

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001681-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 02-CR-002315

DEMARCUS COLEMAN

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: The Commonwealth has appealed from an interlocutory order of the Jefferson Circuit Court entered on July 23, 2003, which granted Demarcus Coleman's motion to suppress evidence. Having concluded that the trial court erred by determining that "some reasonable suspicion of drug activity" was required before the plain-feel doctrine could have justified the seizure of the crack cocaine found on Coleman's person, we vacate and remand for further proceedings.

The relevant facts are not in dispute. On October 21, 2002, Coleman was indicted by a Jefferson County grand jury on one count of trafficking in a controlled substance in the first degree,<sup>1</sup> one count of possession of marijuana,<sup>2</sup> one count of illegal use or possession of drug paraphernalia,<sup>3</sup> one count of loitering,<sup>4</sup> one count of drinking alcoholic beverages in a public place,<sup>5</sup> and on one count of illegal possession of a controlled substance in the first degree.<sup>6</sup> One week later, Coleman appeared in court and entered pleas of not guilty to all of the charges in his indictment.

On January 29, 2003, Coleman filed a motion to suppress all of the evidence against him on grounds that it had been obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kentucky Constitution. A suppression hearing was held on March 7, 2003. Our review of the record of that hearing reveals the following.

At approximately 4:00 a.m. on March 14, 2002, Officer Brenda Turner of the Louisville Police Department was on foot

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<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1412.

<sup>2</sup> KRS 218A.1422.

<sup>3</sup> KRS 218A.500.

<sup>4</sup> KRS 525.090.

<sup>5</sup> KRS 222.202.

<sup>6</sup> KRS 218A.1415.

patrol near an apartment complex in the Park Hill area of Louisville. During her patrol, Officer Turner observed Coleman walking around outside the area of one of the apartment buildings while drinking what appeared to be an alcoholic beverage. Officer Turner stated that when she approached Coleman, he attempted to enter a nearby building, but he stopped when she called for him to come back and answer some questions.

Upon initial questioning, Coleman informed Officer Turner that he did not live in that particular apartment complex, and that he lived in a different area of the city. Approximately 30-45 seconds later, after Officer Turner's backup had arrived on the scene, she placed Coleman in handcuffs and conducted a Terry<sup>7</sup> pat-down of his outer clothing.<sup>8</sup> Officer Turner testified that during this pat-down, she felt a large, irregularly-shaped hard object in what appeared to be a plastic baggie inside Coleman's jacket pocket. Officer Turner stated that she immediately recognized the object as crack cocaine. Officer Turner removed the object from Coleman's pocket, confirmed that it was in fact crack cocaine, formally placed Coleman under arrest, and read him his Miranda<sup>9</sup> rights.

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<sup>7</sup> Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

<sup>8</sup> Officer Turner stated that although she did not at that time place Coleman under arrest, it was her personal policy to arrest individuals for drinking alcohol in public unless it was clear that they lived nearby and could get home safely.

<sup>9</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

After reading Coleman his Miranda rights, Officer Turner stated that he informed her that his girlfriend lived at the apartment complex in question, and that he sometimes stayed with her. Officer Turner stated that she asked Coleman if he had anything in his girlfriend's apartment that was of an illegal nature. Officer Turner testified that Coleman told her that he had a small bag of marijuana, a scale, and some baggies. Consequently, Officer Turner went to his girlfriend's apartment and obtained her consent to enter and seize the items that Coleman had described.<sup>10</sup>

The trial court entered an order on July 23, 2003, granting Coleman's motion to suppress evidence. The trial court determined that although Officer Turner had reasonable suspicion to conduct the initial Terry stop and pat-down of Coleman's person, the plain-feel doctrine did not justify Officer Turner's seizure of the crack cocaine found in Coleman's jacket pocket. Hence, the trial court ultimately concluded that the crack cocaine had been seized as a result of an illegal search, and that the marijuana and drug paraphernalia found in Coleman's girlfriend's apartment were "fruits" of that illegal search. Therefore, the trial court ordered all of the drug evidence against Coleman to be suppressed. This appeal followed.

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<sup>10</sup> Officer Turner stated that Coleman's girlfriend was not arrested on the morning in question.

In granting Coleman's motion to suppress, the trial court stated in part as follows:

The Court agrees with the Commonwealth that the police had reasonable suspicion to stop [Coleman] based on his apparent use of alcohol in a public place. Furthermore, the Terry pat down would be justified for the officer's safety. The pat down did not reveal the feel of a firearm or other weapon. What it revealed was a lump in a bag in [Coleman's] jacket pocket.

