STATE OF LOUISIANA	*	**NO. 2001-KA-1131**
VERSUS	*	**COURT OF APPEAL**
CAROLYN MCGUIRE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 232-672, DIVISION "C"
Honorable Wayne Cresap, Judge
* * * * * *
JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay III and Judge David S. Gorbaty)

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AFFIRMED.

STATEMENT OF THE CASE

On April 7, 1999 the State filed a bill of information charging the defendant. Carolyn McGuire with one count of possession of cocaine, a violation of La. R.S. 40:967. The defendant entered a not guilty plea on April 27, 1999. Following a hearing on November 16, 1999, the court denied the defendant's motion to suppress evidence. Although retained defense counsel gave notice of intent to file a writ application, he did not do so. On April 24, 2000, the defendant withdrew her former plea of not guilty and entered a plea of guilty as charged, while reserving her right to appeal from the adverse ruling on the motion to suppress evidence. The court set sentencing for September 12, 2000. On that date, the defendant appeared but her retained counsel did not. With the representation of an appointed attorney, the defendant was sentenced to two years at hard labor, suspended, and placed on active probation to include payment of $1200 in fines and costs. The court set the matter for execution of sentence on December 5,

2000 to give the defendant's retained counsel an opportunity to appear. On that date, counsel did appear and advised the court that the case was on appeal. The defendant was subsequently arrested for a probation violation; her term of probation was extended on March 26, 2001.

Although the defendant through retained counsel moved for an appeal in December 2000, costs were not paid, and the record was not lodged. It was subsequently learned that counsel had died, and the matter was remanded for determination of counsel. On May 21, 2001, the trial court appointed the Louisiana Appellate Project to represent the defendant in her appeal. The appellant's brief was filed on June 28, 2001, and the State filed its brief on August 10, 2001.

STATEMENT OF THE FACTS

On January 9, 1999, Deputy Robert Broadhead of the St. Bernard Sheriff's Department was training a new deputy, Mike Ocman. At approximately 10:30 p.m. the two deputies were in the Arabi area when they observed a white Ford pick-up enter the parish from the lower Ninth Ward of Orleans Parish. Deputy Broadhead observed that the truck had no light illuminating the license plate. As they began following the truck, the deputies observed it run a red light at Mehle and Judge Perez. The officers stopped the truck in the parking lot of a convenience store. The stop was

based solely on the observed traffic violations. The driver of the vehicle, Pamela McGuire, exited while the defendant, Carolyn McGuire, exited from the passenger side. Deputy Broadhead interviewed the women, who told him that they had been in Arabi to drop a friend off. This apparent falsehood aroused the deputy's suspicions. Furthermore, during the routine interview, the deputy noticed the defendant "favoring her right pocket" by squeezing it and repeatedly placing her hand partially inside. Because he was concerned for his safety, Deputy Broadhead did a pat-down of the defendant's jacket. While patting down the pocket which the defendant had been "favoring," the deputy felt "a small rock-like substance" which he believed to be crack cocaine. He retrieved the object, field-tested it, and found that it tested positive for cocaine. The defendant was arrested; Pamela McGuire was released after being issued citations for the two traffic offenses.

In further testimony at the motion to suppress hearing, Deputy Broadhead stated that the defendant's jacket was either leather or imitation leather. He stated that he had felt crack cocaine through fabric more than a dozen times before. He also testified that his suspicions were somewhat aroused because the vehicle in which the defendant was riding had come from "a certain part of Orleans Parish" which was known for drug activity.

The deputy could not recall if he was driving or if Deputy Ocman was, but he did recall pointing out the traffic violations to Ocman. He also could not recall who retrieved the insurance and registration papers from the vehicle. The deputy did not know if the defendant was instructed to exit the pick-up or if she had done so of her own accord. He was "pretty sure" that he was the officer who approached the passenger side and may have asked the defendant to exit the truck. Deputy Broadhead described the size of the rock of crack cocaine which he seized as a quarter-inch in diameter.

The State's only witness at the motion to suppress hearing was Deputy Broadhead. The defense chose to call three witnesses, Pamela McGuire, Deputy Ocman, and the defendant, at the hearing. Pamela McGuire stated that she is the sister of the defendant and had been driving the pick-up truck on the night of the defendant's arrest. She stated that she had already parked her car in the convenience store parking lot when the police pulled up behind her. She exited and walked to the back of her truck with her driver's license. Deputy Broadhead asked her if she knew why she had been stopped, then told her it was because she had run a yellow light and had no light on her license plate. Ms. McGuire further testified that she was questioned about where she was coming from, and she responded that she had been dropping the dishwasher off. The deputy said she was a liar and

had been coming from the Ninth Ward. During this conversation, the defendant was sitting in the truck. The deputies made her exit and searched the truck. They then ordered the defendant to raise her hand. According to Ms. McGuire, the deputy went into the defendant's pockets, pulled something out, then told her she was under arrest for crack cocaine; he did not pat the defendant's jacket at all. Ms. McGuire also stated that the defendant's purse was dumped out and searched.

Deputy Ocman, testifying as a hostile witness, stated that he was in training with Deputy Broadhead on the night of the defendant's arrest. As they pulled out of the Arabi station onto Judge Perez Drive, Deputy Broadhead noticed a vehicle with no license plate illumination. Deputy Ocman saw the truck go through the red light and determined that there was cause to stop the vehicle. The traffic stop occurred in the parking lot of the convenience store. Deputy Ocman recalled that Deputy Broadhead met with the driver, Pamela McGuire, outside the truck while he went to the passenger side. Deputy Ocman stated that he was the one who observed the defendant constantly touching her jacket; he pointed that activity out to Deputy Broadhead out of concern for officer safety, and Deputy Broadhead did the frisk. At the request of the defendant, Deputy Ocman demonstrated on the defendant, who put her jacket on for the demonstration, how Deputy

Broadhead did the frisk with the backs of his hands.

The defendant testified that she and her sister were driving from Arabi where they had dropped off a worker when they pulled into the convenience store. A police car turned on its lights, and her sister exited the vehicle. The defendant stated she was sitting in the truck looking for the insurance and registration papers when Deputy Broadhead approached from the driver's side and told her to get out. Deputy Broadhead searched the truck and her purse. He then walked over to her, told her to raise her hands, and started searching. He stuck his hand in her pocket, then told her she was under arrest. She denied that he frisked her first. The defendant stated that neither deputy searched her sister.

ERRORS PATENT

A review of the record for errors patent reveals none.

DISCUSSION

In a single assignment of error, the defendant contends that the trial court erred when it denied the motion to suppress evidence. She argues that, even assuming the trial court correctly discounted the testimony of the defense witnesses, it is incredible that Deputy Broadhead could determine with the backs of his hands, through the pocket of a leather jacket, that a small object such as he described was crack cocaine. The appellant

acknowledges the “plain feel” doctrine enunciated in Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), in which the court ruled that officers may seize contraband detected by touch during a patdown search if the search remains within the bounds of a Terry patdown search. The court stated:

> We have already held that police officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a Terry search. . . . Under [the plain view] doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See Horton v. California, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 2307-2308, 110 L.Ed.2d 112 (1990); Texas v. Brown, 460 U.S. 730, 739, 103 S.Ct. 1535, 1541-1542, 75 L.Ed.2d 502 (1983) (plurality opinion). If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object--i.e. if "its incrimination character [is not] immediately apparent," Horton, supra, at 136, 110 S.Ct. at 2308--the plain view doctrine cannot justify its seizure. Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).
>
> We think that this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the

> Fourth Amendment - or at least no search independent of the initial intrusion that gave the officers their vantage point.... The same can be said of tactile discoveries of contraband. 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.

Minnesota v. Dickerson, 113 S.Ct. at 2136-2137.

As noted in State v. Smiley, 99-0065, p. 5-6 (La. App. 4 Cir. 3/3/99), 729 So.2d 743, 746:

> In order for this exception to apply, the State had to show a basis for a patdown search, during which the officer felt what was immediately apparent as contraband. LSA-C.Cr.P. art. 215.1(B) authorizes a limited frisk for weapons during an investigatory stop. Paragraph B provides:
>
> > When a law enforcement officer has stopped a person for questioning pursuant to this Article and reasonably suspects that he is in danger, he may frisk the outer clothing of such person for a dangerous weapon. If the law enforcement officer reasonably suspects the person possesses a dangerous weapon, he may search the person.
>
> See also State v. Hunter, 375 So.2d 99 (La. 1979). "The officer need not be absolutely certain that the person is armed, but the officer must be warranted in his belief that his safety or that of others is in danger." State v. Smith, 94-1502 p. 5 (La. App. 4 Cir. 1/19/95), 649 So.2d 1078, 1082. As noted by this court in State v. Denis, 96-0956, pp. 7-8 (La. App. 4 Cir. 3/19/97), 691 So.2d 1295, 1299, writ denied 97-1006 (La.

6/20/97), 695 So.2d 1352:

> We recognize that the police have the right to ensure their own safety in an encounter with a suspected criminal. Under both our federal and state Constitutions, however, this right must be balanced against an individual citizen's right to be free from unreasonable searches. Although sometimes appearing to be a legal technicality, Article 215.1 B represents the legislature's attempt to maintain that balance by allowing the officer, who has lawfully stopped an individual, to perform a pat-down for weapons, but **only** if he "reasonably suspect[s] that he is in danger."
>
> A police officer's duty to enforce and uphold the laws includes not only those statutes that define and prohibit criminal conduct, but also those which define and limit the government's intrusion into the lives of its citizens. Unless the plain language of Article 215.1 B is interpreted as authorizing an officer to frisk every pedestrian who is stopped pursuant to subsection A, the only way a court can determine if the officer reasonably suspected that he was in danger is to require him to express that suspicion, and explain upon what it is based. Eliminating the requirement for such articulation not only eviscerates this statute, but also opens the door for potential abuse by the rare officer who acts upon personal prejudices rather than actual observation and experience. (emphasis supplied)

In the instant case, the defendant in her brief assumes for the sake of her argument that there was a sufficient basis for a legitimate frisk of her jacket by Deputy Broadhead. Considering that the officers here articulated that the actions of the defendant, specifically in manipulating her pocket and reaching in and out of it, caused them concern for their safety, it appears that the requirements of Article 215.1 were met. The issue then is solely whether

the State met its burden of showing that the evidence was properly seized under the plain feel exception.

The application of the plain feel doctrine has been considered in several cases from this Court, as was noted in State v. Johnson, 94-1170, p. 7, (La. App. 4 Cir. 8/23/95), 660 So.2d 942, 948:

> In State v. Parker, 622 So.2d 791 (La. App. 4th Cir. 1993), writ denied 627 So.2d 660 (1993), the officer, while conducting a pat-down search, seized a matchbox containing crack cocaine. Because the officer could not tell that the matchbox contained contraband just by feeling it, this court found that its seizure was not justified by Dickerson. Likewise, in State v. Jackson, 26,138 (La. App. 2d Cir. 8/17/94), 641 So.2d 1081, the seizure of cocaine from a matchbox inside the defendant's pocket was found not to fall within the "plain feel" exception. However, the court also found that the defendant consented to the removal and opening of the matchbox, which then revealed the cocaine. In State v. Short, 605 So.2d 1102 (La. 1992), decided before Dickerson, the officer seized crack cocaine from the defendant's watch pocket discovered during a pat-down search. Although this court upheld the seizure, the Supreme Court reversed, merely stating: "The search went beyond a frisk for weapons." It is unclear, however, if this ruling would be affected by the subsequent ruling in Dickerson.

In Johnson, this Court found that the seizure of a rock of crack cocaine was justified under this exception: "Officer Waguespack testified that when he felt the rock-like substance during the pat-down frisk, he

immediately believed the substance to be crack cocaine. The seizure of the cocaine clearly falls within the plain feel exception to the warrant requirement." Id. at 948.

