

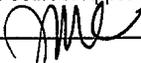
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Washington Court of Appeals, Division Three

NO. 25255-8-III

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GARVIN,

Appellant.

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

The Honorable Susan Hahn, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was convicted of possession of a controlled substance, methamphetamine, as a result of a baggie containing methamphetamine found in his coin pocket by police. The trial court erred in denying Appellant's CrR 3.6 motion to suppress the unlawfully seized baggie evidence where the investigating officer exceeded the scope of a proper *Terry*¹ frisk for weapons.

2. The trial court erred in entering CrR 3.6 Findings of Fact III and IV to the extent that they suggest the investigating officer did not squeeze or manipulate the contents of the baggie in Appellant's pocket or that the officer immediately recognized the incriminating nature of the baggie and its contents.²

3. The trial court erred in entering CrR 3.6 Conclusions of Law III and IV to the extent that they suggest the investigating officer lawfully frisked Appellant and obtained probable cause to arrest Appellant based on the baggie contained in his pocket.

¹ *Terry v. Ohio*, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

² A copy of the trial court's Findings of Fact and Conclusions of Law is attached to this brief as an appendix.

Issues Pertaining to Assignments of Error

1. Did the trial court err in refusing to suppress the baggie improperly seized from Appellant's coin pocket where the investigating officer ascertained that the pocket did not contain any weapons and felt the baggie by squeezing the contents of the pocket?

2. Did the trial court err in refusing to suppress the baggie improperly seized from Appellant where substantial evidence in the record supports a finding only that the officer suspected but was not aware that the baggie contained narcotics?

B. STATEMENT OF THE CASE

1. Procedural Facts

Anthony Gaylord Garvin was charged by amended information with possession of a controlled substance, methamphetamine, and bail jumping. CP 19; RCW 69.50.4013(1), 9A.76.170(1). Prior to trial, Garvin moved to suppress a baggie of methamphetamine seized from his pocket during a *Terry* stop on the grounds that the investigating officer exceeded the lawful scope of a weapons patdown. CP 26. The court conducted a CrR 3.6 hearing, and concluded that the search and seizure was lawful. CP 32; 1RP 37³.

³ This brief refers to the verbatim report of proceedings as follows: 1RP – 3/28/06; 2RP – 5/26/06.

The case proceeded to a bench trial based on the facts as stipulated in the investigating officer's police report, including the baggie evidence. CP 18; 2RP 3. The State dismissed the bail jumping count, and the court found Garvin guilty of possession of a controlled substance. CP 4, 11; 2RP 6. He received a standard range sentence of 20 days imprisonment. CP 5. This appeal timely follows. CP 3.

2. Substantive Facts

Union Gap City Police Officer Gregory Cobb was on patrol on the evening of October 21, 2005, when he stopped Garvin's automobile for a defective taillight and a shattered front windshield. CP 14. Upon peering inside the vehicle, Officer Cobb observed a knife lying next to Garvin on the front seat and that the vehicle's ignition had been "punched" out. CP 14.

Officer Cobb ordered Garvin out of the vehicle and asked him whether he had any weapons on his person. CP 14. Garvin responded that he had a second knife in his pocket. CP 14. Officer Cobb then began performing a patdown search of Garvin's outer clothing for weapons. CP 14. He located and removed the knife from one of Garvin's pockets. CP 14. Officer Cobb's report then states:

AS I PAT SEARCHED HIS RIGHT FRONT PANTS
POCKET AREA I FELT SOMETHING IN THE COIN
POCKET. I RECOGNIZED THE FEEL OF THE

OBJECT AS A PLASTIC BAGGIE. THERE WAS SOMETHING INSIDE THE PLASTIC BAGGIE THAT *MOVED AROUND INSIDE WHEN I SQUEEZED IT*. I RECOGNIZED THE FEEL OF THE OBJECT THROUGH TRAINING AND EXPERIENCE AS THE TYPE OF BAGGIE USED BY DRUG USERS TO PACKAGE ILLEGAL DRUGS.

CP 14 (emphasis added).

Officer Cobb provided the sole testimony at the CrR 3.6 hearing. 1RP 3. He testified that after stopping Garvin's vehicle, he ordered him to stand in a "Falker" position, with his feet shoulder width apart, hands behind his back, and fingers interlaced together and palms facing the ground. 1RP 4-5. Officer Cobb then began searching Garvin for other weapons by "quadrants."⁴ 1RP 4-5.

But instead of "patting" down Garvin, Officer Cobb conducted his search by "squeezing" locations over Garvin's person. 1RP 6. He testified, "We don't really pat anymore. It's more of a squeeze search." 1RP 7. Garvin was wearing jeans on the night in question and Officer Cobb felt a baggie inside the coin pocket. Officer Cobb offered the following testimony:

Something was in the pocket. It was obvious when I squeezed it gave way, and it felt like there was something

⁴ Officer Cobb testified that the body is divided into eight "quadrants" for searching purposes. 1RP 4.

