

No. 75305-3-I
Snohomish Superior Court No. 16-1-00548-3

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

CARLOS BROWN,
Defendant-Appellant.

FILED
October 31, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Thomas J. Wynne, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in holding that bare possession of drug paraphernalia is sufficient to support an arrest for a violation of RCW 69.50.412(1).

2. Const., Art. 1, § 7 prohibits the use of the “plain feel” exception to the warrant requirement to establish probable cause.

II.
ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in finding that simple possession of a pipe without more was sufficient probable cause to arrest Brown for a violation of RCW 69.50.412(1) when there is no evidence that Brown used the pipe in his pocket to ingest drugs?

2. Does the Washington Constitution prohibit the use of the plain feel exception for establishing probable cause in the context of a *Terry*¹ pat-down for weapons?

III.
STATEMENT OF THE CASE

Carlos Brown was charged with possession of methamphetamine.
CP 85-86.

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

On February 27, 2016, Brown was inside a Bartell's store. Store personnel called the police because they suspected Brown of shoplifting. According to Deputy Oyetuga, the report stated that store personnel observed Brown pick something up and put it in a bag. RP 7. They also told the police that they believed Brown had a gun. *Id.*

As Oyetuga arrived, Brown was leaving the store. RP 8. Oyetuga approached Brown and stopped him. *Id.* Brown denied that he was shoplifting and handed the officer his bag. RP 9. Brown was cooperative and made no threatening movements. RP 14.

Because of the report of a possible weapon, a second deputy, Koster, frisked Brown. *Id.* Koster said that when he was frisking Brown, he felt a meth pipe. He knew it was a meth pipe based upon "10 years of training and experience." RP 24.

Koster admitted that he had no information as to why the store personnel said Brown was armed. RP 30. And when he answered and saw Brown, he saw nothing that led him to believe Brown was armed. *Id.* Koster also admitted that a meth pipe is not a weapon. RP 31.

After discovering the pipe, Koster placed Brown under arrest for possession of drug paraphernalia. RP 9, 26. He advised Brown of his constitutional rights and then questioned Brown. RP 26-27. Brown was insistent that he had taken nothing from the store. RP 27. Koster then

searched Brown as he was taking him into custody and found the small bag of methamphetamine that this basis for the charge. RP 28.

Prior to trial, Brown moved to suppress the seized contraband. He argued that prior to the arrest, the officers had dispelled any suspicion of theft, the officers had no reasonable belief that Brown was armed and dangerous and the scope of the search was unlawful. CP 75-84. The State responded and argued that Brown was lawfully detained for suspicion of theft and lawfully arrested for possession of paraphernalia. CP 61-63. The defense responded and pointed out that mere possession of paraphernalia is not criminal. CP 61-63. Thus, Brown's custodial arrest and the search that followed was unlawful.

The trial court found that because Koster had the right to search for weapons or stolen property, the seizure of the meth pipe was lawful. The trial court also found that:

In the course of patting down Mr. Brown, Deputy Koster's hand came into contact with the a pocket of Mr. Brown an item [sic] which he could immediately tell from feel was an item usually used for the purpose of ingesting meth as a meth pipe. He knew that before he removed it from the pocket of Mr. Brown. For the purposes of the search here, that's all that's required. You don't need to have proof beyond a reasonable doubt at that point in time that there's remnants of smoking meth in the pipe or that Mr. Brown intends in the future for using it to smoke meth.

RP 45.

The findings of fact and conclusions of law entered later deal only with the stop and frisk and do not address the custodial arrest or the fact that the methamphetamine was not discovered until after the custodial arrest for possession of paraphernalia. CP55-57.

Brown agreed to a stipulated facts trial. CP 27-54. The stipulated evidence consisted of the police reports and Brown's stipulation that "the substance recovered, as described in the agreed documentary evidence, is the controlled substance of Methamphetamine." CP 34. The only "substance recovered" was the bag of methamphetamine seized after Brown's custodial arrest for possession of paraphernalia. CP 44, 46.²

The trial court entered findings of fact and conclusions of law. CP 25-26. She found that the police recovered the bag of methamphetamine during the search incident to arrest. CP 26.

Brown was sentenced to 8 months in jail. CP 6-18. This timely appeal followed. *Id.*

² The bag field tested positive for the presence of methamphetamine. CP 46. It does not appear that the pipe was ever tested.

