[J-114A-B-1998]
IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	No. 100 M.D. Appeal Docket 1997
	:	
Appellee	:	Appeal from the Judgment of the Superior Court entered December 12, 1996 at No. 541PHL96, affirming the Order entered January 12, 1996 of the Court of Common Pleas of Bucks County, Juvenile Division, at No. 1007-95.
v.	:	
	:	
E.M., A JUVENILE,	:	
	:	
Appellant	:	ARGUED: April 30, 1998
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COMMONWEALTH OF PENNSYLVANIA,	:	No. 49 E.D. Appeal Docket 1997
	:	
Appellee	:	Appeal from the Judgment of the Superior Court entered March 5, 1997 at No. 281PHL96, affirming the Order entered on December 27, 1995 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 3144, March Term, 1991.
v.	:	
	:	
CHRISTOPHER HALL,	:	
	:	
Appellant	:	
	:	
	:	ARGUED: April 30, 1998

OPINION

MR. JUSTICE NIGRO **DECIDED: JULY 21, 1999**

In this consolidated appeal, Appellants contend that the Superior Court improperly upheld the trial court's denial of a motion to suppress physical evidence obtained pursuant to a stop and frisk. We agree and therefore, reverse.

Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Commonwealth v. Cortez, 507

Pa. 529, 532, 491 A.2d 111, 112 (1985), cert. denied, 474 U.S. 950, 106 S. Ct. 349 (1985). When reviewing rulings of a suppression court, we must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Id. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. Id.

FACTS

Commonwealth v. E.M.

In Commonwealth v. E.M., the trial court found that on October 7, 1995, Appellant E.M., a juvenile, and O.T., also a juvenile, were attending a football game at Council Rock High School. At approximately 1:30 p.m., William Rick, a security guard at the school, observed the two juveniles go underneath the bleachers to a darkened area, where there were no concession stands, restrooms or other spectators. Rick approached the juveniles behind the bleachers and asked what they were doing. O.T. responded, "Just smoking, Mr. Rick." Rick then asked the juveniles to come out from under the stands.

As the juveniles came out of the bleachers, Corporal Bruce McNickle and Corporal Stephen Meyers, both Newton Township police officers, arrived.[1] The officers asked the juveniles what was happening, and O.T. responded that they were smoking. Since there is a non-smoking policy at the school, Corporal McNickle ordered O.T. to get rid of the cigarette.

[1] The two officers had been assigned to provide security during the football game.

Corporal McNickle testified that, at this point, he noticed plastic bags of what appeared to be marijuana bulging out of O.T.'s jacket pocket. Corporal McNickle then reached into O.T.'s pocket and pulled out two bags that contained a substance which was later confirmed to be marijuana. At that time, E.M. was standing next to O.T.

Corporal Meyers then noticed a bulge in E.M.'s left front pants pocket, which he testified could have been "characteristic of a small semi-automatic, .22 or .25," N.T., 11/6/95, at 23, and proceeded to pat E.M. down. Meyers' pat down revealed that the bulge was soft. Although Meyers testified that he knew it was not a weapon, he felt that the bulge could be contraband. As a result, he reached into E.M.'s pocket and pulled out a large bundle of money. He proceeded to search E.M.'s other pockets and removed what appeared to be acid tabs wrapped in foil from E.M.'s left rear pocket and a small glassine packet of pills from his right rear pocket.[2] Both E.M. and O.T. were arrested.

E.M. was charged with possession of a controlled substance, possession with intent to deliver and criminal conspiracy. On November 1, 1995, E.M. filed a motion to suppress, claiming that the fruits of the pat down and subsequent search were obtained pursuant to an illegal investigative stop and frisk and that the subsequent search was unconstitutional. The trial court denied the motion and adjudicated E.M. delinquent. On appeal, the Superior Court affirmed, finding that the investigative stop and frisk was valid and that the officer had properly recovered the money and drugs pursuant to the 'plain feel' doctrine. Judge Schiller dissented, finding that "once the officer determined that the bulge was not a weapon, and was not contraband, he had no authority to conduct a search because he had

[2] The tabs turned out to be some inert substance, and not LSD. The pills were Percoset and Toradol. N.T., 11/6/95, at 22.

no probable cause justifying such a search." Slip Op., No. 541 (Pa. Super., Dec. 12, 1995) (Schiller, J., dissenting).