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.*

1RP 9 (emphasis added).

Officer Cobb testified that he “pretty much knew what it was in terms of [he] *suspected* [he] was dealing with narcotics.”

1RP 10 (emphasis added). He suspected that the substance in Garvin’s pocket was a narcotic because, in his experience, drugs are often stored in a small, plastic “dime baggy” in a suspect’s coin pocket. 1RP 9, 17. Officer Cobb placed Garvin under arrest and, incident to the arrest, removed a small, blue plastic baggie from his pocket. 1RP 10. The baggie contained a white, crystalline substance, which later tested positive for methamphetamine. CP 16; 1RP 10.

On cross-examination, Officer Cobb admitted that he did not feel any weapons or other hard objects when he first felt Garvin’s coin pocket. 1RP 12. Nevertheless, he squeezed the pocket. 1RP 12. Officer Cobb further admitted that he suspected, but did not know, that the substance inside Garvin’s coin pocket was narcotics. 1RP 12.

The following exchange between Defense Counsel and Officer Cobb took place:

Q. Okay. At that point in time, sir, did you know what the substance in his pocket was?

A. I suspected it was narcotic.

Q. Not my question. Did you know what the substance was?

A. No.

Q. Okay. But you then removed the substance from his pocket, correct?

A. I did.

Q. Okay. But you knew it wasn't a weapon?

A. Yes.

1RP 12.

Garvin did not challenge either the stop of his vehicle or the frisk of his person for weapons. 1RP 2. However, he argued that Officer Cobb was not justified under *Terry* in squeezing the contents of his coin pocket, particularly after determining that the pocket contained no weapon, and that Officer Cobb was unable to immediately identify the substance in his pocket as narcotics. CP 20. Nevertheless, the court upheld the warrantless search and seizure under *Terry* and the "plain feel" exception to the warrant requirement. CP 32-33; 1RP 35-36.

C. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED FROM A WARRANTLESS SEARCH AND SEIZURE THAT EXCEEDED THE SCOPE OF A PROPER *TERRY* STOP AND FRISK AND DID NOT SATISFY THE “PLAIN FEEL” WARRANT EXCEPTION.

Under the Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the Washington State Constitution, warrantless searches and seizures are per se unreasonable. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984); *State v. Miller*, 91 Wn. App. 181, 184, 955 P.2d 810 (1998). However, a few “jealously and carefully drawn exceptions” to the warrant requirement exist. *Miller*, 91 Wn. App. at 184 (quoting *Williams*, 102 Wn.2d at 736). The burden is on the state to show that a particular search or seizure falls within such an exception. *Miller*, 91 Wn. App. at 184.

Here, the trial court relied upon the “*Terry* stop” exception to the Fourth Amendment warrant requirement in upholding the search and seizure. See *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under *Terry*, an officer may stop and frisk an individual when: (1) the individual stop is legitimate; (2) a reasonable safety concern exists to justify a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purpose. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Miller*, 91 Wn. App. at 184.

Garvin does not contest that Officer Cobb was justified in stopping him and frisking him for weapons. However, Officer Cobb exceeded the scope of a lawful *Terry* search when he squeezed the contents of Garvin's coin pocket despite ascertaining that the pocket did not contain a weapon. The trial court should have suppressed the baggie evidence.

In reviewing a trial court's denial of a suppression motion, this court reviews challenged findings of fact for substantial supporting evidence. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Mendez*, 137 Wn.2d at 214. The court reviews the trial court's conclusions of law de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.2d 1076 (2006).

The purpose of the limited *Terry* stop and frisk is not to discover evidence of a crime, but to allow an officer to pursue his or her investigation without fear of violence. *Adams*, 407 U.S. at 146; *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). A weapons frisk is strictly limited in its scope to a search of the outer clothing -- a patdown to discover weapons that might be used to assault the officer. *Hudson*, 124 Wn.2d at 112 (quoting *Terry*, 392 U.S. at 29-30); *Miller*, 91 Wn. App. at 185. In other words, the intrusion must be one that is "reasonably

designed to discover guns, knives, clubs, or other hidden instruments for the assault of the officer.” *Terry*, 392 U.S. at 29.

Because a valid frisk is strictly limited to a search necessary for the discovery of weapons, once it is ascertained that no weapon is involved, the government’s limited authority to invade an individual’s right to be free of police intrusion ends; any continuing search without probable cause becomes an unreasonable intrusion. *Hudson*, 124 Wn.2d at 113 (citing *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980)).

