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A. Assignment of Error

Assignment of Error

The trial court erred by denying Mr. Duncan's motion to suppress all evidence illegally seized from him on May 2, 2006.

Issues Pertaining to Assignment of Error

Mr. Duncan was searched as part of a Terry investigation for weapons. Did the officer illegally exceed the scope of the Terry search when he removed a "hard object" from his jacket pocket that he did not reasonably believe was either a weapon or contraband?

B. Statement of Facts

Dennis Duncan was charged by information with possession of methamphetamine. CP, 1. Prior to trial, he filed a motion to suppress evidence based upon an illegal search. CP, 6. A hearing was held on July 18, 2006 to address the motion. RP, 1. At that hearing, the parties stipulated to the admissibility of the probable cause affidavit in lieu of testimony. RP, 2. The trial court concluded that the methamphetamine was discovered during a valid Terry search and denied the motion. RP, 14.

The methamphetamine in question was discovered during a pat down search conducted by Officer Michael Davis. His report reads:

On 5-2-06 at 0811 hrs. CenCom advised of a suspicious vehicle in the 1100 blk of Wycoff Ave under the 11<sup>th</sup> St overpass. CenCom advised that subjects may be sleeping in the vehicle. This area is residential/commercial with a heavy flow of vehicle/foot traffic. Sgt W Davis and I arrived and observed a tan Dodge van #A508771 parked on the shoulder. As we approached the passenger side of the van, I noticed that the side door was open and facing the sidewalk. I could see that the interior of the van was cluttered with items. I noticed a butane torch commonly used in the smoking of narcotics in the van. As we slowly approached the opened side of the van, I observed a subject lying down on a bed in the rear of the van. I then heard what appeared to be a buzzing sound. I then observed the subject holding a chrome object in his right hand. The object was being held near the subjects genital area below his waist. The object had a long white cord coming from the end of it. We contacted the subject and asked him to step out of his van. The subject then looked at me and turned away throwing the item towards the rear of the van. I asked the subject who then turned back in my direction to show me his hands as he quickly placed them into his jacket. The subject, who I then recognized from prior contacts as Dennis Duncan began moving towards me. Duncan quickly placed his hands back into his jacket. I advised Duncan again to take his hands out of his jacket. Duncan exited the van and was very unsteady. I placed Duncan into the pat down position. I noticed a buldge in Duncan's left front jacket pocket where he placed his hands into his pocket twice. I patted down the outside of the pocket and felt the hard object but could not make out what the object was. Sgt Davis advised that the chrome object was a vibrator. Duncan's conduct clearly violated the BMC Lewd Conduct code 9A44.070 #4. I opened the pocket to look inside and noticed a clear plastic baggie with suspected Methamphetamine inside. Duncan was in possession of a second baggie that was located inside of right front jacket pocket. Baggie #A weighed 0.5 and baggie #B weighed 0.8 grams. The suspected Methamphetamine was NIK tested at the scene and tested positive for Methamphetamine. Duncan was placed in handcuffs which were checked for proper fit and double locked. Duncan was issued his Miranda Warnings from a department issued rights card. Duncan stated that he understood his rights and that he wished to speak to me. Duncan advised that the object he was holding was a vibrator and that the crystal substance he possessed was Methamphetamine. Duncan stated that he last used "yesterday."

Mr. Duncan was convicted after a stipulated facts trial on July 28, 2006. CP, 20, RP, 20. The stipulated facts from the suppression hearing indicate that, after the discovery of the first baggie of methamphetamine, Officer Davis discovered a second baggie in Mr. Duncan's jacket pocket. The second baggie, referenced in Officer Davis' report, is not mentioned at all in the stipulated facts from the trial. Consequently, only the first baggie is at issue in this appeal.

Mr. Duncan was sentenced to 25 days in custody. CP, 30, RP, 24. He promptly appealed. RP, 24.

#### C. Argument

**The officer illegally exceeded the scope of the Terry search when he removed a "hard object" from Mr. Duncan's jacket pocket that he did not reasonably believe was either a weapon or contraband.**

The trial court ruled that the detention and pat down search of Mr. Duncan was justified under Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1968 (1968). In Terry, the Supreme Court held that a brief detention of a suspect is justified when "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Terry at 30. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to

pursue his investigation without fear of violence.” Adams v. Williams, 407 U.S. 143, 145-146, 32 L. Ed. 2d 612, 92 S.Ct. 1921 (1972).

In Minnesota v. Dickerson, 508 U.S. 366, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993) the United States Supreme Court reviewed the permissible scope of a search under Terry v. Ohio. In what the Supreme Court called a “plain touch” seizure, the Court said that a police officer is not required to ignore the discovery of evidence while patting down a subject pursuant to Terry. Emphasizing that the purpose of a Terry pat-down is not the discovery of evidence, however, the Court placed an important restriction on the seizure: the officer must have probable cause to believe and immediately recognize the object as contraband.

