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TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-002178-MR

CHARLES JONES

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE RON JOHNSON, JUDGE  
ACTION NO. 03-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

TACKETT, JUDGE: Charles Jones appeals from an order of the Harlan Circuit Court denying his motion to suppress evidence seized during a warrantless search. The Commonwealth argues that, since the evidence was discovered during a brief stop and frisk as authorized by the United States Supreme Court's decision in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the circuit court properly refused to suppress it. We disagree because the contraband nature of the evidence was not immediately apparent; therefore, the officer's order to

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Jones to remove said evidence from his pocket exceeded the scope of a search authorized by Terry. Consequently, the judgment of the circuit court is reversed and this case is remanded for entry of an order suppressing the evidence seized and dismissing the felony charges against Jones.

Harlan City Police Officer John Teagle encountered Jones when the officer drove to Jones's home to serve him with an Emergency Protective Order. When he pulled up in front of Jones's residence, Teagle saw a man leaning in the driver's side window of a white car. When they saw the marked police cruiser, the driver and the man standing beside the car broke apart; the car drove away and the man began rapidly walking toward Jones's house. Teagle repeatedly asked the man to approach him, but the man kept heading toward the house. Teagle followed him and prevented him from shutting the door while asking his name. The man admitted that he was Charles Jones.

Teagle began serving the EPO papers and noticed a bulge in one of Jones's pockets. He asked Jones what he had in his pockets and was told that it was nothing. Because the EPO petition stated that Jones had assaulted his wife with a handgun, Teagle decided to do a Terry patdown to determine whether Jones was armed. The object in Jones's pocket felt like a prescription pill bottle and Teagle asked Jones to remove it. Jones was reluctant to comply and, when he removed the bottle,

he turned away from the officer and threw the pills on the ground. Teagle arrested Jones after a struggle. The pills were later determined to be Oxycontin tablets. Jones was charged by indictment with trafficking in a controlled substance, tampering with physical evidence, and resisting arrest.

Jones filed a motion asking the circuit court to suppress the evidence seized as the fruit of an unlawful warrantless search. The circuit court held a hearing at which both parties agreed to accept Teagle's police report as an accurate account of events in lieu of having the officer testify. The circuit court reviewed memorandums filed by both parties and denied the motion to suppress. Jones was allowed to enter a conditional plea to the charges, subject to his right to appeal the circuit court's denial of his suppression motion, and sentenced to two years' imprisonment.

On appeal, Jones argues that the circuit court erred by denying his motion to suppress the evidence obtained by Teagle. The Commonwealth contends that the initial Terry stop was valid and that the plain feel doctrine does not apply in this case. We agree that Teagle had a reasonable and articulable suspicion that Jones was armed and dangerous and, thus, it was proper for the officer to conduct a Terry patdown. The issue before us is whether Teagle exceeded the scope of Terry when he told Jones to remove the prescription bottle from

his pocket. The United States Supreme Court has previously decided that a valid Terry stop which results in the discovery of contraband possessed by an unarmed suspect is allowable under the plain feel doctrine. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

The Kentucky Supreme Court adopted the holding in Dickerson when confronted with a case where an officer performing a Terry patdown removed a small quantity of cocaine from a suspect's pocket. Commonwealth v. Crowder, Ky., 884 S.W.2d 649 (1994). We reversed the circuit court's decision refusing to suppress the evidence against Crowder, and the Kentucky Supreme Court affirmed this court on discretionary review because the officer was uncertain as to the contraband nature of the item in Crowder's pocket. The Kentucky Supreme Court stated the holding in Dickerson as follows:

The Court concluded that a narrowly drawn exception to the warrant requirement is appropriate when: (1) the requirements of Terry are otherwise complied with; and (2) the non-threatening contraband is *immediately apparent* from the sense of touch.

Crowder at 651. In the case at hand, Teagle's police report stated that the object in Jones's pocket "felt like a prescription bottle" and that he asked Jones to remove it from his pocket which Jones reluctantly did. Prior to inspecting the pill bottle removed from Jones's pocket, the officer had no way

to know whether or not Jones had a valid prescription for the medicine in the bottle, thus the contraband nature of the item was not readily apparent. Both Dickerson and Crowder are controlling on this issue. Consequently, the circuit court's refusal to suppress the Oxycontin tablets is erroneous and must be reversed.

