

79690-4

Supreme Court No. _____
COA No. 33846-7-II

FILED
JAN 17 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON
ap

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DEREK SETTERSTROM,

Petitioner.

PETITION FOR REVIEW

FILED
COURT OF APPEALS
DIVISION II
06 JAN 16 AM 10:30
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

PETER B. TILLER
Attorney for Petitioner

THE TILLER LAW FIRM
N. Rock & W. Pine Streets
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

A. IDENTITY OF MOVING PARTY 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW..... 1

D. STATEMENT OF THE CASE 2

 1. Proceedings on Appeal..... 6

E. ARGUMENT 7

 1. THE OFFICER EXCEEDED THE PERMISSIBLE SCOPE OF A TERRY PAT-DOWN WHEN HE REMOVED THE HARD OBJECT FROM SETTERSTROM'S PANTS BECAUSE THE SHAPE AND SIZE OF THE ITEMS IN SETTERSTROM'S POCKETS DID NOT ESTABLISH PROBABLE CAUSE THAT HE POSSESSED A WEAPON...... 7

F. CONCLUSION 122

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Broadnax, 98 Wn.2d 389, 654 P.2d 96 (1982)..... 11, 12
State v. Hobart, 94 Wn.2d 437, 617 P.2d 429 (1980) 7, 8
State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994)..... 10
State v. Loewen, 97 Wn.2d 562, 647 P.2d 489 (1982)..... 7, 9
State v. Smith, 115 Wn.2d 775, 801 P.2d 975 (1990)..... 8
State v. Terrazas, 71 Wn. App. 873, 863 P.2d 75 (1993)..... 8

Washington Court of Appeals Decisions

State v. Blair, 65 Wn. App. 64, 827 P.2d 356 (1992)..... 7
State v. Fowler, 76 Wn. App. 168, 883 P.2d 338 (1994)..... 1, 2, 8, 9
State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993).... 1, 2, 8, 9
State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650
(1995)..... 8
State v. Tzinzun-Jimenez, 72 Wn. App. 852, 866 P.2d 667
(1994)..... 10, 11
State v. Wilkinson, 56 Wn. App. 812, 785 P.2d 1139 (1989)..... 8

United States Supreme Court Decisions

Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed.
2d 334 (1993)..... 9, 10, 11, 12
Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889
(1968)..... 7, 11, 12

Rules

CrR 3.6..... 2
RAP 13.4(b)(4)..... 2

A. IDENTITY OF PETITIONER

Petitioner Setterstrom, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section

B.

B. COURT OF APPEALS DECISION

Dixon seeks review of Division Two's Order Denying Motion to Modify in *State v. Setterstrom*, No. 39-3-II (Filed December 20, 2006), and the Court Commissioner's Ruling Affirming Judgment. A Copy of the ruling Affirming Judgment and Order Denying Motion to Modify. Opinion is attached hereto.

C. ISSUES PRESENTED FOR REVIEW

1. Setterstrom was prosecuted for possession of methamphetamine. In *State v. Fowler*,¹ and *State v. Galbert*,² Division 3 and 1 of the Court of Appeals, respectively, addressed the limits of removing unknown objects not reasonably suspected of being weapons during searches. Was the ruling of the Court Commissioner affirming the trial court's finding that law enforcement did not exceed the scope of a lawful search when he removed the Ziploc baggie from the Appellant's pants pocket where the officer testified that he felt "hard objects" in his pocket and

¹ *State v. Fowler*, 76 Wn. App. 168, 170, 883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995);

² *State v. Galbert*, 70 Wn. App. 721, 725, 855 P.2d 310 (1993).

testified that he removed all the objects from the Appellant's pocket, including the Ziploc baggie in error?

Should this Court grant review to clarify the application of *Fowler and Galbert*? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Michael Setterstrom was convicted of one count of possession of methamphetamine. The defense moved pursuant to Criminal Rule 3.6 to suppress methamphetamines found by Lieutenant Don Stevens during a search of Mr. Setterstrom on February 28, 2005, and to dismiss the charge. CP at 8-12. The motion was heard by the Honorable William Thomas McPhee on August 22, 2005. Report of Proceedings [RP] (8.22.05) at 1-44.