**IV.
ARGUMENT**

- A. THERE WAS NO PROBABLE CAUSE TO JUSTIFY THE ARREST OF BROWN. THUS, THE SEARCH INCIDENT TO THAT ARREST WAS UNLAWFUL.

The bag of methamphetamine was not discovered and seized pursuant to the stop and frisk. It was discovered only after Officer Koster arrested Brown for possession of paraphernalia – the meth pipe. The trial judge clearly erred in finding that bare possession of drug paraphernalia is a crime. It is not. RCW 69.50.412(1) states:

It is unlawful for any person *to use drug paraphernalia* to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana.

(Emphasis added).

Because the statute requires evidence of the use of the paraphernalia, bare possession alone will not support probable cause for an arrest. *State v. Neeley*, 113 Wn. App. 100, 108, 52 P.3d 539, 544 (2002). There must also be evidence that the paraphernalia was being use to “ingest, inhale or otherwise introduce” a controlled substance into the body. *See State v. Lowrimore*, 67 Wn. App. 949, 959, 841 P.2d 779 (1992), *quoting* RCW 69.50.412; see also, *State v. Godsey*, 131 Wn. App.

278, 286, 127 P.3d 11, 14, *review denied*, 158 Wn.2d 1022, 149 P.3d 379 (2006).

Brown was not using the pipe to ingest drugs at the time Koster patted him down. The time and location of arrest do not support a finding of drug use. There is no evidence of any drug residue in the pipe. Brown was cooperative and the officers did not describe any behavior that would indicate Brown was using drugs.

Because Brown's arrest was unlawful, the bag of methamphetamine discovered during a search incident to that arrest should have been suppressed. This Court must reverse the trial court.

B. THE WASHINGTON CONSTITUTION PROHIBITS THE USE OF THE PLAIN FEEL EXCEPTION FOR ESTABLISHING PROBABLE CAUSE IN THE CONTEXT OF A *TERRY* PAT-DOWN FOR WEAPONS

In the event this Court finds there was sufficient evidence to establish probable cause, this Court should then consider whether the state constitution allows for a plain feel exception in the context of a *Terry* stop and frisk.

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*, 508 U.S. at 375; *Hudson*, at 114; *State v. Tzintzun-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 with which the officer has come in contact. *Dickerson*, 508 U.S. at 379; *Hudson*, 124 Wn.2d at 119-120; *Tzintzun-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*, 508 U.S. at 378; *Hudson*, 124 Wn.2d at 118; *Tzintzun-Jimenez*, 72 Wn. App. at 857.

Whether Wash. Const., art 1, § 7 allows for the use of the plain feel exception in the context of a *Terry* pat-down for weapons is an issue of first impression. Courts in Washington have noted the United States Supreme Court’s decision in *Minnesota v. Dickerson*, *supra*, determining that the plain feel exception may apply in the context of a *Terry* pat-down

without offending the Fourth Amendment.³ *Hudson*, 124 Wn.2d at 116-17; *Rodriguez-Torres*, 77 Wn. App. 692-93; *Tzintzun-Jimenez*, 72 Wn. App. at 854-57. However, there is no published decision in Washington that determines whether the plain feel exception in the context of a *Terry* pat-down offends Wash. Const., art. 1, § 7.⁴ Although the petitioner in *State v. Hudson*, supra, raised this issue in supplemental briefing, the Supreme Court held that it was not timely raised and refused to consider it.

This Court should hold that Wash. Const., art. 1, § 7, precludes application of the “plain feel” exception in the context of a *Terry* pat-down. This Court should do so because: (1) the sense of touch is inherently less reliable than the other senses, (2) because until the decision in *Minnesota v. Dickerson*, Washington courts consistently rejected the plain feel exception, and (3) the heightened privacy interest guaranteed by Wash. Const., art. 1, § 7, should discourage expansion of the weapons frisk by prohibiting seizure of non-weapons felt during such frisks.

³ The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...”

⁴ Wash. Const., art. 1, § 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

1. The Decision in *Minnesota v. Dickerson*

In *Minnesota v. Dickerson*, two police officers saw a man leave a building they believed was a “crack house.” The man turned and went in the opposite direction once he saw the officers. The officers stopped and frisked him for weapons. One officer felt a small lump in the front pocket. The officer said “it slid” and felt like a lump of crack cocaine in cellophane. He reached into the pocket and retrieved crack cocaine. *Dickerson*, 508 U.S. at 369.

