IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GUILLERMO ARMANDO BARBOZA, Appellant.	No. 39768-4-II UNPUBLISHED OPINION

Worswick, J. — Guillermo Barboza appeals his conviction for unlawful possession of methamphetamine, arguing that he was subjected to a search that exceeded the permissible scope of a *Terry*[1] frisk and was not incident to a lawful arrest. Concluding that the search did not exceed the permissible scope of *Terry* frisk, we affirm.[2]

FACTS

On June 16, 2009, the Kelso Police Department received a 911 call reporting that two young Latino men displayed a gun while driving in a maroon vehicle through a Kelso neighborhood. Officers located a maroon vehicle matching the reported description and conducted a high-risk stop of the car with guns drawn. Barboza was a passenger in that vehicle.

The officers ordered Barboza out of the vehicle. Officer Brian Clark handcuffed Barboza and told him that he was being detained on suspicion of a weapons offense but was not under arrest. Officer Clark patted Barboza's right side pocket and found a folding knife clipped to the

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

[2] A commissioner of this court initially considered Barboza's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

inside of the pocket. He continued patting and felt a hard object inside Barboza's outside pocket. He did not distinguish between the hard object and anything else in that pocket. He pulled out four items from Barboza's pocket in one grasp. The items consisted of two baggies, a credit card, and a lighter. The lighter was the hard object Officer Clark had originally felt. The baggies contained a white crystalline substance, which Officer Clark believed was a controlled substance and which later tested positive for methamphetamine. Upon seeing the baggies, Officer Clark believed they contained controlled substances.

The State charged Barboza with unlawful possession of methamphetamine. He moved to suppress the methamphetamine, arguing that Officer Clark exceeded the permissible scope of a *Terry* frisk by removing all of the items inside his pocket rather than just the hard object. Officer Clark testified that he did not recall feeling the baggies in the pocket before pulling them out. He testified that he did not intend to remove anything other than the hard item when he reached into the pocket and did not stop to discern, while reaching inside the pocket, between the hard object and any other items in the pocket. The trial court denied the motion to suppress, finding that there was reasonable suspicion to detain Barboza, that probable cause existed for his arrest, that the search of Barboza's pocket was incident to arrest and that Officer Clark was permitted to conduct a weapons frisk for officer safety.

Barboza waived his right to a jury trial. After a stipulated facts trial, the court found Barboza guilty of unlawful possession of methamphetamine.

ANALYSIS

Barboza argues (1) the search exceeded the permissible scope of a *Terry* frisk and (2) he was not under arrest, so the search cannot be justified as a search incident to a lawful arrest. Generally, warrantless searches and seizures are per se unreasonable and in violation of the Fourth Amendment and article 1, § 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513(2002). However, '"a few 'jealously and carefully drawn exceptions' to the warrant requirement"' exist, which all require exigent circumstances. *Garvin*, 166 Wn.2d at 249 (quoting *Duncan*, 146 Wn.2d at 171-72). These include searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* frisks. *Garvin*, 166 Wn.2d at 249 (citing Duncan, 146 Wn.2d at 171-72).

In *Terry v. Ohio*, the United States Supreme Court held that during an investigation of possible criminal activity, a police officer is entitled to protection, and may conduct a carefully limited search of the outer clothing of a person in an attempt to discover weapons that might be used to assault the officer. 392 U.S. at 30. A police officer is permitted to stop and frisk an individual when: (1) the original stop of the individual was legitimate; (2) the officer has a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purpose. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). A protective frisk must be justified in scope at both inception and throughout the duration of the search. *State v. Fowler*, 76 Wn. App. 168, 172, 883 P.2d 338 (1994). The scope of the frisk is

limited to a pat down of the outer clothing for weapons that could be used to assault the police officer. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Once the police officer ascertains that there is no weapon, the government's "limited authority to invade the individual's right to be free of police intrusion is spent." *Hudson*, 124 Wn.2d at 113 (quoting State *v. Allen*, 93 Wn.2d 170,173, 606 P.2d 1235 (1980)). Any continuing search without probable cause is an unreasonable intrusion into the individual's private affairs. *Hudson*, 124 Wn.2d at 113 (citing *Allen*, 93 Wn.2d at 173).

Barboza relies principally on *State v. Fowler*. In *Fowler*, a trooper stopped a vehicle for speeding and driving erratically, ordered the driver out of the car and frisked him for weapons. *Fowler*, 76 Wn. App. at 170. The trooper felt one hard object and two soft objects of indeterminate shape in Fowler's pocket. *Fowler*, 76 Wn. App. at 170. The trooper removed everything from Fowler's pocket; the hard item was a pager, and the soft objects were cigarette packages containing LSD blotter paper. *Fowler*, 76 Wn. App. at 170. The trooper testified that he knew that the soft objects were not weapons when he reached into the pocket. *Fowler*, 76 Wn. App. at 170. He testified that he reached in and grabbed everything inside the pocket in order to withdraw the hard object. *Fowler*, 76 Wn. App. at 170. The court held that the trooper had a right to search for weapons, but no right to search for or remove other items, and so the seizure of the soft items exceeded the permissible scope of a *Terry* frisk. *Fowler*, 76 Wn. App. at 173.

The frisk conducted by the trooper in *Fowler* is distinguishable from the frisk of Barboza

conducted by Officer Clark. When Officer Clark patted down Barboza, he was unable to tell that there was anything inside Barboza's pocket other than the hard object. Officer Clark testified that he did not intend to remove anything other than the hard object in Barboza's pocket. In *Fowler*, the court noted that during the course of a protective frisk, the police may not intentionally seize items they know are not weapons. *Fowler*, 76 Wn. App at 173. Here, however, Officer Clark did not know that he was seizing anything that was not a weapon until after he already pulled it out. Thus, Officer Clark's removal of the entire contents of Barboza's pocket, which included the baggies containing methamphetamine, did not exceed the permissible scope of a *Terry* frisk.

Barboza challenges Officer Clark's testimony, and the trial court's subsequent findings,[3] that he did not feel the other items in Barboza's pocket, as being not believable and being illogical. But we review the trial court's findings only for substantial evidence, *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003), and substantial evidence supports the trial court's findings.

Because the seizure of the baggies of methamphetamine did not exceed the permissible scope of a *Terry* frisk, we need not address whether Officer Clark searched Barboza's pocket incident to arrest.

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[3] The trial court found:

> 19. When Officer Clark removed the hard item, a lighter, credit card, and two small baggies all came out together.
> 20. Officer Clark's intent was only to remove the hard item. He did not feel the baggies prior to their removal.
> 21. The baggies were not intentionally removed from the pocket, but came out inadvertently in the officer's attempt to quickly remove a potential weapon.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Van Deren, J.

Penoyar, C.J.