Don Stevens, a lieutenant employed by the Tumwater Police Department, testified that he was dispatched to a Department of Social and Health Services building located at 6860 Capitol Boulevard in Olympia regarding a complaint of two individuals in the lobby of the building. RP (8.22.05) at 9. Lt. Stevens stated that Mr. Setterstrom was sitting on a bench in the lobby filling out a form, and the second man appeared to be asleep. RP (8.22.05) at 10. He described Mr. Setterstrom as having "fidgiting, uncontrollable behavior, up and down in his activities." RP

(8.22.05) at 10.

Lt. Stevens stated that he looked at the form Mr. Setterstrom was filling out and noted that his name appeared to be Michael Setterstrom. RP (8.22.05) at 10. Lt. Stevens asked him if that was his name, and Mr. Setterstrom stated that it was not him and that he was filling out the form for a friend. RP (8.22.05) at 10. Lt. Stevens testified that he stated that his name was Victor M. Garcia. RP (8.22.05) at 10.

Lt. Stevens stated that he believed that Mr. Setterstrom “was high on some kind of drugs, methamphetamine.” RP (8.22.05) at 11. He stated that Mr. Setterstrom's behavior of “twitching and fidgeting” was escalating and that as he was being questioned, Mr. Setterstrom “started to become nervous.” RP (8.22.05) at 19. Lt. Stevens stated that Mr. Setterstrom had started to make “me feel like I was in some sort of threat there and I needed to take control of the subject.” RP (8.22.05) at 19. Lt. Stevens separated him from the other individual—later identified as Joseph Rice—who was now awake. RP (8.22.05) at 11. Lt. Stevens performed a “pat down” search of Mr. Setterstrom “to make sure there was no danger to me as far as weapons were involved.” RP (8.22.05) at 12. He stated that he felt “hard objects” in Mr. Setterstrom’s right

front pants pocket. RP (8.22.05) at 12. He removed the objects, which involved a small Ziploc baggie containing a white crystalline powder substance. RP (8.22.05) at 12. Lt. Stevens testified that he “didn’t document” the other objects that he stated he removed from Mr. Setterstrom’s pocket. RP (8.22.05) at 13. He testified that did not “recall feeling a gun” in Setterstrom’s pocket. RP (8.22.05) at 22. The “hard objects” that Lt. Stevens referred to were not placed in evidence. RP (8.22.05) at 23. He denied that he was looking for drugs at the time of the search. RP (8.22.05) at 23-24.

As Lt. Stevens was handcuffing Mr. Setterstrom, he “dropped down to his knees and sucked the baggie into his mouth” and swallowed it. RP (8.22.05) at 14. The baggie was not recovered. Trial RP at 33.

The other man was identified as Joseph Rice. RP (8.22.05) at 27. Mr. Rice was not arrested as a result of the contact. Trial RP at 57.

After hearing testimony, Judge McPhee denied the motion to suppress evidence obtained by the officer, and ruled that Lt. Stevens was justified in detaining Mr. Setterstrom and patting him down. RP (8.22.05) at 40. Judge McPhee found that the officer’s action of removing all the contents of the pants pocket was not

unreasonable under the circumstances. RP (8.22.05) at 41. ;

At trial, Lt. Stevens testified regarding his contact with Mr. Stevens in the lobby of the DSHS building, the discovery of the Ziploc baggie in Mr. Setterstrom's pocket, and the eventual swallowing of the same. Trial RP at 23-49. Lt. Stevens also searched a black bag, which he stated that Mr. Setterstrom identified as his own. Trial RP at 33. Inside the black bag he found a small Sentry safe and other items. Trial RP at 34. Lt. Stevens obtained a search warrant and opened the locked safe on March 3, 2005. Trial RP at 34. Exhibit 6. Inside the safe he found a Ziploc baggie. Exhibit 2. The defense stipulated that the baggie contained methamphetamine. Trial RP at 66. Exhibits 1 and 7. Lt. Stevens also found a syringe containing a clear liquid substance in the safe. Trial RP at 36. Exhibit 5.

Mr. Setterstrom that he was the DSHS building in order to apply for medical benefits and disability benefits. Trial RP at 69. He stated that he owned the black bag and a fishing box seized by police at the time of his arrest, but stated the safe inside the black bag belonged to his roommate Joseph Rice the morning of the arrest. Trial RP at 70, 76. He stated that Mr. Rice put it in the bag the morning of the arrest when he was holding the black bag. Trial

RP at 70. He stated that he was unaware of the contents of the safe, but thought it contained equipment used to sanitize tattoo needles. Trial RP at 70, 79. He stated he did not have access to the safe and did not have a key to open it. Trial RP at 70.

Mr. Setterstrom testified that he originally thought he was swallowing a bag of methamphetamine when he was arrested and thought that he might get high from it. Trial RP at 74. He stated that he did not know what was in the baggie, and that “as it turns out it wasn’t a bag of meth so there was nothing to get high off of.” Trial RP at 73, 74.

Setterstrom was convicted of possession of methamphetamine and the court imposed a standard range sentence.

1. Proceedings on Appeal. On appeal, Setterstrom contended, *inter alia*, the trial court erred in failing to suppress the methamphetamine obtained from Setterstrom’s pocket during a frisk.

The court rejected all of Setterstrom’s claims. For the reasons set forth below, he seeks review.

E. ARGUMENT

1. THE OFFICER EXCEEDED THE PERMISSIBLE SCOPE OF A TERRY PAT-DOWN WHEN HE REMOVED THE HARD OBJECT FROM SETTERSTROM'S PANTS BECAUSE THE SHAPE AND SIZE OF THE ITEMS IN SETTERSTROM'S POCKETS DID NOT ESTABLISH PROBABLE CAUSE THAT HE POSSESSED A WEAPON.

The search of Setterstrom was unlawful because it exceeded the permissible scope of a *Terry* pat-down search for weapons. Therefore, the evidence recovered from Setterstrom as a result of the unlawful search should have been suppressed.

During an investigatory stop of an individual, a limited pat-down search for weapons is warranted if the investigating officer reasonably believes that the suspect is presently armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Loewen*, 97 Wn.2d 562, 566, 647 P.2d 489 (1982); *State v. Blair*, 65 Wn. App. 64, 70, 827 P.2d 356 (1992). The officer must be confronted with specific facts and circumstances within the immediate context of the stop which would provoke a reasonable concern that the individual is armed and dangerous. *Terry*, 392 U.S. at 30; *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. Galbert*, 70 Wn. App. 721, 725,

855 P.2d 310 (1993). A general suspicion, unsupported by specific facts, is not sufficient to justify a frisk. *Galbert*, 70 Wn. App. at 725.

Even without a weapon visibly apparent on a suspect's person, a stop of a person who is in a vehicle may justify a search if there are indications that a weapon may be hidden within the vehicle, such as a furtive movement by a person to possibly hide a weapon within the vehicle or the sighting of a concealed weapons permit. *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990); *State v. Terrazas*, 71 Wn. App. 873, 879, 863 P.2d 75 (1993); *review denied*, 123 Wn.2d 1028 (1994); *State v. Wilkinson*, 56 Wn. App. 812, 815, 785 P.2d 1139, *review denied*, 114 Wn.2d 1015 (1990). However, if the contact that results from a standard pat-down search fails to identify an object as a weapon, further intrusive efforts, such as manipulation or removal of the object, are beyond the scope of a *Terry* search. *Hobart*, 94 Wn.2d at 439-440; *State v. Rodriguez-Torres*, 77 Wn. App. 687, 693, 893 P.2d 650 (1995).

Cases have held that seizures improperly exceed the scope of a protective weapons frisk when hard but very small items, which could not reasonably be suspected of being weapons, were pulled from suspects' pockets. In *State v. Fowler*, 76 Wn. App. 168, 170,

883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995), the officer removed a hard object, measuring two by three inches, along with two soft object of indeterminate shape. *Fowler*, 76 Wn. App. at 170. The court held that this removal exceeded the scope of a protective frisk. *Fowler*, 76 Wn. App. at 173. The object in the instant case is even smaller than the object in *Fowler*. RP 22, 25; *Fowler*, 76 Wn. App. at 173. In *Galbert, supra*, the removal of a “three inch by one inch lump,” which turned out to be rock cocaine, was held to exceed the scope of a weapons frisk. *Galbert*, 70 Wn. App. at 726. In *Loewen, supra*, the removal of a small plastic container measuring approximately two by one-half inches, which the court characterized as being “about two-thirds the size of an average lipstick container” was held to exceed the reasonable scope of a weapons frisk. *Loewen*, 97 Wn.2d at 567. Thus, removal of small objects which cannot reasonably be suspected to be weapons unlawfully exceeds the scope of a protective frisk for weapons.

