[J-72A/B-1999]
THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 192 M.D. Appeal Docket 1998
	:	
Appellee,	:	Appeal from the **Memorandum Opinion**
	:	**and Order** of the Superior Court
	:	(Cavanaugh, Beck and Brosky, JJ.) dated
v.	:	October 30, 1997, **affirming** the
	:	Judgment of Sentence of the Court of
	:	Common Pleas of Delaware County
REUBEN STEVENSON,	:	(Hazel, J.) dated June 3, 1996.
	:	
Appellant.	:	ARGUED: April 28, 1999
	:	
	:	
	:	No. 191 M.D. Appeal Docket 1998
	:	
IN THE INTEREST OF R.A., A Minor	:	Appeal from the **Memorandum Opinion**
	:	**and Order** of the Superior Court
APPEAL OF: R.A., A Minor	:	(Johnson, Stevens and Olszewski, JJ.)
	:	dated June 10, 1998, **affirming** the
	:	Adjudication of Delinquency of the Court
	:	of Common Pleas of Dauphin County
	:	(Turgeon, J.) dated June 14, 1997.
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	:	ARGUED: April 28, 1999
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DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: January 20, 2000**

I respectfully dissent. The United States Supreme Court set forth the parameters of a proper search under the plain feel doctrine in Minnesota v. Dickerson, 508 U.S. 366 (1993). To interpret the issue as the majority does effectively renders the plain feel

doctrine a nullity. See Commonwealth v. E.M., __ Pa. __, 735 A.2d 654 (1999) (discussing plain feel under the United States Constitution).[1]

Essentially, a police officer, when conducting a valid Terry[2] stop and frisk, may seize items that are not weapons if, when patting down a suspect's outer clothing, the officer feels an object whose contour or mass makes its identity immediately apparent as contraband.[3] When such situation occurs, 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 is justified by the same practical considerations that exist under the plain view doctrine. Dickerson, supra at 375-76.

As the majority states, an officer may seize non-threatening contraband detected by plain feel during a pat-down search for weapons if: 1) the officer is lawfully in a position to detect the presence of contraband and 2) the incriminating nature of the contraband is immediately apparent and the officer has a lawful right of access to the object. See Dickerson, supra; E.M., supra. Neither appellant disputes that the officers in both cases

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[1] A plurality of this Court in Commonwealth v. Graham, 554 Pa. 472, 721 A.2d 1075 (1998) (opinion announcing judgment of the court) would have adopted plain feel under Dickerson. However, since neither party argues that the state constitution provides greater protection than the federal constitution, we need not address whether the state constitution was implicated.

[2] Terry v. Ohio, 392 U.S. 1 (1968) (holding that when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon).

[3] While the Supreme Court did not define “immediately apparent,” the Court noted that Dickerson’s search exceeded the lawful bounds marked by Terry because the officer identified the contraband after “squeezing, sliding and otherwise manipulating the object.” Dickerson, supra at 377.

sub judice met the first prong. To satisfy the second prong of the test, an officer must be able to substantiate what it is about the tactile impression of the object that made it immediately apparent to him that he was feeling contraband. E.M., supra.

The majority suggests that an officer's testimony falls short of Dickerson if the officer does not know whether non-contraband items would feel similar to the contraband seized. Thus, the majority would require that an officer identify crack cocaine or marijuana to the exclusion of any other item. That is an impossible request. Interpreting the plain feel doctrine to require identifying a substance to the exclusion of any other would leave no grist for the mill. Absent x-ray vision, and being a mere mortal, an officer can only rely on his experience when determining whether a concealed item gives the immediate impression of contraband.

The Court must look at the totality of the circumstances and allow an officer to rely on his experience when interpreting tactile sensations to identify the object felt. See Commonwealth v. Petroll, __Pa.__, 738 A.2d. 993 (1999) (stating that to judge whether incriminating nature of an object was immediately apparent to police officer, reviewing courts must consider totality of the circumstances). In the instant cases, it was immediately apparent under the totality of the circumstances that the appellants carried contraband.

COMMONWEALTH v. STEVENSON

On the evening of October 17, 1995, Officer Robert Birney of the Parkside Borough Police Department saw appellant, Reuben Stevenson, park a vehicle at a townhouse complex and enter a residence known for illegal drug activity. The officer continued on his patrol and, about two minutes later, saw appellant return to the vehicle and exit the complex. Officer Birney observed that the vehicle had a broken rear taillight and signaled

for appellant to pull over. Appellant complied; however, during the stop, appellant appeared nervous, began to fidget and repeatedly reached toward the glove compartment of the vehicle. The officer, fearing for his safety, ordered appellant out of the vehicle and conducted a pat-down search. It was during this search that the officer felt three hard packages of folded paper or cardboard in appellant's pocket. The officer stated that he knew, based on his experience, that the packages contained crack cocaine. The officer retrieved the packages, confirmed that the packages contained crack cocaine and placed appellant under arrest. A subsequent search of appellant's trunk revealed more cocaine.

