**REL: September 20, 2019**



# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2018-2019**

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**CR-18-0368**

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**Beverlee Gardner**

**v.**

**State of Alabama**

**Appeal from Montgomery Circuit Court**
**(CC-18-932)**

KELLUM, Judge.

Beverlee Gardner pleaded guilty to the unlawful possession of a controlled substance, specifically methamphetamine. See § 13A-12-212, Ala. Code 1975. The trial court sentenced her to 13 months' imprisonment but suspended

the sentence and placed her on 18 months' probation. Gardner expressly reserved the right to appeal the trial court's denial of her motion to suppress the 0.2 grams of methamphetamine found in the pocket of her pants.

At the suppression hearing, the State presented testimony from a single witness, T.C. Curley, a detective with the narcotics division of the Montgomery Police Department. Det. Curley testified that he and other officers had been investigating a residence on Eaton Road in Montgomery where Amanda Millwood, Constance Millwood, and Gardner lived. Using a confidential informant ("CI"), officers had completed "[c]ontrolled drug buys for heroin" at the residence and, during each, three people were present. (R. 7.) On May 9, 2017, Det. Curley said, he and several other officers executed a search warrant at the residence. When they first arrived, only Constance was present at the residence; Gardner arrived later, while officers were searching the premises. Det. Curley said that, "[f]rom [his] knowledge," Gardner tried to approach the residence, telling officers that she lived there and asking what was happening. (R. 6.) The State questioned Det. Curley about what happened next:

> "[Prosecutor]: And at that point was she patted down for officer safety?
>
> "[Det. Curley]: That's correct, due to her coming from inside of her vehicle.
>
> "[Prosecutor]: All right. And when she was patted down, was anything found?
>
> "[Det. Curley]: Yes. A bag of methamphetamine in her left jeans pocket.
>
> "[Prosecutor]: Okay. And when that was found, was she arrested?
>
> "[Det. Curley]: Yes."

(R. 6.) Later during direct examination, Det. Curley testified:

> "Once she got out of the car, you could tell that she had some kind of a nervous look on her face as to why we were there. Once she approached us asking why we were there, we asked her to put her hands, I believe it was, on the car and at which time she kind of got nervous and didn't want to put her hands on the car for the pat-down search. And then once we did pat her down, like I said, we felt a bulge in her left pocket that was consistent -- once we grabbed hold of it, was crunchy, which is consistent with methamphetamine. It's kind of like salt. You know when you grab hold of it. And that's when we went into the pockets."

(R. 7-8.)

On cross-examination, Det. Curley stated that, before the search warrant was executed, officers knew only that a third person was living with Amanda and Constance and did not know

that the person was Gardner. He testified that the CI did not know Gardner personally and did not know her name. Rather, the CI had indicated that, during one of the controlled buys of heroin from Amanda and Constance, there was a third person at the back of the residence, although the CI did not know who it was. The CI had also indicated that, during another of the controlled buys, a third woman was present with Amanda and Constance. Because Gardner's name was unknown to police before the search, she was not named in the search warrant. However, during the search, Det. Curley said, officers found mail and other items indicating that Gardner lived in the residence. Det. Curley admitted on cross-examination that, although he observed it, he did not conduct the patdown of Gardner's person -- Det. Dailey, a female officer,[1] conducted the patdown. According to Det. Curley, the patdown was conducted for officer safety because Gardner had gotten out of her vehicle and approached the officers at the scene. Det. Curley stated that he was inside the residence when Gardner arrived and that he did not see what she had done at that time; he came out of the residence right before the patdown

[1]Det. Dailey's first name does not appear in the record.

was conducted. The following exchange then occurred on cross-examination:

> "[Gardner's counsel]: Do you know if there was a bulge in her jeans indicating that there might have been the presence of a weapon?
>
> "[Det. Curley]: According to Detective Daily, when she patted her down, she felt a bulge in her left pocket.
>
> "[Gardner's counsel]: Not a bulge -- not that kind of bulge, but a bulge that indicates that a weapon is present?
>
> "[Det. Curley]: No, not to my knowledge.
>
> "[Gardner's counsel]: And you mentioned that the drugs were found in her front-left pocket; correct?
>
> "[Det. Curley]: Correct.
>
> "[Gardner's counsel]: And Detective Daily -- you said that you observed the search, and you also mentioned, I believe, that she had to, I guess, feel or feel the bag to know that it was a bag of methamphetamine?
>
> "[Det. Curley]: Correct, from outside the pocket, yes.
>
> "[Gardner's counsel]: So she had to alter the bags to kind of know what it was?
>
> "[Det. Curley]: I mean, I don't -- like I said, she just grabbed the pocket, and she said she felt it smush."