E.M. filed a Petition for Allowance of Appeal. We granted allocatur to determine whether the investigatory stop and frisk of E.M. was proper and whether the Superior Court properly applied the plain feel doctrine to the circumstances of this case.

Commonwealth v. Hall

In Commonwealth v. Hall, the trial court found that on March 6, 1991, at approximately 12:30 a.m., Philadelphia Police Officer Michael Kopecki and his partner were on routine patrol eastbound on Reger Street. When they arrived at the intersection of Reger and Portico Streets, Officer Kopecki saw three males standing about eighty feet away. One of the three males was Appellant Hall, who was standing two feet away and to the right of the other two males. Officer Kopecki testified that Hall was holding a sandwich baggie in his hand which appeared to be full, though he could not see the contents of the bag. The officer observed Hall motion towards the other two males, who then engaged in a single transaction, exchanging currency for a small, unidentifiable object. Officer Kopecki, however, "was unable to see what that transaction was." N.T., 11/27/95, at 9. While he did see Hall motion towards the two males making the transaction, the officer did not see any exchange or conversation between Hall and the two males.

As the officers pulled up to the corner, Hall put the baggie into his left coat pocket and began walking away. When Officer Kopecki ordered Hall to stop, Hall quickened his pace and ran into an alley. The officer pursued Hall and stopped him approximately thirty feet into the alley. Officer Kopecki testified that he patted Hall down, "feeling the left pocket, which I observed him put the bag in." N.T., 11/27/95, at 14. Although he knew that

the baggie did not contain a weapon, Officer Kopecki grabbed and squeezed Hall's left pocket. Id. at 17, 23. He felt something "bulky, crunchy" and claimed that, based on past experience, it felt like vials. Id. at 14-15. He further testified that, after he grabbed and squeezed Hall's pocket, he immediately recognized the baggie as containing drugs. Id. at 14, 17. After removing the bag and discovering vials filled with what appeared to be cocaine, the officer conducted a further search of Hall and recovered a pager and some money. Hall was arrested and charged with possession with intent to distribute a controlled substance.

Hall filed a motion to suppress, which the trial court denied. Following a non-jury trial, Hall was convicted of the charges and sentenced to a term of imprisonment of one to two years. On appeal, the Superior Court affirmed the judgment of sentence. The court found that the officer had conducted a valid investigatory detention and protective frisk of Hall and had properly recovered the drugs pursuant to the plain feel doctrine.

Hall filed a Petition for Allowance of Appeal. We granted allocatur to determine whether the investigatory stop and frisk of Hall was proper and whether the Superior Court properly applied the plain feel doctrine to the facts of this case.[3] Based on the similarity of the issues, this appeal was consolidated with Commonwealth v. E.M.

DISCUSSION

We must first address Appellants' claim that the officers in their respective cases did not possess the reasonable suspicion necessary to justify subjecting them to an investigatory stop and frisk.

It is well established that a police officer may conduct a brief investigatory stop of an individual if the officer observes unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot. Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968); Commonwealth v. Lewis, 535 Pa. 501, 509, 636 A.2d 619, 623 (1994). An investigatory stop subjects a person to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Commonwealth v. Ellis, 541 Pa. 285, 294, 662 A.2d 1043, 1047 (1995). Such an investigatory stop is justified only if the detaining officer can point to specific and articulable facts which, in conjunction with rational inference derived from those facts, give rise to a reasonable suspicion of criminal activity and therefore warrant the intrusion. Commonwealth v. Murray, 460 Pa. 53, 61, 331 A.2d 414, 418 (1975).

If, during the course of a valid investigatory stop, an officer observes unusual and suspicious conduct on the part of the individual which leads him to reasonably believe that the suspect may be armed and dangerous, the officer may conduct a pat-down of the suspect's outer garments for weapons. Terry, 392 U.S. at 24, 88 S. Ct. at 1881; In the Interest of S.J., 713 A.2d 45, 48 (Pa. 1999) (opinion announcing judgment of the Court); Commonwealth v. Melendez, 544 Pa. 323, 329 n.5, 676 A.2d 226, 228 n.5 (1996); Commonwealth v. Hicks, 434 Pa. 153, 158-59, 253 A.2d 276, 279 (1969). In order to justify a frisk under Terry, the officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." Sibron v. New York,

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(…continued)

[3] Although Hall claims that the search and seizure he was subjected to violated his rights under both the United States and Pennsylvania Constitutions, we need only reach his claim on federal constitutional grounds.

