IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 377 CR 2008
	:	
TIMOTHY STEPHEN KEER,	:	
Defendant	:	

Cynthia Ann Dyrda-Hatton, Esquire,
Assistant District Attorney — Counsel for Commonwealth

George T. Dydynsky, Esquire — Counsel for Defendant

Criminal Law – Search and Seizure – Plain Feel Doctrine - Suppression

1. The terms search and seizure, while often used together in the law, are not synonymous. The plain feel doctrine, like the plain view doctrine, is a doctrine which authorizes the seizure of, not the search for, contraband.
2. Under the plain feel doctrine, an officer conducting a lawful *Terry* frisk or a consensual weapons patdown may seize contraband from a suspect if (1) the officer is lawfully in a position to detect the presence of contraband, (2) the incriminating nature of the contraband is immediately apparent from its tactile impression, and (3) the officer has a lawful right of access to the object.
3. An officer who has a defendant's consent to conduct a protective patdown for the officer's safety is not authorized under the plain feel doctrine to seize cocaine wrapped in cellophane found in the defendant's pocket which the officer, after having concluded that the item is not a weapon, is not able to immediately identify as contraband without further manipulation. The latter constitutes an extended search beyond that authorized for the officer's protection and requires suppression of the cocaine seized.

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MEMORANDUM OPINION

Nanovic, P.J. – June 16, 2009

In these proceedings, the Defendant, Timothy Stephen Keer, seeks to suppress crack cocaine seized from his person during the course of a consensual pat-down search for weapons. The only question before us is whether this seizure exceeded the scope of the consent given for a protective patdown.

BACKGROUND FACTS

On November 21, 2007, Officer Frank Buonaiuto of the Franklin Township Police Department was on routine patrol within the township. At approximately 1:47 A.M. he observed the Defendant walking alone along the side of Fairyland Road, approximately fifty feet from the location of a known narcotic house. The Defendant was dressed in a black jacket and camouflage pants.

Officer Buonaiuto stopped to see if the Defendant needed help. The Defendant informed the officer that he was fine and was walking to his home in Coaldale. The Defendant gave no appearance of being under the influence of alcohol or drugs. Officer Buonaiuto offered to drive the Defendant home, and the Defendant accepted.

Before entering the police cruiser, Officer Buonaiuto requested that the Defendant provide him with identification. This was provided and the Defendant correctly identified himself. Officer Buonaiuto, who was by himself, also advised the Defendant that before entering the cruiser he would have to consent to a pat-down search for weapons for the officer's safety. The Defendant agreed.

As the Defendant was being patted down, Officer Buonaiuto felt a bulge in the Defendant's left front pants pocket. While neither the size nor shape of the buldge was described, Officer Buonaiuto did testify that the bulge was soft and crinkled, leading him to believe that he was feeling cellophane, and not a weapon. When he squeezed further, he felt a hard, rock-like object. At this point, Officer Buonaiuto believed he was dealing with a controlled substance, likely cocaine, wrapped in cellophane.

Officer Buonaiuto then reached into the Defendant's pocket and removed the item which, on sight, also appeared to be

cocaine, a fact later confirmed by field testing. The Defendant was arrested, taken to the police station, and Mirandized; he admitted that the substance seized was crack cocaine.

DISCUSSION

The burden of establishing that evidence has not been obtained in violation of a defendant's rights is upon the Commonwealth in a suppression proceeding. *See* Pa.R.Crim.P. 581(H). Here, the Commonwealth contends that the crack cocaine was seized pursuant to the plain feel doctrine.

> Under the plain feel doctrine, a police officer may seize non-threatening contraband detected through the officer's sense of touch during a Terry frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object. [T]he plain feel doctrine is only applicable where the officer conducting the frisk feels an object whose mass or contour makes its criminal character immediately apparent. Immediately apparent means that the officer readily perceives, without further exploration or searching, that what he is feeling is contraband. If, after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the immediately apparent requirement has not been met and the plain feel doctrine cannot justify the seizure of the object.

Commonwealth v. Pakacki, 901 A.2d 983, 989 (Pa. 2006) (citations omitted). The parties do not dispute that this standard applies equally to the present circumstances where consent is

voluntarily given and is limited to a search for weapons. *See generally*, Commonwealth v. Moultrie, 870 A.2d 352 (Pa.Super. 2005) (treating a consensual weapons patdown the same as a Terry frisk).

Such a search, being an intrusion on a defendant's constitutionally protected rights, must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Terry v. Ohio, 392 U.S. 1, 26 (1968); *see also* Commonwealth v. Canning, 587 A.2d 330, 331 (Pa.Super. 1991) (agreeing with Terry that because the sole justification for the search is the protection of the officer, it must be confined in scope to a search for weapons). The purpose of this search is not to discover evidence, but to protect the officer or others nearby. *See* Commonwealth v. Stevenson, 744 A.2d 1261, 1264 (Pa. 2000). Once the officer determines that there are no weapons, there is no legal justification, at least under Terry and the terms of consent here, to conduct a further search. *Cf.* Commonwealth v. Wilson, 927 A.2d 279, 285 (Pa.Super. 2007) ("Following a protective pat-down search of a suspect's person, a more intrusive search can only be justified where the officer *reasonably believed* that what he had felt appeared to be a weapon.").