In State v. Lavigne, 95-0204 (La. App. 4 Cir. 5/22/96), 675 So.2d 771, the police officer testified at trial that, during the search, he felt an object in the defendant's right front pants pocket which, from prior experience, he suspected to be what is commonly called a "crack pipe." As in Johnson, this Court found that his testimony indicated that the officer was aware, without further investigation, that the object in the defendant's pants pocket was a crack pipe. Therefore, seizure of the crack pipe was justified under the "plain feel" exception.

In State v. Dappemont, 98-0446 (La. App. 4 Cir. 3/17/99), 734 So.2d 736, police officers targeted a particular courtyard in a housing project. As they arrived, several subjects fled the area while alerting other subjects that the police were in the area. The police officers observed the defendant. He was walking "off the corner" while placing his hands in his waistband and looking around in all directions. The police stopped him and ordered him to remove his hands. He complied, at which time one of the officers saw a white piece of paper sticking out from his zipper area. The defendant was frisked; the officer felt a large bulge where the paper was sticking out. The

officer removed the object from the defendant's pants and found that it was a Popeye's bag. The officer inspected the contents of the bag, which appeared to be marijuana, and arrested the defendant. The trial court granted the motion to suppress evidence; this Court found no error, and then the matter was remanded by the Louisiana Supreme Court for argument and a full opinion. On remand, this Court again affirmed the trial court because the police officer articulated no facts to substantiate his belief that the bag contained contraband except for the fact that a waistband is not a normal place to find a Popeye's bag, Notably, the officer did not testify that he was familiar with the feel of concealed marijuana or that he had any experience with identifying marijuana through feel.

In State v. Littles, 98-2517 (La. App. 4 Cir. 9/15/99), 742 So.2d 735, police officers were traveling in a marked police unit when they observed a vehicle partially parked in the street in front of a known crack house. The defendant was standing on the driver's side of the car leaning towards the driver. As the officers watched, the defendant handed an object to the driver with his right hand and received what appeared to be currency in return. When the officers pulled behind the vehicle, the defendant noticed the police car and said something to the driver; the driver left the scene while the defendant placed his hands in his pockets. The officers stopped and frisked

the defendant. During the patdown, the officer felt a substance in the defendant's pocket which he believed was consistent with crack cocaine. The officer retrieved the object and discovered that it was a plastic bag containing twelve pieces of rock cocaine. On appeal, following the trial court's denial of the motion to suppress evidence and the defendant's conviction and sentence, he argued that there was no basis for the stop and frisk; alternatively he argued that the frisk exceeded the legal limits of a pat down search. This Court disagreed, finding that the officer's testimony that he observed the defendant engage in an apparent narcotics transaction in front of a crack house justified a stop and a frisk for weapons. The Court further found that the seizure of the bag from the defendant's pocket was lawful under the plain feel doctrine because, as in Johnson and Lavigne, the officer testified that, in his experience, the contour of the object made it immediately apparent that it was crack cocaine.

As noted by this Court in State v. Scull, 93-2360, p. 9 (La. App. 4 Cir. 6/30/94), 639 So.2d 1239, 1245, writ denied 94-2058 (La. 11/11/94), 644 So.2d 391: "The trial court is vested with great discretion when ruling on motion to suppress." See also State v. Williams, 89-2308 (La. App. 4 Cir. 1/16/92), 594 So.2d 476, 479. The trial court in this case accepted Deputy Broadhead's testimony that he could immediately determine that the object

which he felt in the defendant's jacket pocket was a piece of crack cocaine. The defendant suggests that this Court should reject the deputy's testimony as incredible on its face. However, this Court did not have the opportunity to view the officer. Furthermore, the defense actually had the jacket in court and showed it to Deputy Ocman as well as the trial judge. The defendant put the jacket on, and Deputy Ocman demonstrated the frisk. Deputy Broadhead described the piece of cocaine in detail. The trial court was in the unique position of being able to determine whether the deputy could feel what he said he did.

Furthermore, it should be noted that the defendant in this case was observed coming from an area known for narcotics activity. The driver of the truck lied about where they had been. The defendant was handling her pocket jacket in a suspicious fashion. These facts, in conjunction with Deputy Broadhead's tactile observation of a small rock-like object, certainly supports his immediate ability to identify the object in the defendant's pocket as a piece of crack cocaine.

For the forgoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.