392 U.S. 40, 64, 88 S. Ct. 1889, 1903 (1968). Such a frisk, permitted without a warrant and on the basis of reasonable suspicion less than probable cause, must always be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S. Ct. 2130, 2136 (1993) (quoting Terry, 392 U.S. at 26, 88 S. Ct. at 1882).

In Appellant Hall's case, the Superior Court concluded that Officer Kopecki had the requisite reasonable suspicion to conduct an investigatory detention of Hall, reasoning:

> Instantly, Officer Kopecki clearly possessed the requisite reasonable suspicion that criminal activity may have been afoot. He encountered Appellant at 12:30 a.m.; Appellant was located in a high drug area; Appellant was carrying a plastic baggie which is typically used to transport drugs; Appellant's companions engaged in a street-level transaction after Appellant attempted to flee from the police.

Slip Op., No. 281 at 4 (Pa. Super., March 5, 1997).

Under the totality of the circumstances in this case, we agree that Officer Kopecki reasonably concluded that criminal activity was afoot. During the course of his patrol in a high crime area, in which he had previously made several drug-related arrests, Officer Kopecki saw Hall holding a baggie at waist level and making a motion towards the two males who were standing approximately two feet away from Hall. He observed the two males engage in a single transaction. Officer Kopecki further testified that Hall, after looking in the direction of the approaching police car, put the baggie in his pocket and began walking away, quickening his pace into a run when the officer ordered him to stop. Under the totality of these circumstances, we find no error in the Superior Court's

conclusion that Officer Kopecki had the requisite reasonable suspicion to conduct an investigatory stop of Hall. [4]

The facts of this case also establish that Officer Kopecki was justified in subjecting Hall to a frisk for weapons. Officer Kopecki was in a high-crime area, after midnight, and had just observed activity he suspected of being drug-related. Hall's subsequent flight forced Officer Kopecki to confront Hall alone, in an alley, approximately forty feet away from his partner. Given the totality of these circumstances, we agree with the Superior Court that Officer Kopecki had the requisite suspicion to frisk Hall for weapons. See Hicks, 434

[4] Although we find that Officer Kopecki had reasonable suspicion to stop Hall for investigation, we reject the Commonwealth's argument that Officer Kopecki had probable cause to arrest Hall at this point. While Officer Kopecki testified that he observed Hall motion towards the other two males, he saw no transaction or conversations between Hall and those two men. Rather, he saw two people, other than Hall, exchange a small, unidentified item for cash. And although Hall was holding a plastic baggie with unknown contents and Officer Kopecki saw Hall place the baggie into his pocket and flee at the sighting of the police car, this does not rise to the level of probable cause. See Commonwealth v. Banks, 540 Pa. 453, 658 A.2d 752 (1995) (police officer's observation of defendant making single, street corner exchange of unidentified item for cash together with defendant's flight did not constitute probable cause to arrest); Commonwealth v. Malson, 642 A.2d 520 (Pa. Super. 1994) (officer lacked probable cause to arrest defendant when officer, at approximately 9 p.m., observed defendant receive something green from an unknown man on corner in area where officer had made several previous drug-related arrests); Commonwealth v. Hunt, 421 A.2d 684 (Pa. Super. 1980) (officer lacked probable cause to arrest defendant when officer received tip that several people were selling drugs in particular area, which was one in which officer had made several previous drug-related arrests, and officer proceeded to area and saw defendant make some sort of exchange with another person and defendant fled when approached by officer). In his dissenting opinion, Justice Castille proclaims his disagreement with our finding that Officer Kopecki lacked probable cause, noting his belief that "it is more instructive that neither appellant nor the majority make any suggestion as to what innocent activity it was that the officer did observe at 12:30 a.m. on a street corner behind the Rose Electric Supply Yard . . ." We note that, contrary to any suggestion made by the dissent, neither Hall, as the defendant, nor this Court has any obligation in a suppression case to provide an explanation of what "innocent activity" an officer may or may not have seen the defendant engage in. Rather, the burden of proof is solely on the Commonwealth to establish that the circumstances justified seizing the defendant. See Pa.