"[I]f the protective search goes beyond that which is necessary to determine whether the suspect is armed, it is no

longer valid, and its fruits will be suppressed." Commonwealth v. Graham, 721 A.2d 1075, 1078 (Pa. 1998). However, until that determination has been made, an officer in the process of securing his safety may lawfully seize contraband whose incriminating nature is immediately apparent upon touch, rather than through a further search.[1] To be immediately apparent requires that the incriminating nature of an object be determined at or before the officer's legal basis to search for weapons ceases, otherwise the information upon which the officer's recognition of contraband is based will have been acquired without legal justification. *See* In the Interest of S.J., 713 A.2d 45, 53 (Pa. 1998) (Cappy, J., concurring and dissenting) ("Manipulation of any object detected during a pat down [sic], once the officer is satisfied that the object is not a weapon, is unacceptable.").[2]

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[1] In this respect it is helpful to note that the plain feel doctrine, like that for plain view, "establishes an exception to the requirement of a warrant not to search for an item, but to seize it." Commonwealth v. Graham, 721 A.2d 1075, 1080 (Pa. 1998). "This artful distinction between search and seizure highlights the principle that the plain view doctrine permits police officers to seize contraband that is in their purview if an independent justification gives the officer a lawful right of access to the item, but cannot, on its own, justify an officer extending his or her search for that item." Id.

[2] In Minnesota v. Dickerson, the Supreme Court stated:

> **If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.**

508 U.S. 366, 375-76 (1993); *see also* Commonwealth v. Zhahir, 751 A.2d 1153, 1160 (Pa. 2000) ("Because the existing requirements under Terry serve to

Here, Officer Buonaiuto testified that when he first touched the bulge in the Defendant's pocket, it was soft and crinkled, and felt to him like cellophane. Officer Buonaiuto did not articulate any reason to believe that what he felt in the Defendant's pocket was a weapon or contraband. *See* Commonwealth v. E.M./Hall, 735 A.2d 654, 664 n.8 (Pa. 1999) ("In order to remain within the boundaries delineated by Dickerson, an officer must be able to substantiate what it was about the tactile impression of the object that made it immediately apparent to him that he was feeling contraband"). To the contrary, the object did not feel like a weapon and he did not believe it was a weapon. Nevertheless, he squeezed the bulge to see if he could feel if anything was contained inside the cellophane. At this point, he felt a hard, rock-like object and, based on his experience and training, immediately formed the conclusion that the cellophane contained a controlled substance. The Defendant argues that the patdown conducted by Officer Buonaiuto exceeded his consent to search for weapons, that once the officer was able to discern that the bulge in his pocket was not a weapon, the officer exceeded his authority in squeezing and probing further and, in effect, conducting an extended search beyond that authorized.

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limit the scope and duration of the search, and because the plain feel seizure applies solely to items immediately apparent as contraband, the privacy interests of the suspect are not further compromised by recognition of the plain feel doctrine.").

The evidence presented by the Commonwealth shows that while the packaging, cellophane, was immediately apparent to Officer Buonaiuto, its contents were not. Cellophane alone is not *per se* contraband. It can be used to hold either legal or illegal substances.[3] Only after Officer Buonaiuto explored further, squeezing the bulge, was he able to feel the contents and conclude the Defendant possessed cocaine. In doing so after determining that the bulge was not a weapon, Officer Buonaiuto exceeded both the scope of the consent given and his lawful authority. Once Officer Buonaiuto's justification for the patdown ended (i.e., officer security), and before the incriminating nature of the bulge was apparent to him, he had no independent justification to search further or to seize any object from the Defendant's pockets.

Particularly apropos to the present facts is the following language from the United States Supreme Court's

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[3] In Commonwealth v. Stevenson, a case which examined the immediately apparent requirement in the context of items which have both legal and illegal uses, the Pennsylvania Supreme Court stated:

> **We agree with the Fink and Stackfield courts that the immediately apparent requirement of the plain feel doctrine is not met when an officer conducting a Terry frisk merely feels and recognizes by touch an object that could be used to hold either legal or illegal substances, even when the officer has previously seen others use that object to carry or ingest drugs. To find otherwise would be to ignore Dickerson's mandate that the plain feel doctrine is a narrow exception to the warrant requirement that only applies when an officer conducting a lawful Terry frisk feels an object whose mass or contour makes its identity as contraband immediately apparent.**

744 A.2d 1261, 1266 (Pa. 2000).

decision adopting the plain feel corollary to the plain view doctrine:

> Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search [under Terry:]. . . . the protection of the police officer and others nearby." It therefore amounted to the sort of evidentiary search that Terry expressly refused to authorize and that we have condemned in subsequent cases.

Minnesota v. Dickerson, 508 U.S. 366, 378 (1993) (citations omitted) (finding that when officer felt small hard object wrapped in plastic and determined it was crack cocaine only after conducting further search, i.e., squeezing and manipulating object, seizure of object was not justified by plain feel doctrine); *see also* Commonwealth v. Stackfield, 651 A.2d 558, 562 (Pa.Super. 1994) (finding officer's testimony that he felt a zip-lock baggie during Terry frisk did not support conclusion that officer felt item that he immediately recognized as contraband since baggie is not "*per se* contraband").

CONCLUSION

In accordance with the foregoing, the search as conducted exceeded the scope of a permissible patdown, resulting in a violation of the Defendant's constitutional right to be free from an unreasonable search and seizure. Consequently, the cocaine seized from the Defendant must be suppressed, as must

all evidence obtained subsequent to and flowing from this seizure, including the Defendant's later confession.

BY THE COURT:

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P.J.