(R. 22-23.) When asked if he "believe[d] that altering clothing in any way would exceed the cursory patdown for weapons," Det. Curley responded: "I mean, if you want to say grabbing your pants is altering your clothing to see what it is, then sure." (R. 25-26.) When asked if Det. Dailey "knew what the bulge was in [Gardner's] pocket," Det. Curley said that he "can't testify to what she thought it was or knew what it was." (R. 28.) Det. Curley also testified that, based on his training and experience, he would not "confuse[]" 0.2 grams of methamphetamine with a weapon. (R. 30.)

Gardner contends that the patdown of her person exceeded the scope of Terry v. Ohio, 392 U.S. 1 (1968), because, she says, Det. Dailey had to manipulate the bulge in her pants pockets to determine whether it was contraband.[2] Gardner maintains that the State presented no evidence at the suppression hearing indicating that it was immediately apparent to Det. Dailey that the bulge in her pocket was contraband or that Det. Dailey believed the bulge might be a weapon so as to warrant manipulation of the bulge beyond the initial patdown. According to Gardner, the testimony at the

[2]Gardner concedes that a Terry patdown was warranted for officer safety.

suppression hearing indicated Det. Dailey initially felt the bulge in her pants pocket during the patdown but it was not until Det. Dailey "grabbed" the bulge after initially feeling it that it became apparent that the bulge was methamphetamine. Thus, Gardner concludes, the plain-feel doctrine does not apply in this case. The State argues, on the other hand, that this case falls squarely within the plain-feel doctrine.

> "Generally, a Terry patdown 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, 88 S.Ct. at 1882, 20 L.Ed.2d at 908 [(1968)]. In Minnesota v. Dickerson[, 508 U.S. 366 (1993),] the United States Supreme Court recognized a 'plain feel' exception to the Fourth Amendment protection analogous to the 'plain view' exception. The 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. at 375-76, 113 S.Ct. at 2137, 124 L.Ed.2d at 346. (Emphasis added.)
>
> "The Supreme Court in Dickerson did not intend that the plain feel doctrine should be construed

without reference to the standards for a 'protective search' set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Although the Supreme Court in Dickerson recognized the plain feel doctrine, it ultimately concluded, under the facts of that case, that the evidence (a lump of crack cocaine detected in the defendant's pocket by an officer in the course of conducting a patdown) was illegally seized, because the officer's patdown of the defendant before his seizure of the cocaine exceeded the permissible scope of Terry. Under Terry, an officer may conduct a protective patdown search of a suspect 'to determine whether the person is in fact carrying a weapon.' Terry, 392 U.S. at 24, 88 S.Ct. at 1881, 20 L.Ed.2d at 908. However, because the court in Dickerson found that the officer's patdown exceeded the purposes of a protective search before he recognized the object in the defendant's pocket as contraband, the plain feel doctrine could not salvage the officer's subsequent seizure of the contraband. Although the Supreme Court, in ruling that the officer's actions were unconstitutional, emphasized the fact that the officer testified that he had manipulated the object in the defendant's pocket, by squeezing it and sliding it through his fingers, before concluding that the object was a lump of crack cocaine and then seizing it, it is clear that the factor that actually rendered the officer's actions unconstitutional was the officer's testimony that he continued to squeeze, to slide, and to manipulate the object in the defendant's pocket even though it was 'a pocket which the officer already knew contained no weapon.' Dickerson, 508 U.S. at 378, 113 S.Ct. at 2138, 124 L.Ed.2d at 347 (emphasis added). The court stated that 'the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by Terry at the time he gained probable cause to believe that the lump in respondent's jacket was contraband.' Dickerson, 508 U.S. at 377, 113 S.Ct. at 2138, 124 L.Ed.2d at 347.

