IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEORGE WILLIAM McCLURE, Appellant.	No. 38035-8-II UNPUBLISHED OPINION

Bridgewater, J.—George William McClure appeals his Cowlitz County conviction of possession of a controlled substance, methamphetamine. He contends that the drugs should have been suppressed because the search of his person exceeded the scope of a proper weapons search. We affirm.[1]

FACTS

The drugs came to light as a result of a traffic stop. Washington State Patrol trooper Gary Lane stopped the truck in which McClure was a passenger because it had no mud flaps and its tabs had expired. A records check indicated that the driver had a prior felony conviction, and

[1] A commissioner of this court considered this matter pursuant to RAP 18.14 and referred it to a panel of judges.

when Trooper Lane saw live ammunition on the dashboard of the truck, he became concerned about the presence of firearms. The driver consented to/invited a search of the vehicle. Trooper Lane conducted a weapons search of his person, during which he found two knives. By that time a backup officer had arrived, and he took custody of the driver while Trooper Lane searched defendant McClure. The trooper explained:

> I walked him back to the back portion of the truck, patted him down for weapons and when I did in the watch pocket there was a bit [sic][2] bulge there. When I felt the bulge, I looked down and saw the top of a baggie sticking out. Asked him what it was. He said "Meth."

Report of Proceedings (RP) Mar 11, 2008 at 17. During cross examination, he said that he felt the baggie and "[s]o [he] lifted up the shirt to see it and when [he] . . . lifted his shirt, [he] could see the top of a baggie sticking out." RP Mar 11, 2008 at 23. On rebuttal, he confirmed that he saw the baggie after he lifted up McClure's outer jacket or shirt.[3] The trooper also agreed that the baggie was not immediately recognizable as narcotics.[4]

McClure sought to have the drugs suppressed, contending that the trooper did not have an adequate basis for a search of any kind. The trial court denied his motion, ruling that the presence of live ammunition—both rifle and small arm shells in this case—gave Trooper Lane reasonable grounds to believe that one of the men might be carrying a gun. McClure went to trial on

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[2] The trooper subsequently indicated that it was a large bulge.

[3] The State is simply wrong in its contention that there was no evidence the trooper had to lift up McClure's shirt in order to see the baggie.

[4] Thus, even if the baggie had been visible without lifting McClure's shirt, the State's "plain view" argument would have no merit.

stipulated facts. The court convicted him as charged, and he appeals.

ANALYSIS

McClure does not now challenge the trial court's determination that a protective search was reasonable. Rather, he contends that Trooper Lane exceeded the scope of such a search when he lifted up McClure's shirt. The State asserts that McClure has waived this issue because he did not raise it below. The issue does pertain to a constitutional right and it may be raised for the first time on appeal. *State v. Littlefair,* 129 Wn. App. 330, 338, 119 P.3d 359 (2005). However, McClure must establish that the error is "manifest." *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "Manifest" means unmistakable, evident, or indisputable. *State v. Lynn,* 67 Wn. App. 339, 346, 835 P.2d 251 (1992). In order to be "manifest," an alleged error must have practical and identifiable consequences in the trial. *State v. Barr,* 123 Wn. App. 373, 381, 98 P.3d 518 (2004), *review denied,* 154 Wn.2d 1009 (2005). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown, and the error is not manifest. *McFarland,* 127 Wn.2d at 333.

A protective frisk is strictly limited to a patdown to discover weapons that might be used against the officer. *State v. Hudson,* 124 Wn.2d 107, 112, 874 P.2d 160 (1994). However, in cases where a patdown is inconclusive, an officer may reach into a detainee's clothes and may withdraw an object in order to ascertain whether it is a weapon. *See Hudson*, 124 Wn.2d at 112-13. Under this rule, courts have held that it was proper to remove a cigarette pack, a wallet, and a pager. *See State v. Allen,* 93 Wn.2d 170, 172, 606 P.2d 1235 (1980); *State v. Horton,* 136 Wn. App. 29, 38, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008); and *State v. Fowler,*

76 Wn. App. 168, 170-72, 883 P.2d 338 (1994), *review denied,* 126 Wn.2d 1009 (1995).[5]

In this case, all we know is that the trooper felt a large bulge, and that the plastic baggie that was making the bulge contained a crystalline substance that proved to be methamphetamine. Because McClure did not challenge the scope of the search, there was no attempt to elicit further details. There is nothing in this record that compels a finding that the baggie could not have been mistaken for a weapon. The alleged error is not evident or indisputable. It is not manifest. Accordingly, we affirm the conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Bridgewater, J.

We concur:

Hunt, J.

Van Deren, C.J.

[5] The *Allen* and *Horton* courts held that once the objects were removed and identified, the officers did not have the right to look inside them. Here, McClure told Trooper Lane what was in the baggie before Lane removed it. He does not challenge the admission of that statement. We note that admission was proper under *State v. Wilkinson,* 56 Wn. App. 812, 819, 785 P.2d 1139, *review denied,* 114 Wn.2d 1015 (1990), which held that a frisk is not comparable to formal arrest, and *Miranda* warnings are not required prior to questions like the one Trooper Lane asked. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).