

SUPREME COURT NO. 80941-1

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GARVIN,

Petitioner.

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SUPREME COURT  
STATE OF WASHINGTON

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

The Honorable Susan Hahn, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER ANTHONY GARVIN

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A. SUPPLEMENTAL ISSUE STATEMENTS

1. In conducting a protective search for weapons during the course of a Terry stop, a police officer is strictly limited to a pat down of the outer clothing. The officer may not manipulate objects or otherwise engage in a more intrusive search unless the initial pat down reveals an object that may be a weapon. In petitioner's case, the Court of Appeals held the officer conducted a lawful Terry frisk even though the officer did not do a pat down but rather manipulated the contents of petitioner's pants pocket from the outset of the search. Should this Court reverse and hold the officer's invasive probe exceeded the carefully limited scope of a lawful Terry frisk for weapons?

2. The plain touch exception to the warrant requirement does not justify seizure of contraband during a Terry frisk for weapons unless the officer has immediate knowledge sufficient to support probable cause that the object being touched is contraband. The Court of Appeals held the officer was justified in seizing a small baggie from petitioner's pocket even though the officer only suspected the presence of possible narcotics. Should this Court reverse and hold the seizure unlawful because the officer lacked probable cause under the plain touch doctrine to believe the object was an illegal substance?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The Yakima County prosecutor charged Anthony Garvin with unlawful possession of methamphetamine, 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 protective frisk for weapons. CP 20-28.

The evidence presented at the CrR 3.6 hearing showed Union Gap police officer Gregory Cobb stopped Garvin's car for a traffic infraction. CP 32; RP 1 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. 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, quadrant by quadrant. CP 32; RP 4-9, 15-16.

Officer Cobb testified, "We don't really pat anymore. It's more of a squeeze search. And I'll squeeze the contents of the pocket and try to identify what's in there, and then I work my way up the pocket and I

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<sup>1</sup> This petition refers to the verbatim report of proceedings as follows: RP - 3/28/06.

squeeze." 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.

Garvin wore blue jeans with a coin pocket on the day in question. RP 8-9. A coin pocket is a pocket set within the main pants pocket. RP 7-8, 16

Cobb first squeezed the main pocket of Garvin's pants pocket. RP 16. He then separately squeezed the coin pocket because the dimensions of the coin pocket are "much different." RP 16. Based on experience, Cobb knew narcotics are often kept in the coin pocket. RP 9.

Cobb 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 one and a half inch by one and half inch plastic baggie containing a powder or crystalline substance. RP 8, 17.

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). When later asked if he immediately recognized what he was squeezing, the officer responded, "I knew exactly what I was squeezing at that point." RP 10. He knew it was "suspected narcotics packaging." RP 10. 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 Garvin's pocket, Cobb handcuffed Garvin 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 methamphetamine weighed 0.1 gram. CP 16.

As part of the CrR 3.6 hearing, defense counsel tested Cobb's ability to identify objects through sense of touch by having Cobb squeeze Garvin's pockets in the courtroom. RP 13-14. Cobb was able to determine he was feeling something in sandwich-size bags, but could not determine the contents of the bags. RP 15, 17. When asked by the court

how he was able to identify narcotics in Garvin's pocket on the day of the search but not identify the substances he felt during the CrR 3.6 demonstration, the officer specifically relied on his ability to distinguish between a regular freezer sandwich bag and "a small, an inch and a half by inch and a half" plastic baggie. RP 17. According to Cobb, the regular size bag "could contain anything." RP 17. "It could be Kool-Aid for all I know." RP 17. Cobb said most people do not carry an inch and a half by inch and half "dime baggy" in a coin pocket with a crystalline substance. RP 17.

The trial court denied Garvin's motion to suppress and 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. The court subsequently found Garvin guilty of possession of a controlled substance after a bench trial on stipulated facts. CP 12-18.

On appeal to Division Three, 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 Cobb lacked probable cause to believe the object in Garvin's

pocket was contraband 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 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 "further manipulation" of the pocket. Slip op. at 8.

Garvin filed a petition for review, which this Court granted.

C. ARGUMENT

1. THE OFFICER EXCEEDED THE SCOPE OF A LAWFUL TERRY FRISK WHEN HE MANIPULATED GARVIN'S POCKET FROM THE OUTSET OF THE SEARCH.

In effect, Division Three held police officers can lawfully 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. Division Three's decision unacceptably erodes the right to be free from searches by government agents and should be reversed.

a. The Officer's Intrusive Squeeze Search Was No Different Than A General Exploratory Search For Contraband.

The Court of Appeals, without acknowledging the ramifications of its decision, extended one of this Court's carefully drawn exceptions to the warrant requirement in treating an officer's squeeze search as synonymous with a lawful pat down.

The Terry frisk exception to the warrant requirement is "narrowly drawn and carefully circumscribed." State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). A valid weapons frisk is "strictly limited" to an initial pat down search of the outer clothing. Id. at 112-13. Cobb's squeeze method of searching exceeds the scope of a valid Terry frisk for weapons.

The Court of Appeals acknowledged an officer "may not slide, squeeze or in any other manner manipulate the object to ascertain its incriminating nature," and that "[s]uch manipulation will exceed the scope of a Terry frisk." Slip op. at 5. The Court of Appeals nevertheless held the search was lawful because Cobb "immediately recognized" the presence of narcotics in Garvin's pocket "without any *further* manipulation of the pocket." Slip op. at 8 (emphasis added).

But no manipulation at all is allowed unless and until the pat down reveals the questionable presence of a weapon, and even then the officer

may only "take such action as is necessary" to confirm whether the object is a weapon. Hudson, 124 Wn.2d at 112-13. Officer Cobb testified, "We don't really pat anymore. It's more of a squeeze search." RP 7. Cobb should have started by patting down the outside of Garvin's pocket. Instead, Cobb dispensed with the pat down altogether.

Both the trial court and the Court of Appeals were beguiled by the notion that the search was lawful because the officer squeezed the coin pocket only once. Slip op. at 6-7; CP 33. Instead of appropriately focusing on the impermissibly manipulative nature of the squeeze itself, the lower courts treated the number of squeezes as the dispositive point.

A Terry frisk for weapons must be brief and nonintrusive. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265, 1267 (2007). Short of actually reaching into the pocket, there is no more intrusive action than squeezing the pocket as Cobb did. Furthermore, Garvin was not subjected to a single, brief squeeze. Cobb repeatedly, methodically, and slowly squeezed Garvin all over his body, quadrant by quadrant, which allowed him to feel "the texture of things." RP 4-9; 15-16. When Cobb reached Garvin's pants pocket, he squeezed the main pocket first. RP 16. Finding nothing, he squeezed the coin pocket, which he knew from experience

often contained narcotics.<sup>2</sup> RP 9. It was only at this point, in squeezing the baggie until granules separated between his fingers, that Cobb suspected the presence of possible contraband. RP 9-10, 12.

Terry does not allow "any search whatever for anything but weapons." Ybarra v. Illinois, 444 U.S. 85, 93-94, 100 S. Ct. 338, 62 L. Ed.2d 238 (1979). In light of this standard, it is troubling that Cobb's method of searching for "weapons," which he employs as a matter of routine policy, is equally capable of detecting a tiny amount of narcotic (0.1 gram) hidden inside someone's interior jean pocket.

Cobb slowly squeezed Garvin's pocket until he could feel the granules separate between his fingers. RP 9. This squeezing method allowed Cobb to determine he was feeling an inch and half by inch and a half plastic baggie containing a powder or crystalline substance. RP 8, 17. There is no way Cobb could ascertain this minute level of detail without considerable manipulation. See Hudson, 124 Wn.2d at 118 (officer's detailed description of the tactile qualities of contraband in baggie suggests considerable manipulation). Cobb's squeeze method of searching

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<sup>2</sup> The Court of Appeals pointed out Cobb's testimony that he squeezed the coin pocket "because such pockets can extend quite far depending on the style of the pants." Slip op. at 6; RP 7-8. What the Court of Appeals failed to point out, however, is that Cobb could not even recall whether Garvin wore the style of pants that contained a coin pocket longer than an inch or two. RP 11-12.

turned what should have been a nonintrusive pat down into a general exploratory search for whatever evidence of criminal activity he might find. The United States Supreme Court declared this very type of search unlawful forty years ago. Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).

Cobb never explained why, if he was concerned about being poked by a sharp object, he squeezed Garvin's pocket until the granules separated between his fingers. See State v. Hobart, 94 Wn.2d 437, 439, 617 P.2d 429 (1980) (frisk unlawful where officer squeezed balloons "with the obvious purpose of ascertaining whether they had the shape and consistency of balloons commonly used for narcotics."). There was no need to manipulate Garvin's pocket to this considerable extent in determining the object did not have the size and density of a weapon. Searches that exceed what is necessary to determine if an individual is armed amount "to the sort of evidentiary search that Terry expressly refused to authorize" Minnesota v. Dickerson, 508 U.S. 366, 378, 113 S. Ct. 2130, 2135, 124 L. Ed.2d 334 (1993).

It does not matter whether Cobb subjectively believed he was only searching for weapons. This Court has "long declined to create 'good faith' exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers

that they were acting in conformity with one of the recognized exceptions to the warrant requirement." State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005).

Nor does it matter if Cobb's method of searching can be characterized as "reasonable" in some sense. "[U]nlike the Fourth Amendment, article I, section 7 'focuses on the rights of the individual rather than on the reasonableness of the government action.'" State v. Eisfeldt, \_\_ Wn.2d \_\_, 185 P.3d 580, 586 (2008) (quoting Morse, 156 Wn.2d at 12). "[A]rticle I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." Eisfeldt, 185 P.3d at 584.