In reaching its conclusion that the officer's actions exceeded the lawful bounds set by Terry, the court pointed to the evidence in the record indicating that the officer never actually believed that the object he felt in the defendant's pocket might be a weapon. Id. The officer's actions went beyond the scope of Terry because he continued his patdown beyond the point that it could be justified as a protective search.

"....

"The Supreme Court in Dickerson made it clear that the plain feel doctrine is a corollary of the long-recognized plain view exception that allows warrantless seizures. Under the plain view doctrine, if a police officer is lawfully in a position from which the officer views an object whose incriminating character is apparent, and the officer has a lawful right of access to the object, the officer may properly seize it without a warrant. See Horton v. California, 496 U.S. 128, 136–37, 110 S.Ct. 2301, 2307–08, 110 L.Ed.2d 112 (1990); Texas v. Brown, 460 U.S. 730, 739, 103 S.Ct. 1535, 1541–42, 75 L.Ed.2d 502 (1983). There is no requirement under the plain view doctrine, however, that the officer recognize the object as contraband upon first glance, or that any information gained from additional looking must be ignored, or that the officer cannot mull over what has been seen before concluding that it is in fact contraband. Nor is it necessary that the officer recognize with certainty that the object is contraband. Rather, the officer must only have probable cause to believe that the object is contraband. It defies logic and consistency, then, to hold that the plain feel doctrine, a corollary to the plain view exception, is so constricted as to prevent an officer from seizing an object that, as a result of a perfectly legal patdown, the officer has probable cause to believe is contraband. An officer should not be required to ignore the incriminating character of an

> object simply because that character became evident in the course of feeling, rather than seeing, the object, if the officer's actions in feeling the object, up to the point its incriminating character is revealed to the officer, are completely legal. ..."

Allen v. State, 689 So. 2d 212, 213-16 (Ala. Crim. App. 1995).

> "[Minnesota v.] Dickerson[, 508 U.S. 366 (1993),] establishes three prerequisites for a police officer's seizure of contraband pursuant to the plain-feel doctrine:
>
> "1. The officer must have a valid reason for the search, i.e., the patdown search must be permissible under Terry.
>
> "2. The officer must detect the contraband while the Terry search for weapons legitimately and reasonably is in progress.
>
> "3. The incriminating nature of the object detected by the officer's touch must be immediately apparent to the officer so that before seizing it the officer has probable cause to believe the object is contraband."

Ex parte Warren, 783 So. 2d 86, 90 (Ala. 2000).

The first two prerequisites are clearly met here. Gardner concedes that the Terry patdown of her person was justified and Det. Curley's testimony established that the bulge in Gardner's pocket was detected during that patdown. The question in this case is whether the nature of the bulge was immediately apparent to Det. Dailey so as to give Det.

Dailey probable cause to believe the bulge was contraband. As noted above, Det. Curley testified on direct examination that "[o]nce we did pat her down, like I said, we felt a bulge in her left pocket that was consistent -- once we grabbed hold of it, was crunchy, which is consistent with methamphetamine." (R. 8.) On cross-examination, Det. Curley further testified that Det. Dailey "just grabbed the pocket, and she said she felt it smush." (R. 23.) Gardner appears to interpret these statements to mean that Det. Bailey first felt the bulge in her pants pocket during the patdown and that, after that, she "grabbed" the bulge and manipulated it, at which point it was apparent that the bulge was methamphetamine.[3] We disagree.

[3]We note that Gardner also asserts that Det. Curley expressly admitted on cross-examination that the patdown exceeded the scope of Terry. The question whether a patdown exceeds the scope of Terry is an objective one and is not determined by a police officer's subjective belief. See, e.g., State v. Hails, 814 So. 2d 980, 987 (Ala. Crim. App. 2000). Moreover, we reject Gardner's assertion that Det. Curley made any such admission. As noted above, when asked on cross-examination if he "believe[d] that altering clothing in any way would exceed the cursory patdown for weapons," Det. Curley responded: "I mean, if you want to say grabbing your pants is altering your clothing to see what it is, then sure." (R. 25-26.) This testimony was clearly not an admission by Det. Curley that the patdown in this case exceeded the scope of Terry, but was an expression of Det. Curley's disagreement with Gardner's belief that "grabbing" clothing during a patdown was the equivalent of "altering" clothing.

