IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	**No.: 04-10,726**
	:	
SHAWN GRAHAM,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Defendant's Motion to Suppress filed June 28, 2004 alleging that evidence of crack cocaine removed from the Defendant's sock during a protective patdown by officers must be suppressed. The facts of the case, as presented during a hearing in this matter on July 19, 2004, are as follows:

On April 13, 2004, officers were dispatched to 602 Brandon Avenue in the City of Williamsport for a report of shots fired. The person who reported the shots identified him or herself when making the report. When the officers arrived at the address about one minute after the initial call, they discovered the Defendant and another person sitting on the front porch. The two were called from the porch and patted down by officers to determine if they possessed a firearm. While conducting a patdown of the Defendant, Officer Joseph Ananea of the Williamsport Bureau of Police saw a bulge the size of a golf ball on the inside of the Defendant's right ankle, just above his shoe. When he reached that area during the patdown, the officer briefly rubbed the bulge between his finger and thumb. At that time he heard the

sound of a baggie and felt something inside of it. The officer testified that he immediately believed that the baggie contained either a controlled substance or drug paraphernalia. He further testified that he knew immediately that the bulge was not a weapon. The officer testified that although he had discovered the baggie during the patdown, he did not remove it at that time because the investigation regarding the gunshot was not yet resolved. A short time later, it was determined that the Defendant was not connected with the gunshot incident. The officer then confronted the Defendant about the bulge by asking him if he had any drugs in his right sock. The Defendant denied having any drugs and lifted his pant leg to confirm it. The bulge was still visible inside of the Defendant's sock and this was pointed out to the Defendant by another officer. The Defendant then dropped his pant leg and took a single step away from the officers. The officers then placed him under arrest for possession of a controlled substance and/or possession of drug paraphernalia. After a search incident to the arrest, the bulge was discovered to be a sandwich bag containing eleven smaller, individual baggies of suspected rock cocaine. Also found on the Defendant were two additional, separate small baggies of marijuana, over $1300 in cash and two cell phones. Defendant contends that the seizure of the contraband from his person was unlawful because it exceeded the parameters of the "plain feel" doctrine, and that his arrest was unlawful because it was not supported by probable cause. The Commonwealth counters that the actions of the officers

are permissible under “plain feel” and therefore the evidence found on the Defendant should not be suppressed.

The initial question in any plain feel case is whether the officer was justified in conducting a Terry[1] stop and patdown of the Defendant. It is well established in Pennsylvania that a police officer may conduct a brief investigatory stop of an individual if the officer observes unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot. Commonwealth v. E.M./Hall, 558 Pa. 16, 735 A.2d 654 (Pa. 1999). See also Commonwealth v. Lewis, 535 Pa. 501, 509, 636 A.2d 619, 623 (Pa. 1994). Additionally, “a police officer need not personally observe the illegal or suspicious conduct which lead (sic) him or her to believe that criminal activity is afoot and that a person is armed and dangerous.” Commonwealth v. Jackson, 359 Pa. Super. 433, 519 A.2d 427 (Pa.Super. 1986). An investigatory stop subjects an individual to a stop and a brief period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Commonwealth v. Ellis, 541 Pa. 285, 294, 662 A.2d 1043, 1047 (Pa. 1995). “Such an investigatory stop is justified only if the detaining officer can point to specific and articulable facts which, in conjunction with rational inference derived from those facts, give rise to a reasonable suspicion of criminal activity and therefore warrant the intrusion.” E.M., supra., citing to Commonwealth v. Murray, 460 Pa. 53, 61, 331 A.2d 414, 418 (Pa. 1975).

[1] Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889 (1968).

Significantly, not all investigatory stops will necessarily support a frisk of the detained individual. In order to justify a frisk under Terry, the officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." E.M., supra., quoting Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917 (1968). See also Terry, supra. at 392 U.S. at 24, 88 S. Ct. at 1881; In the Interest of S.J., 551 Pa. 637, 713 A.2d 45, 48 (Pa. 1999); Commonwealth v. Melendez, 544 Pa. 323, 329 n.5, 676 A.2d 226, 228 n.5 (Pa. 1996); Commonwealth v. Hicks, 434 Pa. 153, 158-59, 253 A.2d 276, 279 (Pa. 1969). Such a frisk is "strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby."" E.M., supra., citing Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S. Ct. 2130, 2136, 124 L. Ed. 2d 334 (1993) (quoting Terry, 392 U.S. at 26, 88 S. Ct. at 1882). "(T)he purpose of this limited search is not to discover evidence, but to allow the officer to pursue his investigation without fear of violence." E.M., supra., quoting Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). If the search "goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed." E.M., supra., citing Sibron, supra., at 65, 1904, ___.

In this case, the officers arrived at the scene to investigate a report made by a named person that shots had been fired at a particular address. The Defendant and another individual were on the porch of that residence

when the officers arrived approximately one minute after they were dispatched. The Court finds that given these circumstances, the officer had reasonable suspicion both that criminal activity was afoot and that the Defendant and his companion might be armed and dangerous. The officer's fear for his own safety justified a brief detention and patdown frisk of the Defendant under Terry, supra.

Once the detention and pat-down is justified, the Court must determine if the seizure of drugs was lawful under the "Plain Feel" doctrine.

