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No. _____
COA No. 25255-8-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent

v.

ANTHONY GAYLORD GARVIN,

Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 NOV 26 PM 4:06

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Susan Hahn, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Anthony Gaylord Garvin, the appellant below, asks this Court to review the following Court of Appeals decision, referred to in Section B.

B. COURT OF APPEALS DECISION

Garvin requests review of the Court of Appeals decision in State v. Anthony Gaylord Garvin, Court of Appeals No. 25255-8-III, filed October 25, 2007. The decision is attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A Terry frisk for weapons is strictly limited to a pat down search of the outer clothing unless the pat down reveals an object that may be a weapon. Did the trial court err in denying Garvin's motion to suppress where the officer, instead of patting down Garvin's clothing, exceeded the scope of a lawful Terry frisk by squeezing Garvin's clothing from the outset of the search?

2. Contraband seized during the course of an otherwise lawful Terry frisk is admissible under the "plain touch" doctrine only if an officer has immediate probable cause to believe the detected object is contraband. Did the trial court err in denying Garvin's motion to suppress on the basis of the "plain touch" doctrine where

the officer only suspected the object he squeezed in Garvin's pocket was possible contraband?

D. STATEMENT OF THE CASE

1. Trial Court.

a. Procedural History.

The State charged Garvin with unlawful possession of a controlled substance. CP 19. Garvin moved to suppress methamphetamine seized from his pocket during a Terry stop because the investigating officer exceeded the lawful scope of a Terry frisk for weapons. CP 20-28. The trial court denied Garvin's motion following a CrR 3.6 hearing. CP 32-34.¹ The court subsequently found Garvin guilty of possession of a controlled substance after a bench trial on stipulated facts. CP 12-18.

b. CrR 3.6 Hearing.

Police Officer Gregory Cobb stopped Garvin's car for a traffic infraction. CP 32; RP² 3-4. Officer Cobb saw a knife lying next to Garvin on the front seat. CP 32. He ordered Garvin out of the car and asked him whether he had additional weapons. CP 32; RP 6.

¹ The trial court's CrR 3.6 findings of fact and conclusions of law are attached as Appendix B.

² This petition refers to the verbatim report of proceedings as follows: RP - 3/28/06.

Garvin said he had a knife in his pants pocket, which the officer removed. CP 32; RP 6, 10-11.

Officer Cobb then began searching Garvin using a special technique. RP 6-9. Instead of a pat down search, Officer Cobb methodically squeezed locations up and down Garvin's body. CP 32; RP 4-9, 15-16.

Officer Cobb testified, "We don't really pat anymore. It's more of a squeeze search." RP 7. As a matter of routine policy, Officer Cobb squeezes instead of pats because he believes the squeezing motion minimizes the danger of being poked by a sharp object while conducting the search. CP 32; RP 6-8. The squeeze method, when done slowly, allowed him to "feel the texture of things." RP 6.

He did not feel any weapons or other hard objects when he squeezed Garvin's coin pocket. RP 12. He testified "It was obvious when I squeezed it gave way, and it felt like there was something granule inside the pocket. As I continued to squeeze, the granules separated. It's like the area I pinched granules separated and down from there." RP 9. By means of squeezing Garvin's blue jeans, Officer Cobb determined the object was a 1

and 1/2 inch by 1 and 1/2 inch plastic baggie containing a powder or crystalline substance. RP 8, 17.

Based on this squeeze, the officer initially testified on direct examination "[t]hrough my training and experience, *usually* when I feel that in a coin pocket I know I am dealing with some sort of narcotics, some sort of illegal contraband." RP 9 (emphasis added). He later clarified the extent of his certainty when he testified "I pretty much knew what it was in terms of I suspected I was dealing with narcotics." RP 10. On cross-examination, he reiterated he "suspected" it was a narcotic, but did not know what the substance was. RP 12.

After squeezing the pocket, Officer Cobb placed Garvin under arrest for narcotics possession and removed a small, plastic baggie from his pocket. CP 33; RP 10, 24-25. The baggie contained a white, crystalline substance that later tested positive for methamphetamine. CP 33; RP 10.

The trial court upheld the warrantless search and seizure under the "plain touch" doctrine. CP 32-34; RP 35-36. It ruled Officer Cobb's squeezing technique was a lawful pat down search, and Garvin's right to privacy was not violated because Cobb

immediately recognized the baggie's contents as "possible narcotics" by means of the squeezing motion. CP 33; RP 36.

2. Court Of Appeals

On appeal, Garvin argued Officer Cobb exceeded the scope of a valid Terry frisk when he searched by means of squeezing Garvin's pocket. Brief of Appellant (BOA) at 2, 7-15. Garvin further argued Officer Cobb lacked probable cause to believe the object in Garvin's pocket was a narcotic because the officer only suspected it was a possible narcotic. BOA at 2, 10-15.

The Court of Appeals acknowledged a police officer may only conduct a "non-invasive search" limited to a pat down of the outer clothing. Slip op., at 4. The Court further acknowledged an officer cannot slide, squeeze or in any manner manipulate an object to ascertain its incriminating nature. Slip op., at 5. The Court nevertheless held Officer Cobb's search was lawful under the "plain touch" doctrine because, by means of a single squeezing motion, Cobb knew he was touching contraband without the need for any continuing manipulation of the pocket. Slip op., at 7. The Court cited no applicable authority for the proposition that officers may manipulate objects from the outset of a Terry frisk so long as the

manipulation is intrusive enough to allow for the immediate recognition of contraband.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION THAT MANIPULATION OF GARVIN'S POCKET DID NOT EXCEED THE LAWFUL SCOPE OF A TERRY FRISK CONFLICTS WITH THIS COURT'S DECISIONS AND INVOLVES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Officer Cobb exceeded the scope of a lawful Terry frisk for weapons by squeezing Garvin's pocket from the outset of the search. Even if the squeeze was permissible, the search was still unlawful because Officer Cobb lacked probable cause to believe the object in Garvin's pocket was a controlled substance. The necessary remedy is exclusion of incriminating evidence discovered by means of the unlawful search and seizure.

- a. A Terry Frisk For Weapons Is Strictly Limited To A Pat Down Search Of The Outer Clothing.

"The right to be free from searches by government agents is deeply rooted into our nation's history and law, and it is enshrined in our state and national constitutions." State v. Day, __Wn.2d__, 168 P.3d 1265, 1267 (2007). Both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution prohibit unreasonable searches and seizures.

Id. Warrantless searches and seizures are per se unreasonable. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984); Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed.2d 334 (1993). The federal constitution provides the minimum protection against unreasonable searches. State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994). Article I, section 7 goes further than the Fourth Amendment and requires actual authority of law before the State may disturb an individual's private affairs.³ Day, 168 P.3d at 1267.

The State bears the "heavy burden" of proving that a warrantless search and seizure is justified under one of the "carefully drawn" exceptions to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); Williams, 102 Wn.2d at 736. This Court jealously guards these exceptions "lest

³ "Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). Accordingly, a Gunwall analysis is unnecessary before this Court undertakes an independent state constitutional analysis. Id. 160 Wn.2d at 71; accord State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007); State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007). "The only relevant question is whether article I, section 7 affords enhanced protection in the particular context." Surge, 160 Wn.2d at 71.

they swallow what our constitution enshrines." Day, 168 P.3d at 1268.

Here, the trial court and the Court of Appeals relied on the Terry stop exception to uphold the search and seizure. Terry v. Ohio, 392 U.S. 1, 29-30, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). This exception allows officers to briefly detain a person they reasonably suspect is engaged in criminal conduct. Day, 168 P.3d at 1268. Officers are not authorized to search for evidence of crime during a Terry stop. Rather, officers are only allowed to make a brief, nonintrusive search for weapons if "a reasonable safety concern exists to justify the protective frisk for weapons." Id. (citation omitted). This nonintrusive search is referred to as a "Terry frisk." Id.