To illustrate, in *State v. Hobart*, 94 Wn.2d 437, 446, 617 P.2d 429 (1980), the officer felt “spongy” objects in the defendant’s pocket during a weapons patdown. Although the officer had no fear that the objects were weapons, he squeezed them and determined that they were balloons containing narcotics. *Hobart*, 94 Wn.2d at 446. The Hobart court held that once the officer had ascertained that the objects were not weapons, the permissible scope of the search had ended and any further search required probable cause. *Hobart*, 94 Wn.2d at 446. 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.” *Hobart*, 94 Wn.2d at 447. *See also State v. Keyser*, 29 Wn. App. 120, 126-27, 627 P.2d 978 (1981) (officer’s search exceeded limits of a protective weapons search when he continued to investigate the

contents of a bag after ascertaining that it did not contain any weapons); *State v. Loewen*, 97 Wn.2d 562, 567, 647 P.2d 489 (1982) (officer's search exceeded limits of a protective weapons search when he removed a small tube found to be a cocaine sniffer from the defendant's pocket after ascertaining that the pocket contained no weapons).

Similarly, Officer Cobb overstepped the bounds of a protective search for weapons. Instead, he enlarged the specific authorization to frisk for weapons permitted under *Terry* "into the equivalent of a general warrant to rummage and seize at will." *Texas v. Brown*, 460 U.S. 730, 748, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). While Officer Cobb may have been authorized to perform a protective patdown for weapons, as in *Hobart*, his actions in squeezing Garvin's coin pocket despite ascertaining that the pocket contained no weapons exceeded the scope of a *Terry* frisk. Such a search was unrelated to officer safety; the court should have suppressed the baggie found therein.

The state may argue, as it did below, that the baggie and its contents are nevertheless admissible under the "plain feel" exception to the warrant requirement. See *Minnesota v. Dickerson*, 508 U.S. 366, 367, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); *Hudson*, 124 Wn.2d at 115-16. Under this exception, officers may obtain probable cause to seize evidence during the course of a *Terry* frisk if, in the course of the patdown, 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 (emphasis added).

The “immediate recognition” requirement is met where officers have probable cause to believe that object felt is contraband and the officer recognizes the object as contraband *without further manipulation of the object in any way* beyond what is necessary to determine it is not a weapon. *Dickerson*, 508 U.S. at 367; *Hudson*, 124 Wn.2d at 118. The incriminating nature of an object rarely is immediately apparent; the “tactile sense does not usually result in the *immediate* knowledge of the nature of the item.” *Hudson*, 124 Wn.2d at 111 (quoting *State v. Broadnax*, 98 Wn.2d 289, 298, 654 P.2d 96 (1982)). This is because the sense of touch is “inherently less immediate and less accurate than the other senses.” *Hudson*, 124 Wn.2d at 115.

Dickerson is dispositive. In that case, the officer conducted a lawful *Terry* stop and weapons search. *Dickerson*, 508 U.S. at 369. During the patdown, the officer ascertained that the defendant did not have any weapons but felt a small “lump” in one of his front pockets. *Dickerson*, 508 U.S. at 369. The officer examined the “lump” with his fingers; as the object “slid,” he believed it to be a lump of crack cocaine. *Dickerson*, 508 U.S. at 369. The Court held that the search did not satisfy

the plain feel exception to the warrant requirement because the officer recognized the contraband only after “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket –a pocket which the officer already knew contained no weapon.” *Dickerson*, 508 U.S. at 378 (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn.1992)). In short, the officer did not immediately recognize the lump as cocaine, and the continued manipulation of the defendant’s pockets after ascertaining that there was no weapon exceeded the scope of *Terry*. *Dickerson*, 508 U.S. at 379.

Likewise, the record here does not support a finding that Officer Cobb immediately recognized the object in Garvin’s pocket to be narcotics. Rather, he recognized that the substance he felt *might* be narcotics -- and only after squeezing and manipulating Garvin’s pocket.

The trial court found that Officer Cobb “used a single squeezing motion as opposed to squeezing, sliding or manipulating the contents of [Garvin’s] pockets.” CP 33 (Finding of Fact III). This finding is erroneous on two grounds. First, such a finding presupposes that an officer may squeeze the contents of a suspect’s pockets or his person during the course of a *Terry* patdown even after determining that there are no weapons -- a supposition that runs contrary to well-settled law. Officer Cobb testified that during patdowns, he “[doesn’t] really pat anymore. It’s

more of a squeeze search.” 1RP 7. The court appears simply to have accepted this testimony -- even though the U.S. and Washington State Supreme Courts have held that officers may not squeeze or otherwise manipulate objects not believed to be a weapon during a *Terry* frisk. There was no legal authority for the court’s ruling that an officer may conduct a “*Terry* squeeze;” the police should not be permitted to circumvent the U.S. Constitution by instituting a “squeeze” search policy.

Secondly, even if this court finds that an officer may “squeeze,” rather than patdown, a suspect during a *Terry* stop, Officer Cobb’s own testimony belies any notion that he immediately recognized that Garvin possessed contraband upon a single squeeze designed to feel for a weapon. His detailed description of the substance—i.e., “[W]hen 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.”—reveals considerable manipulation of the baggie. Simply put, Officer Cobb described the substance in the baggie with a particularity not attainable without manipulation. 1RP 9 (emphasis added).

The trial court’s finding that Officer Cobb “immediately recognized the incriminating character of the baggy and its contents as possible narcotics” likewise is erroneous. CP 33 (Finding of Fact IV)

(emphasis added). This is an oxymoron: if Officer Cobb recognized the incriminating nature of the baggie, he would have known it contained narcotics, not thought that it possibly might have.

Officer Cobb's testimony certainly supports the court's finding that he believed the baggie contained possible narcotics, but it does not support any finding that he recognized that the baggie contained actual narcotics.⁵ Officer Cobb testified that upon squeezing Garvin's pocket, he merely "suspected [he] was dealing with narcotics," and on cross-examination, admitted that he *did not know what the substance was*. 1RP 10, 12. An officer's belief that a substance had tactile qualities that are "consistent" with narcotics or was "likely" to be narcotics is not equivalent to an immediate knowledge that the substance is narcotics. *Hudson*, 124 Wn.2d at 119 (quoting *State v. Hudson*, 69 Wn. App. 270, 848 P.2d 216 (1993)). Indeed, what Officer Cobb felt was as consistent with sugar or some other such item. *See Hudson*, 124 Wn.2d at 119 (quoting *Hudson*, 69 Wn. App. at 276) (agreeing with the court of appeals that the feel of rock cocaine could be "as consistent with hard rock candy, a food item, a small part to a car, or some other such item"). Moreover, as noted, the record shows that

⁵ It appears that the trial court may have been confused, as it found that Officer Cobb could not identify the particular substance, e.g., methamphetamine vs. cocaine, inside the baggie. CP 33 (Finding of Fact IV). Garvin contends only that an officer must immediately recognize a substance as contraband, i.e., narcotics, -- not that he or she must identify a particular narcotic.

even if Officer Cobb was able to identify contraband inside the baggie, such identification was not immediate and occurred only after squeezing and manipulating the baggie.

In sum, while Officer Cobb may have been lawfully in position to feel the outside of Garvin's pocket because *Terry* entitled him to place his hands on Garvin's outer clothing, Officer Cobb should have stopped when he ascertained that Garvin's coin pocket did not contain a weapon. Under *Dickerson* and its progeny, manipulation of the baggie inside Garvin's pocket was justified only to the extent necessary to determine whether Garvin was armed. When Officer Cobb nevertheless proceeded to squeeze and manipulate the baggie, he conducted a further search not authorized by *Terry* or any other exception to the warrant requirement. Moreover, Officer Cobb did not immediately recognize the substance in Garvin's pocket as narcotics; rather, he determined that the substance was possibly narcotics and only after squeezing and otherwise manipulating the pocket's contents. Because this further search was unconstitutional, the subsequent arrest of Garvin and seizure of the baggie containing methamphetamine was unconstitutional, and this evidence should have been suppressed. *Dickerson*, 508 U.S. at 367.

D. CONCLUSION

The trial court erred in admitting evidence that was unlawfully seized from Garvin. Accordingly, this court should reverse the trial court's ruling and suppress the evidence. Further, this court should reverse Garvin's conviction and dismiss the charge against him.

DATED this 25th day of October, 2006.

Respectfully submitted,

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Appendix

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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.

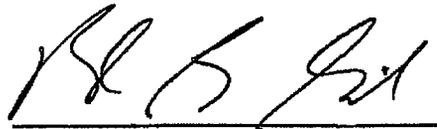
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The discovery made by squeezing the watch pocket provided probable cause to arrest the Defendant allowing the removal of the baggy incident thereto.

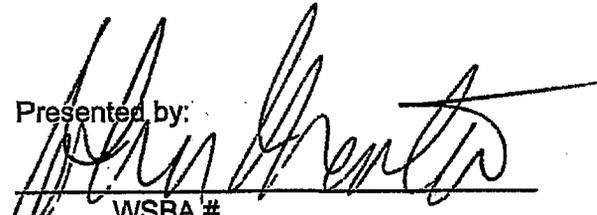
Based on the foregoing the Court must deny the Defendant's motion.

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



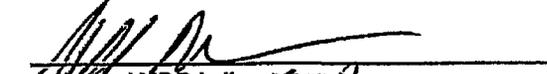
Judge

Presented by:



, WSBA #
Deputy Prosecuting Attorney

Approved as to form:



, WSBA # 19108
Attorney for Defendant

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