In 1993, the United States Supreme Court carved out a new exception to the warrant requirement of the Fourth Amendment referred to as the “plain feel” or “plain touch” exception. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d

334 (1993); *State v. Hudson*, 124 Wn.2d 107, 111, 874 P.2d 160 (1994). The “plain feel” exception is an extension of the plain view exception. *Dickerson*, 124 L. Ed. 2d at 345-46; *Hudson*, at 114; *State v. Tzinzun-Jimenez*, 72 Wn. App. 852, 854, 866 P.2d 667 (1994). To satisfy the plain feel exception, just as with its plain view antecedent, tactile sensing must provide immediate recognition of the object the officer has come in contact with. *Dickerson*, 124 L. Ed. 2d at 346; *Hudson*, 124 Wn.2d at 119-120; *Tzinzun-Jimenez*, 72 Wn. App. at 857. This tactile recognition must result immediately from the initial pat-down contact. If recognition is even briefly delayed, or results only after further manipulation or visual examination of the object, then the scope of the *Terry* pat-down for weapons is exceeded. *Dickerson*, 124 L. Ed. 2d at 348; *Hudson*, 124 Wn.2d at 118; *Tzinzun-Jimenez*, 72 Wn. App. at 857.

In the case at bar, Lt. Stevens testified that he patted down Setterstrom’s front, side, and back to determine if there were weapons on him. The officer testified that he felt “hard objects” in Mr. Setterstrom’s pants, which he removed.

The Ziploc baggie containing a white substance was removed from Mr. Setterstrom's pants pocket at that time. The baggie was subsequently swallowed by Mr. Setterstrom. None of the “hard

objects” described by Lt. Stevens were entered into evidence, and in fact the officer was not able to describe the items during the CrR 3.6 hearing or the trial.

To fall within the plain feel exception, Lt. Steven’s recognition of the items as drugs had to occur immediately upon his initial contact with the lump in Setterstrom’s pocket. *Dickerson*, 124 L. Ed. 2d at 346; *Hudson*, 124 Wn.2d at 118; *Tzintzun-Jimenez*, 72 Wn. App. at 857. Lt. Steven’s recognition of the Ziploc bag containing methamphetamine had to occur immediately upon his initial contact with the objects in Setterstrom’s pockets. *Dickerson*, 124 L. Ed. 2d at 346. Lt. Steven’s testimony belies any such possibility. He testified that he found the objects in his pocket, and “I just removed a bunch of items out.” RP at 22. After he removed the objects, he saw the Ziploc bag. *Id.* The record is clear that he did not “immediately” recognize the object in Setterstrom pocket as drugs as a result of the search.

It is the distinctive size, shape and density of weapons that allows for the permissible scope of a *Terry* pat-down to be established. *Hudson*, at 113; *State v. Broadnax*, 98 Wn.2d 389, 398, 654 P.2d 96 (1982). Only when a pat-down is inconclusive as to whether an object has the size, shape and density of a weapon

is an officer entitled to do more than pat-down a suspect's outer clothing. *Broadnax*, at 298.

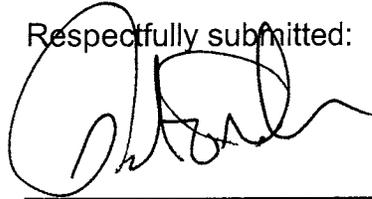
Only if an officer feels something from which its contour or mass makes its identity immediately apparent as contraband does the plain feel exception allow for seizure of the item in the context of a *Terry* pat-down. *Dickerson*, 113 S. Ct. 2137.

F. CONCLUSION

For the foregoing reasons, Setterstrom respectfully requests his petition for review be granted.