The plain feel doctrine holds that

> 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. Dickerson, 508 U.S. at 373-75, 113 S. Ct. at 2136-37. As Dickerson makes clear, the 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. Id. at 375, 113 S. Ct. at 2137;

Commonwealth v. Stevenson, 560 Pa. 345, 744 A.2d 1261 (Pa. 2000), quoting Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed. 2d 334 (1993); See also Commonwealth v. E.M./Hall, 558 Pa. 16, 735 A.2d 654 , 663 (Pa. 1999); Commonwealth v. Smith, 454 Pa. Super. 489 (Pa. Super. 1996); Commonwealth v. Johnson, 429 Pa. Super. 158, 631 A.2d 1335 (1993). "Plain feel" was adopted by the United States Supreme Court in Minnesota v. Dickerson, supra. The Pennsylvania Superior Court recognized the doctrine in Johnson, supra., (adopting Dickerson and holding that seizure of contraband recognized by plain feel during a Terry frisk is not

a violation of the IV Amendment of the United States Constitution) and Commonwealth v. Dorsey, 439 Pa.Super. 494, 654 A.2d 1086 (Pa.Super. 1995) (plain feel seizure is not a violation of Article I, Section 8 of the Pennsylvania Constitution).

The Pennsylvania appellate courts have been extremely careful to limit the applicability of the plain feel exception under Article I § 8 of the Pennsylvania Constitution. They have done so by strictly construing the requirement that the criminal character of the seized object must be immediately apparent. "Immediately apparent means that the officer readily perceives, without further exploration or searching, that what he is feeling is contraband." E.M., supra. If, after initially discovering the object during the valid Terry frisk, 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." Id. "Once the initial pat-down dispels the officer's suspicion that the suspect is armed, any further poking, prodding, squeezing, or other manipulation of any objects discovered during that pat-down is outside the scope of the search authorized under Terry." Commonwealth v. Graham, 554 Pa. 472, 721 A.2d 1075 (Pa. 1998). Additionally, a seizure under the plain feel doctrine is constitutionally unacceptable if the officer "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."

Stevenson, supra. See also Commonwealth v. Fink, ___ Pa. Super. ___, 700 A.2d 447 (Pa.Super. 1997), app. den. 552 Pa. 694, 716 A.2d 1247 (Pa. 1998) (illegal nature of a pipe used to smoke marijuana was not immediately apparent to officer because pipe can also be used to smoke legal substances); Commonwealth v. Stackfield, 438 Pa. Super. 88, 651 A.2d 558 (Pa.Super. 1994) (officer's testimony that he felt packaging material for drugs or zip-lock baggies in Defendant's pants pocket was not acceptable under plain feel doctrine because zip-lock baggies can also be used to package legal materials). When an object with both lawful and unlawful uses is discovered during a Terry search for weapons, the officer is required to articulate what about the object makes it immediately apparent that the object is being used illegally at the time that it is felt. E.M., supra. See also Commonwealth v. Smith, 454 Pa. Super. 489, 685 A.2d 1030 (Pa.Super. 1993) (envelope containing incriminating contraband removed from Defendant's pocket must be suppressed when officer fails to articulate what about the envelope caused it to be immediately apparent to the officer that it contained contraband). "An officer must do more than testify as to his general suspicion that a bulge may have been contraband." E.M., supra., citing Commonwealth v. Mesa, 453 Pa.Super. 147, 683 A.2d 643 (Pa.Super. 1996).

In this case, the officer testified that he noticed a bulge the size of a golf ball in the Defendant's sock, just above his boot. He further explained that when he felt the bulge he also rubbed it between his finger and thumb

and was then able to hear the sound of a baggie. He related that he felt something inside the baggie, but did not describe what he felt. He testified that he knew from the pat-down that the object was not a weapon, but believed that it was drugs because of his past training and experience. The Court finds that when the officer rubbed the bulge between his finger and thumb that he exceeded the permissible scope of a Terry frisk for weapons and therefore the contraband seized from the Defendant does not fall within the plain feel exception to the warrant requirement of the United States and Pennsylvania Constitutions. Although the officer testified that he believed that the bulge was contraband, he did not testify as to whether he reached this conclusion before or after he manipulated the bulge with his finger and thumb. He also testified that he knew the object was a baggie and thought, based upon his training and experience, that it was either drugs or drug paraphernalia. He did not explain what about the baggie or what from his training and experience caused him to believe that the baggie was not being used for a legal purpose. Although he testified on cross examination that he felt something inside of the baggie, the officer did not in any way describe what he felt. He did say, however, that he was certain that the bulge was not a weapon. In these circumstances, the Court finds that the officer not only exceeded the permissible scope of a Terry frisk for weapons by his fingering of the bag, its seizure could not be justified under the plain feel doctrine. Therefore, since the police exceeded their authority in seizing the cocaine in the Defendant's sock, probable cause did not exist for their arrest of

Defendant. Accordingly, the additional contraband later removed from the Defendant's person when he was searched incident to the unlawful arrest will be suppressed as fruit of the poisonous tree. See Sibron, supra.

ORDER

AND NOW, this ____ day of August, 2004, upon consideration of Defendant's Motion to Suppress Evidence, and for the reasons set forth above, the Motion is GRANTED and it is ORDERED and DIRECTED that all items seized from Defendant after his stop and subsequent arrest must be suppressed.

By the Court,

_____J.
Nancy L. Butts, Judge

xc: DA
PD(MM)
Deputy Court Administrator
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire