Rel: September 25, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1190172

Ex parte Beverlee Gardner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Beverlee Gardner

v.

State of Alabama)

(Montgomery Circuit Court, CC-18-932; Court of Criminal Appeals, CR-18-0368)

STEWART, Justice.

Beverlee Gardner petitioned this Court for a writ of certiorari, challenging the Court of Criminal Appeals' decision in Gardner v. State, [Ms. CR-18-0368, Sept. 20, 2019]

___ So. 3d ___ (Ala. Crim. App. 2019), in which that court affirmed the denial by the Montgomery Circuit Court ("the trial court") of Gardner's motion to suppress certain evidence that Gardner contends was seized during an illegal search. We granted certiorari review to determine whether the Court of Criminal Appeals' decision in Gardner conflicts with Terry v. Ohio, 392 U.S. 1 (1968), Minnesota v. Dickerson, 508 U.S. 366 (1993), and Ex parte Warren, 783 So. 2d 86, 90 (Ala. 2000). For the reasons expressed below, we reverse the judgment of the Court of Criminal Appeals.

Facts and Procedural History

Gardner was charged with unlawful possession of a controlled substance, in violation of § 13A-12-212, Ala. Code 1975. Gardner filed in the trial court a motion to suppress evidence of the 0.2 grams of methamphetamine that formed the basis of the charge against her. The Court of Criminal Appeals provided the following summary of the evidence adduced at the suppression hearing:

> "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, 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 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 Dailey, 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 Dailey -- 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 meant 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, ___ So. 3d at ___.

The trial court denied Gardner's motion to suppress. Before entering a guilty plea, Gardner expressly reserved the right to appeal the trial court's denial of her motion to suppress. After adjudicating her guilty, the trial court sentenced Gardner to 13 months in prison, which it suspended, and 18 months on probation. Gardner appealed the trial court's denial of her motion to suppress to the Court of Criminal Appeals.

Before the Court of Criminal Appeals, Gardner argued that Detective E.L. Dailey's search exceeded the scope authorized for officer safety under Terry because, she argued, Detective Dailey "grabbed" the item in Gardner's pocket. On September 20, 2019, the Court of Criminal Appeals affirmed the trial court's denial of Gardner's motion to suppress in an opinion,

from which Judge Cole and Judge Minor dissented. Gardner, ___ So. 3d at ___.

Discussion

Gardner argues that the Court of Criminal Appeals' opinion conflicts with Terry, Dickerson, and Ex parte Warren. In Terry, the United States Supreme Court held constitutional a warrantless search and seizure now commonly referred to as a "Terry stop." A Terry stop "permit[s] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Terry, 392 U.S. at 27. This Court has explained that "Terry permits a police officer to conduct a patdown search of a suspect's outer clothing to 'discover guns, knives, clubs or other hidden instruments [which may be used] for the assault of the police officer.'" Ex parte James, 797 So. 2d 413, 418 (Ala. 2000) (quoting Terry, 392 U.S. at 29) (emphasis added in Ex parte James).

In Dickerson, the United States Supreme Court examined to what extent a law-enforcement officer may legally seize

nonweapon contraband found during a Terry stop. The Court developed a "plain-feel" or "plain-touch" doctrine. Under that doctrine,

> "[i]f 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."

Dickerson, 508 U.S. at 375-76. In Ex parte Warren, this Court interpreted Dickerson as requiring three prerequisites for an officer to seize contraband under 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."

783 So. 2d at 90.

In considering Ex parte Warren, the Court of Criminal Appeals in Gardner held:

> "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. Dailey 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. We disagree. 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."

Gardner, ___ So. 3d at ___ (footnote omitted).

Judge Cole, joined by Judge Minor, dissented in Gardner, stating:

> "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. Dailey had to manipulate the bulge by 'smushing' to make a determination as to whether it was contraband.

"Because Det. Dailey 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. Dailey had told him, Det. Curley's testimony fell short of establishing that the patdown search was constitutional."

Before this Court, Gardner argues that the methamphetamine found in her pocket was not detected during a reasonable Terry search because, she says, the incriminating nature of the methamphetamine was not immediately apparent to Detective Dailey. This is so, according to Gardner, because Detective Dailey had to "grab a hold of" the "bulge" in Gardner's pocket before she realized that the bulge was consistent with the feeling of methamphetamine. Gardner argues that a "grab" is an "impermissible manipulation" and not a permissible patdown search.

The State argues that Detective Dailey discovered the methamphetamine while conducting an authorized Terry search and that the nature of the methamphetamine was immediately apparent to Detective Dailey.[1] The State cites Huffman v.

[1]The State argues that Gardner failed to preserve her argument that, under Dickerson, Detective Dailey lacked a reasonable basis for concluding that it was "immediately apparent" that Gardner's pocket contained contraband before Detective Dailey removed the methamphetamine. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992)(holding that "our review is restricted to the evidence and arguments considered by the trial court"). The State thus contends that this Court should limit its review solely to Gardner's

State, 651 So. 2d 78 (Ala. Crim. App. 1994), and Allen v. State, 689 So. 2d 212 (Ala. Crim. App. 1995), cases in which, it contends, the officers, while conducting permissible patdown searches like the one conducted by Detective Dailey, felt objects whose identity as contraband was immediately apparent.

There is no evidence in this case indicating that the nature of the bulge in Gardner's pocket as methamphetamine was immediately apparent to Detective Dailey through a patdown search. Instead, the evidence indicated that Detective Dailey "grab[bed] hold of" an item in Gardner's pocket before feeling a "crunch" or "smush" and forming an opinion that the bulge

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argument that the search was illegal because Detective Dailey was allowed to continue the Terry search only if she discovered weapons. A review of the record, however, reveals that Gardner adequately raised the issue in her motion to reconsider the trial court's order denying her motion to suppress. In addition, as a part of her arguments before the trial court and the Court of Criminal Appeals, Gardner argued that the search exceeded the scope of a search conducted pursuant to Terry. The Court of Criminal Appeals addressed the "immediately apparent" issue in its decision, and, as Judge Cole noted in his dissent, "[b]efore 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 ... and Dickerson ...." Gardner, ___ So. 3d at ___. Accordingly, we conclude that Gardner's argument is preserved for our review.

was contraband. As Judge Cole notes in his dissent, the facts of Dickerson are particularly relevant to this case. In Dickerson, officers witnessed Dickerson leaving a building that they believed was a "crack house." The officers observed Dickerson acting evasively, so they stopped him and performed a patdown search. The search did not reveal any weapons, but one of the officers felt a lump in Dickerson's jacket. The officer testified: "'[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.'" Dickerson, 508 U.S. at 369. The United States Supreme Court affirmed the Minnesota Supreme Court's holding that the seizure of the cocaine from Dickerson was unconstitutional, because the officers exceeded the limits of Terry by "'squeezing, sliding, and otherwise manipulating the contents of the defendant's pocket' -- a pocket which the officer already knew contained no weapon." Dickerson, 508 U.S. at 378 (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992)). The Supreme Court further cautioned that,

> "[w]here, 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.'"

Dickerson, 508 U.S. at 378 (quoting Texas v. Brown, 460 U.S. 730, 748 (1983) (Stevens, J., concurring in the judgment)).

This case fits within the rationale of Dickerson. There was no evidence presented at the suppression hearing indicating that Detective Dailey ever believed that she felt a weapon during a patdown search of Gardner. There was also no evidence indicating that Detective Dailey immediately believed the bulge in Gardner's pocket to be methamphetamine during the patdown search. Detective Curley testified at the suppression hearing that "'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.'" Gardner, ___ So. 3d at ___ (emphasis added). Detective Curley's testimony is similar to that of the officer in Dickerson.

Terry and Dickerson allow law-enforcement officers to pat down a suspect's outer clothing for weapons or possible contraband. As explained in Dickerson, officers are not

permitted to squeeze or otherwise to manipulate a suspect's clothing to find contraband that the officer knows is not a weapon. Based on Detective Curley's testimony, that appears to be exactly what Detective Dailey did, and Detective Dailey did not testify at the suppression hearing to explain or to provide additional context. Accordingly, based on the facts in the record, the methamphetamine was illegally seized and evidence of it should have been suppressed. The Court of Criminal Appeals' opinion conflicts with Terry, Dickerson, and Ex parte Warren, and its judgment is, therefore, reversed. The cause is remanded for the Court of Criminal Appeals to enter a judgment consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bryan, Sellers, and Mitchell, JJ., concur.

Bolin, Shaw, Wise, and Mendheim, JJ., dissent.