DATED this 12th day of January, 2007

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

PETER B. TILLER – WSBA NO. 20835
Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL DEREK SETTERSTROM,
Appellant.

No. 33846-7-II

RULING AFFIRMING
JUDGMENT

FILED
COURT OF APPEALS
DIVISION II
06 OCT -3 PM 2:27
STATE OF WASHINGTON
BY _____
DEPUTY

Michael Derek Setterstrom appeals his Thurston County conviction of possession of methamphetamine, RCW 69.50.4013(1). Setterstrom argues that the trial court erred in denying his motion to suppress the drugs, contending that the officer did not have a reasonable, articulable suspicion of criminal activity to support the initial seizure; the pat-down search for weapons was not justified, and the search was not reasonable in scope. This court reviewed the matter pursuant to its own motion on the merits. RAP 18.14.

FACTS

Someone at the Department of Social and Health Services building requested Tumwater Police assistance in dealing with two unwanted individuals in the lobby. One of the individuals was sleeping, and the other appeared to be

on drugs. Lieutenant Don Stevens and Officer Glen Staley responded at approximately 8 A.M. They observed two individuals sitting on a bench inside the lobby. One individual (Joseph Rice) appeared to them to be sleeping, and the other (Setterstrom) was filling out a DSHS form. Lt. Stevens contacted Setterstrom while Officer Staley tried to wake up Rice. Stevens noticed that Setterstrom was twitchy, nervous, and fidgety, and he had trouble focusing on the officer's questions. When Stevens asked Setterstrom for his name, he first gave it as Setterstrom, but then claimed to be Victor Garcia. Around this time, Rice began to wake up, and Stevens asked Rice for Setterstrom's name. Setterstrom quickly said that his name was Victor before Rice had the opportunity to answer. Officer Staley then took Rice outside to talk to him.

Based on his observations, Stevens believed that Setterstrom was probably under the influence of methamphetamine. Setterstrom was becoming increasingly agitated. Stevens believed that because of the effect of the drugs, he might become violent, and he performed a pat-down search for weapons. He felt several hard objects in Setterstrom's right front pants pocket, but could not tell what they were. He reached into the pocket and removed all of the objects at one time. Among them was a small baggie containing a white crystalline substance that Stevens believed to be methamphetamine. Stevens placed this baggie and the other items on the bench.

Lt. Stevens then arrested Setterstrom and told him to place his hands behind his back. While he was attempting to handcuff Setterstrom, Setterstrom dropped to his knees and sucked the baggie into his mouth. Stevens was unable

to recover the baggie. A subsequent search of a black bag belonging to Setterstrom turned up more methamphetamine.

Setterstrom sought to suppress the drugs from his bag, contending that the arrest was based on an unlawful detention and search. At the suppression hearing, Stevens testified that he could not recall what the hard objects in Setterstrom's pocket were. He explained that sometimes when defendants know their drugs have been discovered and they are likely to be arrested, they become more violent, and so he was focused on Setterstrom.

The court denied the motion to suppress, finding that Lt. Stevens had reasonable safety concerns to justify the search. A jury convicted Setterstrom as charged, and this appeal followed.

DISCUSSION

An appellate court reviews findings of fact on a motion to suppress under a substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214 (1999). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644 (1994).

Setterstrom first contends that Stevens did not have a reasonable, articulable suspicion of criminal activity to support the initial detention.¹ Not every encounter between a police officer and a citizen constitutes a seizure. An officer

¹ At the suppression hearing, however, Setterstrom's counsel stated very clearly that everything Stevens did prior to the pat-down search was done correctly. Nevertheless, Setterstrom may raise the issue here for the first time. See *State v. Contreras*, 92 Wn. App. 307, 311-12 (1998).

may engage a person in conversation in a public place and ask for identification without that contact becoming a seizure, and may do so without an articulable suspicion of wrongdoing. *State v. Young*, 135 Wn.2d 498, 511 (1998) *Young*, 135 Wn.2d at 511; see also *State v. Armenta*, 134 Wn.2d 1, 11 (1997). A seizure occurs only when, by physical force or a show of authority, law enforcement has in some way restrained the liberty of the citizen. There is a seizure when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Young*, 135 Wn.2d at 509-10. The defendant has the burden of showing that a contact between a police officer and a citizen amounted to a seizure. *Young*, 135, Wn.2d at 510.