"A valid weapons frisk is strictly limited in its scope to a search of the outer clothing; a patdown to discover weapons which might be used to assault the officer." Hudson, 124 Wn.2d at 112. An officer may go beyond a pat down search only if the pat down reveals an item of questionable identity that might be a weapon based on its size and density. Id. at 112-13. A Terry frisk that exceeds its proper scope is unlawful. Id. at 112.

Contraband seized during the course of a Terry frisk is admissible only if the requirements of the "plain touch" doctrine are met. Dickerson, 508 U.S. at 375-76; Hudson, 124 Wn.2d at 114, 116. Under the plain touch doctrine, officers may lawfully seize evidence during the course of a pat down if they "happen across some item for which they had not been searching and the incriminating character of the item is immediately recognizable." Hudson, 124 Wn.2d at 114.

- b. The Officer Exceeded The Scope Of A Lawful Terry Frisk When He Squeezed Rather Than Patted Down Garvin From The Outset Of The Search.

Officer Cobb's search by means of manipulating the contents of Garvin's pocket without first patting down the pocket rendered the search unlawful. There is no invasion of a suspect's privacy beyond that already authorized by the search for weapons only "*[i]f an officer lawfully pats down a suspect and feels an object possessing characteristics that make its identity as contraband immediately apparent.*" Hudson, 124 Wn.2d at 114 (emphasis added); accord Dickerson, 508 U.S. at 375. An initial pat down of the outer clothing is the necessary factual predicate for any further

lawful search of a suspect's pockets during the course of a Terry frisk.

When an officer initiates a Terry frisk by manipulating a suspect's clothing instead of doing a pat down, the search exceeds its proper scope and is unlawful from its inception. The Court of Appeals did not grasp this basic idea. Its holding stands for the proposition that an officer may manipulate the contents of a suspect's clothing instead of doing an initial pat down so long as the manipulation is intrusive enough to allow the officer to immediately recognize an object as incriminating evidence. This is not the law. An item can be lawfully seized only if, without further investigation, the pat down itself provides probable cause to believe an object is contraband. State v. Rodriguez-Torres, 77 Wn. App. 687, 692, 893 P.2d 650 (1995).

In Dickerson, the question was "whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by Terry." Dickerson, 508 U.S. at 373. Officers may lawfully seize contraband "so long as the officers' search stays within the bounds marked by Terry." Id. The officer in Dickerson did a pat down search of a suspect during the course of a Terry stop. Id. at 369. The officer testified "[A]s I pat-

searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Id. The officer then reached into the suspect's pocket and retrieved a plastic bag containing cocaine. Id. The United States Supreme Court held the search was unlawful because the officer did not recognize the object as contraband during the initial pat down, which meant the subsequent manipulation of the pocket constituted a second search unrelated to the need to detect a weapon. Id. at 378.

Here, the manipulation was unlawful because the officer never did a pat down in the first place. Officer Cobb started manipulating Garvin's outer clothing from the outset of the search. An officer only has authority to squeeze or otherwise manipulate a suspect's clothing only if it is unclear that an object detected by means of a pat down is a weapon. Hudson, 124 Wn.2d at 113.

The Court of Appeals distinguished Dickerson from Garvin's case by observing Officer Cobb, unlike the officer in Dickerson, immediately detected contraband by means of squeezing the object from the outset. Slip op., at 6-7. The Court of Appeals wrongly treated the different factual predicate of Dickerson as license to conclude that manipulation of a suspect's clothing without first

patting down the area is lawful so long as the manipulation gives probable cause to believe the object is contraband.

Officers, in the guise of searching for weapons, are not allowed to "conduct a general exploratory search for whatever evidence of criminal activity he might find." Terry, 392 U.S. at 30. Officer Cobb's routine squeeze method of searching for weapons is indistinguishable from a general exploratory search for contraband.

State v. Hobart illustrates why the Terry frisk is limited to a pat down. In that case, the officer initially "patted" the suspect for weapons and found none. State v. Hobart, 94 Wn.2d 437, 439, 617 P.2d 429 (1980). The pat down, however, revealed two spongy objects in a shirt pocket. Id. at 439-40. The officer squeezed these objects and concluded they were balloons containing narcotics. Id. The scope of this search was not strictly limited to a search for weapons, but rather constituted "an exploration of the possibility that the defendant might be in possession of narcotics." Id. at 446. Having discovered "spongy" objects in the suspect's pockets by means of a lawful pat down - objects which could not reasonably be feared as dangerous weapons - "the officer squeezed them, with the obvious purpose of ascertaining whether they had the shape and consistency of balloons commonly used for narcotics." Id.

The Court warned that "[t]o approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches." Id. at 447. Similarly, Officer Cobb's routine squeeze method oversteps the bounds of a protective search for weapons and becomes "the equivalent of a general warrant to rummage and seize at will." Dickerson, 508 U.S. at 378 (citation omitted).

As demonstrated by the facts in this case, the squeeze is inherently more intrusive than the pat down. Officer Cobb, by means of a single, slow squeezing motion of a blue jean pocket, was able to determine that (1) he felt a plastic baggie; (2) the baggie was 1 and 1/2 by 1 and 1/2 inches in dimension; (3) the baggie contained a granule substance; and (4) the granules separated between his fingers as he continued to squeeze. RP 8-9, 17.

An officer's detailed description of the tactile qualities of contraband in a baggie suggests considerable manipulation. Hudson, 124 Wn.2d at 118. In Hudson, the officer testified a baggie contained "chunks of some kind [of] substance, probably two inches long, probably an inch-and-a-half to a little more across, [with] kind of ragged edges, chunks" and "less powder and shake"

making them "consistent with [being] broken off a kilo size amount of cocaine." Id. The officer "described the substance in the baggie with a particularity arguably unattainable without extensive manipulation." Id. To satisfy the immediate recognition prong of the plain touch doctrine, the recognition must not be the result of manipulation. Id. at 119-20. Officer Cobb's intimate knowledge of the object's qualities was unattainable without extensive manipulation.

The limitations of a Terry frisk would be rendered meaningless if officers were allowed to manipulate pockets in a quest for contraband: "If given long enough, most police officers . . . could pinch and squeeze and twist and pull and rub and otherwise manipulate a suspect's jacket pocket and figure out what is inside. State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992). A purported weapons search that allows the officer to detect the precise dimensions of a small baggie through a jeans pocket is indistinguishable from a general search designed to search for contraband. Cobb's search is not the strictly circumscribed search envisioned by Terry.

The Court of Appeals nonetheless emphasized Officer Cobb used one long squeezing motion, as opposed to two separate

squeezes, to determine the contents of Garvin's pocket. Slip op., at 6-7. The distinction is immaterial to the degree of intrusiveness involved here. It is the squeeze itself, rather than the number of squeezes, which renders the search unlawful. Regardless, Cobb testified that he squeezed the main pocket first. RP 16. He separately squeezed the smaller coin pocket within the main pocket because the dimensions of the coin pocket are different. RP 16. Cobb never explained why his first squeeze of the main pocket was insufficient to detect a weapon that may have been in the coin pocket.

The Court of Appeals also placed weight on Officer Cobb's explanation for why he routinely squeezed rather than patted during a Terry frisk for weapons. Slip op., at 6. Cobb justified his preference to squeeze rather than pat down on the purported ground that squeezing lessens the danger of being poked by a sharp object. RP 6-7. An officer's subjective belief that a particular form of search lessens the risk of being poked by a sharp object during the course of a Terry frisk cannot override the constitutional safeguards against unlawful search and seizures. "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in

their persons, houses, papers and effects, 'only in the discretion of the police." Terry, 392 U.S. at 22 (citation and internal quotation marks omitted).

The Court of Appeals treated Officer Cobb's collateral safety concern as authorization to enlarge the scope of a Terry frisk. Such reasoning unacceptably breaches the circumscribed boundaries of a weapons search. The scope of the Terry frisk must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. at 19 (citation omitted). The purpose of the limited Terry frisk is not to discover evidence of a crime, but to allow an officer to pursue investigation without fear of violence. Hudson, 124 Wn.2d at 112. A police officer's concern for safety must be balanced against the need to protect an individual's right to be free from invasive police tactics. Terry fully appreciated the risk of violence that police officers face in the line of duty but recognized a pat down search of the outer clothing is sufficient to guard against that risk. Terry, 392 U.S. at 23-24, 29-30.

c. The Plain Feel Doctrine Does Not Apply Because Officer Cobb Did Not Have Probable Cause To Believe The Object In Garvin's Pocket Was A Controlled Substance.