The majority states that the officer failed to relate what led him to believe that appellant had contraband in his pocket. In doing so, the majority fails to consider the totality of the circumstances or take into account the officer's experience. The officer saw appellant go into a known crack house and come back out in a very short period of time.[4] During the subsequent traffic stop, appellant acted suspiciously. The officer conducted a proper Terry frisk and immediately recognized the three hard packages in appellant's pocket as contraband.

Officer Birney had over seven years experience as a law enforcement officer. He testified that he had personally made 50 drug arrests and had assisted on hundreds of others. He stated that, when he felt the small change pocket on Stevenson's jeans, indicating the small pocket above the front right pocket, he knew it contained narcotics. He testified that he had previously seen and felt controlled substances packaged in cardboard

[4] At the suppression hearing Officer Birney stated that he knew the townhouse that Stevenson entered well, including the names and work schedules of the residents. He had also taken previous complaints concerning heavy pedestrian traffic, during the night, to the house. N.T. 4/1/96 at 10-11.

during drug arrests that he had made and witnessed. He also testified that he had purchased drugs in similar packaging while working undercover. N.T. 4/1/96 at 31-34.

It is clear that, under the totality of these circumstances and due to his experience, it was immediately apparent to Officer Birney that the items in appellant's pocket were contraband. See Commonwealth v. Evans, 546 Pa. 417, 685 A.2d 535 (1996) (holding that, under the plain view doctrine, police officer's belief that package he observed protruding from under seat of defendant's automobile contained narcotics, based on his prior police experience involving observations of narcotics being similarly packaged, together with defendant's suspicious behavior during traffic stop, gave officer probable cause to arrest defendant). Therefore, the evidence should be admitted under the plain feel doctrine.

IN THE INTEREST OF R.A.

Pennsylvania State Trooper Jerry Oberdorf testified that on February 27, 1997, at approximately 12:40 a.m., he observed a car with a cracked windshield proceeding ahead of his patrol car. The car contained three occupants including appellant R.A., who was in the back seat. Trooper Oberdorf signaled for the car to pull over and the driver complied. After coming to a complete stop, the driver jumped out of the car and began to move away from it. Trooper Oberdorf ordered the driver back to the vehicle and noticed that the driver appeared nervous and was speaking incoherently. The trooper ordered the driver to stay put and patted him down. He found no weapons or contraband.

While conducting the pat-down, Trooper Oberdorf ordered the remaining passengers to place their hands so he could see them. Initially, the passengers complied, but then they began to fidget and move their hands around the inside of the vehicle. Trooper Oberdorf

then ordered the passengers out of the vehicle. Appellant complied but appeared nervous and continued to move his hands about his jacket. Based on these actions, Trooper Oberdorf patted down appellant. During the pat-down, Trooper Oberdorf felt what seemed to be a cigarette or a cigar and something similar to a pill bottle in the liner of appellant's jacket. Trooper Oberdorf immediately concluded that the items contained contraband. Accordingly, the trooper removed the objects and found a hollowed-out cigar filled with marijuana and a pill bottle that contained crack cocaine. Trooper Oberdorf then placed appellant under arrest.

Although neither a cigar nor a pill bottle by its nature constitutes contraband, under the totality of these circumstances, it is clear that Trooper Oberdorf had probable cause to believe that the liner in appellant's jacket contained contraband. Commonwealth v. Kendrick, 340 Pa. Super. 563, 490 A.2d 923 (1985) (holding that film container has other uses and therefore is not purely single-purpose container; however, given circumstances, trained narcotics detective's view of container was tantamount to view of narcotic itself). Trooper Oberdorf testified that he had over six years experience as a State Trooper and that he had cadet training in the detection of drugs and the different ways it is packaged and carried. He further testified that he had made over one hundred drug arrests, and that he had previously seen cocaine packaged in a pill bottle and a marijuana cigar, sometimes referred to as a "Phillie blunt." N.T. 6/11/97 at 10. Even the trial court noted that, "everybody knows in this room that cigars are what they use as blunts." N.T. 6/11/97 at 18. Thus, based on his experience and under the totality of the circumstances, it was immediately apparent to the trooper that the items in the liner of R.A.'s jacket were contraband.

The majority fails to examine the totality of the circumstances and discounts the trooper's experience. Instead, the majority focuses on the fact that, when asked whether he had felt any narcotics or any other objects that he could identify as contraband, the trooper responded in the negative. However, the record reflects that Trooper Oberdorf was asked whether he felt any other narcotics or any other objects that he could identify as contraband. N.T. 6/11/97 at 16. Thus, Trooper Oberdorf did not testify that he did not feel any items that he could identify as contraband.

The majority's interpretation of "immediately apparent" would require absolute certainty on the part of the officer, requiring him to identify an item as contraband to the exclusion of any other possibility. If that were the relevant standard, the police would never have probable cause to seize a white powdery substance that they believed, under the totality of the circumstances, was cocaine because the possibility always exists that the substance could be flour, powdered sugar, or any other similar lawful substance. However, that is not the standard set forth in Dickerson. Rather, Dickerson only requires that the item appear to be contraband.

Because I believe that under the totality of the circumstances it was immediately apparent to the investigating officers in both cases that the items felt in the Terry frisks were contraband, I would hold that the contraband found by the officers should not be suppressed. Therefore, I dissent.