Setterstrom has not satisfied that burden. Lt. Stevens legitimately responded to a call for assistance, and made contact with Setterstrom by approaching him in a public place and asking his name. There was no attempt to restrain Setterstrom, and Setterstrom describes no show of authority sufficient to justify a belief that he was not free to leave.

Setterstrom next contends that Stevens did not have a reasonable safety concern to support the frisk for weapons. A weapons search is justified at its inception if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). When Lt. Stevens contacted him, Setterstrom was fidgety, nervous, and unable to focus, indications of the influence of methamphetamine. Setterstrom's agitation escalated as Stevens questioned him. Based on his narcotics training and his experience, Stevens knew that people under the influence of methamphetamine

can become uncontrollable and violent at any moment. Additionally, Setterstrom lied to Stevens about his name. Stevens testified that this behavior indicated that Setterstrom might be "wanted" by some law enforcement authority.² This combination of events provided a reasonable basis for Stevens's concerns.

Finally, Setterstrom contends that the search for weapons was unreasonably intrusive and not limited to a search to promote officer safety. A weapons frisk is adequately limited if "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29); *see also State v. Hudson*, 124 Wn.2d 107, 112 (1994). During the course of a protective sweep, the police may not intentionally seize items they know not to be weapons. *State v. Fowler*, 76 Wn. App. 168, 173 (1994), *review denied*, 126 Wn.2d 1009 (1995). However, when an officer conducts a pat-down search and feels an item of questionable identity which could be a weapon, he may take such action as is necessary to examine the object and determine its identity. *Hudson*, 124 Wn.2d at 112-13.

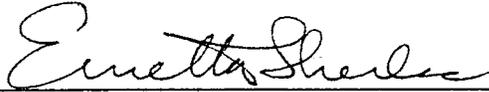
Stevens testified that he pulled the objects out of Setterstrom's pocket in order to determine if any of them were weapons. The law permits him to take that action. *See Hudson*, 124 Wn.2d at 112-13. He further testified that he did not perceive that there was a "soft" item mixed in with the hard objects he felt in Setterstrom's pocket until he pulled all of the items out. As the baggie of

² Report of Proceedings Aug. 22, 2005 at 11.

methamphetamine was discovered during a lawful search, it provided a proper basis for the arrest and subsequent search.³ Accordingly, it is hereby

ORDERED that the judgment is affirmed.

DATED this 3rd day of October, 2006.



Ernetta G. Skerlec
Court Commissioner

cc: Peter Tiller
James Powers
Hon. Richard D. Hicks
Hon. Wm. Thomas McPhee

³ Notably, Setterstrom did not disagree below that the drugs would be admissible under these circumstances. He argued that those were not the actual circumstances, that the officer felt the baggie and emptied his pocket to retrieve the contraband. The trial court found the officer credible, and that determination is not subject to review. See *State v. Camarillo*, 115 Wn.2d 60, 71 (1990).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL DEREK SETTERSTROM,
Appellant.

No. 33846-7-II

ORDER DENYING MOTION TO MODIFY

FILED
COURT OF APPEALS
DIVISION II
06 DEC 20 PM 1:57
STATE OF WASHINGTON
BY DEPUY

APPELLANT has filed a motion to modify a Commissioner's ruling dated October 3, 2006, in the above-entitled matter. Following consideration, the court denies the motion.

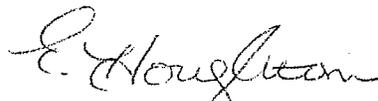
Accordingly, it is

SO ORDERED.

DATED this 20th day of December, 2006.

PANEL: Jj. Houghton, Quinn-Brintnall, Van Deren

FOR THE COURT:


CHIEF JUDGE

James C. Powers
Thurston County Prosecuting Attorney Ofc
2000 Lakeridge Dr SW
Olympia, WA, 98502-6001

Peter B. Tiller
The Tiller Law Firm
PO Box 58
Centralia, WA, 98531-0058