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Pa. at 158-59, 253 A.2d at 279 (officer may conduct frisk a suspect's outer clothing for weapons if he reasonably concludes that the person with whom he is dealing may be armed and dangerous); Terry, 392 U.S. at 27, 88 S. Ct. at 1883 (frisk for weapons is justified if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger").

Hall argues, however, that even if Officer Kopecki had reasonable grounds to stop and search him for weapons, the officer's frisk exceeded the scope of a permissible pat-down. We agree.

While Officer Kopecki initially asserted at Hall's suppression hearing that he patted Hall down for his safety, he later candidly testified that he frisked Hall because he wanted to see if the baggie placed in Hall's pocket contained drugs. N.T., 11/27/95, at 23, 25. He testified that he knew the baggie was not a weapon. Id. at 23. In summarizing Officer Kopecki's testimony regarding the purpose of the frisk, the trial court stated:

> I think his answer was very specific. He thought what he -- when he saw this plastic sandwich baggy, he thought it was drugs. And when he saw him put the drugs in his pocket, he was going to find out whether or not they were drugs. And when he patted him down, his primary purpose in patting him down was to get to feel that bag to see if what he originally believed was right.

Id. at 26. Officer Kopecki specifically agreed with this analysis. Id.

This testimony clearly reveals that the officer's search of Hall was outside the scope authorized by Terry. Terry specifically held that when an officer is justified in believing that the individual whose suspicious behavior he is investigating is armed and presently dangerous to the officer or to others, the officer may conduct a frisk of the suspect's outer

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R.Crim.P. 323 (h) (Commonwealth has burden of establishing that challenged evidence was not
(continued…)

clothing to determine whether the person is in fact carrying a weapon. Terry, 392 U.S. at 24, 88 S. Ct. at 1881; Hicks, 434 Pa. at 158-59, 253 A.2d at 279. Since the sole justification for a Terry search is the protection of the police and others nearby, such a protective search 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, 392 U.S. at 26, 88 S. Ct. at 1882. Thus, the purpose of this limited search is not to discover evidence, but to allow the officer to pursue his investigation without fear of violence. Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed. Sibron, 392 U.S. 40 at 65, 88 S. Ct. at 1904.

Applying these principles to the instant case, it is clear that the officer's frisk of Hall was not within the scope authorized by Terry. By searching Hall's pocket to determine if it contained drugs, the officer's search necessarily went beyond what was necessary to determine if Hall was armed. While Terry and its progeny legitimately allow officers to frisk a suspect for weapons when they have an articulable and reasonable suspicion that the suspect is armed and dangerous, Terry simply does not allow an officer to conduct a search in an attempt to validate a belief that a suspect is carrying non-threatening contraband. See Adams, 407 U.S. at 146, 92 S. Ct. at 1923 (search merely for contraband or evidence of crime is not within permissible scope of Terry frisk); Dickerson, 518 U.S. at 378, 113 S. Ct. at 2138 (noting that Terry expressly refused to authorize evidentiary search). This is what occurred here. Accordingly, Officer Kopecki's search of Hall's

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obtained in violation of defendant's rights).

pocket, which held the baggie that the officer suspected contained drugs but knew did not contain a weapon, unconstitutionally exceeded the scope of Terry. See Sibron, 392 U.S. at 64-65, 88 S. Ct. at 1903-04 (when officer's statement to defendant "you know what I am after" and other testimony revealed that officer searched defendant's pocket to determine whether it contained narcotics as officer suspected, protective search was not related to justification of protection of officer or others, and therefore, protective search was outside scope of Terry and narcotics seized from defendant's pocket should have been suppressed).

We recognize, of course, that the Superior Court found that Officer Kopecki's seizure of the baggie from Hall's pocket was constitutionally permissible under the plain feel doctrine. Given our finding that Officer Kopecki's search was outside the scope of Terry, however, we disagree with the Superior Court that the plain feel doctrine is applicable to this case.