Even if Officer's Cobb's manipulation of Garvin's pocket did not exceed the scope of a lawful Terry frisk, the subsequent seizure of the item from Garvin's pocket was unlawful because Cobb lacked probable cause to believe the item was contraband.

Probable cause is required to satisfy the "immediate recognition" prong of the plain touch doctrine. Hudson, 124 Wn.2d at 118. The probable cause requirement guards against "excessively speculative seizures." Dickerson, 508 U.S. at 376.

When an officer feels something during the course of a Terry frisk, mere suspicion that an object is a narcotic does not give the officer probable cause to reach into the pocket and pull out the object under the plain touch doctrine. For example, officer testimony that a substance has tactile qualities "likely" to be a controlled substance is not sufficiently certain to constitute an immediate knowledge that it is a controlled substance. Hudson, 124 Wn.2d at 119. Feeling an item with tactile qualities "consistent" with contraband is not enough either. Id. (description of item felt by officer could be as consistent with hard rock candy, a food item, a

small part to a car, or some other such item as it is with rock cocaine).

Here, Officer Cobb repeatedly testified he only suspected the item he felt in Garvin's pocket was a narcotic. RP 10, 12. He did not know the object was a controlled substance. RP 12. The trial court found Cobb "immediately recognized" the contents of the baggie as "possible narcotics." CP 33. Suspecting an item is a possible narcotic is not enough to establish the "immediate recognition" prong of the plain touch doctrine because such an equivocal level of certainty does not satisfy probable cause. Id. at 119.

Furthermore, Officer Cobb testified that, after he first felt "something granule," he "continued to squeeze" until "the granules separated." RP 9. Cobb's testimony belies any notion that he "immediately" knew what he felt.

The Court of Appeals held the plain touch doctrine was satisfied because Cobb "knew he was touching some sort of narcotic." Slip op., at 7. Cobb's own testimony and the trial court's finding that Cobb recognized the item as "possible narcotics" undermines the Court of Appeals conclusion that Cobb had probable cause.

d. The Unlawfully Obtained Evidence Must Be Suppressed.

The exclusionary rule requires suppression of evidence obtained as a result of an unlawful search and seizure under both the Fourth Amendment and article I, section 7. Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, 138 Wn.2d at 359.

The fruits of the search are thus excluded if the search exceeds its proper bounds. Day, 168 P.3d at 1268. The search in this case exceeded its proper bounds because Officer Cobb turned what should have been a search strictly limited to a pat down of the outer clothing into a generalized search by means of manipulating the contents of Garvin's pocket. Hudson, 124 Wn.2d at 112.

Even if Cobb's manipulation was lawful, the evidence must still be suppressed because there was no probable cause to believe the object was contraband under the plain touch doctrine. Id. at 118 (probable cause needed to seize contraband during Terry frisk).

F. CONCLUSION

For the reasons stated, Garvin respectfully requests that this Court grant review.

DATED this 26th day of November, 2007.

Respectfully Submitted,

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APPENDIX A

FILED

OCT 25 2007

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ANTHONY GAYLORD GARVIN,)
)
 Appellant.)

No. 25255-8-III

Division Three

UNPUBLISHED OPINION

RECEIVED
OCT 29 2007
Nielsen, Broman & Koch, P.L.L.C.

STEPHENS, J.—Anthony Gaylord Garvin appeals his conviction for one count of possession of a controlled substance – methamphetamine. He contends the court erred by denying his motion to suppress evidence seized by a patdown search. We affirm.

FACTS

On October 21, 2005, Officer Gregory Cobb stopped Mr. Garvin for driving with defective brake lights and a shattered front windshield. Upon approaching the car, the officer noticed that the ignition had been “punched” out and there was a knife on the seat next to Mr. Garvin. Clerk’s Papers (CP) at 14. Officer Cobb asked Officer Henning to have Mr. Garvin get out of the car. Officer Cobb

then asked Mr. Garvin if he had any additional weapons. Mr. Garvin responded by saying that he had another knife in his pants pocket.

Officer Cobb removed the knife from Mr. Garvin's pocket and placed it on the trunk of the car. He then began a patdown of Mr. Garvin using a squeezing method. Officer Cobb testified that he uses this method because he is concerned about needles and other sharp objects, and a slow, squeezing method allows him to avoid being poked. Officer Cobb squeezed the coin pocket of Mr. Garvin's jeans and felt a small "dime baggy" with a granule substance inside the pocket. Report of Proceedings (RP) (March 28, 2006) at 8-9, 17. Believing that the substance was a narcotic, the officer placed Mr. Garvin in handcuffs and removed the bag from the coin pocket. The bag contained methamphetamine.

Mr. Garvin was charged with one count of possession of a controlled substance – methamphetamine. The information was later amended to charge Mr. Garvin with one count of possession of a controlled substance – methamphetamine and one count of bail jumping.

On November 30, Mr. Garvin moved to suppress the methamphetamine evidence. He argued that the officer exceeded the permissible scope of a *Terry*¹

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

stop when he squeezed Mr. Garvin's pocket contents and removed the plastic bag from the pocket.

The court denied Mr. Garvin's motion. It determined that the officer's discovery of the methamphetamine-filled bag resulted from "a single squeezing motion as opposed to squeezing, sliding or manipulating the contents of [the] pockets." CP at 33. The court concluded that, under the "plain touch" doctrine, there was no invasion of Mr. Garvin's privacy beyond the patdown for weapons, and discovery of the baggy provided probable cause to arrest Mr. Garvin, thus allowing the removal of the plastic bag from his pocket. CP at 33-34.

Following a bench trial, the court found Mr. Garvin guilty of possession of a controlled substance – methamphetamine, but dismissed the bail jumping charge. This appeal follows.

ANALYSIS

Mr. Garvin contends the court erred by denying his motion to suppress. He argues that Officer Cobb exceeded the scope of a lawful *Terry* search when he squeezed the contents of his pocket despite ascertaining that the pocket did not contain a weapon.

When reviewing the denial of a suppression motion, we determine whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313

(1994). We give great deference to a trial court's resolution of differing accounts of the circumstances surrounding the encounter set forth in its factual findings. *Id.* at 646. When challenged, findings entered in a CrR 3.6 suppression hearing are reviewed for substantial evidence. *Id.* at 644. "Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the stated premise." *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999).

"As a general rule, warrantless searches and seizures are per se unreasonable." *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). There are, however, "a few 'jealously and carefully drawn' exceptions." *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (internal quotation marks omitted) (quoting *Hendrickson*, 129 Wn.2d at 70). A *Terry* stop for investigatory purposes is a very limited exception to the requirement of probable cause to support governmental searches and seizures. Such a stop is permitted when the law enforcement officer has an "articulable suspicion" the individual is involved in criminal activity. *Terry*, 392 U.S. at 21; *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). An officer may conduct a brief, non-invasive search of the person stopped when he has reason to believe the person is armed. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). The scope of the weapons search is limited to a patdown of the outer clothing. *Id.*

At the point the officer ascertains a weapon is not involved, any continuing search becomes unreasonable. *Id.* at 113. On the other hand, if that information coincides with the officer's recognition that an object is contraband, there is no invasion of privacy beyond that already necessitated by the search for weapons. *Id.* at 114. These circumstances have been referred to as the "plain touch" or "plain feel" exception to the warrant requirement. *Id.* at 113-14. The officer may not slide, squeeze or in any other manner manipulate the object to ascertain its incriminating nature. *Id.* at 119. Such manipulation of the object will exceed the scope of a *Terry* frisk. *Id.* When reviewing the merits of a *Terry* investigatory stop and search, we must evaluate the totality of the circumstances presented to the investigating officer, taking into account an officer's training and experience. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986).

Mr. Garvin argues that *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) is dispositive here. In *Dickerson*, the United States Supreme Court held that where an officer conducts a weapons frisk of a suspect's pockets during the course of a valid *Terry* stop and finds no object whose contour or mass makes it immediately apparent to be a weapon, the continued manipulation of the suspect's pocket constitutes an impermissible search. *Id.* at 368-78. Under *Dickerson*, a weapons frisk can become an

impermissible search when the officer goes beyond feeling for weapons and engages in further squeezing, sliding or manipulation of objects in a suspect's pockets. *Id.* at 377-78. *Dickerson* does not, however, indicate whether the scope of a *Terry* frisk is exceeded when the identification of contraband *coincides* with an officer's determination that the object is not a weapon, as is the case here.

In *Hudson*, 124 Wn.2d at 114, our Supreme Court noted, "[i]f an officer lawfully pats down a suspect and feels an object possessing characteristics that make its identify as contraband immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the search for weapons." Probable cause is required, however, to satisfy the requirement of immediate recognition. *Id.* at 118. An officer must have probable cause to believe the object he has touched is contraband, without conducting some further search. *Id.* The incriminating character must be immediately apparent. *Id.*

Here, Officer Cobb testified at the suppression hearing that he utilized a squeezing motion as opposed to a patdown based on his concern for needles and sharp objects. He said that "patting" does not give him time to respond to a sharp object before being poked. RP (March 28, 2006) at 6. He said that he squeezed the coin pocket on Mr. Garvin's jeans, because such pockets can extend quite far depending on the style of the pants, but that he squeezed the

coin pocket only once. He said that he did not feel any weapons or hard objects, but felt a small bag with something granule inside of the pocket. He said that as he squeezed the item, the granules separated. He testified that through his training and experience, he knew that he was dealing with some sort of narcotic.

Based on this testimony, we conclude that the trial court did not err by denying the motion to suppress. *Hudson*, 124 Wn.2d at 114-17. Officer Cobb had reasonable concern for officer safety because of the knives found in Mr. Garvin's car and in his pocket. Thus, the patdown search for weapons was justified. Moreover, in a single squeezing motion to feel for weapons, Officer Cobb immediately recognized the contents of Mr. Garvin's pocket as contraband. He knew he was touching some sort of narcotic without the need for any continuing manipulation of the pocket. *Dickerson*, 508 U.S. at 368. Officer Cobb's knowledge that the item in Mr. Garvin's pocket was a narcotic gave rise to probable cause justifying the seizure of the item. Some circumstances fall squarely within the narrow confines of the "plain touch" doctrine. *Hudson*, 124 Wn.2d at 114-17.

CONCLUSION

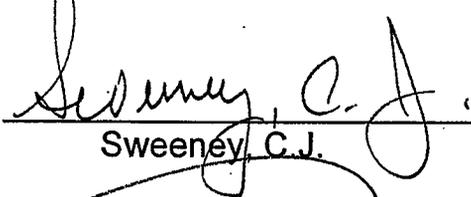
We hold Officer Cobb immediately recognized narcotics in Mr. Garvin's pocket during the weapons frisk without any further manipulation of the pocket. Under the plain touch doctrine of *Hudson*, the officer's actions did not exceed the scope of *Terry*.

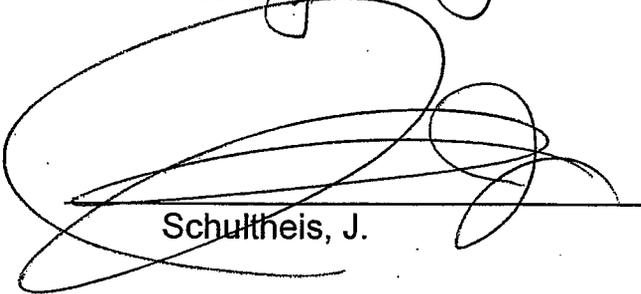
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Stephens, J.

WE CONCUR:


Sweeney, C.J.


Schultheis, J.

APPENDIX B

FILED

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PROS. ATTY
BY YAKIMA COUNTY
RECEIVED

JUN 09 2006

KIM M. EATON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ANTHONY GARVIN,

Defendant.