The Supreme Court initially discussed the rule in *Terry v. Ohio*, supra, that when a police officer reasonably believes criminal activity “may be afoot” that officer may briefly stop the person in question and make reasonable inquiries. *Dickerson*, 508 U.S. at 372-373 (citing *Terry*, 88 S.Ct. at 1868). Furthermore, when the officer believes that the individual is armed and presently dangerous the officer may conduct a pat-down search to determine whether the person is carrying a weapon. The purpose of this “limited search” is not to discover evidence and the search must be “strictly limited” to what is necessary to the discovery of weapons. *Dickerson*, 508 U.S. at 373. If the search goes beyond that purpose, it is no longer valid under *Terry*. *Id.*

The Court also discussed the “plain view” doctrine. Under plain view, the police may seize an object without a warrant if they are lawfully

in a position from which they view an object, its incriminating character is immediately apparent, and the officers have a lawful right of access to the object. Plain view does not apply if the police lack probable cause to believe the object is contraband without a further search. *Dickerson*, 508 U.S. at 375. The Court then held that there was an analogy between cases where an officer discovers contraband through the sense of sight and cases where an officer discovers contraband through the sense of touch. The Court held that if a police officer lawfully conducts a pat-down search and feels an object whose character is immediately apparent, there has been no invasion of the person's privacy beyond that already authorized.

Dickerson, 508 U.S. at 375.

However, the Court also held that the officer's continued search of the object after determining it was not a weapon violated *Terry*'s "strictly circumscribed" bounds for weapons searches. *Dickerson*, 508 U.S. at 378. The incriminating nature of the object was not immediately apparent to the officer and he determined that the item was cocaine only after conducting a further search authorized under *Terry* by squeezing, sliding and manipulating the contents of the defendant's pocket. *Dickerson*, 508 U.S. at 379.

2. Analysis Under Wash. Const., art. 1, § 7

An independent analysis of the plain feel exception under Wash. Const. art. 1, § 7, as set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), precludes its application in this state. In *Gunwall*, the court developed six “nonexclusive” criteria to determine whether the Washington Constitution extends broader rights than the United States Constitution. Those criteria are: (1) the textual language of the relevant provision in the state constitution; (2) differences between the texts of the state and federal provisions; (3) the constitutional history of the state provision; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) matters of particular state and local concern. *Gunwall*, 106 Wn.2d at 58.

In *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990), the court held that it is only necessary to examine the fourth and sixth criteria when determining whether a search and seizure violates article 1, § 7, because the *Gunwall* analysis of the first, second, third, and fifth criteria supports independent state interpretation of search and seizure law. Accordingly, Brown restricts his analysis to the fourth and sixth criteria under *Gunwall*.

a. *Factor (4): Preexisting State Law*

In comparing Washington's constitution to the Fourth amendment, the *Boland* court stated:

Under Const. art. 1, § 7, the focus is whether the "private affairs" of an individual have been unreasonably violated rather than whether a person's expectation of privacy is reasonable.

115 Wn.2d at 580. This distinction is important because it indicates that under article 1, § 7, it is the State's actions that are intended to be limited rather than an individual's expectations.

In harmony with the principle expressed in *Boland*, the Washington Supreme Court has repeatedly held that article 1, § 7 provides greater, protection of privacy rights than the Fourth Amendment. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984); *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (first requirement for plain view not met under art. 1, § 7); *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982) (purpose for exclusionary rule different under art. 1 § 7); *State v. Hehman*, 90 Wn.2d 45, 578 P.2d 527 (1978) (greater protection in area of custodial arrests). In *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980), the Court held: "Const. art. 1, § 7 differs from the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations."

As such, preexisting state law indicates that Wash. Const., art. 1, § 7, generally provides greater protection against intrusive searches than does the Fourth Amendment.

Specific to searches where there is no probable cause, the Washington Supreme Court has held in numerous cases that the limitations on the scope of a *Terry* stop must be strictly construed. For example, in *State v. Hobart*, 94 Wn.2d 437, 617 P.2d 429 (1980), the court held that when a police officer discovered “spongy objects” while conducting a pat-down of the defendant’s pockets, the officer was not entitled to squeeze them to discover their contents because the search went beyond that permitted by the Fourth Amendment. *Hobart*, 94 Wn.2d at 446. In *State v. Loewen*, 97 Wn.2d 562, 647 P.2d 489 (1982), the court held that the seizure of a small tube from the defendant’s pocket during a pat-down search exceeded the permissible scope of the search. *Loewen*, 97 Wn.2d at 567.