After reviewing the entirety of Det. Curley's testimony, it is apparent that Det. Dailey grabbed Gardner's pants pocket as part of the patdown for weapons and felt the crunchy texture of the bulge making it immediately apparent the bulge was methamphetamine because "[y]ou know when you grab hold of it." (R. 8.) Because the seizure of the methamphetamine was justified under the plain-feel doctrine, the trial court properly denied Gardner's motion to suppress.

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and McCool, J., concur. Cole, J., dissents, with opinion, which Minor., J., joins.

COLE, Judge, dissenting.

Beverlee Gardner appeals her guilty-plea conviction for unlawful possession of a controlled substance, see § 13A-12-212, Ala. Code 1975, and her resulting sentence of 13 months in prison, which the trial court suspended and placed her on 18 months of probation. Before she pleaded guilty, Gardner preserved and reserved the right to appeal the trial court's decision to deny her motion to suppress drug evidence found in her possession, in which she claimed that the search violated Terry v. Ohio, 392 U.S. 1 (1968), and Minnesota v. Dickerson, 508 U.S. 366 (1993).

Although the officer who conducted the patdown search of Gardner did not testify at the hearing on Gardner's motion to suppress, the main opinion nonetheless affirms the circuit court's decision to deny the motion to suppress, holding that "the seizure of the methamphetamine was justified under the plain-feel doctrine." ___ So. 3d at ___. Because the patdown search of Gardner exceeds the scope of what is permissible under Terry and Dickerson, and because the only person who could have provided testimony to show that the search was

within the bounds of those cases did not testify, I respectfully dissent.

> "In Dickerson, the Supreme Court held that if a police officer detects contraband during a valid Terry patdown search, the officer may seize the contraband and it may be admitted into evidence. In stating the plain-feel doctrine, the Court rejected the contention that 'plain feel' is not comparable to 'plain view':
>
> > "'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.
> >
> > "'... The very premise of Terry, after all, is that officers will be able to detect the presence of weapons through the sense of touch and Terry upheld precisely such a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.'

> "508 U.S. at 375–76, 113 S. Ct. 2130 (footnotes omitted). The Court of Criminal Appeals has adopted the plain-feel doctrine in Alabama. See Huffman v. State, 651 So. 2d 78 (Ala. Crim. App. 1994) (holding that an officer had not exceeded the scope of Terry when, during a patdown, he recognized without any further examination that he felt a lump that had the configuration of a crack-cocaine rock); and Allen v. State, 689 So. 2d 212 (Ala. Crim. App. 1995) (holding that an officer had not exceeded the scope of Terry when he retrieved an envelope of marijuana that he simultaneously realized was not a weapon but recognized as an envelope containing marijuana).
>
> "Dickerson establishes three prerequisites for a police officer's seizure of contraband pursuant to the plain-feel doctrine:
>
> "1. The officer must have a valid reason for the search, i.e., the patdown search must be permissible under Terry.
>
> "2. The officer must detect the contraband while the Terry search for weapons legitimately and reasonably is in progress.
>
> "3. The incriminating nature of the object detected by the officer's touch must be immediately apparent to the officer so that before seizing it the officer has probable cause to believe the object is contraband."

Ex parte Warren, 783 So. 2d 86, 89-90 (Ala. 2000) (footnote omitted; first emphasis added).

In Dickerson, the Supreme Court of the United States applied the above-quoted principles to reject the argument that an officer's search of Dickerson was permissible.

Dickerson, 508 U.S. at 378-79. In that case, officers watched Dickerson leave an apartment building known to be a "notorious 'crack house.'" Id. at 368. When Dickerson saw the officers, he "abruptly halted," "began walking in the opposite direction," and "turned and entered an alley on the other side of the apartment building." Id. at 369. Given Dickerson's suspicious behavior, the officers stopped him and conducted a patdown search of Dickerson. Id. During the patdown, the officers did not find any weapons on Dickerson, "but the officer conducting the search did take an interest in a small lump in [Dickerson's] nylon jacket." Id. According to the officer, "[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Id. The officers then retrieved from Dickerson's pocket one gram of crack cocaine. Id.

The Supreme Court explained that, because the first prerequisite as listed above was not at issue,

> "the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by Terry at the time he gained probable cause to believe that the lump in [Dickerson's] jacket was contraband. The State District Court did not make precise findings

on this point, instead finding simply that the officer, after feeling 'a small, hard object wrapped in plastic' in [Dickerson's] pocket, 'formed the opinion that the object ... was crack ... cocaine.' App. to Pet. for Cert. C-2. The District Court also noted that the officer made 'no claim that he suspected this object to be a weapon,' id., at C-5, a finding affirmed on appeal, see 469 N.W.2d, at 464 (the officer 'never thought the lump was a weapon'). The Minnesota Supreme Court, after 'a close examination of the record,' held that the officer's own testimony 'belies any notion that he "immediately"' recognized the lump as crack cocaine. See 481 N.W.2d, at 844. Rather, the court concluded, the officer determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'--a pocket which the officer already knew contained no weapon. Ibid.

"Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under Terry. See Terry, 392 U.S., at 26, 88 S. Ct., at 1882. Where, as here, 'an officer who is executing a valid search for one item seizes a different item,' this Court rightly 'has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.' Texas v. Brown, 460 U.S. [730], at 748, 103 S. Ct. [1535], at 1546-1547 [(1983)] (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of [Dickerson'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.' 392 U.S., at 29, 88 S. Ct., at 1884. It therefore amounted to the sort of evidentiary search that

> Terry expressly refused to authorize, see id., at 26, 88 S. Ct., at 1882, and that we have condemned in subsequent cases. See Michigan v. Long, 463 U.S. [1032], at 1049, n. 14, 103 S. Ct. [3469], at 3480–3481 [(1983)]; Sibron [v. New York], 392 U.S. [40], at 65–66, 88 S. Ct. [1889], at 1904 [(1968)]."

Dickerson, 508 U.S. at 377–78. What happened in this case is strikingly similar to what occurred in Dickerson.

Here, at the hearing on Gardner's motion to suppress, the State called only one witness--Detective T.C. Curley. Det. Curley explained that on May 9, 2017, he was "investigating a house" in Montgomery that was occupied by Amanda Millwood, Constance Millwood, and Gardner because officers had conducted "[c]ontrolled drug buys for heroin" at that house. (R. 4, 6.) When officers arrived at the house to execute a search warrant,[4] only Constance was there. (R. 4.) At some point after officers began searching the house, Gardner arrived. (R. 5.) When Gardner tried to approach the house, "she had some kind of nervous look on her face as to why [the officers] were there."[5] (R. 7.) Gardner was then told "to put her

[4]According to Det. Curley, the Millwoods were mentioned in the search warrant but Gardner was not. (R. 17.)

[5]On cross-examination, Det. Curley conceded that he "didn't actually see [Gardner] approach the house." (R. 22.)

hands on the car for the pat-down search." (R. 7.) Det. Curley, who did not conduct the patdown search but said he did observe it (R. 20), explained that, during the patdown, Det. Daily, the female officer who searched Gardner,[6] "felt a bulge in [Gardner's] left pocket that was consistent--once we grabbed a hold of it, was crunchy, which is consistent with methamphetamine. It's kind of like salt. You know it when you grab a hold of it. And that's when we went into the pockets." (R. 7.) In going into Gardner's pocket, the officers found methamphetamine.

On cross-examination, Det. Curley conceded that he did not know whether Gardner attempted to "breach the perimeter" the officers had set up to execute the search warrant (R. 22), and, although he said he observed the patdown, he conceded that he could not testify as to whether Gardner tried to reach into her pocket during the search. (R. 22.) Det. Curley also testified as follows:

> "[Gardner's Counsel]: Do you know if there was a bulge in her jeans indicating that there might have been the presence of a weapon?

[6]At the close of the hearing, the State explained that Det. Daily was not available to testify because "she did not receive a subpoena." (R. 40.)

> "[Det. Curley]: According to Detective Daily, when she patted her down, she felt a bulge in her left pocket.
>
> "[Gardner's Counsel]: Not a bulge--not that kind of bulge, but a bulge that indicates that a weapon is present?
>
> "[Det. Curley]: No, not to my knowledge.
>
> "[Gardner's Counsel]: And you mentioned that the drugs were found in her front-left pocket; correct?
>
> "[Det. Curley]: Correct.
>
> "[Gardner's Counsel]: And Detective Daily--you said that you observed the search, and you also mentioned, I believe, that she had to, I guess, feel or feel the bag to know that it was a bag of methamphetamine?
>
> "[Det. Curley]: Correct, from outside the pocket, yes.
>
> "[Gardner's Counsel]: So she had to alter the bags to kind of know what it was?
>
> "[Det. Curley]: I mean, I don't--like I said, she just grabbed the pocket, and she said she felt it smush.
>
> "[Gardner's Counsel]: Okay.
>
> [Det. Curley]: So, I mean, I can't testify to her--"

(R. 22-23.) Det. Curley agreed that he could not "testify to what [Det. Daily] thought [the bulge] was or knew what it

was"[7] and that he did not know how big the bulge was. (R. 29.) Det. Curley then admitted that, although the patdown search was conducted by the street (R. 20), he was "up by the house watching them do the search." (R. 29.) Finally, the following exchange occurred:

> "[Gardner's Counsel]: In your training and experience, Detective Curley, do you believe that .2 grams of meth can be confused with a weapon?
>
> "[Det. Curley]: In mine, no. But I can't speak on another officer's behalf.
>
> "[Gardner's Counsel]: Okay. Well, then because you can't speak on another officer's behalf, you can't speak to what exact reasonable suspicion she had to search, can you?
>
> "[Det. Curley]: Repeat that. I'm sorry.
>
> "[Gardner's Counsel]: I said, because you can't speak to another officer's belief, you also can't testify as to that particular officer's reasonable suspicion for searching Ms. Gardner, can you?
>
> "[Det. Curley]: No, not to hers."

(R. 31.)

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[7]The State objected to this question, and the circuit court sustained its obejection, after Det. Curley answered the question. Thus, the objection was untimely. See Scott v. State, 624 So. 2d 230, 234 (Ala. Crim. App. 1993) ("An objection to a question must be made before an answer is given.").

Det. Curley's testimony at the suppression hearing shows that the patdown of Gardner exceeded the scope of Terry and Dickerson. Indeed, here, as in Dickerson, the officer admitted that, to his knowledge, the bulge in Gardner's pocket would not have been one that indicated the presence of a weapon. (R. 22.) Additionally, Det. Curley testified that it was not immediately apparent that the bulge in Gardner's pocket was contraband; rather, Det. Curley explained that Det. Daily had to manipulate the bulge by "smushing" to make a determination as to whether it was contraband.

Because Det. Daily had to "smush" the bulge in Gardner's pocket--which Det. Curley conceded contained no weapons--to determine what it was, the patdown search of Gardner exceeded the scope of Terry and Dickerson. Compare Dickerson, 508 U.S. at 378 (holding a search to be unlawful when the "officer determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'"), with Huffman v. State, 651 So. 2d 78, 81 (Ala. Crim. App. 1994) (holding a search permissible when the officer testified that "based on his training and experience he recognized the lump as having the configuration

of a crack cocaine rock" and that he "did not have to wiggle the crack rock around during the pat down in order to recognize it as being what it is").

Moreover, it is well settled that "[w]here a search is executed without a warrant, the burden falls upon the State to show that the search falls within an exception," Ex parte Tucker, 667 So. 2d 1339, 1343 (Ala. 1995), and the State did not meet that burden here. Indeed, as set out above, the State called only one witness to testify about the patdown search of Gardner--Det. Curley. Det. Curley, however, did not conduct the patdown. Additionally, Det. Curley admitted that he did not see Gardner arrive at the house, that he could not testify as to the size of the bulge, that he did not know whether Gardner made any attempt to reach into her pocket during the search, and that he observed the patdown search from a distance. Although Det. Curley attempted to relay to the trial court what Det. Daily had told him, Det. Curley's testimony fell short of establishing that the patdown search was constitutional.

Because the testimony concerning the patdown search of Gardner showed that the search exceeded the scope of Terry and

Dickerson, and because the only person who could have provided testimony to satisfy the State's burden of showing that the patdown was constitutional did not testify, I respectfully dissent.

Minor, J., concurs.