NO. 05-1-2429-7

FINDINGS OF FACT
CONCLUSIONS OF LAW RE 3.6

This matter having come on before the Court on March 28, 2006; Defendant appearing personally and with counsel; The State appearing through the undersigned deputy prosecutor; Testimony and evidence having been presented the court now makes the following:

I

On October 21, 2005, Officer Cobb, Union Gap PD was on patrol in that city and stopped a car driven by the Defendant for a traffic infraction. Upon approaching the car the officer could observe that the ignition had been "punched" and there was a large knife on the seat next to the Defendant. For safety reasons the officer had the Defendant get out of the car.

II

The officer escorted Mr. Garvin to the rear of Garvin's car. When asked if he had additional weapons Mr. Garvin responded that there was a knife in his pants pocket. After directing the Defendant to interlace his fingers behind his back the officer took hold of Mr. Garvin in order to search him for weapons. The officer removed a knife from Garvin's pants pocket and continued his search by "quadrants".

III

The officer conducted his search by squeezing locations on Mr. Garvin's person a method designed to locate weapons which minimizes exposure of the officer. The

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officer used a single squeezing motion as opposed to squeezing, sliding or manipulating the contents of pockets.

IV

Upon reaching the watch pocket of the Defendant's jeans the officer used this same technique. Upon squeezing the pocket the officer immediately recognized the incriminating character of a baggy and its contents as possible narcotics. This was based on the location, size and feel of the baggy. The officer could not, at this time, identify any particular controlled substance, ie heroin vs cocaine.

V

Officer Cobb, upon this realization, cuffed the Defendant, arresting him and then he removed a small baggy containing a white crystal substance which he recognized as methamphetamine.

CONCLUSIONS OF LAW

I

This Court has jurisdiction over the parties and subject matter herein.

II

The stop of the Defendant's car and the subsequent search of his person for weapons was certainly justified given the facts and these issues are not contested.

III

The plain touch doctrine discussed in State v Hudson 124 Wn.2d107,114 notes the similarity to the plain view doctrine. Where an officer lawfully pats down a defendant, as in this case, and feels an object possessing characteristics that make its identity as contraband immediately apparent, as in this case, there has been no invasion of the Defendant's privacy beyond the search for weapons.

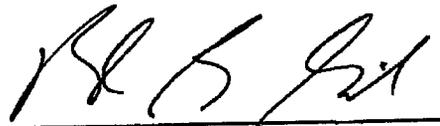
IV

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The discovery made by squeezing the watch pocket provided probable cause to arrest the Defendant allowing the removal of the baggy incident thereto.

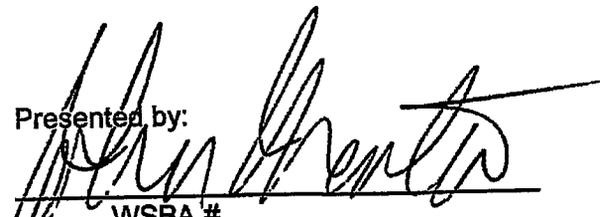
Based on the foregoing the Court must deny the Defendant's motion.

Done in open Court this 14 day of ^{June}~~April~~, 2006.



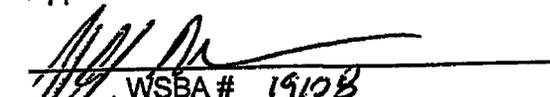
Judge

Presented by:



, WSBA #
Deputy Prosecuting Attorney

Approved as to form:



, WSBA # 19108
Attorney for Defendant

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED

NOV 29 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ANTHONY GARVIN,)
)
 Appellant.)

NO. _____
COA NO. 25255-8-III

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF NOVEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVIN EILMES
YAKIMA COUNTY PROSECUTOR'S OFFICE
128 NORTH 2ND STREET, ROOM 329
YAKIMA, WA 98901

[X] ANTHONY GARVIN
1304 E ALDER, #16
YAKIMA, WA 98901

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER, 2007.

x Patrick Mayovsky

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STATE OF WASHINGTON
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