep. Burke suspected the soft bulge was a plastic baggie containing drugs.

The deputy asked the defendant what was in the defendant's coin pocket and defendant denied any knowledge. The deputy then asked the defendant "Do you mind if I remove it?" The defendant sighed and said, "Yeah, go ahead."

Deputy Burke removed the baggie and asked the defendant what it was. The defendant replied that it was "Dope." The baggie contained a white crystal substance which the deputy recognized as methamphetamine. The defendant was arrested at this point.<sup>1</sup>

Following a review of the facts, the defendant was convicted as charged. 1/9 RP 9. This appeal followed. CP 35-36.

#### IV.

#### ARGUMENT

##### A. THE DEFENDANT'S CONSENT TO SEARCH HIS POCKET OBVIATED ANY ARGUMENTS REGARDING SEARCH ISSUES?

The major issue argued by the defendant is the nature of the officer's recovery of narcotics found in the defendant's front pocket. The State has no particular problem with the defendant's recitation of the law in this area, but it is puzzling that the defendant bothered to raise this issue at all. The defendant *consented* to the officer removing the baggie. RP 9. Had the defendant not

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<sup>1</sup> All of the previous factual statements arise from a single page of the relevant police report. Due to the fact that these facts are not contested, the State chose to cite the entire section once, in order to make the section more readable.

consented to the officer's removal of the baggy, this argument would take on different dimensions.

The defendant does not contest the deputy's stop of the car or the ordering of the defendant to exit the car. *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer may stop and briefly detain a person if the officer reasonably suspects criminal activity, even if the officer lacks probable cause to search or arrest the detainee. *State v. Mendez, supra*. *Terry* also "permits the officer to frisk the person for weapons if the officer has reasonable grounds to believe the person to be armed and presently dangerous." *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). So, the frisk was proper as the defendant had now lied to the officer about the possession of a weapon.

A *Terry* search is valid if, (1) the initial stop is legitimate; (2) a reasonable safety concern exists that justifies the protective frisk for weapons; and (3) the scope of the frisk was limited to the protective purpose. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (*citing Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

B. THE DEFENSE COUNSEL WAS NOT INEFFECTIVE  
FOR FAILING TO RAISE THE ISSUE OF THE  
OFFICER'S RECOVERY OF THE DRUGS.

As has already been pointed out, there is no issue available to the defendant regarding the search and recovery of drugs from his person. The trial defense counsel can hardly be faulted for failing to raise an issue that has zero chance of success.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 3<sup>rd</sup> day of August, 2012.

STEVEN J. TUCKER  
Prosecuting Attorney



Andrew J. Metts #19578

Deputy Prosecuting Attorney  
Attorney for Respondent

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 30549-0-III
v.	)	
	)	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 August 3, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

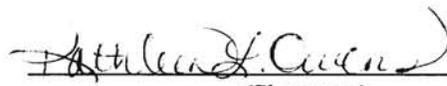
Janet G. Gemberling  
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and mailed a copy to:

Dawes M. Marlatt  
983 Beaver Valley Rd  
Newport Wa 99156

8/3/2012  
(Date)

Spokane, WA  
(Place)

  
(Signature)