The eagerness with which the lower courts seized upon the officer's explanation that squeezing was better than patting down for purposes of avoiding being stuck by a sharp object is misplaced. Slip op. at 6; CP 32. The sole purpose of a Terry frisk is to detect weapons. Ybarra, 444 U.S. at 93-94. The lower courts, in upholding the lawfulness of the search, credited the officer's collateral concern that the scope of the frisk itself needed to be enlarged because he could be poked during the course of searching for weapons. But if the squeeze is lawful by virtue of the need to search for weapons, then it should not matter why the officer is squeezing so long as there is a reasonable fear that the suspect is armed

with a weapon. The fear of being stuck while searching for a weapon should be irrelevant.

On the other hand, if the squeeze is unlawful but for the officer's fear of being stuck, then the courts should have recognized the law they were creating for what it is: an unprecedented enlargement of this Court's carefully tailored exception to the warrant requirement. Given that a sharp object is always potentially present in someone's pocket, affirming the Court of Appeals decision would mean police officers could lawfully squeeze or otherwise manipulate a suspect's clothing in every Terry frisk encounter.

This Court jealously guards exceptions to the warrant requirement "lest they swallow what our constitution enshrines." Day, 161 Wn.2d at 894. Nowhere is the need to jealously guard such exception more pressing than in the context of a Terry frisk, where the temptation to conduct a general exploratory search in the guise of searching for weapons is ever present and a lawful pat down turns into unlawful manipulation so readily.

This Court has "always been careful to balance an individual's privacy concerns with the safety concerns and law enforcement duties of police officers." State v. Grande, \_\_ Wn.2d \_\_, 187 P.3d 248, 253 (2008). This Court maintains the balance struck by Terry forty years ago: "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. Cobb's subjective belief that he would be safer if he squeezed the clothing rather than patted it down to avoid being poked does not trump constitutional protections afforded the person being touched. See Eisfeldt, 185 P.3d at 586 (under article I, section 7, focus is on expectation of person being searched rather than reasonableness of officer action).

b. 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 squeeze did not exceed the scope of a lawful Terry frisk, the subsequent seizure of the object from Garvin's pocket was unlawful because Cobb did not immediately recognize the object as contraband with enough certainty to support probable cause.

Contraband seized during the course of an otherwise lawful Terry frisk is admissible only if the requirements of the "plain touch" doctrine are met. Dickerson, 508 U.S. at 375-76. Under the plain touch doctrine, officers may lawfully seize evidence during the course of a pat down only 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. Probable cause is required to satisfy the

"immediate recognition" prong of the plain touch doctrine. Id. at 118. The probable cause requirement guards against "excessively speculative seizures." Dickerson, 508 U.S. at 376. Whether probable cause exists is a question of law reviewed de novo. State v. Chamberlin, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

Officer Cobb testified he only suspected the item he felt in Garvin's pocket was a narcotic. RP 10, 12. The trial court found Cobb knew it was "possible" narcotics. CP 33. That is not good enough to satisfy the immediate recognition requirement. See Hudson, 124 Wn.2d at 119 (officer testimony that a substance has tactile qualities "likely" to be a controlled substance and "consistent" with such a substance is not sufficiently certain to constitute immediate knowledge). Nor did Cobb immediately recognize the object as contraband, as shown by the fact that he squeezed the object in Garvin's pocket until granules separated between his fingers.

c. The Unlawfully Obtained Evidence Must Be Suppressed And the Charge Dismissed With Prejudice.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). This Court suppresses evidence not to punish the police, but to

avoid becoming "knowingly complicit in an unconstitutional exercise of power." Day, 161 Wn.2d at 894. The fruits of the search are thus excluded if a search exceeds its proper bounds. Id. at 895.

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 something indistinguishable from a generalized search for contraband by means of manipulating the contents of Garvin's pocket. Hudson, 124 Wn.2d at 112. The fruits of this search include the methamphetamine found in Garvin's pocket and the test results showing the identity of this substance. Even if Cobb's squeeze 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.

Conviction must be reversed and the charge dismissed with prejudice if there is insufficient evidence to prove each element of the crime. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The State cannot prove Garvin possessed methamphetamine without the suppressed evidence. This Court should therefore dismiss the charge of methamphetamine possession with prejudice. See State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges because remaining evidence insufficient to prove guilt beyond a reasonable doubt).

D. CONCLUSION

Garvin respectfully requests that this Court reverse the decision of the Court of Appeals and dismiss the charge with prejudice.

DATED this 11<sup>th</sup> day of August, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
\_\_\_\_\_  
CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 80941-1
	)	
ANTHONY GARVIN,	)	
	)	
Appellant.	)	

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**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 11<sup>TH</sup> DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPELEMENTAL BRIEF OF PETITIONER ANTHONY GARVIN** 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 2<sup>ND</sup> STREET, ROOM 329  
YAKIMA, WA 98901

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF AUGUST, 2008.

x *Patrick Mayovsky*