The Commonwealth attempts to distinguish Dickerson and Crowder by arguing that the plain feel doctrine does not apply in this case. According to the Commonwealth, Teagle had probable cause to seize the pill bottle based on the totality of the circumstances. The facts supporting this argument are as follows: Jones was seen outside his house talking to someone in a car; upon seeing a police cruiser, the parties separated and Jones headed into the house; Jones ignored repeated requests to approach Teagle and attempted to enter the house and shut the door; Jones denied that he had anything in his pocket despite a bulge which was clearly visible; Jones was reluctant to remove the pill bottle from his pocket; the label was torn off the bottle; and Jones emptied the pill bottle and threw the pills on the ground. Although these circumstances may have served to ignite suspicion, this argument ignores the fact that seizure occurred when Teagle asked Jones to remove the suspected item from his pocket. At that point, its contraband nature was not

readily apparent, and the officer's actions exceeded the scope of an allowable warrantless search under Terry.

For the forgoing reasons, the order of the circuit court denying Jones's motion to suppress the drug evidence seized during a warrantless search is reversed. This case is remanded, and the circuit court is instructed to enter an order suppressing the evidence and dismissing the trafficking in a controlled substance and tampering with physical evidence charges.

SCHRODER, JUDGE, CONCURS.

EMBERTON, SENIOR JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, SENIOR JUDGE, DISSENTING. The majority properly holds that Officer Teagle had a reasonable and articulable suspicion that Jones was armed and the patdown search was valid. But I believe the majority ignores that it was not Officer Teagle who removed the bottle from Jones's pocket, but Jones himself, upon being asked by Officer Teagle. Therefore, the seizure of the bottle was a valid search based on consent. I also differ from the majority's conclusion that the illegal contents of the pill bottle were not "immediately apparent."

Uncoerced consent is an exception to the warrant requirement.<sup>2</sup> The record indicates only that Jones was hesitant to remove the bottle from his pocket. Being reluctant is not the same as being coerced. If it were, then I doubt any consent would ever be valid since most suspects, knowing that they are in the possession of contraband, would virtually always be reluctant to give consent. Also, it is significant that Jones remained in possession and control of the bottle until he removed the contents and threw them away.

In two cases similar to the present, the courts upheld the seizure of drugs following a patdown search. In Stewart v. Commonwealth,<sup>3</sup> we held that a suspect voluntarily gave officers a pill bottle after they inquired about a bulge in his waistband. And in Commonwealth v. Banks,<sup>4</sup> the officers lawfully removed a crack pipe from the suspect's pocket after feeling it in a lawful patdown search and receiving permission from the suspect.

I would affirm on the basis there was consent to the seizure of the bottle.

I also believe that even absent the consent, based on the totality of the circumstances any search beyond the outer clothing and seizure of the bottle was proper. Where the

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<sup>2</sup> Anderson v. Commonwealth, Ky. App., 902 S.W.2d 269, 271 (1995).

<sup>3</sup> Ky. App., 44 S.W.3d 376 (2000).

<sup>4</sup> Ky., 68 S.W.3d 347 (2001).

requirements of Terry are otherwise complied with and it is immediately apparent from the sense of touch that the suspect possesses contraband, the officer is not required to ignore it.<sup>5</sup> "Immediately apparent" in the context of the plain view doctrine and by analogy in the context of tactical discoveries, does not mean conclusive upon sight but is satisfied when there is probable cause to associate an object with criminal activity.<sup>6</sup> Probable cause exists when there are sufficient facts applied in a commonsense manner based on the totality of the circumstances to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.<sup>7</sup> The basis for the officer's belief is not limited to his sense of touch but is to be considered in the context of the entire circumstances including his training and experience.<sup>8</sup>

Officer Teagle's first observation of Jones was seeing him leaning into the driver's side window of a car. Upon seeing Officer Teagle, Jones began walking away from the car toward his house, and the car then pulled away. When Officer Teagle requested Jones to come over to his cruiser, Jones continued to walk away. Officer Teagle then exited his cruiser and proceeded

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<sup>5</sup> Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

<sup>6</sup> Commonwealth v. Crowder, Ky., 884 S.W.2d 649, 651 (1994).

<sup>7</sup> Baltimore v. Commonwealth, Ky. App., 119 S.W.3d 532, 538-39 (2003).

<sup>8</sup> Id. at 539.

toward Jones. Jones again ignored him and continued walking toward his house. Upon reaching his residence, in a continuing effort to remove himself from Officer Teagle's sight, Jones entered the residence and attempted to shut the door but was stopped by Officer Teagle. Giving consideration to the totality of the circumstances: having viewed what appeared to be a drug transaction; knowing Jones had attempted to separate himself from Officer Teagle; and having conducted a patdown search that revealed a prescription pill bottle, Officer Teagle was justified in believing that the bottle contained illegal drugs. While a pill bottle does not necessarily indicate criminal activity, it is a reality that such bottles are often used as a container for illegal drugs such as Oxycontin. Such knowledge combined with the other circumstances observed by Officer Teagle, are sufficient to establish probable cause to believe the bottle contained illegal drugs.

I would affirm the circuit court's order denying the motion to suppress the evidence.

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