Even more specific to the issue here, in *State v. Broadnax*, 98 Wn.2d 289, 654 P.2d 96 (1982), the court held that there is no plain feel exception to the warrant requirement analogous to the plain view doctrine because the sense of touch cannot meet the three requirements of the plain view exception: (1) a prior justification for the intrusion; (2) an inadvertent discovery of incriminating evidence; and (3) immediate

knowledge by police that they have evidence before them.⁵ *Broadnax*, at

298. Specifically, the court held:

[T]he third requirement [of the plain view exception] is not met if the sense of touch is relied upon exclusively for the recognition of contraband. The tactile sense does not usually result in the “immediate” knowledge of the nature of the item. The officer in this case could not know the bulge was a balloon containing heroin. His observations lacked “the distinctive character of the smell of marijuana or the hardness of a weapon.” *Broadnax*, 25 Wn. App. at 718^[6] (Ringold, J., dissenting). A soft bulge in a shirt pocket is not alone sufficient information to find probable cause to arrest. More importantly, to “recognize” an object through the tactile sense is in itself a search requiring probable cause. Whereas the detection of evidence by sight or smell can be accomplished without the physical intrusion of one's person, this is not so with respect to evidence discovered by touch. Evidence seen or smelled “prior” to any physical intrusion may establish probable cause to arrest and search an individual. By contrast, one cannot search first to gather evidence to establish the probable cause needed to justify the initial intrusion. Otherwise, the requirement of probable cause to arrest would be turned upside down.

Broadnax, 98 Wn.2d at 298-99.

The court in *Broadnax* looked not to whether the petitioner's expectation that items in his pocket were private, but instead to whether

⁵ Although the plain view doctrine was revised after *Broadnax* in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (inadvertent discovery is no longer required under the Fourth Amendment to justify seizure of evidence in plain view), the change does not affect the analysis in this case.

⁶ *State v. Broadnax*, 25 Wn. App. 704, 612 P.2d 391 (1980), *reversed*, 98 Wn.2d 289, 654 P.2d 96 (1982).

the police officer was reasonable in identifying an object solely by sense of touch. The court clearly concluded it was not. Under *Broadnax*, *Loewen*, and *Hobart* – all pre-*Dickerson* cases – Washington courts repeatedly and consistently refused to allow police officers to perform more than a limited pat-down for weapons in the context of a *Terry* stop. These decisions were consistent with and based on the then current interpretation of the Fourth Amendment by the United States Supreme Court. The novel concept that a plain feel exception could apply in the context of a *Terry* pat-down was clearly rejected in *Broadnax* and did not become an issue under the Washington Constitution until the unprecedented decision in *Dickerson*.

In a post-*Dickerson* decision, the Washington Supreme Court characterized above quoted language from *Broadnax* as follows:

Although *Broadnax* clearly acknowledges the limitations of the tactile sense under the plain view doctrine, it does not hold “as a matter of law” that the sense of touch cannot satisfy the immediate knowledge requirement. Clerk’s Papers, at 48. On the contrary, *Broadnax* implicitly recognizes that a warrantless seizure may be justified by touch alone where the item has a “distinctive character” such as the “hardness of a weapon”. *Broadnax*, at 298. *Broadnax* merely acknowledged that touch alone cannot “usually” result in immediate recognition of contraband. *Broadnax*, at 298. This is because the sense of touch is inherently less immediate and less accurate than the other senses. Thus, rather than categorically denying that the tactile sense can satisfy the requirements of the plain view doctrine, the *Broadnax* court merely recognized its

limitations. If recognition of the contraband is as immediate and as accurate as recognition of a weapon, then the third requirement of the plain view doctrine may be satisfied. This is consistent with the position recently adopted by the United States Supreme Court in *Minnesota v. Dickerson*, [508] U.S. [366], 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993).

Hudson, 124 Wn.2d at 115-16.

The court in *Hudson* acknowledged that the sense of touch, on its own, is “inherently less immediate and less accurate than the other senses” for purposes of identifying items felt during a *Terry* pat-down. 124 Wn.2d at 115. However, the court rationalized that because officers rely on the sense of touch to detect weapons in a *Terry* pat-down, it is therefore illogical to categorically dismiss the application of the plain feel exception for the detection of contraband, at least in the context of the Fourth Amendment. *Hudson*, at 116 (citing *Minnesota v. Dickerson*, *supra*).

Despite acknowledging that the plain feel exception no longer offends the Fourth Amendment, after *Dickerson*, the court held that the trial court’s findings were insufficient to determine whether the officer in that case had immediately recognized as contraband the item felt in the suspect’s pocket before removing it. *Hudson*, 124 Wn.2d at 117. As such, the court in *Hudson* was careful to require a specific finding on the “immediate recognition” prong of the plain feel/plain view exception.

In *Tzintzun-Jimenez*, supra, another post-*Dickerson* decision, Division Two noted the *Dickerson* Court's difficulty in applying the "plain feel" exception it had just devised:

The practical difficulty of recognizing the nature of an item by a patdown of a suspect's outer clothing became apparent when the Court applied the test to the facts of the case. The *Dickerson* Court affirmed the suppression based on the trial court's finding that the officer developed probable cause to believe the item was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket." *Dickerson*, 113 S.Ct. at 2138.

Tzintzun-Jimenez, 72 Wn. App. at 857. The court also noted the *Dickerson* Court's failure to elaborate on:

how, or under what circumstances, an officer would be able to recognize an item as contraband by a patdown of the outer clothing. Rather, based on *Terry*, it declined to foreclose the possibility. It noted, however, the requirement that prosecutors satisfy the immediate recognition prong of the test which suggests they will infrequently "be able to justify seizures of unseen contraband." *Dickerson*, 113 S.Ct. at 2137.

72 Wn. App. at 856. The *Tzintzun-Jimenez* court, as in *Dickerson* and *Hudson*, concluded that there was insufficient evidence to support finding the officer immediately recognized the item felt in the suspect's pocket as contraband. 72 Wn. App. at 859.

In summary, an examination of preexisting state law reveals the following factors:

i) Analysis under Wash. Const., art. 1, § 7, versus the Fourth Amendment, focuses on the reasonableness of the state’s action rather than on the reasonableness of the individual’s privacy expectation.

ii) Wash. Const., art. 1, § 7, provides greater protection against intrusive searches than does the Fourth Amendment.

iii) Washington courts have consistently recognized the inherent unreliability of the sense of touch for identifying objects.

iv) Prior to *Dickerson*, Washington never recognized a “plain feel” exception to the warrant requirement under either the Fourth Amendment or Wash. Const., art. 1, § 7.

v) Following *Dickerson*, there have been no published cases in Washington finding that the elements of the plain feel exception have been met.

vi) Following *Dickerson*, there have been no published cases in Washington that have analyzed the “plain feel” exception to the warrant requirement under Wash. Const., art. 1, § 7.⁷

⁷ *Broadnax*, *Hobart*, *Loewen*, *Hudson*, and *Tzintzun-Jimenez*, are the only pre-existing state law on this issue. *Broadnax*, *Hobart*, and *Loewen*, all pre-*Dickerson* cases, were based on the Fourth Amendment, rather than art. 1, § 7. There was no need for an independent analysis under art. 1, § 7, because, prior to *Dickerson*, the plain feel exception was summarily rejected under the Fourth Amendment. In *Tzintzun-Jimenez*, the issue of the whether the Washington Constitution allowed for a plain feel exception never

The issue is: Does the Washington Constitution permit law enforcement officers to stop a person whom they have no probable cause to arrest, pat-down that person for weapons and, in the course of that pat-down, take the opportunity to search for contraband using a method of identification that is inherently unreliable? When analyzed on the basis of preexisting state law, the answer must be “no.”

Whether pre- or post-*Dickerson*, preexisting Washington law has been absolutely consistent in maintaining the original purpose of a *Terry* pat-down, which is to allow police officers investigating suspected criminal activity to reduce the risk of harm to themselves and bystanders by searching suspects for weapons, but not for contraband. In addition, the courts have repeatedly noted that it is the distinctive size, shape and density of weapons that allows for such a limited search. In this way, the courts have maintained the integrity of article 1, § 7, by limiting the actions of the state and not the expectations of individuals.

Not until *Dickerson*, did the degree of protection provided individuals under the Fourth Amendment diverge from those provided by article 1, § 7, in the context of a *Terry* pat-down. Whether pre- or post-

arose. In *Hudson*, the Court did not address the issue in the context of the Washington State Constitution because of untimely briefing. 124 Wn.2d at 120. Here, the issue has been timely raised and properly briefed.