In Minnesota v. Dickerson, 508 U.S. at 373-75, 113 S. Ct. at 2136-37, the United States Supreme Court adopted the so-called 'plain-feel' doctrine and held that a police officer may seize non-threatening contraband detected through the officer's sense of touch during a frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent and the officer has a lawful right of access to the object. The Court emphasized, however, that such action is only permissible "so long as the officers' search stays within the bounds marked by Terry." Id. at 373, 113 S. Ct. at 2136. Here, we have already determined that Officer Kopecki's search to discern whether the baggie in Hall's pocket contained drugs, as he suspected, is not within the scope of the protective search authorized by Terry. As Dickerson makes

clear, the plain feel doctrine simply cannot be triggered to salvage a search, such as the one here, which was "not within the bounds marked by Terry." [5]

Thus, we find that Officer Kopecki unconstitutionally exceeded the scope of Terry when he searched Hall's pocket and seized the baggie of vials inside and consequently, that the narcotics found on Appellant Hall must be suppressed.

Turning to Commonwealth v. E.M., Appellant E.M. also argues that Corporal Meyers subjected him to a frisk without the requisite reasonable suspicion that he was armed and dangerous.[6] Contrary to this assertion, however, the record clearly demonstrates that

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[5] The Commonwealth argues, however, that the officer's frisk was not outside the scope of Terry under Dickerson because Dickerson holds that if an officer, while frisking an individual to determine if he is armed, feels an object whose mass or contour makes its criminal character immediately apparent, then the officer may seize that object. Dickerson, 508 U.S. at 375-76, 113 S. Ct. at 2137. The Commonwealth notes that here, Officer Kopecki testified that he grabbed and squeezed Hall's pocket, felt something "bulky, crunchy" and immediately recognized the baggie, based on his experience, as containing vials of drugs. The Commonwealth's argument, however, fails to recognize that Officer Kopecki testified that when he grabbed and squeezed Hall's pocket he was attempting to discern if the baggie contained drugs, and not whether the pocket contained a weapon. Nevertheless, the Commonwealth's argument fails for another reason. In Dickerson, the Supreme Court found that once the initial pat-down of an individual dispels the officer's suspicion that the individual is armed, any further search which manipulates (i.e. squeezes, pokes) the contents of a defendant's pocket is not authorized by Terry. Dickerson, 508 U.S. at 378, 113 S. Ct. at 2138-39; Commonwealth v. Graham, 721 A.2d at 1081; In the Interest of S.J., 713 A.2d at 53 (Cappy, J., concurring and dissenting) ("manipulation of any object detected during a pat down, once the officer is satisfied that the object is not a weapon, is unacceptable"). Here, Officer Kopecki specifically testified that he knew the baggie in Hall's pocket was not a weapon, but after "grabbing and squeezing" it, he knew it to be narcotics. N.T., 11/27/95, at 14, 17, 23. This manipulation, of course, is inappropriate under Dickerson. Therefore, the Commonwealth's argument that Officer Kopecki's seizure of the baggie of vials from Hall's pocket was constitutionally valid under Dickerson necessarily fails.

[6] E.M. also baldly asserts, but makes no developed argument in his brief, that the officers did not possess reasonable suspicion that criminal activity was afoot, so as to make the initial stop unconstitutional. See Commonwealth v. Shaw, 494 Pa. 364, 370 n.3, 431 A.2d 897, 900 n.3 (1981) (claims raised on mere assertions without adequate elaboration are deemed waived). Nonetheless, (continued…)

Corporal Meyers properly subjected E.M. to a pat down for weapons. Corporal Meyers specifically testified that he noticed a bulge in E.M.'s front pocket which was characteristic of a semi-automatic weapon. It was this particularized fear that E.M. was carrying a weapon which led Corporal Meyers to conduct a protective frisk of E.M. to determine if the bulge was in fact a weapon. Thus, the record reflects that Corporal Meyers had the reasonable suspicion necessary to warrant a protective search of E.M.

E.M. further argues, however, that Corporal Meyers exceeded the scope of a permissible pat-down search and that the Superior Court erroneously relied on the plain feel doctrine in finding that the seizure of the "wad of money" and illegal drugs was constitutionally permissible. We agree.

As noted in the above discussion of Commonwealth v. Hall, Minnesota v. Dickerson held that police may lawfully seize non-threatening contraband from individuals detected by 'plain feel' during the scope of a Terry frisk if the criminal character of the item felt is immediately apparent to the officer conducting the frisk. Dickerson, 508 U.S. at 375-76, 113 S. Ct. at 2137. Our Superior Court has applied Dickerson's plain feel doctrine in several recent cases. See, e.g., Commonwealth v. Fink, 700 A.2d 447 (Pa. Super. 1997), appeal denied, 716 A.2d 1247 (Pa. 1998); Commonwealth v. Smith, 685 A.2d 1030 (Pa. Super. 1996), appeal denied, 695 A.2d 785 (Pa. 1997). See also Commonwealth v. Graham, 721 A.2d 1075 (Pa. 1998) (opinion announcing judgment of the court) (adopting plain feel doctrine under Dickerson).

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even if this claim was properly presented, we find no error in the lower courts' conclusion that the officers had sufficient facts to reasonably believe E.M. and O.T. were connected with criminal activity.

As noted in Graham, the Superior Court stated in Commonwealth v. Fink that the plain feel doctrine is only applicable if the incriminating nature of the contraband is immediately apparent. Graham, 721 A.2d at 1081; Fink, 700 A.2d at 450 (citing Dickerson, 508 U.S. at 375, 113 S. Ct. at 2136-37); see also Commonwealth v. Mesa, 683 A.2d 643 (Pa. Super. 1996) (police officer may seize contraband during a Terry search if contraband is detected through officer's sense of touch and the contour or mass of the object makes its identity as contraband immediately apparent). Immediately apparent, as explained by the Fink Court, means that the officer conducting the frisk readily perceives, without further exploration or searching, that what he is feeling is contraband. Fink, 700 A.2d at 450; see also Dickerson, 508 U.S. at 378-79, 113 S. Ct. at 2138-39.

Applying these principles to the instant case, it is clear that Corporal Meyers did not "plainly feel" contraband when frisking E.M. Here, Corporal Meyers testified that, when he first came upon E.M., he noticed a bulge which was characteristic of a semi-automatic weapon. When he frisked E.M.'s outer clothing, however, Corporal Meyers specifically testified that he discovered that the bulge was not a gun or weapon.[7] Instead, Corporal Meyers testified that the bulge was soft and that he "felt that it may have been more contraband." N.T., 11/6/95, at 19. At no time did Corporal Meyers testify that it was "immediately apparent" to him that the bulge in E.M.'s pocket was contraband, but rather,

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[7] Corporal Meyers testified:

Q: So you reached down and you patted this bulge in [Appellant's] pants, correct?
A [Meyers]: That's correct
Q: You knew at that point it wasn't a gun, right?
A: That's correct.
Q: You knew it wasn't a knife, is that correct?
A: Yes, sir.

(continued…)

only that he believed that the bulge "may" have been contraband. Further, the only testimony the officer gave specifically regarding the bulge felt in E.M.'s pocket was that it was "soft." He offered no testimony indicating what it was about the mass or contour of this soft bulge which would support a finding that the feeling of the bulge made it immediately apparent to him that the bulge was contraband. See Commonwealth v. Smith, 685 A.2d 1030 (Pa. Super. 1996) (plain feel exception did not apply to contraband recovered during Terry frisk when record failed to indicate what it was about the envelope felt by officer that made it immediately apparent to officer that the envelope was contraband); In the Interest of S.D., 633 A.2d 172 (Pa. Super. 1993) (when contraband is retrieved from individual's pocket during Terry frisk and officer is unable to give specific testimony regarding how the contraband felt, contraband must be suppressed). In fact, Corporal Meyers did not state what type of "contraband" he thought E.M.'s pocket may contain.

Similarly, in Commonwealth v. Mesa, 683 A.2d 643 (Pa. Super. 1996), the officer came across a bulge in the defendant's pocket during a Terry frisk. The officer testified that the bulge was soft, and that although he knew it was not a weapon, he felt that the bulge may contain a controlled substance due to the "shape and form it was in." Id. at 648. Based on this suspicion, the officer then reached into the defendant's pocket and pulled out a large roll of cash, with a baggie containing marijuana wrapped up inside the cash. In finding that the search of Appellant's pocket was outside the scope of Terry, the Mesa court stated:

> [The] record does not support the factual finding that [the] Detective recognized an object whose 'contour or mass made its identity immediately apparent',

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(…continued)
N.T., 11/6/95, at 24.

