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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2020 AP 000907

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

TIMOTHY M. ARGALL,

Defendant – Appellant.

BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR CALUMET COUNTY
THE HONORABLE JEFFREY FROEHLICH PRESIDING

JOHN MILLER CARROLL LAW OFFICE

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ISSUES PRESENTED FOR REVIEW

Did the trial court err by denying Argall's motion to suppress evidence seized during an unlawful search of his person in violation of his Fourth Amendment rights?

The Circuit Court answered: No.
The Defendant-Appellant Submits: Yes.

Did the trial court err in finding that the Search of the Defendant was lawful?

The Circuit Court answered: No.
The Defendant-Appellant Submits: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this appeal are of statewide importance, clarification of the limitations of *Terry* is needed. Oral argument and publication are requested.

STATEMENT OF THE CASE

This is an appeal from a judgment, entered in Calumet County Circuit Court, the Honorable Jeffrey Froelich presiding, in which the Defendant-Appellant, Timothy M. Argall ("Argall"), was found guilty of Operating While Intoxicated (3rd Offense). (R. 19).

On February 21, 2019, the State of Wisconsin filed a Complaint in the Calumet County Circuit Court charging

Argall with, Operating While Intoxicated (3rd Offense), contrary to Wis. Stat. § 346.63 (1)(a). (R. 7). Argall initially pleaded not guilty. (R. 9).

On or about May 1st, 2019, Argall filed a *Motion to Suppress Evidence* with the circuit court. (R. 16). Accordingly, a motion hearing was held on June 27th, 2019. (R. 55). At the June 27th hearing, the circuit denied Argall's motion and made a finding that validated the Search of the Defendant as lawful. (R. 55 at 58).

Following the circuit court's ruling denying the motion, a Plea and Sentencing Hearing was held on January 13th, 2020. (R.38). Argall was found guilty of Operating While Intoxicated (3rd Offense).

The Judgment of Conviction was entered on January 14th, 2020. (R. 42) A order staying sentence was entered on Janurary 15th, 2020. (R. 49) This appeal follows.

STATEMENT OF THE FACTS

As indicated above, a Criminal Complaint (R.7) was filed on February 21st, 2019 charging Argall with Operating While Intoxicated (3rd Offense). According to the Complaint Argall was seized for a headlight violation.

During the stop Argall was asked to exit his vehicle. (R. 55) Upon exiting the vehicle Argall was asked to proceed to the rear of the vehicle where he was subjected to a search of his person. (R 55. At 27-28) During the search of his person individual items in his pockets were isolated by feel and examined as to their identity. (R. 55 at 29; 31; 32) After manipulation and requests by the officer to identify a flashlight and other items in Argall's pockets, eventually the officer examines and manipulates a hydraulic fitting in Argall's pocket. (R. 55 at 32) The Officer testified that there was no individualized suspicion of danger or weapons and that she does this "pat-down" to everyone. (R. 55 at 31) The officer testified that the fitting in question was not apparently obvious as contraband and that in order to identify the object, questioning and removal was necessary to establish its nature. (R. 55 at 32 lines 8-11)

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS VALIDATION OF THE OF THE SEARCH.

Scope of the *Terry* Search

"The Fourth Amendment is violated and evidence generally excluded if the manner [**14] in which the search and seizure were conducted exceeds the proper parameters. *Terry*, 392 U.S. at 28-29. Again, a *Terry* search based on reasonable suspicion "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26. If the protective search exceeds the scope necessary to determine if a person is armed, it is unconstitutional, and its fruits must be suppressed. *Dickerson*, 508 U.S. at 373.

As long as an officer stays within the scope of a *Terry* search, in addition to weapons the officer may also seize without a warrant any detected contraband, whether threatening or nonthreatening. *Id.* at 373-76; *Michigan v. Long*, 463 U.S. 1032, 1050, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). But the officer *must have probable cause to believe the item is contraband before seizing it*; the probable

cause requirement "ensures against excessively speculative seizures." *Dickerson*, 508 U.S. at 376.

During a *Terry* pat-down search for weapons, detection of contraband may validly occur based on plain view or the [**15] related "plain feel." *Id.* at 375-76. Thus, "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." *Id.* at 375.

The immediate recognition of the object upon pat-down is key. The incriminating nature of the item must be immediately apparent. *Id.; United States v. Rivers*, 121 F.3d 1043, 1046 (7th Cir. 1997); *United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994).