Dickerson, “plain feel” has never been a viable excuse for conducting a warrantless seizure in the context of a *Terry* pat-down in Washington. Pre-*Dickerson* cases summarily rejected the plain feel exception and post-*Dickerson* cases have yet to find the exception applicable. As such, preexisting state law has never recognized a valid plain feel exception to the warrant requirement in the context of a *Terry* pat-down.

Because article 1, § 7 limits state actions rather than personal expectations and is generally more protective than the Fourth Amendment, and because preexisting state law has never found the plain feel exception to apply in the context of a *Terry* pat-down, an analysis under preexisting state law necessarily leads to the conclusion that article 1, § 7 does not allow the inherently unreliable sense of touch to give rise to probable cause in the course of a *Terry* pat-down.

b. Factor (6): Matters of Particular Local or State Concern

In *State v. Wojtyna*, 70 Wn. App. 689, 693, 855 P.2d 315 (1993), review denied, 123 Wn.2d 1007, 869 P.2d 1084 (1994), this Court held that when other state courts have decided a particular issue on independent state grounds, it may indicate the matter is local or state in character. That holding is applicable here.

In a case decided before *Dickerson*, *People v. Diaz*, 612 N.E.2d 298 (N.Y. 1993), the Court of Appeals of New York refused to accept a plain feel exception to the warrant requirement. The court said it would have reached the same conclusion by an independent state analysis. *Diaz*, 612 N.E.2d at 302 n.2. In a case decided after *Dickerson*, *In the Interest of S.D.*, 633 A.2d 172 (Pa. Super. 1993), the majority opinion held that it would be appropriate to determine whether the Pennsylvania Constitution requires a different result on this issue. *S.D.* at 176. *See also*, *Commonwealth v. Stackfield*, 651 A.2d 558, 562 (Pa. Super. 1994) (That officer felt a baggie in defendant's pocket did not allow officer to exceed scope of *Terry* pat-down because the baggie "could as easily have contained the remains of [defendant's] lunch as contraband").

Moreover, in Washington, the unique nature of the exclusionary rule makes the issue of whether to allow the plain feel exception a matter of particular state and local interest. This rule is intended to do more than deter unlawful police conduct; it also serves to protect privacy interests and to preserve the integrity of the judiciary. *State v. Boland*, *supra*; *State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983); *State v. White*, 97 Wn.2d at 109 n.8. The Supreme Court has stated it "is beneath the dignity of the state and contrary to public policy" to admit evidence which was obtained

pursuant to an illegal invasion of privacy. *Tacoma v. Houston*, 27 Wn.2d 215, 227, 177 P.2d 886 (1947).

Here, adoption of the plain feel exception in Washington will “invite the use of weapons’ searches as a pretext for unwarranted searches, and thus to severely erode the protection[s]” preserved by article 1, § 7. *Hobart*, 94 Wn.2d 447. As such, police officers will not be deterred from conducting unlawful searches, the protection of individual privacy interests will be eroded and, as a result, the integrity of the judiciary will be diminished.

Finally, there is no need for national uniformity with respect to *Terry* frisks and the plain feel exception. The Fourth Amendment, via the Fourteenth Amendment, already provides a uniform minimum level of privacy protection. U.S. Const., Amends. 4 and 14; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, *reh’g denied*, 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 (1961) (applying Fourth Amendment rights and remedies to states). The objective of national uniformity in search and seizure issues has long since been abandoned as states have interpreted their own constitutions to find “individual liberties more expansive than those conferred by the Federal constitution.” *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 64 L.Ed 2d 741 (1980) (cited in *Gunwall*, 106 Wn.2d at 59).

Indeed, the Washington Supreme Court has recognized that the Washington bill of rights was adopted to protect citizens against unreasonable actions by the state. *Southcenter Joint Venture v. NDPC*, 113 Wn.2d 413, 422, 780 P.2d 1282 (1989). Thus, the state has a particular interest in ensuring no such unreasonable actions occur. This interest surely extends to preventing arbitrarily motivated searches that may be facially justified by the almost limitless scope of the plain feel exception.

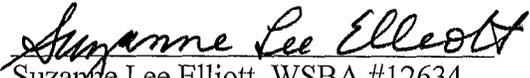
Thus, under an independent state constitutional analysis, this Court should reject the rule in *Dickerson* and hold that the plain feel exception in the context of a *Terry* pat-down cannot be used as a basis for a police officer to establish probable cause in Washington.

**V.
CONCLUSION**

For the reasons stated above, this Court should reverse Brown's conviction and remand for reversal.

DATED this 31st day of October, 2016.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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10/31/2016
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