> especially when we consider the size and shape of the folded money and packet of marijuana. . . . [The] Detective gave general testimony that the bulge felt like a controlled substance, but he never provided specific testimony as to why the 'shape and form' of the bulge warranted an intrusive search into appellant's pocket.

Mesa, 683 A.2d at 648 (citations omitted). Thus, the court found that absent testimony that the officer felt a weapon or identifiable contraband, there was no probable cause to justify the search into the defendant's pocket. Id.

As in Mesa, the record in the instant matter does not support a finding that the object felt during the frisk of E.M. was immediately apparent to Corporal Meyers as contraband. In order for the plain feel doctrine to apply under Dickerson, which specifically requires that the criminal nature of the object be immediately apparent to the officer conducting the frisk, we agree with the Mesa court that an officer must do more than testify as to his general suspicion that a bulge may have been contraband and offer, as substantiation, that the 'mass' of the bulge was soft.[8] Since this is all the record supplies in the instant case, we cannot find that it was "immediately apparent" to Corporal Meyers that the bulge felt in E.M.'s pocket was contraband.[9]

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[8] Here, the trial court found that once Corporal Meyers determined that the bulge was soft, he had probable cause to believe the bulge was the product of unlawful activity. We cannot agree. In fact, if we were to allow an officer to seize an object under such circumstances, we would in effect be ignoring the admonition of the Supreme Court in Dickerson that "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." Dickerson, 508 U.S. at 378, 113 S. Ct. at 2138, quoting Texas v. Brown, 460 U.S. 730, 748, 103 S. Ct. 1535, 1546 (1983) (Stevens, J., concurring in judgment). Dickerson carefully circumscribes the application of the plain feel doctrine to situations where an officer, while lawfully conducting a Terry frisk for weapons, plainly feels an object that is immediately apparent to him as contraband. In order to remain within the boundaries delineated by Dickerson, an officer must be able to substantiate what it was about the tactile impression of the object that made it immediately apparent to him that he was feeling contraband.

(continued…)

Thus, when Corporal Meyers reached into E.M.'s pocket because he thought the soft bulge he felt "may" have been some type of contraband, and subsequently recovered a large roll of cash, he was acting outside the scope of a legitimate Terry frisk. Since the pat down failed to establish probable cause to believe E.M. was carrying either a weapon or other identifiable contraband, the subsequent search of E.M.'s other pockets, which resulted in the discovery of the packet of aluminum foil containing what appeared to be acid tabs, a glassine packet of pills and a pocket pager, was likewise unconstitutional. As stated by Judge Schiller in his dissent:

> [O]nce the officer determined that the bulge was not a weapon, and was not contraband, he had no authority to conduct a search because he had no probable cause justifying such a search. Thus, everything obtained thereafter should have been suppressed. See Wong Sun v. United States, 377 U.S. 471, 83 S. Ct. 407 (1963).

Slip Op., No. 541 (Pa. Super., Dec. 12, 1995) (Schiller, J., dissenting).

For the reasons outlined above, we find that the lower courts erred in denying Appellant Hall's and Appellant E.M.'s suppression motions. Accordingly, the Orders of the Superior Court are reversed.

Mr. Justice Zappala files a concurring opinion.

Mr. Justice Castille files a concurring and dissenting opinion in which Madame Justice Newman joins.

(…continued)

[9] Moreover, even assuming that Corporal Meyers recognized the bulge in E.M.'s pocket as a large amount of cash, a large amount of cash is not, in and of itself, "per se contraband." See Mesa, 683 A.2d at 648 (stating that large amount of cash is not "per se contraband" and noting doubt that roll of cash could have contour or mass that would make it immediately recognizable as a controlled substance); Commonwealth v. Stackfield, 651 A.2d 558, 562 (Pa. Super. 1994) (officer's testimony that he felt zip-lock baggie during Terry frisk did not support conclusion that officer felt item that he immediately recognized as contraband since baggie is not "per se contraband").