STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 24, 2000
v	No. 225589 St. Clair Circuit Court
JASON CHRISTOPHER SIMERSON, Defendant-Appellee.	LC No. 99-001817-FH

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant was charged with possession of under fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant moved to suppress evidence discovered during a patdown search and a subsequent statement made to the police on the ground that the seizure of the evidence violated the Fourth Amendment. The trial court granted the motion and subsequently dismissed the charge against defendant. The prosecution appeals as of right. We affirm.

While preparing to execute a search warrant on a residence, St. Clair County Sheriff's Department plainclothes officers observed defendant and the homeowner get into a van and leave. A Port Huron police officer stopped the van and conducted a patdown search of both occupants. Detecting an audio cassette holder in defendant's pocket, the officer, satisfied the object was not a weapon, placed defendant in the back of the police car. A sheriff's department sergeant arrived moments later and was advised that both defendant and the other man had been patted down for weapons.

Deciding to patdown defendant himself, the sergeant detected a hard object in defendant's pocket. The sergeant testified that he did not know what the object was when he felt it, but that he did not think it was any sort of weapon. He twice asked defendant what the object was, and defendant first replied that he did not know, then dropped his head and did not reply. Removing the object from defendant's pocket, the sergeant discovered a clear audio cassette holder that contained diamond wraps – pieces of paper wrapped in the shape of a diamond –that he knew from previous experience often held illegal controlled substances. After opening one of the diamond wraps, the sergeant

discovered a powdered white substance that later tests revealed to be cocaine. Defendant was arrested and later gave an incriminating statement to the police.

The trial court suppressed the evidence, holding that the plain feel exception to the warrant requirement of the Fourth Amendment did not apply because the identity of the object as contraband was not immediately apparent to the sergeant, and he did not have probable cause to believe the object was contraband or a weapon.

The factual findings of a trial court in a suppression hearing are reviewed for clear error, and will be affirmed unless this Court has a definite and firm conviction that a mistake has been made. *People v Custer*, ___ Mich App ___; ___ NW2d___ (Docket No. 218817, issued 7/28/00), slip op, 2-3. We review de novo the lower court's final ruling on the motion to suppress. *Id*.

The legality of the sergeant's initial patdown search of defendant for weapons is not disputed. At issue is the propriety of the seizure of the audio cassette holder containing cocaine during the *Terry*[1] patdown. Specifically, we must decide whether the sergeant exceeded the legitimate scope of a *Terry* search when he continued to manipulate the object after determining it was not a weapon and whether the plain feel exception to the warrant requirement of the Fourth Amendment applies to permit the search in this case.

It is well settled that a police officer is entitled to perform a "stop and frisk" search for weapons where a reasonable belief exists that an individual is armed and dangerous. *Terry, supra* at 27. A *Terry* search is limited to the discovery of guns, knives, clubs or other hidden items that present a threat of assault to an officer. *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996). If a protective search pursuant to *Terry* extends beyond what is necessary to discern if a suspect is armed and dangerous, it is no longer valid, and its fruits will be suppressed. *Sibron v New York*, 392 US 40, 65-66; 88 S Ct 1889; 20 L Ed 2d 917 (1968). The trial court found that the sergeant's testimony clearly indicated that he did not believe the object felt during the search to be a weapon. At best the sergeant's testimony indicated that it was possible for a weapon to be contained in an object the size of the container at issue. However, at no time during his testimony did the sergeant state that he believed defendant was so concealing a weapon. On these facts we conclude that the further search of defendant progressed into an evidentiary search, which is expressly prohibited by *Terry*.

Turning to the applicability of the plain feel exception to the Fourth Amendment, we note that contraband detected during a lawful *Terry* search may be seized without violating the Fourth Amendment where the identity of the object is immediately apparent as contraband, and the officer has probable cause to believe the object is contraband before seizing it. *Minnesota v Dickerson*, 508 US 366, 375-376; 113 S Ct 2130; 124 L Ed 2d 334 (1993). Our Supreme Court has held that the degree of certainty required for the "immediately apparent" qualification is probable cause. *Champion, supra* at 108. Probable cause means "a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999),

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

quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Whether an officer has probable cause to believe an object is contraband is determined against the backdrop of the totality of the circumstances. *Champion, supra* at 111.

There is no suggestion in the record that defendant was apprehended in a high drug crime area, nor is there any indication that defendant attempted to evade the police or exhibited unusually suspicious behavior, indicia our Supreme Court has held to support a finding of probable cause. *Champion, supra* at 111-113. Considering the totality of the circumstances, the only facts that could be considered remotely suspicious are defendant's refusal to answer the officer's questions regarding the nature of the item and his presence as a passenger in a van driven by one suspected of drug activity. We conclude that these facts are insufficient to constitute probable cause to believe that the item was contraband. See *People v Massey (After Remand)*, 220 Mich App 56, 58-59; 558 NW2d 253 (1996).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins