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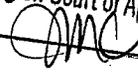
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IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY G. GARVIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE BLAINE GIBSON, JUDGE

BRIEF OF RESPONDENT

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I.
STATEMENT OF FACTS

Appellant's Statement of the Case is generally accurate, but the State submits the following additional facts for consideration by the court.

At the suppression hearing in this matter, Officer Cobb of the Union Gap Police Department testified to, and demonstrated, the method he utilizes for conducting so-called 'pat-down' searches. Because he is concerned about needles and sharp objects which he might encounter in pockets, he utilizes a slow squeezing motion, instead of a pat. In this manner, he is able to respond to a sharp object before he is poked. (3-28-06 RP 6)

Consistent with this approach, Officer Cobb squeezes coin pockets from the sides, instead of from the bottom of the pocket, believing that he is less likely to be poked from that angle. (3-28-06 RP 7-8)

Applying this technique to Mr. Garvin, the officer obviously felt something in the coin pocket, which gave way as if it were granular in nature. Based upon his training and experience, he knew from the feel of the item that "I know I am dealing with some sort of narcotics, some sort of illegal contraband." (3-28-06 RP 9)

Officer Cobb further testified that the coin pocket is a common place for persons to keep narcotics, in a small bag, commonly referred to as a "dime baggy". (3-28-06 RP 9)

Cobb was specifically asked whether he recognized that the baggy in question was not a weapon, and then chose to continue searching in Mr. Garvin's pocket, or whether he immediately recognized what he was squeezing:

Q: Was it a matter of your feeling this, recognizing it not to be a weapon and then searching further or did you immediately recognize what you were squeezing?

A: I knew exactly what I was squeezing at that point.

Q: That was?

A: Suspected narcotics packaging.

(3-28-06 RP 10)

In response to further questioning by the court, Officer Cobb was able to elaborate why he recognized narcotics packaging at the time of Mr. Garvin's arrest, but did not recognize the contents of sandwich bags in an in-court demonstration:

A: The primary difference is the size and the location, your Honor. Those are regular freezer sandwich bags that could contain anything. Most people don't carry a dime baggy in an inch by inch-in a coin pocket with a crystalline substance. So we're comparing apples and oranges, so to speak, in this particular demonstration.

In my experience and my training, when I feel a small an inch and a half by inch and a half plastic baggy containing a powder or crystalline substance, my training and experience tells me that that's contraband. In a front pocket, a big baggy, Mr. West is right. It could be Kool-Aid for all I know. In that pocket, that location, that size of a container, my training and experience tells me that I am dealing with contraband.

(3-28-06 RP 17)

II. STATEMENT OF PROCEDURE

Appellant Anthony Gaylord Garvin was charged by amended information with possession of a controlled substance-

methamphetamine under RCW 69.50.4013(1). (CP 19)

Garvin's motion to suppress a baggie of methamphetamine seized from his person, was denied. (CP 32) He was found guilty after a stipulated bench trial; a second count of bail jumping was dismissed. (CP 4; 11) He was sentenced within the standard range to 20 days of confinement. (CP 5) A timely appeal followed. (CP 3)

III. STANDARD OF REVIEW

A. Conclusions of Law entered in connection with an order pertaining to the suppression of evidence are reviewed *de novo*.

State v. Mendez, 137 Wn. 2d 208, 214, 970 P.2d 722 (1999).

B. It is the trial court which must make the determination whether the nature of a particular object at issue is such that there can be a credible claim of recognition by touch.

State v. Hudson, 124 Wn.2d 107, 120, 874 P.2d 160 (1994),

citing United States v. Pace, 709 F. Supp. 948 (C.D. Cal.

1989).

IV. ISSUES

Garvin raises the following issues:

- A. Did the trial court err in refusing to suppress the seized baggie where the officer had ascertained that the pocket did not contain any weapon, and felt the baggie by squeezing the contents of the pocket?
- B. Did the trial court err in refusing to suppress the baggie where substantial evidence supports a finding only that the officer suspected, but was not aware that the baggie contained narcotics?

V. ARGUMENT

- A. The seizure was justified under the “plain feel” exception to the warrant requirement.

It is well-settled that the Fourth Amendment protects against unreasonable searches and seizures. Warrantless searches or seizures are *per se* unreasonable unless supported

by a recognized exception to the warrant requirement. State v. Tzintzun-Jimenez, 72 Wn. App. 852-54, 866 P.2d 667 (1994), *citing* Thompson v. Louisiana, 469 U.S. 17, 19-20, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984).

One such exception is the “plain view” doctrine, which allows police officers to seize evidence without a warrant when it is within plain view during the course of a lawful search. Id., *citing* Coolidge v. New Hampshire, 403 U.S. 443, 464-73, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). The doctrine has been extended to evidence which may be discovered by touch during a lawful *Terry* stop. Minnesota v. Dickerson, 508 U.S. 366, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993). This was so, the Court reasoned, because a “plain feel” exception authorized no more touching than that allowed in any *Terry* stop. Dickerson, 113 S. Ct. at 2138. Indeed, the Court applied the same three-prong test for admissibility established for the “plain view” doctrine: the prosecution must prove that “(1) the officer lawfully occupied the vantage point from which the evidence

was discovered, (2) the officer immediately recognized the incriminating character of the object seized, and (3) the officer had a lawful right of access to the object itself.” Dickerson, 113 S. Ct. at 2137.

“If an officer lawfully pats down a suspect and feels an object possessing characteristics that make its identity as contraband immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the search for weapons.” Hudson, 124 Wn.2d at 114.

Here, Garvin does not contest that Officer Cobb was justified in stopping him and frisking for weapons, so the first prong of the analysis is met. Rather, the remaining issue on appeal is whether Cobb exceeded the scope of the *Terry* stop when he squeezed the bag while it was in the coin pocket, then seized it.

The State then, must show that the “immediate recognition prong” of the “plain view” test was met, in that the officer had probable cause to believe that the item was

contraband. That probable cause must be developed within the scope of the search authorized by the underlying exception to the warrant requirement. In the case of a *Terry* stop, an officer must develop probable cause to believe an item is contraband while simultaneously determining that the item was not a weapon. Tzintzun-Jimenez, 72 Wn. App. at 857, *citing* Dickerson, 113 S. Ct. at 2138-39. Probable cause requires that the facts available to an arresting officer would “warrant a man of reasonable caution in the belief, ‘. . . that certain items may be contraband . . .’” *Id.*, *quoting* Texas v. Brown, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983); Carroll v. United States, 267 U.S. 132, 162, 69 L. Ed. 543, 45 S. Ct. 280 (1925).

It is clear that the “immediate recognition prong” is met in this case. The officer described in detail how and why he utilized a slow squeeze approach to frisking for weapons, and he was clear that the initial squeeze to check for weapons was *one and the same* as that which revealed the small baggy of

contraband in the coin pocket. Probable cause that the pocket contained contraband was further bolstered by the dimensions of the baggy itself, as well as its location in a coin pocket.

Thus, at the same moment he determined that the pocket contained no weapon, the officer knew he had felt contraband.

The court's finding, then, that there was one squeezing motion which was part of the weapons search, as opposed to further manipulation of the material in the pocket, after no weapon was detected, was well supported by the evidence. (3-28-06 RP 35-36)

This is in contrast to the result reached in Dickerson, 113 S. Ct. at 2138, where the court found that there was further "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket", even after no weapon was detected.

VI. CONCLUSION

For all the foregoing reasons, Garvin's conviction should be affirmed.

Respectfully submitted this 19th day of March, 2007.



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