The Supreme Court analogized to the case of Arizona v. Hicks, 480 U.S. 321, 94 L.Ed.2d 347, 107 S.Ct. 1149 (1987), a “plain view” case. In Hicks, the officer observed a television set that he suspected was stolen. Trying to confirm his suspicions, he tipped the television enough to write down the serial number. The Supreme Court held that the tipping of the television was an illegal seizure because the officer did not immediately recognize the television as contraband. Likewise, if an officer cannot immediately determine by touch that an object in a pocket is contraband, then it is not within his “plain touch” and may not be seized.

The facts of Dickerson are illustrative. The officer was conducting a Terry detention and pat-down when he felt a "small lump" in the suspect's pocket. Examining it with his fingers, the lump slid, causing him to believe it was an object in cellophane. Removing the object, he determined it was crack cocaine. The United States Supreme Court affirmed the suppression of the lump because the officer did not immediately recognize the object as contraband. When the officer first felt the lump in the suspect's front pocket, he did not suspect it was a weapon and at the same time, he did not have probable cause to believe it was cocaine. He determined it was cocaine only after he squeezed the lump. Dickerson, 113 S. Ct. at 2138. The Court, therefore, concluded that the search should have ended once the officer was certain that the lump was not a weapon. Dickerson, 113 S. Ct. at 2138-39.

In State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995) the Court of Appeals relied on Dickerson to conclude that a Terry search was illegal. (The Court upheld the search on an alternative ground not applicable here.) An officer observed what he believed to be a drug deal taking place. The suspect dropped something on the ground and immediately picked it up and placed it in his pocket. The suspect kept his hand in his pocket continuously until contacted by the officer. The officer reached into the pocket and pulled out drugs. The Court held that the

search of the suspect's pocket fell outside the scope of the Terry exception because it was a search for evidence, not weapons.

In State v. Tzintzun-Jimenez, 72 Wn.App. 852, 866 P.2d 667 (1994) the Court reached a similar conclusion. In Tzintzun-Jimenez, the officer was questioning two young men. The men were moving around evasively, which caused the officer to become concerned for his safety. He decided to pat them down for weapons. One of the suspects pulled away from the officer during the pat down, causing the officer to hook his finger into his coin-fob pocket. Inside the pocket he felt a slippery material. Upon continuing the pat down, he removed the slippery material, which turned out to be a plastic baggie containing cocaine. The Court held that the removal of the slippery object was illegal and suppressed.

The Court in Tzintzun-Jimenez emphasized that the burden is on the prosecutor to prove that the officer had probable cause, upon feeling an object during a pat down, to believe that the object is contraband. The absence of a finding by the trial court that the officer knew that a slippery material was likely cocaine was "fatal."

In this case, Officer Davis was conducting a pat down search of Mr. Duncan. Mr. Duncan twice placed his hands into his jacket pocket. Mr. Davis got out of the van and Officer Davis placed him into a "pat

down position.” He patted the outside of his jacket and felt a hard object that he could not identify. He could not determine what the object was, so he opened the pocket and saw a baggie with suspected methamphetamine. The baggie turned out to be 0.5 grams of methamphetamine.

Under Dickerson and its progeny, the opening of the pocket to determine the identity of the hard object was illegal. By his own admission, when he felt the hard object, he did not know what it was. He clearly did not have probable cause to believe it was contraband nor did he immediately recognize it as drugs.

It is possible the State will argue that the fact he could not determine what the hard object was justified the subsequent search of Mr. Duncan’s pocket because the object could have been a weapon. The State raised a similar argument in State v. Horton, \_\_ Wn.App. \_\_, 146 P.3d 1227 (2006). In Horton, the officer conducted a pat down search and found a cigarette package. He then searched the cigarette package and found methamphetamine. The State argued that the second search was justified because the cigarette package could have contained a small weapon, such as a razor blade. The Court rejected this argument saying, “Incident to a Terry investigative stop, an officer may perform a superficial pat down of the outer clothing for weapons, if the particular circumstances present grounds for concern for officer safety. The

protective search must be justified in scope throughout the duration of the search. The officer may withdraw an object if it feels like it might be a weapon. But if the officer withdraws a cigarette pack under this rationale, the justification for the intrusion ends once he determines it is not a weapon.” Horton at \_\_\_. Regarding the scope of the search, the Court observed, “Nothing in the particular circumstances here suggested that Mr. Horton's weapon of choice was likely to be a razor blade or paper clip.” Horton at \_\_\_.

In Mr. Duncan’s case, the trial court did not make any findings in its findings of fact that Officer Davis reasonably believed that the hard object was a weapon. CP, 26. Nor is there anything in the stipulated facts justifying a finding that Officer Davis reasonably believed the object was a weapon. It is hard to imagine how an experienced officer could mistake 0.5 grams of powder for a weapon. If anything, the cigarette package at issue in Horton was more likely to contain a weapon than a plastic baggie with 0.5 grams of methamphetamine.

The Horton case emphasized that a search must be justified throughout its duration. Accord State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991) (Search must be reasonably related in scope to the circumstances which justified the interference in the first place). In this case, Mr. Duncan was being investigated for lewd conduct and public masturbation

while lying alone in his van on a public road. He was seen with a vibrator placed against his clothed genitals. He immediately threw the vibrator to the back of the van upon being discovered. There is nothing about these circumstances that justified Officer Davis' opening his pocket in order to identify an object the size of 0.5 grams of powder. The search was not justified throughout its duration.

Before concluding, it is necessary to address an issue raised by the parties, but not ruled on by the trial court. The State argued that Mr. Duncan was arrested for lewd conduct and the subsequent search was incident to that arrest. RP, 8. The trial court confined its analysis to the Terry search and did not reach the issue of whether there was a valid search incident to arrest. Although this Court may affirm the trial court on any ground raised in the trial court, regardless of whether the trial court ruled on it or not, there are three reasons why it is not appropriate to affirm the trial court on this ground.

First, the stipulated facts set out the chronology of events, which show that Mr. Duncan was searched prior to the determination of probable cause for lewd conduct. At the time Mr. Duncan was removed from the van, the buzzing "chrome object" had not yet been identified. After getting out of the van, Mr. Duncan was promptly searched by Officer Davis while Sergeant Davis identified the chrome object, last seen in the rear of the

van. The stipulated facts do not state if Sergeant Davis entered the van or not. But Sergeant Davis was able, after the pat down search had commenced, to identify the chrome object as a vibrator. At that point, Officer Davis determined that he had probable cause to arrest for lewd conduct. Because the search occurred prior to the probable cause determination, it was not a search incident to arrest.

Second, it is unclear if Officer Davis' probable cause determination was correct. In the trial court, the parties argued whether Officer Davis had probable cause to arrest for lewd conduct. RP, 6. The trial court specifically refrained from reaching this conclusion, choosing instead to base its decision on the reasonable and articulable suspicion standard of Terry, which the trial court described as "not as much [evidence] as probable cause." RP, 13. Given that the trial court made no determination of probable cause, it is not appropriate for this Court to reach that issue for the first time.

The third and most important reason this Court should refrain from addressing the search incident to arrest is that there was no arrest. Even assuming Officer Davis had probable cause to arrest for lewd conduct, there is no indication in the stipulated facts that Mr. Duncan was actually arrested for lewd conduct. In State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) the Supreme Court held that a valid arrest is a condition

precedent for a search incident to arrest. Mr. Duncan cited O'Neill in the trial court. CP, 15. Because Mr. Duncan was not arrested, there could not be a lawful search incident to arrest.

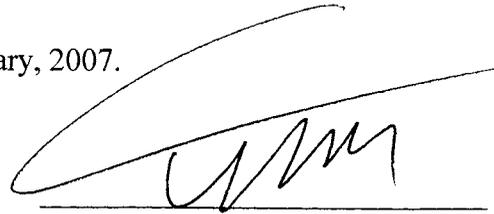
One final issue needs to be addressed. The stipulated facts from the trial indicate that Mr. Duncan was convicted only of possessing the baggie of methamphetamine from the pocket that was searched during the pat down. The second baggie of methamphetamine, mentioned in the stipulated facts from the suppression hearing, was not mentioned at the trial. Mr. Duncan's motion to suppress asked that "all controlled substances and drug paraphernalia" be suppressed. CP, 6. The parties limited their arguments to the first baggie and the trial court's findings of fact make no mention of the second baggie. CP, 26. Even so, under the circumstances of this case, even if the second baggie is included, its discovery would be fruit of the poisonous tree from the illegal search of the jacket pocket. Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S.Ct. 407 (1963).

The trial court properly treated this case as a Terry search and not a search incident to arrest. But the trial court erred by not suppressing the methamphetamine because it exceeded the proper scope of a Terry search.

D. Conclusion

This Court should reverse and dismiss Mr. Duncan's conviction because the evidence was seized during an illegal search.

DATED this 12th day of January, 2007.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant



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On January 12, 2007, I sent a copy, postage prepaid, of BRIEF OF APPELLANT to Mr. Dennis James Duncan, 17540 Hintzville Rd. N.W., Seabeck, WA 98380.

Dated this 12<sup>th</sup> day of January, 2007.



Thomas E. Weaver  
WSBA #22488  
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 12<sup>th</sup> day of January, 2007.



Christy McAdoo  
NOTARY PUBLIC in and for  
the State of Washington.  
My commission expires: 7/31/2010