In *Dickerson*, an officer did not immediately recognize a lump within the suspect's pocket as crack cocaine. Instead, he determined that the lump was crack only after "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket' -- a pocket which the officer already knew contained no weapon." *Dickerson*, 508 U.S. at

378 (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)). The Supreme Court affirmed the holding that the officer had exceeded the scope [**16] of a *Terry*. search; the officer's "continued exploration of respondent's pocket after having concluded that it contained no weapon" went beyond the sole justification for the search, which was to protect the police and bystanders. *Id.* The search of the pocket was thus unconstitutional, as was the seizure of the crack. 508 U.S. at 379.

Similar to the continued manipulation in *Dickerson*, an officer's movement and [*955] shaking of a hard box within a suspect's pocket has been held to be beyond the scope of a *Terry* search. *United States v. Miles*, 247 F.3d 1009, 1010-11 (9th Cir. 2001). While patting down a suspect's jacket an officer could tell the item was a box rather than a weapon. The officer nevertheless wrapped his hand around the box and moved and shook it, hearing bullets rattling inside; he then seized from the pocket a cardboard box containing bullet shells. *Id.* at 1011-12. The Ninth Circuit held the search invalid. The officer had reached the outer limits of his patdown authority when it was clear that the object was a small box and could not possibly be a weapon. . .

. At that point, the officer's further manipulation of the [**17] box was impermissible. He had no cause to shake or manipulate the tiny box on the pretext that he was still looking for a weapon. *Id.* at 1014-15. The court noted the government's argument that the officer might have been looking for a tiny knife or other small weapon, but did not consider the argument persuasive, as the testimony did not support such a motivation. *Id.* at 101.

Similarly, an officer's inspection of the contents of a brown bag inside a suspect's jacket exceeded the scope of a *Terry* pat-down search, where the officer testified at a suppression hearing that he did not actually know the contents of the bag based on the pat-down search, but rather only when he opened the bag. *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994). United States v. Lemons, 153 F. Supp. 2d 948, 954-55 (E.D. Wis. 2001)

Argall asserts that the blanket practice of performing roadside inventory searches in every traffic stop and specifically manipulating and requiring identification of the contents of a person’s pocket exceeds the “terry pat” exception to the warrant requirement.

The facts surrounding this search are largely undisputed and for the most part consistent between the Defendant who testified and the officer.

Officer Scharbarth testified there was no individualized suspicion pertaining to danger or a weapon. (R. 55 at 29) Officer Scharbarth testified that this search method is something she does in every traffic stop. (R. 55 at 29) Officer Scharbarth testified that during the search of the Defendant items in his pocket were manipulated by feel and further that the officer would make an inquiry verbally as to the identity of each item. (R. 55 29-38)

Argall's testimony largely mirrored that of the officer with the one discrepancy - - Argall specifically recalled not identifying the hydraulic fitting at issue as a marijuana pipe until it was removed from his person and he was confronted with it. (R. 55 at 39)

a. Officer Scharbath did not have the required reasonable suspicion of Danger or Weapons to justify a pat down.

When examined on what observations Officer Scharbath made to justify a terry pat, the officer testified that she witnessed zero factors that would lead to reasonable suspicion that weapons may be found. The officer candidly admitted that this type of search was something she does to everyone. (R. 55 at 29) The officer further testified that items removed from the defendant's person during this search "didn't have any feel of a weapon", yet they were removed. (R. 55 at 31) Officer Scharbath concedes that in order to ascertain the nature of the hydraulic fitting in question she needed to question Argall about it. *(R. 55 at 32 – "The question is was it immediately apparent by feel that this was contraband? A: Nope. I asked what it was and he admitted to it.)*

A *Terry* search based on reasonable suspicion "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26. If the protective search exceeds the scope necessary to determine if a person is armed, it is unconstitutional, and its fruits must be suppressed. *Dickerson*, 508 U.S. at 373.

There was not one objective fact witnessed by the officer in this case that would elude to a reasonable person that the sixty-three-year-old suspect would be harboring a weapon. The area in question was not a high crime area. Worse the officer admits that this wasn't just a search for weapons but rather something more akin to an inventory search. Specifically, every item in the Appellants pockets were manipulated, inquired upon and then specifically identified. The Officers standard procedure for every stop appears to be searching the vehicles driver and inventorying their possessions.