The Court would acknowledge that the odds of a resident of a project having crack cocaine on their person are high. Absent, however, some reasonable suspicion[ ] of drug activity the Court is not satisfied with the probability that a lump in a bag in an otherwise legitimate location (a pocket) could reasonably be assumed to be contraband when measured against the community as a whole.

Stop any person walking in a parking lot in an east end mall, make the same "feel[,]" and the odds of illegitimacy fail substantially.

If the item had been felt on [Coleman] in a suspicious location, in a sock in his underwear, then the probability of illegitimacy increases because it appears there is intent to conceal.

On appeal, the Commonwealth argues that the trial court erred as a matter of law by determining that "some reasonable suspicion of drug activity" was required before Officer Turner could have been justified in seizing the crack cocaine found in Coleman's jacket pocket. We agree.

In Minnesota v. Dickerson,<sup>11</sup> the Supreme Court of the United States discussed the rationale and purpose of the plain-feel doctrine:

We think that [the plain-view] doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment--or at least no search independent of the initial intrusion that gave the officers their vantage point. The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment. The same can be said of tactile discoveries of contraband. 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 [citations omitted].<sup>12</sup>

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<sup>11</sup> 508 U.S. 366, 375-76, 113 S.Ct. 2130, 2137, 124 L.Ed.2d 334 (1993).

<sup>12</sup> See also Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 80 (2002)(stating that "[i]n Kentucky, in determining whether a 'plain feel' or 'plain touch' rule is applicable, it has been concluded that a narrowly drawn exception to the requirement for a warrant is appropriate when the requirements of Terry, supra, are otherwise met and the nonthreatening contraband is immediately apparent from a sense of touch" [citations omitted]).

However, the plain-feel doctrine does not dispense with the requirement that a seizure of suspected contraband be supported by probable cause.<sup>13</sup> Rather, the plain-feel doctrine merely states that probable cause to seize suspected contraband may be found if, during an otherwise lawful Terry pat-down, the illegal nature of the object detected becomes immediately apparent to the officer based upon the sense of touch.<sup>14</sup> Hence, the plain-feel doctrine, much like the plain-view doctrine, is an exception to the warrant requirement.<sup>15</sup>

In the case sub judice, we hold that the trial court erred in its plain-feel doctrine analysis. As Whitmore makes clear, when the Commonwealth argues that the plain-feel doctrine justifies the seizure of the contraband in question, the sole issue is whether the officer, based upon her experience in conducting Terry pat-downs, can articulate specific facts which, if believed, would support a finding that the illegal nature of

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<sup>13</sup> Dickerson, 508 U.S. at 376 (stating that "[r]egardless 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").

<sup>14</sup> See Arizona v. Hicks, 480 U.S. 321, 326, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987)(holding that an officer must have probable cause to believe that an object is contraband before the plain-view doctrine will justify the seizure of the object); and Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)(discussing the analogous plain-view doctrine and holding that the "incriminating character" of the suspected contraband must be "immediately apparent" to the officer before the seizure will be justified).

<sup>15</sup> See Dickerson, 508 U.S. at 375.

the object detected became "immediately apparent" to the officer during the Terry pat-down.<sup>16</sup> Accordingly, since the trial court did not make the appropriate factual findings with respect to the plain-feel doctrine issue, we must vacate the trial court's order and remand with instructions to apply the Whitmore standard to the evidence presented at the suppression hearing.

Finally, we note that Coleman states in his brief that he "does not concede" that the initial Terry stop and pat-down of his person were constitutionally permissible as found by the trial court. Hence, if the trial court on remand denies Coleman's motion to suppress evidence, Coleman may then appeal both the constitutionality of the initial Terry stop and pat-down, and the seizure based on the plain-feel doctrine.

Based on the foregoing, the order of the Jefferson Circuit Court is vacated and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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<sup>16</sup> Whitmore, 92 S.W.3d at 80 (noting that "[h]ere, the officer testified at the suppression hearing that she had four years['] experience as a police officer and had participated in over 100 drug arrests. She stated that Whitmore was wearing a light nylon jacket and that when she did the pat down search, the bag of crack cocaine was immediately recognizable based on her experience. The officer testified to specific and articulable facts that the bulge in the nylon jacket contained contraband. She described the amount, the shape and the packaging and the unique feel of the substance. She stated that these facts indicated to her, based on her experience, that the bulge was crack cocaine. Moreover, the substance was not in any container that shielded its identity. The seizure of the crack cocaine was lawful and the trial judge was correct in overruling the motion to suppress").

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