The officer admitted she does this by patting the suspects clothing and inquiring as to what every item is regardless of its apparent or immediately apparent nature. (R. 55 29-37)

This is not a Terry Frisk. This is not what the law allows. The purpose of the exception to the warrant requirement is to protect officer's safety by allowing a brief superficial check of outer clothing for weapons. By the officer's own admissions, this search was not designed to protect safety but rather compel the discovery of items unknown to the officer without a warrant or the required probable cause to seize them.

This court should find that there was not the required Reasonable Suspicion to conduct the search and further that the

search in its execution exceeded the permissible bounds of the Terry Frisk exception to the 4th Amendments warrant requirement.

b. The Search exceeded the scope of the exception to warrant requirement for a Terry Frisk.

Officer Scharbath admits that the items removed from the defendant's person during this search "didn't have any feel of a weapon", yet they were removed. (R. 55 at 31) Officer Scharbath concedes that in order to ascertain the nature of the hydraulic fitting in question she needed to question Argall about it. (R. 55 at 32 – *"The question is was it immediately apparent by feel that this was contraband? A: Nope. I asked what it was and he admitted to it.*)

In order to justify the seizure of an object during a warrantless Terry Pat, the item must be immediately apparent as contraband. The officer testified that these items were not immediately apparent as contraband, but rather further questioning was required to establish what they were.

"The incriminating nature of the item must be immediately apparent." *Id.; United States v. Rivers*, 121 F.3d 1043, 1046 (7th Cir. 1997); *United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994).

> The Fourth Amendment to the United States Constitution declares:
>
> > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. United States Const., Amend. IV.

The police bear a heavy burden when trying to establish an urgent need justifying warrantless searches and seizures. *See Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984).

For the sake of argument, even if there was some objective reasonable suspicion concerning officer safety, the inventory style of search is not justified under terry.

The trial court ruled that the terry pat was not overly intrusive. (R. 55 at 58). However, the record and case law do not support this finding. Moreover, the evidence and testimony do not support this finding.

During the motion hearing Officer Scharbath acknowledged that she stopped Argall six blocks after leaving Cheers for a headlight violation. Despite the nature of the seizure being for a headlamp violation, The Deputy nearly immediately began inquiring as to OWI factors. (R. 55 at 11)

Shortly after the Deputy commanded Argall from his vehicle. 14(R. 55 at 13)

It was cold out and upon exiting the vehicle Argall put his hands in his pockets. (R. 55 at 14). This is the sole factor present for officer safety concerns in the entire record. The Officer testified:

"I do it to everybody. It's not that I'm picking and choosing people. I believe that my safety is an issue, so I pat everybody down. Especially in the wintertime I understand that its cold out and people want to put their hands in their pockets, and its just a safety issue for me. "

Argall is a in fact an elderly gentleman born in 1956 who has had significant back issues. It is largely undisputed that there were no objective factors present that would warrant a frisk for weapons.

c. No Probable Cause Existed to Seize or Remove items

Officer Scharbath admitted that the object she felt during this search was not immediately apparent as contraband. (R. 55 at 32) The law requires that in order for an officer to seize an item from the person of a subject the item

has to be immediately apparent as contraband by “plain feel”. Even before the removal of the item in question, aka the Hydraulic fitting, this search exceeded its permissible scope.

Specifically, Officer Scharbath testified that as she was feeling for items on the Defendant, she would squeeze them and ask the Appellant to identify each of them. This is not akin to a terry pat which is limited to the search for weapons. The officer further testified that even after manipulation of the object within Argall’s pocket she did not know immediately the contraband nature of the hydraulic fitting that was removed. (R. 55 at 31-32) Rather the Officer needed more than just the “plain feel” and without cause began confronting the Appellant while manipulating items in his pocket. The removal and examination of items that are not plainly apparent as a weapon or contraband exceeds that scope of the exception to the warrant requirement under *Terry.*

The appellant humbly requests this Court issue an order that the all evidence obtained via this warrantless roadside inventory search of a person, suppressed pursuant to the "the fruit of the poisonous tree" doctrine, “evidence seized as a result of an illegal search or seizure is inadmissible

against the defendant at trial." *See Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court of Appeals issue an Order Overturning the Trial Courts finding that the search at issue was lawful, Concluding that the Trial Court erred in its Order justifying the warrantless search at issue and finally, overturn the circuit court's ruling denying the Defendant-Appellant's motion to suppress evidence.

Dated this 31st day of July 2020.

Respectfully Submitted,
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FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,845 words.

Dated this 31st day of July, 2020.

Electronically Signed by John Miller Carroll

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State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 31st day of July 2020.

Electronically Signed by John Miller Carroll

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